FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

Office of Administrative Law Judges
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Washington, D.C. 20004

March 31, 2017

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of JEFFREY PAPPAS, Complainant, v. CALPORTLAND COMPANY, and RIVERSIDE CEMENT COMPANY, Respondents.	: : : : : : : : : : :	DISCRIMINATION PROCEEDING Docket No. WEST 2016-264-DM WE MD 16-02 Mine ID 04-00011 Mine: Oro Grande Quarry

DECISION

Appearances: Abigail G. Daquiz, Esq., and Sonya P. Shao, Esq., U.S. Department of Labor, Office of the Solicitor, Seattle, Washington, on behalf of Complainant;

Brian P. Lundgren, Esq., and Erik M. Laiho, Esq., Davis Grimm Payne & Marra, Seattle, Washington, for CalPortland Company;

Karen L. Johnston, Esq., Jackson Kelly PLLC, Denver, Colorado, for Riverside Cement Company.

Before: Judge Paez

This complex case is before me upon a complaint of discrimination filed by the Secretary of Labor ("Secretary"), on behalf of Jeffrey Pappas, against CalPortland Company ("CalPortland") and Riverside Cement Company ("Riverside"), pursuant to section 105(c)(2) of the Federal Mine Safety and Health Review Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(2).[1]

I. PROCEDURAL HISTORY

In October 2015, Jeffrey Pappas filed a complaint with MSHA alleging discrimination under section 105(c) of the Mine Act against CalPortland. After an investigation, the Secretary chose to pursue the case on behalf of Pappas and filed an application for temporary reinstatement pursuant to section 105(c)(2) of the Mine Act against CalPortland. I held a hearing on the temporary reinstatement on January 5, 2016, and granted the Secretary's application. Upon review, the Federal Mine Safety and Health Review Commission ("Commission") upheld

[1] In this decision, the hearing transcript, the joint exhibit, the Secretary's exhibits, Riverside's exhibits, and CalPortland's exhibits are abbreviated as "Tr.," "Joint Ex. #," "Ex. S–#," "Ex. RCC–#," and "Ex. CPC–#," respectively.

Pappas's temporary reinstatement. CalPortland subsequently filed a petition for review with the U.S. Court of Appeals for the D.C. Circuit, which granted CalPortland's petition and vacated the Commission's decision and order for temporary reinstatement on October 20, 2016.[2] Pursuant to the D.C. Circuit's formal mandate, I dismissed the temporary reinstatement proceeding on December 14, 2016.

On February 11, 2016, the Secretary filed a discrimination complaint on behalf of Pappas with the Commission. Chief Administrative Law Judge Robert J. Lesnick assigned the matter to me on March 11, 2016. On March 11, 2016, the Secretary filed an amended complaint adding Riverside as a respondent to the proceeding and proposing penalties of $20,000 and $15,000 against Riverside and CalPortland, respectively.[3] CalPortland and Riverside each filed an answer to the amended complaint on April 8, 2016. After consultation with the parties, I issued a Notice of Hearing on April 14, 2016, and set this matter for hearing on December 6–9, 2016, in San Bernardino, California.

Prior to the hearing, the parties filed several motions. On November 10, 2016, Respondents Riverside and CalPortland each filed a motion for summary decision, which I denied in a separate order on December 2, 2016. On November 18, 2016, Respondents Riverside and CalPortland filed a Joint Motion to Compel Discovery Responses, which I also denied in a separate order on December 2, 2016. On December 2, 2016, the Secretary filed a Motion in Limine to Exclude Riverside Cement Company Witnesses and a Motion for Sanctions for Spoliation of Evidence, both of which I denied in a separate order on March 30, 2017.[4]

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[2] The D.C. Circuit held Pappas was an "applicant for employment" under section 105(c)(2) who was not eligible for temporary reinstatement. *CalPortland Co. v. FMSHRC*, 839 F.3d 1153, 1156 (D.C. Cir. 2016). The court maintained, however, that CalPortland may still be held liable for discrimination under section 105(c)(2). *Id.* at 1164 ("In a final decision, CalPortland, as the successor operator of the Oro Grande plant, could perhaps be ordered to instate Pappas if it was found to have violated the Mine Act when it failed to hire him. . . .") (internal citation omitted).

[3] At the hearing, the Secretary moved to amend the complaint to allege that CalPortland is a successor-in-interest to Riverside. (Tr. 312:2–16.) Counsel for CalPortland stated its objection to the motion on the record, arguing that CalPortland was not placed on notice and would be prejudiced by the amendment. (Tr. 313:3–21, 314:21–316:24.) However, I noted on the record that the Secretary pled the claim that CalPortland is a successor to Martin Marietta, Riverside's owner, in its initial application for temporary reinstatement filed on December 8, 2015. (Tr. 317:1–9; App. Temp. Restatement at 2.) I also noted that in its decision on appeal of the temporary reinstatement proceeding, the D.C. Circuit stated the Secretary could pursue a successorship theory during the discrimination case on the merits. (Tr. 317:11–15); *supra* note 2. I therefore concluded that the parties have been on notice that a successorship issue exists in this case. (Tr. 317:15–19.) For the reasons stated, I granted the Secretary's motion to amend the complaint with regard to the successorship issue. (Tr. 316:25–317:24.)

[4] The Secretary moved to exclude Riverside's presentation of Jamie Ambrose's and David Salzborn's testimony, asserting that Riverside falsely claimed it did not have access to

I held a hearing on December 6–9, 2016, in San Bernardino, California. At the hearing, the parties stipulated to the following:

1. Respondent Riverside is an operator within the meaning of the Mine Act.

2. Respondent CalPortland is an operator within the meaning of the Mine Act.

3. Oro Grande Quarry, Mine I.D. No. 04-00011, is subject to the jurisdiction of the Mine Act.

4. The Administrative Law Judge has jurisdiction in this matter.

5. Jeffrey Pappas was a laborer at the time of his termination in September 2015 from his employment at Riverside.

6. On or about October 12, 2015, Jeffrey Pappas filed a discrimination complaint with MSHA under section 105(c) of the Mine Act.

7. Jeffrey Pappas's employment with Riverside was terminated on September 30, 2015.

8. The exhibits to be offered by the parties are stipulated to be authentic, but no stipulation is made as to their relevance or truth of the matters asserted therein.

(Tr. 23:9–24:12, 26:18–22; Joint Ex. 1.) The Secretary presented testimony from three witnesses: Jeffrey Pappas, the complainant; William Arps, Jr.,[5] a miner at Oro Grande and local

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these witnesses and failed to adequately respond to discovery requests related to their knowledge of Pappas's work history. (Mot. to Exclude at 1–7.) Because the Secretary's motion did not show any attempt to depose or obtain contact information directly for either witness, despite having advanced notice of their identity and role in these proceedings, I denied the motion.

[5] At the hearing, Riverside and CalPortland objected to the Secretary's presentation of Arps's testimony and requested it be excluded because he was not timely disclosed as a miner witness. (Tr. 322:20–324:25.) I issued a Notice of Hearing on April 14, 2016, which stated that if the Secretary intended to call miner witnesses, pursuant to 20 C.F.R. § 2700.62, the number of such witnesses shall be noted in a prehearing statement and a list of names of such witnesses with a description of their expected testimony shall be filed and served on all parties by 9:00 a.m., Pacific Time, on the second business day prior to the hearing.

Counsel for Riverside pointed out that the Secretary neither noted the number of miner witnesses in his prehearing statement nor timely filed the name of the miner witness with a description of his expected testimony. (Tr. 323:10–25.) Respondents asserted that the late filing hampered counsels' ability to prepare for the witness. (Tr. 324:5–25.) Counsel for the Secretary admitted to the deficiencies in her filings, but suggested the miner be able to testify later in the hearing to give Respondents additional time to prepare. (Tr. 325:2–15.) Counsel for the Secretary also stated on the record the purpose of Arps's testimony. (Tr. 326:15–20.)

union president; and Kyle Jackson, an MSHA special investigator.[6] Riverside presented testimony from three witnesses: Timothy Sheridan, Martin Marietta's director of employee relations; David Salzborn, former plant manager at Oro Grande; and Jamie Ambrose, a former human resources generalist for Riverside. CalPortland presented testimony from four witnesses: Jamie Ambrose, currently a human resources manager at CalPortland; Robert Binam, CalPortland's vice president, general counsel, and corporate secretary; Steven Antonoff, CalPortland's vice president of human resources; and Betsy Lamb, CalPortland's former vice president of organizational planning and development.

The parties completed briefing on February 10, 2017, and each filed post-hearing briefs and reply briefs.

II. ISSUES

The following issues are before me: (1) whether the Secretary has established by a preponderance of evidence that Riverside discriminated against Pappas in violation of section 105(c) of the Mine Act, and if so, what are the appropriate remedies; and (2) whether the Secretary has established by a preponderance of evidence that CalPortland discriminated against Pappas in violation of section 105(c) of the Mine Act, and if so, what are the appropriate remedies.

III. FINDINGS OF FACT

A. Background of the Oro Grande Facility

The Oro Grande mine is a cement manufacturing facility located in Oro Grande, California. (Ex. S–31 at 104–115.) From 1998 to 2014, Texas Industries ("TXI") owned the Oro Grande facility through a subsidiary named Riverside Cement Company ("Riverside"). (Tr. 61:24–62:2, 655:13–18; Ex. S–31 at 105.) In July 2014, Martin Marietta purchased TXI in a stock purchase and assumed operation of Riverside and its Oro Grande facility. (Tr. 409:16–410:9, 655:25–656:2, 777:2–4; Ex. S–31 at 105.)

The Secretary failed to abide by my Notice of Hearing. (Tr. 326:1–6.) I reasoned, however, that because only one witness was at issue the prejudice could be cured. (Tr. 326:21—327:12.) Respondents suggested and agreed to have a 10-minute break, allow Arps to subsequently testify on direct examination, and then have an extended lunch break after his direct examination to prepare their cross-examinations. (Tr. 327:24–328:14.) I granted Respondents' request and allowed Arps's testimony. (Tr. 328:15–17, 377:10–15.)

[6] At the close of the Secretary's case, Riverside and CalPortland each moved for a directed verdict. (Tr. 596:21–610:1.) Riverside moved for a directed verdict on the grounds that the Secretary failed to establish a nexus between Pappas's protected activity and the adverse action. (Tr. 596:21–599:15.) CalPortland moved for a directed verdict on the grounds that the Secretary did not establish that CalPortland had knowledge of Pappas's protected activity and that the Secretary's successorship theory of liability fails. (Tr. 599:17–610:1.) Given the volume of the record that needed to be reviewed in this matter to render a complete and full decision, I denied both motions for a directed verdict. (Tr. 613:8–614:4.)

Under Martin Marietta, Riverside operated the Oro Grande facility around the clock because of the difficulty of shutting down and restarting the cement plant's kiln. (Tr. 64:19–21, 813:13–23.) The facility had several revolving shifts running 24 hours a day, seven days a week, and employed approximately 150 employees, approximately 110 of whom were hourly employees. (Tr. 44:14–16, 856:8–15; Exs. CPC–27, CPC–28 at 3–5, S–37 [112: 10–23, 127:3–7].) The mine's hourly employees were represented by the United Steel Workers union. (Tr. 333:2–5, 412:22–413:6, 723:22–724:6; Ex. RCC–26.) Generally, a newly-hired hourly employee at the mine would begin as a laborer, which was physically demanding work involving shoveling debris and other tasks. (Tr. 37:18–23, 42:10–12, 331:10–12, 332:15–333:1.)

Hourly employees could transfer to different positions through a bidding process according to the collective bargaining agreement ("CBA") the union had with Riverside Cement Company under TXI, which was extended by Martin Marietta. (Tr. 43:16–25, 414:6–415:8; RCC Ex. 26 at 50–57.) Under this process, consideration for a position was first based on seniority, provided the senior bidder was physically capable of performing the position's duties. (Ex. RCC–26 at 53.) Additionally, an employee could "bump" into different positions at the mine in the event the miner's current position was eliminated or re-organized. (Ex. RCC–26 at 50–51.)

The CBA also established grievance procedures by which the union represented employees who had disputes with the company. (Tr. 345:8–351:19; Ex. RCC–26 at 29–32.) The grievance process consisted of four steps. (*Id.*) The first step involved the aggrieved employee consulting his immediate supervisor. (Ex. RCC–26 at 29.) If the grievance remained unresolved, the second step involved a meeting between the company's representative and the union committee to discuss the grievance. (*Id.* at 29–30.) If no agreement was made at the second step, the third step consisted of a meeting with the company's director of human resources and union representatives. (*Id.* at 30.) Finally, the fourth step involved the grievance's referral to arbitration, which included the involvement of the United Steel Workers' international representative. (*Id.* at 30–31; Tr. 334:11–24.)

On June 30, 2015, just about a year after Martin Marietta acquired the mine, CalPortland signed an agreement with Martin Marietta to purchase Oro Grande in a limited asset sale. (Exs. CPC–2, CPC–3.) Under the asset purchase agreement, CalPortland would not assume certain liabilities associated with Riverside, including Riverside's labor force and current CBA. (Ex. CPC–2 at 21–27.) The sale closed on October 1, 2015. (Tr. 680:4–9, 691:1–2, 731:6–9.)

B. Pappas's Work History at the Oro Grande Mine

Jeffrey Pappas worked at the Oro Grande facility for 16 years beginning in 1999 as a laborer during TXI's ownership. (Tr. 37:10–23, 61:24–62:2; Ex. S–13 at 10–13.) Over time, Pappas held numerous hourly-wage positions, including recuperator, feed tender, preheater helper, mill lube man, cement scheduler, quarry worker, and dust collector. (Tr. 42:9–45:6, 50:23–51:17, 59:1–60:11; Ex. S–13 at 10–13.)

In regard to his work history at the mine, Pappas has never been disciplined for safety or doing his job incorrectly and has been described as a hard worker and model employee. (Tr.

61:14–23, 372:15–373:1, 353:14–20.) However, during his first ten years at the mine, Pappas was disciplined for attendance issues.[7] (Tr. 161:17–162:9.) Additionally, while working as a cement scheduler at the mine's pack house in 2010, a co-worker filed a complaint against Pappas, alleging he created a hostile environment by arguing with and complaining to fellow employees. (Tr. 60:18–61:4, 158:5–25; Ex. RCC–6 at 1.) As a result, the company found that Pappas violated the plant's Work Rule 13(g).[8] (Ex. RCC–6 at 1.) As discipline, Riverside, under TXI's ownership, suspended Pappas for three days, disqualified him from the cement scheduler position, and required him to attend anger management classes. (Tr. 61:5–10, 159:1–10; Ex. RCC–6 at 1.) Upon his return, Pappas was re-assigned as a laborer at the mine. (Tr. 160:19–24; Ex. RCC–6 at 1.) He eventually became a dust collector in 2012. (Ex. S–13 at 11.)

1. Prior Termination and Discrimination Case at Riverside/TXI in 2014

In December 2013, when Pappas worked as a dust collector, he and two co-workers were assigned to replace filters on the chutes that loaded rail cars in the mine's pack house. (Tr. 69:11–20.) As they were working on manlifts elevated above two of three tracks, a string of train cars moved backwards on the track towards them. (Tr. 72:2–17.) The train had no miner stationed at the end of the cars for safety to instruct the locomotive operator whether to stop. (Tr. 72:22–73:5.) The track split three ways, and the train eventually came down the third track where Pappas and his co-workers were not working. (Tr. 73:6–9.) Pappas felt his life had been endangered by the moving train, and the work crew subsequently placed a lock on the train. (Tr. 72:18–22, 75:17–20, 73:16–20, 74:15–17.)

Upon coming down from the manlift, Pappas's supervisor singled Pappas out and reprimanded him, demanding he pull the lock off the train so the train could be moved. (Tr. 73:9–20.) Pappas informed his supervisor that the train should not have been operating while he and his co-workers were working on the track and demanded a safety review. (Tr. 73:21–25.) Company policy allowed workers to stop an assigned task and request a safety review whenever they felt unsafe. (Tr. 74:1–11.) Despite Pappas's request, his supervisor threatened to charge Pappas with insubordination if Pappas did not remove the lock off the train. (Tr. 74:12–17.) Pappas removed the lock, but insisted on the safety review. (Tr. 74:18–75:1.) Three hours later, the mine's safety director, Diane Fionda, arrived at their location to conduct the requested safety review. (Tr. 75:2–12.) Fionda told Pappas that the safety policy permitted miners to work on the

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[7] Pappas testified to having problems with alcoholism, which contributed to his attendance problems. (Tr. 161:17–162:9.) After the company warned him, Pappas corrected his behavior in order to prevent losing his job. (Tr. 162:4–9.) At the time, Riverside's policy under TXI's ownership allowed an employee's personnel file to be expunged of his absentee issues after 12 months. (Tr. 289:24–19.)

[8] Riverside's Work Rule 13(g), under TXI, prohibited "[t]hreatening, intimidating, coercing, or interfering with fellow employees on company premises." (Ex. RCC–22 at 2.) The company marked Work Rule 13(g) as a major violation, which may subject a violator to immediate discharge. (*Id.* at 2.) According to the company, violating Work Rule 13(g) constitutes creating a "hostile work environment." (Tr. 436:4–22; Ex. RCC–6 at 1.)

tracks next to the locomotive. (Tr. 77:1–4.) Later, Pappas brought up the issue at a monthly safety meeting with then-plant manager, David Salzborn, who Pappas testified only got mad at him for accusing Pappas's direct supervisor of lying about safety.[9] (Tr. 76:11–17.)

A few weeks later, Pappas approached an MSHA Inspector, who was conducting an on-site inspection with Fionda, and asked him whether the train incident created a safety issue. (Tr. 77:13–78:3.) Upon learning what happened to Pappas and his coworkers on the train tracks, the MSHA Inspector wrote TXI citations for safety violations and instructed the mine to place an additional lock on the rail tracks. (Tr. 78:12–22.)

Soon after, Pappas was told he had been abusing his truck privileges and was ordered by mine management not to use his truck on mine property during work. (Tr. 165:4–24.) However, Pappas testified his immediate supervisor later allowed him to use the truck periodically and did not reprimand Pappas when he saw Pappas using the truck. (Tr. 165:25–166:5, 167:18–24.) Nevertheless, on April 4, 2014, Pappas was terminated for gross insubordination after he was observed using his work truck. (Tr. 79:8–12, 165:4–167:24; Ex. S–1 at 1.) Later that same month, Pappas filed a section 105(c) discrimination complaint with MSHA against Riverside, alleging his termination was motivated by his reporting the train incident to MSHA. (Tr. 79:8–16, 255:19–24; Ex. S–1 at 1.) Following depositions in December 2014, Riverside and Pappas reached a Commission-approved settlement, which reinstated Pappas at the Oro Grande mine, expunged all records of the truck incident and termination from Pappas's personnel file, and resulted in Riverside paying civil penalties.[10] (Tr. 763:11–764:2; Ex. S–1 at 1.) As part of the settlement, Pappas returned to work as a dust collector at the cement facility on January 5, 2015. (Tr. 79:21–80:1, 167:25–168:4.)

2. Incidents at Riverside/Martin Marietta after Pappas's Reinstatement

When Pappas returned to work in January 2015 as a result of the section 105(c) settlement, he felt harassed by his former coworkers because of his discrimination case and prior safety complaint. (Tr. 81:14–82:16.) Specifically, a miner named Stacy Portis,[11] who also

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[9] Salzborn did not specifically testify about how he personally addressed Pappas at the safety meeting. However, Salzborn testified that after conducting a safety review and investigation of the incident, the company changed its policy regarding the amount of clearance required between the rail track and a manlift. (Tr. 646:14–18.) The record is unclear whether this change of policy occurred before or after MSHA issued citations related to the incident.

[10] During Pappas's 2014 discrimination proceeding, Riverside was represented by TXI's retained counsel, William K. Doran, from the law firm of Ogletree, Deakins, Nash, Smoak & Stewart, P.C. (Tr. 439:7–15.) In July 2014, Martin Marietta purchased TXI. (Tr. 409:16–410:9.) Doran continued his representation of Riverside because the 105(c) complaint was still pending when Martin Marietta acquired TXI. (Tr. 439:12–15.) Riverside, under Martin Marietta's new ownership, carried out the terms of the settlement with Pappas because Martin Marietta's purchase of TXI included Riverside's liabilities. (Tr. 409:16–410:9.)

[11] Pappas has known Portis for 30 years and first started working with him at a trucking company prior to working at Oro Grande. (Tr. 40:18–41:7.) Despite Pappas's arguments with

worked as a dust collector and whom Pappas described as a friend, repeatedly made derogatory comments about Pappas being brought back to work and attempted to bait Pappas into conversations about race and gender. (Tr. 81:14–82:16, 247:18–248:10.) In early February 2015, Pappas met with human resources manager Jamie Ambrose (née Rowe) and asked her to intervene to stop the harassing behavior. (Tr. 82:17–83:3, 85:25–86:1, 659:21–660:6.) Ambrose informed Pappas that she would talk to his supervisor, and she asked Terry Jacobs, the mine's maintenance manager, to instruct Pappas's direct supervisor to monitor the situation and report to Ambrose if any further issues occurred. (Tr. 83:3, 660:22–661:5.) Around the same time, Pappas removed himself from the group by avoiding the breakroom and eating lunch by himself because he felt the harassment continued even after he asked Portis and his companions to stop. (Tr. 83:4–84:5, 172:21–173:4.) On April 17, 2015, Ambrose took maternity leave and did not return to work until July 6, 2015.[12] (Tr. 662:11–14.)

In late April 2015, a series of events led to a heated exchange between Pappas and Portis. Pappas along with three co-workers on the dust collector team had been responsible for gathering dust collector readings by the end of every week. (Tr. 81:9–13, 89:18–21.) Pappas was assigned to the plant's northern area, and Portis was assigned to the area between the pack house and the tower. (Tr. 89:21–24.) James "Slim" Wright, the team's lead man and local union vice president, decided to switch Pappas's and Portis's assignment areas. (Tr. 90:6–9.) On a Monday, while inspecting the area originally assigned to Portis, Pappas uncovered three broken interior dust collector doors. (Tr. 90:9–11.) Pappas wrote up a work order to have these doors fixed. (Tr. 91:11–13.)

On Tuesday, April 28, the following day, Pappas, Portis, Wright, and the fourth team member, Harold Cole, had to repair roofs at the mine's hammermills, which took the entire day. (Tr. 81:9–13, 92:20–93:6.) On Wednesday morning, April 29, Portis turned in his dust collector readings to Wright. (Tr. 93:7–17.) Pappas informed Wright that he did not believe Portis could have completed the assignment in such a short period of time and alleged Portis falsified his report.[13] (Tr. 93:13–95:5, 217:12–14, 467:7–469:1; Ex. RCC–12.)

Portis, including one instance during their truck driving days when Pappas left Portis in Chicago but returned to get him, Pappas nevertheless still considers Portis a friend. (Tr. 41:3–7, 102:18–23, 153:9–11.)

[12] Pappas testified to meeting once more with Ambrose before she took maternity leave to address his harassment concerns. (Tr. 86:2–23.) However, Ambrose does not recall meeting with Pappas again before she took leave on April 17, 2015. (Tr. 662:11–19.) Nor does Pappas's own calendar note a second meeting. (Ex. S–2.)

[13] Pappas subsequently reported that Portis falsified the report to the Mojave Desert Air Quality Management District "MDAQMD," which initiated an investigation. (Tr. 467:7–469:1; Exs. S–6, RCC–12.) The claim remained unsubstantiated because the investigator found no evidence the report had been manipulated. (Tr. 469:2–8; Exs. S–6, RCC–12.) Simultaneous to Pappas's report, an anonymous call to the MDAQMD also alleged the mine had violative emissions, which resulted in a pop-up inspection. (Tr. 469:24–470:8; Exs. S–6, RCC–12 at 5–6.) During the inspection, the MDAQMD again did not find any evidence that the mine had

The next day, Thursday, April 30, Pappas and Portis were assigned to fix the broken dust doors, a job which required two workers under the company's policy and MSHA regulations. (Tr. 95:23–96:17.) Pappas arrived at the work location at 9:00 a.m. and waited for Portis for two hours before taking his lunch break. (Tr. 96:21–97:3.) At lunch, Pappas saw Portis socializing with Wright and another co-worker. (Tr. 97:4–10.) After lunch, Pappas spoke with Dan Kegel, a maintenance manager, and informed Kegel that he had not finished his assignment because he had been waiting for Portis to come help him. (Tr. 97:11–20.) Kegel assured Pappas he would tell Portis to meet him and instructed Pappas to go back to the work location. (Tr. 97:21–24.) Pappas waited another several hours and attended to other work duties in the area, but Portis never arrived to help fix the broken dust collector doors. (Tr. 97:25–98:9.)

Towards the end of the shift, Pappas put away his work tools and went back to the break room to pack up. (Tr. 98:6–13.) In the break room, Pappas saw Portis socializing again with co-workers, Wright, Cole and David Wray. (Tr. 98:13–18.) Pappas confronted Portis for not helping him earlier in the day by yelling, using profanity, and calling Portis a "lazy mother fucker" and a "piece of shit."[14] (Tr. 98:19–99:5, 107:15–16, 183:14–17, 248:11–20; Ex. RCC–1.) Portis and Pappas engaged in a heated exchange that lasted for several minutes. (Ex. RCC–1.) Afterward, Pappas gathered his stuff, slammed his locker, and left for the day. (Tr. 99:11–13.)

The following day, Friday, May 1, 2015, Stacy Portis filed a written complaint with management against Pappas, stating that Pappas verbally assaulted him and that he feared Pappas may physically attack him, mentioning that Pappas had made it widely known that he owned guns. (Ex. RCC–1.) When Pappas arrived at the mine that morning, Cole advised Pappas that mine management was gathering statements from Portis, Wray, and Wright regarding the incident. (Tr. 103:1–19.) Pappas attempted to talk to mine management that day, but could not reach the plant manager, Kevin Grogan, or assistant manager, Kevin Deatley. (Tr. 104:2–5.) Pappas also attempted to speak to human resources, but Pappas could not locate anyone in that office either, and Ambrose was on maternity leave at the time. (Tr. 104:3–4, 662:11–14.) Later that day, Pappas learned that Portis, Wray, and Wright were called into plant chemist Bob Sylvia's office to further discuss the incident. (Tr. 105:1–16.) Pappas finished his shift and returned home for the weekend without discussing his involvement with the incident in detail with a member of management. (Tr. 105:18–25.)

The next Monday, May 4, 2015, maintenance manager Terry Jacobs called Pappas into his office, and Pappas exercised his union rights to have the union's president, William Arps, Jr., present; Jacobs asked Pappas about the verbal incident. (Tr. 106:6–108:3; Ex. RCC–2.) When Pappas started to give background information, Jacobs refused to consider Pappas's explanation

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manipulated its reports nor found any violative emissions. (Tr. 470:9–12; Exs. S–6, RCC–12.)

[14] Pappas told Portis that he was "lazier than James Hawthorne," another miner at the plant who had a reputation for being lazy. (Tr. 99:1–10.) Riverside management noted in its investigation of the incident that both Portis and Hawthorne were African-American, though Portis himself did not mention in his complaint that he took Pappas's comment to be racial. (Exs. S–7 at 1; RCC–1 at 3–7.)

of the events leading up to the incident between Pappas and Portis and focused solely on the quarrel itself. (Tr. 107:6–11, 339:6–340:9.) The company conducted an investigation, gathering the statements of several witnesses including Pappas, Portis, Wright, Wray, and Cole. (Exs. RCC–1, RCC–2, RCC–3, RCC–4.) Grogan contacted Martin Marietta's director of employee relations, Timothy Sheridan, for his advice on the situation. (Tr. 420:20–421:25.) Grogan informed Sheridan of Pappas's 2010 suspension for violating Work Rule 13(g). (Tr. 424:16–23.) Sheridan reviewed the witness statements and spoke over the telephone with Grogan, Deatley, and Bob Kidnew, the president of the company's cement division, regarding the incident. (Tr. 422:15–21, 423:20–424:1.) After his telephone conversations and review, Sheridan concluded that Pappas was the instigator of the incident and engaged in threatening and intimidating behavior. (Tr. 424:5–10.) Sheridan was concerned that such behavior could lead to violence in the workplace. (Tr. 424:9–15.)

Grogan suggested to Sheridan that the company terminate Pappas. (Tr. 438:22–25; Ex. RCC–3 at 1–2.) During the course of his investigation, Sheridan discovered that Pappas had recently been reinstated to the mine following his 2014 discrimination case. (Tr. 439:1–6.) Sheridan expressed to Grogan his concern that terminating Pappas may pose a significant risk to the company. (Ex. RCC–3 at 2.) Sheridan, an attorney himself, then consulted with Doran, the attorney who represented Riverside under TXI's ownership, to ensure the company would not make any missteps in disciplining an employee who had recently been reinstated. (Tr. 439:16–24.)

Riverside determined that Pappas violated the plant's Work Rule 13(g) prohibiting conduct that threatened, intimidated, coerced, or interfered with other employees. (Tr. 108:18–109:3; Ex. RCC–4.) Upon Sheridan's recommendation, Riverside suspended Pappas for five days, required him to undergo a psychological evaluation before returning to work, and disqualified him from working in the dust collector shop. (Tr. 440:7–19, 109:8–22; Exs. S–8, RCC–4.) Pappas signed a statement outlining the discipline on May 12, 2015. (Ex. RCC–4.) Because of a delay in scheduling the evaluation, Pappas did not return to work for more than a month. (Tr. 110:19–111:23, 342:5–12.) While Pappas was not working, the union negotiated with Sheridan for Pappas to receive back pay for the period between the end of his suspension and the time he waited for his psychological review to be completed. (Tr. 200:19–201:13, 342:5–24, 446:6–447:8.) After receiving a psychological review, a doctor declared Pappas fit for duty to return to work and did not recommend Pappas attend anger management. (Tr. 114:5–12, 442:22–24, 484:2–7; Ex. S–38.)

3. Pappas's Grievances with Riverside/Martin Marietta

On June 22, 2015, Pappas returned to work and met with assistant manager Kevin Deatley to sign another form that outlined the discipline received and served as a documented warning. (Tr. 115:15–116:17; Ex. S–9.) The union filed grievances on behalf of Pappas to reduce the discipline he received for the incident.[15] (Exs. S–3, S–4.) After his return, Pappas

[15] The union filed two grievances on behalf of Pappas related to his May 2015 suspension. (Tr. 387:2–7, 668:6–8; Exs. S–3, S–4.) One grievance requested that the discipline be reduced to a documented verbal, which would note in Pappas's personnel file that he was

attempted to speak with management to further dispute the discipline he received. (Tr. 117:13–126:17.) First, Pappas approached plant manager, Kevin Grogan, and after two meetings, Grogan informed Pappas that his dispute would be handled by the union's grievance procedures. (Tr. 118:10–121:12.) Pappas also wrote a letter to Donald McCunniff, Martin Marietta's senior vice president of human resources, explaining the incident. (Tr. 462:25–463:13; Ex. S–10.) Pappas received a call informing him the matter would be looked into, but received no substantive follow-up. (Tr. 123:13–25, 463:14–464:12.) McCunniff forwarded Pappas's letter to Sheridan, who read the letter and did not take further action because he believed the matter would be addressed in the union's grievance process and did not interpret the letter to be a complaint about an ethical violation. (Tr. 463:1–464:12.) In July, Pappas also approached Ambrose after she returned from maternity leave to discuss the matter, but Ambrose also informed Pappas the issue would be dealt with in the grievance procedure. (Tr. 124:3–126:19, 664:4–665:21.)

Pappas's grievance was moved to the third step of the union's grievance procedure. (Exs. S–3, S–4.) A third step meeting was held on August 27, 2015, at the plant. (Tr. 455:13–20, 627:17–20, 670:3–9.) Present for the company were Ambrose, Grogan, Deatley, and Sheridan. (Tr. 670:17–671:7.) Present for the union were union president Arps, union vice president Wright, and union international representative Ron Espinosa. (*Id.*) Also present was David Salzborn, the plant's retired former plant manager whom Martin Marietta hired back as a consultant in May 2015 and then as a plant manager in July 2015 to help the company transition during its sale to CalPortland. (Tr. 616:15–618:3, 627:17–20, 457:22–458:1.)

After the union settled Pappas's grievance on August 27, 2015, Ron Espinosa, the union's international representative, requested Pappas be brought up to their third step meeting. (Tr. 354:21–355:7, 630:12–15.) Several witnesses, including Pappas, testified that Espinosa's request was unusual and that employee grievants did not normally attend third step meetings. (Tr. 127:2–128:1, 204:4–8, 354:21–355:7, 460:16–23, 646:19–647:5.) Pappas joined the meeting where Espinosa instructed Pappas to put the behavior that contributed to the incident behind him. (Tr. 130:18–19, 355:8–22, 461:1–18, 630:15–631:1.) Arps described that Espinosa addressed Pappas like a "big brother" would, while Sheridan described that Espinosa "went off" on Pappas and dressed him down for close to five minutes. (Tr. 355:8–22, 461:1–18.) Afterwards, Sheridan told Pappas that he was responsible for Pappas's discipline and mentioned Pappas's 2014 discrimination complaint. (Tr. 129:2–22, 356:2–16, 461:19–462:19.) Pappas felt that Sheridan belittled him. (Tr. 129:8–130:23.)

As a result of the grievance meeting, Pappas's suspension was reduced to three days. (Tr. 395:23–396:1, 460:1–4, 673:17–21.) Pappas received back pay for two days of his original five-day suspension. (Tr. 350:14–17, 395:16–24, 460:1–3.) Thereafter, on September 28, 2015, Pappas was among approximately 15 Oro Grande employees at Riverside who were not hired by

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counseled about his behavior, but would not necessarily put Pappas at risk of termination for a subsequent offense. (Tr. 393:16–22, 394:7–395:10; Ex. S–3 at 1.) The other grievance requested that Pappas's disqualification from the dust shop be removed and his suspension be eliminated. (Tr. 197:10–25, 453:19–454:18; Exs. S–4, S–5.)

CalPortland when it assumed control of the cement plant on October 1, 2015. (Tr. 142:18–144:6, 489:14–490:6.)

C. CalPortland Company's Acquisition of the Oro Grande Plant

On June 30, 2015, CalPortland entered into an asset purchase agreement with Martin Marietta to purchase certain assets, including the Oro Grande facility, two shipping terminals in National City and Stockton, California, and some inventory stockpiled in Martin Marietta's storage facility in Crestmore, California. (Exs. CPC–2 at 12–15, S–37 [83:15–84:6].) In July and August 2015, CalPortland representatives began touring Oro Grande to understand how the plant operated in anticipation of the purchase's closing date. (Tr. 620:16–621:4.) The asset sale closed on October 1, 2015, when CalPortland took ownership. (Tr. 680:4–5, 680:9, 691:1–2, 731:6–7.)

The negotiated agreement did not include any employment liabilities, such as the CBA or the facilities' workforce. (Exs. CPC–2 at 24–27, S–37 [87:15–88:1].) CalPortland specifically structured the limited asset sale according to the model that the Supreme Court first recognized in *NLRB v. Burns International Security Services, Inc.*, 406 U.S. 272 (1972), to ensure CalPortland would be free to negotiate new employment terms. (Ex. S–37 [108:21–111:18]; *see* Ex. CPC–1.) Hence, Martin Marietta terminated all its employees at the purchased facilities on September 30, 2015, right before 12:00 midnight of the day the agreement closed. (Tr. 361:13–19, 417:12–17; Ex. S–25 at 1.) Immediately thereafter, at 12:01 a.m. on October 1, the prior Riverside employees that were hired at Oro Grande began working for CalPortland. (Tr. 682:1–2, 686:20–23; Ex. S–37 [108:10–17, 111:9–25, 113:4–21, 135:2–136:9, 146:9–12].)

Before hiring hourly workers, CalPortland sought to get its management team in place. (Tr. 882:23–883:18.) In mid-August, Ambrose interviewed for a position at CalPortland to be a human resources manager at Oro Grande following CalPortland's takeover. (Tr. 817:11–21.) CalPortland's vice president for human resources, Steve Antonoff, offered Ambrose the position at the Oro Grande, and Ambrose signed her offer letter acceptance on September 1, 2015. (Tr. 681:22–25, 804:5–9; Ex. CPC–23.) Because CalPortland wanted to take control of the Oro Grande cement operation without undergoing the expensive process of shutting down the plant's kiln, the company began the process of staffing the plant early. (Tr. 812:25–813:23, 869:17–24.) Martin Marietta provided a list of current employees to CalPortland's Antonoff. (Tr. 808:11–18.) Antonoff then contacted Ambrose, who was still an employee of Riverside, so they could discuss her hiring recommendations at the facilities. (Tr. 685:3–10, 812:18–815:13.)

On September 3, Ambrose and Antonoff met and went through the list of the employees who were currently employed at Riverside's multiple facilities. (Tr. 685:3–686:5, 711:20–23, 819:18–820:10, 854:16–22.) For each employee, Ambrose gave her recommendation by saying "yes," "no," "pass" (meaning skip), or "unsure." (Tr. 689:7–14, 815:15–22, 818:4–819:14.) Antonoff took notes on a spreadsheet he initially created to provide staffing information to payroll and highlighted the employees' names Ambrose did not give a "yes" answer for in lavender (gray). (Tr. 688:24–689:6, 820:2–821:20, 843:3–18; Ex. CPC–27.) For some employees, Ambrose commented on whether the employee was close to retirement, on leave, or was on a performance improvement plan. (Tr. 693:7–23, 705:13–21, 707:11–708:1; Ex. CPC–

27.) For Pappas, Ambrose told Antonoff that she was "not sure"; Antonoff highlighted Pappas's name in lavender (gray), but made no further notation by his name. (Tr. 689:18–690:6; Ex. CPC–27 at 5.)

A week or so later, in a mid-September 2015 meeting open to all employees, CalPortland informed all of the miners at the Martin Marietta facilities that they would be fired and would need to reapply for positions at CalPortland. (Tr. 835:5–21, 872:6–873:12; Exs. CPC–6, CPC–7.) Because of the asset purchase, Riverside's Crestmore facility would be shut down, so its miners would be unable to keep their jobs at Crestmore. (Tr. 918:5–8; Ex. S–37 [83:24–84:6, 86:3–6.]) Based on the calls union president Arps received, this meeting created considerable anxiety among the Oro Grande workforce because their future employment was not guaranteed, in contrast to when Martin Marietta had bought Riverside Cement from TXI. (Tr. 359:21–363:23, 369:2–370:1.) Pappas did not attend that meeting. (Tr. 137:4–18.)

Thereafter, CalPortland sent out applications and arranged interviews for all of the miners applying to work for them, and the interviews at Oro Grande lasted for three days from September 21 to September 23, 2015. (Tr. 894:25–895:2; Exs. CPC–7, CPC–8, CPC–9, CPC–28 at 3–5, S–21, S–37 [112:24–113:3].) Nearly all of the miners from the four plants interviewed to work under CalPortland, including approximately 108 of the 110 hourly miners working at Oro Grande. (*See* Tr. 808:14–809:14, 810:1–13, 844:9–12; Exs. CPC–27, CPC–28 at 3–5, S–37 [112: 10–23, 127:3–7].) Approximately 21 miners who were losing their positions at Crestmore applied to be reemployed at Oro Grande under CalPortland's ownership. (Tr. 896:10–24; Ex. CPC–28 at 2.) Miners met at Oro Grande in a large break room with several tables set up and manned by interviewers from CalPortland. (Tr. 141:1–6, 364:2–10.) Each miner's interview was brief, with some lasting anywhere from three to seven minutes. (Tr. 141:1–12, 364:2–16, 889:5–8.) CalPortland's interviewers had a list of six questions for each miner regarding the miner's honesty and workplace relationships. (Tr. 890:2–12; *see, e.g.*, Exs. S–14, S–33.)

The hiring decisions were made by Rich Walters, who was hired to be the plant's new manager under CalPortland, and Betsy Lamb, CalPortland's vice president of organizational planning and development at the time. (Tr. 632:1–5, 806:6–21, 876:21–877:1, 879:18–25.) Although Lamb reported to Antonoff, Antonoff himself was a new hire, so Lamb took over the task of hiring because of her experience even though she was considering retiring. (Tr. 870:7–871:11, 879:18–881:1.) In preparation, Walters also had a brief conversation with Salzborn regarding some employees who might be problematic. (Tr. 530:15–19, 581:13–23, 632:1–633:4.) During that discussion, Salzborn named two employees, one of whom was Pappas, whom he considered to be an issue. (*Id.*)

The interviewers' notes were compiled and given to Lamb. (Tr. 806:4–14, 876:21–877:1, 879:18–25.) Lamb also received the information contained in Antonoff's spreadsheet noting Ambrose's hiring recommendations. (Tr. 824:9–14, 904:17–905:2; Ex. S–23.) Lamb reviewed the applications and interviews. (Tr. 900:4–902:16, 914:10–14.) She made her own notes on a separate spreadsheet, circling in blue ink applicants she would not extend an offer to and adding comments with her reasons for most of those applicants. (Tr. 915:3–13, 916:4–7; Ex. CPC–29.) The names Antonoff highlighted on his spreadsheet of people, who did not receive a positive

recommendation from Ambrose, were also circled in blue ink on Lamb's spreadsheet. (Tr. 916:5–13; Ex. CPC–29.) Lamb circled Pappas's name in blue ink and also wrote "no" and "job hopping; safety" next to his name on her spreadsheet. (Ex. CPC–29 at 3.)

On Friday, September 25, 2016, Lamb met with Walters to make the final hiring selections. (Tr. 902:17–903:7.) In each job category, Walters informed Lamb how many people the plant needed for each position, and Lamb would provide him with a list of people she recommended to fill the positions. (Tr. 904:1–11.) Walters had final authority to make the hiring decisions, but ultimately adopted Lamb's recommendations from her list.[16] (Tr. 904:12–16.)

On September 25, 2015, CalPortland began extending employment offers for the Oro Grande cement plant and ultimately hired roughly 125 employees at the facility, approximately 100 of whom were hourly miners.[17] (Tr. 716:17–720:20, 836:25–837:2; Exs. CPC–14, CPC–15, CPC–18, CPC–19, CPC–31, CPC–32.) Two days later, on September 28, 2015, Martin Marietta informed the remaining miners that they would not be brought back to the mine. (Tr. 142:18–22, 489:14–490:6; Ex. S–25 at 2.) Martin Marietta told those miners to take the rest of the day off and not return for their shifts at Oro Grande the following two days. (Tr. 142:24–144:6; Ex. S–25 at 2.) The miners were paid through September 30, despite not coming to work. (Tr. 143:11–13.) For Oro Grande miners whom CalPortland did not hire, Martin Marietta paid severance packages in the amount of $750 for any miner who had served at least three years. (Tr. 419:10–24; Ex. CPC–5.) Miners who had served longer received additional weeks of severance pay in three-year service increments, up to a maximum of six weeks of severance pay or $4,500. (*Id.*) In addition to monetary compensation, Martin Marietta also provided a voluntary outplacement service that would help the unemployed miners with interview skills, résumé writing, and referrals to other jobs. (Tr. 420:6–12.)

Pappas was among 15 hourly workers who were told on September 28, 2015, that they did not receive an offer of employment from CalPortland. (Tr. 143:23–144:6; Ex. CPC–30.) He had not received a positive recommendation from Ambrose, who testified the discipline Pappas received for the incident with Portis had been fresh in her mind based on the August 27 grievance meeting. (Tr. 690:16–23.) Ambrose stated she therefore said "unsure" for Pappas during her meeting with Antonoff. (*Id.*) CalPortland's Lamb testified that she did not recommend Pappas be offered a position because his job application indicated job hopping and no progression in employment and salary. (Tr. 906:16–908:15, 911:12–913:2.) Lamb said the answers Pappas gave during his interview did not reflect the type of answers CalPortland sought.[18] (Tr. 906:23–907:4, 913:3–914:9.) Specifically, Pappas's interviewer wrote that

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[16] Walters informed Inspector Jackson in an interview that the final decision to hire the hourly employees was not up to Walters, but that the final decision depended on a hire and no-hire list developed by human resources personnel from the interviews. (Ex. S–22 at 2.)

[17] CalPortland extended offers to approximately 115 hourly miners to work at Oro Grande. (Ex. S–37 [113:13–114:5].)

[18] Although the interviewer's form had six questions, Pappas testified that the interviewer only asked him three questions relating to (1) conflicts with co-workers, (2) what he would

Pappas would attempt to correct a miner he saw engaging in a safety violation and that he never had conflict with a co-worker[19] or boss. (*Id.*; Ex. S–14.) Lamb testified she looked for applicants who would report safety violations to supervisors, and she had trouble believing that a miner with such a long work history would have never had workplace conflicts. (Tr. 906:23–907:4, 913:3–914:9.) Lamb concluded that Pappas's work history and interview answers demonstrated that Pappas likely had performance issues which he did not identify and that Pappas was not someone CalPortland should hire. (Tr. 912:1–913:2, 913:15–20, 914:5–9.)

On September 30, 2015, Pappas wrote Antonoff a letter seeking reconsideration of his job application. (Tr. 146:18–147:2, 845:11–846:20; Ex. S–15.) Antonoff read the letter, spoke with Lamb to ask why Pappas had not been hired, and reviewed Pappas's application and interview questionnaire. (Tr. 846:12–20.) Antonoff testified that not only did Oro Grande not have open positions at the time of Pappas's letter, but that he found items in Pappas's application to be troubling, including some of Pappas's answers to interview questions and indications of job hopping. (Tr. 847:4–848:3; Ex. S–24.) Antonoff concluded he would not consider Pappas for hire, which was consistent with what Lamb had told him. (Tr. 847:23–25.) On October 15, 2015, Antonoff wrote Pappas stating that CalPortland could not offer Pappas a job, but told Pappas out of professional courtesy that he would keep Pappas's application on file. (Tr. 846:21–848:17; Ex. S–16.)

CalPortland advertised its open positions at Oro Grande to begin on October 1, 2015, only to Riverside's current employees, though CalPortland openly advertised and hired for a few open positions at the mine two weeks later. (Tr. 732:18–738:10; Exs. S–37 [146:9–12], S–34, S–35, S–36, CPC–38.) Additionally, CalPortland did not receive Martin Marietta's personnel files from the four facilities. (Tr. 676:7–677:1, 683:11–684:12; Exs. CPC–21, CPC–22.) CalPortland renamed a few positions at the mine and altered or combined job responsibilities for some hourly positions. (Ex. S–37 [141:22–142:10].) Most of the job duties remained unaltered. (Ex. S–37 [143:7–145:18].) CalPortland also made modifications to the miners' shifts and attendance policy. (Tr. 728:9–13, 724:24–725:6, 750:5–8; Exs. CPC–16, CPC–17.) Because no collective bargaining agreement currently exists with the union at Oro Grande, the job bid process and grievance procedure no longer exist, the vacation policy and employee benefits have changed,

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change about his last employer, and (3) how he would respond to a payroll mistake. (Tr. 144: 20–146:15, 229:8–230:17, 231:14–20, 240:3–7; Ex. S–14.) He does not recall being asked the other three questions listed on the interviewer's form involving how he liked to be managed, whether he had a disagreement with a boss, and what he would do if he saw a co-worker committing a safety violation. (Tr. 229:8–240:14; Ex. S–14.)

[19] Pappas explained that he believed the interviewer meant a physical altercation when she asked whether he ever had a conflict with a co-worker even though the question did not indicate the type of conflict. (Tr. 146:6–15, 262:22–265:11.) Pappas therefore answered that he never had a physical altercation with a co-worker, and testified the interviewer moved on without following up further on the question. (Tr. 262:22–265:11.) This makes sense since interviewers were specifically instructed to stick to the six interview questions, write down what they were told, and not do a lot of probing for answers, in part because the company had very limited time to complete the hiring process. (Tr. 890:2–18.)

and shift premiums have been modified. (Tr. 725:8–729:12; Exs. S–37 [140:4–141:4], CPC–16, CPC–17, CPC–20, CPC–35.) The mine now mostly produces the same cement product using the same equipment and the same processes as Martin Marietta. (Ex. S–37 [144:24–145:5, 171:18–172:18].) CalPortland continues to sell its cement to many of Martin Marietta's former customers with some changes in the customer base. (Ex. S–37 [168:2–12].)

IV. PRINCIPLES OF LAW

A. Section 105(c) Discrimination

Section 105(c)(1) of the Mine Act provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

Under Commission law, a complainant establishes a prima facie case of a violation of section 105(c) if the preponderance of the evidence proves (1) that the complainant engaged in a protected activity, (2) that there was adverse action, and (3) that the adverse action was motivated in any part by the protected activity. *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

In evaluating whether a complainant has proven a causal connection between protected activities and adverse action, the following factors are to be considered: (1) knowledge of the protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). If the mine operator cannot rebut the prima facie case, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activities and

would have taken the adverse action in any event based on unprotected activities alone. *Driessen*, 20 FMSHRC at 328–29; *Pasula*, 2 FMSHRC at 2800.

The Commission has noted that its *Pasula-Robinette* test is "substantially the same" as and "virtually identical" to the National Labor Relations Board's *Wright Line* test for discrimination. *Robinette*, 3 FMSHRC at 818 n.20 (citing *Wright Line*, 251 NLRB No. 150, 105 LRRM 1169, 1173–75 (1980)); *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 15 (Jan. 1984). Both tests are based on a similar burden shifting scheme articulated in *Mount Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), a Supreme Court case dealing with First Amendment claims.

B. Burdens of Production and Persuasion in Discrimination Cases

In light of recent developments in Commission case law, I find it helpful to clarify the parties' burdens of production and persuasion at the various intermediary stages of the Commission's burden shifting framework.

To begin, it is important to have conceptual clarity on the differences between several legal burdens that tend to cause confusion. The Third Circuit has provided the following useful clarification on the distinctions between the terms "burden of proof," "burden of persuasion," and "burden of production":

> Many of the cases we cite use the terms "burden of *proof*" and "burden of persuasion" interchangeably. Yet the two concepts are not identical. The burden of proof comprises the burdens of production and persuasion. *McCann v. Newman Irrevocable Trust*, 458 F.3d 281, 287 (3d Cir. 2006). The former is the obligation to come forward with evidence of a litigant's necessary propositions of fact. It often matters most before trial because plaintiffs who have not come forward with hard evidence to support their necessary allegations cannot survive a summary judgment motion by the defense. The burden of persuasion, on the other hand, is the obligation to convince the factfinder at trial that a litigant's necessary propositions of fact are indeed true. 21B Charles Alan Wright & Kenneth W. Graham, Jr., *Fed. Prac. & Proc.* § 5122 (3d ed. 2005); *Black's Law Dictionary* 190 (7th ed. 1999).

El v. SEPTA, 479 F.3d 232, 237 n.6 (3d Cir. 2007).

Deciding which of these burdens apply to the prima facie case requires careful analysis of what a prima facie case actually is, since there are multiple possible definitions for the term. In *Holo-Krome Co. v. N.L.R.B.*, 954 F.2d 108, 111 (2d Cir. 1992), a decision analyzing the NLRB's *Wright Line* test for discrimination, the Second Circuit noted that the phrase "*prima facie* showing . . . sometimes means facts sufficient to send a disputed issue to a fact-finder, and sometimes means facts that persuade a trier of the elements of liability, thereby placing on the defendant the obligation to prove an affirmative defense, if he has one, or else suffer an adverse decision." After articulating these two options and acknowledging ambiguity in the wording of the *Wright Line* test that could suggest either meaning, the Second Circuit concluded "that the Board uses the phrase '*prima facie* case' to mean the General Counsel's burden to prove by a

preponderance of the evidence that protected activity was at least part of the motivation for the employer's adverse action." *Id.* In other words, the "prima facie showing" in the NLRB context is more akin to a burden of persuasion than a burden of production. Since *Holo-Krome* was decided, several other circuits have come to the same conclusion, all of which have even advised the NLRB to stop using the term "prima facie" because of its potential to create confusion.[20] *See id.* at 112; *Valmont Indus. Inc. v. N.L.R.B.*, 244 F.3d 454, 464 n.2 (5th Cir. 2001) (rejecting the Title VII definition of "prima facie"); *N.L.R.B. v. Joy Recovery Tech. Corp.*, 134 F.3d 1307, 1314 (7th Cir. 1998); *N.L.R.B. v. CWI of Md., Inc.*, 127 F.3d 319, 330–31, 331 n.7 (4th Cir. 1997); *Sw. Merch. Corp. v. N.L.R.B.*, 53 F.3d 1334, 1340 n.8 (D.C. Cir. 1995).

As noted, the Commission has previously stated that its discrimination test is "substantially the same" as the NLRB's *Wright Line* test, wherein a complainant's burden of making out a prima facie case is treated as a burden of *persuasion* and established by a "preponderance of the evidence."[21] *Pasula*, 2 FMSHRC at 2799. However, the Commission in *Turner v. National Cement Co. of California* subsequently defined the "prima facie" burden as the "*production* of enough evidence to allow the fact-trier to infer the fact at issue and rule in the party's favor."[22] *Turner*, 33 FMSHRC 1059, 1065–66 (May 2011) (citation omitted) (emphasis added).

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[20] As cases in point, at least one circuit and even the NLRB itself have occasionally slipped up and used the term "prima facie" in a contrary manner for NLRA discrimination claims, albeit with much more cursory treatment than the cases cited above provide. *See, e.g., FiveCAP, Inc. v. N.L.R.B.*, 294 F.3d 768, 777 (6th Cir. 2002) (defining a prima facie burden as "setting forth evidence that supports an inference" of discrimination, without further discussion). The NLRB and its judges have been rebuked by higher courts when this error has occurred. *See N.L.R.B. v. CWI of Md., Inc.*, 127 F.3d 319, 330–31 (4th Cir. 1997).

[21] Even when the Commission, like the NLRB, has used less-than-clear language to describe the "prima facie" burden, its actual application of the test demonstrated that it operated as a *Wright Line*-type burden of persuasion rather than a burden of production. *See, e.g., Driessen*, 20 FMSHRC at 328 (defining a prima facie case in an oft-quoted phrase as "presenting evidence sufficient to support a conclusion of" discrimination, but affirming a finding that the complainant failed to prove a prima facie case despite significant evidence from which a fact-finder could infer discriminatory intent).

[22] In its analysis, *Turner* drew from the more common *Black's Law Dictionary* definition of "prima facie" that most circuits have rejected in the NLRB context and from the language in *Driessen* that resembles a burden of production but operates like a burden of persuasion. Otherwise, *Turner* drew nearly exclusively from U.S. court of appeals cases involving Title VII claims under the Civil Rights Act of 1964, which stand for the proposition that a Title VII prima facie burden is less "onerous" than the plaintiff's ultimate burden of proving discrimination, and then cited to a small subset of those cases describing the burden of production necessary to survive summary judgment on the prima facie issue in a Title VII case. Putting all of these pieces together, *Turner* concluded that the "lower" or "less onerous" prima facie burden spoken about in many Title VII cases must be synonymous with the extra-minimal burden of *production* at the prima facie summary judgment stage and as defined in *Black's Law Dictionary*. *Turner*,

Turner did not address *Pasula*'s holding, as to the burden of *persuasion*, that "the *complainant ... establishe[s] a prima facie case* of a violation of section 105(c)(1) *if a preponderance of the evidence proves* (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity." *Pasula*, 2 FMSHRC at 2799 (emphasis added). In remaining silent on this point, *Turner* does not overturn the well-settled principles set forth in *Pasula*, *Robinette*, and their progeny. *See Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986) ("An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.") (citations

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33 FMSHRC at 1065–66 (citing *Young v. Warner-Jenkinson Co., Inc.*, 152 F.3d 1018, 1022 (8th Cir. 1998), and *Black's Law Dictionary* 1310 (9th ed. 2009)).

The Supreme Court has made clear that the Title VII prima facie burden is not merely a burden of production. *See Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 254 n.7 (1981). But, a plaintiff's prima facie burden in a Title VII case is still less onerous than his or her ultimate burden of persuasion, while the Secretary's or complainant's section 105(c) prima facie burden is not. To understand why, it is first important to understand how Title VII discrimination analysis differs from the Commission's *Pasula* test. First, in *Pasula*, the burden of persuasion shifts to the operator at the affirmative defense stage. In Title VII cases, this burden never shifts. Second, in *Pasula*, the prima facie, rebuttal, and ultimate burdens are all geared toward the same issue: whether an operator's adverse action was motivated in part by protected activity. *Robinette*, 3 FMSHRC at 818 n.20. The Title VII prima facie inquiry, by contrast, is geared toward a more limited and distinct issue than the issue that the plaintiff will ultimately have to prove. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (limiting the prima facie case to whether the plaintiff belongs to a protected class and was rejected for employment to an available position for which he or she was qualified, limiting rebuttal to merely "articulat[ing] some legitimate, nondiscriminatory reason for the employee's rejection," and only then reaching the ultimate issue of whether there was in fact discrimination).

These principles lead to two major distinctions between the *Pasula* and Title VII prima facie showings. First, depending on the type of Title VII case, the prima facie inquiry may be so limited that it resembles a burden of production. *See, e.g.*, *CWI of Md.*, 127 F.3d at 331 n.7 (distinguishing the *Wright Line* prima facie burden from the *McDonnell Douglas* prima facie burden on this basis). This is not the case with *Pasula*. Second, even where the Title VII prima facie showing does not resemble a burden of production, it will only be the first step in a series of increasingly onerous burdens placed on the plaintiff. Thus, in the context of Title VII retaliation claims, the plaintiff's initial prima facie burden of proving that protected activity was a motivating factor is still naturally "lower" or "less onerous" than the plaintiff's later burden of proving that protected activity was the "but for" cause of an adverse action. *See Long v. Eastfield College*, 88 F.3d 300, 304–05 n.4 (5th Cir. 1996). *Pasula*, by contrast, does not place the burden of proving "but for" causation on the Secretary or complainant at any point. The operator may raise the issue as an affirmative defense, but it bears the burden of persuasion on this point. *See Sec'y of Labor on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1921 (Aug. 2016) (noting that the term "because" in section 105(c) of the Mine Act was not intended to condition liability on "but for" causation as it was in Title VII). In that sense, a Title VII plaintiff's prima facie burden may be "lower" than his or her ultimate burden of persuasion, but a section 105(c) complainant's prima facie burden is not.

omitted). Instead, the Commission has in effect embraced multiple definitions of the term "prima facie," thus requiring a weaker "prima facie" burden of production, contained within a stronger "prima facie" burden of persuasion.

In a recent decision, the Commission stated that once the Secretary establishes a prima facie case the burden then shifts to the respondent to rebut it, but did not clarify whether it is a burden of persuasion or merely a burden of production that shifts to the operator. *See Sec'y on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1931 n.25 (Aug. 2016) (noting that "[o]n rebuttal [of the prima facie case], the operator bears the burden of proof"). Shifting the burden of persuasion at the rebuttal stage would potentially violate the Administrative Procedure Act. *See* 5 U.S.C. § 556(d) ("Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof."); *cf. Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994) (distinguishing the Department of Labor's "true doubt rule" from the NLRB's *Wright Line* test by clarifying that the *Wright Line* test is permissible under the APA because it shifts the burden of persuasion only at the affirmative defense stage and not earlier). It would also conflict with prior Commission precedent. *See Saab v. Dumbarton Quarry Assoc.*, 22 FMSHRC 491, 495 (Apr. 2000) ("At the rebuttal phase of the Commission's discrimination analysis, the burden remains on the complainant.") Moreover, at the rebuttal stage a judge could not find by a preponderance of the evidence that an adverse action was in no part motivated by protected activity, after already finding at the prima facie stage by a preponderance of the evidence that the act was in part motivated by protected activity. Those would be two mutually exclusive findings.

However, the above context clarifies that when a complainant produces sufficient evidence to allow the fact-trier to infer the fact of discriminatory motivation and rule in the party's favor (i.e., when he meets his prima facie burden of production), the burden of *production* shifts to the respondent to demonstrate the absence of protected activity or articulate a non-discriminatory reason for its actions, *cf. Burdine*, 450 U.S. at 254–56 (imposing a similar burden of production at the Title VII rebuttal stage), while the burden of *persuasion* remains with the Secretary or complainant. This does not mean that the operator's justifications will be examined superficially. Nor does it mean that the judge may not rely on reasonable inferences from circumstantial evidence to find discriminatory motivation. It simply means that the direct or circumstantial evidence that an adverse action was motivated in part by protected activity must be more persuasive than evidence that the articulated alternate rationale was the sole motivating factor.[23] Only when the Secretary or complainant proves his case by a preponderance of the evidence do the "twin burdens of producing evidence and of persuasion then shift to [the operator] with regard to th[e] elements of affirmative defense." *Robinette*, 3 FMSHRC at 818 n.20.

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[23] Analogously, even the Sixth Circuit, which uses burden of production-type language to describe the Title VII prima facie case, *see EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997) (defining the prima facie case as "sufficient evidence . . . to get a plaintiff past . . . a motion to dismiss in a nonjury case"), has clarified that the fact-trier can question the proof constituting the plaintiff's prima facie case even after that initial burden has been satisfied, because any evidence that bears on the prima facie case is still relevant to the ultimate issue of discrimination. *See Kovacevich v. Kent State Univ.*, 224 F.3d 806, 825 (6th Cir. 2000).

C. Successor Liability

A successor operator may be found derivatively liable for, and responsible for remedying, its predecessor's discriminatory conduct. *Meek v. Essroc Corp.*, 15 FMSHRC 606, 610 (Apr. 1993). The factors for determining successorship are:

> (1) whether the successor company had notice of the charge, (2) the ability of the predecessor to provide relief, (3) whether there has been a substantial continuity of business operations, (4) whether the new employer uses the same plant, (5) whether he uses the same or substantially the same work force, (6) whether he uses the same or substantially the same supervisory personnel, (7) whether the same jobs exist under substantially the same working conditions, (8) whether he uses the same machinery, equipment and methods of production; and (9) whether he produces the same products.

Sec'y of Labor on behalf of Keene v. S&M Coal Co., 10 FMSHRC 1145, 1153 (Sep. 1988) (citing *Munsey v. Smitty Baker Coal Co.*, 2 FMSHRC 3463 (Dec. 1980), *aff'd sub nom. Munsey v. FMSHRC*, 701 F.2d 976 (D.C. Cir 1983), *cert. denied*, 464 U.S. 851 (1983)). The last seven factors provide the framework for analyzing whether there is a continuity of business operations and workforce between the successor and its predecessor, which is the key question in the successorship analysis. *See Keene*, 10 FMSHRC at 1153 (including all of the last seven factors to determine whether a substantial continuity of business operations existed). This question is fact intensive and must be resolved on a case-by-case basis. *Id.*

In other labor cases, courts have held that a successor must have notice before liability can be imposed. *Golden State Bottling Co. v. N.L.R.B.*, 414 U.S. 168, 185 (1973); *Resilient Floor Covering Pension Trust Fund Bd. of Trustees v. Michael's Floor Covering, Inc.*, 801 F.3d 1079, 1092–93 (9th Cir. 2015) (citing *Golden State Bottling Co.*, 414 U.S. at 185). The Commission has recognized that the notice factor examines whether the company could protect itself by taking into account the liability when negotiating a purchase. *See Munsey*, 2 FMSHRC at 3466 (finding that the asserted successor had "sufficient notice to enable it to protect itself by either an indemnification clause or a lower purchase price in the takeover agreement").

V. ADDITIONAL FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

A. Whether Riverside Engaged in Discrimination

The Secretary alleges, and Riverside does not dispute, that Pappas engaged in protected activity when he filed a section 105(c) discrimination complaint in 2014.[24] (Sec'y Br. at 32;

[24] In his complaint, the Secretary also alleges that Pappas engaged in protected activity when he made hazard complaints to MSHA and reported safety issues to MSHA inspectors during their inspections, but this argument is absent from the Secretary's post-hearing brief. (Compl. at 2–3; Am. Compl. at 2–3; Sec'y Br. at 32.) Since these instances of protected activity

Riverside Br. at 16.) The Secretary further alleges that Pappas engaged in protected activity when he complained about harassment from his co-workers regarding the resolution of his section 105(c) discrimination complaint. (Compl. at 2–3; Am. Compl. at 2–3.) Complaining to management officials about hostility toward a reinstatement agreement reached pursuant to the Mine Act's 105(c) provisions also qualifies as protected activity, and Riverside does not dispute this.[25] Therefore, the issues to be decided are: (1) whether Jamie Ambrose's decision not to recommend Pappas for a position at the Oro Grande plant and David Salzborn's statements to Rich Walters concerning Pappas constituted adverse actions; (2) if so, whether the negative recommendations were motivated, at least in part, by Pappas's protected activity; and (3) if so, whether Riverside would have taken the adverse actions due to Pappas's unprotected activity alone.

1. Adverse Action

An adverse action is "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847–48 (Aug. 1984). The Commission has looked to Title VII case law in defining the scope of adverse actions, *see Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930–31 (Aug. 2012) (adopting the Title VII adverse action test from *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)), and numerous circuits have held that a negative reference may qualify as an adverse action in a Title VII discrimination or retaliation claim even if the reference did not ultimately influence a prospective employer's hiring decision. *See Hillig v. Rumsfeld*, 381 F.3d 1028, 1031–35 (10th Cir. 2004); *E.E.O.C. v. L.B. Foster Co.*, 123 F.3d 746, 754 n.4 (3d Cir. 1997); *Hashimoto v. Dalton*, 118 F.3d 671, 673 (9th Cir. 1997); *Smith v. Sec'y of Navy*, 659 F.2d 1113, 1121–23 (D.C. Cir. 1981).

The Secretary alleges that Riverside effectively "blacklisted" Pappas for future employment at the Oro Grande plant through the recommendations of Ambrose and Salzborn to CalPortland officials and that these acts constitute adverse actions. (Sec'y Br. at 32–33.) Riverside denies that these statements qualify as adverse actions or even actual recommendations and instead characterizes Ambrose's statements as "personal opinions" and Salzborn's statement as a "stray remark" in a "general conversation." (RCC Br. at 16–19.) Riverside also stresses that "Ambrose did not identify Pappas as an individual whom CalPortland should not hire," but simply "did not offer an opinion one way or the other." (RCC Br. at 17–18.)

In early September, CalPortand's vice president for human resources, Antonoff, went through a list of Riverside employees with then Riverside human resources manager Ambrose and asked her whether or not she would hire each one. (Tr. 685:3–686:9.) Ambrose gave

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predate and form the basis of Pappas's 2014 discrimination complaint, my analysis of that 105(c) complaint and whether it motivated any adverse action from Riverside also encompasses by reference the prior alleged protected activity.

[25] Instead, Riverside denies at length that this harassment and management's response qualify as adverse actions. (RCC Br. at 25–27.) The Secretary has not alleged that this harassment constitutes an adverse action. so it is unnecessary to address this argument.

positive "opinions" for the overwhelming majority of Riverside employees (approximately 185 out of 205), but did not offer one for Pappas, instead stating she was "not sure" about him. (Tr. 689:22–690:4; Ex. CPC–27.) Ambrose was at the time still employed by Riverside and was providing this information to Antonoff pursuant to explicit authority from Riverside. (Tr. 687:4–7.) Antonoff explained to her that the answers would be used as a "reference check," and the references ultimately played a part in CalPortland's decision on whether or not to hire individual Riverside employees. (Tr. 814:2–6, 905:3–6.) In explaining her familiarity with the concept of a "reference check," Ambrose described how she herself would often ask other employers whether they would rehire applicants under consideration. (Tr. 688:1–14.)

Around this same time, Salzborn offered a warning about Pappas to CalPortland's plant manager Walters, who would have the final authority on whether or not to hire Pappas. (Tr. 632:6–20, 904:12–16.) Salzborn was a former plant manager at Oro Grande who had been specifically rehired by Riverside to help with the ownership transition taking place at the plant on October 1, 2015. (Tr. 620:2–10.) In his discussion with Walters, Salzborn identified Pappas as a problematic employee and discussed several disciplinary incidents involving Pappas, including the company's revocation of Pappas's use of a company truck and Pappas's alleged insubordination for continuing to use the vehicle. (Tr. 632:12–20, 635:13–636:9, 641:4–17.)

I find that Ambrose's and Salzborn's statements amount to negative references, which satisfy the test for adverse action articulated in both *Hecla-Day* and Title VII case law. In making this determination I find it relevant that Ambrose declined to say "yes" to a relatively small number of employees, and that Antonoff told her that her "opinions" would be used as a "reference check," which based on her understanding of the term would have alerted her to the possibility that her "opinions" would influence hiring decisions. Likewise, the relevant circumstances of Salzborn's warning to Walters include Salzborn's prominent role in facilitating the transition at the Oro Grande plant, the fact that only two employees were singled out as especially "problematic," and Walters's final authority to make hiring decisions. Moreover, Walters himself admitted in his MSHA interview with Inspector Jackson that Salzborn's recommendations to him would have caused him not to hire Pappas had Betsy Lamb not already excluded Pappas from hiring consideration. (Tr. 530:12–19; Ex. S–22.) When a person in Salzborn's position singles out a potential hire as "problematic" to the individual responsible for hiring, and the warning is so strong that the prospective employer admits that it would have prevented that employee's hiring had he been under consideration, the comment goes beyond a "stray remark." Given these factors, I find that Salzborn's warning and Ambrose's recommendations subjected Pappas to a detriment in his employment relationship and therefore qualify as adverse actions.

The key question then becomes whether there is a motivational nexus between these efforts and Pappas's protected activity.

2. Discriminatory Motive

The Secretary alleges that Ambrose's and Salzborn's "blacklisting" of Pappas were motivated by Pappas's protected activity and relies largely on evidence of animus from Riverside to infer such motive. (Sec'y Br. at 33–37.) According to the Secretary's narrative, Riverside displayed indifference and hostility toward Pappas's concerns about harassment regarding his

reinstatement, inadequately investigated the incident leading to his suspension, continued to inappropriately use his 2014 termination and reinstatement to label him a problem employee to others despite a settlement and Commission order barring the company from doing so, meted out disproportionate discipline to him for his comments to Portis, and made disingenuous statements to him in resolving his disciplinary grievance. (*Id.*)

Riverside argues that the alleged adverse actions were "solely and directly the result of [Pappas's] entire work history," including his argumentative, hostile, and insubordinate behavior. (RCC Br. at 19.) Riverside denies all of the Secretary's evidence of animus, and further argues that there is no indication of disparate treatment or a coincidence in time between Pappas's protected activity and the alleged blacklisting from which to infer discriminatory motivation. (RCC Br. at 20–22.)

In evaluating whether there exists a causal connection between Pappas's protected activity and Riverside's adverse actions, I consider the four *Chacon* factors: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510.

a. Knowledge of Protected Activity

David Salzborn and Jamie Ambrose both conceded that they had knowledge of Pappas's 2014 discrimination complaint when they made their recommendations to CalPortland. Not only was Salzborn the plant manager during Pappas's prior section 105(c) complaint in 2014, but he was ultimately responsible for the decision to terminate Pappas that formed the basis of that complaint, and he was thus named by Pappas in the initial 2014 complaint. (Tr. 647:20–648:21.) Ambrose admitted to MSHA that she was also involved in Pappas's prior termination, which led to the section 105(c) complaint. (Ex. S–17 at 3.) Ambrose was subsequently reminded of Pappas's protected activity when Pappas complained to her that he was being harassed because of his reinstatement. (Tr. 82:17–83:3, 760:20–22.)

The Secretary also paraphrases testimony from Arps to describe the plant as "a surprisingly active 'rumor mill' where word about employees who [are] fired and reinstated . . . travels fast." (Sec'y Br. at 5; Tr. 336:9–20.) However, I do not infer from this testimony alone that each and every management official at the mine was aware of Pappas's protected activity. This will have important implications in the following section for my analysis of Riverside's alleged hostility toward Pappas's protected activity, because questions remain about whether the employees and officials alleged to be hostile even knew about Pappas's protected activity. Consequently, where the Secretary alleges that management officials displayed animus toward Pappas's protected activity, more specific direct or circumstantial evidence would be required to establish that the named official actually knew about Pappas's protected activity.

b. Hostility or Animus toward Protected Activity

The Secretary rests most of his case on evidence of hostility or animus toward protected activity. (*See* Sec'y Br. at 32–37.) At the outset, I note that this is not a temporary reinstatement hearing. The Secretary's burden at the temporary reinstatement stage is to persuade the judge

that a miner's discrimination complaint was not frivolously brought. 30 U.S.C. § 815(c)(2). But at the merits stage, the Secretary's burden of *persuasion* is to establish unlawful discrimination by a preponderance of the evidence.[26] Although I previously determined at the temporary reinstatement proceeding that the Secretary met his burden to establish that Pappas's complaint against CalPortland was not frivolously brought, I must note that the Secretary has brought forth very little additional evidence to meet his higher burden at this stage of the proceedings, even after adding Riverside as a party to the complaint.

i. Harassment

The heart of Pappas's allegations of hostility toward protected activity involves the words and actions of a Riverside employee, Stacy Portis. Pappas claims that Portis began verbally attacking him within two weeks of Pappas being reinstated. (Tr. 81:14–82:16.) According to Pappas, Portis allegedly told Pappas that he should never have been brought back. (*Id.*) If Riverside management was aware of this behavior but failed to respond adequately, that could constitute evidence of hostility or animus toward protected activity on the part of the company. *Cf. Turner*, 33 FMSHRC at 1069 (finding that a complainant may establish animus with evidence that management was non-responsive or dismissive toward safety complaints); *see also Pendley v. Highland Mining Co.*, 37 FMSHRC 301, 315 (Feb. 2015) (ALJ) (holding an operator responsible for a rank and file miner's acts of interference when management responded inadequately to harassment).

However, the Secretary has not established that Riverside failed to respond adequately to Pappas's complaints of harassment. The record supports a finding that Portis verbally harassed Pappas over the exercise of protected activity upon his reinstatement and that Pappas complained to Ambrose in early February and requested her assistance with the matter.[27] (Tr. 81:22–83:3.) But, Ambrose's initial response to this complaint was appropriate. In explaining the steps she took to address Pappas's complaints, Ambrose credibly described the following conversation she had with Terry Jacobs about Pappas:

> Pappas'[s] complaint was that . . . other employees that he interacted with were speaking about his previous case that had already been resolved. So my instruction to Mr. Jacobs was to make sure that he communicated that to Mr. Pappas'[s] direct supervisor and just monitor the situation, for lack of a better term . . . So my instruction was for him to just monitor any employees that

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[26] As discussed earlier, this burden is also higher than the Secretary's burden of *production* at the prima facie stage.

[27] Pappas claims that he complained to Ambrose again in March, shortly before she left for maternity leave. (Tr. 86:2–9.) However, Ambrose did not recall Pappas coming to her again with similar concerns, and although Pappas documented visiting Ambrose the first time on his calendar, he did not have similar documentation for the second meeting he believed he had with her. (Tr. 86:4–5, 662:15–19; Ex. S–2.) Therefore, I credit Ambrose's testimony that Pappas only met once with her about this issue prior to her maternity leave.

interacted with Mr. Pappas. And if they saw anything like that going on, then I needed to be notified of who they were so that we could correct it with that person specifically.

(Tr. 760:16–761:6.)

Had Pappas's supervisor then observed instances of harassment, or had any other instances of harassment over the exercise of protected activity come to Ambrose's attention, Riverside's failure to respond more forcefully could indicate animus or hostility toward protected activity. But, Ambrose never heard back from Pappas's supervisors, managers, or fellow employees regarding this harassment,[28] and Pappas himself said that the harassment receded somewhat at that point around March and April.[29] (Tr. 662:20–663:14, 170:24–171:15.) Pappas also clarified that this occurred because he removed himself from potential interactions with Portis and other employees who also targeted him and that the harassment never fully stopped; but it is highly likely that Pappas's withdrawal from these situations limited the opportunities that his supervisors had to observe instances of harassment. (Tr. 172:2–173:12, 250:18–252:6.) Moreover, Pappas described Ambrose's demeanor as "polite" and "very professional," when he raised a complaint with her, and stated, "I don't have anything bad to say about her." (Tr. 250:11–17.) I am unable to infer discriminatory animus from Ambrose's conduct during this interaction.

Furthermore, the record remains unclear whether the harassment that Pappas says he continued to experience in March and April was related to his protected activity. Pappas testified about harassment related to his dismissal and reinstatement immediately upon his return and mentioned another incident of verbal harassment at an unspecified date from an employee involved in the facts of his original section 105(c) complaint (Russell Ontiveros); yet, his testimony about subsequent instances of harassment contains references to more general forms of harassment regarding a much broader range of topics, including racial and sexual subject matter. (Tr. 83:4–25, 247:13–248:10, 248:23–249:25.) Pappas also repeatedly testified that he and Portis had been good friends for over 30 years. (Tr. 41:4–7, 81:6–8, 102:18–32, 169:12–18.) This context raises further questions about whether or not Portis's regular conduct toward Pappas would be reasonably perceived by others as harassment or simply banter among friends.

These allegations of harassment are inadequate to establish hostility or animus that would support a motivational nexus between the negative references and Pappas's protected activity.

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[28] It is quite possible that this did not happen because Ambrose left for maternity leave in April and returned in July. (Tr. 662:12–14.)

[29] Pappas's own calendar notes appear to confirm that the harassment receded during this period. While Pappas documented an incident of harassment on January 19, shortly after his return, there are no documented incidents of harassment on the calendar after that. (Ex. S–2.)

ii. Suspension

As previously mentioned, Pappas was suspended in 2015 following an altercation where Pappas confronted Portis for failing to show up to help repair broken dusty doors. The Secretary alleges that "Riverside's investigation of the incident failed to take into account the history of their dealings," and that the process that led to the suspension supports a finding of animus toward protected activity. (Sec'y Br. at 34.) This argument is bolstered by Pappas's and Arps's testimony that Pappas was not allowed to fully explain his side of the story when he was interviewed about the incident. He was only asked to repeat what he said to Portis in the specific incident and then was cut off when he tried to provide additional context. (Tr. 107:6–108:3, 254:5–255:2, 339:6–340:9.) Even before the investigation, Pappas claims that a fellow employee, Harold Cole, told Pappas that Portis and other employees in the break room (including James "Slim" Wright to whom Pappas initially voiced his concerns about Portis falsifying records) were "getting their stories together," and then stated, "What they're doing is wrong and it should never, ever, ever . . . be allowed to happen in a place like this." (Tr. 103:5–19.) At the conclusion of this investigation, which was conducted by management officials Terry Jacobs and Bob Sylvia, acting plant manager Kevin Grogan initially recommended termination, but Sheridan opted for a five-day suspension instead, presumably after considering the Mine Act implications of termination. (Tr. 422:25–423:6, 420:17–421:5, 438:22–439:25; Ex. S–7.)

This evidence raises questions about the investigation into the breakroom incident and whether the suspension was imposed for legitimate reasons. Portis's conduct leading up to the incident, Cole's warning to Pappas, Jacobs's and Sylvia's reluctance to delve into Pappas's and Portis's prior history, and Grogan's seemingly harsh recommendation for termination may justify Pappas's feeling that he was being treated unfairly. However, this evidence does not establish a collective or widespread hostility toward Pappas's protected activity.

In a letter to Martin Marietta, during the pendency of his grievance after the April 2015 incident with Portis, Pappas alluded to a conspiracy to terminate him involving Pappas's own union and the rank-and-file miners alongside him:

> While I was off harold cole told me everyone in the shop (slim, david wray, stacy portis) would talk about me bad. they would talk about how they could get me out of the shop. how they all hatted me. I have documented proof in the msha investagation that shows the union (slim,bill arps.jr) had a large part of what happend to me. msha told me they have never had a union go against one of its members like they did me [sic]

(Ex. S–10 at 3.) The Secretary never developed this argument further or even referred to those specific allegations from Pappas, possibly because Arps testified on Pappas's behalf at the hearing and the union fought for Pappas and obtained some relief for him during his grievance process.[30] (Tr. 329–403, 342:5–343:1, 350:12–17.) However, the Secretary's argument that

[30] There is a tension and irony in the fact that Pappas views many of his co-workers and those fighting on his behalf as part of a wide-ranging conspiracy against him, while simultaneously and regularly describing individuals with whom he has clashed as "good

Pappas's suspension indicates hostility toward protected activity implicitly relies on a similar conspiracy theory involving management, union officials, and rank-and-file miners.

Perhaps Portis's and Wright's behavior immediately prior to Pappas's outburst and the failure of their immediate supervisor, Dan Kegel, to intervene adequately were motivated by animus toward protected activity and were (as per Cole's warning) part of a concerted effort to set in motion a series of events that might lead to Pappas's termination. Perhaps Jacobs and Sylvia conducted an arbitrary, one-sided investigation fueled by hostility and animus toward protected activity with the ultimate intention of getting Pappas fired. And perhaps Grogan's harsh recommendation of termination (before Sheridan talked him down to a suspension due to Mine Act concerns) was the culmination of Riverside's concerted effort to punish Pappas over his exercise of protected activity. It makes for a good narrative.

Yet, I can only speculate on the motives of Portis, Cole, Wright, Kegel, Jacobs, Sylvia, and Grogan because none of them were called to testify, and there is little evidence in the record that any of them (other than Portis) were even aware of Pappas's protected activity at the time of this implied conspiracy or involved in his original section 105(c) dispute. While there is evidence in the record that Grogan had been a general manager for a number of years, and that Sheridan discussed Pappas's reinstatement with Grogan after the initial termination recommendation, I find this insufficient to infer Grogan's awareness of the circumstances surrounding Pappas's dismissal and reinstatement when he initially made his recommendation. (Tr. 117:17–118:2; Ex. S–7.) Similarly, there is evidence that Ambrose told Jacobs that co-workers were discussing a previous case of his, but the Secretary did not ask Ambrose on cross-examination whether she discussed anything more specific about Pappas's case with Jacobs. (Tr. 760:16–761:6.) Without such evidence, I conclude that Grogan and Jacobs had little incentive to blacklist Pappas for future employment at Oro Grande or to retaliate against him over the exercise of protected activity.

iii. Psychological Evaluation

Pappas took offense to statements made to him by Dr. James O'Brien, the reviewing physician who examined him for a psychological evaluation. On the basis of Pappas's recounting of the conversation that took place during that evaluation, the Secretary alleges that Riverside "told the reviewing physician about Mr. Pappas being a disgruntled employee who had been terminated and reinstated after filing a complaint" in violation of the settlement terms of his prior section 105(c) complaint, and that this is further evidence of animus. (Sec'y Br. at 34–35.) According to Pappas, O'Brien allegedly said he understood that Pappas had been nothing but a problem employee and that his employer had fired him for this reason. (Tr. 112:12–20.) Pappas says this was communicated by Riverside to O'Brien by fax prior to the evaluation. (Tr. 112:21–

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friends." These "good friends" include Rod Roderick, who previously reported Pappas in 2010 for creating a hostile work environment; James Hawthorne, whom Pappas compared Portis to unfavorably due to his reputation for laziness; and Portis, someone Pappas once left stranded in Chicago because he upset him and now alleges harassment against. (Tr. 41:4–7, 81:6–8, 102:18–23, 158:7–23, 169:12–18, 183:14–184: 6.) The incoherence of these descriptions makes me unable to fully credit Pappas's assessments of other individuals' behavior.

25.) The fact that Riverside communicated this information at all to O'Brien (when the details were meant to remain confidential) is troubling. However, a closer inspection of the faxed document that O'Brien relied on for this assessment reveals that Riverside did not describe Pappas or his protected activity with anywhere near the level of hostility that O'Brien's alleged statements (or Pappas's recollection of them) might suggest. Instead, the document appears to alert O'Brien to Pappas's prior termination and reinstatement in the event that Pappas wished to discuss this incident himself. (Ex. S–38 at 2.)

The full text of the fax's reference to Pappas's prior complaint is as follows:

> As additional background, previously Mr. Pappas had been terminated from employment at the plant, but subsequently reinstated in December 2014, following his claim that the termination was for retaliation for his reporting of adverse plant information to the Mine Safety and Health Administration (MSHA) during a plant inspection by MSHA. Mr. Pappas may provide his details of this as well as other events during the evaluation.

(Ex. S–38 at 2.) The language in this paragraph is fairly neutral toward Pappas's protected activity and appears to be an attempt to ensure that O'Brien was not taken by surprise when the subject inevitably came up. I do not find this to be strong evidence of animus by Riverside. Rather, it is evidence of Riverside providing a physician with appropriate background.

iv. Further Complaints to Riverside

After Pappas was suspended, he attempted to raise complaints about retaliation and harassment against him to numerous management officials at Riverside and Martin Marietta. (Tr. 118:10–121:12, 122:22–123:25.) The Secretary notes that Pappas was "rebuffed on numerous occasions." (Sec'y Br. at 35.) It is once again unclear whether these complaints were related to newer incidents of harassment over the exercise of protected activity, or if they were still in reference to the early issues he faced with Portis upon his reinstatement or to issues of a racial or sexual nature. Nonetheless, management officials refused to deal with these complaints, because they believed the issues were closely tied to his suspension and that the union grievance process for that suspension was the only appropriate venue for addressing those concerns. (Tr. 243:15–244:25, 463:19–465:10, 664:4–665:21.) Tim Sheridan, who previously worked as a trial attorney at the NLRB, believed that under the NLRA, management could not even communicate directly with Pappas about these matters without first going through his certified union representative in the grievance process, and he surmised that this is why certain Riverside officials were reluctant to engage Pappas after his suspension when Pappas came to them with concerns about harassment and retaliation. (Tr. 407:2–6, 464:17–465:10.) All exhibits documenting these interactions support Sheridan's understanding. (*See* Exs. S–10, S–11.)

For example, in his June 29, 2015 letter to Martin Marietta corporate management, Pappas related the following conversation he had with Kevin Grogan:

> Kevin says to me what do you want to talk about? I said the investagation terry conducted. Terry refused to include my witness harold cole in the investagation. . . .
>
> Grogan said to me "this is on the grievance we can not talk about this now, we will talk about at grievance meeting, we can bring up then ." I said Mr. Grogan this is a complaint about procedure not a violation of the c.b.a.. If a fair investagation was conducted with my witnesses statements included the outcome would be differant . grogan stated "no we can talk about at grievance meeting " [sic]

(Ex. S–10.) This confirms that Pappas's complaints were ostensibly about his suspension, and that management did in fact reasonably respond to those complaints by noting that the issues raised should be resolved in the grievance proceeding for his suspension. Furthermore, the first two pages of this letter to Martin Marietta are entirely devoted to the alleged unfairness of Pappas's suspension and do not mention protected activity. (*Id.*) While the last half-page contains references to his prior "MSHA case" the context of the preceding two pages would have reasonably led Martin Marietta to believe that the issues were closely bound up with his suspension. (*Id.*)

Similarly, Pappas's July 23, 2015, three-page letter to Jamie Ambrose is predominantly about the alleged unfairness of his suspension. (Ex. S–11.) On the second page, Pappas references MSHA's interviews with "Slim" Wright during the investigation into Pappas's prior section 105(c) complaint, but only to support Pappas's contention that Wright was predisposed against Pappas and lied to Terry Jacobs in the investigation that led to Pappas's suspension. (*Id.* at 2.) Further in the letter, Pappas also contends that the arbitrariness of his suspension and the faxed document to Dr. O'Brien mentioning his prior section 105(c) complaint are evidence of retaliation over the exercise of protected activity. (*Id.*) While I have already determined that these incidents are not evidence of retaliation over the exercise of protected activity, Ambrose would have been further justified in refusing to discuss these issues based on the way they were presented: sandwiched between extended discussions regarding issues with his suspension likely to arise during his grievance proceeding. (*Id.*)

Although Pappas's retaliation complaints may have in fact been distinct from his grievance, I find Riverside's belief that they were closely connected and that therefore legal risks existed in discussing such matters with Pappas to be, at the very least, understandable from management's perspective. This belief, rather than animus or hostility, explains why Pappas's complaints about harassment in conjunction with his grievance issues went partially ignored after his suspension.

v. Statements from Tim Sheridan

The Secretary also alleges that at the third step grievance meeting resolving Pappas's suspension, Sheridan made several comments indicative of hostility toward protected activity. Pappas took offense to what he viewed as Sheridan "talk[ing] down" to him during this meeting and bringing up his prior section 105(c) case for inexplicable reasons. (Tr. 130:3–23.) Sheridan

also told him at this meeting that the fact Sheridan even knew his name means Pappas is a problem, and then promised him that if he cooperated he would have a future with Riverside, which the Secretary labels as disingenuous since Sheridan knew that Riverside would be laying off all its employees in September. (Tr. 129:19–23; Sec'y Br. at 36.) Sheridan was undoubtedly aware of Pappas's prior section 105(c) complaint, so the question becomes whether the statements above indicate hostility toward that protected activity. (Tr. 439:1–6.)

As an initial matter, although Pappas testified that Sheridan told him "we'll keep you here, [and we] want some kind of long-term thing," Pappas also admitted that he could not remember what Sheridan said at that point because Pappas was so disturbed by Sheirdan bringing up his prior section 105(c) complaint. (Tr. 129:25–130:4.) The Secretary views Sheridan's promise as disingenuous and evidence of animus, even though Pappas himself does not describe it this way. Regardless, given Pappas's hazy recollection of the statement and surrounding context, it is hard for me to derive any strong meaning from those words other than a routine desire by Sheridan for Pappas to maintain an amicable long-term relationship at the mine with his coworkers and management. Sheridan may have expected most of the management officials and employees at Riverside to be hired by CalPortland, as they ultimately were, so his statement was not necessarily disingenuous.

Regarding the other statements made, Sheridan testified that he might have told Pappas that if he knew his name, it was not a good thing, because "95 percent of the employees" that Sheridan deals with come to his attention because of a disciplinary matter. (Tr. 461:22–462:1.) I find this explanation credible and not indicative of animus. In fact, I found Sheridan to be a wholly credible witness in general.

Sheridan also explained that his role is specifically set up to make him out to be "the bad guy" – the one "wearing a black hat" – in disciplinary matters, so as to reduce tensions between employees and local management officials who have to work together on a day to day basis. (Tr. 462:2–19.) Unlike Riverside management officials, Sheridan (who worked for Martin Marietta) could return to his office on the other side of the country, in Raleigh, North Carolina, at the end of this meeting. (*Id.*) For this reason, Sheridan wanted to make it clear to Pappas that he alone was responsible for everything happening to him. (*Id.*) Thus, I find that Sheridan told Pappas he contacted the attorney who handled Pappas's prior section 105(c) complaint not as an expression of animus toward protected activity but rather as proof of how involved Sheridan was in the process that led to Pappas's suspension. The way that Sheridan perceived his role in these matters may also explain why Pappas believed that he was being "talked down to," since Sheridan felt it necessary to redirect the animosity of aggrieved employees toward him rather than management officials. Furthermore, Sheridan's allegedly condescending statements do not appear out of place or entirely uncalled for when juxtaposed with the similarly harsh message that Pappas's international union representative Ron Espinosa delivered in that very same meeting. (Tr. 461:3–11.)

Thus, I do not find animus toward Pappas's protected activity from Sheridan.

Up to this point, the Secretary has attempted to marshal all of the evidence surrounding Pappas's suspension, starting from the company's initial investigation into Portis's complaint to

the grievance resolution, to suggest a collective hostility toward Pappas's protected activity. The evidence fails to support that conclusion. Accordingly, the Secretary cannot establish a motivational nexus between Pappas's protected activity and Ambrose's and Salzborn's references by imputing to them the alleged hostility of other management officials.

vi. Statements from David Salzborn

While there is insufficient evidence in the record to support a finding that Riverside or Martin Marietta management was collectively hostile toward protected activity, there is stronger evidence that Salzborn individually was. Pappas alleges that Salzborn was directly hostile toward the protected activity that formed the basis of his prior section 105(c) complaint. (Tr. 76:11–17.) In 2014, Pappas brought up the issue of the train car hazardous incident at a safety meeting and also noted at that meeting that his supervisor brushed off his concerns and then lied about whether Pappas brought this issue to his attention. (Tr. 74:1–76:17.) According to Pappas, Salzborn got mad at him for calling the supervisor a liar, even though that supervisor conceded that he had lied about the incident. (Tr. 76:11–23.) This testimony went unrebutted by Salzborn and Riverside. Accordingly, I find this to be evidence of animus toward protected activity from Salzborn.

In addition, Salzborn's decision to brief Walters on some of the specifics of the incident leading to Pappas's termination, when asked by Walters to name problem employees, could be viewed as evidence of animus or hostility, given that Riverside paid a penalty to MSHA for that incident and was required to expunge from Pappas's record any mention of his termination as a part of that settlement. (Tr. 648:24–649:2; Ex. S–1.) As previously discussed, Pappas was initially terminated by Salzborn in 2014 for allegedly insubordinate behavior in driving a company vehicle when he was ordered not to do so. Pappas filed a discrimination complaint that year alleging that the company's justification for terminating him was a pretext, and that he was actually terminated for safety complaints he had made to MSHA earlier. He was subsequently reinstated pursuant to the settlement agreement mentioned above. Riverside argues that "Salzborn never described any of the factors underlying his opinion of Pappas as an employee" to Walters and "did not mention the underlying adverse action . . . at issue in the first" discrimination case. (RCC Reply Br. at 12.) While there is no evidence that Salzborn discussed Pappas's protected activity with Walters, including his safety complaints to MSHA or his 2014 discrimination complaint (Walters did not testify and neither party elicited testimony from Salzborn on the topic), Salzborn's testimony at hearing indicates that he went into much more detail about Pappas than Riverside now claims. When asked why he identified Pappas as a poor performer, Salzborn mentioned that Pappas had a long history of discipline and specifically noted the incidents that led to his suspension and termination, including the company's revocation of Pappas's use of a company vehicle. (Tr. 635:13–637:19.) Salzborn also testified that Pappas was disciplined for this behavior and subsequently reinstated. (*Id.*) Next, when asked directly whether he gave Walters the same details he described at hearing in explaining why he believed Pappas to be a poor employee and in relating the discipline Pappas received, Salzborn responded "I probably would have explained it in the same way I've explained it here." (Tr. 641:4–14.) I conclude from this testimony that Salzborn did in fact describe to Walters the factors underlying his opinion of Pappas and did in fact mention the suspension and termination relating to his use of a company vehicle.

The Commission order approving the settlement for Pappas's initial section 105(c) claim states, in no uncertain terms, "Respondent agrees to, within ten days of this order, remove from Complainant's personnel file all records relating to the revocation of Complainant's use of the company vehicle, Complainant's March 21, 2014 suspension, and Complainant's April 4, 2014 termination." (Ex. S–1.) Given that Salzborn would have been prohibited from disseminating this information to CalPortland through a personnel file, Riverside similarly violated the spirit of this order by providing this information to CalPortland orally from one plant manager to another.

It is unclear from the record whether Salzborn was at the time aware of the settlement terms for Pappas's initial section 105(c) complaint, as Salzborn had retired during the same month in which Pappas settled the matter and was therefore not working at the plant when Pappas returned to work. (Tr. 637:20–23, 648:16–649:25.) The Secretary's cross-examination revealed Salzborn's awareness of the settlement terms at the time of the December 2016 hearing, but left uncertain whether Salzborn knew these facts in 2015. (*Id.*) However, given Salzborn's central role in the initial discrimination claim, I infer that he would have been made aware of the terms of Pappas's reinstatement at some point prior to his discussion with Walters.

Salzborn's deliberate disregard of a Commission order and settlement resolving Pappas's section 105(c) claim is an expression of animus toward Pappas's section 105(c) rights that should not be tolerated. This behavior is indicative of a discriminatory motive for providing a negative reference.

c. Coincidence in Time

The Commission does not have any hard and fast criteria for determining a sufficiently close temporal proximity between protected activity and adverse action, as it has stressed that "[s]urrounding factors and circumstances may influence the effect to be given to such coincidence in time." *Hyles v. All Am. Asphalt*, 21 FMSHRC 34, 45 (Feb. 1999) (citation omitted). In particular, "evidence of intervening acts of hostility, animus, and disparate treatment" may be relevant in making that determination. *Sec'y on behalf of Lige Williamson v. Cam Mining, LLC*, 31 FMSHRC 1085, 1090 (Oct. 2009).

Pappas filed his initial section 105(c) discrimination complaint on July 21, 2014. As a part of the terms of the settlement for that complaint, Pappas was reinstated at the Oro Grande Plant in January 2015. (Tr. 79:19–22.) Ambrose and Salzborn both provided their recommendations to CalPortland regarding Pappas in early September. (Tr. 632:7–11, 685:3–686:5.)

In this case, there was a 17-month window between Pappas's discrimination complaint and the adverse actions alleged, a gap that does not support a finding of coincidence in time. While it may be more appropriate to begin counting from when Pappas was reinstated in January, I find that even an eight-month proximity between Pappas's reinstatement and Salzborn's and Ambrose's September recommendations does not weigh strongly in favor of a coincidence in time finding. The Secretary wants me to treat Riverside's actions as one continuous, escalating series of wrongdoings in order to shorten the gap between protected

activity and adverse activity. The problem with this theory is that I do not find evidence of intervening acts of hostility, animus, or disparate treatment between Pappas's reinstatement and the adverse actions alleged that would influence the effect to be given to this lengthy gap in time.

However, the Secretary has also alleged that Pappas exercised protected activity by complaining about harassment after his reinstatement to Riverside. He initially complained about this to Ambrose in early February 2015. (Tr. 81:14–82:16.) He next complained about related issues on June 29, 2015, to Kevin Grogan and Martin Marietta headquarters. (Tr. 117:13–123:25; Ex. S–10.) Finally, he requested help from Jamie Ambrose in July, approximately two months prior to when she gave CalPortland her reference checks. (Tr. 124:1–126:13.) In these discussions, Pappas raised concerns about Riverside's indifference or hostility toward his protected activity, albeit as an aside in conversations more focused on other issues with his suspension. (*See* Ex. S–10 at 3.) Although the evidence is not overly compelling, this two-month window just barely establishes a sufficient coincidence in time between Pappas's protected activity and Riverside's adverse actions. *See Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (finding that an adverse action taken three to four months after a miner's exercise of protected activity constituted sufficiently close temporal proximity).

d. Disparate Treatment

i. Suspension

The Commission has determined that "[t]ypical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Chacon*, 3 FMSHRC at 2512. The Secretary does not cite extensively to evidence of disparate treatment in Ambrose's and Salzborn's references to CalPortland. However, the Secretary claims that Riverside meted out "disproportionate discipline," referring to Pappas's suspension which was in part the alleged basis for Ambrose's and Salzborn's negative references. (Sec'y Br. at 35.)

Pappas claimed, and Arps concurred, that profanity and heated exchanges were commonplace at the mine, because miners deal with dangerous and physically draining work, and tensions often run high in such conditions. (Tr. 100:2–102:17, 375:19–377:2.) However, neither witness established whether Riverside employees engaged in such behavior without disciplinary consequences, and thus whether Pappas was disparately treated. A Riverside employee, Russell Ontiveros, who threatened an employee in a manner similar to the conduct for which Pappas was suspended was, according to Pappas, also ultimately suspended for that conduct. (Tr. 290:23–293:7.) The Secretary attempts to distinguish Pappas's and Ontiveros's cases by noting, through Pappas's hearsay testimony, that Ontiveros was "only disciplined after several complaints and an appeal to corporate headquarters" and that he only received a "brief suspension" without any "position change or staff changes to separate him from the complaining employee" or any "requirement for a psychological evaluation or anger management." (Sec'y Br. at 36.) I do not find these facts to be meaningfully distinguishable. Pappas's three-day suspension was also brief, also came after an earlier complaint against him, and also involved a delayed response after input from corporate headquarters. Importantly, Pappas did not know if Ontiveros had a "prior incident of a hostile work environment finding," which caused Riverside to recommend additional measures for Pappas. (Tr. 309:24–310:14.)

The other incident that Pappas cited to as evidence of disparate treatment is similarly unpersuasive. After Pappas returned from his suspension, Portis and another employee allegedly teased him by repeating the same profane language that earned Pappas his suspension. Pappas allegedly reported this incident to Ambrose, but his concerns were brushed aside. (Tr. 296:17–298:25.) However, Pappas does not appear to have alleged to Ambrose that Portis's language was similarly threatening in the way that Pappas's language was perceived to be. (*Id.*) And once again, Pappas did not know if the individual who was with Portis had a prior incident of a hostile work environment finding. (Tr. 310:15–18.) Nothing in the record shows that Portis had a prior incident of a hostile work environment finding either. I can only conclude that in failing to develop this evidence further, the Secretary is conceding the weakness of this argument.

The Secretary's claim that Pappas's suspension was disproportionately harsh also does not stand up to scrutiny. While Arps testified that verbal counseling would be a more appropriate response to Pappas's behavior and that the decision to disqualify Pappas from his position at the time was objectionable, he was unaware that Pappas had already been suspended once in 2010 for threatening language prior to the incident with Portis. (Tr. 403:8–12.) I agree with Riverside that this context is crucial for determining whether this discipline was an appropriate response the second time in 2015.

In this case, the strongest evidence weighing against a finding of disparate treatment for Pappas's suspension is that Pappas had already received nearly identical discipline (a three-day suspension without pay, along with anger management counseling and disqualification from his position at the time) for a similar (and by Pappas's telling a less serious) incident in 2010, involving a violation of the same work rule, and there is no allegation that the 2010 suspension was motivated by protected activity. (Tr. 158:7–161:3, 311:2–9; Ex. RCC–6.) This indicates that Sheridan's punishment was not out of line with the operator's normal business practices. Further, the company's disciplinary rules allowed Riverside to terminate Pappas for a violation of this rule. (Tr. 434:25–435:5; Ex. RCC–22 at 2.)

Nor do I find that Riverside's justification was weak or implausible. Pappas's behavior was serious enough to merit discipline. His outburst lasted somewhere between two to seven minutes and occurred within 10-12 feet of Portis.[31] (Ex. RCC–1; Tr. 184:14–23, 433:13–21.) Ron Espinosa, a USW official, found Pappas's behavior troubling enough to merit calling him into his grievance proceeding and giving him a stern lecture, which numerous witnesses, including Pappas himself, credibly described as an unusual occurrence. (Tr. 127:23–128:1, 354:25–355:22, 460:11–461:18, 630:8–631:1.)

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[31] Although "Commission precedent establishes that it is not the duration of various single incidents that is most relevant to disparate treatment analysis, but rather whether there was a prior problem with misconduct involving the complainant," in this case there was both a prior problem with misconduct and a verbal outburst of lengthy duration. *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 933 (Sept. 2001). Consistent with Commission case law, the prior misconduct is the more relevant factor in my analysis, but I find the length of his outburst to be somewhat relevant as well.

The Secretary's evidence is insufficient to establish disparate treatment in Pappas's suspension.

ii. Salzborn's Statements

When Salzborn was asked by Walters to identify "some of the employees that might be problematic," Salzborn listed only two employees that he felt posed an issue, one of whom was Pappas. (Tr. 632:12–20, 641:25–642:5.) Pappas was allegedly singled out because of disciplinary issues. At the hearing, Salzborn could not remember the name of the other employee he discussed with Walters, although he knew that the employee was a recent hire and was a mechanical supervisor. (Tr. 651:1–12.) Salzborn claimed that he was not aware of that employee having engaged in protected activity and that he mentioned that employee to Walters because of absenteeism issues. (Tr. 642:6–25.) Given the lack of information provided about this employee, it is difficult for me to evaluate whether both employees singled out had actually engaged in protected activity, which could provide evidence of disparate treatment. However, Salzborn neglected to mention a number of other employees with disciplinary issues. In her testimony, Ambrose named at least three different employees with multiple or recent disciplinary issues, and numerous more with related problems, none of whom Salzborn identified at hearing.[32] (Tr. 694:7–15, 695:5–11, 702:17–23.) I find this evidence to be marginally probative of disparate treatment.

iii. Ambrose's Recommendations

As a preliminary matter, I note that I found Ambrose to be a credible witness on the stand in regard to her motivation for not providing Pappas with a positive reference. Admittedly, she did have troubling inconsistencies in the statements she gave to MSHA Inspector Jackson regarding whom she spoke to from CalPortland and what the subject matter was, but her rationale for Pappas's non-recommendation did not change, and her testimony in-person on this point was reasonable, detailed, and consistent. Furthermore, Ambrose explained that some of the inconsistencies during the MSHA interview process were due to her not fully understanding Inspector Jackson's initial questioning. (Tr. 715:1–15.) I observed Ambrose and Inspector Jackson closely on the stand, and based on my observations I also found this explanation believable. Beyond those inconsistencies, the Secretary's direct examination of Jackson and cross-examination of Ambrose did very little to impeach Ambrose's credibility – for example by pointing out instances of disparate treatment in her recommendations.

Ambrose claimed that her decision not to recommend Pappas for hiring was based on Pappas's hostile work environment disciplinary issue, which was fresh on her mind due to the recent resolution of his grievance seven days prior. (Tr. 690:16–23.) Ambrose did not recommend hiring two other employees with disciplinary issues, both of whom also had their grievances settled alongside Pappas's in that same meeting Ambrose attended. (Tr. 694:7–695:11, 645:19–647:14.) The Secretary notes that Ambrose gave a positive reference to Russell

[32] Salzborn had recently attended a third step grievance in which several different miners' grievances were settled, but Salzborn testified that he did not recall any of those grievances or miners, or any of the disciplinary issues that may have been grieved. (Tr. 646:19–647:14)

Ontiveros, who Pappas claimed was also accused of creating a "hostile work environment." (Sec'y Reply Br. to RCC at 9; Tr. 290:20, 293:15). Pappas believed that Ontiveros's incident occurred at the beginning of 2015, around February, just after Pappas was reinstated. (Tr. 309:2–17.) But he did not mention when Ontiveros was suspended, or whether he grieved the suspension, such that the issue would have been fresh on Ambrose's mind in September. Pappas also admitted that he did not know if Ontiveros had a "prior incident of a hostile work environment finding." (Tr. 309:24–310:14.) The Secretary did not question Ambrose or any management official about their familiarity with Ontiveros's issues or introduce easily obtainable corroborating evidence about his discipline. Pappas recognized the potential for distortion, inaccuracy, and unfair reputational harm in rumors based off hearsay. (Tr. 82:3–6.) However, the Secretary appears to rely entirely on rumor and hearsay to make out a case of disparate treatment from Ambrose.

Without further information on the circumstances of Ontiveros's suspension and his prior disciplinary history, this one incident, only vaguely alluded to in Pappas's testimony, is very weak evidence of pretext. The Secretary failed to develop this evidence: he could have easily requested Riverside's personnel files, examined whether the employees Ambrose positively recommended for hiring had recent or recurrent disciplinary problems comparable to Pappas's, or questioned Ambrose about Ontiveros. The Secretary did not introduce any such evidence into the record, the absence of which prevents me from finding disparate treatment on Ambrose's part.

Consequently, the Secretary's evidence does not establish a motivational nexus between Pappas's protected activity and Ambrose's references.

e. Conclusion

The Secretary has produced evidence on all of the prima facie elements of a discrimination claim. Riverside has presented rebuttal evidence that Salzborn's and Ambrose's references were in no part motivated by protected activity and were instead motivated by Pappas's disciplinary issues and recent suspension. After weighing this evidence, I find that the Secretary has proven by a preponderance of the evidence that Salzborn's statements to Walters were motivated in part by his protected activity. Salzborn had knowledge of Pappas's protected activity, displayed animus toward that protected activity in discussing his termination and reinstatement, and engaged in disparate treatment by failing to mention other miners with disciplinary problems at the mine.

However, the Secretary has not proven by a preponderance of the evidence that Ambrose's actions were motivated in any part by protected activity. I should first note that although I have already credited Ambrose's explanation for many of the inconsistencies in her MSHA interview, I am troubled by one piece of evidence from that interview. Ambrose stated she did not give Antonoff any reason for why she would not hire any of the employees she declined to recommend, but Antonoff told MSHA that Ambrose singled out employees with poor attendance, conflicts with supervisors, or imminent retirement, and that Ambrose "said she wouldn't hire the president and vice president of the union because of the union." (Tr. 519:22–520:18, 832:1–833:25; Exs. S–19, S–20.) This evidence slightly undermines Ambrose's

credibility in her description of the meeting with Antonoff, but more importantly it indicates that Ambrose knew how to spot problem employees, harbored hostility toward protected activity in other statutory contexts like the NLRA, and passed along those concerns to CalPortland. In short, something does not smell quite right with this case. Inspector Jackson's preliminary investigation did indeed uncover problems – problems that would help the Secretary meet his burden in a temporary reinstatement proceeding. But these problems, on their own, do not satisfy the Secretary's higher burden in this proceeding on the merits. The Secretary had a year to develop this case and link these troubling answers to more reliable indicia of discriminatory intent. It is here where the Secretary's case against Ambrose falls short.

While Ambrose did have knowledge of Pappas's protected activity and there was a weak coincidence in time between that protected activity and her recommendations, there was no evidence that she was hostile toward Pappas or his complaints. Nor was there sufficient evidence of disparate treatment regarding whom she did or did not recommend, because the Secretary did not introduce personnel records for any miner she recommended or cross-examine her about the one case of disparate treatment alleged through hearsay testimony.

The Secretary attempts to tie Pappas's suspension, Ambrose's negative reference, and Salzbon's statements to Walters together as part of a larger effort from Riverside to blacklist Pappas for employment at the Oro Grande plant. This allows the Secretary to draw on evidence of animus and disparate treatment from other Riverside officials in inferring discriminatory motivation on Ambrose's part. The problem with this theory is that it would require far more evidence of coordination and widespread animus than the Secretary has provided, a problem that I have already detailed in the context of Pappas's suspension. Although Ambrose's negative reference was close enough in time to Salzborn's to raise concerns that the acts were coordinated, there is no evidence that the two communicated about Pappas with each other or through any other common Riverside management official outside of the third step grievance meeting, from which there is also no evidence of improper discussions. The Secretary has not presented sufficient evidence to tie Ambrose's recommendations to Salzborn's improperly motivated ones. Without this link, the Secretary has not persuaded me by a preponderance of the evidence that Ambrose's recommendations were in any part motivated by Pappas's protected activity.

Therefore, I determine that Salzborn's warning to CalPortland was in part motivated by discriminatory intent but Ambrose's recommendation was not, and that these efforts were not a part of a larger conspiracy to prevent Pappas's retention at the plant. However, as Salzborn was a management official, Riverside would still be liable for Salzborn's unlawful acts if the operator cannot establish an affirmative defense.

3. Affirmative Defense

Riverside argues that "even if the Court finds that the Secretary established a prima facie case, the complaint must still be dismissed because Riverside established a proper business justification for its" adverse actions. (RCC Br. at 23; *see also* RCC Reply Br. at 11.) I interpret

this as an affirmative defense.[33] While I have determined that Ambrose's negative reference was in no part motivated by protected activity while Salzborn's negative reference was, I will evaluate whether Riverside can establish a successful affirmative defense for both adverse actions.[34] The company articulates a nearly identical business justification for both Ambrose and Salzborn which allegedly would have motivated them to say what they did with or without protected activity. (RCC Br. at 23.) According to Riverside, Pappas's 2015 hostile work environment claim and the incident with Portis that led to it were "fresh in [the] mind[s]" of Ambrose and Salzborn, who had both attended Pappas's third step grievance meeting shortly before they gave their recommendations, and this is in fact what "caused them to formulate their respective opinions." (RCC Br. at 21.) The Secretary responds that this explanation is mere pretext.

When evaluating an operator's business justification for an adverse action,

> [T]he inquiry is limited to whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The Commission may not impose its own business judgment as to an operator's actions.

Pendley v. FMSHRC, 601 F.3d 417, 425 (6th Cir. 2010) (citations omitted). However, the Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug 1990) (citations omitted). The Commission has added,

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[33] Riverside supports its business justification by citing to a case in which the operator prevailed by proving as an affirmative defense that "it *would have* taken the adverse action . . . for . . . unprotected activity alone." (RCC Br. at 23.) (emphasis added) In context, then, it is clear that Riverside's business justification is an affirmative defense pled in the alternative after assuming, *arguendo*, that the Secretary has met his prima facie burden of persuasion.

[34] Recently, in rejecting an operator's affirmative defense which had been pled in the alternative, the Commission stated, "Since [the operator] contends that its termination of Riordan was completely unrelated to his protected activity, this is not a 'mixed-motive' case where, under *Pasula-Robinette*, the operator could prove an affirmative defense by showing that it would have terminated Riordan for unprotected activity alone." *Riordan*, 38 FMSHRC at 1923 n.11. I do not interpret this to mean that an operator cannot prevail on an affirmative defense if it is pled in the alternative. In *Riordan*, the ALJ wholly discredited the operator's business justification on rebuttal and effectively determined that the adverse action was *in no part* motivated by *un*protected activity. I interpret *Riordan*'s holding to mean that in such cases the operator cannot prevail on a "mixed-motive" affirmative defense, because the defense must rely in part on a credible business justification. *See Riordan* at 1930. In contrast, I have not wholly discredited the operator's business justification on rebuttal.

> In the context of other federal discrimination statutes, courts have analyzed the issue of pretext as follows: "A plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the adverse action], or (3) that they were *insufficient* to motivate [the adverse action].'

Turner, 33 FMSHRC at 1073 (citations omitted).

In this case, there can be no dispute that the proffered reason was plausible and had a basis in fact. Pappas was in fact suspended for his outburst toward Portis, and both Ambrose and Salzborn did in fact attend his grievance meeting for that incident shortly before giving their references. (Tr. 129:2–7.) I also do not find that this recent suspension was a weak justification or would have been insufficient to motivate a negative recommendation absent protected activity. A serious and recent disciplinary problem would certainly make someone in Ambrose's position "unsure" about whether or not to recommend Pappas for hiring to a new employer, and could easily lead someone in Salzborn's position to single out Pappas when asked to name problematic employees. The question then becomes whether the proffered reasons actually motivated Ambrose's and Salzborn's recommendations.

As discussed, there was very little evidence of disparate treatment at hearing, and the Secretary's case lacked detailed comparisons between employees who were and were not recommended, which an examination into Riverside's personnel records could have shed light on. Instead, Riverside has presented sufficient evidence that Ambrose gave negative or "unsure" references about multiple other employees with disciplinary issues comparable to Pappas's. (Tr. 694:7–695:11, 645:19–647:14.) While there is some evidence that Salzborn did not mention a couple other employees with similar disciplinary issues, Salzborn credibly testified that Pappas's issues were recent, recurrent, and unprecedented in provoking such a harsh response from the international union representative Ron Espinosa, an incident that caused Pappas's suspension to stick in Salzborn's mind. (Tr. 646:19–647:5.) Multiple witnesses, including Pappas himself, confirmed that this was an unusual response from Espinosa. (Tr. 127:2–128:1, 354:25–355:22, 460:11–461:18, 630:8–631:1.) Therefore, I find that both Ambrose and Salzborn would have given negative references for Pappas based on his unprotected activity alone.

The Secretary cites first to inconsistencies in the statements Ambrose and Antonoff gave to MSHA and then to language from Commission ALJ decisions that "where an employer provides an inconsistent or shifting rationale for its actions, a reasonable inference can be drawn that the reason proffered is a pretext designed to mask an unlawful motive." (Sec'y Br. at 37.) However, it is not Ambrose's rationale that has shifted or lacked consistency; it is her account of who she spoke to and what they discussed that has changed. Of the six or seven pieces of evidence that the Secretary cites to for the proposition that Riverside's rationale was shifting or inconsistent, the only one that even mentions a rationale for not recommending Pappas is Ambrose's Declaration filed in conjunction with CalPortland's Motion for Summary Decision, and this rationale is consistent with Ambrose's testimony at hearing that she was motivated by Pappas's recent suspension and her recent participation in his grievance process. (*See* Sec'y Br. at 22–23; Tr. 690:16–23.) Her rationale for not offering a positive opinion on Pappas has remained consistent and credible throughout these proceedings.

Based on the above findings, I conclude that Salzborn and Ambrose would have provided negative references to CalPortland on the basis of Pappas's unprotected activity alone.

4. Conclusion

The Secretary has failed to establish that Riverside unlawfully discriminated against Pappas in violation of Section 105(c) of the Mine Act. While Riverside may have been motivated in part by discriminatory animus, I find that the operator would have given the same negative references as a result of Pappas's unprotected activity alone.

B. Whether CalPortland Engaged in Discriminatory Hiring

The Secretary argues that CalPortland unlawfully discriminated against Pappas when CalPortland did not hire Pappas because of Salzborn's and Ambrose's recommendations. (Sec'y Br. at 39.) CalPortland does not dispute that Pappas engaged in protected activity when he filed his April 2014 discrimination complaint. (CPC Br. at 42.) CalPortland also does not dispute that its decision to not hire Pappas constituted adverse action. (*Id.* at 42–43.) Thus, the sole issue before me at this stage is whether CalPortland's hiring decision was motivated in any part by Pappas's first 2014 discrimination complaint.

1. Discriminatory Motive

The Secretary argues that CalPortland's decision to not hire Pappas was motivated by Pappas's protected activity. (Sec'y Br. at 39–45.) Specifically, the Secretary claims that CalPortland had knowledge of Pappas's protected activities through Salzborn and Ambrose and that Ambrose exhibited animus toward Pappas's protected activity through her inadequate response to Pappas's harassment and her participation in disciplining Pappas for the incident involving Portis. (*Id.* at 33–36, 39–42.) The Secretary argues that Ambrose's recommendation influenced CalPortland's hiring decision and therefore her knowledge and animus may be imputed to CalPortland. (*Id.* at 40–44.) Lastly, the Secretary asserts that CalPortland's reasons for not hiring Pappas are pretextual and that other miners with applications and interviews identical to Pappas's were hired by CalPortland. (*Id.* at 43–45.)

In contrast, CalPortland argues that it had no knowledge of Pappas's protected activity and that such knowledge cannot be imputed from Ambrose because she did not work for CalPortland during the hiring process. (CPC Br. at 32–37.) Additionally, CalPortland argues that neither CalPortland nor Ambrose exhibited animus toward Pappas's protected activity, that no coincidence in time existed between Pappas's protected activity and CalPortland's hiring decision because Pappas's first discrimination case was resolved in December 2014, and that there is no evidence of disparate treatment. (*Id.* at 43–44.) Lastly, CalPortland maintains that the reasons behind its hiring decision were not pretextual and that Lamb had legitimate business reasons for not recommending Pappas for hire. (*Id.* at 44–47.)

In evaluating whether a causal connection existed between Pappas's protected activity and CalPortland's hiring decision, I again consider the four *Chacon* factors: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in

time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510.

a. Knowledge of Protected Activity

The Secretary alleges that CalPortland had actual knowledge of Pappa's protected activity through Salzborn's conversation with Walters and Ambrose's interactions with Antonoff, who communicated Ambrose's recommendations to Lamb. (Sec'y Br. at 39–40.) Both Salzborn and Ambrose had knowledge of Pappas's protected activity and were questioned in Pappas's 2014 discrimination proceeding. (Tr. 635:13–637:19, 647:15–649:2, 763:11–764:10.) However, neither of them had the final authority to hire Pappas at CalPortland. (Tr. 632:1–5, 806:6–21, 876:21–877:1, 879:18–25, 904:12–16.) Instead, Walters and Lamb made the final hiring decisions for CalPortland. (*Id.*)

The Secretary points to Salzborn's conversation with Walters as evidence that Salzborn informed Walters about Pappas's protected activity. (Sec'y Br. at 39–40.) Salzborn identified Pappas as a problem employee and told Walters about Pappas's termination for insubordination. (Tr. 632:18–20, 633:7–639:12, 641:7–24.) Although this termination was the subject of Pappas's 2014 discrimination complaint, Salzborn never explicitly testified to mentioning Pappas's discrimination case to Walters, but only stated that he talked about the alleged insubordination regarding Pappas's use of his truck at the mine. (*Id.*) Walters stated in an interview with Inspector Jackson that he did not know Pappas filed a discrimination complaint in 2014. (Ex. S–22 at 2.) I cannot infer based solely on Salzborn's ambiguous description of his conversation with Walters and Walters's unsigned statement to Jackson that Walters had actual knowledge of Pappas's protected activity. Had the Secretary presented further testimony from Walters to clarify his conversation with Salzborn or discredit his statement to Jackson, then perhaps I would be able to reach that conclusion. However, no such testimony exists. I therefore determine that the Secretary has failed to establish that Walters had actual knowledge of Pappas's protected activity through Salzborn.

The Secretary also asserts that CalPortland had actual knowledge of Pappas's protected activity through Ambrose's contact with CalPortland. (Sec'y Br. at 39–40.) The record establishes that Ambrose met with Antonoff to conduct a reference check of Riverside's employees. (Tr. 685:3–686:5, 711:20–23, 819:18–820:1, 854:16–22; Exs. S–18 at 2, S–19 at 3, S–20 at 3.) Although Ambrose initially told Inspector Jackson she did not talk about Riverside's employees to CalPortland, Antonoff revealed to Jackson that Ambrose identified certain employees with attendance issues, supervisor conflicts, and upcoming retirements. (Exs. S–17 at 3, S–19 at 3, S–20 at 3.) While Ambrose's inconsistent statements about the meeting cloud the record in regard to what exactly she shared about Pappas during the meeting, Antonoff's spreadsheet does not contain any additional meeting notes for Pappas besides a highlight indicating that Ambrose did not give Pappas a positive recommendation. (Ex. CPC–27 at 5.) This evidence is not sufficient to establish that Antonoff had actual knowledge of Pappas's protected activity through his conversation with Ambrose. Furthermore, the record provides no additional proof that Antonoff communicated any additional details to Lamb, who made the actual hiring decision. Although Antonoff's spreadsheet was provided to Lamb, Lamb would not have learned about Pappas's protected activity based on a review of the spreadsheet alone.

(Tr. 824:9–14, 904:17–905:2; Ex. CPC–27 at 5.) The absence of further evidence from the Secretary therefore prevents me from determining that CalPortland had actual knowledge of Pappas's protected activity through Ambrose.

Nevertheless, the Secretary also asserts that even if CalPortland did not have actual knowledge of Pappas's protected activity, the knowledge of its agents may be imputed to CalPortland. (Sec'y Br. at 40.) A supervisor's knowledge and animus may be imputed to an employer if the supervisor is consulted regarding the miner's employment and influences the employment decision. *See Turner*, 33 FMSHRC at 1067–68 (imputing knowledge and animus of miner's direct supervisors to official making disciplinary decision); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) ("An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions"); *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSRHC 350, 358 (Apr. 2002) ("If a supervisor has knowledge of an employee's protected activities, harbors animus towards that protected activity, and influences or participates in a decision that adversely affects the employee, the courts have imputed knowledge and animus to the employer notwithstanding the actual decision-maker's ignorance of the protected activities") (Comm'r Jordan, concurring). A supervisor hired for future employment by a company purchasing a mine may be considered an agent of the purchasing company though he or she remains employed by the selling company. *Meek v. Essroc Corp.*, 13 FMSHRC 1970, 1978 (Dec. 1991) (ALJ) (finding a plant manager and a human resources manager still employed by the selling company to be de facto management agents of a buying company whose discriminatory motive in recommending employees for hire may be imputed to the buyer), *aff'd* in relevant part, 15 FMSHRC 606 (Apr. 1993).

The Secretary argues that Ambrose's knowledge may be imputed to CalPortland because Lamb relied on Ambrose's recommendations.[35] (Sec'y Br. at 40–42.) After Ambrose accepted CalPortland's job offer, Antonoff consulted Ambrose for her hiring recommendations and made notes on a spreadsheet, which he shared with Lamb, as noted above. (Tr. 685:19–686:5, 688:24–3, 819:18–821:20, 824:9–14, 843:3–18, 904:17–905:2; Ex. CPC–27.) Lamb incorporated Ambrose's recommendations in her own spreadsheet list. (Tr. 915:3–13, 916:4–13; Ex. CPC–29.) On the spreadsheet list, Lamb circled in blue ink the names of employees who she would not hire based on her independent review of the application and interview materials. (*Id.*) She also circled in blue ink the names of employees Ambrose did not recommend. (*Id.*) Lamb relied on her spreadsheet list to make the final hiring decisions for CalPortland. (Tr. 904:3–11, 915:3–13, 916:4–13; Ex. CPC–29.) Because Ambrose already accepted CalPortland's job offer before she met with Antonoff, I determine that Ambrose was a de facto agent of CalPortland at the time she gave her hiring recommendations. Given that Ambrose's recommendations were indistinguishable from Lamb's own recommendations on the spreadsheet list Lamb relied on to make the hiring decisions, I also determine that Ambrose had influence over Lamb's hiring

[35] The Secretary does not contend that Salzborn is an agent of CalPortland whose knowledge and animus may be imputed. Indeed, unlike Ambrose who accepted a job offer to work for CalPortland, Salzborn was never employed by CalPortland. (Tr. 616:9–618:15.) Although his role was to act as a liaison between Riverside and CalPortland during the mine's transition, Salzborn remained an employee of Riverside (Martin Marietta) and retired from Riverside on September 30, 2015, before CalPortland took over the mine. (*Id.*)

decisions. Accordingly, I conclude that Ambrose's knowledge of Pappas's protected activity may be imputed to Lamb.

Based on the reasons above, I determine that CalPortland had knowledge of Pappas's protected activity.

b. Hostility or Animus toward Protected Activity

The Secretary argues that Ambrose displayed animus that may be imputed to CalPortland when she failed to address Pappas's harassment, which led to Pappas's outburst and subsequent discipline. (Sec'y Br. at 40–42, 33–36.) Like knowledge, a supervisor's animus may be imputed to an employer if the supervisor influenced the adverse employment decision. *See Turner*, 33 FMSHRC at 1067–68; *Garcia*, 24 FMSRHC at 358 (Comm'r Jordan, concurring). As determined above, Ambrose acted as a de facto agent of CalPortland at the time she gave her recommendations, which influenced CalPortland's hiring decisions. *See* discussion *supra* Part V.B.1.a. Any discriminatory animus that motivated her recommendations could therefore be imputed to CalPortland. *See Turner*, 33 FMSHRC at 1067–68; *Meek*, 13 FMSHRC at 1978, *aff'd* in relevant part, 15 FMSHRC 606 (Apr. 1993).

However, as previously discussed, the evidence does not establish that Ambrose exhibited animus toward Pappas's protected activity. *See* discussion *supra* Part V.A.2.b.i. Pappas himself testified that Ambrose had always been nice and polite to him. (Tr. 170:14–17.) Ambrose addressed Pappas's harassment concerns by speaking with Pappas's supervisors, who never reported any further issues to her. (Tr. 660:22–661:5, 662:15–22, 170:24–173:12.) Ambrose's subsequent maternity leave also offers a non-discriminatory reason for why she could not fully remedy Pappas's issues with co-workers and also limited her role in Riverside's investigation into the hostile work environment claim against Pappas. (Tr. 662:11–14.) Further, I have already determined that Ambrose's recommendation was not in any part motivated by Pappas's protected activity. *See* discussion *supra* Part V.A.2.e. Thus, consistent with my prior determinations, I cannot conclude that Ambrose displayed discriminatory animus that may be imputed to CalPortland.

The Secretary has failed to put forward any additional evidence showing that other agents of CalPortland with knowledge of Pappas's protected activity exhibited animus or hostility toward the protected activity. Notably, the Secretary has claimed that CalPortland's liability for Pappas's discrimination could stem from Walters's alleged knowledge of Pappas's protected activity, which Salzborn communicated to him. Yet, the Secretary inexplicably did not develop this theory and neglected to present evidence through Walters's deposition or Walters's testimony at hearing that Walters displayed animus or hostility toward the protected activity. Walters's comments to Inspector Jackson referring to Pappas as a "poor performer" and "not a good employee," and indicating Pappas was a "no" for hire appear unrelated to Pappas's protected activity, given that Walters denied knowledge of Pappas's 2014 discrimination complaint. (Ex. S–22.) Moreover, although Salzborn exhibited animus toward Pappas's protected activity, he was not an agent of CalPortland whose knowledge and animus may be imputed. *See* discussion *supra* Part V.B.1.a, note 35.

Based on the reasons above, I therefore conclude that the Secretary has failed to establish that Ambrose or any other agent of CalPortland exhibited animus or hostility towards Pappas's protected activity.

c. Coincidence in Time

The eight-month gap between Pappas's reinstatement at Oro Grande in January 2015 and CalPortland's failure to hire on September 28, 2015, does not support a coincidence in time finding. However, I have determined that a coincidence in time existed between Pappas's complaints about harassment to Ambrose, whose knowledge may be imputed to CalPortland. *See* discussion *supra* Part V.A.2.c. Because Ambrose knew about Pappas's harassment complaints, the last of which occurred in July 2015, and declined to recommend Pappas two-months later, which influenced CalPortland's adverse hiring decision, I determine that the two-month window establishes a coincidence in time between Pappas's protected activity and CalPortland's adverse action.

d. Disparate Treatment

The Commission has determined that "[t]ypical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Chacon*, 3 FMSHRC at 2512. "Precise equivalence in culpability between employees" is not required, rather employees must have engaged in conduct of "comparable seriousness." *Pero*, 22 FMSHRC at 1368.

Although the Secretary has not made a specific claim for disparate treatment against CalPortland, the Secretary suggests that Lamb did not give the same time and attention to Pappas's job application as the other applications, but rather relied solely on Ambrose's recommendation to not hire Pappas. (Sec'y Br. at 43–44.) The Secretary claims that had Lamb evaluated the applications according to her description of her review process, she would have uncovered other applications with the same problems she identified in Pappas's application. (*Id.*) Yet, the Secretary argues, Lamb did not make similar negative remarks about these applicants on the spreadsheet she created to make the final hiring decisions. (*Id.*)

During CalPortland's interview process, Inspector Jackson found that 48 out of 99 applicants answered similarly to Pappas in response to the question about conflicts with co-workers. (Tr. 574:12–23; Ex. S–29.) Jackson also found that 56 applicants answered similarly to Pappas in response to the question about disagreements with a boss and that 29 applicants answered similarly to Pappas in response to the question about reporting safety violations. (Tr. 574:24–575:7; Ex. S–29.) Jackson additionally noted that several applicants' working history demonstrated "job hopping" or a history of three of more job positions at Oro Grande. (Tr. 570:12–19; Ex. S–29.) Based on these numbers, the Secretary suggests that these other miner applicants should have also not been recommended for hire by Lamb.

But, of these applicants that Jackson identified, only three miners' applications and interview questions reflected both job hopping and answers similar to Pappas's for the questions about reporting safety violations and workplace conflicts which Lamb identified factored in her

decision not to hire Pappas.[36] (Exs. S–29, S–30.) Although these three applicants were extended job offers by CalPortland, their application materials also reveal significant differences from Pappas's application. (Exs. S–30, CPC–30 at 2–4.) For example, all three applicants were being considered for positions other than laborer – one an electrician, one a shift utility worker, and one a mill lubeman. (Exs. S–30, CPC–30 at 2–4.) Pappas's application does not indicate he would be qualified to be hired as an electrician, which was considered a coveted position. (Ex. S–13; Tr. 932:23–25.) Moreover, although Pappas noted he would be open to any position at the mine and had previously held utility and lubeman positions, Pappas's application showed that he had been demoted back to a laborer twice since 2010. (Ex. S–13; Tr. 274:3–276:5.) The other two miners, on the other hand, either held more specialized jobs consistently throughout their job history or showed a progression in job title. (Ex. S–30.)

At first blush, the sheer number of employees who were hired by CalPortland seems to suggest disparate treatment inasmuch as Pappas was one of only 15 miners who were not extended job offers. (Tr. 142:18–144:6; Ex. CPC–30.) However, further analysis shows that Pappas was not hired over other miners because of his application and job history. (Ex. S–13.)

Based on the evidence before me, I therefore determine that the record as a whole does not weigh in favor of finding disparate treatment.

e. Conclusion

The Secretary has met his burden of production by presenting evidence for each element required to establish a prima facie case of discrimination. However, weighing the record in its entirety, I determine that the Secretary has not met his burden of persuasion to establish that any adverse action taken by CalPortland against Pappas was motivated in any part by Pappas's protected activity.

Specifically, although the Secretary presented two theories by which CalPortland could be held liable for discrimination, he failed to develop and put forward enough evidence to support a discrimination claim for either one. First, the Secretary presented evidence that CalPortland may have had knowledge of Pappas's protected activity through Salzborn and Walters. However, the record not only fails to establish Walters's actual knowledge of the protected activity, but also does not contain any reliable evidence to indicate whether such knowledge would have motivated him to discriminate against Pappas. Second, the Secretary relies heavily on Ambrose's link to CalPortland, asserting that her knowledge and animus motivated her negative recommendation of Pappas and may be imputed to CalPortland. However, although her knowledge and animus may be imputed to CalPortland as CalPortland's agent, there is insufficient evidence proving she was hostile towards Pappas's protected activity.

[36] These applicants were Lawrence Herrera, Timothy Turnage, and David Wray. (Ex. S–30.) The Secretary also identified the applicant Tommy Ontiveros as having provided similar interview answers as Pappas and a job hopping history. (Ex. S–29.) However, in reviewing his application, Tommy Ontiveros listed only one position and demonstrated a progression in salary. (Ex. S–30.) Another applicant, Danny Ontiveros, had listed a number of jobs at Oro Grande, but did not provide the same answers during his interview as Pappas did. (*Id.*)

The Secretary's failure to depose Ambrose, or even Walters, prior to the hearing was an odd omission, given the emphasis placed on these witnesses in the Secretary's theory of the case.

Furthermore, the record does not support a finding that Lamb treated Pappas disparately during her job application review and hiring process. Even if the Secretary's allegations regarding Lamb's hiring process were true and Lamb did rely solely on Ambrose's recommendation, the Secretary's theory still falls short of establishing that such reliance would have been improper given that Ambrose had non-discriminatory reasons for not recommending Pappas.

Therefore, I conclude that the Secretary has not established by a preponderance of evidence a case of discrimination against CalPortland. Nevertheless, had the Secretary met his burden of persuasion, I examine in the alternative whether CalPortland has established an affirmative defense below.

2. Affirmative Defense

CalPortland asserts as an affirmative defense that it would have not hired Pappas based on unprotected activity alone. (CPC Br. at 44–47.) According to CalPortland, Pappas did not perform as well as other applicants during CalPortland's hiring process. (*Id.*) In contrast, the Secretary asserts CalPortland provided inconsistent and shifting reasons for not hiring Pappas. (Sec'y Br. at 44–45; Sec'y Reply Br. to CPC at 7–11.) The Secretary claims that Pappas's application was indistinguishable from the applications of the over 100 other miners and that CalPortland's proffered reasons are pretextual. (*Id.*)

When an operator asserts its affirmative defense, a judge must examine "whether the reasons are plausible, whether they actually motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity." *Pendley*, 601 F.3d at 425. The Commission may not impose its own business judgment as to an operator's actions. *Id.* If the operator's affirmative defense is "weak, implausible, or out of line with the operator's normal business practices," then the justification may be found to be pretextual. *Price,* 12 FMSHRC at 1534. The complainant "may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not *actually* motivate [the adverse action], or (3) that they were *insufficient* to motivate [the adverse action].'" *Turner*, 33 FMSHRC at 1073.

When CalPortland and Martin Marietta announced the asset purchase, their message indicated that a number of Riverside employees would lose their jobs. (Tr. 361:14–362:25.) Arps testified that many miners were genuinely afraid and uncertain about their future employment. (Tr. 361:14–362:25, 363:3–23, 369:2–370:1.) Pappas missed that meeting, yet was told by his supervisor, Joe Padilla that the application to CalPortland would just be a "formality" and was under the impression that because Oro Grande had just enough people to run the plant as it is, the Oro Grande miners' jobs were safe. (Tr. 138:13–21, 272:24–273:4, 278:7–12.) Padilla had already been hired by CalPortland as a supervisor, perhaps explaining why he viewed the application process as a formality. (Tr. 138:6–11.)

However, because of the asset purchase, Riverside's Crestmore facility would be shut down and its miners would have to find jobs elsewhere.[37] (Tr. 918:5–8; Ex. S–37 [83:24–84:6, 86:3–6.]) Many of these Crestmore employees, approximately 21 of them, applied to be reemployed at Oro Grande under CalPortland's ownership. (Tr. 896:10–24, Ex. CPC–28 at 2.) As Padilla noted to Pappas, Oro Grande was already fully staffed under Riverside with 110 hourly miners. (*See* Tr. 808:14–809:14, 810:1–13, 844:8–12; Ex. CPC–27.) Given the widened applicant pool that included miner applicants from both Crestmore and Oro Grande, a number of Riverside miners would have still lost their jobs even if CalPortland maintained the same staffing levels at Oro Grande as Riverside did. CalPortland ultimately only hired approximately 99 hourly miners to start working at Oro Grande on October 1, 2015. (Tr. 716:17–720:20; Exs. CPC–32, CPC–33.)

Prior to receiving CalPortland's application, Pappas testified he did nothing to prepare to apply for a job at CalPortland. (Tr. 139:15–18.) Pappas testified that he received the application late and filled it out just ten minutes prior to his interview. (Tr. 272:19–273:11.) Pappas sought his supervisor Padilla's help because he did not know how to fill out the application; Padilla told Pappas to not "even worry about it." (Tr. 272:19–273:11.) Other miners, as Arps testified, were more nervous and tried to put their best foot forward by creating résumés beforehand that listed all their former job duties and titles to attach to the application. (Tr. 363:3–23.) Pappas did not attach a résumé to his application, but instead included job bid announcements that included general job descriptions of the positions Pappas's held, which Padilla printed out on his computer right before Pappas's interview. (Tr. 139:19–140:9, 272:19–273:11; Ex. S–13.) Based on Padilla's representations, Pappas may have not considered the application process to be as important as other miners did.

In response to Inspector Jackson's investigation, CalPortland stated that Pappas was not hired because they received more applications than available positions and those hired were better applicants than Pappas. (Exs. S–26, S–27, S–28 at 1.) Lamb explained that the answers Pappas gave during his interview did not reflect the type of answers CalPortland sought. (Tr. 906:23–907:4, 913:3–914:9.) Pappas's interviewer wrote that Pappas would correct a miner he saw committing a safety violation and that he never had conflict with a co-worker or boss. (*Id.*; Ex. S–14.) Lamb testified she looked for applicants who would report safety violations to supervisors, and she had trouble believing that a miner with a long work-history would have never had such workplace conflicts. (Tr. 906:23–907:4, 913:3–914:9.) Lamb also noted that Pappas's application demonstrated "job hopping" and his salary history at the mine did not show a progression. (Tr. 911:19–912:4; Ex. S–13.) Lamb concluded that Pappas's work history and interview answers raised "red flags" demonstrating that Pappas likely had performance issues which he did not identify and that Pappas was not someone CalPortland should hire. (Tr. 912:1–913:2, 913:15–20, 914:5–9.)

[37] After the sale's close, a few employees were retained by Riverside at the Crestmore facility under a service agreement to finish packaging and moving inventory out of Crestmore to CalPortland. (Ex. S–37 [87:8–14].) Riverside now only employs one worker at Crestmore to act as a caretaker. (Ex. S–37 [83:24–84:6].)

The Secretary asserts that given the time constraints of CalPortland's hiring, it is implausible that Lamb gave such detailed consideration of Pappas's application and that Pappas's application was actually "indistinguishable" from all the other miners' application. (Sec'y Br. at 44–45; Sec'y Reply Br. to CPC at 7–11.) However, Lamb is an experienced human resources professional,[38] and her testimony is supported by the hiring documents, including Pappas's application and notes from Pappas's interview. (Tr. 879:8–17, 876:21–877:1; Exs. S–13, S–14.) Although Pappas has suggested that he was not thoroughly given consideration because he was only asked three of the six interview questions listed on the interviewer's questionnaire, he also testified that the answers the interviewer wrote down for the other questions reflect answers he would have given had he been asked those questions. (Tr. 144:20–146:15, 229:8–230:17, 231:14–233:24, 236:21–237:10, 240:3–7, 242:15–23; Ex. S–14.) Furthermore, as discussed above, the record does not support a finding that Pappas was treated any differently from the other miners who applied to CalPortland nor does it support the Secretary's assertion that Pappas's application was comparable to other miners who were hired by CalPortland. *See* discussion *supra* Part V.B.1.d.

Indeed, CalPortland presented evidence that the applicants for laborer positions who were extended offers were better candidates than Pappas in Lamb's estimation. (CPC Br. at 30–31, 46.) CalPortland hired six laborers to begin employment at Oro Grande under CalPortland on October 1, 2015. (Tr. 729:17–731:17; Ex. CPC–32.) This group of laborers included Arps, who personally introduced himself to Lamb as President of the Union and whose salary history reflected increases. (Tr. 923:6–925:18; Exs. S–30, S–32.) Lamb testified she was impressed with Arp's interview responses. (Tr. 925:4–18.) Indeed, at hearing Arps was an articulate and well-spoken witness. The hired laborers also included three Crestmore employees. Lamb testified that CalPortland wanted to offer some positions at Oro Grande to the Crestmore group, whose jobs were being eliminated at the Crestmore facility. (Tr. 918:2–18.) Lamb stated that the Crestmore miners had many crossover skills and that the company wanted to introduce new people into the Oro Grande culture. (Tr. 918:2–18.) The other two hired laborers included one miner who had been with the company since 1979 and had received increases in pay as well as another miner who had formerly been involved in an apprenticeship program to become an electrician. (Tr. 929:11–23, 932:9–934:16; Exs. S–30, S–32.) Lamb stated CalPortland could not hire the latter miner as an electrician, but she was impressed with the miner who showed potential and was willing to learn new skills, so she considered him for a laborer position. (Tr. 932:9–934:16.)

Lamb provided reasonable justifications for not hiring Pappas, and I find her testimony to be credible in light of the competition for jobs at the Oro Grande facility, her experience, and the documents that support her testimony. Lamb had sufficient reason not to hire Pappas, which not only include the "red flags" she considered to be present on Pappas's application, but also the number of other qualified miners from both the Crestmore and Oro Grande mines competing for

[38] Lamb has 30 years of experience working in human resources and has held positions in every functional area, including recruiting, compensation, benefits, employee development, and employee relations. (Tr. 879:8–14.) She served as CalPortland's vice president of organizational planning and development from February 2013 to December 2015. (Tr. 876:21–877:1.)

a limited number of positions. I do not find Lamb's proffered reasons to be weak or implausible. Her business judgment and CalPortland's decisions to hire less hourly staff and introduce new employees from Crestmore to the Oro Grande facility must therefore be accorded deference. *Pendley*, 601 F.3d at 425.

I therefore determine that even if the Secretary had met his burden of persuasion in establishing a case of discrimination, CalPortland has established its affirmative defense proving it would have not hired Pappas for unprotected activity alone.

3. Conclusion

Based on foregoing reasons, I therefore conclude that the Secretary failed to prove Pappas's claim of discrimination under section 105(c) of the Mine Act against CalPortland for the company's failure to hire Pappas. In the alternative, I find that CalPortland would have not hired Pappas for Pappas's unprotected activity alone. [39]

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[39] Because I have determined that the Secretary failed to establish that Riverside unlawfully discriminated against Pappas under section 105(c), I need not determine whether CalPortland may be liable as a successor-in-interest for Riverside's discrimination.

In the alternative, I briefly consider the Commission's nine-factor test and note that the record weighs in favor of finding a substantial continuity of business operations from Riverside to CalPortland. *Keene*, 10 FMSHRC at 1153 (citing *Munsey*, 2 FMSHRC 3463); *see* discussion *supra* Part III.C. If the remedy for Riverside's discrimination in this present case was reinstatement, then it could perhaps be seen as a continuation of Riverside's obligations set forth by the Decision Approving Settlement issued on December 3, 2014, in Pappas's prior discrimination case. (*See* Ex. S–1.) In such case, CalPortland may have had notice of the charge and liability, and Riverside could not provide relief to Pappas because it no longer owns Oro Grande. *See Munsey*, 2 FMSHRC at 3466 (noting that an ALJ decision finding liability for reinstatement may give notice to a successor operator and that a miner will not be made whole unless he is offered reinstatement).

However, I have determined that CalPortland would not have hired Pappas regardless of Riverside's negative references. Therefore, reinstatement would not be the proper remedy for Riverside's negative job reference, which would create a new liability separate from Pappas's 2014 discrimination complaint. CalPortland would not have had notice of this new liability, given that CalPortland's asset purchase closed on October 1, 2015, and Pappas did not file this instant discrimination complaint until October 12, 2015. (Tr. 680:4–5, 680:9, 691:1–2, 731:6–9; Joint Ex. 1.) Further, any remedies other than reinstatement, such as civil penalties or economic relief, could be provided by Riverside who still owns the Crestmore facility and exists as a direct subsidiary of Martin Marietta, which owns over 400 other facilities. (Ex. S–37 [82:14–17, 83:2–84:84, 83:24–84:1.]) Therefore, despite a substantial continuity of business, the other factors would not weigh in favor of finding CalPortland a successor-in-interest to Riverside's liability for discriminatorily giving Pappas a negative job reference.

VI. ORDER

In light of the foregoing, it is hereby **ORDERED** that the Secretary's complaint of discrimination on behalf of Jeffrey Pappas under section 105(c) of the Mine Act be **DISMISSED**.

Alan G. Paez
Administrative Law Judge

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