

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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May 5, 2017

Secretary of Labor, Mine Safety and Health  
Administration (MSHA), on behalf of  
JERRY RAMSEY,  
Complainant,

v.

VULCAN CONSTRUCTION  
MATERIALS,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. SE 2016-0145-DM  
MSHA Case No. SE-MD-16-06

Mine: Bristol Quarry  
Mine ID: 40-02872

**DECISION**

Appearances: Thomas J. Motzny, Esq., 618 Church St., Suite 230, Nashville, Tennessee for the  
Complainant

John B. Flood, Esq. and Lauren Marino, Esq., 1909 K St. NW, Washington, D.C.  
for the Respondent

Before: Judge Moran

This case is before the Court upon a complaint of discrimination under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2) (“Mine Act” or “Act”). At issue is whether Complainant Jerry Ramsey (“Ramsey” or “Complainant”) was wrongfully terminated by the Respondent, Vulcan Construction Materials LLC (“Vulcan,” or “Respondent”) in retaliation for exercising his rights under the Act. For the reasons which follow, the Court finds that Ramsey was wrongfully terminated for exercising those rights and accordingly it orders appropriate relief, as set forth herein.

## Findings of Facts

### Summary

Complainant Jerry Ramsey filed the present discrimination complaint under the Mine Act on December 11, 2015.<sup>1</sup> The Complainant asserted that he was terminated on December 4, 2015 because his boss, Keith Austin, claimed that he, Ramsey, was using a cell phone on December 1, 2015 while operating his haul truck. Use of a cell phone while working is prohibited by Vulcan policy. Ramsey denied that he was using a cell phone that day.

A hearing in this matter was held on Tuesday, August 2 and Wednesday, August 3, 2016 in Rogersville, Tennessee, at which both parties presented evidence. Due to transcription problems, it was necessary to reconvene on December 8, 2016, in order to fill in audio gaps in the hearing record from the first day of the hearing. Those problems were adequately solved by the further testimony received on December 8th, as set forth in note 2, below.<sup>2</sup> In reaching its findings of fact and conclusions of law, the Court fully considered all testimony and documentary evidence, as well as the parties' post-hearing briefs.

At hearing, the Secretary sought to show that Ramsey was fired in retaliation for engaging in protected activities, including making safety complaints, making a discrimination complaint prior to the one that initiated this case, and for seeking to become a miners' representative. The Respondent alleged several forms of improper behavior on Ramsey's part yet, ultimately, they moved away from those allegations, arguing that Ramsey was actually fired

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<sup>1</sup> As discussed herein, Complainant Ramsey filed an earlier discrimination complaint in September 2015. This decision addresses the Complainant's December 11, 2015 complaint, but the earlier filed complaint is not without probative value.

<sup>2</sup> Though scheduled, the court reporter did not appear for the first day of the hearing. The host courthouse then offered the use of its audio system to record the testimony. Both sides and the Court accepted that offer. Unfortunately, the recorded testimony had several "inaudible" portions, creating some gaps in the questions posed and witnesses' testimony. A court reporter did appear for the second day of the hearing and there were no transcription problems for that day. The host courthouse sent a second audio recording of the Day 1 testimony with fewer audio gaps and the court reporter created a second version of that day's testimony. However, because gaps still remained for the Day 1 testimony, the Court reconvened on December 8, 2016, giving counsel and the witnesses an opportunity to reconstruct missing questions and answers. The Court finds that, when the court reporter's second effort to create a transcript for Day 1 is combined with the December 8th testimony, there is a fully adequate record of the testimony for Day 1 and that neither side was disadvantaged. The testimony for Day 1, though it required reconvening to fill in gaps, represents a complete explication of the testimony for that day. In fact, with the benefit of hindsight, the December 8th testimony produced little useful and no dramatic or significant additional information and neither side points to or contends otherwise. Nevertheless, it is part of the record. *Accordingly, for the Day 1 testimony, only the second transcription effort, which was derived from the second audio recording copy from that day, and which consists of 219 pages should be considered, together with the December 8, 2016 testimony.*

for violating the company's policy forbidding, in most circumstances, the use of personal "electronic telecommunication devices" ("ETDs") while on the job. At least as applied in this case, in practical terms an ETD means a cell phone. Thus, whether the Complainant actually was using a cell phone on December 1, 2015 is the central issue in this case.

Ramsey contends that on his final day of work with Vulcan, he used an iPod to play music. Vulcan stipulated that an iPod cannot be used to "talk" with another as one can with a cell phone. Even assuming for the sake of argument that Ramsey was using a cell phone while on the job on December 1, 2015, it is interesting to note that both Austin and Bush conceded that such conduct on that date was not dangerous. Tr. 166, 207, 268. Although Vulcan introduced evidence which it believed showed that Ramsey was using an unauthorized cell phone that day, rather than an iPod, it presented no credible evidence that Ramsey actually used any such cell phone-type device to communicate with anyone in or outside the mine while he was on the job on December 1, 2015. With the basis for firing Ramsey not established, Vulcan's case collapsed. In contrast, the credible evidence shows that Ramsey made numerous safety complaints, that he invoked various rights under the Mine Act, and that Vulcan's response to those actions was to fire him.

### **Complainant's Evidence**

#### **Protected Activity**

Jerry Ramsey worked for Vulcan Construction Materials as an equipment operator from 2013-2015, primarily driving a haul truck. His direct supervisor was Keith Austin. During the course of his employment, Ramsey made several safety complaints to Austin regarding issues such as a faulty parking brake on a truck, leaking calipers, a leaking belt, a truck bed slamming down,<sup>3</sup> and an incident that occurred around the winter of 2014 when Ramsey's sweatshirt became ensnared in a moving machine while he was trying to clear blockage in a crusher.<sup>4</sup> Tr. 33-39. Each of these safety complaints constituted protected activity.

Ramsey engaged in other types of protected activity as well. As described below, he was questioned repeatedly about a "lock and key" incident. In connection with that, Ramsey was suspended for three days, purportedly for failing to cooperate in an "investigation" of that matter.

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<sup>3</sup> Austin preferred not to characterize Ramsey's issues about his haul truck as safety complaints but rather that Ramsey "stated what he had problems with it at times." Tr. 163. The Court finds that Austin's attempt to dress up Ramsey's issues with his haul truck as "problems," not safety complaints, was not credible.

<sup>4</sup> Ramsey later clarified that the incident when he reported his sweatshirt becoming caught in a machine part occurred in 2014. Tr. 128. There is no dispute that this event occurred. Austin admitted that one of the things Ramsey complained about was almost being hit with a sway bar while he was cleaning out the jaw pressure. [sic] Tr. 162. It appears that the correct intended term is a jaw *crusher*. Tr. 36.

He then filed a 105(c) discrimination complaint, one of his protected activity rights under the Mine Act, because of that lock and key incident.

Later, in November 2015, Ramsey indicated to MSHA Inspector Mike LaRue that he was interested in becoming a miners' representative, and the two exchanged e-mails on the subject. Tr. 72-74. His interest in becoming a miners' representative was motivated because he was "tired of not being listened to" by Vulcan management. Tr. 72. An email from Ramsey to LaRue sent November 30, 2015 demonstrates his interest. Tr. 74; Gov. Ex. S 9. Although Ramsey sent paperwork to MSHA to apply as a miners' representative, the application was incomplete, as his submission was missing the mine's identification number. Tr. 74-75. Among other things, Ramsey inquired of MSHA if he would have to tell his foreman, Austin, about his application. Ex. S-9.

On the morning of December 1, 2015, Ramsey engaged in protected activity when he asked Austin for the mine's ID number so that he could submit his MSHA representative papers. Tr. 75-76. Austin did not respond to Ramsey's inquiry. Tr. 76.

### **Ramsey's job performance at Vulcan**

For the year 2014, Vulcan gave Ramsey a "satisfactory" performance review. Tr. 31; Gov. Ex. S 6. Ramsey signed the review on March 2, 2015. The only suggestion for improvement that management noted was for him to show up slightly earlier for work, that is to say, *before* his shift began. There was no claim that Ramsey had been arriving late, nor was he being asked to clock in earlier. Tr. 31-32. Ramsey testified that he found the suggestion confusing, and did not understand why he was being asked to do this. *Id.* For his part, Austin admitted in his testimony that it was not a violation of company policy to show up when one's shift begins, that Ramsey is paid hourly, beginning when he clocks in, and that no one is required to show up before they clock in, nor to work off the clock. Tr. 156-57.

### **Events preceding Ramsey's firing**

Several incidents involving Vulcan and Ramsey were raised during the hearing: a lock and key incident; a September 2015 cell call by Ramsey to his mother; and Ramsey's alleged use of a cell phone on December 1, 2015. Each is discussed in turn, but the most critical event for this decision pertains to December 1, 2015, because it was Ramsey's alleged behavior on that day that was the basis for Vulcan's decision to terminate his employment.

### **The July 2014 Lock and Key incident**

The parties spent much time on this matter. While it did not form the basis for Vulcan's firing Ramsey, it is important to understand the event because it reveals Vulcan's attitude toward Ramsey and it is instructive in setting the stage for its decision to fire him. Though the record testimony about the incident made it appear complicated, it can be simply explained.

In July 2015, Ramsey was working in the mine's NCC building and, while performing tasks there, he admitted losing the key for a lock to a breaker on C12 in that building. Tr. 41-43.

Ramsey failed to report the lost key to management. Although he offered explanations for the reporting lapse, that did not change the fact that he failed to report losing the key.

As it happened, about a month after losing the key, Sherrod and Austin, both part of Vulcan's management, came upon a mismatched lock and key. Thus, while there was a key found in a lock, it was the wrong key, and it would not open that lock. Sherrod and Austin learned that Ramsey had lost a key for a lock and they interviewed him about that, inquiring if the lock and key mismatch they discovered involved the key that Ramsey lost. Ramsey told them that the mismatched lock and key did not involve the lock for which he lost a key. This assertion by Ramsey was supported, because the mismatched lock and key did not have Ramsey's tag on it. Instead, the tag for the mismatched lock and key belonged to another employee.<sup>5</sup> Tr. 41-46.

Having interviewed Ramsey about the mismatched lock and key and with Ramsey admitting that he had lost a key, but that it was unrelated to the lock and key mismatch, that should have been the end of the matter. However, about 30 minutes after the first interview, Sherrod and Austin interviewed Ramsey *a second time*, again about the same matter, asking the same questions of him and with Ramsey providing the same answers. Tr. 45-46. At the end of his work that day Ramsey, having clocked out, went to the mine office and asked Sherrod and Austin for the "miner's rights number and VP [Vulcan's vice president's telephone] number." Tr. 47. Ramsey explained that he asked for this information because he "was tired of being interviewed .... [and] didn't want to take the blame for somebody that wasn't [his] fault."<sup>6</sup> Tr. 48.

Matters involving the mismatched lock and key did not end after the second interview of Ramsey. Instead Ramsey was interviewed *for a third time* on July 27, 2015. Upon review of the record, at the point of the third interview, the Court has concluded that calling the further

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<sup>5</sup> The other employee was identified only as "Charlie" but, of greater importance, there is no evidence to contradict Ramsey's claim that he had nothing to do with the mismatched lock and key incident. Tr. 44-45. Thus, Ramsey's only failing was losing his key for the C12 breaker.

<sup>6</sup> Following the office visit that day, Ramsey sent a text message to Austin, informing that the numbers he was given were not correct for either issue. Tr. 50-51. Ramsey's text to Austin, sent July 24 and 28, 2015, stated: "That was not the correct num for the miners right people nor was it the num for our vp. It's nothing against u but I won't put up with being talked down to as a liar [sic] and I know I may lose this battle but it might make it better for the next person and I'm good with that but I think it's a law u have to give me the correct num to the miners right .. The good things about iPhones it shows when a message has been sent and read. That's the reason I sent it as a text instead as a phone call." Gov. Ex. S 20. Austin disputed Ramsey's account and replied with his own text, stating "If you remember I didn't give you either of those numbers. I don't have the vp number and you said you had the miners number. The vp number came from the safety director. It wasn't that I didn't want you to have em but you said you had what you needed when you left." Gov. Ex. S 20. The Court would comment that, apart from the disputed accounts between Austin and Ramsey, the exchange shows that matters had heated up between the two.

questioning of Ramsey on the same issue an “interview” would be inaccurate and that interrogation and harassment are more accurate characterizations of Austin’s and Sherrod’s behavior. Understandably and appropriately, in the Court’s view, Ramsey, using his iPod,<sup>7</sup> recorded the third interrogation. Tr. 52, 113. The recording was made part of the record evidence in this case. Sherrod played the major role in questioning Ramsey. Although he objected to Ramsey recording the third interrogation and advised in the recording that he knew the law and that such a recording couldn’t be used in court, Ramsey, unintimidated, still recorded the questioning and the recording was made a part of the record, notwithstanding Sherrod’s asserted knowledge of the law. Gov. Ex. S 8.

The Court heard the recording at the hearing and listened to it again, post-hearing, in deciding this case. The recording, as noted, was made on July 27th, as there were references in it to the second interview, the previous Friday. It would have to be said that, while there were a few moments when Ramsey lost his composure, overall he was polite and civil.<sup>8</sup> As Sherrod continued to ask the same questions, now in the context of the third interview concerning the same lock and key matter, Ramsey, understandably exasperated, told them he had enough and did not want to continue the never-ending questioning. Revealing, in the Court’s estimation, that Sherrod’s design was to get under Ramsey’s skin, he then remarked to Ramsey that he “could pinpoint some things right now that [he] kn[e]w about but [he was] keeping to himself.” Ex. S-8. Ramsey, not cowed by the vague claim, invited him to make those things known. Sherrod did not back up his claims. As noted, while Ramsey did swear, in the Court’s view, having heard the entire recording, and placing Ramsey’s expressions in context, it is found that his swearing was out of exasperation.<sup>9</sup> It should also be noted that, if the swearing was considered aggressive, the recording reveals that the aggression was bilateral – Sherrod had his finger in Ramsey’s face, as

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<sup>7</sup> As Austin later admitted in his testimony about the lock and key incident, just as he *believed* that Ramsey was using his cell phone on December 1, 2015, he also *believed* that Ramsey was using his cell phone when he recorded the third interview. Tr. 153. As Austin put it, “[t]hat’s what I thought.” *Id.* Both *beliefs* were erroneous – Ramsey was using his iPod to record the third interview.

<sup>8</sup>Ramsey denied that he slammed open the door upon entering the mine office. Instead, he stated that Austin opened the door for him and that he, Ramsey, stood in the doorway the whole time. Tr. 113, 117. Ramsey admitted that he made some sarcastic and unprofessional remarks, including a few swear words to Sherrod, who was the chief interrogator about the lock and key matter. Tr. 111-13. Ramsey acknowledged that he was very frustrated and that he raised his voice, because he didn’t appreciate that management kept questioning him about the same matter. The suspension letter Ramsey was given after that incident stated that he violated company policies regarding “complying in the company investigation” and for engaging in “abusive and harassing conduct.” Tr. 108. Ramsey did not agree with these claims, but signed the suspension letter so that he could return to work. Tr. 112.

<sup>9</sup> The Court will presume that the soft swears that Ramsey uttered were not new terms to the ears of Sherrod or Austin. In fact, Austin admitted that cursing is *not* a violation of company policy. Tr. 154.

Sherrod acknowledged on the recording, but he felt *that* was okay, as he told Ramsey that his “finger wasn’t doing anything to [him].” Ex. S-8. The Court would agree, just as Ramsey’s occasional swears were not doing anything to Sherrod. Ramsey, worn from the harangue, expressed that he had told the truth and he couldn’t keep providing the same answers. Sherrod agreed that this interview was the third time they had gone over the same matters, but showing his intention was not about honestly seeking Ramsey’s answers, provocatively told Ramsey that his answers were a “fairy tale.” Gov. Ex. S 8.

The Court concludes that the third investigation, this one lasting nearly 17 minutes, really was more in the nature of interrogation and harassment, that it was repetitive, totally disproportionate to the subject, excessively prolonged, and not designed to elicit new facts. It is of note that Sherrod did not testify in the proceeding before this Court.

Ramsey was suspended without pay for three days in connection with the event, ostensibly because he impeded the lock and key “investigation.”<sup>10</sup> Tr. 59. In any event, Ramsey was not disciplined for the lock and key incident, at least not for losing the key, but rather “[f]or not cooperating during the investigation.” Tr. 56-57. After the third interview on the subject, Ramsey was sent home and was not allowed to return to work until serving the three-day suspension. Tr. 56. Ramsey was given a memo titled “Final Warning and Disciplinary Suspension” and dated July 30, 2015. Gov. Ex. S 4. It was issued by Keith Austin and it relates that it pertained to July 27-28. The memo asserts that Ramsey engaged in “abusive and harassing conduct” in violation of Vulcan’s policy “regarding compliance and cooperation during a Company investigation.” *Id.* As noted above, the memo focused upon Austin’s and Sherrod’s “investigation” into “a lockout/tagout situation” about which they interviewed Ramsey multiple times. The memo asserts that Ramsey gave silly, argumentative and disrespectful answers and that, as their investigation continued, Ramsey’s “uncooperative nature escalated including the use of profanity toward [Sherrod].” *Id.* The memo then continued that Ramsey’s comments “could be interpreted as threatening” and that the investigation stopped due to Ramsey’s “erratic behavior.” *Id.* Not finished, after receiving the disciplinary suspension letter,

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<sup>10</sup> There was an interesting epilogue, as it were, to the lock and key incident, as Ramsey eventually did find a lock on Vulcan’s property. As he related the discovery, “We were doing work inside the plant and as we were downstairs -- everybody was getting their locks out-- I got - - just had to – turned to look and it was a red lock with my tag on it.” Tr. 61. Upon discovering the lock, Ramsey stated that he left it hanging for a few days until somebody could come from the office so he could show it to them. When that did not occur, Ramsey decided to take the lock to the office. Upon presenting the lock at the office, he asked if that changed anything, but it had no impact on the discipline that had been imposed on him. Tr. 62. The Court inquired of Ramsey what he thought finding the lock demonstrated from his side of the issue. Ramsey responded, “I lost a lock that was on a breaker, I lost the key to it, the only way to get that lock off would have been to cut it, and that lock [had] been cut, it was still hanging on there, I didn’t cut it.” Tr. 62. There was a tag on the cut lock, with Ramsey’s name on it. Tr. 62. Ramsey left his lock on C12, yet the lock he was being questioned about was on breaker C8. Tr. 62-63. Vulcan never did an investigation into who cut the lock. Tr. 63, 154.

Ramsey was interviewed yet again by Sherrod, with that session, *now the fourth*, lasting about 40 minutes.<sup>11</sup> Tr. 58; Gov. Ex. S 4.

Thus, to be clear, Ramsey was never disciplined for violating Vulcan's lock and key policy, and the key that was found in the incorrect lock was not assigned to Ramsey. Tr. 45, 48. It is noteworthy that, despite the four grillings regarding the lock and key incident, aside from Ramsey's three-day suspension for allegedly failing to cooperate in the investigation, *no other* employee was ever disciplined for the incident. Tr. 153.

Austin's account of the July 24, 2015 incident, when Ramsey came to the mine office, presented a picture that Ramsey was riled up, wanted the miners' rights and vice president's numbers and that things were "pretty tense for a period of time." Tr. 175. Ramsey, he said, entered the office on his own but he could not recall if the door was open or closed before he entered. *Id.* Asserting that Ramsey cursed, Austin stated that neither he nor Sherrod cursed at Ramsey and that they were professional in their behavior towards him. Tr. 175-76. Austin also asserted that when Ramsey became aware that others were listening to the office meeting, via the mine office telephone, Ramsey's behavior calmed down. Tr. 178. Austin maintained that when Ramsey asked for the miners' rights number, he did not understand what Ramsey meant by that request. Tr. 178.

Following the lock and key incident and being subjected to the multiple interrogation sessions, Ramsey filed a 105(c) claim, naming Austin and Sherrod as the sources of discrimination against him. Tr. 63, 215. MSHA investigator Mike LaRue was assigned that first discrimination claim. During September 2015, while collecting evidence and investigating Ramsey's first 105(c) discrimination complaint against Vulcan, LaRue met with Ramsey. Tr. 214. During that investigation, although LaRue determined there was a prima facie case, worthy of further inquiry, MSHA did not file an action against Vulcan. Tr. 215.

#### **Ramsey's September 2015 cell phone call to his mother**

Ramsey was asked about a September 2015 incident when he called his mother from the mine using his cell phone. According to Ramsey, the mine called him on the truck's CB radio and told him there was a call from his mother, which was described as urgent. Ramsey then pulled off the side of the haul road and called his mother. Tr. 65. After Ramsey called his mother, Austin told him that cell phones were to remain in the employee's personal vehicle. Tr. 66. Ramsey stated no issue arose out of that incident. The next day there was a safety meeting held by Austin, informing miners they were to leave their phones in their personal vehicles, and Ramsey stated that thereafter he followed the change to the rule.<sup>12</sup> Tr. 65-66. At least according

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<sup>11</sup> Ramsey asserted that no one from "HR" (Human Resources) asked him for his side of the story about the incident. Tr. 57.

<sup>12</sup> Thus Ramsey admitted that in September 2015 he used his cell phone at the mine site without prior permission from his manager, when he called his mother about a family issue. Tr. 100-01. As noted above, Ramsey did not feel that he had violated company policy, because he had been informed at the safety meeting that employees should not be *operating* any equipment while



to Ramsey's account, it would appear that, per that meeting, Vulcan clarified its cell phone policy so that, not only was *use* of a cell phone prohibited but *having* a cell phone in company vehicles was not allowed either. Gov. Ex. S 1 is Vulcan's policy regarding cell phones.<sup>13</sup> Ramsey stated that, from Gov. Ex. S 2, he saw page 183 from the mine's handbook, posted in the breakroom. Tr. 69. Ramsey, referring to those exhibits, observed that neither speaks to the use of iPods. Tr. 71.

With Vulcan's policy prohibiting the use of "electronic telecommunication devices," ("ETDs") and after the clarification that cell phones were not even to be in mine vehicles, Ramsey began leaving his cell phone in his personal vehicle while on the job. Tr. 67; Ex. S-1.<sup>14</sup> Ramsey testified that his understanding of the policy was that the term "electronic communication device" meant that he was not to use his cell phone. Tr. 92. In noting this incident, it is important to recall that Ramsey's September 2015 cell call to his mother was not the basis for firing him – Ramsey was fired for using his cell phone on December 1, 2015.

Austin's understanding of the event, which varied from Ramsey's account, was that Ramsey had been talking with his mother on his cell phone, that the connection was lost and that his mother then called the mine office asking that Ramsey *call her back*. Tr. 171. Ramsey was contacted on the haul truck's CB radio, told to call his mother and he then stopped hauling and called his mother using his cell phone. Austin then later spoke with Ramsey about the call, but Austin challenged the truthfulness of Ramsey's account, asserting that Ramsey had called his mother first. Tr. 172. Austin stated that he told someone in safety about the event, but couldn't recall with whom he spoke. *Id.* He did not report the incident to HR. The incident occurred after Ramsey had filed his first 105(c) complaint, which named Austin as a person who discriminated against him. *Id.* Austin offered that no action was taken against Ramsey because his first 105(c) complaint was being investigated, so "it was decided to pass." Tr. 173.

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using a phone, and when he made the call in September he was not operating any equipment. Tr. 101. He recalled that the day *after* the call to his mother, there was a meeting instructing employees to leave their phones in their personal vehicles. *Id.*

<sup>13</sup> Ramsey also received a copy of Vulcan's employee handbook in October 2013, although he testified that he was not working on the day that there was a training session addressing changes that appeared in the handbook. Tr. 98-99, ref. Ex. R-183. When Ramsey was questioned further, he admitted that, according to the policy in the handbook, he should not have had his cell phone in a work area in September 2015, and that he would only have been allowed to carry it with the express permission of a supervisor, which he did not have. Tr. 103-04. However, Ramsey contended that he discussed a family situation — his father being ill — with an assistant manager he identified only as "Scooter," and suggested that if it was a problem to have his cell phone on him during work he could take the day off, but "Scooter" said it wasn't a problem. Tr. 104. Austin later warned Ramsey about the ETD device policy in October 2013. Tr. 103.

<sup>14</sup> Ramsey testified that there was no mention of iPods or other kinds of MP3 players during this training. Tr. 67. This assertion was not contradicted by testimony from the Respondent's witnesses.

MSHA inspector LaRue was aware of the incident in September 2015 when Ramsey used his cell phone to speak with his mother while at the mine, and was aware that the mine took no disciplinary action, ostensibly because of MSHA's ongoing 105(c) investigation of Ramsey's first discrimination complaint. Tr. 223-24. LaRue testified that Bill Duran, counsel to the Respondent, made the decision that there would be no discipline for that September cell phone incident. Tr. 227.

### **The Events of December 1, 2015**

After Ramsey's December 1, 2015 protected activity, seeking information to enable his filing as a miners' representative, as described above, he then clocked in and went to work driving the mine's haul truck. He was using his iPod that day. Tr. 76. He used his iPod to listen to music when the truck's radio reception was poor. Tr. 76-77. Ramsey's iPod does not have cellular service, meaning one cannot use the device to make phone calls or send text messages. While that is sufficient to establish that this device cannot function as a cell phone, in addition, to Ramsey's knowledge, there is no Wi-Fi at the mine. Tr. 77, 88.<sup>15</sup>

Following Ramsey's request to Austin for the information he needed to file his miners' representative papers, he next saw Austin that morning standing above him on the high wall, looking down at him as he was operating his haul truck below. Tr. 77. Ramsey was alerted to Austin's surveillance from above, because he heard some rocks rolling down and wanted to see where that sound was coming from. *Id.* It was then that he observed Austin above him, close to edge of the high wall, only 3 or 4 feet away from its edge. Tr. 78. Austin watched Ramsey from above as he completed his haul truck cycle, which consisted of driving the truck to the loading point, loading, and then driving to the dumping location, a process involving a total of about 10 minutes per cycle. Tr. 79. Austin himself would later testify that he was about 50 feet away from Ramsey, when peering down on him as Ramsey was operating his haul truck. Tr. 137. The Court would comment that this whole situation bordered on weird behavior on Austin's part, surveilling his employee from atop the high wall. And of course it is noteworthy that this behavior occurred in the context of Ramsey having requested information that morning from Austin so that he could file an application with MSHA to become a miners' representative.

In any event, Ramsey next saw Austin when he, Ramsey, was pulling into the shop to use the restroom. Tr. 79. At that time Austin told Ramsey to give him his (i.e. Ramsey's) cell phone. Ramsey responded that he didn't have a cell phone. He told Austin he had an iPod. Tr. 79-80. Austin persisted, asserting that he saw Ramsey on his cell phone. Tr. 80. Ramsey responded, "my cell phone is over in my truck, let's go get it." *Id.* Asked how many cell phones he has, Ramsey responded "one." *Id.* Austin then telephoned someone, telling the person on the line that Ramsey refused to give him Ramsey's cell phone. *Id.* Next, Austin used his work truck to take Ramsey to the mine office, where they waited for Mr. Bush to arrive. *Id.* When Bush arrived, Austin and Bush told Ramsey to hand over his cell phone. Again Ramsey told them his cell phone was in his pickup truck, repeating this "20, 30 times, and [I] offered them my keys so

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<sup>15</sup> These points are uncontested by the Respondent and Austin admitted that there is no Wi-Fi signal at the Bristol Quarry. Tr. 145.

they could go by themselves to get it.” Tr. 81. Ramsey was then taken to his pickup truck by Austin and Bush and was advised that he was suspended until further notice. Tr. 82. Very oddly, neither Austin nor Bush used the clear opportunity to search the haul truck Ramsey was using, nor to search Ramsey’s pickup truck, though they were all at the pickup truck. *Id.* Ramsey then identified his cell phone records. Gov. Ex. S 10. Those records show that on December 1, 2015, Ramsey’s first call that day occurred at 9:47 a.m., which was at a time before he clocked in that day, and the next call was at 1:37 p.m. that afternoon, after he was suspended. Tr. 84-85.

Not surprisingly, Vulcan objected to the introduction of Ramsey’s cell phone records, but not because they challenged their authenticity or accuracy, but rather because it was “not evidence that was provided to Mr. Austin, Mr. Bush or others with the company at the point in time they’re making the decision [to terminate Ramsey].” Tr. 83. This was part of Vulcan’s unusual defense that, though the facts completely refuted Vulcan’s claim, it was Austin’s *belief* that Ramsey used his cell phone that day. *Id.* Though the records could not have been made available at the time that Austin claimed Ramsey was using his cell phone, nor when the decision was made to fire him, apparently Ramsey should have provided the unavailable information at the time the decision was made to fire him. And, of course, Vulcan felt no obligation to revisit its *beliefs* once the exculpatory phone records were later disclosed to it. Thus, though disabused of its ill-founded beliefs, Vulcan’s stance remained unchanged. In the Court’s view, there is only one rational reason to explain its intransigence — Vulcan was determined to rid itself of Ramsey because of his multiple invocations of his safety and health rights under the Mine Act.

When Vulcan next contacted Ramsey, he was asked to attend a meeting with Austin and a representative from Human Resources. Tr. 90. This occurred on December 4, 2015. Vulcan did not ask Ramsey to share his account of what had happened with the alleged cell phone use incident and his employment was terminated during that meeting. Tr. 91-92. Although Ramsey received his termination at that meeting, he testified that he did not understand why he was being fired at the time. *Id.*; Ex. S-7. Ramsey filed the instant discrimination complaint with MSHA shortly afterwards, and has not returned to work at Vulcan since his termination. This Court ordered Ramsey’s temporary economic reinstatement on February 11, 2016.<sup>16</sup>

Ramsey does not dispute the Respondent’s contention that he had *a device* in his hand while he was sitting in the haul truck on December 1, 2015, as he admits this is shown in the photos and video that Austin took. Tr. 120. The more important question is what that device was, as Vulcan’s policy was directed against the use of cell phones, not against devices which only play music. Indeed, as the Vulcan trucks were equipped with AM/FM radios, Vulcan could hardly object to other music-playing devices. Austin admitted that employees were allowed to listen to the radio in their trucks. Tr. 191. When Ramsey spoke with management that day, he told them that his iPod was in his lunch box in the haul truck. Tr. 125-26. He did not act to retrieve the iPod to show it to Bush or to management, although he admitted that he could have done that. Tr. 123-24. However, to place that decision in perspective, as was pointed out during Ramsey’s testimony on re-direct, no one asked him to see his lunchbox. Tr. 127.

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<sup>16</sup> See Docket No. SE 2016-0107-DM.

## **Testimony of Keith Austin**

Keith Austin works for Vulcan as a plant manager and he was Ramsey's direct supervisor. Tr. 129-30. He testified that he gave Vulcan employees a talk on the mine's ETD policy, and that Ramsey signed a sheet acknowledging that he was present for the talk. Tr. 133. Important to understanding Vulcan's policies is Gov. Ex. S 1, dated September 1, 2006, which is titled "Midsouth Division Policy" and which lists the policy's topic of "Use of Cellular Phones" immediately below that heading. Tr. 131. Austin admitted that there is no company policy that specifically mentions iPods, and that he never told Ramsey or any other employee that iPods violate the company's policy on ETDs. Tr. 131. The policy lists a number of devices as examples of ETDs, but the list does not include iPods. Ex. S-2; *see also* Tr. 133-34. On September 28, 2015, Austin held a "Toolbox" meeting with six employees, including Ramsey, present. Austin reviewed the cell phone policy, which was that no one was to have cell phones during work hours. Gov. Ex. S 3.

Beginning in May 2015, Austin took notes concerning Ramsey. Tr. 156; Ex. S-5. He wrote the notes around the time that he observed certain events, such as Ramsey not returning phone calls while on leave covered by the Family Medical Leave Act (FMLA). Tr. 158-59. However, Austin did not know whether employees are required, under the FMLA, to check in with an employer while on such leave. Tr. 159. Although Austin testified that there were complaints from other employees concerning Ramsey, his notes do not reference any complaints about Ramsey using an ETD prior to his suspension. Tr. 160-61. Nor did Austin tell anybody, not even his own supervisor, about the claim that there were complaints from employees about Ramsey using his cell phone. Tr. 161.

Austin recalled Ramsey making safety complaints during his employment with Vulcan — these included a "near miss," following which Austin failed to fill out a "near miss" form. Tr. 162-63. The only potentially critical comment on Ramsey's performance review, prior to his termination, was that he did not show up *before* his shift was supposed to begin. Tr. 157. This was not a violation of company policy, because Ramsey is an hourly employee. *Id.*

### **Austin's testimony regarding the lock and key incident**

Austin was present at all of the "interviews" management conducted with Ramsey about what was described as the "lock and key" incident, and he admitted that Ramsey did not change any of his answers between interviews. Tr. 146. Austin also admitted that Ramsey asked for the company's vice president's telephone number, stating that Ramsey asked for this "on, [interviews] two and three." Tr. 146. Although Austin is aware that MSHA enforces miners' rights, he claimed that he did not understand what Ramsey meant when he was asking for the "miners' rights number." Tr. 147. At the hearing, Austin claimed he did not recall whether he had heard of miners' rights being referred to in any other context than MSHA enforcement — this contradicted his deposition testimony, in which he admitted that he had never heard of the term "miners' rights in any other context than MSHA. Tr. 147-48.

According to Austin, HR employees Jones and Barrett made the decision to suspend Ramsey over the lock and key incident, yet Austin was involved in preparing the suspension letter.<sup>17</sup> Tr. 148, Gov. Ex. S 4. Austin acknowledged that the suspension letter refers only to Ramsey's alleged conduct on July 27, 2015. Tr. 151. While the alleged intemperate behavior by Ramsey occurred during the first two interviews, both of which occurred on July 24th, Austin admitted that the suspension letter, the letter which had Austin's signature on it, did not mention the alleged agitated and violent behavior by Ramsey, while simultaneously claiming "it should have been in [the suspension letter]." Tr. 151. In the face of that claim, Austin admitted that Ramsey is not a "physically intimidating guy," and Austin did not recall Ramsey ever acting violently towards anyone at work. Tr. 152. Further, Austin admitted that Ramsey never refused to answer any questions during any time he interviewed him about the lock and key incident. *Id.*

#### **Austin's testimony regarding the alleged December 1, 2015 cell phone use incident**

As a manager, Austin has the power to decide when he should involve the corporate office in an issue. Tr. 135-36. On December 1, 2015 he decided to call Huffman, Vulcan's Safety Director, because he believed Ramsey was using a cell phone while working, in violation of the mine's ETD policy. *Id.* When Austin was watching Ramsey, ostensibly using a cell phone while operating his haul truck, he was about 50 feet away<sup>18</sup> from Ramsey and looking down at an angle. Tr. 137, 183. Although Austin testified that he believed that what Ramsey was allegedly doing presented a safety hazard, he did not contact Ramsey on the CB radio or take any other action to stop the alleged dangerous activity.<sup>19</sup> Tr. 139. Rather, Austin waited until Ramsey went on a bathroom break to stop him and then accused him of using a cell phone. Tr. 140. Austin admitted that Ramsey *immediately* told him that it wasn't a cell phone, but rather an iPod. *Id.*

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<sup>17</sup> Austin testified that there was never a "conclusion" to the lock and key incident. Tr. 154. It was the lock and key incident interrogations which led to Ramsey filing his earlier discrimination complaint. Tr. 149. That earlier-filed complaint is not the subject of this matter. It is mentioned here for context and because it was brought up during the testimony in this case.

<sup>18</sup> The Court takes note that looking at a device as small as a cell phone or an iPod from a distance of 50 feet is a significant distance. The Court takes judicial notice that, across their various generations, iPods are *not* larger than 5 inches by 2.5 inches. The smart phone video Austin took only serves to confirm that one cannot tell the nature of the device Ramsey had on that day, December 1, 2015. Tr. 186. It is also noteworthy that in Austin's ten years of working at Vulcan's Bristol Quarry, this was the only time he ever took a video of a truck driver at that mine. Tr. 188.

<sup>19</sup> Also of note, there is no allegation by Vulcan that Ramsey ever used any sort of device while the haul truck was in motion. Tr. 139. Vulcan's evidence in support of their basis for the termination contained no reference to Ramsey endangering himself or others by driving while distracted.

Austin testified at the hearing that he believed Ramsey using an iPod “was a distraction and it was.” Tr. 141. This contradicted his testimony at deposition, only two weeks earlier, at which time he stated that he had not formed an opinion on whether iPods violated company policy. Tr. 141-42. Importantly, Austin’s evaluation of Ramsey’s behavior was based solely on his belief that Ramsey was using a cell phone; iPod use was not part of his thoughts. In any event, Austin, disbelieving Ramsey’s assertion that he was not using a cell phone, proceeded to contact HR. Tr. 143. Although company policy would have allowed Austin to look inside the haul truck Ramsey had been operating, both he and Danny Bush (manager for the Norton quarry) chose not to look inside. Tr. 143-44. This joint decision not to confirm Austin’s suspicion was especially odd, as looking in the haul truck would have confirmed or refuted Austin’s claim. Tr. 145. Austin also affirmed that he had *never* heard of anyone being disciplined for using an iPod. Tr. 145-46.

Despite the testimony, as recounted above, in Austin’s opinion, there is no danger in a miner having a cell phone with them at work so long as they act responsibly.<sup>20</sup> Tr. 166. In fact, he acknowledged that there are situations where a cell phone might be needed in an emergency, such as if there is a problem with the truck’s CB radio. Austin himself carries a cell phone when he is at the mine site, adding that it is the fastest way to reach him in an emergency. Tr. 167.

On cross examination,<sup>21</sup> Austin claimed that his decision to take notes on Ramsey was not related to Ramsey’s making safety complaints. Tr. 195. Furthermore, Austin testified that Ramsey admitted using his cell phone to speak with his mother during a family emergency *prior* to December 2015. Tr. 168. This matter has been discussed above. As Austin told the event, in September 2015 Ramsey’s mother called the mine office and told the clerk that she had been talking with Ramsey on the phone and that the call then disconnected, and that she needed Ramsey to call her back. Tr. 171. Austin apparently heard about this conversation secondhand, through an unnamed clerk, who did not testify. *Id.* Austin recounted,

I told her just get him [Ramsey] on the radio, the shop, to call his mother and he stopped hauling and sat there for a few minutes... When I talked to him about it, he said that he... called her on the haul road... And I said that you were on it before that because your mother had called and said that you had been on with her. He said okay.

Tr. 171.

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<sup>20</sup> It is noted that it was not easy to get Austin to admit that cell phone use was not inherently dangerous. At the hearing he initially responded that there was danger with someone having a cell phone on the mine site. Tr. 166. Then, directed to his deposition only a few weeks earlier, he admitted that at that time he stated it *was not dangerous* “if they’re responsible and use it the way they’re supposed to.” *Id.*

<sup>21</sup> Technically, because Vulcan employee and manager Austin was first called by the Secretary of Labor, he was under “cross-examination” when questioned by Vulcan’s attorney. Therefore, labels aside, the questioning by the Respondent was from a friendly, not adversarial, source.

Austin reported these events to Huffman or John Sherrod, or possibly both. Tr. 172. He gave Ramsey a verbal warning to use the office phone for situations like this in the future, but there was no formal discipline against Ramsey over this incident. Tr. 171-72. Although Austin felt there had been a violation of company policy, he believed there was no discipline imposed because “we were in the middle of an ongoing investigation at the time.” Tr. 173. That ongoing investigation involved Ramsey’s first discrimination complaint.

Returning to events prior to the alleged December 1st “cell phone incident,” Austin stated that he believed Ramsey had a cell phone because he had heard from other employees that Ramsey had been using a cell phone while on the job. *Id.* The two employees who complained to Austin about Ramsey were Glen Lunsford and Tom Leonard, both hourly employees. Austin asserted that the two employees complained *separately and on multiple occasions* about Ramsey’s alleged cell phone use. Tr. 169. However, Austin did not discipline Ramsey based on these complaints of cell phone use because “it wouldn’t have been fair. I didn’t see it — didn’t see it with my [own] eyes.” Tr. 170.<sup>22</sup>

Austin testified that he did not recall Ramsey asking him for a mine ID number or saying anything about miners’ representatives when clocking in on December 1st and he could not recall if he saw Ramsey clocking in that day. Tr. 192.

As for the central event, and Austin’s claimed eyewitness observation of Ramsey’s using a cell phone, Austin stated that his conclusions were based upon his direct observations which were, in his view, also supported by the photos and video he took of Ramsey in the haul truck. Tr. 183, 190. Austin recounted that he saw Ramsey “scrolling up and he punched [the device] every now and then.” Tr. 183. However, Austin conceded that that one can also scroll on an MP3 player as well as a cell phone. Tr. 190. Austin claimed he could zoom in on the video he took on his phone, and that also informed his judgment. *Id.* In the Court’s estimation, it is notable that during Austin’s 10 years of working at the mine, this was the first instance when he ever recorded video of an employee. Tr. 188.

Austin told Ramsey during the December 1st interaction that, “if there was an iPod [ ] [he, Austin] wanted to see it.” Tr. 180. Austin is sure he made it clear that he wanted Ramsey to show him whatever he had been using in the haul truck. *Id.* At one point, Austin admitted, Ramsey told him that the device was in his lunchbox. *Id.* Austin also recalled that when he told Ramsey, per the instructions from Huffman, that he could return to work if he put the iPod in his

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<sup>22</sup> There is certainly irony in Austin’s response, because his standard for taking action regarding cell phone use was *to see it with his own eyes*. Tr. 170. Yet, on December 1, 2015, Austin never actually saw Ramsey using a cell phone with his own eyes. He only *believed* he saw Ramsey using a cell phone, a view made some 50 feet away, and which view was never established by his smart phone video surveillance of Ramsey. That video only established that Ramsey had a device of some sort in his lap.

personal truck, Ramsey kept saying, “my cellphone is in my pickup truck, you can go look at it.” Tr. 181.<sup>23</sup>

Austin denied that the motivation for taking notes about Ramsey arose because of Ramsey’s previous safety complaints. Tr. 195. He also denied that he acted in any way to retaliate against Ramsey for asking for the MSHA phone number, for raising safety issues, or for filing an earlier 105(c) complaint. Tr. 179; 194-95. However, Austin admitted that Ramsey named him as the person who discriminated against him in that earlier complaint. Tr. 167.

On re-direct, Austin admitted that he conducted no investigation of the alleged safety complaints about Ramsey from other employees.<sup>24</sup> Tr. 200. Austin first began taking notes on Ramsey after he had been at Vulcan for over a year. Tr. 196. Curiously, while he took notes about Ramsey, he took no notes about the alleged complaints from other miners, nor did he discuss those complaints with Ramsey. Tr. 201. Austin said that even though there were complaints made about Ramsey habitually using his cell phone, he would not necessarily have been able to see such alleged frequent use. *Id.* Yet, he admitted that the one day he claimed to have seen Ramsey using his cell phone was the same day Ramsey asked for the mine ID number so that he could apply as a miners’ rep.<sup>25</sup> *Id.* While Austin denied he was “upset” about being named in Ramsey’s previous 105(c) complaint, he admitted he did not like the MSHA inspector showing up at the mine after the complaint. Tr. 196-97.

As noted earlier, while making his video-recording, allegedly showing Ramsey using his cell phone, Austin was standing above Ramsey, on an elevated area. He admitted this was a location where he does not usually go during the work day — in fact, Austin admitted he does not even go there on a weekly basis. Tr. 199. When the Secretary’s counsel asked, “the one day you did see [Ramsey using an electronic device] was the day Mr. Ramsey said he asked for the

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<sup>23</sup> In the Court’s view, Ramsey was wise to reject the suggestion that he, Ramsey, go to his pickup truck, retrieve his cell phone and then show it to Austin. This is because, with Austin rejecting the invitation to go to Ramsey’s truck and see the cell phone himself, Vulcan could easily claim that Ramsey had the cell phone with him the whole time. Ramsey’s credible testimony and his cell phone call records each clearly establish that he was not using his cell phone while on the job on December 1, 2015.

<sup>24</sup> On re-direct examination, Austin again denied hearing anything about a mine ID or becoming a miners’ rep. Tr. 202. Austin also asserted that he has taken notes on other employees at Vulcan, and believed that there was nothing improper with that practice. *Id.* When the Court asked Austin to clarify the sources and frequency of the employee complaints about Ramsey using a cell phone, Austin stated that he heard complaints about Ramsey from two or three employees, and that these were made a couple of times from each person over the course of a few months. Tr. 203-04. Despite his characterization that those reports described “highly dangerous” activity, he admitted that he took no affirmative steps to investigate or stop this conduct. Tr. 205-06. Last, Austin admitted that the specific behavior shown in the video he recorded was not, in itself, dangerous. Tr. 207.

<sup>25</sup> While there was an attempt to repair Austin’s admission, his testimony was clear on the issue.



mine ID so he could fill out his miners' rep papers; correct?" Austin acknowledged, "yes, it was that day." Tr. 201.

There were multiple instances when Austin's credibility was brought into question. For example, near the end of his testimony the Court asked about Austin's claim that on numerous occasions employees had told Austin that Ramsey had been inattentive while driving his haul truck. Inquiring further about this claim, the Court asked over what period of time the alleged complaints had been made to him. Tr. 203. Austin responded that it had been "a few months" and that "two to three" employees had made the complaints to him about Ramsey's inattentiveness. *Id.* Austin claimed that these complaints had been made "at least a couple of times per person." Tr. 204. Having heard, according to Austin's own count, a minimum of six such complaints, he formed an opinion that this was "highly dangerous" activity. Tr. 205. When the Court then inquired, "yet [the Court's] understanding is that despite having a minimum of six different reports, you [Austin] took no affirmative action, no steps, didn't write anything up, didn't speak to highers up, didn't speak to Mr. Ramsey ... you took none of those steps, despite having multiple reports of his being inattentive, a highly dangerous activity?" Tr. 205. Austin admitted he did nothing in the wake of all those reports. Tr. 206.

After Vulcan completed calling its witnesses, Austin was recalled. After playing the video of Ramsey in his haul truck from December 1, 2015, Austin revisited the photos and video he took on that date. Tr. 431; R's Ex. 52. Austin asserted that the images appeared more clearly on his phone than they did on the large screen display in the courtroom and that, with his phone, he could zoom in on the video of Ramsey. Tr. 431-38. Thus, Austin asserted that the image, on his cell phone screen of about three inches by four inches, was much clearer and sharper than the enlargement. Austin denied knowing that any miners regularly brought their cell phones onto the mine site before the safety training in October 2015. Tr. 429. Austin agreed with the Court's perception that in every photos and video, one can see that the individual pictured has both hands near their lap or waist. Tr. 440-41.

On cross-examination, Austin stated that he was standing at least seven feet away from the edge of the highwall when he took the photo, and that his photos were not cropped in any way. Tr. 441-42. He agreed that the total distance for his video and photos from his location to Ramsey's haul truck was about 55 feet. Tr. 442. Austin added that when he recorded video of Ramsey, he zoomed in as far as he could on his phone. Tr. 443.

### **Testimony of Mike LaRue**

Mike LaRue is an MSHA safety and health inspector, who has also worked as a special investigator and a fatal accident investigator. Tr. 212. In addition to the MSHA training required to be a special investigator, LaRue's credentials include an associate's degree in occupational safety, job-related certifications, and 13 years of experience in underwater construction. Tr. 213.

LaRue met Ramsey around September 2015, while collecting evidence and investigating Ramsey's first 105(c) discrimination complaint<sup>26</sup> against Vulcan. Tr. 214. During that investigation, LaRue determined there was a prima facie case — that Ramsey was a miner, that he engaged in the protected activity of making safety complaints to his mine management, and that he incurred an adverse action, for which at least LaRue believed there was a nexus. Tr. 215. LaRue was aware of the incident in September 2015 when Ramsey used his cell phone to speak with his mother while at the mine, and was aware that the mine took no disciplinary action because of MSHA's ongoing 105(c) investigation. Tr. 223-24. LaRue testified that Bill Duran, counsel to the Respondent, made the decision that there would be no discipline for this incident. Tr. 227. To be clear, in no way does the Court infer that Ramsey's first complaint establishes or advances the present discrimination complaint. It does show, however, that there was a history of underlying events between Ramsey and Vulcan. The Court assured Vulcan that the mere lodging of Ramsey's first complaint could not be used by the Secretary to bootstrap the merits of the present complaint. Tr. 216.

A month or two after that, LaRue discussed the process of becoming a miners' rep with Ramsey via phone and e-mail, including topics such as elections, protected activities, and how to complete the required paperwork. Tr. 225-26. Ramsey asked LaRue if he had to inform Vulcan management that he was seeking to become a miners' representative, and LaRue told him he did, because election results would be posted at the mine. Tr. 226. LaRue testified that miners' reps are a relative rarity at Vulcan; it was his belief that out of roughly 20 Vulcan quarries throughout its Southeast district, only two quarries had miners' representatives.<sup>27</sup> Tr. 237.

LaRue also looked into Vulcan's cell phone policies and, to the best of his knowledge, at the time of Ramsey's discharge, Vulcan's policies on that subject are contained in Exhibits S-1 and S-2. Tr. 228; Ex. S-1; Ex. S-2. When LaRue reviewed the examples of ETDs listed in the company policy, he noted that all of the devices enable two people to speak to each other in real time. Tr. 232-33. However, LaRue found that an iPod cannot provide any kind of cell service without a Wi-Fi connection. *Id.*

On cross-examination, LaRue described how, after he began his investigation of the instant complaint, he asked Ramsey to bring in both his cell phone and his iPod. LaRue then photographed the two devices side by side. Tr. 239; Ex. S-12. The photographs were taken after LaRue had interviewed management, including Bush and Austin, about the alleged "cell phone incident" that led to Ramsey's termination. Consequently, LaRue did not show either Austin or Bush his photos of the devices, nor did LaRue elect to show any Vulcan management Ramsey's phone records. Tr. 241-49, 252.

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<sup>26</sup> Ramsey's earlier 105(c) complaint also named Sherrod as a discriminator. Tr. 215.

<sup>27</sup> The Secretary presented some testimony through LaRue about cell phone use and miners' reps *at other* Vulcan properties. Tr. 233- 238; Gov. Ex. S 8. The Court twice described this evidence as having "marginal" relevance, a description which remains accurate. The footnote appears because the Court stated that this information of marginal relevance would appear in a footnote in this decision. Tr. 238. This is that footnote.

When the Respondent asked LaRue if Mr. Duran had made a statement to him to the effect that, if there had been a prior written warning about cell phone use, the company would “at least . . . normally take disciplinary action,” LaRue responded, “I believe he referred something to that — yes.” Tr. 255.

### **Respondent’s Evidence**

#### **Testimony of Daniel Bush**

Daniel Bush has worked for Vulcan for 23 years, and is a plant manager for the sites in Bristol, Tennessee and Norton, Virginia. Tr. 260. On December 1, Bush got a phone call from Huffman informing that Austin needed him to act as a witness at the Bristol quarry. *Id.* Bush then went to the mine and attended a meeting with both Austin and Ramsey present. Tr. 261-62. Austin told Bush that he had witnessed Ramsey using a cell phone in the haul truck, that Austin confronted Ramsey about that, and that Ramsey would not show the cell phone to Austin. Tr. 261. Bush stated that Ramsey “spoke up and said he [Ramsey] don’t have – I don’t have a phone, didn’t have a phone in the haul truck, I had an iPod, and he [Ramsey] refused to show it.” Tr. 261. During this meeting, which lasted about an hour, Bush observed Ramsey being asked several times to produce “the device” he had used. Tr. 262. At one point, Bush was briefly alone in the room with Ramsey, and asked Ramsey why he wouldn’t just show Austin his phone, or iPod, or whatever he had. *Id.* Bush testified that Ramsey responded, “that’s not the point, you all should just trust me.” *Id.*

On cross-examination, Bush agreed that he conducted training “on a cellphone policy” that consisted of instructions “to keep your personal cellphone off the quarry property.” Tr. 266-67. As a supervisor, Bush granted miners permission to use cell phones in certain situations, such as if there was a family emergency. Tr. 267. Bush admitted that there is no more danger in using an iPod in a vehicle that is not moving than there is in using a radio. Tr. 267-68. On re-direct examination, Bush clarified that miners are supposed to get a manager’s permission before using a cell phone at work during a family emergency. Tr. 269.

#### **Testimony of William Huffman**

Mr. Huffman is the health and safety manager for Vulcan’s Central Division, and has held this position for nearly 30 years. Tr. 272. His responsibilities include investigating accidents, reviewing relevant policies and regulations, and overseeing other personnel who are responsible for workplace safety. Tr. 273. Another part of Huffman’s job is interacting with MSHA representatives. Tr. 274.

Although Huffman was not physically present at the Bristol quarry on a particular day in the summer of 2015, he did participate by being present on the telephone during a conference call with Austin and Sherrod that day. Tr. 275.

Through the telephone, Huffman heard Ramsey enter the office in what he described as a violent and threatening manner:<sup>28</sup>

I heard an individual bust into the room, very violently, I heard a lot of commotion going on... I was in Chattanooga, Tennessee when it happened, and I had two people in the room that I had — it almost sounded like that the next thing we were going to hear was gunshots. I mean, that's how violent it was.

*Id.*

Huffman responded by introducing himself to Ramsey, and told him,

I had heard what had transpired, and at that point I asked him, he needed to leave because he was very — very upset and I could not see him. All I could do was hear the interaction of what was going on over the phone.

Tr. 276.

Huffman asserted that he also heard Ramsey cursing during the call. But, even by Huffman's version, Ramsey was not all about rambunctious behavior, as Huffman admitted that Ramsey requested the phone number of Vulcan's vice president. *Id.* In return, Huffman told Ramsey the number for Vulcan's Knoxville office, and "asked him to call Jeff May, the Vice President." *Id.*

However, Huffman did not recall if Ramsey made his other request concerning a number for miners' rights, and despite hearing quite clearly Ramsey's alleged contumacious behavior, he added that Ramsey "did not ask [for that information] *that [he] heard.*" Tr. 277 (emphasis added). The next day, he had a discussion with Barrett about his concern that "[Ramsey's] action and the way he came into the room, that he was upset, you know, we had people that were in harm's way, that we felt..." *Id.* Huffman asserted that he was concerned about safety, and not about the request for the vice president's phone number. Tr. 278.

Regarding the incident of December 1, 2105, Austin informed Huffman of what he believed he observed at the mine that morning, and sent Huffman the photo and video he recorded of Ramsey using a device in the haul truck. *Id.* Huffman then called the company's lawyer, Mr. Duran, and asked for his advice. Tr. 279. After conferring with the lawyer, Huffman instructed Austin to question Ramsey as to what he was using in his haul truck. Tr. 280. Austin called Huffman back and informed that Ramsey "was claiming that he was using an iPod." *Id.* He then instructed Austin "to get the iPod - - if there was an iPod, then tell [Ramsey]

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<sup>28</sup> Huffman had met Ramsey before this call and it is fair to state that he had a poor opinion of him based on that prior interaction. If believed, Huffman stated that he met Ramsey around December 2014, when he was conducting annual refresher training and that Ramsey fell asleep during the class. Tr. 273-74. It is unnecessary, because of the lack of its importance, for the Court to determine if Ramsey was asleep in Huffman's class. Based on his testimony, recounting his *audio* participation of that summer of 2015 conference call, the Court considered Mr. Huffman to be an exaggerator.

to put it in his personal truck and go back to work.” *Id.* Austin did not follow through with Huffman’s instruction. Huffman maintained that Ramsey’s suspension was motivated by the events of December 1, and not the prior discrimination complaint. Huffman admitted that he was aware of the prior 105(c) complaint. Tr. 282.

On cross-examination, Huffman stated that prior to Ramsey’s suspension there had been no conversations among management about whether the use of an iPod was permitted under company policy. Tr. 284-85. He also agreed that even at the time of his testimony it was not yet settled whether iPods are currently prohibited at Vulcan’s mines.<sup>29</sup> *Id.*

Huffman admitted that the entire conference call he overheard concerning the lock and key incident, which call he found to be so threatening, lasted about *one minute*. Tr. 287. Though Huffman testified that he looked up the number to call the police in Bristol, Tennessee, despite his dramatic recounting, *he did not call the police about Ramsey*. Tr. 286. On cross-examination, Huffman agreed with the Secretary’s counsel that during his deposition he indicated Ramsey did, in fact, mention miner’s rights. Tr. 287. Further, while Huffman agreed during his hearing testimony that Ramsey *did* request the telephone number for Vulcan’s vice president during the conversation, this was at variance from his deposition two weeks earlier. He explained his contradictory testimony because he “was confused between the miners’ rep number and --during the deposition we talked a lot about different 800 numbers.” Tr. 286. Pressed, he then admitted that when deposed he claimed Ramsey did not ask for the number. Tr. 287. Continuing with the lock and key incident, Huffman admitted that it was never determined that the lock belonged to Ramsey. A window into where Huffman was coming from, when asked whether he agreed that it was never determined that Ramsey misled Vulcan, Huffman could only admit, “[n]ot conclusively, no.” Pressed about his indefinite response, Huffman then admitted, Vulcan “had no evidence that would say that it was his or it wasn’t his lock.” Tr. 288.

Regarding Ramsey’s suspension letter in connection with the lock and key investigation, Huffman admitted that he had input into the letter in that he was “not very happy” with what Austin and Sherrod “had to undergo” from Ramsey’s behavior. Tr. 289; Ex. S-4. However, Huffman also informed that “John Sherrod probably was the person that inputted the most, because he was on the scene.” It should be recalled that Sherrod, the one who put his finger in Ramsey’s face, was certainly *on the scene*, as he acted as the chief interrogator.

Although Huffman told Barrett that he was worried about gunshots and was ready to call the police, and that he would call the police if Ramsey returned to the mine that day, that information does not appear in the suspension letter. Tr. 290. Despite his great fears, Huffman stated that he did not participate in discussions about the discipline Ramsey would receive for any infraction related to the July 2015 event. *Id.*

On the topic of the December 1st video Austin sent to Huffman, at the hearing Huffman scuffled in his response, stating at first that he could hardly see anything from the video, but that was “when [he] couldn’t open it.” Tr. 293. He then offered that “when [he] finally viewed it at

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<sup>29</sup> Huffman also agreed that Exhibit S-2 is a “more abbreviated version of the policy contained in Exhibit S-1. Tr. 283.

a larger version, [he] could see it looked and appeared to be a cellphone in his hand, and [he] could see, you know, how you scan through on a [sic] iPhone or whatever.” Tr. 292. Having viewed the video itself, the Court was amazed at Huffman’s capacity for discernment, inquiring “You saw all that on the video?” Tr. 293. Huffman affirmed he could indeed see all that. *Id.*

Huffman admitted that Austin had the authority to stop Ramsey from doing anything unsafe, and was in fact required to do so. Yet, he gave no such instruction to Austin to have Ramsey stop his alleged cell phone use. Tr. 294.

In Huffman’s opinion, using an iPod is similar to using a radio, which Vulcan does allow truck drivers to do. Tr. 295. However, Huffman was unwilling to take Ramsey at his word because, “*Austin believed* he had a cellphone.” *Id.* (emphasis added). Huffman admitted he does not know of anyone at Vulcan who has been disciplined for the use of an iPod, aside from Ramsey. Tr. 301. He also clarified that Ramsey was terminated for “use of an electronic device,” and *not* for refusing to show management his iPod. Tr. 297.

Regarding miners’ representatives, Huffman admitted that, to his knowledge, there is only one mine in Vulcan’s Central Division with a miners’ representative: the Green Rivers quarry in Kentucky. Tr. 298. Huffman admitted that, although Vulcan’s training may mention miners’ reps while covering miner rights and responsibilities, there is no specific training on how to become a miners’ representative. Tr. 299-300. Huffman himself does not encourage any miners to become a representative in that he doesn’t “go out and talk about [that].” Tr. 300. It was his testimony that he only learned that Ramsey was trying to become a miners’ rep after December 1, 2015. Tr. 297-98.

On re-direct examination, Huffman reiterated his lack of discriminatory intent and testified that Vulcan is very reluctant to search the personal belongings of a miner without permission, including a lunchbox, even if there were suspicion of a miner having weapons, drugs, or alcohol.<sup>30</sup> Tr. 305-06.

Huffman maintained that Ramsey was not disciplined for using an iPod. Tr. 301. It was Huffman’s view that Ramsey had the burden to prove his innocence, not that Vulcan had to prove he in fact had a cell phone that day. As he expressed it,

In my mind if you can't show what you say that you've got... the way that I saw that was *if you can't produce what you're saying you've got*, you're not willing to do that, then what we saw or what we felt at that time, was he was using an electronic device such as a cellphone while he was working.

Tr. 304 (emphasis added).

In response to the Court’s inquiry whether it’s “true that at any time any management person at that site could walk over to that truck and examine it and anything that's in it, because

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<sup>30</sup> Huffman did not address the fact the Ramsey explicitly invited management to come with him to his pickup truck so that it could be established by Vulcan itself that his cell phone was in his personal truck.

it's Vulcan's truck; correct?," Huffman responded, "That is correct." Tr. 304-05. Huffman admitted that Vulcan never took the action it had the authority to take, agreeing that "even if Mr. Ramsey said I refuse to let you look in the truck, you could totally overrule that and look in that truck, from one end to the other; correct?" Huffman affirmed, "That is correct, Judge." Tr. 305.

The Court considered Huffman's testimony to be dubious.

### **Testimony of Edward Barrett**

Mr. Barrett worked for Vulcan for over 19 years; but he had retired from its employment prior to the hearing in this matter. Tr. 310-11. Barrett has a secondary degree in industrial labor relations. Tr. 312. His career in human resources includes "36 years on the employer's side and eight years on the union side." Tr. 311. At the end of his career, Barrett was the vice president of Human Resources for Vulcan's Central Division. *Id.*

Barrett reviewed "some videos of Mr. Ramsey operating the vehicle that had been obtained by Mr. Austin ... Mr. Ramsey's record, his situation with prior discipline, and [with that information he] made a determination that the appropriate course of action under the circumstances was termination." Tr. 314. Barrett was then involved in drafting the notice of termination discussing these topics, which ultimately requires approval of a VP-GM level, senior manager. Tr. 315.

Barrett testified that he concluded Ramsey should be terminated because,

he had full knowledge of the policy, he had received that policy when he was employed, he was disciplined for that -- for a violation of the policy in October of '13. He was trained on the policy in the course of our open enrollment, refresher training in late October of 2013.

Tr. 316.

Barrett also stated that Ramsey would not have been fired if this had been his "first offence," but stated that his "prior record" justified the discharge. Tr. 319. The prior record referred to by Barrett was the instance where Ramsey, in Barrett's words,

basically lied to... Austin about possessing a cell phone on the premises... only after he was confronted with the fact that his mother had called the plant office saying [she] got cut off from [her] son [did] he admit to Keith [Austin] that he actually did have a cellphone in the [work]vehicle and he... was given a written warning.

Tr. 317; R's Ex. 13.

In Barrett's account, management chose to discharge Ramsey because, "basically it was a repeat situation." Tr. 320. Barrett admitted that he was not at the site personally for any of the events he recounted concerning Ramsey and that, apart from Austin's video, he conceded that "[a]nything [he] learned was what other people at Vulcan were telling [him]." Tr. 322.

Although Barrett testified that he believes it is safe to use haul truck radios while working because “they’re actually installed in the vehicle,” he stated that Vulcan’s policy bars the use of “any type of electronic device that would distract the employee.”<sup>31</sup> Tr. 324-25. Barrett stated that the company handbook provides for a progressive system of discipline, yet it also states that Vulcan may terminate an employee for a first offense “depending on the severity of the infraction.” Tr. 334. Finally, Barrett denied that his decision to terminate Ramsey was motivated by his previous safety complaints, contending that he did not know about them at that time. Tr. 325-26. However, Barrett did admit that he was aware as of December 1, 2015, that Ramsey had filed a prior discrimination complaint. Tr. 325.

On cross examination, Barrett testified that the usual steps that Vulcan takes in disciplining an employee are: a verbal warning; a written warning; a suspension; and then termination. Tr. 339-40. He advised that Vulcan’s policy is that discipline only stays on an employee’s record for one year, so the October 2013 warning contained in Exhibit R-6 should no longer have been in Ramsey’s record by December 2015. Tr. 337. Yet, Barrett equivocated on the issue of whether the October 2013 warning played a role in the decision to terminate Ramsey, saying it was not used “directly,” but it did show “awareness of the policy.”<sup>32</sup> Tr. 337-38.

Although Barrett could not “recall a specific case” where a Vulcan employee was given a final warning as a first disciplinary step, he asserted that among Vulcan’s 1200 employees and 60 facilities he was “sure” he could find an instance where that occurred. Tr. 341-42. However, assurances aside, no actual example was provided by Barrett. He also testified that Vulcan has a general rule known as the “day in court” rule, meaning that an employee will not be disciplined “without an opportunity to sit down and speak with someone” about their side of the story. Tr. 343. However, Barrett added that this was not a “written policy,” but rather only a “general rule.” Tr. 342. He further qualified that Vulcan’s “day in court” general rule does not necessarily mean that a miner would have the opportunity to tell their story to someone not directly involved in the incident. Tr. 343-44.

Barrett also made inconsistent statements on the issue of whether Ramsey was terminated in part due to “lack of cooperation” during the December 2015 cell phone incident. Barrett testified at hearing that the lack of cooperation was not “a direct factor,” yet he denied that the lack of cooperation was “not a significant factor at all.” Tr. 347. He then agreed that, during his deposition testimony, given only one week before the hearing, he stated, “[he] didn’t consider that [lack of cooperation] a significant factor. *Again, we focused on the what [sic] [Ramsey] had been doing when he was operating the truck.*” Tr. 348 (emphasis added).

The Court would comment that Barrett’s conclusion and recommendation were built on the premise that Ramsey was in fact using his personal cell phone while on the job on December

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<sup>31</sup> This is at odds with the Respondent’s stated position in this matter.

<sup>32</sup> The Secretary contended that, since Ramsey was re-trained on the ETD policy in 2015, the 2013 warning was not relevant to showing his knowledge of the policy. Tr. 339.



1, 2015. The Court has found that Ramsey did not use his cell phone on the job that day. Working as he was from that defective premise, Barrett's testimony must be disregarded.

### **Testimony of Glen Lunsford and Tommy Leonard**

Glen Lunsford has been working at Vulcan's Bristol plant for 42 years, with the last 15 to 20 years of that time as a haul truck driver. Tr. 364. Lunsford is an hourly worker with no managerial duties. Tr. 368. He testified of becoming concerned about Ramsey using a cell phone while driving his haul truck. That conclusion, that Ramsey was using a cell phone, was made because on occasion he saw Ramsey looking down at his lap while driving a haul truck. While Lunsford admitted that he "didn't have no idea what [Ramsey] was doing," that behavior, Ramsey looking down at his lap, made him suspicious that Ramsey was using a cell phone. Tr. 365. Lunsford later reaffirmed that he didn't know if Ramsey had a cell phone in his truck, only that Ramsey was doing something with his lap. Tr. 368, 375. According to Lunsford, Ramsey's looking down while driving his haul truck made him afraid for his safety and he told Austin of his fear.<sup>33</sup> Tr. 366.

Tommy Leonard has been working at the Bristol quarry for 40 years. He operates an excavator. Tr. 377. Like Lunsford, Leonard is also an hourly employee with no managerial duties. *Id.* Leonard stated that, while loading Ramsey's haul truck, he could see Ramsey was "playing with what [he, Leonard] thought was a phone." Tr. 378. It was his testimony that he could observe Ramsey's behavior through Ramsey's side view mirror. Tr. 379. Leonard, like Lunsford, reported his concerns to Austin. Tr. 380.

Leonard recounted the same information about the safety meeting, and recalled there being a few meetings in 2015 where management mentioned cell phones. Tr. 383-84. On the issue of actually seeing Ramsey possessing or using a cell phone, Leonard admitted that he never saw Ramsey holding a cell phone up to his ear, as if to talk with someone. Tr. 387.

In an obvious attempt to diminish that Ramsey had raised safety issues to Vulcan's management, Leonard stated that "everybody" at the quarry would bring up safety complaints. Tr. 385. However, Leonard's claim contradicted his own deposition testimony on this issue. At his deposition, Leonard said that Ramsey was the only person he knew who made safety complaints to management. Tr. 385-86. With his contradictory claims exposed, Leonard then responded that he had misunderstood the question during his deposition. On re-direct examination, Leonard claimed that he may have heard other people talking about Ramsey using a cell phone in the haul truck. Tr. 389. On re-cross examination, Leonard admitted that he knew

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<sup>33</sup> Interestingly, Lunsford, speaking to his awareness of Vulcan having a policy against using cell phones, stated he "didn't really know it was a policy until later." Tr. 368. It was only when Austin held a safety meeting one morning *in the fall of 2015* telling the employees not to have their cell phones in the mine vehicles, that he stopped bringing his cell phone in his haul truck. Tr. 371-72. Ironically, Lunsford admitted that he has used his cell phone at work, "[w]hen [his] wife called [him]." *Id.* That use, in the Court's estimation, is hard to distinguish from Ramsey's call with his mother.

Ramsey had made safety complaints and talked to other miners about safety, but did not recall any details about these complaints. Tr. 390.

Thus, both Lunsford and Leonard stated that they confronted Ramsey and told him to stop using his phone while working before he got caught by management.<sup>34</sup> Neither could recall what, if anything, Ramsey said in response to the concerns they allegedly raised to him. Tr. 369; 382. The Court did not consider either Lunsford or Leonard to be especially credible.

### **Testimony of Benjamin Cate**

Mr. Cate is an area manager for Vulcan, and supervises the managers of 12 plants, including the Bristol quarry. Tr. 392-93. He has held this position since 2010, and has worked for Vulcan for 31 years. *Id.* Although Cate met Ramsey briefly during a meeting at the Bristol quarry, he was not at the plant on December 1, 2015. *Id.* Cate heard secondhand about the “phone incident” that day, watched the video that Austin recorded, and personally believed that Ramsey had a cell phone based on how Ramsey “was holding his hand and looking at it.” Tr. 396. Cate told Barrett that he thought Ramsey should be terminated. Tr. 397. He denied, as each of Vulcan’s witnesses who spoke to the subject dutifully denied, that the decision to terminate was motivated by Ramsey’s previous safety or discrimination complaints. *Id.*

On cross-examination, Cate admitted that he played no role in preparing Exhibit S-7, the termination letter, and stated that he never prepares disciplinary documents. Tr. 398. Cate also agreed that he said he did *not* make a *recommendation* about the discipline that Ramsey should receive. Tr. 399. On re-direct examination, Cate offered an interesting perspective about his participation, as he perceived a nuanced difference between telling Barrett what he believed should be done and making a recommendation. Tr. 399-400. As Cate, an apparent wordsmith, explained to Vulcan’s attorney, the Secretary’s attorney asked if he made a *recommendation* about the discipline for Ramsey, whereas he only gave his *opinion* on the subject. Tr. 399. The reader can glean the Court’s estimation of the value of Cate’s testimony.

### **Other Testimony**

Several other witnesses testified for the Respondent about the practices that Vulcan employs regarding authorizations to use cell phones at other quarries in Cleveland, Tennessee and Athens-Sweetwater, Tennessee.<sup>35</sup> Tr. 401-11.

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<sup>34</sup> This struck the Court as an oddity, which diminishes their credibility, and not simply because the witnesses’ testimony paralleled one another. Consider this: we have two witnesses who were *ostensibly concerned about Ramsey getting caught by management* while using his cell phone and yet they are the ones who *reported to management, informing Austin about the alleged conduct*.

<sup>35</sup> Except perhaps to point out that Vulcan’s policy on cell phone usage is not uniform across its many operations, the value of testimony from Vulcan witness Steve Vickery was elusive. Vickery is the plant manager for a Vulcan plant in Cleveland, Tennessee. Apparently called to speak to his practice for cell phone use at his mine site, Vickery stated that he has authorized that

### **Testimony of Amy Reese**

Ms. Reese is Vulcan's Human Resources supervisor, and has been with the company for 28 years. She has 15 years of experience with the Human Resources team, and has been a supervisor for about a year and a half. Tr. 413. Reese conducted presentations on the Respondent's new employee handbook, which addressed ETDs. Tr. 414-15; Ex. S-2. Because this was a new policy, she included two slides about the policy in her presentation. Tr. 415. Reese testified that Ramsey was present at the Bristol quarry training on October 29, 2013, which she knows in part because HR asked employees to sign sheets acknowledging receipt of the handbook. Tr. 415-18. Ex. R 50, and 51. On cross examination, Reese clarified that Vulcan's policy on cell phones appeared in a policy memo, and was only included in the employee handbook in October 2013. Tr. 423. The Court would comment that this testimony added nothing to the central issues in this matter.

### **Testimony of Russell Scott Powers**

Mr. Russell Scott Powers was also called as a witness for the Respondent — he is the foreman at the Bristol quarry, and has worked for Vulcan for 18 years. Tr. 425-26. Austin is Powers' direct supervisor, and Powers knows Ramsey. *Id.* Powers, though acknowledging awareness that Ramsey had some family medical issues, affirmed that it would be fair to say that he did not remember giving Ramsey approval to carry his cell phone in his, (i.e. Ramsey's), haul truck. Tr. 427. Powers also stated that employees with family emergencies are supposed to use the office phone to take calls. Tr. 428.

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certain people could have their cell phones as long as they use them in a safe practice and that it is his understanding that Vulcan's policy permits such use. Tr. 403. Upon cross-examination, Vickery stated that 7 people are authorized to use cell phones at his Vulcan plant, all of them being hourly employees. Tr. 404. The only restriction placed on cell phones is that they are not to be used while they are "operating." *Id.* Equally elusive was the testimony Vulcan offered from "lead man" Allen Stewart, an hourly employee, who accompanied Inspector LaRue during an inspection of the Athens-Sweetwater quarry in July 2015. Tr. 406. At one point, while a third party was waiting for a phone call, Stewart made a statement to LaRue that "everyone knows we ain't supposed to have these phones and stuff... but sometimes it's the best means of communication that we got." Tr. 407. By Stewart's account, LaRue then told him to stop talking about that. *Id.* Stewart knew of two employees at his quarry who have special authorization from his boss, Mr. Jason Perry, to carry cell phones. *Id.* Martin Jason Perry was next up for Vulcan's witnesses. Perry is the plant manager for another Vulcan plant, this one in Athens-Sweetwater. Offering testimony even more attenuated than that of Vickery or Stewart, Perry stated that cell phones may be used for potential family emergencies. Tr. 411.

## Mine Act Discrimination Claims

This discrimination complaint was brought under section 105(c)(2) of the Mine Act, alleging a violation of section 105(c)(1), which states, in relevant part:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner [or] representative of miners . . . because such miner [or] representative of miners . . . has filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine.

30 U.S.C. § 815(c).

As the Commission stated in *Jaxun v. Asarco*, “[t]he Mine Act, the Administrative Procedure Act (‘APA’), and the Commission’s Procedural Rules permit a Complainant to proceed with an action under section 105(c)(3) of the Mine Act without representation.” *Jaxun v. Asarco, LLC*, 20 FMSHRC 616, 620 (Aug. 2007).

The legal framework for assessing discrimination claims brought under the Act is well-established and clear. A complainant may establish a prima facie case by showing “(1) that he engaged in protected activity, and (2) that he thereafter suffered adverse employment action that was motivated in any part by that protected activity.” *Pendley v. FMSHRC*, 601 F.3d 416, 423 (6th Cir. 2010). The complainant bears the ultimate burden of proving these elements by a preponderance of the evidence. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803 (Apr. 1981).

Protected activity often takes the form of complaints made to the operator or its agent of an “alleged danger or safety or health violation. 30 USC § 815(c)(1). Often, the Court will be called upon to consider indirect evidence of a discriminatory motivation for the adverse action. The Commission has stated that “[d]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect.” *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). Where direct evidence of motivation is unavailable, the Commission has identified several indicia of discriminatory intent, including, but not limited to: “(1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant.” *Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1066 (May 2011) (citing *Chacon*, 3 FMSHRC at 2510). When considering indirect evidence, the Court may draw reasonable inferences from the facts. *Id.*

An adverse action is any “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). An adverse action must be material, meaning that the harm is significant rather than trivial. In determining whether adverse action has occurred, the Commission applies the test articulated in *Burlington North v. White. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006); see also *Sec’y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1931 (Aug. 2012).

If a complainant establishes the required elements, the burden shifts to the operator to rebut the prima facie case by showing “either that no protected activity occurred or that the adverse action was in no part motivated by protected activity.” *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998).

An operator who cannot rebut the prima facie case may still raise an affirmative “mixed motive” defense by proving that the adverse action was motivated only in part by protected activity, and it “would have taken the adverse action for the unprotected activity alone. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982). The operator must prove this defense by a preponderance of the evidence. *Id.*, see also *Pasula*, 2 FMSHRC at 2799-800. When evaluating an affirmative defense, the Court follows the two-step analysis outlined by the Commission in *Chacon v. Phelps Dodge. Sec’y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508 (Nov. 1981). The first step of the *Chacon* analysis directs the Court to determine whether “the justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive.” 3 FMSHRC at 2516. If the Court finds that the justification is *not* pretextual, it then moves to the second step, which is a “*limited* examination” of the justification’s substantiality, and assesses the narrow question of “whether the reason was enough to have legitimately moved that operator” to engage in the adverse action.” *Id.* at 2516-17.

## Discussion

As noted, the Court fully considered the parties post-hearing briefs. A few comments about those submissions are made here, followed by the Court’s further discussion of this case.

The Court agrees with the Secretary’s remarks summarizing Ramsey’s invocations of protected activity to include his safety complaints, all made to Austin, as fully discussed above. The lock and key incident is also important because it reveals that Vulcan, acting through Austin and Sherrod, had an animus toward the safety-active Ramsey. There is no reasonable explanation to justify Vulcan’s many interrogations of Ramsey regarding the lock and key incident. Austin and Sherrod effectively goaded Ramsey through the use of the multiple questioning sessions, asking repeatedly about the same issues. Sherrod, in particular, so shocked that Ramsey, having had enough, would swear as a means of venting because of the repetitive harangues, was hardly a model of professionalism. As has been noted, he characterized Ramsey’s answers as a “fairy tale” and aggressively put his finger in Ramsey’s face. Even after serving his three-day suspension, a suspension which the Court considered to be unwarranted, Ramsey was interrogated again. It is noteworthy that Ramsey was never disciplined on the basis

of any violation of the mine's lock out/tag policy, nor was any employee, except Ramsey, disciplined in connection with that matter.

Following the issuance of the Final Warning and Disciplinary Suspension, Ramsey stood up to the unwarranted suspension by having the courage to file a 105(c) complaint against Vulcan. In the Court's estimation, that protected activity, filing a discrimination complaint, made Ramsey more of a marked man, as did Ramsey's making it known to Vulcan that he would be applying to MSHA to become a miners' representative. It was no happenstance that, on the same day Ramsey reiterated that intention, by seeking the mine's identification number so that his miners' application could be completed and submitted, Austin elected to surveil Ramsey from atop a high wall, peering down some 50 feet below and recording what he believed was Ramsey using a cell phone in his haul truck.

Thus, the Court concludes that the Secretary well met its burden, under the preponderance standard, having established both that Ramsey engaged in protected activity, and that Vulcan's adverse action was motivated by that activity. Vulcan had knowledge of Ramsey's protected activity, displayed hostility towards it, and the adverse action occurred close in time to that protected activity.<sup>36</sup>

The Secretary, addressing the December 1, 2015 event, contends that there was no unprotected activity that could justify Ramsey's firing. The ostensible unprotected activity put forward by Vulcan was use of a personal cell phone in violation of its electronic communications policy. As noted, the Court finds that the evidence does not support, at all, that Ramsey was in fact using his cell phone while on the job on December 1, 2015. It is clear that Ramsey was using an iPod on that date. Ramsey's cellphone records support that he was not using his cell phone on that date during his time on the job. Vulcan's policy does not prohibit the use of iPods.

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<sup>36</sup> The Secretary asserts that Vulcan disciplined Ramsey in a "disparate manner" by issuing a final warning and suspension with regard to the missing key incident, which essentially provided that any kind of transgression on Ramsey's part in the next year, including any form of "problem performance" would cause him to be fired. Ex. S 4. The Secretary's point is that Vulcan simply discarded its "progressive discipline policy" for Ramsey. Sec. Br. at 16-17. Although Vulcan asserted that it can go outside of the progressive discipline steps for serious violations, the Secretary provided a litany of workplace failures for which only written warnings were issued even though, on their face, those failures were more serious. Perhaps the most glaring example of a disciplinary process that seems to operate on a chaotic whim is that involving an employee who was "given a non-disciplinary warning for bringing a firearm to work in direct violation of a Vulcan written policy. Ex. S-18 at RESP 0120." *Id.* at 18. In fact, Barrett, Vulcan's former vice president "for human resources, could not think of any case involving another employee who was given a final warning as the first step in the disciplinary process." *Id.* at 18, citing Tr. at 341-42. Apart from these observations, the Court is of the view that Vulcan's actions on December 1, 2015 are themselves more than sufficient to establish its discriminatory behavior toward Ramsey.

Neither Vulcan's Division Policy nor its Handbook prohibits the use of an MP3 player,<sup>37</sup> such as an iPod.

Regarding Vulcan's post-hearing briefs, Vulcan begins with the claim that Ramsey's claim should fail because he "failed to demonstrate that there was a causal link between his protected activity and the termination of his employment which is sufficiently close in time to justify an inference of discrimination on the part of Vulcan's personnel." R's Br. at 1. This is hardly worth comment – Ramsey's protected activities were cumulative and, certainly with regard to his initial complaint of discrimination, and his effort to file as a miners' representative, those actions were, undeniably, sufficiently close in time to draw the inference. In fact, speaking just to the morning of December 1, 2015, Ramsey's protected activity seeking the information to file his miners' representative application was contemporaneous with the day he was, for all practical purposes, fired. Vulcan, for good reason, rapidly moved to its alternative stance that, even if there is a link, the evidence shows Ramsey's firing was in no part motivated by any protected activity. *Id.* To the contrary, the evidence shows that, as Vulcan never established that Ramsey was using his cell phone while on the job operating his haul truck on December 1, 2015, Ramsey's firing can only be explained as being motivated by his protected activity.

In what the Court finds to be a peculiar stance, Vulcan asserts that in determining whether or not the Complainant actually possessed a cellular phone while in the haul truck in question on December 1, 2015, the analysis of this case should not be driven by hindsight, which necessarily includes information to which Vulcan was not privy when its supervisors, in real time, had to address the repeated, obstinate refusals by the Complainant to comply with the reasonable request of Mr. Austin to show him the electronic device that he had used in the haul truck.

*Id.* at 1-2.

In the Court's estimation, another way to express Ramsey's "obstinate refusals" is that Ramsey refused to prove his innocence. While Vulcan had full authority to search Ramsey's haul truck and had been invited repeatedly by Ramsey to search his pickup truck, Vulcan refused to exercise those available options. The Court has already expressed that Ramsey wisely did not take the bait to produce the device. Failing that strategy, with no proof that Ramsey was using a cell phone that day, Vulcan would have the case turn on whether its personnel *believed* that Ramsey was using a cell phone while in the mine's haul truck. *Id.* at 2.

Apart from their central contention — Vulcan's *belief* that Ramsey was using his cell phone on December 1, 2015 — Vulcan refers to an event more than two years earlier, in October 2013, when it issued Ramsey a written reprimand for talking on a cell phone while at work. R's Br. at 4. They use this relatively ancient event to bootstrap the claim that it was a violation to have or use a cell phone in his haul truck, and that Ramsey knew of the policy, although even

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<sup>37</sup> The Secretary makes the point that, if an iPod was prohibited, it would have made no sense for Vulcan to interrogate Ramsey so many times, as he told them he was using an iPod. The record is teeming with references that Vulcan's policy applied to cell phones alone.

Vulcan admits that only “partially” supports its claim that Ramsey violated the policy on December 1, 2015. This argument confuses whether Ramsey *knew* of the cell phone ban policy *with whether he actually violated the policy on that December 2015 date*. In fact, Ramsey never contended that he didn’t know of, nor that he didn’t understand, the policy regarding cell phone use at the mine. Therefore, such points on the part of Vulcan are non-issues here. Again, the evidence is that Vulcan never established that Ramsey was using his cell phone in his haul truck that day, and no amount pointing to other issues changes that.

Vulcan’s brief then turns to the “lock out –tag out” incident. Although the Court has discussed this at some length already, a few points are worth revisiting. Vulcan’s issue with this incident, in which Ramsey admits that he lost a key to a lock, is that “[d]uring the second interview, management officials concluded that Complainant was uncooperative, gave silly and disrespectful answers to questions, and used profanity and made comments which they felt were threatening in nature.” R’s Br. at 5. Vulcan then contends that “[a]fter these interviews, Complainant burst into Mr. Austin’s office and demanded the telephone number for the Vice President of Vulcan and the ‘miners’ rights’ telephone number while Mr. Sherrod and Mr. Austin were on a conference call with Mr. Huffman.” *Id.* at 5-6. For proof of their claim of Ramsey’s outrageous behavior, Vulcan points to the testimony of Mr. Huffman. It needs to be pointed out that Mr. Huffman was not even present in Austin’s office when the alleged behavior occurred. He was only on the phone. A poor prognosticator, Huffman dramatically testified that he “feared that the next sound he heard would be gun shots.” *Id.* at 6. Suffice it to say, there were no gun shots fired, nor was there even a gun present. At any rate, the upshot of the lock and key tale was that Ramsey “received a Final Warning and Disciplinary Suspension for his ‘abusive and harassing conduct’ and for failing to abide by Vulcan’s policy regarding compliance and cooperation with a company investigation.” *Id.* The tape (or more accurately the recording) of claimed abusive and harassing conduct tells the tale, so to speak, and it does not establish such conduct. Noteworthy also is that it was Ramsey who recorded the session, not Vulcan.

While the Court appreciates the role of full-throated advocacy, and respects the effort Respondent’s Counsel put forth in that regard, that does not mean that hollow arguments should be presented. One such example is Vulcan’s assertion that the “Complainant was warned about his pattern of tardiness.” *Id.* at 7. By that claim, Vulcan’s idea of tardiness is not just to show up for work on time but rather to be at work before the day begins. Of course, Vulcan does not point to such a requirement in its work policy, nor did it advise that employees are paid for starting work early. Vulcan also points to the September 11, 2105 cell phone incident in which Ramsey used his cell phone to contact his mother. *Id.*; Ex. S-5. The point of this incident is difficult to fathom, as Vulcan did not use the event as part of its justification for firing Ramsey. If, for the sake of argument, it demonstrates an instance of Ramsey violating the cell phone policy at that time, it does not excuse Vulcan’s failure to show that Ramsey used his cell phone on December 1, 2015.

Arriving in its brief at the event which prompted Vulcan to terminate the Complainant, Ramsey’s, alleged, conduct of using a cell phone on December 1, 2015, while he was operating a mine haul truck, the problem with Vulcan’s theory is that it presents the same deficiency noted



earlier — Vulcan’s claim of Ramsey’s cell phone use was never credibly established, though *in theory* it was completely within their ability to irrefutably make their case. Clearly, Vulcan wanted to avoid finding out that Austin was wrong. Thus, it is not surprising that Vulcan declined Ramsey’s invitation, permitting them to establish that their claim was valid. It is undeniable that Vulcan had full authority to inspect the haul truck, and Ramsey encouraged them to search his personal pickup truck by affording them permission to conduct such a search. Respondent effectively concedes it has no proof that Ramsey was using his cell phone on that date, acknowledging that Austin “believed that handheld electronic device to be a cell phone.” R’s Br. at 8. As Vulcan expresses it,

the critical issue is whether Vulcan’s personnel *believed* that Complainant had violated Vulcan’s policy at the time in question when Keith Austin and other management personnel concluded that Mr. Ramsey used a cell phone while in the haul truck in violation of Company policy. The credible evidence demonstrates that Mr. Austin and other management officials *sincerely held this belief* at the time in question based upon what they knew at the time.

*Id.* at 13-14 (emphasis added).

Vulcan expresses this unusual position, that Vulcan *believed* Ramsey was using a cell phone in the mine’s haul truck, as a “fully plausible” conclusion. *Id.* at 15. Again, mere belief is not enough, particularly where, if Vulcan really believed its claim, such proof, in theory, was readily at hand.

To remove any doubt that Vulcan’s position is that belief, not proof, can carry the day, Vulcan, acknowledging that the Court might conclude that “the device that Mr. Ramsey had in the haul truck on December 1, 2015, was in fact an ipod and not a cell phone,” submits that issue

is not the material issue for decision in this case; rather, the critical issue is whether Vulcan’s personnel actually believed that Complainant had a cell phone in the haul truck on the day in question. So long as such belief was sincerely held and was plausible, it is **not** material whether it was shown to be correct as a factual matter through the hearing process.

*Id.* at 16 (emphasis in original).

Vulcan’s position would have its belief overtake the facts. In taking that stance, Vulcan asserts that for the Commission to “substitute its own justification for disciplining the miner,” amounts to imposing its own business judgment over the operator’s actions.” R’s Br. at 17. This is nothing more than an attempt at legerdemain, because it tries to divert attention from the Court’s determinations as to what the evidence established, *and what it did not establish*, as augmented by its credibility determinations.

Even Vulcan’s citation to *Cumberland River Coal Co.* and its quoting from that Court’s observation that “ ‘[i]n examining the mine operator’s justification for terminating a miner, the court 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,” draws the incorrect conclusion from that decision, because it claims that the Commission “is limited to a ‘restrained’ examination of the mine operator’s justification and may not insert its own justification.” *Id.* at 17, citing *Cumberland River Coal Co.*, 712 F.3d 311 (6th Cir. 2013). However, the mine’s justification must be sound and supported by facts, not beliefs, sincere or invented.

In Vulcan’s Response Brief it notes that the Court determined at the hearing that the Secretary can’t build its case on the predicate events regarding the lock and key incident. Response at 1, citing Tr. 217. That remains true: the Secretary had to prove that Vulcan’s firing of Ramsey was based on his protected activity and that a nexus was established between them. The Secretary met those burdens. However, the Court would note that doesn’t mean that those earlier events are to be ignored entirely, as they provide informative context for the event which Vulcan used to fire Ramsey. Therefore, the Court does not agree with Vulcan’s claim that Ramsey did not engage in protected activity in July 2015, when he asked for the telephone number for the vice president of Vulcan, and for the telephone number for the “miners’ rights.” *Id.* at 2. Certainly, as to the latter request, it was protected and the Court rejects Vulcan’s claim that Ramsey’s request for that information was “because he was ‘just tired of being interviewed.’” *Id.* at 3.

Although Vulcan has urged that the Court put aside the lock and key incident, it cannot resist assailing Ramsey’s earlier filed mine act discrimination complaint of August 2015. That first-filed complaint was precipitated by the lock and key incident, but in the context of his second discrimination complaint, the matter at issue here, Vulcan asserts it has refuted any “inference of a causal link between the two events.” Response at 7. It theorizes that if Vulcan wanted to retaliate against Ramsey for filing his first discrimination complaint, it could have acted against him for the September 2015 cell phone incident involving the circumstances of a call between Ramsey and his mother. Vulcan asserts that its forbearance over the September 2015 event, coupled with the “approximately two more months beyond [the September] incident, weakens any possible inference of a discriminatory motive.” *Id.* at 7-8. The Court does not share Vulcan’s characterization of those events. To the contrary, weak or strong, Vulcan would have had an aversion to disciplining Ramsey in September, coming on the heels of his first discrimination filing. By December however, it may have concluded that a sufficient interval had passed to inoculate it against the appearance of retaliating against Ramsey for his August discrimination complaint.

Implicitly recognizing the weakness of its argument, Vulcan asserts that its decision to fire Ramsey was in no part motivated by his earlier discrimination filing and returns again to its claim that Vulcan managers’ believed that Ramsey was using his cell phone on December 1st. Vulcan states that Ramsey’s only protected activity on that date was his request for the mine’s identification number. To deal with that, Vulcan claims that Austin “testified unequivocally” that Ramsey did not ask for the mine’s identification number and that Ramsey made no mention of becoming a miners’ representative that morning. *Id.* at 3-4.

Contrary to Vulcan’s assertion, Austin’s claims and Vulcan’s characterization that Austin testified “unequivocally” about the issue, do not settle the matter, as the competing versions of

what was said that day are matters of credibility determinations for the Court. In that regard, the Court finds that Ramsey's account was the only credible version. The Court, closely observing both witnesses when they testified, had no ambivalence about this determination – it was Ramsey who was credible, not Austin.<sup>38</sup>

### Conclusion

As discussed above, Ramsey clearly engaged in multiple instances of protected activity. These instances, which also had a cumulative effect, were close in time to the adverse action of Ramsey's firing on December 1, 2015 and one such instance was on the same morning as the date he was effectively fired.

Ramsey's complaint of discrimination, filed on December 11, 2015, asserted that on December 1, 2015, while Ramsey was working his shift at Vulcan, his boss, Keith Austin, sent him home, claiming that he had seen Ramsey on his cell phone. Official Record, Temporary Reinstatement Proceeding for Ramsey, Exhibit B. Following an investigation, MSHA special investigator Michael LaRue declared that on December 1, 2015, Ramsey sought information from Austin so that he could apply to become a miners' representative. Austin did not supply the information and later that same morning Austin accused Ramsey of using his cell phone while driving the mine's haul truck.

Haul truck drivers, like Ramsey, were allowed to play the radio installed in their trucks and to talk on the trucks' CB radios too. Thus, while the Court has found that Ramsey did not use his cell phone while in the mine's haul truck on December 1, 2015, it is still instructive that drivers were allowed to listen to music on the truck radio while performing their jobs. Further, use of the Vulcan-installed CB radio in its vehicles provided a virtual, though limited range, truck telephone.

Ramsey was suspended that day and fired three days later. Vulcan's "Notice of Disciplinary Termination," signed by Austin alone, asserts that "[o]n the morning of December 1st, I personally observed you repeatedly using an electronic communications device while operating a haul truck at the Bristol quarry. When confronted, you told me that you were not using a cell phone, but were using an iPod." Gov. Ex. S-7. Briefly, but without distortion, the letter from Austin goes on to state that Ramsey refused to show Austin the device and it asserts that in October 2013 and on September 11, 2015, Ramsey had other incidents about cell phone use while on the job. Austin's letter then relates that on September 28, 2015, that is to say, *after* the September 11th incident, Vulcan reminded the entire crew about its policy prohibiting the use of phones on the job.

In Austin's letter and recurrently during the hearing and in its post-hearing briefs, as discussed previously, Vulcan repeatedly tried to blur what devices were prohibited while working under the vague term of "electronic communication devices." Austin's letter of termination continued that theme of obfuscation but, as a whole, any rational reading of that

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<sup>38</sup> The remainder of Vulcan's Response brief is a regurgitation of arguments it advanced in its initial brief and therefore will not be repeated.

letter boils down to a policy prohibiting *cell phone* use. For example, Austin's letter alleges that Ramsey "continued to deny cell phone use" and he reveals that electronic communication devices means cell phones as the specific examples he cites are "cellular phones, Blackberries, Palm Pilots, Treos, iPhones, iPads," each of which are cell phones. Gov. Ex. S-7. Notably, an iPod is not included as a prohibited device in Austin's letter.

It is also true that Vulcan generally, and Austin particularly in his termination letter to Ramsey, after making it clear that the policy was about *cell phone* use, tried to leave wiggle room for themselves by employing the phrase that the policy also prohibited "other electronic devices on the job." Ex. S 7. The Court does not accept these stratagems.

Austin's letter of termination to Ramsey works under a fundamental and essential premise — that Ramsey *was using a cell phone* while operating a mine haul truck on December 1, 2015. From that premise, Austin's letter then moves to his determination of the "appropriate level of discipline to apply," citing a July 30, 2015 incident for "inappropriate and disruptive conduct" toward Austin and one of Vulcan's Safety Representatives. Ex. S-7-2. That July 2015 incident was invoked by Austin as the sole springboard to justify Ramsey's termination. By Vulcan's own statement, the action to fire against Ramsey came about because of his alleged cell phone use on December 1, 2015. Distinct from the alleged cell phone use violation, the *discipline* for the alleged violation relied essentially on the July 30th incident, alleging bad conduct. It is noted that, as with its attempt to vaguely infer that electronic communication devices covered more than cell phones, Vulcan tried to roll into the mix that Ramsey's "prior record of performance, conduct and discipline" were also considered, but the only specific item identified was the July 30, 2015 incident.

Thus, in a nutshell, Ramsey was fired on Vulcan's claim that he was using his cell phone while on the job on December 1, 2015. There were two stories presented on the issue of whether Ramsey was using a cell phone on that day while operating the mine's haul truck – Ramsey's testimony and Austin's. As between the two, the only credible testimony was Ramsey's. Vulcan never established that Ramsey was, in fact, using his cell phone. Instead, the credible evidence is that Ramsey was using a music player, his iPod, which does not function as a cell phone. Having failed to establish that Ramsey was using a cell phone, Vulcan's case collapses.

Further, the Court rejects Vulcan's stance that it was up to Ramsey to establish his innocence. While Vulcan claimed that *Ramsey* could simply go to his personal vehicle, a pickup truck, and bring the phone to them, as has been noted this ignores that Vulcan certainly had the authority to search the haul truck Ramsey was using, and it avoids Ramsey's unconditioned and multiple offers for Vulcan to search his pickup truck.

The Court's determinations are based on the record evidence and the Court's credibility determinations. With that in mind, the evidence establishes that Ramsey stood out, within the small group of hourly employees at the Bristol quarry because of his willingness to bring safety issues to the attention of his supervisor. When Ramsey felt he was being singled out unfairly during a lock and key investigation, he filed a discrimination complaint preceding the one at issue today, thereby raising his visibility as a miner who actively exercised rights protected under the Act. Ramsey engaged in protected activity when he complained about his sweatshirt

becoming ensnared in a moving machine part and by his inquiry to Vulcan management about the information he needed to apply as a miners' rep.

The Court finds that Austin was not receptive to addressing safety issues that Ramsey raised. For example, he failed to fill out a near miss form after Ramsey reported one to him. Tr. 162-63. Austin began to consider Ramsey as a problem for the mine, as evidenced by the fact that he began taking notes on his conduct in May 2015. At that point Ramsey had been working at Vulcan for over a year. Austin's close scrutiny, tied in time as it was to Ramsey's assertions of safety issues and miners' rights, supports the Court's conclusion that management saw Ramsey as "troublesome" due to his exercise of protected activities. As the Secretary has noted, the Commission has held that hostility towards a miner who exercises his or her right to make safety complaints is a circumstantial indicator of discriminatory intent. Sec. Br. at 13, citing *Jungers v. U.S. Borax*, 15 FMSHRC 300, 308 (Feb. 1993).<sup>39</sup>

Considering all of the evidence, including, as mentioned above, the Court's credibility assessments and in particular the Court's evaluation of the believability of Ramsey as compared to Austin, the Court finds that Ramsey was, by far, the more credible witness. This conclusion was reassessed and reaffirmed by the Court when it had the opportunity to hear and observe the testimony of Austin and Ramsey again, when the hearing reconvened in Charlotte for the purpose of trying to fill in gaps in the transcript of the original, first, day of the hearing. The point is that the Court determined that its original credibility determinations were correct, and that Ramsey was more credible than Austin. Accordingly, the Court finds that Ramsey was truthful in his testimony that he was not using a cell phone on December 1, 2015 and that Austin's cell phone video capture of Ramsey while in his truck at that time utterly failed to show otherwise. Upon those findings and for the other reasons articulated in this decision, the Court finds that Ramsey did not violate the Respondent's ETD policy. Vulcan, therefore, had no legitimate basis to fire Jerry Ramsey.

### Order

Wherefore, finding that the Secretary established that Jerry Ramsey engaged in protected activity, that Vulcan took adverse action for that activity and that Vulcan failed to establish any viable defense, the Court **ORDERS** the Respondent to reinstate Jerry Ramsey to his former position at the Bristol Quarry and to restore all benefits<sup>40</sup> due, so that he is fully returned to his position as if he had never been terminated. Further, Vulcan is ordered to expunge all references to the termination of the Complainant, and the asserted reasons therewith, from his personnel file.

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<sup>39</sup> "Circumstantial indicia of discriminatory intent by a mine operator against a complaining miner include the following: knowledge by the operator of the miner's protected activities; hostility towards the miner because of his protected activity; coincidence in time between the protected activity and the adverse action complained of; and disparate treatment of the complaining miner by the operator." *Id.* (internal citations omitted).

<sup>40</sup> Such restoration will include, for example, the period of compensation between Ramsey's unlawful discharge and the date of economic reinstatement of February 11, 2016.

Within ten (10) days of the issuance of this Decision, the Respondent **SHALL** post this decision on a bulletin board at the mine that is visible to every employee, along with a visible and clear notice explaining that: the Respondent has been found liable for discrimination against an employee; that such discrimination shall be remedied; and that it will not reoccur in future. The notice shall also inform all employees of their rights in the event that they experience workplace discrimination.

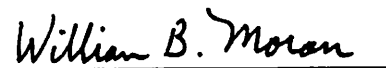
**Pursuant to Procedural Rule 44(b), a copy of this decision will be sent to the office of the applicable Regional Solicitor so that the Secretary may take the actions required by the rule. 29 C.F.R. § 2700.44(b).**

The Parties are hereby also **ORDERED to confer** within 21 days of the issuance of this Decision for the purpose of reaching an agreement on the specific actions and monetary amounts that will constitute the complete relief to be ordered in this matter. If an agreement is reached, the parties shall submit it within 30 days of the issuance of this Decision.

If an agreement cannot be reached, the parties are **FURTHER ORDERED** to submit to this Court, within 30 days of the issuance of this Decision, their respective positions concerning the issues on which they cannot agree, along with supporting arguments, case citations, and references to the record. For areas involving monetary relief on which the parties disagree, they shall submit specific proposed dollar amounts for each category of relief. In the rare event that there are factual disputes requiring an evidentiary hearing, the parties shall submit a joint hearing request and identify those issues.

The Court retains jurisdiction of this matter until a final Decision is issued, disposing of all specific remedies to which the Complainant is entitled. Accordingly, this Decision shall not become final until an Order has been entered granting any specific relief and awarding any monetary damages which are appropriate.

**SO ORDERED.**

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William B. Moran  
Administrative Law Judge

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