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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of MINDY S. PEPIN, Complainant, v. EMPIRE IRON MINING PARTNERSHIP, Respondent.	DISCRIMINATION PROCEEDING: Docket No. LAKE 2015-386-DM MSHA Case No. NC-MD 15-02 Mine: Empire Mine Mine ID: 20-01012

DECISION

Appearances: Suzanne F. Dunne, Esq., U.S. Department of Labor, Office of the Solicitor, Chicago, Illinois, on behalf of Complainant

R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, on behalf of Respondent

Before: Judge Barbour

This case is before me upon a complaint filed by the Secretary of Labor ("the Secretary") on behalf of Mindy Pepin pursuant to the interference provision of Section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act" or "the Act"), 30 U.S.C. § 815(c), and on an amended complaint seeking the assessment of a civil penalty filed by the Secretary against Empire Iron Mining Partnership ("Empire Iron") pursuant to Sections 105 and 110 of the Act, 30 U.S.C. §§ 815 and 820.[1] On December 2, 2014, Pepin filed a complaint with the Mine Safety

[1] Section 105(c)(1) states, in part:

> No person shall discharge or in any manner discriminate against or . . . cause discrimination against *or otherwise interfere with the exercise of the statutory rights of any miner* . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1) (emphasis added). Section 105(a) requires the Secretary to advise the operator of the amount of the civil penalty proposed for an alleged violation of section 105(c)(1),

and Health Administration ("MSHA") alleging that her shift supervisor, Tim Hooper, confronted her about a safety concern she raised and accused her of using safety to bottleneck production. On April 6, 2015, the Secretary filed this action on behalf of Pepin alleging that "Pepin was illegally interfered with by [Empire Iron] when she was confronted and intimidated by a management official for engaging in activities protected by [the Act]." Sec'y Complaint at 2.

The Secretary proposes a civil penalty of $20,000 for Empire Iron's alleged violation of section 105(c)(1) and an order granting Pepin unspecified monetary compensation for pain, suffering, and emotional distress. Additionally, the Secretary requests a finding that Empire Iron unlawfully interfered with protected activity, an order that the company cease and desist from the unlawful interference, an order that the company's mine superintendent read a notice to all miners informing them of their 105(c) rights and of the company's 105(c) violation, and an order that the company post a written copy of that notice to the mine bulletin board for a period of one year.

The case was assigned by the Chief Judge to the court, and the parties presented testimony and documentary evidence at a hearing on January 20, 2016, in Marquette, Michigan. For the reasons that follow, the court concludes that Empire Iron interfered with the rights of Pepin under the Mine Act in violation of section 105(c).

I. STIPULATIONS

1. At all times relevant to this proceeding, [Empire Iron] did business and operated the Empire Mine . . . and associated processing plants and is . . . an "operator" as defined in Section 3(d) of the Act. . . .
2. The subject Empire Mine wherein [Empire Iron] operates the surface mine . . . is a "mine" as defined in Sections 3(b) and 4 of the Act. . . .
3. At all times relevant herein, Mindy S. Pepin . . . worked at . . . Empire Mine and was a "miner" as defined in Section 3(g) of the Act. . . .
4. Empire Mine is subject to the jurisdiction of the [Act]. . . .
5. Empire [Mine] is a large open pit mine near Ishpeming, Michigan. Empire [Iron] produces iron ore pellets for use in the steelmaking industry.
6. Pursuant to Section 113 of the Act . . ., the Federal Mine Safety and Health Review Commission has jurisdiction over the subject matter of this case.
7. The presiding Administrative Law Judge has jurisdiction over these proceedings, pursuant to Section 105 of the Act.
8. The parties stipulate to the authenticity of their exhibits, but not to the relevance or truth of the matters asserted therein.
9. [Empire Iron's] operations affect interstate commerce.

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and section 110(a)(1) requires the Commission to assess a penalty if a violation of section 105(c)(1) is found to have occurred. 30 U.S.C. § 820(a)(1). Section 105 mandates the assessment of a penalty for a violation of the Act, and Section 110(i) sets forth criteria the Commission must consider in assessing any such penalty. 30 U.S.C. § 820(i).

10. On the morning of October 31, 2014, an alert generated by the ThorGuard lightning detection system was "cleared" and the mine returned to full operating mode.
11. On November 2 and 3, Ms. Pepin had recorded the clearing of a lightning red alert on what [are] known as "Take 5" cards.[2] These cards were signed by Mike Gauthier who made Tim Hooper aware of the notations. Copies of such cards are identified as Exhibit G-1 and may be admitted into evidence.
12. A section 103(g) complaint was filed concerning the issue.[3] On November 3-4, MSHA Inspector Ernie Letson investigated the Section 103(g) complaint concerning the clearing of the lightning red alert. A copy of such complaint as presented to the mine is identified as Exhibit G-2 and may be admitted into evidence.
13. On November 4, 2014, after extensive interviews of hourly and management personnel, Mr. Letson issued a notice of negative findings[4] to Steve Baril, who forwarded it to Tyson Murphy, who forwarded it to the Mine Operations Supervisory team, including Tim Hooper, Ms. Pepin's direct supervisor. A copy of the negative findings [is] marked as Exhibit G-3 and may be admitted into evidence.
14. The Secretary has no independent knowledge of whether or when Ms. Pepin was informed of the outcome of the Section 103(g) complaint she filed related to the ThorGuard lightning detection system. Pursuant to MSHA requirements, MSHA investigators routinely inform company management and union officials of results of hazard complaints. MSHA does not routinely inform complainants of results of hazard complaints.
15. Mr. Hooper gave a copy of the findings to Ms. Pepin on the evening of November 4, 2014 before the start of her shift.

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[2] A red alert indicates the potential for lightning in the area.

[3] Section 103(g)(1) of the Act states, in pertinent part:

> Whenever a . . . miner . . . has reasonable grounds to believe that a violation of this Act or a mandatory health or safety standard exists, or an imminent danger exists, such miner . . . shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the . . . miner, and a copy shall be provided the operator or his agent no later than at the time of inspection. . . . The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this title.

30 U.S.C. 813(g)(1).

[4] A notice of negative findings informs an operator at the end of a 103(g) complaint investigation that no violation of the Act or a mandatory health or safety standard has been found.

16. Ms. Pepin and Chad Filizetti then went to Mr. Hooper's office for a discussion. The nature and content of such discussion is at issue in this case.
17. On December 2, 2014, Ms. Pepin filed a complaint with the Secretary of Labor charging discrimination pursuant to Section 105(c)(l) of the Act.
18. The total proposed penalty for the citations at issue ($20,000) will not affect Respondent's ability to continue in business.[5]

J-Ex. 1.

II. THE TESTIMONY

1. Background and the 103(g) Complaint

Empire Iron owns and operates two adjacent open pit iron ore surface mines, the Empire Mine and the Tilden Mine, both of which are located in Marquette County, Michigan. Tr. 17, 93. At the Empire Mine, iron ore is extracted, crushed, and concentrated. Tr. 93. Mindy Pepin is a crusher operator at the Tilden Mine. Tr. 24. She has approximately six years of experience in her current position, and nearly eleven years of experience at the mines. Tr. 24.

In the early morning of October 31, 2014, at the end of a midnight shift, Pepin walked into the dispatch office at the mine and noticed a "red alert" on a computer screen for two different ThorGuard systems, which she believed indicated a "great potential for lightning." Tr. 24-25. The ThorGuard system monitors electrical activity in the atmosphere in order to assess the potential for a lightning strike at the mine. Tr. 94. Witnesses for both the Secretary and the company testified that it was snowing that day. Tr. 25, 96. However, Pepin also testified to seeing thunder and lightning around the start of her shift. Tr. 25, 96.

Pepin maintains that up until that night "the ThorGuard system was used as … the holy grail," meaning if there was a red alert, the company evacuated the areas that could be affected by lightning. Tr. 27. However, in this instance, the company "disregarded the red alert" and informed employees at the mine that they could continue working in the affected area. Tr. 26-27. Pepin was concerned about employees working on the ground, especially near a blast pattern, or in areas where they might be handling energized cables, because the ThorGuard system was still indicting the potential for a lightning strike, and lightning could cause explosives to detonate. Tr. 79.

When she entered the dispatch room, Pepin asked her supervisor Tyson Murphy, the section manager for mine production, why Empire Iron chose to disregard the red alert. Tr. 26, 92. Murphy testified that he provided Pepin with a 30 second explanation for why he did not believe there was a hazard. Tr. 98. Part of this explanation was that the ThorGuard system is

[5] No citation or citations were actually issued. Rather, the Secretary seeks the assessment of a $20,000.00 penalty for the company's violation of the Act in an amended complaint. Sec'y Amended Complaint at 3.

prone to show false positives, especially when it is snowing, and all of the other evidence that the company looks to in these circumstances suggested that there was no lightning hazard.[6] Tr. 98.

Murphy described Pepin's demeanor during this conversation as "agitated" and "upset," and he believed that at the end of the discussion Pepin "still wanted to argue the point." Tr. 100. Murphy testified that Pepin turned around with a "humpf" and "stormed down the hallway" saying something he could not make out. Tr. 100. According to Jeffrey Delmont, a blasting supervisor at the mine who walked by her while she was leaving the office, Pepin said, "Fucking red is red." Tr. 116. Witnesses for the company admitted that as of October 31, there was nothing explicit in the electrical storm notification procedures available to employees at the mine dealing with ThorGuard system false positives. Tr. 109-10, 118-19, 130-31.

On the 2nd and 3rd of November, Pepin filled out a Take 5 card, a workplace inspection form on which employees may raise safety concerns with the company. Tr. 27-28, 100-01. On both dates, Pepin documented on the cards that management permitted employees to reenter the area affected by a potential lightning strike on October 31, even though the ThorGuard system was still displaying a red alert. Tr. 28; Sec'y Ex. 1. At the end of each shift, Pepin placed the cards in a box, where they would be picked up and reviewed by the shift supervisor. Tr. 29. Pepin testified that prior to this incident she had only written a safety concern on a Take 5 card three or four times over the course of approximately five years. Tr. 29.

Daniel Keranen, the area manager of mining operations, testified that it is the company's expectation that when employees raise safety issues on Take 5 cards, they will receive a response from management. Tr. 171. When asked whether management responds to these complaints, Keranen responded affirmatively, and clarified that the employee's supervisor may be the one to respond. Tr. 171-72. However, Keranen conceded that the company does not have any way of ensuring that supervisors respond, and therefore he could not say for sure how Take 5 complaints are addressed in practice. Tr. 172-73. Pepin testified that in the three or four prior instances in which she raised a safety concern on her Take 5 cards, she never received a response from management, nor had she received a response to the one additional concern she raised following her ThorGuard complaints. Tr. 58-59. She stated it was typical not to get an answer from the company. Tr. 58-59.

On the morning of November 3, shortly after turning in her Take 5 card at the end of her shift, Pepin contacted MSHA and made a complaint pursuant to section 103(g) of the Act raising the same concerns about the company sending miners back to work even though the ThorGuard system displayed a red alert. Tr. 29; Sec'y Ex. 2. Pepin testified that this was the first time she had ever made a safety complaint to MSHA. Tr. 36. On November 3 and 4, MSHA investigated the complaint, interviewing hourly and management personnel in the process. Tr. 112; Stip. 12. On November 4, MSHA issued a notice of negative findings for the allegations in Pepin's 103(g)

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[6] According to Murphy, none of the supervisors or dispatchers to whom he spoke observed lightning, nobody called in and reported seeing lightning, and an online lightning strike map indicated that the nearest lightning was in Texas. Additionally, Murphy and Jeffrey Delmont, a blasting supervisor at the mine, testified that ThorGuard and Weather Channel radar maps did not indicate any nearby thunderstorm activity. Tr. 97, 114-15.

complaint. Stip. 13; Sec'y Ex. 3. MSHA did not interview Pepin as a part of the investigation or inform her of its findings. Tr. 30. The inspector who investigated the incident personally delivered the findings to Steve Baril, a safety representative for the company. Tr. 122-23. Baril scanned the document and emailed the findings to supervisors Dan Keranen, Tyson Murphy, Dan Wegleitner, and Richard Carlson. Tr. 123. Baril claims he expected them to communicate the findings to the employees at the company through intermediate supervisors in toolbox meetings. Tr. 123-24. He also testified that supervisors often communicate the findings from an MSHA complaint inspection this way. Tr. 124.

2. The Ready Room Incident

On the evening of November 4, Mindy Pepin was seated in the employee's ready room in a building at the mine waiting to start her shift. Tr. 64. With her, at the time, was Chad Filizetti, a fellow miner and her then-fiancé. Tr. 64. At least two or three other miners were also in the room. Tr. 32, 64. Tim Hooper, her shift supervisor for the night, entered the ready room at approximately 10:10 p.m., walked up to Pepin, and gave her a piece of paper containing MSHA's negative findings on her 103(g) complaint. Tr. 31, 65, 137-38. According to Pepin, Hooper "shoved" the paper in her face and said, "Here, I thought you'd like to see this." Tr. 31. He then left the room and went back to his desk. Tr. 139; see also Tr. 65.

Hooper testified that he merely "handed" the paper to Pepin by "set[ting] it on the counter right in front of" her and Filizetti. Tr. 137, 139. Then, in Hooper's account, he stated "Here[,] . . . I thought you'd be interested in seeing this. This is the findings from MSHA on the ThorGuard." Tr. 139. According to him, he did not stick around to have a discussion "because [he] knew it would probably escalate into an argument" which he wished to avoid. Tr. 139-40.

Pepin testified that she was taken aback by Hooper's decision to give her the complaint because it was not a normal practice. Tr. 33. She interpreted Hooper's actions as "giving [her] a message that he knew it was [Pepin] that called MSHA." Tr. 33. Filizetti testified that he interpreted Hooper's actions similarly. Tr. 74, 84.

Hooper insisted that he merely intended to address the concerns Pepin raised in her Take 5 cards, and that he did not even know she filed the section 103(g) complaint.[7] Tr. 136-37, 140. Hooper testified that he arrived at the decision to present Pepin with the negative findings in consultation with his supervisor Joe Garnsey, because "obviously by filling her Take 5 card out two days in a row, [Pepin] was very concerned" about the October 31 incident. Tr. 135-36. Garnsey stated in a deposition that he thought Hooper should show Pepin the findings because they would relieve her anxiety, and that the decision had nothing to do with proving Pepin

[7] Hooper stated that he found out about the complaint almost immediately after seeing Pepin's Take 5 card complaints, so the thought crossed his mind that it was Pepin who called MSHA. Tr. 147, 150. However, Hooper agreed that Pepin could have raised the issue with the safety committee of the United Steelworkers of America (Pepin's union), and a member of the union's safety committee, rather than Pepin, could have called MSHA. Tr. 154. Hooper maintained that he would have no way of knowing who filed the 103(g) complaint in that scenario. Tr. 154-55.

wrong. Resp't Ex. 19 at 10. Garnsey did not know whether Pepin filed the MSHA complaint, but he assumed she had. Resp't Ex. 19 at 11, 16.

Additionally, Hooper testified that he planned to discuss the MSHA negative findings with the rest of the shift crew during their standard toolbox meeting at 10:45 p.m. on November 4, which he subsequently did. Tr. 137-38, 145. However, Pepin started her shift early, normally at 10:20 p.m., before the rest of the crew. Tr. 137. Therefore, Hooper informed Pepin of the findings individually apart from the rest of the crew. Tr. 137.

3. The Confrontation in Tim Hooper's Office

After Hooper left the ready room, Pepin followed him into his office because, according to her, she "was curious to see why he felt the need to give [her] the MSHA findings." Tr. 33. She denied that she had any intent to provoke Hooper, although she was "aware that Mr. Hooper has a temper." Tr. 47, 53. At Pepin's request, Filizetti accompanied Pepin. Tr. 33.

Pepin testified that she calmly asked Hooper why he gave her the findings. Tr. 33-34. According to Pepin, Hooper responded, "Because we all knew it was you that called MSHA." Tr. 34. Pepin said she was shocked by that statement and told Hooper, "Just because you know it's me doesn't mean you're supposed to be telling me it's me." Tr. 34. According to Pepin's testimony, when asked how he knew it was Pepin who had called MSHA, Hooper answered that it was because she wrote the same complaint on her Take 5 cards. Tr. 34.

At some point during this interaction, Pepin claims that Hooper "came flying out of his chair at his desk" and that the conversation "got pretty heated really fast." Tr. 34-35. Pepin recalled that Hooper asked, "Do you know how many people I had to pull off of equipment to go in for your interview?" Tr. 35. She interpreted this question to mean that the MSHA investigation was a major inconvenience for the company. Tr. 35. Pepin also alleged that Hooper told her she used "safety [complaints] to bottleneck production" and that Pepin and Filizetti were the "ringleaders of the bottlenecking" operation.[8] Tr. 35, 37. When asked by Pepin for further elaboration, Hooper allegedly replied, "[E]verybody in the back office knows what [you are] up to and they're watching [you]." Tr. 37. As far as Pepin was aware, the back office would have included Dan Keranen, Tyson Murphy, and all upper salary management personnel. Tr. 38.

Pepin testified that Hooper next threatened to send her home for insubordination. Tr. 38. When Filizetti asked how Pepin was being insubordinate, Hooper allegedly answered, "Because she's scolding me for the way I'm talking to her," and "I'm just telling her everything that everyone else wants to say but is afraid to." Tr. 38. Pepin testified that she was angry and shocked at the turn the conversation had taken, and that she told Hooper the conversation was over and left. Pepin recalled that at the end of the conversation she realized she had backed out

[8] Pepin believed that she did not make safety complaints very often and only regarding issues that were "really concerning." Tr. 35-36. She had never made a complaint to MSHA prior to this incident, although she did recall bringing what she termed "minor things" to the attention of a shift supervisor or salaried employee verbally. Tr. 36-37. These included issues regarding a disintegrating walkway grating and berms of insufficient height. Tr. 37.

into the hallway after Hooper got up from his chair, even though she had started the conversation at his desk. Tr. 47.

Although Filizetti's recollection of the meeting was much hazier than Pepin's and omitted a few statements that Pepin alleged Hooper made, Filizetti corroborated Pepin's testimony that Hooper accused her of filing the MSHA safety complaint and of using safety complaints to bottleneck production. Tr. 66-68. Filizetti also recalled Hooper getting out of his chair at some point during the conversation, although in his telling Hooper "slowly came [their] way" instead of "flying at" them. Tr. 70.

After Pepin left, Filizetti remained with Hooper in his office. Tr. 39. Although Filizetti had trouble recalling most of the ensuing conversation, he testified that Hooper explained, regarding his interaction with Pepin, that he does not have "people skills." Tr. 75. According to Filizetti, Hooper also stated that "everybody in the back hallway knew what [Pepin] was up to," which Filizetti interpreted to mean that his superiors were watching Pepin. Tr. 75-76. Filizetti agreed that the tension eased in the room after Pepin left. Tr. 86.

Hooper's account of the meeting differed slightly from Pepin's. According to Hooper, Pepin started asking questions right away and the interaction became increasingly hostile. Tr. 140. Pepin was allegedly loud, agitated, and full of attitude. Tr. 142. Hooper also testified that he made sure he was seated the entire time, because he did not want to look intimidating, whereas Pepin was "moving around." Tr. 142, 145. Hooper admitted that he did become slightly angry during the conversation. Tr. 145-46. He stated that "it's hard not to be [angry] when stressful situations are thrown at you like that." Tr. 146.

Hooper claimed that he did not know Pepin had called MSHA until she brought up the subject. Tr. 140-41. Hooper stated that once the conversation started to get hostile, he announced that the conversation was over and told Pepin and Filizetti to leave. Tr. 141. However, they did not leave, and Pepin continued to ask questions. Tr. 141. It was at this point that Hooper claims he threatened Pepin with insubordination because she would not leave the room when told to do so. Tr. 141. Hooper then told Filizetti, "She cannot . . . come in here and quiz me on anything she feels is relevant at the time." Tr. 142.

Hooper next described his conversation with Filizetti after Pepin left the room. After complaining about Pepin's attitude, Hooper told Filizetti, "I don't know what's happened to this crew. That crew . . . used to be one of the top crews, and now it seems like there are a few people on the crew that are using safety as a crutch to not do their work." Tr. 143. Hooper clarified that he was referring to "minor equipment issues" where employees would shut down equipment that was actually safe to run. Tr. 143-44. Hooper also believed that there had been frivolous complaints filed with MSHA, including one where an employee had contacted MSHA because a toilet was plugged without notifying management. Tr. 144. Hooper generally did not view MSHA as an ideal first option for raising safety issues.[9] Tr. 151.

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[9] Hooper believed miners should raise safety complaints with management before complaining to MSHA. He expressed this belief during the following exchange with the solicitor at the hearing:

Hooper testified that he then continued, "You know, have you seen the price our stock is trading at? . . . [W]e need to work through some of these safety issues together to take care of them, not in this manner." Tr. 144. As noted, Hooper believed that the majority of safety issues could be taken care of if they were brought to management's attention. Tr. 144-45. That said, he maintained he did not intend to prohibit or discourage Pepin or Filizetti from filing complaints with MSHA. Tr. 145.

4. The Toolbox Meeting

At around 10:45 p.m. on November 4, Hooper subsequently discussed the MSHA negative findings with his crew in a toolbox meeting in the ready room. Tr. 77. Pepin was not a part of this meeting. Tr. 77. According to Filizetti, Hooper made mention during that meeting that the company's stock had been dropping and that the company was not in good shape financially. Tr. 77. Filizetti took this comment, immediately following discussion of the MSHA negative finding, to mean that unsubstantiated safety complaints were costing the company money. Tr. 78. Hooper denied discussing the company's stock prices with the crew, and instead claims that he only mentioned that to Filizetti in private due to Filizetti's own personal interest in the matter. Tr. 153.

Hooper claimed that he had provided MSHA negative findings in a toolbox meeting prior to this, but later admitted that he could not remember if he had. Tr. 148-49. Daniel Keranen, the area manager of mining operations, testified that the company communicates MSHA negative findings with the crew during toolbox meetings and that he had told Tyson Murphy to disseminate information regarding the negative findings at issue in this case to all of the crews at the mine. Tr. 171

Q: [Y]ou felt that some people were making frivolous safety complaints?
A: Not frivolous safety complaints. Frivolous complaints to MSHA.
Q: So you think a complaint to MSHA is not a safety complaint?
A: Not if it's—if it's not a real one.
Q: So who is to judge what a real safety complaint is then?
A: Well, I guess the safety committee and the supervisors.
Q: So then the miners should take their complaints only to the supervisors and not call MSHA if they feel that they have a complaint, to check to see if it's a real safety complaint?

* * *

A: Firstly, yes.
Q: So firstly they should take a complaint to the supervisors instead of taking the complaint to MSHA?
A: Yes.

Tr. 151.

5. Relevant History Between Mindy Pepin and Tim Hooper

Pepin testified that while she and Hooper did have a "couple of small run-ins" prior to the events of this case, she considered her relationship with Hooper to be friendly and professional up until this point. Tr. 40. The "run-ins" to which Pepin referred included an incident where Hooper informed Pepin that she needed to start scanning in and out of the mine at the end of her shift and an incident where he allegedly berated her for using the wrong door to exit a changing room at the mine. Tr. 41, 53-54. Hooper clarified that there were several other employees who were reprimanded for not scanning in and out of the mine at the time, but that the changing room reprimand was specific to her. Tr. 146. These incidents were documented by the company in a record of verbal redirections, although Pepin claims that she was not aware that such a record existed until this proceeding. Tr. 40; Sec'y Ex. 4, 5. Pepin also recalled an incident in the fall of 2011 where Hooper reprimanded her for questioning a management decision on the company radio. Tr. 42. According to Pepin, Hooper angrily slammed open the door where Pepin was working and told her, "Don't ever say something like that again on the radio." Tr. 42.

Filizetti testified that Pepin and Hooper have similar personalities, in the sense that it is very difficult to change their minds when they think they are right. Tr. 81. Multiple witnesses also testified about the fiery attitudes of both individuals. Keranen stated that although he and Pepin had been childhood friends and neighbors, she had been aggressive and abrasive toward him at work in the past, Tr. 169-70, while Garnsey claimed that Pepin is easily agitated. Resp't Ex. 19 at 7-9. Both Pepin and Filizetti testified that everyone who knows Hooper is aware that he has a temper. Tr. 53, 86.

6. Damages and Aftermath

Pepin testified that following her encounter with Hooper, she cried during her shift and felt very frustrated. Tr. 39. Because of allegedly being told that everyone in the back office is watching her, she claims that she now feels there is a target on her back and worries that the company is looking for a reason to fire her. Tr. 45. Filizetti confirmed that Pepin has expressed feeling this way. Tr. 78-79. Keranen testified that Pepin later told him that she felt threatened by Hooper and did not want to work with him. Tr. 174. Pepin stated that the stress of having to interact with Hooper has affected her personal life. Tr. 45-46. According to her, the situation was a contributing cause to the dissolution of her relationship with her then-fiancée and co-worker Filizetti. Tr. 46, 55-56. However, at the time of the hearing, Pepin and Filizetti were once again engaged. Tr. 33, 87. Pepin has also not sought treatment or medication for her stress. Tr. 58.

Other employees at the mine have learned about Pepin and Hooper's confrontation from Pepin and Filizetti. Tr. 60. Pepin testified that those employees have said that they are "floored" by this situation, and have told her sympathetically, "That's what you get for filing safety complaints." Tr. 60. Pepin claims that she will have significant reservations about raising safety issues in the future. Tr. 46.

Pepin has become a member of the union safety committee since the alleged interference. Tr. 53. She has raised a safety issue within the company and made a safety complaint during a crew meeting since then as well. Tr. 158, 170. Since the alleged interference there has not been a

decline in the number of section 103(g) complaints filed by mine employees at the company. Resp't Ex. 17.

III. SECTION 105(C) INTERFERENCE CLAIMS

1. The Law

The Secretary alleges that Empire Iron interfered with the exercise of Pepin's statutory rights in violation of Section 105(c)(1) of the Mine Act. Section 105(c)(1) states in pertinent part:

> No person shall discharge or in any manner discriminate against . . . or otherwise *interfere with the exercise of the statutory rights of any miner* . . . because such miner . . . has filed or made a complaint under or related to this Act . . . or because of the exercise by such miner . . . of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1) (emphasis added). This section establishes a cause of action for unlawful discrimination, which the Commission normally analyzes under the *Pasula-Robinette* framework laid out below. However, in plurality and concurring opinions in a recent case, a majority of Commissioners recognized that this section also "establishes a cause of action for unjustified interference with the exercise of protected rights which is separate from the more usual intentional discrimination claims evaluated under the *Pasula-Robinette* framework." *UMWA on behalf of Franks v. Emerald Coal Res., LP*, 36 FMSHRC 2088, 2103 n.22 (Aug. 2014) (Young & Cohen, Comm'rs), vacated, 620 Fed. Appx. 127 (3d Circ. 2015); *id.* at 2105-07 (Jordan & Nakamura, Comm'rs).

Under the traditional *Pasula-Robinette* framework, a complainant alleging discrimination must prove, by a preponderance of the evidence, (1) that he or she engaged in protected activity; (2) that he or she suffered an adverse action; and (3) that the adverse action taken against him or her by the mine operator was motivated in any part by the protected activity. The operator may rebut a prima facie case by showing that no protected activity occurred or that the adverse action was in no part motivated by the miner's protected activity. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980) (*rev'd on other grounds*); *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). If the operator is unable to rebut the miner's *prima facie* case, it may nevertheless defend itself affirmatively by proving (1) that it was also motivated by the miner's unprotected activity and (2) that it would have taken the adverse action in any event for the unprotected activity alone. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935 (Nov. 1982).

Additionally, certain business policies that on their face plainly and explicitly discriminate against protected activity may be "so 'inherently destructive of employee interests' that [they] may be deemed proscribed without need for proof of an underlying improper motive." *See Swift v. Consolidation Coal Co.*, 16 FMSHRC 201, 206 (Feb. 1994) (quoting *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33 (1967). This is because "some conduct carries with it unavoidable consequences which the employer not only foresaw but which he *must have*

intended and thus bears 'its own indicia of intent.'" *Great Dane Trailers*, 388 U.S. at 33 (emphasis added).

In contrast to the detailed analysis that the Commission has provided for discrimination claims, there is relatively little Commission case law on the appropriate framework for analyzing interference claims. The most significant Commission cases dealing with interference are *Moses v Whitley Dev. Corp.*, 4 FMSHRC 1475 (Aug. 1982), aff'd, 770 F.2d 168 (6th Cir. 1985) and *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.*, 27 FMSHRC 1 (Jan. 2005). Additionally, the Secretary and two Commissioners have recently proposed a framework for interference claims, discussed more fully below, that the Commission as a whole has yet to adopt. *Franks*, 36 FMSHRC at 2108 (Jordan & Nakamura, Comm'rs). The Secretary urges the court to adopt the *Franks* framework, in part because he argues it is consistent with Commission precedent, specifically *Moses* and *Gray*. Sec'y Br. 11. Therefore, the court will discuss these two cases in depth below.

In *Moses v Whitley Dev. Corp.*, the Commission held that persistent and accusatory interrogation directed toward a miner in response to that miner's filing of a 103(g)(1) complaint constituted prohibited interference under the Act. *Moses*, 4 FMSHRC at 1480. In reaching that result, the Commission first cited to Mine Act legislative history indicating that section 105(c)(1) was directed against "not only the common forms of discrimination, such as discharge, suspension, [and] demotion . . ., but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal" and then found that "coercive interrogation and harassment over the exercise of protected rights" were among the "more subtle forms of interference" that the drafters of the Act had in mind. *Id.* at 1479 (citing S. Rep. 95-191, 95th Cong., 1st Sess. 36 (1977) ["S. Rep."], reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978) ["Legis. Hist."]). The Commission was especially concerned about the tendency of an employer's actions or statements to instill a fear of reprisal in the minds of its employees and chill the exercise of protected rights. *Moses*, 4 FMSHRC at 1479. In a footnote, the Commission attempted to distinguish between comments or questions regarding a miner's exercise of a protected right that are "innocuous or even necessary to address a safety or health problem" and those that constitute unlawful interference: "Whether an operator's actions are proscribed by the Mine Act must be determined by what is said and done, and by the circumstances surrounding the words and actions." *Id.* at 1479 n.8.

In a separate part of the *Moses* decision, dealing primarily with discharge, and secondarily with interference, under the *Pasula-Robinette* framework, the Commission also held that an operator may be held liable for adverse actions motivated by the suspicion of protected activity, even if the complainant had not actually engaged in such protected activity. *Moses*, 4 FMSHRC at 1480. The Commission acknowledged that a literal interpretation of section 105(c)(1) might require the actual or attempted exercise of protected activity, but reasoned that such a narrow interpretation would frustrate Congressional intent. *Id.* Instead, the Commission adopted a broad interpretation of the statutory language, "No person shall discharge . . . any miner . . . because of the exercise by such miner . . . of any statutory right afforded by this Act." The Commission's interpretation turned on the motives and beliefs of the "person" discharging the miner, rather than the activities of the miner. *Id.*

The Commission subsequently distinguished interference from discrimination claims and raised new questions about the intent requirement in section 105(c) interference cases in the matter of *Sec'y of Labor on behalf of Gray v. N. Star Mining, Inc.* In *Gray*, a mine's superintendent repeatedly asked an employee about his grand jury testimony stemming from an MSHA investigation and sought assurances from the miner that he did not testify against the superintendent, joking that if he had, the superintendent would kill him. *Gray*, 27 FMSHRC at 2-3. A Commission ALJ evaluated the interference allegations under the *Pasula-Robinette* framework and found that the alleged interference did not qualify as adverse actions under the Act because, in part, the superintendent did not literally intend to harm the employee. *Id.* at 4-5; *Sec'y of Labor on behalf of Gray v. N, Star Mining, Inc.*, 25 FMSHRC 198, 202 (Apr. 2003) (ALJ). The ALJ found it unnecessary to reach the issue of discriminatory motivation, having already found no adverse action. *Gray*, 25 FMSHRC at 216. The Commission vacated the ALJ's interference finding and remanded the matter for "further consideration of the facts and circumstances surrounding the statements to determine if they were coercive under section 105(c)(1) of the Mine Act." *Gray,* 27 FMSHRC at 12.

After first announcing that coercive operator statements are not to be analyzed under the normal *Pasula-Robinette* framework, the Commission identified several other errors in the ALJ's decision that hinted at how the Commission would prefer interference claims to be analyzed. *Gray*, 27 FMSHRC at 7 n.6. In particular, the Commission noted "that the judge examined [the superintendent's] statements too narrowly by considering largely, if not exclusively, [his] intent or motive in making the statement." *Id.* at 10. The Commission found error in the ALJ's belief that "the presence or absence of a violation of section 105(c) of the Mine Act turned on whether [the supervisor] literally intended by his words to cause physical harm to [the employee] or any other miner who testified against him during the grand jury investigation." *Id.*. Instead, citing *Moses* and case law on section 8(a)(1) of the NLRA, the Commission held that the ALJ should have analyzed the "totality of circumstances surrounding [the supervisor's] statements to determine whether they were coercive and violative of section 105(c)" because they carried implicit "threats of reprisals or of employment discrimination," which the Commission had already recognized in *Moses* as capable of giving rise to claims of prohibited interference. *Id.*

2. The Secretary's Proposed Test

The Secretary of Labor has proposed a test for evaluating interference claims. Sec'y Br. 9-12. The Secretary originally proposed this test before the Commission, and two Commissioners chose to adopt it. *Franks*, 36 FMSHRC at 2108 (Jordan & Nakamura, Comm'rs). Under the *Franks* test, an interference violation occurs if:

> (1) a person's action can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights, and
>
> (2) the person fails to justify the action with a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

Franks, 36 FMSHRC at 2108.

Under the first prong of the test, in order to establish that conduct tends to interfere with the exercise of protected rights "it is not necessary [for the Secretary] to show that a miner has been actually prevented or deterred from exercising rights" or "that the operator acted with discriminatory motivation or unlawful intent." *Franks*, 36, FMSHRC at 2107; Sec'y Br. 12. The second prong of the test "ask[s] whether the operator's actions were narrowly tailored enough to promote its business justification without undue interference to the rights of the miners." *Franks*, 36 FMSHRC at 2118 n.14; Sec'y Br. 10-11.

Empire Iron asks the court to reject the Secretary's proposed test, particularly because the company believes that discriminatory motive must be a required element of a section 105(c) violation. Resp't Br. 12. The Secretary in turn claims that his proposed test is entitled to *Chevron* deference, and provides two rationales for why the court should adopt this test. Sec'y Br. 10; *see Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843-44 (1984). First, the Secretary argues that section 105(c)(1)'s prohibition on "interference" reflects parallel language in section 8(a)(1) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(1), and that section 8(a)(1) has been interpreted by courts and the National Labor Relations Board ("NLRB") not to require a showing of intent. Second, the Secretary claims that his proposed test is "firmly grounded in both Commission and NLRA precedent." Sec'y Br. 11.

Even assuming that the Secretary's entire test is deserving of *Chevron* deference if it is found to be a reasonable interpretation of an ambiguous provision,[10] the court finds the Secretary's interpretation of section 105(c)(1) to be unreasonable as to the question of whether the Secretary is required to prove unlawful intent in interference proceedings but reasonable as to the question of whether it is necessary to show that a miner has actually been deterred from exercising rights.

3. The Plain Language of the Act and NLRA Guidance

The court first acknowledges that certain elements of section 105(c)(1) of the Act are ambiguous. For instance, the types of actions that may qualify as "interference" under the section are open to interpretation. However, the court cannot envision any permissible interpretation of section 105(c)(1) that entirely reads out the word "because" and all subsequent language from the phrase: "No person shall . . . interfere with the exercise of the statutory rights of any miner . . . *because* such miner . . . has filed or made a complaint under or related to this Act . . . or *because* of the exercise by such miner . . . of any statutory right afforded by this chapter." 30 U.S.C. § 815(c)(1).

It is a general principle of legal interpretation that every word and phrase in a statutory provision must be given effect. And a statutory provision that prohibits a person from acting "because of" a protected status or activity is generally given the effect of requiring that the

[10] The court notes that the Court of Appeals for the Sixth Circuit, wherein the mine that is the subject of this proceeding is located, has previously refused to grant *Chevron* deference to the Secretary's interpretation of an ambiguous Mine Act provision. *See North Fork Coal Corp. v. FMSHRC*, 691 F.3d 735 (6th Circ. 2012).

protected status or activity "was the 'reason' that the [person] decided to act," *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167 (2009), or at least a motivating factor. *See E.E.O.C. v. Abercrombie & Fitch Stores, Inc.*, 135 S.Ct. 2028, 2032 (2013).[11] The court concludes that within section 105(c), the phrase beginning with the word "because" clearly denotes a requirement that a miner's protected activity motivated an operator's interference with his or her exercise of protected rights.

The Secretary instead relies primarily on the similarities in both language and purpose between section 105(c)(1) of the Mine Act and section 8(a)(1) of the NLRA and argues that the interference language in each statute does not carry with it an intent requirement. Sec'y Br. 11. Section 8(a)(1), in full, states, "It shall be an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title." 29 U.S.C. § 158(a)(1). While there are some similarities between the two sections that justify the inference that section 8(a)(1) informed the drafting of section 105(c), the court nevertheless cannot ignore the obvious difference between the statutory provisions: section 8(a)(1) does not use the word "because" or include any intent requirement, while section 105(c)(1) unambiguously does. The additional language must serve some distinct purpose.

Of further relevance, section 8(a)(4) – a clearly separated sub-section within the same section of the NLRA – provides that, "It shall be an unfair labor practice for an employer to discharge or otherwise discriminate against an employee *because* he has filed charges or given testimony under this subchapter." 29 U.S.C. § 158(a)(4) (emphasis added). If the drafters of the Mine Act had indeed sought guidance from section 8(a) of the NLRA, they would have found a straightforward template for separating discharge and discrimination from interference and for ensuring that the intent requirement for the first two causes of action did not apply to the third. Instead, the Mine Act clearly groups "discharge," "discriminate," and "interfere" together and applies the same intent requirement to all three.

The Secretary also notes that the Commission has previously identified an identical purpose between section 8(a)(1) of the NLRA and section 105(c) of the Mine Act, namely "to provide legal protection against adverse action to employees who exercise rights afforded by law." Sec'y Br. 11 (citing *Sec'y of Labor on behalf of Johnson v. Jim Walters Resources, Inc.*, 18 FMSHRC 552, 558 (Apr. 1996) (finding subjective and objective evidence of an adverse action's chilling effect on the exercise of rights is relevant to the gravity criterion for a civil penalty assessment in discrimination proceedings)). The court agrees that the two provisions share an identical purpose when framed in that broad level of generality. However, the different language in the two statutes indicates that section 105(c) is aimed in a more targeted fashion at providing legal protection against adverse actions *motivated* by the exercise of rights afforded by law.

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[11] In exceptional circumstances involving disparate impact language in antidiscrimination statutes closely modeled after Title VII of the Civil Rights Act of 1964, courts have occasionally declined to give such effect to the words "because of," however this court does not find that section 105(c)(1) of the Mine Act fits into this exception. *See, e.g., Griggs v Duke Power Co.*, 401 U.S. 424 (1971); *Smith v. City of Jackson*, 544 U.S. 228 (2005), *Texas Dept. of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015).

One possible explanation for this difference is that section 8(a)(1) of the NLRA deals with labor organizing and negotiation over terms of employment and assumes a naturally adversarial relationship between employers and employees in that process. *Cf. Franks*, 36 FMSHRC at 2120 (Althen, Comm'r, dissenting). Therefore, intent may be inferred in employer actions that interfere with the right to organize or collectively bargain. In contrast, the Mine Act deals with miner health and safety and does not automatically assume that employers and employees always have adverse interests in the goal of promoting safety.

The Secretary, finding support in NLRA case law, also takes the position that he need not prove that a complainant "has been actually prevented or deterred from exercising rights" in order to "show that [the alleged] conduct tends to [unlawfully] interfere with the exercise of protected rights." Sec'y Br. 12 (citing *Flagstaff Med. Cir., Inc. v. NLRB*, 715 F.3d. 928, 930 (D.C. Cir. 2012); *NLRB v. Air Contact Transp., Inc.*, 403 F.3d 206, 212 (4th Circ. 2005); *NLRB v. Okun Bros. Shoe Store*, 825 F.2d 102, 107 (6th Cir. 1987)). This issue is relevant in this matter because the company claims that Hooper's alleged interference has not in fact affected Pepin's exercise of her protected rights. Resp't Br. 30-31.

In this limited context, the court agrees with the Secretary's use of applicable NLRA principles. The Secretary's position is not contradicted by the plain language of the statute, and the court recognizes that a complainant's perseverance in the face of efforts to deter his or her exercise of protected rights should not defeat any potential interference claims. Therefore, the court finds the Secretary's position regarding the lack of a need to prove that the exercise of protected rights was actually restricted to be reasonable and persuasive, under both a *Chevron* and *Skidmore* analysis. *See Skidmore* v *Swift & Co.*, 323 U.S. 134, 139 (1944) (deferring to an agency's interpretation of an ambiguous provision due to its power to persuade).

4. Commission Precedent

The Secretary argues that his proposed test is consistent with Commission precedent regarding interference, specifically in *Moses* and *Gray*. Regardless of whether or not this assertion is correct, the court does not find that Commission precedent compels the Secretary's interpretation.

Reading the statute broadly in *Moses*, the Commission articulated a totality of the circumstances test to assess whether certain statements or actions rise to the level of unlawful interference and affirmed an ALJ's finding of discrimination even when an operator was motivated by suspicion of a miner's protected activity rather than actual knowledge. *Moses*, 4 FMSHRC at 1479 n.8, 1480. It did not, however, suggest that such a test would be sufficient to establish a violation of section 105(c)(1) absent any showing of intent.[12]

[12] The Commission in *Gray* speculated that the totality of the circumstances test in *Moses* may have been derived from section 8(a)(1) of the NLRA and subsequent case law. *Gray*, 27 FMSHRC at 10. This finding is consistent with this court's approach in drawing from NLRA precedent in its interpretation of section 105(c)(1) where appropriate. Exactly how much of that case law should be imported into the Mine Act, however, is open to question.

Gray provides stronger support for the Secretary's claim that intent is not a necessary element of an interference claim. *See* discussion *supra* p. 13. However, it is important to keep in mind that the ALJ had analyzed the case under the *Pasula-Robinette* framework and had only addressed the issue of the operator's intent in the context of finding that the Secretary had failed to prove any adverse action. It was this finding alone that the Commission found to be in error, as the ALJ did not reach the issue of discriminatory motivation.

It is therefore unclear to this court whether the Commission in *Gray* found the ALJ to be in error for requiring the Secretary to prove any intent whatsoever (which is one possible interpretation of the opinion given the Commission's extended discussion of section 8(a)(1) of the NLRA), or whether it concluded the ALJ erred by finding that the alleged statements could not qualify as adverse actions unless the superintendent in the matter intended his statement as a literal threat on the complainant's life, rather than as a threat of reprisal more generally. The lack of a clearly articulated standard or holding from the decision regarding the role or relevance of intent in interference proceedings, and the extent to which a broad holding would have represented a significant development in the law, cautions against drawing too broad a conclusion from the language therein. Instead, the court reads the opinion to reaffirm the importance, first articulated in *Moses*, of looking at the totality of circumstances in interference allegations and focusing on the tendency of an employer's actions or statements to instill a fear of reprisal in the minds of its employees and chill the exercise of protected rights.

5. Additional Considerations

The court is troubled by the possible implications of the Secretary's proposed test in interference cases going forward. The test may even introduce uncertainty into the relatively settled area of discrimination law under the Mine Act.

Normally a discharge or suspension, or similar acts of serious discipline, would trigger the *Pasula-Robinette* analysis, whereby the Secretary would need to prove all of the elements mentioned previously: protected activity, adverse action, and discriminatory motivation. Then, not only may an operator rebut the Secretary's prima facie case and prevail by establishing non-discriminatory motives for its actions, but it may even avoid liability in spite of discriminatory motives through an affirmative defense. Additionally, other acts of discipline or reprisal can also trigger the *Pasula-Robinette* analysis, provided that they satisfy the *Burlington Northern* standard, which asks whether such actions are "harmful to the point that they could well dissuade a reasonable worker from [engaging in protected activity]," "depend[ing] upon the particular circumstances" surrounding the actions. *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930-31 (Aug. 2012) (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 57 (2006)). This language closely resembles the Secretary's proposed test for interference claims.[13] However, the *Burlington Northern* test still fits within the *Pasula-*

[13] The similarities between the Commission's adverse action test and interference test are not coincidental. The "interference" analysis in *Moses* spawned two divergent lines of cases and culminated in these two related tests. One line of cases (*Moses-Gray-Franks*) treats "interference" as a separate cause of action, with a distinct framework for analysis. *See Franks* , 36 FMSHRC 2088, 2103 n.22 (Young & Cohen, Comm'rs); *id.* at 2105-07 (Jordan & Nakamura,

Robinette framework, and therefore still requires proof of discriminatory motivation (along with protected activity) once an adverse action is established.

In contrast, under the Secretary's theory of section 105(c), alleging subtler acts of interference would trigger a far less demanding test, where the Secretary would no longer be required to prove any protected activity, adverse consequences for the complainant in his or her employment relationship, or improper motivation on the company's part. Further, even if the operator established a motive unrelated to the exercise of protected rights, the company would then need to prove that its justification for its action was substantial, business-related, and that its importance outweighed the harm caused to the exercise of protected rights—additional hurdles not present in the *Pasula-Robinette* analysis. The lack of a substantial business justification whose importance outweighs the interests of the protected activity may provide circumstantial evidence that an operator's proffered justification is merely pretextual. However, this is not the only factor or evidence that the court considers in evaluating an operator's true motivation. The court cannot see how any allegation that satisfied the traditional discrimination requirements would not likewise satisfy all of the elements of the Secretary's proposed interference test, whereas the reverse would not hold true in many instances.

In effect, under the Secretary's suggested test, the less severe of a disciplinary action that a complainant alleges, the lower the burden will be for establishing a section 105(c) violation. This could create a perverse incentive for a petitioner to recast every act of overt discrimination as one of the subtler forms of interference in order to obtain that lower burden, especially since many subtle acts that subject an employee to a detriment in his employment relationship may qualify as either acts of interference or adverse actions under the *Burlington Northern* standard.

Additionally many overt acts of discipline alleged to be discriminatory are often preceded or accompanied by acts or statements that may otherwise tend to interfere with the exercise of protected rights. For example, in *Franks*, three out of five Commissioners disagreed with the ALJ's finding that a company's suspension of its miners constituted unlawful discrimination under section 105(c) of the Act, but the Commission nonetheless affirmed the ALJ's ruling based in part on two Commissioners finding that the suspension and the company's interviews with its

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Comm'rs) (citing *Gray*, 27 FMSHRC at 8 n.6). Another line of cases (*Moses-Hecla Day-Pendley*) treats the "interference" analysis in *Moses* as a guide for deciding when actions other than "discharge" or "suspension" qualify as adverse actions for traditional discrimination claims. *See Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48, 1848 n.2 (Aug. 1984) (noting that when faced with actions outside of the "self-evident form[s] of adverse action, like discharge or suspension, . . . [the Commission] must examine closely the surrounding circumstances to determine the nature of this action.") (citing *Moses*, 4 FMSHRC at 1478); *see also Pendley*, 34 FMSHRC at 1930-31 (adopting the *Burlington Northern* adverse action test in large part due to its consistency with *Moses* and *Hecla-Day*). This has created, over time, no little confusion regarding exactly when the *Gray-Franks* interference test is appropriate and when the *Hecla Day-Pendley* discrimination test should be used instead. *See, e.g., McNary v. Alcoa World Alumina, Inc.*, 37 FMSHRC 2205 (Sept. 2015) (ALJ) (currently on appeal over whether the ALJ erred in analyzing the interference claims under the *Hecla Day-Pendley* adverse action test instead of the *Gray-Franks* interference test.)

miners leading up to the suspension interfered with their protected rights. *Franks*, 36 FMSHRC 2088. The court is unclear as to whether the complainants could have alleged interference, and therefore could have prevailed as they ultimately did, absent the allegation of "subtler acts" of coercive interrogation preceding the suspension. If the answer is no, this creates a problematic incentive to allege coercive operator statements or other subtler acts of interference alongside every allegation of traditional discrimination.[14] If the answer is yes, the court does not see why a complainant would ever again allege a suspension to be an act of discrimination, rather than an act of interference.

6. The Court's Interference Test

Based on the foregoing, the court holds that to prove an allegation of illegal interference under section 105(c)(1), the Secretary must show that (1) the Respondent's actions can be reasonably viewed, from the perspective of members of the protected class and under the totality of the circumstances, as tending to interfere with the exercise of protected rights,[15] and that (2) such actions were motivated by the exercise of protected rights.[16]

The respondent may rebut the Secretary's *prima facie* case by showing that its actions did not tend to interfere with the exercise of protected rights or that the actions were in no part motivated by the miner's protected activity.

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[14] The court recognizes that the alleged acts of interference preceding the suspension in *Franks* were serious and substantial. However, the plurality opinion finding interference did not specify that acts of interference must be any more serious and substantial than the acts that qualify as adverse actions under *Burlington Northern*. Were the Commission to provide clarification along those lines, the court would be less concerned about the potential for opportunistic pleading to avoid the additional hurdles of the *Pasula-Robinette* test.

[15] By focusing on the *tendency* to interfere with protected activity, the court adopts the Secretary's position that "it is not necessary to show that a miner has been actually prevented or deterred from exercising rights." Sec'y Br. 12. Further, the court's interference test does not focus on the type of employer decisions that necessarily subject a miner to an actual detriment in his or her employment relationship, such as discharge, suspension, or demotion. Thus, statements that could reasonably chill the exercise of protected rights may qualify as acts of interference even if the exercise of those rights has not been chilled and the particular complainant in a proceeding has suffered no detriment in his or her employment relationship.

[16] The court notes that while the *Pasula-Robinette* test prohibits retaliation against the complainant's actual, attempted, or suspected exercise of protected rights, the Secretary has urged the Commission to adopt an interference test that encompasses attempts to chill the exercise of rights going forward without any showing of protected activity. *See, e.g., Sec'y of Labor, on behalf of McGary v. The Marshall County Coal Co.*, 37 FMSHRC 2597 (Nov. 2015) (ALJ). The court takes no position on this issue, as the instant matter involves the actual exercise of protected activity.

If the operator is unable to rebut the miner's *prima facie* case, it may nevertheless defend itself affirmatively by demonstrating a legitimate and substantial reason whose importance outweighs the harm caused to the exercise of protected rights.

IV. APPLICATION OF THE COURT'S INTERFERENCE TEST

1. Actions Tended to Interfere with the Exercise of Protected Rights

Section 103(g) protects the anonymity of miners in making safety complaints and encourages complaints when miners have "reasonable grounds to believe" that a violation exists. 30 U.S.C. 813(g)(1). The court finds that Mindy Pepin engaged in protected activity when she filed an anonymous section 103(g) safety complaint with MSHA under a reasonable belief that a violation existed. The fact that the company's procedures did not deal with the possibility of a false positive on the ThorGuard system, and that Pepin did not receive a response when she filed multiple Take 5 complaints within the company raising the issue, supports the reasonableness of Pepin's belief. Tr. 58, 109-10, 118-19, 130-31.

The court further finds that Hooper's response to Pepin's protected activity tended to interfere with the exercise of protected rights. The court finds Pepin's account of the substance of her conversation with Tim Hooper in his office to be credible, and the statements Hooper made in that account would tend to instill within the mind of a reasonable person a fear of reprisal for exercising protected activity.

Unlike acts that the Commission has previously found to constitute interference, this matter does not involve persistent questioning over the course of multiple interactions, explicit threats, or attempts to isolate the complainant in an inherently coercive one on one setting. However, this matter does involve implicit threats of reprisal and intimidating behavior by a supervisor, which the Commission has noted takes on special significance given the supervisor's "ability to impact the employment relationship of [the complainant]." *Gray*, 27 FMSHRC at 8. Hooper's accusations that Pepin was using safety complaints to bottleneck production and that Pepin and Chad Filizetti were the ringleaders of a bottlenecking operation are examples of intimidating language directed against the exercise of protected rights. Tr. 35, 37, 66-68. His statement that his superiors in the back office were watching Pepin can also be reasonably viewed as a threat of reprisal or of employment discrimination. Tr. 37, 75-76.

In regard to the ready room incident, the court first notes that Hooper's decision to hand Pepin the results of the MSHA investigation might not be reasonably viewed as tending to interfere with the exercise of protected rights when taken in isolation. Rather, the decision could be viewed as a reasonable response to the concerns on Pepin's Take 5 cards. However, under the totality of the circumstances, given Hooper's subsequent statements in his office ("We all knew it was you that called MSHA," and "Do you know how many people I had to pull off of equipment to go in for your interview?"), the court's finding that Hooper's actions tended to interfere with protected rights encompasses the events in the ready room as well.[17] Tr. 34-35.

[17] The court however does not agree with the Secretary that Hooper's actions interfered with the rights of others seated in the ready room at the time. Sec'y Br. at 15. Hooper did not publicize

The company argues that Hooper's alleged acts of interference within his office would have never occurred had Pepin not followed him in there and instigated a confrontation. Resp't Br. 28, 31. The court agrees with this assessment. The company also argues that Pepin's behavior during the meeting was likely much more "agitated" and "challenging" than how she portrayed it in her testimony, given other witnesses' descriptions of her normal behavior, while Hooper's demeanor was likely less "threatening." Resp't Br. 29-30. Be that as it may, Hooper's statements were sufficiently threatening in context that Hooper's and Pepin's respective demeanors and the alleged provocation for the statements are not decisive factors in the court's analysis of their tendency to interfere with protected rights.

The Secretary alleges that Hooper's statements to Filizetti, privately, and to Hooper's crew during a toolbox meeting with Pepin out of the room also affected other miners. Sec'y Br. 15. Whether actions directed wholly toward miners other than the complainant are relevant to that complainant's interference claim need not be decided at this juncture, as the court does not find that those statements or activities tended to interfere with protected rights regardless.

There is some discrepancy between Hooper and Filizetti about whether Hooper discussed the company's falling stock prices and financial condition in the toolbox meeting with the entire crew or only in the private conversation between the two of them after Pepin left Hooper's office. Tr. 77, 144, 153. Although both witnesses had difficulties with their recollection in their testimony, the court credits Hooper's testimony that he only discussed falling stock prices with Filizetti in his office, and only because Filizetti had expressed interest in the subject previously. Tr. 153. Given this context that Filizetti would have understood, the court does not find that this statement would tend to interfere with Filizetti's protected activity, or Pepin's protected activity indirectly.

Similarly, the court does not find that the presentation of MSHA's negative findings in Hooper's toolbox meeting constituted interference. The court credits Keranen's and Baril's testimony that the company often communicated MSHA negative findings with the crew during toolbox meetings. Tr. 124, 171. While Hooper himself may not have presented negative findings in a toolbox meeting prior to this incident, a reasonable person at the mine listening to the presentation would not necessarily draw an inference that Hooper was motivated by animus toward Pepin, since Hooper did not mention Pepin at the time nor use the findings to discourage safety complaints. Tr. 148-49.

In summary, the court finds that Hooper's statements to Pepin in his office and his decision to hand Pepin MSHA's negative findings from her 103(g) complaint tended to interfere with her exercise of protected rights, because they carried with them implicit threats of reprisal. However, the court does not find that Hooper's statements to Filizetti in private or to the crew during his toolbox meeting violated section 105(c) of the Act, because under the totality of

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his message for Pepin to anyone else in the room, and there is insufficient evidence in the record to find that anyone else in the room knew or could have known what Hooper's actions meant. Tr. 57.

circumstances a reasonable person in the miners' positions would not interpret them as threats or hostile gestures.

2. Actions Were Motivated by the Exercise of Protected Rights

With traditional discrimination claims, a complainant will often have to rely on circumstantial evidence in order to prove that an adverse action was motivated by protected activity, since "direct evidence of motivation is rarely encountered." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has clarified that circumstantial evidence may include: (1) knowledge of protected activity, (2) hostility or animus toward the protected activity, (3) coincidence in time between the protected activity and the adverse actions and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510. The court finds such evidence to be equally useful in analyzing whether the actions that give rise to an interference claim were intended to interfere with protected activity.

The court first finds that Hooper had at least a strong suspicion that Pepin had filed a 103(g) MSHA complaint based on his knowledge that she had filed nearly identical Take 5 safety complaints within the company. Tr. 147. While Hooper could not be sure that the MSHA complaint came from Pepin (rather than a United Steelworkers safety committee member), he admitted that the thought crossed his mind, and his supervisor Joe Garnsey admitted that he assumed she had. Tr. 150; Resp't Ex. 19 at 11-16.

Hooper also expressed hostility and animus toward the protected activity both in his statements to Pepin in his office and at the hearing during cross-examination. Several of Hooper's statements that form the basis of Pepin's interference claim also provide evidence of Hooper's hostility toward protected activity. These include accusing Pepin of using safety complaints to bottleneck production and expressing significant frustration at having to pull miners away from production to participate in the MSHA investigation. Tr. 34-5, 37, 66-68. At hearing, Hooper also complained about frivolous complaints to MSHA, and suggested that all complaints should go through the company or safety committee first in order to determine whether or not they are frivolous. Tr. 151. The court finds these statements also indicate animus and hostility toward 103(g) complaints and those who make them, in this case Pepin.

The coincidence in time between Pepin's protected activity and the alleged interference is a less relevant factor in this analysis, since the company contends that the alleged interference was a response to Pepin's Take 5 complaints, which were filed contemporaneously with her 103(g) MSHA complaint. Tr. 136-37. Additionally, there may have been disparate treatment in the way the company responded to Pepin's Take 5 complaints by using MSHA negative findings, as there is sufficient evidence to suggest that the company did not normally respond to employees about their Take 5 complaints at all. Tr. 58-59. However, this disparate treatment can be explained by the persistence with which Pepin raised concerns about the ThorGuard issue. Tr. 135-36.

There are two additional considerations for the court in this matter. First, the heart of Pepin's interference claims is contained in her confrontation with Hooper in his office. That

confrontation never would have happened if she had not followed him into his office. Second, Hooper's temper, Pepin's adamant questioning, and past disciplinary "run-ins" between the two likely contributed to Hooper's outbursts during the meeting.

Taken together, these findings lead to the conclusion that the proven acts of interference in the proceeding were not premeditated. However, the court concludes that they were motivated by Hooper's animus toward Pepin's exercise of protected rights, which boiled to the surface during a heated exchange, and they were intended in that moment to deter Pepin from filing safety complaints with MSHA in the future. The court finds this sufficient to establish intent to interfere with protected activity.

3. Actions Had No Legitimate and Substantial Business Justification

The court finds that Hooper could not have had any legitimate business justification for the statements he made to Pepin in his office and that his proffered rationale for presenting Pepin with the MSHA negative findings was not narrowly tailored to achieve the company's interests of adequately responding to Pepin's Take 5 complaints without doing undue harm to her right to make anonymous safety complaints with MSHA. Empire Iron could have achieved the same purpose by simply explaining the findings of its own investigation to Pepin after she filed her Take 5 cards. Alternatively, the company could have posted the MSHA negative findings in the ready room as it normally did. Tr. 57. This approach would have protected Pepin's anonymity and would not have created the perception that she was being singled out for reprisal because she exercised her 103(g) rights.

V. REMEDIES

1. Civil Penalty

The court has found a violation and it must assess a civil penalty taking into account the statutory civil penalty criteria, including the size of the operator, its history of previous violations, the effect of the penalty on the operator's ability to continue in business, the operator's negligence, the gravity of the violation, and the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of a violation. 30 U.S.C. § 820(i).

The Secretary has proposed a $20,000.00 civil penalty. The Secretary relies primarily on the "high negligence" and "substantial" gravity of Hooper's conduct in justifying the penalty. Sec'y Br. 18. Empire Iron argues that the Secretary's assessment lacks evidentiary foundation and that the company evidenced no animus toward protected activity. Resp't Br. 33, 35.

The court first notes that the parties stipulated to the fact that Empire Mine is large and that the assessed penalty would not impact the mine's ability to continue in business. Stip. 5, 18. Additionally, the mine's history of assessed violations admitted into evidence showed no history of 105(c) violations. Sec'y Ex. 7.

In regard to the company's negligence, the court has found that Hooper intentionally interfered with Pepin's protected rights. This intent establishes an elevated level of negligence, and that intent is imputed to the company. However, the court has also found that Hooper's interference was not premeditated. Additionally, there was scant evidence at hearing, outside of Hooper's own comments during his confrontation with Pepin, that other officials at the company displayed animus toward Pepin's protected activity or that backroom management officials were actually watching Pepin and plotting reprisal as Hooper claimed. Hooper's interference did not reflect a concerted effort by multiple agents of Empire Iron to interfere with Pepin's protected rights.[18] Indeed, one of those backroom officials Hooper referenced was Keranen, a childhood friend of Pepin's, who gave serious attention to her complaints regarding Hooper and offered to formally investigate her allegations against him – which the court also considers a good faith effort to remedy the violation. Tr. 169-70, 174; Resp't Ex. 5. These factors mitigate Empire Iron's level of negligence.

The court finds that the gravity of the violation was serious. The right to make anonymous safety complaints to MSHA is an important and necessary one. Therefore, the expression of animus toward those rights and efforts to chill their exercise must not be tolerated. However, different actions have varying degrees of chilling effect on the exercise of rights. An oral confrontation where a supervisor expresses animus regarding a miner's exercise of protected rights may not have the same effect as a discharge or suspension or even an overt threat of dismissal. As indicated earlier, the Secretary did not allege persistent questioning over multiple interactions, explicit threats, or attempts to isolate the complainant in an inherently coercive one on one setting. The record also does not indicate that Hooper's actions have had any effect on the filing of MSHA safety complaints, which the court finds slightly relevant for its gravity determination. Resp't Ex. 17. Furthermore, the court has found that Hooper did not widely publicize his hostility regarding Pepin's protected activity, which limited the number of persons affected by his act of interference. Consequently, the court finds the gravity of the violation to be lower than alleged.

Given these findings, the court assesses a civil penalty of $8,000.00 for the violation.

2. Other Relief Requested

As Pepin was not terminated, suspended, or officially disciplined, there is no back pay owed. Pepin instead seeks unspecified compensation for pain, suffering, and emotional distress caused by the company's interference. The Secretary acknowledges that the "Commission has never specifically decided whether emotional distress damages may be awarded under the Act." Sec'y Br. 16. And, the complainant acknowledged that she did not seek or incur expenses for

[18] The court observes that this factor may often distinguish interference from discrimination claims. The adverse actions in a typical discrimination proceeding, including discharge and suspension, often require multiple agents to sign off on the decision giving rise to a cause of action and therefore tend to reflect a level of deliberation and coordination (or at least a systemic failure of oversight and supervision) that may not be present in an interference case stemming from the words of a single supervisor in the heat of the moment. The court believes that the civil penalties in these matters should reflect this distinction.

treatment or medication related to her distress. Tr. 58. However, the Secretary argues that emotional distress damages are nonetheless necessary to fulfill the Act's remedial purpose of making the complaining party whole. Sec'y Br. 16.

The court expresses no opinion as to whether emotional distress damages may ever be awarded under the Act, absent any concrete injury or financial loss, but finds that this case does not present the sort of exceptional circumstances that might merit such an award. Pepin may have been justifiably upset by her encounter with Hooper, but being upset by workplace disputes is part and parcel of the workplace experience, and there is nothing in the record to indicate her encounter with Hooper caused her to seek medical and/or psychological assistance, or that it interfered with her normal daily activities. Pepin also alleged that the violation had strained her relationship with her fiancé, Chad Filizetti, and caused them to break their engagement. However, Pepin and Filizetti were again engaged at the time of the hearing. Tr. 33, 46, 55-56, 87. Given these facts, the court denies the request for emotional distress damages.

In regard to the Secretary's request for Empire Iron to have its Mine Superintendent (a position that the company alleges does not exist at its mine) read a notice to all miners at Empire Mine acknowledging the violation and reiterating miners' rights, the court deems it sufficient for deterrence purposes to order the company to post a notice to that effect to the mine bulletin board, for a period of one year.

ORDER

Based on the above, the court finds that Respondent violated section 105(c) of the Act by unlawfully interfering with the protected activity of Pepin. It is hereby **ORDERED** that Empire Iron cease and desist from the unlawful interference that forms the basis of the interference violation. It is further **ORDERED** that within 30 days of the date of this decision Empire Iron post on the mine bulletin board, for a period of one year, a written notice stating that: (1) a section 105(c) complaint was filed against Empire Iron based on the above-described conduct; (2) Empire Iron has been found to violate section 105(c); (3) miners have a protected right to communicate safety and health concerns to Empire Iron management; (4) miners have the protected right to confidentially and independently communicate safety and health concerns to MSHA; and (5) mine management will not interfere with or engage in discrimination based on the exercise of those protected rights. Finally, within 30 days of the date of this decision, Respondent is hereby **ORDERED** to pay a civil penalty of $8,000.00.[19]

David F. Barbour
David F. Barbour
Administrative Law Judge

Distribution:

[19] Payment should be sent to: Mine Safety and Health Administration, U.S. Department of Labor, Payment Office, P.O. Box 790390, St. Louis, MO 63179-0390.

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