FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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SECRETARY OF LABOR MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), on behalf of RICHARD B. HARRISON, Complainant, v. CONSOLIDATION COAL CO.[1], Respondent.	TEMPORARY REINSTATEMENT PROCEEDING Docket No. WEVA 2015-811-D MSHA Case No.: MORG-CD 2015-20 Mine: Loveridge #22 Mine ID: 46-01433

DECISION AND ORDER REINSTATING RICHARD B. HARRISON

Appearances: Jordana L. Greenwald, Esq., Office of the Solicitor, U.S. Department of Labor, Philadelphia, PA, Representing the Secretary of Labor

Philip K. Kontul, Esq. & Michael D. Glass, Esq., Ogletree, Deakins, Smoak, Nash & Stewart P.C., Pittsburgh, PA, Representing Respondent

Before: Judge Harner

On June 9, 2015, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 ("Act"), 30 U.S.C. §801, *et. seq.*, and 29 C.F.R. §2700.45, the Secretary of Labor ("Secretary") filed an Application for Temporary Reinstatement of miner Richard B. Harrison ("Harrison" or "Complainant") to his former position with Consolidation Coal Co., ("Consolidation" or "Respondent") at Loveridge #22 Mine pending final hearing and disposition of the case.

The application followed a Discrimination Complaint filed by Harrison on May 6, 2015, that alleged, in effect, that his termination was motivated by his protected activity. The Secretary represents that this Complaint was not frivolously brought and requests an Order directing Respondent to reinstate Harrison to his former position as a beltman.

[1] Respondent may be in the process of changing its name to "Murray American Energy Inc." and/or "Marion County Coal Co." and changing the name of the mine to "Marion Mine."

Respondent filed a timely motion requesting a hearing regarding this application on June 22, 2015, wherein it summarized its position. A hearing was held in Pittsburgh, PA on June 26, 2015.[2] The Secretary presented the testimony of the Complainant. Respondent had the opportunity to cross-examine the Complainant and present testimony and documentary evidence in support of its position. 29 C.F.R. §2700.45(d).

For the reasons set forth below, I grant the application and order Consolidation Coal and/or its successors to temporarily reinstate Harrison.

Discussion of Relevant Law

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners "to play an active part in the enforcement of the [Mine Act]" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977,* at 623 (1978).

Congress created the temporary reinstatement as "an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978).

Temporary Reinstatement is a preliminary proceeding, and narrow in scope. As such, neither the judge nor the Commission is to resolve conflicts in testimony at this stage of the case. *Sec'y of Labor on behalf of Albu v. Chicopee Coal Co.*, 21 FMSHRC 717, 719 (July 1999). The substantial evidence standard applies.[3] *Sec'y of Labor on behalf of Peters v. Thunder Basin Coal Co.*, 15 FMSHRC 2425, 2426 (Dec. 1993). A temporary reinstatement hearing is held for the purpose of determining "whether the evidence mustered by the miners to date established that their complaints are non-frivolous, not whether there is sufficient evidence of discrimination to justify permanent reinstatement." *Jim Walter Resources,* 920 F.2d 738, 744 (11th Cir. 1990).

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[2] Under Commission Rule 45, a Temporary Reinstatement hearing must be held within 10 calendar days of an operator's request. 29 C.F.R. §2700.45(c).

[3] "Substantial evidence" means "such relevant evidence as a reliable mind might accept as adequate to support [the judge's] conclusion." *Rochester & Pittsburgh Coal Co.,* 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. V. NLRB*, 305 U.S. 197, 229 (1938)).

In adopting section 105(c), Congress indicated that a complaint is not frivolously brought if it "appears to have merit." S. Rep. No. 181, 95th Cong., 1st Sess. 36-37 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624-25 (1978). In addition to Congress' "appears to have merit" standard, the Commission and the courts have also equated "not frivolously brought" to "reasonable cause to believe" and "not insubstantial." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 9 FMSHRC 1305, 1306 (Aug. 1987), *aff'd*, 920 F.2d 738, 747 & n.9 (11th Cir. 1990). "Courts have recognized that establishing 'reasonable cause to believe' that a violation of the statute has occurred is a 'relatively insubstantial' burden." *Sec'y of Labor on behalf of Ward v. Argus Energy WV, LLC*, 2012 WL 4026641, *3 (Aug. 2012) citing *Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001

In order to establish a *prima facie* case of discrimination under section 105(c) of the Act, a complaining miner must establish (1) that he engaged in protected activity and (2) that the adverse action complained of was motivated in any part by that activity. *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 (April 1981).

In the instant matter, the Secretary and Harrison need not prove a *prima facie* case of discrimination with all of the elements required at the higher evidentiary standard needed for a decision on the merits. Rather, the same analytical framework is followed within the "reasonable cause to believe" standard. Thus, there must be "substantial evidence" of both the applicant's protected activity and a nexus between the protected activity and the alleged discrimination. To establish the nexus, the Commission has identified these indications of discriminatory intent: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; and (3) coincidence in time between the protected activity and the adverse action. *Sec'y of Labor on behalf of Lige Williamson v. CAM Mining, LLC,* 31 FMSHRC 1085, 1089 (Oct. 2009). The Commission has acknowledged that it is often difficult to establish a "motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Sec'y of Labor on behalf of Baier v. Durango Gravel,* 21 FMSHRC 953, 957 (Sept.1999). The Commission has further considered disparate treatment of the miner in analyzing the nexus requirement. *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The Petition for Temporary Reinstatement

On May 6, 2015, Harrison executed a Summary of Discriminatory Action, which was filed with his Discrimination Complaint. In this statement he alleged the following:

> I am a miner who feels that I have been wrongfully terminated based upon a previous 105(c) that was filed on my behalf, which I withdrew due to a settlement being reached. In the settlement an agreement was made that these records were going to be removed from my file. Recently these records were used against me in an arbitration. I believe this was a form of retaliation.

Application for Temporary Reinstatement at Exhibit B, p. 2.

The Secretary also submitted with the Application the June 8, 2015 Declaration of Jeffrey C. Maxwell, a Special Investigator employed by the Mine Safety and Health Administration ("MSHA"). Maxwell made the following findings and conclusions:

2) As part of my responsibilities, I investigate claims of discrimination by miners filed under Section 105(c) of the Mine Act. In this capacity, I have reviewed and gathered information as part of an ongoing investigation of the discrimination claim of Richard B. Harrison filed against Consolidation Coal Company ("CCC"). My review of the information gathered in this investigation disclosed the following:

   a) Mr. Harrison was employed as a beltman at CCC's Loveridge #22 Mine.

   b) Mr. Harrison filed a Section 105(c) complaint in 2008 concerning an "unsafe act" slip placed in his personnel file at that time. Mr. Harrison withdrew his 2008 complaint as part of the resolution of his grievance concerning the same "unsafe act" slip. CCC agreed, as part of the resolution of the grievance, to remove the "unsafe act" slip from Mr. Harrison's record.

   c) Mr. Harrison raised concerns with management about the safety-related impacts of a bonus plan proposed and implemented by management in January 2015.

   d) Mr. Harrison further objected to the bonus plan by voiding and later returning his check to CCC. Mr. Harrison was angry about the company's decision to implement the plan and about the impact that he believed the plan would have on safety. In addition to writing "VOID VOID" on the check he received on February 6, 2015, he also wrote "KISS MY ASS, BOB."

   e) The company took no action at the time Mr. Harrison returned his check. Mr. Harrison heard nothing further until March 7, 2015.

   f) The company learned of Mr. Harrison's check only because they reviewed all returned checks on March 6 or 7, 2015, after discovering that another employee wrote a message on a returned check.

   g) On March 13, 2015, Mr. Harrison was suspended with intent to discharge for allegedly violating Employee Rule of Conduct No. 4, which provides that

> In order to minimize the occasions for discipline or discharge, each employee should avoid conduct which violates reasonable standards of an employer-employee relationship

including:

> ...
>
> 4. Insubordination (refusal or failure to perform work assigned or to comply with supervisory direction) or use of profane, obscene, abusive, or threatening language or conduct toward subordinates, fellow employees, or officials of the company.

h) Mr. Harrison alleges that Employee Rule of Conduct No. 4 is not consistently enforced at the Mine.

i) Mr. Harrison, who was represented by the UMWA in his dealings with CCC management, grieved his termination and requested an arbitration hearing.

j) During the arbitration hearing held on April 3, 2015, CCC management presented the 2008 "unsafe act" slip as part of Mr. Harrison's disciplinary history in support of his termination.

k) On April 27, 2015, the arbitrator issued a decision upholding Mr. Harrison's termination. The decision relied, at least in part, on Mr. Harrison's disciplinary record.

3) Based upon the information available as the result of the special investigation being conducted in these matters, I have concluded that there is reasonable cause to believe that Mr. Harrison was discharged from his employment with CCC because he filed a prior Section 105(c) complaint and because he protested the implementation of the bonus plan. There is, therefore, reasonable cause to believe that Mr. Harrison's termination violated Section 105(c) of the Mine Act, and the complaint filed by Mr. Harrison was not frivolous.

Application for Temporary Reinstatement at Exhibit A, p. 1-3. The Secretary cited this declaration as a basis for the formal request for temporary reinstatement. *Application for Temporary Reinstatement* at 4.

Joint Stipulations:

At hearing, the parties orally submitted the following Joint Stipulations:

1) At all relevant times, Consolidation Coal Company was the operator of Loveridge #22 Mine near Marion County, West Virginia.
2) Loveridge #22 Mine is a mine as that term is defined in Section 3(h) of the Mine Act, 30 U.S.C. Section 802(h).

3) At all relevant times, products of Loveridge #22 Mine enter commerce or the operations or products thereof affected commerce within the meaning and scope of Section 4 of the Mine Act, 30 U.S.C. Section 803.
4) Consolidation Coal Company is an operator as that term is defined in Section 3(d) of the Mine Act, 30 U.S.C. Section 802(d).
5) Richard B. Harrison worked at Loveridge #22 Mine and is a miner within the meaning of Section 3(g) of the Mine Act, 30 U.S.C. 802(g).
6) Consolidation Coal Company is subject to the jurisdiction of the Federal Mine Safety and Health Review Commission.
7) The presiding administrative law judge has authority to hear this case and issue a decision regarding this case.
8) Marion County Coal Company is a successor in interest to Consolidation Coal Company.

Tr. 6-7.[4]

Summary of Testimony[5]

Richard B. Harrison was a general inside worker at the Marion County Coal Mine[6] at the Sugar Run Portal on A shift before he was terminated. Tr. 17. He had worked in this position for approximately three years. Tr. 17. Prior to this position, he worked at the mine as a regular bolter, on belt crew, and as a precision mason, for a total of 10 years. Tr. 18. Prior to working at Loveridge #22 Mine, Harrison worked at Sago Mine as a general contractor for one year. Tr. 18.

Murray Energy purchased the instant mine from Consol Energy Inc. in December 2013. Tr. 21. Harrison and the other miners at Loveride #22 were represented by the United Mine Workers of America ("UMWA") prior to the purchase, and the UMWA has continued to represent the miners at the mine. Tr. 21.

Harrison has served as the union walk-around for 9 years, and was previously on the union safety committee for six months. Tr. 19. As a walk-around, Harrison would accompany inspectors on inspections. Tr. 19. As a result of this position, Harrison testified as a witness for MSHA in two court proceedings, one in 2006 and one in 2009. Tr. 19-20.

After Murray Energy purchased the mine, CEO Bob Murray had an initial meeting for every shift where he informed the miners that he reviewed previous violations that ended up in

[4] Hereinafter, the transcript of the proceeding shall be referred to as "Tr." The Secretary's exhibits shall be referred to as "GX" followed by the number. The Respondent's exhibits shall be referred to as "RX" followed by the number.

[5] As Respondent did not call any witnesses, the only testimonial evidence presented at hearing was that of the discriminatee.

[6] This is apparently what the Respondent currently calls the Loveridge #22 Mine.

court, and knew how much those violations cost the company and who served as witnesses. Tr. 22-23. Harrison understood these statements to mean that Murray and other mine management were aware of his court appearances on behalf of MSHA, and that he had cost the company money. Tr. 22-23.

In January 2015, the mine instituted a new production-based bonus program, wherein miners' bonus checks would be tied to the amount of coal extracted. Tr. 26-27. This was after UMWA Local 9909 came to an agreement with management that it would hold a vote on the bonus plan to determine if its members approved of the Respondent's proposed plan. Tr. 24-25. The vote was held in January, and the members voted to turn down the bonus plan. Tr. 25.

Respondent nevertheless proceeded with implementation of the new bonus plan, and miners were told that if they did not agree with the bonus plan, they had the option to opt out by writing "void" on the first bonus check and returning it. Tr. 24-26, 30-31. Harrison was not aware of any other means of opting out of the plan. Tr. 26. Shortly before the checks were issued, Harrison explained his safety concerns about the bonus plan to the Sugar Run Portal superintendent John Larry and the portal safety director Wayne Conaway. Tr. 46-48. They responded to Harrison's safety concerns, saying, "Why would you complain about free money? Take the money and run." Tr. 48.

Harrison received his bonus check dated February 6, 2015 in early February. Tr. 23-24. The check was for $11.58, and was signed by Robert E. Murray. GX-1. Harrison wrote "VOID VOID KISS MY ASS BOB," and returned the check to Sonya Singleton in the payroll office the day after he received it. Tr. 24, 31, 33; GX-1.

Harrison opted out of the bonus plan because he felt that the way the program was set up placed the miners' "safety for sale because...the more coal you got, the bigger the bonus." Tr. 26. Harrison testified that he had discussions with other miners and many agreed with him. Tr. 27. Other miners returned their bonus checks.[7] Tr. 68, 72. Harrison knew that another miner named Jesse Stolzenfels wrote on his check, "Eat Shit, Bob," and was subsequently terminated. Tr. 68-69, 104.

Harrison testified that he wrote the statement on the check because he had recently experienced various serious health and family issues, which led to a great deal of stress. Tr. 28-29. Harrison and others believed that the bonus checks constituted a safety issue, and testified that he felt "Mr. Murray felt it was okay to go ahead and override our vote." Tr. 28-29. Harrison believed that the company would know that his returned check was a safety complaint because he had spoken with several company bosses about the safety implications of the bonus plan. Tr. 67.

Harrison testified that safety at the mine has "dropped tremendously." Tr. 29. He described increased citations, especially for problems in rock dusting. Tr. 29-30. Harrison explained that he believed that the production-based bonus program would make matters worse,

[7] According to Respondent's counsel, dozens of other miners returned their bonus checks. Tr. 68, 72.

leading miners to conclude "why take the time to rock dust. You're taking my money away from me. We need to get in the coal." Tr. 29-30. Harrison explained that the safety implications of the bonus plan upset him. Tr. 103. "It all comes back to the safety issue. If you don't have safety, you're dead in the coal mine. That's all there is to it." Tr. 103.

Harrison posted a picture of his check with the written statement on UMWA Local 9909's Facebook page. Tr. 69, 98. The Local's Facebook page was private and used by miners to talk about work matters. Tr. 99. As part of an ongoing discussion about the bonus plan on the Facebook page, other miners were posting photos of their voided checks to show their disagreement with the bonus plan. Tr. 69, 99-100.

On March 6, management first confronted Harrison about his voided check. Tr. 33-34. At that time, Harrison did not admit to management that he wrote "Kiss My Ass Bob" on the check because he was scared of losing his job and health insurance.[8] Tr. 34, 73-75. He believed that by fighting for miners' safety, his job was at risk. Tr. 34. Mine management did an investigation to find out who wrote on the check. Tr. 35.

Respondent brought Harrison back for another meeting on March 13 with Mr. Hudson and Pam Layton from Human Resources, and a union representative. Tr. 35-36, 41. They explained that they could not find the person who wrote on the check, and that he was going to be terminated. Tr. 35-36, 39. The only matter discussed during this meeting was the check. Tr. 40-41. On that date, Harrison was issued a letter explaining the suspension with intent to discharge. Tr. 39, 40; RX-3. The letter stated that the reason for the action was Harrison's writing "Kiss My Ass Bob" in violation of Conduct Rule No. 4, which defines insubordination and mentions the use of profane language. RX-3.

On the following day, on March 14, Harrison had his 24-48 hour meeting.[9] At this meeting on March 14, Harrison again denied writing on the check. Tr. 75. At this meeting, it came out that a fellow miner named Tim Cox would corroborate that Harrison did not write the phrase on the check. Tr. 76-77. During this meeting, Respondent officials asked Harrison why he posted the check on Facebook, and he responded that he thought it was funny. Tr. 69.

A day or two after the 24-48 hour meeting, Harrison admitted to the union representative that he had written "Kiss My Ass Bob" on the check. Tr. 78-79. He and the union representative then went to the portal to meet with Mr. Hudson from the company and Harrison admitted to Hudson that he wrote the statement on the check, explained why he did so, why he originally denied it, and apologized for lying. Tr. 36-41, 46, 78-80. He explained that "after ten years being on the walk-around, being in the hole, seeing the violations that they're getting, they were basically putting our safety for sale." Tr. 46. Hudson told Harrison that his admission will count in his favor. Tr. 80.

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[8] There was some inconsistency regarding the dates of the March meetings. The first meeting took place on a date between March 6-8. Tr. 33-34, 73-75. The next meeting took place on either March 12 or 13. Tr. 35-36, 73-75.

[9] According to the contract, a terminated employee has the right to a meeting within 24 hours of a termination. This meeting is referred to as the "24-48 hour meeting." Tr. 37.

Harrison requested arbitration. Tr. 41. At the arbitration hearing, Respondent presented into evidence the unsafe work act slip from 2008. Tr. 42. Harrison was surprised because the grievance settlement agreement required the company to remove the unsafe work slip from Harrison's file in exchange for Harrison withdrawing his 105(c) complaint. Tr. 42; GX-2. Prior to seeing the slip at the arbitration, Harrison was not aware that it was still in his file. Tr. 43.

Pam Layton had filled out the grievance settlement in 2008, which stated "the unsafe slip will be removed from the file for the employee." Tr. 45; GX-2. At the arbitration, Layton said she did not know about the 105(c) and the agreement to remove the slip from his file. Tr. 49-50. Layton took a leading role in Harrison's termination. Tr. 45. She was present in all the meetings and was involved in the decision to terminate Harrison. Tr. 45-46.

The arbitrator's award notes that Harrison does not have a spotless record, but it does not mention the 2008 incident explicitly. Tr. 54-55; GX-3, 7. Other than the unsafe act slip, the company mentioned Harrison's participation in the absentee plan for his kidney problems. Tr. 55. They also mentioned a grievance he filed concerning the company's denial of Harrison's request to have a union representative present during a drug test. Tr. 57. There was no other evidence submitted at the arbitration about disciplinary action, and Harrison received no other disciplinary action at the mine that the arbitrator could have been referencing. Tr. 55-58.

Contentions of the Parties

The Secretary argued at hearing that Harrison engaged in at least three types of protected activities: (1) Harrison filed a Section 105(c) complaint in 2008 for an unsafe act allegation that was made and placed in his personnel file. As part of a settlement, Harrison withdrew his 105(c) complaint and the company agreed to remove the slip from his personnel file. Tr. 10-11; (2) Harrison has served as a walk-around with inspectors, and has testified in two Federal Mine Safety & Health Review Commission ("FMSHRC") proceedings concerning safety issues; and (3) Harrison returned a bonus check and wrote a message that included a profane term on it, because he believed the bonus plan put miners' safety at risk. Tr. 12. The Secretary argued that the return of the bonus check was part of an ongoing series of concerns that were voiced by both Harrison and the union to management about the bonus plan. Tr. 12.

The Respondent did not contest that an adverse employment action had occurred, but rather argued that Harrison's statement on the check, as well as his subsequent denials, constituted a legitimate reason for his termination. Tr. 14. Furthermore, the Respondent argued that the arbitration decision did not cite to the 2008 safety issue. Tr. 16.

Findings and conclusions

Protected Activity and Adverse Employment Action

Harrison was fired on March 14, 2015, and none of the parties argued that this does not constitute an adverse employment action. According to the Act and well-settled Commission precedent, suffering a discharge or a demotion is an adverse employment action. 30 USC § 815(c)(1); *see also Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1478 (Aug. 1982), aff'd, 770

F.2d 168 (6th Cir. 1985). Therefore, the main issues in this case involve whether Harrison engaged in protected activities, and whether a nexus exists between his protected activities and the termination of his employment.

As discussed *supra*, to obtain a temporary reinstatement a miner must raise **a non-frivolous claim** that he engaged in protected activity with a connection, or nexus, to an adverse employment action.

Under the Act, protected activity includes filing or making a complaint of an alleged danger, or safety or health violation, instituting any proceeding under the Act, testifying in any such proceeding, or exercising any statutory right afforded by the Act. *See* 30 U.S.C. § 815(c)(1); *See also 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). According to the legislative history:

> The Committee intends that the scope of the protected activities be broadly interpreted by the Secretary, and intends it to include not only the filing of complaints seeking inspection... or the participation in mine inspections... but also the refusal to work in conditions which are believed to be unsafe or unhealthful and the refusal to comply with orders which are violative of the Act or any standard promulgated thereunder, or the participation by a miner or his representative in any administrative and judicial proceeding under the Act.

(S. Rep. No. 181, 95th Cong., 1st Sess. 35-36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong. 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* (1978). Further, "the listing of protected rights contained in section [105(c)(1)] is intended to be illustrative and not exclusive." *Id.*

In the instant case, the Secretary argues that Harrison engaged in at least three types of protected activities: filing a 105(c) complaint in 2008, testifying at FMSHRC proceedings on behalf of MSHA in 2006 and 2009, and making safety complaints concerning the bonus plan in 2015. With respect to protected activity, the Respondent argued that Harrison's writing "Kiss My Ass Bob" on the bonus check was not protected and provided legitimate cause for his termination.

Harrison's 2008 filing of a 105(c) complaint, as well as his participation at FMSHRC proceedings in 2006 and 2009, are clearly protected activities. Indeed, these activities are specifically enumerated in the Act as protected activities. See 30 U.S.C. § 815(c)(1).

Safety complaints made by Harrison concerning the company's bonus plan also constitute protected activity. Harrison made clear in his testimony that his objections to the bonus plan were based on the safety implications of the program. Tr. 26-29, 46-48. Prior to the implementation of the plan, Harrison spoke with various company bosses about his safety concerns with the plan. Tr. 67. Harrison testified that he voted against the bonus plan because he feared that it would diminish safety at the mine. Tr. 24-25. Then, right before the checks were issued, Harrison had conversations with the portal superintendent, John Larry, and the portal

safety director, Wayne Conway, explaining his safety concerns with Respondent's bonus plan. Tr. 48.

When the checks were issued in spite of Harrison's and other miners' serious safety concerns, Harrison protested by way of the only means available to him. The miners were told that if they wanted to opt out of the bonus program, they were to write "void" on the check and return it to the company. Tr. 24-26, 30-31. This was precisely what Harrison did. Tr. 24. Harrison's further written statement, "Kiss My Ass Bob," does not transform Harrison's protected activity in voicing a safety concern into unprotected activity because of the use of a swear word. Indeed, his statement on the check appears to emphasize his frustration with the bonus program that was implemented despite the fact that the union voted against the plan.

It should first be noted that though Harrison did not explicitly reference his safety objections to the bonus plan on the check, his previously voiced safety concerns would have made the reasons for his actions immediately apparent to Respondent. Harrison's writing and return of the check was part of an ongoing conversation about the safety implications of the bonus program. Indeed, to paraphrase Harrison's supervisors, why else would anyone turn down free money? The answer, as Harrison made clear, is that the money was not in fact free. The bonus program was production-based, and Harrison felt that the program was "basically putting our safety for sale." Tr. 46.

Though Harrison's writing "Void Void Kiss My Ass Bob" may not have been the most articulate means of making a safety complaint, the use of a swear word does not change the nature of Harrison's action. The Commission has repeatedly held that the use of profanity does not remove protected activity from coverage under the Mine Act. *See Sec'y obo Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924 (Sept. 19, 2001); *Amos Hicks v. Cobra Mining, Inc., Jerry K. Lester, and Carter Messer*, 13 FMSHRC 523 (Apr. 1, 1991); *Sec'y obo Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516 (Mar. 30, 1984). One must consider the context in which the comment was made—this is a mine, not a nursery—and whether the company strictly enforced a policy prohibiting profanity. In this record, there is scant evidence of a policy, as only an out of context sentence fragment entitled "Conduct Rule No. 4" quoted in the termination letter (RX-3) and an arbitrator's decision (GX-3), has been introduced into evidence. On cross examination, although the Respondent's attorney asked Harrison about Stolzenfels writing "Eat Shit, Bob" on his check and his subsequent termination, Harrison knew little about the details of Stolzenfels's situation. Tr. 68-69, 104.

The Commission is not alone in concluding that the use of profanity does not make an act *per se* unprotected. The National Labor Relations Board, which Commission decisions often look to for guidance in discrimination cases,[10] has similarly held that one must consider the context, and balance the employee's rights against the employer's need to maintain order. For example, in *Plaza Auto Center, Inc. and Nick Aguirre*, the Board stated:

> The *Atlantic Steel* balancing test presupposes that "not every impropriety committed during [otherwise protected] activity places the employee beyond the protective shield of the [A]ct." *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965). This is so

[10] *See eg, Sec'y obo Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298 (Mar. 16, 2000).

> because "[t]he protections [that] Section 7 affords would be meaningless were [the Board] not to take into account the realities of industrial life and the fact that disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses" (*Consumers Power Co.*, 282 NLRB 130, 132 (1986)), and that the language of the workplace "'is not the language of 'polite society'. 'D" *Stanford Hotel*, 344 NLRB 558, 564 (2005) (citation omitted). Thus, the employee's right to engage in concerted activity permits "some leeway for impulsive behavior." *NLRB v. Thor Power Tool Co.*, 351 F.2d at 587. Still, the right to engage in concerted activity is not absolute and must be balanced against the employer's need to maintain order and respect in its establishment. See *Thor Power Tool Co.*, 148 NLRB 1379, 1389 (1964), *enfd.* 351 F.2d 584, 587; *Caterpillar, Inc.* 322 NLRB 674, 677 (1996).

360 NLRB No. 117 at 10 (May 28, 2014). This reasoning applies as strongly to the instant case, where one must take into consideration the realities of the mine and the fact that disputes about health and safety are "likely to engender ill feelings and strong responses."

Furthermore, the Respondent's argument must fail if it is found that Harrison was provoked into writing a profanity on the check. The Commission has held "that an employer cannot provoke an employee into an indiscretion and then rely on that indiscretion as grounds for discipline." *Sec'y obo Bernardyn v. Reading Anthracite Co.*, 22 FMSHRC 298, 305-306 (Mar. 16, 2000). Whether an employee's behavior was excusable is a fact intensive inquiry that must look at the particular facts and circumstances of the case. *Id.* at 306. Based on the record in the instant case, it is not clear whether Harrison was indeed provoked. The union was given the option to vote on the bonus plan, and Harrison and a majority of members voted against the plan. Harrison testified that when he found the bonus check, he felt that the company was ignoring the union members' safety concerns and unilaterally proceeding with an unauthorized bonus plan. Tr. 28-29. It was only at that point that Harrison wrote "VOID VOID KISS MY ASS BOB" on the check and returned it to the Respondent.

Based on the evidence in the record, I find non-frivolous Harrison's claim that he engaged in protected activity when he wrote "Void Void Kiss My Ass Bob" on the bonus check and returned it as a protest against a program he believed would serve as a safety hazard.

Nexus between the protected activity and the alleged discrimination

Having concluded that Harrison engaged in protected activities and suffered an adverse employment action, the examination now turns to whether that activity has a connection, or nexus, to the subsequent adverse action, namely the March 14, 2015 termination. The Commission recognizes that direct proof of discriminatory intent is often not available and that the nexus between protected activity and the alleged discrimination must often be drawn by inference from circumstantial evidence rather than from direct evidence. *Phelps Dodge Corp.*, 3 FMSHRC at 2510. The Commission has identified several circumstantial indicia of discriminatory intent, including: (1) hostility or animus toward the protected activity; (2) knowledge of the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *See, e.g., CAM Mining, LLC,* 31 FMSHRC at 1089; *see also, Phelps Dodge Corp.*, 3 FMSHRC at 2510.

Knowledge of the protected activity

According to the Commission, "the Secretary need not prove that the operator has knowledge of the complainant's activity in a temporary reinstatement proceeding, only that there is a non-frivolous issue as to knowledge." *CAM Mining, LLC,* 31 FMSHRC at 1090 *citing Chicopee Coal Co.*, 21 FMSHRC at 719. In fact, evidence is sufficient to support a finding of knowledge if an operator erroneously suspects a miner made safety complaints, even if no complaint was made. *See Moses v. Whitley*, 4 FMSHRC at 1478.

In the instant matter there is sufficient evidence of knowledge of the various protected activities to meet the evidentiary threshold. With regard to the 105(c) complaint filed in 2008, Pam Layton, the Human Resource representative, filled out the grievance settlement that required the employer to remove the slip from Harrison's file. Tr. 45; GX-2. Layton continued to work in human resources at the mine and had a role in Harrison's ultimate termination. Tr. 45-46. Layton's participation in the 2008 complaint and ultimate settlement, combined with her participation in the 2015 termination is sufficient to show that the company had knowledge of Harrison's 2008 complaint when he was terminated.

The company similarly had knowledge of Harrison's 2006 and 2009 participation in FMSHRC proceedings on behalf of MSHA. In addition to the fact that the company would have known about Harrison's testimony when he testified, after Murray Energy purchased the mine Bob Murray told the miners that he had reviewed past violations and court proceedings, and knew who served as a witness. Tr. 22-23. This statement by Murray is evidence that the Respondent had knowledge of Harrison's protected activity of participating in a FMSHRC hearing.

Lastly, the Respondent had knowledge of Harrison's protected activity of making safety complaints concerning the bonus program implemented in February 2015. Harrison engaged in various conversations with mine management over his safety concerns about the program. Tr. 46-48. Based on Respondent's cross-examination of Harrison, it appeared that the Respondent was arguing that there was no way for it to conclude from the words on the check that Harrison was making a safety complaint. Tr. 67. However, based on the totality of the circumstances, including previous conversations with mine management, it is clear that the Secretary has met its burden in showing that Respondent should have known that Harrison's writing and returning the check was in reference to his safety concerns.

Coincidence in time between the protected activity and the adverse action

The Commission has accepted substantial gaps between the last protected activity and the adverse employment action. See e.g. *CAM Mining, LLC,* 31 FMSHRC at 1090 (three weeks) and *Sec'y of Labor on behalf of Hyles v. All American Asphalt*, 21 FMSHRC 34 (Jan. 1999) (a 16-month gap existed between the miners' contact with MSHA and the operator's failure to recall miners from a lay-off; however, only one month separated MSHA's issuance of a penalty resulting from the miners' notification of a violation and that recall failure). The Commission has stated "We 'appl[y] no hard and fast criteria in determining coincidence in time between protected activity and subsequent adverse action when assessing an illegal motive. Surrounding

factors and circumstances may influence the effect to be given to such coincidence in time.'" *All American Asphalt*, 21 FMSHRC 34 at 47 (quoting *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 531 (Apr. 1991).

In the instant matter, two of the protected activities—the 2008 discrimination complaint and the 2006 and 2009 participation in FMSHRC proceedings—occurred several years before Harrison's termination. If these acts alone served as the basis of Harrison's instant discrimination complaint, then the Secretary would have had a harder time showing that a coincidence in time existed.[11] However, the third protected activity, which concerned Harrison's complaints about the bonus plan and which culminated in the return of his bonus check, occurred less than five weeks from Harrison's termination, with Harrison returning the check on February 7 and being suspended with intent to discharge on March 13. Tr. 23-24, 33-39. As a result, I find that the time span between the protected activities and the adverse action is sufficient to establish a nexus.

Hostility or animus towards the protected activity

The Commission has held, "[h]ostility towards protected activity--sometimes referred to as 'animus'--is another circumstantial factor pointing to discriminatory motivation. The more such animus is specifically directed towards the alleged discriminatee's protected activity, the more probative weight it carries." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corporation*, 3 FMSHRC 2508, 2511 (Nov. 1981) (citations omitted).

In the instant case, there are a host of actions that could constitute animus towards Harrison's protected activities. First, Bob Murray's speech to miners, where he stated that he has reviewed past violations and litigation and knew who served as witnesses and how much it cost the company represented animus towards Harrison's testifying on behalf of MSHA. Tr. 22-23.

Second, the Respondent's introduction at the arbitration hearing of the 2008 safety slip as evidence of past impropriety also represented animus towards Harrison's 2008 Section 105(c) discrimination complaint. Tr. 42. According to the terms of the settlement between the company and Harrison, the company was required to remove this slip from the Harrison's file. Tr. 42; GX-2. The act of not removing the slip, the ongoing act of retaining the slip, and the act of using the slip at arbitration to show past misconduct, all represent animus toward Harrison's protected activity.

Third, the response by John Larry and Wayne Conaway to Harrison's safety concerns over the bonus program, that he should "take the money and run," showed that they were not taking his safety concerns seriously. Tr. 46-48. Their glib response represented hostility to Harrison's protected activity of bringing a serious safety concern to management attention.

Lastly, the suspension with intent to discharge as a response to Harrison's protected activity of writing on the check and returning it, illustrated animus towards the act. Though the

[11] This is not to say that a six or seven year span from the protected activity to the adverse employment action is *per se* too long. The Secretary would simply have to make a strong showing that a strong nexus existed using the other factors in the Commission's test.

Respondent appeared to offer shifting reasons for the termination, suggesting at times that it was due to Harrison's lying about the check or his posting a photo of the check on Facebook, the returned check with the markings was the only matter mentioned in meetings with mine management and in the termination letter. Tr. 40-41; RX-3. Having found these repeated instances of animus towards Harrison's protected activities, I find sufficient animus to meet the evidentiary bar at issue here.

Disparate Treatment

"Typical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2512 (Nov. 1981). The Commission has previously held that evidence of disparate treatment is not necessary to prove a *prima facie* claim of discrimination when the other indicia of discriminatory intent are present. *Id.* at 2510-2513.

In the instant matter, the record is sparse with regards to disparate treatment. There is some evidence that another miner, Jesse Stolzenfels, wrote "Eat Shit, Bob" on his returned check and was subsequently fired. Tr. 68-69, 104. However, there was no evidence presented as to whether his use of profanity on the check and his termination were connected.

In the *Cooley* case cited above, as well as other Commission precedent regarding swearing, the Commission laid out a several factor test to determine whether a terminated complainant was disparately treated for using offensive language. This test looks at "whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and how the operator treated other miners who had cursed." *Sec'y obo Bernardyn v. Reading Anthracite* 23 FMSHRC 924, 929-30 (Sept. 2001) (*citing Cooley v. Ottawa Silica,* 6 FMSHRC at 521, and *Hicks v. Cobra Mining,* 13 FMSHRC 532-33.) As discussed *supra*, there is little in the record about a company policy regarding swearing, nothing about prior issues with Harrison swearing, and little about how the operator treated other miners who used profanity. Without this additional evidence, it is impossible to conclude that Harrison was or was not disparately treated.

Conclusion

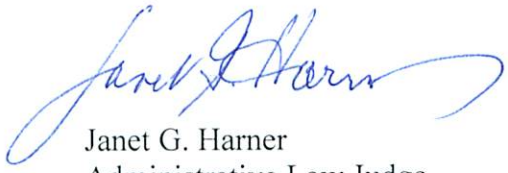
In concluding that Harrison's complaint herein was not frivolously brought, I find that there is reason to believe that Harrison engaged in a variety of protected activity, including his 2008 discrimination complaint, his 2006 and 2009 participation in FMSHRC proceedings, and his 2015 complaints about the bonus plan. I further conclude that the Secretary has met its burden in showing that there was a nexus between Harrison's protected activities and his March 2015 termination.

ORDER

For the reasons set forth above, it is **ORDERED** that Complainant Richard B. Harrison be immediately reinstated by Respondent and/or its successors to his former position, or the

equivalent, at the same rate of pay, hours worked, and with all other benefits he was receiving at the time of his discharge, effective the date of this decision.

The court retains jurisdiction over this temporary reinstatement proceeding. 29 C.F.R. § 2700.45(e)(4). The Secretary shall complete the investigation of the underlying discrimination complaint *as soon as possible*. Immediately upon completion of the investigation, the Secretary shall notify counsel for Respondent and this court, in writing, whether a violation of Section 105(c) of the Mine Act has occurred. *Id.*



Janet G. Harner
Administrative Law Judge

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