FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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MANUEL A. GARZA, Complainant, v. HANSON AGGREGATES, LLC, Respondent.	DISCRIMINATION PROCEEDING Docket No. CENT 2013-307-DM SC MD 13-08 Mine ID: 41-00059 Mine: Servtex Plant

DECISION ON LIABILITY

Appearances: Mark A. Sanchez, Esq., San Antonio, Texas, on behalf of Complainant Manuel A. Garza

William K. Doran, Esq., Washington, D.C., on behalf of Respondent Hanson Aggregates, LLC.

Before: Judge James G. Gilbert

This case is before me upon a complaint of discrimination brought by Manuel A. Garza ("Garza"), a miner, against Hanson Aggregates, LLC, ("Hanson" or "the mine"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 "(Mine Act"), 30 U.S.C. § 815(c). Complainant alleges that he was unlawfully discharged by Respondent Hanson on August 31, 2012. Garza alleges that his termination was motivated by discriminatory animus toward his protected activities, which consisted of reporting various safety issues regarding Hanson's Servtex Plant.[1] Hanson denies the allegation of unlawful discrimination and asserts that Garza was fired for violations of safety practices that occurred several days before the date of his termination.

A two day hearing was held commencing on December 10, 2013, in San Antonio, Texas.

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[1] Section 105(c)(1) provides in pertinent part:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner ... because such miner ... has filed or made a complaint under or related to this Act[.]

I. Stipulations of Fact

1. Respondent Hanson Aggregates, LLC, operates the Servtex plant located in New Braunfels, Texas.

2. Operations at the Servtex plant are subject to the jurisdiction of the Mine Act.

3. The Administrative Law Judge has jurisdiction in this matter pursuant to section 105 of the Act.

II. Procedural Background

On November 19, 2012, Garza filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Act. The Complaint was investigated by MSHA, and by letter dated February 4, 2013, MSHA determined that no discrimination had occurred. On February 27, 2013, Garza filed a discrimination complaint on his own behalf with the Federal Mine Safety and Health Review Commission pursuant to section 105(c)(3) of the Mine Act.[2] On April 5, 2013, and again on April 10, 2013, and again on May 16, 2013, Respondent was ordered to file an *Answer* within thirty days. On May 22, 2013, Hanson filed an *Answer* denying the allegations of discrimination.[3] On June 17, 2013, this matter was assigned to me. A *Notice of Hearing and Site* was issued on August 1, 2013, for a hearing scheduled for October 23-24, 2013, in San Antonio, Texas. As the result of a lapse in appropriations during the period leading to the scheduled hearing, the hearing was rescheduled in a conference call on October 17, 2013. Following the conference call, a *Notice of Rescheduled Hearing and Site* set the date for hearing as December 10-11, 2013, in San Antonio, Texas. Pre-hearing reports were filed by both parties in a timely manner. Although both parties were invited to submit post-hearing briefs, only Respondent chose to do so.

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[2] Section 105(c)(3) of the Act states in pertinent part:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right ... to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing ... and thereafter shall issue an order, based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate.

[3] There is no information in the record to explain the multiple orders extending time for an *Answer*, all of which were issued prior to my assignment to the case.

III. Factual Background and Findings

A. Garza's Employment History

Garza was employed by Hanson at its Servtex plant in New Braunfels, Texas ("Servtex") beginning in March 1991. Tr. 383. During his 21 year career with Hanson, Garza served as a utility man, eventually being promoted to quarry supervisor of production in 2007. Tr. 383-84. Garza served as a supervisor for four years before he was demoted by Plant Manager Kenneth Early ("Early") on June 1, 2011. Tr. 355, 393, 443, 551; Resp. Exh. 12. Garza accepted the demotion in lieu of termination and continued to be employed with Hanson until the date of his termination. Tr. 393; Resp. Exh. 10.

B. Garza's 2011 Demotion

Garza served as a supervisor from approximately 2007 until his demotion on June 1, 2011. Tr. 443. During this time he reported to Early directly. Tr. 383. Notwithstanding the demotion, there was no documentation introduced to refute that throughout the time Garza served as supervisor he performed his duties at an acceptable level.[4] Tr. 488. In fact, Keith Bechly ("Bechly") Hanson's Director of Human Resources for the South Region, testified that Garza had done a good job. Tr. 550. However, his employment relationship with Early was strained. There were multiple examples of difficulties Garza encountered with Early as his supervisor. One of the more significant of these involved Garza's attempt to rectify a recent blasting of rock.

Sometime in the first half of 2011, Garza was scraping the wall, which is a process by which fallen rock is removed so as to prevent the possibility of a rock slide into the base of the plant.[5] Tr. 485-86. On this particular day, Early was hosting a meeting of other general managers at the facility. Tr. 385, 485. When Early encountered Garza scraping the wall, Early was incensed because this safety procedure interfered with production. Tr. 385. Although scraping the wall is a necessary safety procedure, Early delivered clearly his message to Garza that any such safety measures were second to the need to maintain production. *Id.*

Within a month or two of this incident, Early sought to demote Garza from his position as supervisor. Tr. 487. Early consulted with Bechly. Tr. 492-93, 496. Bechly, for his part, could

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[4] On rebuttal, Production Manager Jacob Scherer testified to a "best practices" team that he participated in that was critical of Garza's operation of the base of the plant during the time he was supervisor. Tr. 652-54. Although he testified that those findings were presented to Early prior to Garza's demotion, no record or copy of any written report to support the testimony was offered by Hanson, either at the hearing, or as a request to supplement the record post-hearing. Tr. 654.

[5] In fact, such an incident occurred sometime prior to Garza's termination when a rock slide came down and landed a few feet away from Garza, and Garza brought that safety infraction to the attention of Early at the time. Tr. 486. The record does not reflect when that rock slide occurred.

not specify or recall any basis for the demotion, other than Early's statements about Garza's lack of performance. Tr. 512, 515. There was no documentation offered to support Early's position that Garza was not performing his duties. Tr. 515. There were no records introduced into evidence of any performance appraisals for Garza during this four year period as supervisor. Also, although Garza had been in the supervisor's position for four years, Bechly did not require documentation when Early approached him with the request to demote Garza. Tr. 524. Likewise, Bechly did not make any inquiry of Early as to whether Garza had engaged in protected activity prior to this time. Tr. 513. While Bechly testified that such demotions were rare, Bechly concurred with the demotion notwithstanding the lack of any documentation to support the personnel action.[6]

Early told Garza that he could return as a leadman in the base of the plant, or face termination. Tr. 487. Garza accepted the demotion in lieu of being fired, but credibly testified that he still did not understand why he was forced to accept the demotion after four years as a supervisor. Tr. 485.

C. Garza's Relationship with Early

Garza credibly testified to a long history of verbal abuse from Early. Tr. 391-393. Although Early's reputation for verbal abuse was well known, and many in the plant were victims of his anger, Andy Gallegos ("Gallegos"), Garza's supervisor, credibly testified that Garza was singled out by Early for particularly harsh treatment. Tr. 206-07. Incidents included the use of profanity, derogatory comments related to Garza's perceived political affiliations, and other inappropriate offensive language. Tr. 207. Garza described an example of Early's ongoing abuse.

> Q. How was Mr. Early's demeanor, behavior towards you in these [safety] meetings?
> A. Oh, you know, he would kind of pick on me more, but he would also, you know, he would pinpoint me as Obama Garza, you know. I didn't like it. I didn't tell him nothing because I had respect for the man. It doesn't matter how much anybody says about you, you know, as long as you have that respect, you know, everything is going to be okay. But he would call me Obama Garza in front of all the supervisors in the meeting.
> Q. Where did that term come from, if you know?
> A. At one time they were talking about the economy being so bad, you know, production was pretty slow at the time. I said yeah, well, you know – some gentleman, Clayton Simpson said, yeah, we're going to be all right, Obama is going to help us out. He said, you mean Obama Garza, and everybody just, like, got quiet, didn't say nothing. And I just looked at him and what can I tell him, you know? I couldn't say nothing.
> Q. Had you ever brought politics into the workplace yourself?

[6] Bechly testified that they discussed the possibility of placing Garza on a performance plan for 120 days, but that idea was rejected by Early, ostensibly to keep Garza employed at Servtex. Tr. 550.

A. No, I don't really talk politics to nobody. That's kind of a closed-doors issues between me and myself.
Q. Well, do you have any idea where he got the term Obama Garza? Why he picked on you like that?
A. No, I don't.
Q. Is this something that occurred frequently at the meetings?
A. Yes.
Q. Would it happen at every meeting?
A. Yes, almost all -- at every meetings they had to bring some kind of politics into it.
Q. And would he single you out at these meetings?
A. Yeah, he would call me Obama Garza.
Q. Did he call you any other names?
A. Not there. On the phone, yes.
Q. What sort of names would he call you?
A. He would just -- he would just say a lot of bad words to me when something wasn't going his way.
Q. Would he drop F bombs?
A. Yes. He had plenty of those for me.

Tr. 391-92.[7]

Although much of the abuse Garza took from Early occurred during his tenure as a supervisor, the abuse continued after his demotion from the position.

D. Early's Written Warning to Garza in July 2012

On July 19, 2012, less than six weeks before his termination, Garza was given a written warning pertaining to a blown tire on the loader by his supervisor Gallegos. Tr. 221; Comp. Exh 1. Garza knew that the nightshift operator had been spinning the tires and otherwise had abused the equipment. Tr. 427-28. Gallegos credibly testified that he saw the damage to the tire first thing in the morning and agreed with Garza that the damage had been done the night before. Tr. 222, 224. Nevertheless, Early insisted that Garza be disciplined for the damage. Tr. 222. Gallegos protested to Early and explained to him that the night shift operator had damaged the tire. Tr. 222. Early told Gallegos to issue the written discipline to Garza anyway. Tr. 223. Garza objected to the written warning and placed his objection in writing on the corrective discipline form. Tr. 223; Comp. Exh. 1. For his part, Production Manager Jacob Scherer ("Scherer") also disagreed with Early's decision to take disciplinary action against Garza for the damage to the loader tire. Tr. 29. None of this prevented Early from ordering Gallegos to issue the written reprimand to Garza even in the face of evidence that Garza was not responsible for the damage.

[7] I take notice that in this area of the State of Texas it is apparently considered insulting to be compared to the President of the United States.

E. Garza's Protected Activity

Garza engaged in multiple activities that would generally fall within the term "protected activity." Prior to his demotion in 2011, Garza was derided by Early for taking proper safety measures such as "scraping the wall." Tr. 484. Garza made repeated requests for access to fall protection prior to his request to Scherer in July 2012. Tr. 446. Garza complained about the lack of scraping the wall to both Russell and Early. Tr. 212-13. Garza also commented to the MSHA inspector on August 29, 2012, that he did not have company issued fall protection. Tr. 464. Each of the above constitutes protected activity.

F. Urbano Garcia's Violation of Safety Protocol

In or about May 2012, Urbano Garcia ("Garcia"), a worker in the electrical department, was filling the oil in the gearbox on top of the crusher and failed to wear protective fall gear.[8] Tr. 603-05. This behavior was observed by witness Derek Henk ("Henk"). Tr. 604. Henk scolded Garcia for his transgressions of safety policy and reported the matter to supervisor Antonio Mosquedo ("Mosquedo"). Mosquedo gave Garcia a verbal warning for this offense. Tr. 300-01. No other disciplinary action was taken against Garcia. Tr. 301. In fact, Mosquedo testified that if Garcia was caught again, he would receive a three-day suspension. *Id.* Mosquedo said at no time was termination of Garcia ever considered for this transgression of safety policy. *Id.* Both Gallegos and Garza testified that Garcia's actions on this date were consistent with how Mosquedo's crew normally filled the oil in the gearbox. Tr. 195, 403.[9]

G. Garza's Termination

On August 29, 2012, MSHA Inspector Lance Miller conducted an inspection of the Servtex Plant, accompanied by Scherer (the "inspection party"). Tr. 66, 68. During the course of that inspection at approximately 6:00 a.m., the inspection party arrived at the crusher at the base of the plant where Garza was assigned that day. Tr. 114. At the time they arrived, Garza was at the top of the crusher, placing oil in the gearbox, and was not wearing protective fall gear. Tr. 116-17, 223. In addition, an inspection of the equipment noted that the diesel engine that operates the electric motors on the crusher was in operation, though the clutch had been

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[8] The gearbox on the top of the crusher leaked oil and need to be refilled two or three times per week. Tr. 399. Garza reported this oil leak to Mosquedo on multiple occasions; however Mosquedo did not consider repair of the gearbox to be a priority. Tr. 400. The decision not to repair the gearbox required Garza to refill the oil. Tr. 400. Each time the oil had to be refilled, the crusher was out of operation for production purposes. *Id.* The parties dispute whether the maintenance of the faulty gearbox was the responsibility of Mosquedo's maintenance unit, or the responsibility of the operator of the crusher. Tr. 123. For the purposes of this matter it is unnecessary to resolve that factual dispute.

[9] In fact, Garza credibly testified that in July 2012, Early saw him on the crusher without a safety harness, and with the engine in idle (the same offenses that led to his termination), and that Early's concern was not that Garza lacked safety equipment, but that Garza's actions slowed production. Tr. 411-12.

disengaged. Tr. 49, 124. Miller asked Garza what he was doing on the top of the crusher and Garza informed him that he was refilling oil. Tr. 123. Miller asked why he was not wearing any safety harness and Garza replied that he did not have a harness. Tr. 464.

As the result of his observations, Miller issued two citations. The first citation cited the mine under 30 C.F.R. § 56.15005 for Garza's failure to use protective gear and for the lack of guardrail protection on the top of the crusher. Resp. Exh. 6. The second cited the mine under 30 C.F.R. § 56.12016 for Garza's failure to lockout the diesel motor while performing maintenance. Resp. Exh. 7.

After the inspection, Scherer met with Early and discussed the citations and Garza's violations of safety protocol. Tr. 480. Early and Scherer then had an additional discussion with Bechly, and Bechly recommended that both Garza and his supervisor Gallegos be suspended pending an investigation into the safety violations. Tr. 85-86. Garza was informed that evening that he was suspended pending investigation. Tr. 82. In the course of that discussion, Garza repeatedly explained that he objected to having to refill the broken gearbox with oil on a regular basis, and that the gearbox was never repaired by Mosquedo's maintenance team. Tr. 85, 397, 399. Scherer testified that Garza also stated that Gallegos told him to fill the oil before the MSHA inspector arrived. Tr. 85. The "investigation" did not include any further discussion with Garza. Tr. 85. Garza was informed that evening that he was under suspension. Tr. 82.

The next day, Early and Scherer spoke with Gallegos and inquired of his knowledge of whether Garza had been instructed to hurry the process of filing the gearbox with oil before the MSHA inspector arrived. Tr. 86. Gallegos denied that Garza had been so instructed and stated only that he told Garza to finish it before the trucks arrived. Tr. 86. Gallegos also admitted that his understanding of the lockout/tagout procedure would permit Garza to do exactly what he had done on the day of the inspection. Tr. 88-89.

After the conversation with Gallegos, there was a conference call between Early, Bechly, Scherer, Richard Crowe, the area production manager, and Russell Ellis, Hanson's south Texas safety manager. Tr. 89. The purpose of the call was to discuss the results of the "investigation" and to make a decision about the future of Garza and Gallegos. Tr. 90. While the parties on the call agreed that termination of Garza was proper, ultimately, it was Early's call to terminate both Garza and Gallegos, overruling Scherer's objection as to the termination of Gallegos. Tr. 55, 90.

On August 31, 2012, Garza was told to report to the plant where he met with Scherer and Early. Tr. 94, 439. Early informed Garza that he was terminated. Tr. 439. Garza did not question Early but left the plant premises. *Id.*

IV. Discussion

I begin by reviewing the Commission's framework for analyzing a section 105(c) "mixed motive" discrimination complaint.[10] This is no easy task. What at first glance appears to be an application of traditional *McDonnell Douglas* burden shifting is in fact and in application a much more complicated analysis that shifts burdens of persuasion from the employee to the employer, and, in the end, to both parties. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under traditional *McDonnell Douglas* analysis, once a plaintiff establishes a prima facie case under Title VII, the burden of proof shifts to the employer to rebut the prima facie case. *Id.* at 802-03. The employer's burden is a burden of production not persuasion. *Id.* At all times, the burden of persuasion remains with the employee. *Id.* However, under Commission precedent, upon establishment of a prima facie case by the miner, the burden shifts to the operator to rebut the prima facie case *by a preponderance of the evidence. Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). Unlike *McDonnell Douglas*, the employer now has the burden of persuasion not production.[11]

Presumably, if the operator meets its burden and can provide sufficient evidence that it would have taken the adverse action based on a nondiscriminatory basis, there is nothing left to rebut. It is indisputable that a fact established by a preponderance of the evidence cannot be overturned by evidence that the fact was a pretext; otherwise it could not have been established in the first place. Under *McDonnell Douglas*, unlike under the Mine Act, a Judge does not find that an employer established his rebuttal by a preponderance of the evidence, but rather that it met its burden of production, leaving open the question of whether the proffered reason was pretextual, and keeping the burden of persuasion at all times with the employee. In my opinion, it is the adjustment of the traditional framework by the Commission that leads many Judges to fail to address pretext because the Commission's altered Title VII framework does not easily invite such an analysis. In order to properly address the issue of pretext, the Commission precedent must be read to require that the Judge review pretext (burden of persuasion on employee) at the same time the Judge reviews the company's affirmative defense (burden of persuasion on employer). *See, e.g., Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1374 (Dec. 2000) (concurring opinion of Commissioner Beatty) ("complainant has a burden to produce evidence designed to refute the operator's affirmative defense by showing that the

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[10] A "mixed motive" case exists "where it is found that both the miner's protected activity and his unprotected activity motivated the adverse action[.]" *Sec'y of Labor on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1923, n.3 (Aug. 2012).

[11] Judges sometimes face remand for failing to conduct a proper or thorough analysis of the operator's proffered reason as pretextual. *Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1076-77 (May 2011); *Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820 (2012) (dissent argues that ALJ failed to adequately consider pretext). Under *McDonnell Douglas*, that pretext analysis is conducted when the employer meets its burden of production with a nondiscriminatory reason for the adverse action. Here, however, the operator's burden is not production but persuasion. Thus, the operator must prove its case by a preponderance of the evidence. There lies the challenge for pretext analysis. *See* discussion *infra* pages 9-10 and accompanying notes.

affirmative defense offered by the operator is merely pretext and not the true reason for the adverse action.") The most efficient way one can accomplish such a task is to clarify the section 105(c) analysis.

On rebuttal, an employer must establish either that: (1) the miner was not engaged in protected activity; or, (2) that the adverse action was not motivated in any part by the protected activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 825 n.20 (Apr. 1981). Such a successful determination on either prong precludes further review, including review on pretext.[12] *Id.* If however, the operator cannot rebut the prima facie case, then the operator may assert an affirmative defense, which it must prove by a preponderance of the evidence.[13] The operator must establish both that: (1) the discharge was also motivated by the miner's unprotected activity, and (2) it would have taken the adverse action in any event for the unprotected activities alone. *Nat'l Cement Co. of California*, 33 FMSHRC at 1064. In the assertion of this affirmative defense, it is best to break down the framework a little further.

To establish its affirmative defense, the company must first carry its burden of persuasion on the issue of whether the discharge was also motivated by the miner's unprotected activity. If the company is unable to prove this element, it has failed to establish its affirmative defense and the employee is entitled to judgment in his or her favor. If, however, the operator meets this burden, the question now rises and falls on whether the operator can establish that it would have taken the adverse action in any event for the unprotected activities alone.

In reviewing this second prong, I find that the suggestion of some Commission precedent regarding the order of proof presents a logical inconsistency. Looking to the operator to establish by a preponderance of the evidence that it would have taken the action in any event, then looking to rebut a fact already established by preponderance makes little rational sense. If the operator sufficiently determines by a preponderance of the evidence that it would have taken the action for the unprotected activities alone, then no pretext could possibly exist. The pretext to be established is that the proffered reason hides actual discriminatory animus. If the operator proves that it would have taken the action for the unprotected activity alone, it has proved that notwithstanding evidence of discriminatory animus the outcome remains the same. The employer acknowledges the existence of the discriminatory animus, but says it was not the ultimate factor in the decision. Thus, if that particular *fact* is established by a preponderance of the evidence, how can that objective finding also be pretextual?

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[12] Again, to state the obvious, successful rebuttal proves that pretext did not exist, thus analysis of pretext is unnecessary. Pretextual analysis is only relevant when considered during the employer's affirmative defense.

[13] When an operator fails to rebut the prima facie case, the operator now faces a "mixed motive" case because the operator is contending that notwithstanding the discriminatory motivation it failed to rebut, there was an equally compelling nondiscriminatory motive represented by the unprotected activity, and that activity alone was sufficient to justify the adverse action. *See supra* note 10.

Rather, I believe the burden on the operator in the final prong of the two part test articulated by the Commission, and the ultimate burden of persuasion on the complainant to establish pretext, are not separate or distinct burdens but directly competing burdens. You cannot both find by a preponderance of the evidence that an employer would have taken the same action without the discriminatory motive, and find by a preponderance of the evidence that the opposite is also true. A pretext by definition is a finding that the proffered reason, here the finding that the operator would have fired the miner anyway, is not true, i.e., a pretext for discrimination. *Black's Law Dictionary* (9th ed. 2009). This raises the question of how can a fact be established by a preponderance of the evidence and yet be untrue. That conundrum represents the logical inconsistency of the order of proof at this stage of a mixed motive case.

By viewing the burdens as competing burdens, the Judge can remain consistent with Commission precedent to evaluate both parties' respective cases, remain true to the burdens of persuasion on each party, but eliminate the logical inconsistency of conducting the review of each burden as though they were entirely unrelated. Accordingly, when reviewing the operator's evidence that it would have taken the action in any event, the Judge must do so with an eye toward any evidence of pretext such an assertion raises. The Judge must evaluate the operator's case not only reviewing the operator's evidence but also looking at all the evidence presented by the employee that the proffered reason for the adverse action was pretextual. It is here that the Judge must determine *either* that the operator met its burden on the second prong, *or* that the employee has proved pretext by a preponderance of the evidence. As stated, these are directly competing burdens, which means that if one is true the other must be false.

The Judge's analysis then is to place the competing burdens on either end of a scale and weigh the evidence. At this stage, the Judge considers all evidence proffered by the employee of pretext, and weighs it against all evidence produced by the company that they would have taken the adverse action in any event.[14] If the evidence weighs greater in one direction than another, then the scale is tipped to the party presenting that evidence. If the employer can establish that they would have taken the action for the unprotected activity alone, then logically pretext was not established. Likewise, if the employee establishes that the proffered reason is pretextual, then logic dictates the employer has failed to meet it burden of persuasion. The one thing cannot exist alongside the other; this is an either/or proposition. In my reading, prior Commission precedent has not explained this analysis in these terms, although I find that this is the intent of the Commission's precedent, and is consistent with existing case law. Accordingly, this is the balance of competing interests that I adopt in deciding the matter before me under section 105(c).

A. Complainant's Prima Facie Case

In order to establish a prima facie case of discrimination, Garza must prove that he was engaged in a protected activity and that "the adverse action complained of was motivated in any part by that activity." *Driessen v. New Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1988). The burden of proof to establish a prima facie case is less than the burden of persuasion under section

[14] An employee's prima facie case need not establish its elements by a preponderance of the evidence. Thus, it is necessary to review the employee's evidence in total, to determine whether the employee has met its burden of persuasion on pretext.

105(c)(1). *Nat'l Cement Co. of California*, 33 FMSHRC at 1065. It is enough that Garza bring forth sufficient evidence in which I can infer retaliation. To assist in this process, the Commission has identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and, (4) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Often, direct evidence of motivation is not available. Thus, to establish motivation I must draw upon reasonable inferences from the facts of record.

In this case, Garza's requests for a safety harness, his actions to encourage safety activities that were criticized by Early including scraping the wall, and his statement to the MSHA inspector that he was not provided with fall protection constitute protected activity. *Howard v. Cumberland River Coal Co.*, 32 FMSHRC 983, 988 (Aug. 2010) (anti-discrimination provision is to be interpreted expansively to effect purpose of safety of mines). Likewise, his allegations regarding Early's conduct, including his repeated verbal assaults, Early's decision to discipline Garza for an infraction just a month prior to his termination under questionable circumstances, a demotion a year earlier under equally questionable circumstances, the disparate treatment of Garza for the same offense committed by another employee, and Early's general pattern of placing production over safety combine to establish evidence of animus. *Sec'y of Labor on behalf of Williamson v. CAM Mining, LLC*, 31 FMSHRC 1085, 1089-90 (Oct. 2009) (evidence of animus included supervisor "'dogged' him, swore at him, and assigned him more difficult and onerous tasks as compared to other" employees).

Garza established that Early had knowledge of Garza's safety complaints, including the repeated requests for a safety harness, and the activity of "scraping the walls," both at the time Garza scraped the walls, and Garza's subsequent complaints to Russell and Early of his safety concerns because of a failure to scrape the wall. Tr. 212-14, 387. Hanson did not rebut that knowledge during its rebuttal case.[15] Also, Garza established that there was hostility to the protected activity of scraping the walls. Tr. 485-87. Further, the disparate treatment of Garza as compared to Garcia is undisputed and suggests ongoing hostility. While the timing of the protected activity of scraping the walls may be in the more distant past, it likely led to Garza's demotion, and thus, was part of a pattern of continuing animus by Early against Garza. This pattern was further evidenced just weeks before Garza's termination by the unjustified disciplinary action against Garza for the blown tire on the loader.[16]

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[15] In its post-hearing brief, Hanson argues that Early's knowledge of the safety complaints cannot be imputed to the company. However, that argument is not consistent with Commission precedent. *Nat'l Cement Co. of California*, 33 FMSHRC 1059; *Metric Constructors, Inc.*, 6 FMSHRC 226 (Feb. 1984). Further, Hanson's reliance on *Metric* and *Nat'l Cement* to support this argument is entirely misplaced. Neither case supports Hanson's attempt to cleanse Early's discriminatory motivations in a single conference call, and the weight of testimony from Hanson's own witnesses place the responsibility of termination ultimately on Early.

[16] Although Gallegos did not identify the time period in which Garza made the complaints to Early and Russell regarding the need to scrape the wall, I infer that these complaints were made

Although Scherer denied knowledge of the discussions between Garza and Miller on the date of the citation, given his close proximity to the site of the infraction, I find it unlikely that Scherer did not hear Garza tell the inspector he did not have a harness. Garza's statement implied that the company had failed to provide him with proper safety protection. In the termination of the citation, there was discussion that "[t]he miner was instructed on the use of fall protection [when] there is a danger of falling." Resp. Exh. 6. This discussion could only have occurred with Scherer at the time of the infraction, as the citation terminates just five minutes after it was issued.[17] *Id.* Although Scherer denied any such conversation, the only person who would have had such a discussion at that time was Scherer. Thus, I find that Early was likely aware of Garza's statement to the inspector through Scherer. This statement was protected activity that occurred just twenty-four hours before Garza was terminated.

In summary, I find that Garza has demonstrated: (1) that Early was aware of his protected activity; (2) that Early exhibited hostility toward the protected activity; (3) that there exists a sufficient nexus between the protected activity and the discriminatory action based on the timelines cited herein; and, (4) that Garza was subjected to disparate treatment. Accordingly, based on the foregoing, I find that Garza established a prima facie case of discrimination in his termination from Hanson.

B. Respondent's Rebuttal of Complainant's Prima Facie Case

The mine operator may rebut the prima facie case by showing that: (1) the miner was not engaged in protected activity; or, (2) that the adverse action was not motivated in any part by the protected activity. *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 825 n.20 (Apr. 1981). Should the company fail to rebut the prima facie case by a preponderance of the evidence, it may assert an affirmative defense that establishes: (1) the discharge was also motivated by the miner's unprotected activity, and (2) it would have taken the adverse action in any event for the unprotected activities alone. *Nat'l Cement Co. of California*, 33 FMSHRC at 1064.

(1) Miner Was Not Engaged in Protected Activity

Hanson argues in its post hearing brief, that none of the issues raised by Garza can be considered protected activity. The argument is supported largely by declarative sentences that contain no reference to Commission precedent. As I have found that the actions indeed constitute protected activity in Garza's prima facie case, I found nothing in Hanson's post-

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after Garza was demoted and assigned to the base of the plant when such a danger would be of particular concern to Garza.

[17] Scherer also denied telling the inspector that part of the termination would be the use of the Genie boom in future situations. Scherer testified that it was likely Mosquedo who so informed the inspector, but only Scherer was present with the inspector at 6:50 a.m. on the date of the infraction. Thus, it had to have been Scherer who explained to the inspector how the company intended to deal with preventing future infractions.

hearing brief, or in the record, that sufficiently rebuts that finding by a preponderance of the evidence. Accordingly, Hanson has failed to meet its burden that no protected activity occurred.

(2) The Adverse Action Was Not Motivated in Any Part by the Protected Activity

Scherer denied any knowledge of Early's mistreatment of Garza. On direct, Scherer testified that he had little contact with Garza prior to arriving at the mine. Tr. 17-18. However, on rebuttal, Scherer clarified that testimony to state that he did have contact with Garza sometime in 2011, that he observed Garza's performance, and that he was very critical of that performance in an unnamed report that was not offered into evidence. Tr. 652-54. I found Scherer's testimony was not persuasive on that issue. Likewise, Scherer's professions of ignorance and his evasiveness on the questions of the circumstances of Early's departure were difficult to believe given the level of responsibility placed upon him when he began working at the mine in July 2012. Tr. 16-17, 565-66. Bechly's testimony of Scherer's responsibilities at the plant certainly raised the question of how Scherer could not have known of the specific circumstances of Early's departure when it was Scherer who was the "company insider" sent to observe and to document Early's operation of the mine. Tr. 565-66. In fact, Bechly testified in detail to Scherer's criticisms of Early's management of the Servtex plant that ultimately led to the decision to terminate Early. *Id.* I infer that Scherer wanted to downplay Early's termination, and the circumstances that led to that departure, because they might be viewed as assisting Garza's discrimination case. As a result, I find that Scherer's instinct to protect the company served to limit his overall credibility as a witness.

Likewise, I find it inconceivable that Bechly, as a human resource professional, never insisted upon documentation or adherence to the progressive discipline policy, either for the Garza demotion in 2011, or at the time of his termination. Bechly also showed no curiosity as to whether Garza had engaged in protected activity prior to his termination, and seemed to exhibit a surprising lack of knowledge of the provisions of the Mine Act that offer protections to miners against retaliatory action by the mine. Bechly testified that he relied on Early's and Scherer's observations alone in making his recommendations for termination. However, to ignore Garza's side of the story, and rely upon the opinion of a man who would be terminated for his poor operation of the plant only weeks later -- at least in part as the result of his mistreatment of employees -- raises the question of what level of analysis and thoughtful guidance Hanson human resources provided to its managers in this instance. Nevertheless, neither Scherer's unlikely lack of knowledge of the circumstances of Early's departure, nor Bechly's odd lack of desire to see that a reasonable investigation of the facts of the termination was conducted, were factors in my decision.

The issue here is neither the motivation of Scherer, who was not the plant manager at the time of Garza's termination, nor that of Bechly in his role as human resource director. Rather, the factual circumstances of this termination involve the retaliatory conduct of Early. If Early acted with animus in retaliation for protected activity, then Scherer's and Bechly's belief that this incident was a termination offense has little probative value. *Nat'l Cement Co. of California*, 33 FMSHRC at 1069 (lack of knowledge of protected activity or discriminatory animus by others does not remove the "taint" of retaliation.) The bad faith of Early is imputed to the company and

cannot be sanitized by Scherer's or Bechly's lack of knowledge of Early's motivation.[18] "'An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.'" *Id.* at 1067 (citing *Metric Constructors, Inc.*, 6 FMSHRC at 230 n.4).

As discussed previously, the animus toward Garza by Early was palpable. The circumstances of the demotion that occurred about a year prior to the termination raise questions about whether the demotion itself was retaliatory, however, that question is not directly before me. It does, however, point to a long history of animus by Early against Garza. There is no question that Early disliked Garza. Early's treatment of Garza as a subordinate was abysmal. Likewise, Early's history of lax oversight of safety in favor of increased production is well established. Even company officials had to admit that Early was not a pleasant person to work with, and that his safety record left something to be desired. Tr. 55.

Also, the decision to terminate for failure to follow the lockout/tagout procedure raises questions. Garza's supervisor was under the apparently mistaken belief that lockout/tagout of the diesel motor was not necessary if the clutch was disengaged. Tr. 88-89. Both Garza and Gallegos testified credibly that this procedure was accepted practice at the plant notwithstanding company policy to the contrary. Thus, the decision to terminate Garza for offenses that were, at least during Early's regime as plant manager, somewhat common safety shortcuts, strikes me as an overreaction. Nevertheless, I do not substitute my judgment for that of company management. Only if Garza can establish that the decision to terminate was the result of his protected activity is the management decision subject to reversal here. *Driessen v. New Goldfields, Inc.*, 20 FMSHRC at 328.

Garza's undisputed testimony that Early got very angry at earlier safety concerns raised by Garza certainly provides evidence that Early's animus toward Garza was long held and continuing. The incident involving scraping the wall was clearly protected activity by Garza that was met with furious indignation by Early for its interference with production. Also, Garza testified credibly that he made multiple requests for safety equipment and until Scherer placed the order for his harness, his prior requests had been ignored. A request for safety equipment is a protected activity. *Sec'y of Labor on behalf of Bailey v. Arkansas-Carbona Company*, 3 FMSHRC 2313, 2318 (Oct. 1981) (ALJ). Thus, Early's late conversion to safety watchdog, after the arrival of Scherer on the scene, strikes me as more self-serving than a rational, dispassionate review of Garza's conduct on August 29, 2012. I believe Early was more likely driven in part by a desire to keep his job, which was clearly in jeopardy after Scherer arrived at the mine. Early no doubt understood that his pressure on production at the expense of safety was not well received by the company. His mistreatment of his employees was also apparently well understood by Hanson management during this period. Tr. 206-07. Indeed, Early's eventual termination several weeks after Garza's dismissal certainly confirms that Early's operation of the mine was less than textbook.

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[18] However, the company can still prove its case that it would have taken the adverse action in any event. This is a different analysis than the analysis under the prima facie case that the adverse action was motivated, at least in part, by the discriminatory animus. On rebuttal, the company must refute the prima facie finding of animus. In its affirmative defense, it must prove that while animus was present, it would have taken the action in any event.

Further, the issuance of the write-up against Garza for the blown tire incident, when it was apparent that Garza had nothing to do with the abuse of the equipment, is evidence that Early was after Garza as recently as just a few weeks before the termination. The circumstances of Garza's demotion, following complaints and concerns regarding safety issues, and Early's history of verbally abusive treatment of Garza, leads to the reasonable conclusion that Early's motivation on August 29, 2012, was at least in part in retaliation for Garza's previous protected activity. Early had Garza in his sights for at least the prior two years, and likely perceived Garza as an ongoing irritant in his efforts to maximize production. If Early had objections regarding Garza's performance as an employee, Hanson offered no evidence to support those criticisms in the way of performance appraisals, human resource documents, or other reports. The only corrective action form submitted by the company tended to prove further animus toward Garza by Early, rather than support any concern with Garza's performance on the job.

In addition, Garza also told the inspector on August 29, 2012, that the reason he was on the crusher without a safety harness was that he did not have one. That statement to the inspector was also protected activity, and would tend to discredit Early, who was already on shaky ground for his lax safety practices at the mine. Thus, to bolster his safety credentials in the presence of Hanson upper management, Early advocated for the termination of both Garza and Gallegos in an apparent effort to portray himself as a safety conscious manager. In fact, even Scherer counseled against the termination of Gallegos, placing Early in the fortuitous position of appearing to Hanson management to hold his employees to higher safety standards than might Scherer, when the record reflects that safety was never a priority for Early prior to August 29, 2012. Thus, I find that Early's discriminatory animus toward Garza was at least in part the result of Garza's protected activity described herein and Hanson has failed to meet its burden to rebut Garza's prima facie case.

C. Respondent's Affirmative Defense

If an operator is unable to rebut a prima facie case of discrimination, it may nevertheless prove an affirmative defense by showing that: (1) the discharge was also motivated by the miner's unprotected activity; and, (2) it would have taken the adverse action in any event for the unprotected activities alone. This affirmative defense, termed the *Pasula-Robinette* test, must be established by the employer by a preponderance of the evidence. *Robinette*, 3 FMSHRC 803, 817-818; *Pasula*, 2 FMSHRC 2786. Having determined that the adverse action was motived at least in part by discriminatory animus, the company bears the burden of persuasion that the discharge was also motivated by unprotected activity.

The Commission has explained that an affirmative defense should not be examined superficially or approved automatically once proffered. *Nat'l Cement Co. of California*, 33 FMSHRC at 1072 (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982)). Rather, in reviewing an affirmative defense, the judge must determine whether it is credible and, if so, whether it would have motivated the particular operator, as claimed. *Id.*, *citing Bradley*, 4 FMSHRC at 993. Pretext may be found where the asserted justification is weak, implausible, or out of line with the operator's normal business practices such that it was seized upon to cloak discriminatory motive. *Chacon*, 3 FMSHRC at 2516; *see also Nat'l Cement Co. of California*, 33 FMSHRC at 1072, *citing Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12

FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro*, 4 FMSHRC at 1937-38). As discussed above, the parties share equal and competing burdens at this stage. While the company must prove its affirmative defense by a preponderance of the evidence, the miner must establish pretext in the assertion of the proffered justification by the same burden. Where two parties carry equal and competing burdens, it is up to the Judge to determine by a preponderance of the evidence which party has met its burden.

(1) Was the Adverse Action Also Motivated by Unprotected Activity

Garza's breach of safety protocols was the "trigger event" for his termination. The operator cited no other basis for the action, and the fact that Garza violated the safety protocols on the date in question is not in dispute. Thus, notwithstanding the findings of animus against Garza by Early, and the establishment of a prima facie case, I find Hanson has brought forth sufficient evidence to establish that the adverse action was also motivated by unprotected activity.[19]

(2) Would Respondent Take the Action for the Unprotected Activity Alone

In this analysis, I must look to the evidence proffered by the company to support its argument that it would have taken the adverse action against Garza for the unprotected activities alone. The burden rests with Hanson to prove this prong by a preponderance of the evidence. At the same time, I do not view Hanson's evidence in a vacuum. Rather, I must weigh the evidence Hanson presents against any evidence put forth by Garza that the proffered reason for his discharge, in this case violation of safety protocols, is a pretext. First I review the evidence submitted by Hanson.

(a) Testimony of Scherer

Scherer testified that he was involved in the decision to terminate Garza. Tr. 52-53. In that testimony Scherer admitted that he has observed employees working in positions similar to Garza without fall protection. Tr. 52. Scherer admitted that not all employees will be terminated for such an offense. *Id.* He indicated that when he witnessed an employee violating such a safety protocol, he would counsel the employee immediately, and then determine later whether disciplinary action was necessary. Tr. 53. Thus, the lack of fall gear alone does not appear to be a termination offense.

Scherer was particularly critical of Early's management of the facility, citing the lax safety culture that was present, and the lack of enforcement of safety rules under Early's tenure. Tr. 54-55. Included among the areas where Early was lax in safety management was following the lockout/tagout procedure. Tr. 55-56. He also testified to an employee who violated the lockout/tagout procedure. Tr. 56. That employee apparently received a three day suspension but

[19] Accordingly, this is a "mixed motive" case. *Sec'y of Labor, Mine Safety & Health Admin. on Behalf of Lawrence L. Pendley*, 34 FMSHRC 1919, 1923, n.3 (Aug. 2012). *See supra* notes 10, 13.

was not terminated. Tr. 188-89. Thus, I find that failure to follow the lockout/tagout procedure is not a termination offense at Servtex.

Scherer justified the harsh treatment of Garza based upon the fact that Garza was a former supervisor. He testified that supervisors are held to a higher standard. Tr. 98, 130. Scherer explicitly denied that Garza's termination had anything to do with protected activity. Tr. 88. Nevertheless, Scherer admits that it was Early who terminated Garza. Tr. 55.[20]

For his part Scherer could not identify any other Servtex employees, or employees of Hanson who were terminated for similar offenses. He stated that if the offense had been one or the other, the likely discipline would have been a three day suspension. Tr. 188-89. However, Scherer felt the combination of the two offenses warranted discharge. While he denied the presence of the inspector or the citations resulted in the harsher discipline, he stated that he would have disciplined Garza exactly the same way had it been his decision alone. Tr. 170

(b) Testimony of Bechly

Hanson's other evidence that it would have taken the same adverse action in any event was presented through the testimony of Bechly. In his position, Bechly could be expected to know of any number of situations in which similar behavior resulted in termination. However, his testimony did not shed much light on that effort.

Bechly testified to supervisors at other facilities who were terminated. In that discussion, he mentions two (non-supervisory) employees who were terminated "for failure to lockout/tagout after having been counseled and talked to substantially about that[.]" Tr. 521. He also testified to a "lead person, who created an unsafe situation in his work environment" who was fired. Tr. 521-22. Bechly offered no documentation to support these prior terminations, although, as human resources director one could assume that such documentation was readily available to him. As such, this hearsay evidence from Bechly is all the company produced to establish similar adverse actions at other facilities.[21]

Bechly testified that both Scherer and Early were asked if there were any other instances of others behaving in the same manner and he was told no. Tr. 524. This contradicts Scherer's own experience of both employees lacking fall gear and employees failing to follow the

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[20] Respondent's post-hearing brief argues that the termination was a group activity, and not one man's decision. However, the testimony cited above establishes that Early was the decision maker, and the others on the call simply agreed with the decision. While the others may not have had knowledge of the protected activity, or Early's discriminatory motive, that lack of knowledge does not excuse Hanson its liability for an unlawful termination. *Nat'l Cement Co. of California*, 33 FMSHRC at 1069 (lack of knowledge of protected activity or discriminatory animus by others does not remove the "taint" of retaliation).

[21] In addition to the lack of documentation, the company did not produce the plant managers involved in these decisions, thus, I had no ability to hear testimony from the direct participants in these matters to determine whether they were relevant to the issues raised in this case.

lockout/tagout procedures. Bechly further denied being aware of any allegations that other supervisors at Servtex may have allowed employees to engage in similar violations, but indicated that information may have had an impact on his decision in Garza's case. Tr. 522-23. "If it happened and we had not acted in the same manner, we would be asking questions why are we doing this different here." *Id.*

D. Complainant's Evidence of Pretext

In *Nat'l Cement Co. of California*, the Commission analyzed the issue of pretext in the context of other federal discrimination statutes, and concluded that a complainant may establish that an operator's explanation is not credible by demonstrating either: (1) that the proffered reason has no basis in fact; (2) that the proffered reason actually did not motivate the adverse action; or (3) that the proffered reason was insufficient to motivate the adverse action. *Nat'l Cement Co. of California*, 33 FMSHRC, at 1073, citing *Madden v. Chattanooga City Wide Service Dep't.*, 549 F.3d 666, 675 (6th Cir. 2008) (*citing Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994)), *overruled on other grounds*, *Geiger v. Tower Automotive,* 579 F.3d 614 (6th Cir. 2009) (emphasis in original)); *McNabola v. Chicago Transit Auth.*, 10 F.3d 501, 513 (7th Cir. 1993). The first type of showing consists of evidence that the proffered basis for the complainant's discharge never happened, *i.e.*, that it was factually false or did not exist. *Id.* The third type of showing generally consists of evidence that other miners were not fired even though they engaged in substantially similar conduct that allegedly motivated the discharge of complainant. Both types of rebuttal are direct attacks on the credibility of the operator's proffered motivation for firing the miner. *Id.* Unlike the first and third discussed above, the second showing "is of an entirely different ilk." *Manzer v. Diamond Shamrock Chemicals Co.*, 29 F.3d 1078, 1084 (6th Cir. 1994).

> There, the plaintiff admits the factual basis underlying the employer's proffered explanation and further admits that such conduct *could* motivate dismissal. The plaintiff's attack on the credibility of the proffered explanation is, instead, an indirect one. In such cases, the plaintiff attempts to indict the credibility of his employer's explanation by showing circumstances which tend to prove that an illegal motivation was *more* likely than that offered by the defendant. In other words, the plaintiff argues that the sheer weight of the circumstantial evidence of discrimination makes it "more likely than not" that the employer's explanation is a pretext, or coverup.
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> *Id.*

One of the more obvious challenges for Respondent in this case is that the decision to terminate Garza is not consistent with the suggested punishment under the progressive discipline policy for these transgressions. Under the progressive discipline policy, the most likely penalty for Garza's infractions would be a three-day suspension, or perhaps even two three day suspensions, one for each transgression. Resp. Exh. 8. Although Garza's behavior resulted in two citations to the company, given the lesser treatment for the same offense involving other miners, and the fact that Early observed Garza on the crusher without a harness on prior occasions, the punishment in this instance does not seem to fit the crime. Thus, when an individual is singled out for harsher treatment than similarly situated employees, we look to the

circumstances that might lead to the decision to do so. *Nat'l Cement Co. of California*, 33 FMSHRC at 1073.

Hanson argues that because Garza's infractions were of two major safety violations, termination was appropriate under the circumstances notwithstanding the progressive discipline policy. The argument is not entirely without merit. Certainly the progressive discipline policy allows for the company to ignore its own guidelines whenever it deems it appropriate.[22] In this case, the decision to deviate from the company policy raises some concerns regarding the company's motivations. A company's failure to follow its own policies can be evidence of pretext. *See Rudin v. Lincoln Land Cmty. Coll.*, 420 F.3d 712, 727 (7th Cir. 2005) (failure to follow company's own procedures may be evidence of pretext). Yet, I do not believe that this deviation from the progressive discipline policy itself was sufficient evidence of pretext. I credit Bechly's testimony on the application of the progressive discipline policy in this case. Thus, I do not rely upon Hanson's uneven application of the progressive discipline policy to establish pretext.[23]

However, I do find it difficult to reconcile the disparate treatment that occurred with respect to Garcia for the same violation that led, in part, to Garza's termination. *Chacon*, 3 FMSHRC at 2512 (pretext may be established by disparate treatment).[24] One obvious difference between Garza's transgression and Garcia's transgression was the presence of the MSHA inspector. Another is Early's well documented longtime animus toward Garza. It strikes me as incredulous to suggest that the offense for which Hanson strongly argues is part of the reason it had little choice but to terminate Garza was worthy of little more than a verbal warning to Garcia. If nothing else, it is clear evidence that enforcement of safety violations at the plant under Early's regime was haphazard and random. If the particular safety violation of which Hanson contends is so egregious that termination must ensue, then one can assume that message must have been clearly sent to all Servtex supervisors to ensure standard and proper enforcement. Yet, in his testimony Mosquedo seemed nonchalant about the lack of safety equipment when Garcia was the violator. Thus, if strict companywide enforcement was the policy, as Scherer would have us believe, it seems to have escaped Mosquedo entirely.

More likely, the inference I draw from this evidence is that the lax enforcement of safety violations as testified to by both Gallegos and Garza was standard procedure under Early's undistinguished tenure. Scherer confirms that Early created a culture where lax enforcement of safety was the norm. Tr. 55. This evidence leads me to the conclusion that Mosquedo did not harshly discipline Garcia for this particular transgression because it was much more

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[22] Of course, a progressive discipline policy that permits the company to ignore the progressive discipline policy is not much of a progressive discipline policy at all.

[23] I also find that given Garza's admission of the facts that establish that he failed to follow company policy regarding safety on the date of his termination, Garza clearly cannot establish that the proffered reason has no basis in fact.

[24] This attack on the employer's proffered reason addresses the third prong referenced in *Nat'l Cement Co. of California.*

commonplace than the company cares to admit in this proceeding.[25] While the parties all acknowledge that working on the crusher without safety equipment is wrong, and violates company safety policy as well as MSHA regulations, the message Early sent to his supervisors was that such violations should not be enforced if they interfere with production. Thus, I find that on the date that Garza was on the crusher, in clear violation of safety protocol, he was following the standard level of mine safety in the Servtex plant, and complying with the unwritten policy of the Servtex plant to value production over safety.[26]

I note that safety protocols and regulations are not present for the convenience of management to enforce as they see fit, or to use as a tool to discipline disfavored employees, or as some expedient defense to deflect attention from a pattern of poor safety compliance at a particular facility. Early created an environment of bullying employees who he perceived criticized his lax safety enforcement, and his policy of placing production over safety at the risk of his employees was well documented. His sudden conversion to zero tolerance for safety infractions on August 29, 2012, is difficult to accept as credible. The disparate treatment of Garza in this case is evidence of pretext.

As a basis to defend the disparate treatment of Garza, Hanson repeatedly noted that Garza was a former supervisor, and taught training classes, and thus should be held to a higher standard. Tr. 98, 130-31; Resp. Post-hearing Brief at 1. This argument conveniently ignores the fact that the company had demoted Garza from supervisory position a year earlier, under somewhat questionable circumstances.[27] Holding Garza to the higher standard of supervisor a year after demoting him to a lesser position simply does not pass the smell test. Garza was not a supervisor, and thus, cannot be argued to be held to any higher standard of safety at the plant than any other employee, including Garcia. The company made the decision to treat Garza as less than a supervisor when they demoted him. It cannot be a post-hoc justification that his prior service as supervisor now warrants a higher standard. I completely reject this attempt by the

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[25] In fact, Gallegos credibly testified that it was normal procedure for individuals to access the top of the crusher without fall protection. Tr. 214.

[26] Garza credibly testified that in July 2012, Early saw him on the crusher without a safety harness, and with the engine in idle, and that Early's concern was not that Garza lacked safety equipment, but that Garza's actions slowed production. Tr. 411-12. This incident is further evidence of Early's desire to place production over safety, and reinforces the notion that Early's safety concerns on August 29, 2012, were pretextual. *See supra* note 9.

[27] On rebuttal, Scherer testified as to a report not offered into evidence that was critical of Garza's performance as supervisor. I did not find the testimony helpful as it was not accompanied by any record of these alleged criticisms of Garza's performance. If these records were the basis for Garza's demotion, I find it unusual they were not part of the record for Bechly's review, or part of the personnel file for Garza. As such, that testimony was given little weight. *See supra* note 4.

company to bootstrap a higher standard on the same employee they demoted so cavalierly a year earlier.[28]

The company also went to great lengths to prove that suitable protective gear was readily available to Garza. Tr. 134, 160, 240, 606. The gear was maintained in the offices in the upper part of the mine, while Garza operated at the base of the mine. Hanson argues that Garza simply needed to drop by any of the offices to pick up his safety gear at the beginning of the shift. I found this line of testimony to be of little value. There is no factual dispute that Garza violated company policy by standing on top of the crusher without protective fall gear. Based on this testimony, I could also infer that if the company were so concerned about the use of fall protection, they should have kept the fall protection close to the crusher for easy access, which they admit they did not. However, whether the fall gear was sitting on the ground in front of Garza, or was back in an office at the top of the mine, is of little consequence here, as the fact of the violation is not in dispute. The issue is whether the company's proffered reason for termination was a pretext.

E. Weighing Complainant's Burden versus Respondent's Burden

In the absence of Early's testimony, Hanson was unable to refute the allegations of Early's misconduct, or his very clear animus toward Garza in any meaningful way. Thus, Hanson could not rebut Garza's prima facie case establishing animus. Hanson was further unable to bring forth evidence to deny that Garza had engaged in protected activity, and thus was also unable to refute that portion of Garza's prima facie case. Thus, having failed to rebut the prima facie case, Hanson must establish its affirmative defense to relieve liability for Early's discriminatory conduct.

In doing so, Hanson must establish that it would have taken the action based solely upon the unprotected activity. I find that Bechly's testimony of other miners who were terminated for similar offenses was hearsay and did not rise to the level of reliability necessary to meet the company's burden. He offered no documents of these terminations to determine whether the circumstances were, in fact, similar. The absence of that documentation left Bechly's testimony, and to some extent Scherer's testimony, as the only evidence proffered by Hanson that it would have taken the adverse action in any event.[29]

Hanson's affirmative defense was further undermined by the failure of Servtex management to take any disciplinary action against Garcia when he engaged in the same misconduct for his failure to wear protective gear while adding oil to the gearbox on the top of the crusher. As that single offense barely merited a verbal warning in Garcia's case, Hanson was

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[28] I likewise reject the argument that Garza's service on the safety committee somehow transforms his transgression into a termination offense. Service on the safety committee in a facility that placed so little emphasis on safety cannot be perceived as anything other than a disingenuous post-hoc justification for termination.

[29] The progressive discipline policy was not helpful to Hanson in this case. It did not specify or require termination when a miner is faced with two or more allegations of safety violations. Thus, reliance on that policy to satisfy the burden was not persuasive.

left to prove either that Garza's failure to do the proper lockout/tagout procedure was a termination offense in and of itself (when its own progressive discipline policy as well as prior actions call for a three day suspension), or that the unique combination of the two safety offenses justified termination.

Garza was a first time offender, according to company records, for both offenses. Prior history at the plant establishes that being on top of the crusher without fall gear was not considered a serious offense at Servtex, notwithstanding company policy to the contrary. If it were, Mosquedo would have strongly disciplined Garcia for the offense, which occurred just a month or two before Garza's termination. In the face of that evidence, Hanson would have to prove that the lack of protective gear combined with the failure to follow the lockout/tagout procedure demands termination. Yet, given the lax safety environment at Servtex during Early's tenure, and the testimony from Garza's supervisor that even he believed Garza had followed proper protocol with respect to the lockout/tagout procedure, Hanson simply cannot meet its burden that such behavior would have resulted in termination of this employee absent the taint of Early's discriminatory animus.

Simply put, Hanson failed to demonstrate by a preponderance of the evidence that the combination of both offenses was a termination offense. Scherer's testimony inferred that if in the position of Plant Manager at the time of Garza's offense, he might have instituted a more strict record of compliance with safety standards than did Early. However, Scherer was not the plant manager at the time of the termination, thus, his testimony of what he considered a termination offense or how he would have handled a similar situation is not definitive. Hanson offered no evidence of any individual at the Servtex plant fired for similar violative behavior in the recent past. I find the evidence presented by Bechly of similar terminations was not persuasive and was not supported by any documentary evidence (though such documentary evidence was presumably available to Hanson). I further note that none of the anecdotes offered of terminations for similar behavior occurred at the Servtex plant. In the absence of supporting documentary evidence of past termination actions for similar offenses that might tend to support Hanson's affirmative defense, I find Hanson has failed to establish its burden by a preponderance of the evidence.[30]

A complainant may demonstrate pretext where the asserted justification is weak, implausible, or out of line with the operator's normal business practices such that it was seized upon to cloak discriminatory motive. *Nat'l Cement Co. of California*, 33 FMSHRC at 1072; *Chacon*, 3 FMSHRC at 2516. Accordingly, after carefully weighing all of the evidence presented by both parties, I find that Garza has established by a preponderance of the evidence that the proffered reason for the termination was pretextual. In applying the *National Cement* tests as guidance, I find that that the proffered reason was insufficient to motivate the adverse action. I find persuasive the evidence that Garcia was treated differently than Garza for a similar infraction, as well as the company's inability to provide sufficient documentation to prove

[30] As the parties maintain competing burdens, this finding logically means that pretext is established. However, an analysis of Garza's evidence of pretext is required to satisfy the Commission's requirements for the record, and to demonstrate how competing burdens demand competing analysis.

similar adverse actions. I also find that the evidence of discriminatory animus and the culture of indifference to safety violations weigh in favor of pretext. Given lax enforcement of safety violations at the Servtex plant, I find that the termination of Garza was not in line with the operator's normal business practices. Thus, the weight of evidence in this case lies in favor of a finding that the termination was pretextual.

In the end, it is clear that with Early at the helm, the lax safety environment at Servtex permitted individuals to violate safety protocols, often without punishment. In fact, it could be inferred from the record that such violations were encouraged when necessary so as not to inhibit production. The preponderance of the evidence establishes that this lax safety environment prevailed at Servtex throughout the period in question here. Although the company did take corrective action after the fact to improve the safety environment when it terminated Early, that post-termination corrective action did nothing to alleviate the situation that existed on the day that Early terminated Garza.

On August 29, 2012, Servtex was a plant in trouble. Early had proven himself to be an incompetent manager, and ongoing lax enforcement of safety violations invited MSHA's citations on that day. For that, Hanson had no one to blame but itself. The termination of Garza purporting to be for his breach of safety protocols served as a convenient scapegoat for Early's mismanagement of the facility. It was not, however, representative of normal business operations at Servtex, nor did it remove the taint of Early's discriminatory animus. Accordingly, Hanson has failed to meet its burden on its affirmative defense and Garza is entitled to judgment in his favor.

V. Conclusion

Garza's termination was motivated, at least in part, by Early's discriminatory animus toward Garza based upon earlier, documented protected activity, and was evidenced by a well-established pattern of animosity toward Garza by Early beginning at least with the demotion in 2011, and concluding with his termination. Although aware of Early's shortcomings, Hanson management chose to ignore what was occurring at the plant on a daily basis, and made a decision in a vacuum to terminate Garza without the benefit of an investigation into the circumstances that led to Garza's departure from safety protocol. It did so at its peril under the Mine Act. *See Merit Contructors, Inc.*, 6 FMSHRC at 230 (precipitous discipline without proper investigation is done at the mine's own legal risk). Accordingly, I find that Garza has established a prima facie case under section 105(c), and that Hanson failed to rebut that prima facie case, either by establishing that the protected activity did not occur, or by establishing that the company would have taken the adverse action in any event for the unprotected activities alone. In so finding, I also find that Garza established pretext by a preponderance of the evidence.

ORDER

Manuel Garza's discrimination complaint under section 105(c)(3) is **GRANTED**.

It is **ORDERED** that Garza be reinstated immediately to his former position as leadman at Hanson's Servtex facility with an equal or greater rate of pay.

It is further **ORDERED** that Hanson shall pay Garza backpay, interest, and full benefits from the date of termination, and reinstate such seniority as he is entitled as though no action had been taken against him.

It is further **ORDERED** that Hanson shall also pay to Garza his reasonable attorney's fees, costs, and expenses associated with this complaint.

It is further **ORDERED** that Hanson shall **EXPUNGE** from its personnel records any reference to Garza's termination on August 31, 2012, the circumstances surrounding his termination, and this discrimination action.

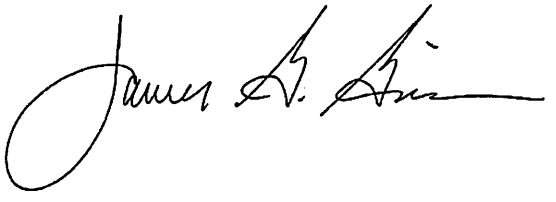
It is further **ORDERED** that Hanson shall post a copy of this *Decision on Liability* and *Final Order* at all of its mining facilities, placed in conspicuous, unobstructed places where notices to employees are customarily posted, for a period of 60 days, together with a posting by Hanson at such properties that it will not violate the Mine Act.

PENDING A FINAL ORDER

The judge retains jurisdiction of this proceeding pending the issuance of a final order granting relief. The parties are **ORDERED** to work together to determine the amount of back pay, interest, and attorney's fees to which Garza is entitled, and to jointly submit to this Court not later than thirty days from receipt of this Decision, a stipulation as to the proposed award of damages, together with specifics on the calculation of the damages. Such stipulation will not preclude Respondent's rights to seek review of this Decision. I will retain jurisdiction on this case until receipt of that joint report and issuance of a Final Order and this Decision shall not become final until issuance of my Final Order.

If the parties are unable to come to agreement within thirty days, they shall notify me in writing, and I will schedule a further proceeding limited to the issue of damages at a time in the near future.

Following issuance of the Final Order, this case will be referred to MSHA for assessment of a civil penalty. 29 C.F.R. § 2700.44(b).



James G. Gilbert
Administrative Law Judge

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