FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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NOV 18 2013

DAVID A. STACHE, Complainant,	:	DISCRIMINATION PROCEEDING Docket No. YORK 2013-41-DM
v.	:	No. NE-MD-12-05
ALVIN J. COLEMAN & SON, INC., Respondent.	:	Mine: Portable #2 Mine ID: 27-00050

DECISION

Appearances:

David A. Stache, Pro Se, West Ossipee, New Hampshire

Russell "Butch" Webster, Alvin J. Coleman & Son, Inc., Conway, New Hampshire, on behalf of Respondent

Before: Judge David F. Barbour

This case is before me upon a complaint of discrimination brought by David A. Stache ("Stache"), a miner, against Alvin J. Coleman & Son, Inc. ("Alvin Coleman" or "the company"), pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"), 30 U.S.C. § 815(c)(3). Stache contends that he was unlawfully discharged by Alvin Coleman on August 8, 2012, because of his protected activities, specifically his safety complaints to his supervisor, Russell "Butch" Webster. Alvin Coleman contends that it did not discriminate against Stache who was discharged not for protected activities, but for physically intimidating Webster.

PROCEDURAL BACKGROUND

On August 8, 2012, Stache was terminated by Alvin Coleman. Almost a month later, on September 6, 2012, Stache filed a discrimination complaint with the Mine Safety and Health Administration ("MSHA") pursuant to section 105(c)(2) of the Act.[1] Discrim. Compl. to MSHA

[1] Section 105(c)(2) of the Mine Act, 30 U.S.C. § 815(c)(2), states in relevant part:

(Sept. 6, 2012). On October 19, 2012, MSHA determined after an investigation that there was no violation of section 105(c), and therefore, that Stache's discharge was not prohibited by the Mine Act. MSHA Determ. of No Discrim. (Oct. 19, 2012).

Subsequently, on November 7, 2012, Stache filed a discrimination complaint on his own behalf with the Federal Mine Safety and Health Review Commission ("Commission") pursuant to section 105(c)(3) of the Mine Act.[2] Stache's Appeal of MSHA Determ. (November 7, 2012). Stache seeks lost wages from the date of his termination, August 8, 2012, to the estimated date of

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> Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate.

[2] Section 105(c)(3) of the Mine Act, 30 U.S.C. § 815(c)(3), states in relevant part:

> Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner . . . 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, within 30 days notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of [section 105(c)(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 of his former position with back pay and interest or such remedy as may be appropriate. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner . . . for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation.

his potential seasonal lay-off, December 14, 2012.[3] Discrim. Compl. to MSHA (Sept. 6, 2012). A hearing was held on May 21, 2013 in Ossipee, New Hampshire.[4]

At the hearing, the evidence established the following chronology of events. On August 8, 2012, Stache failed to inspect and report that the emergency steering of his haul truck was defective. The defective emergency steering was cited by an MSHA inspector later the same day. Complainant's Ex. 2.[5] A few hours after the citation was issued, Webster suspended Stache for two days for failing to inspect and report the defective emergency steering. *Id.* After Webster informed Stache that he was suspended for two days, Stache complained to Webster about safety issues with Stache's truck and mentioned section 105(c). A few minutes after that, Webster terminated Stache. *Id.*

Stache and Webster dispute the reason for the termination. Stache alleges that he was terminated because he made complaints under the Mine Act. Tr. 32. He claims that *after* being terminated, he threw a pen at the windshield of Webster's truck. Tr. 32. Webster claims that Stache angrily threw the pen at his face *prior* to being terminated. Tr. 88-89. Webster maintains that Stache's suspension escalated to a termination not because of Stache's protected complaints, but because Stache engaged in extreme misconduct by throwing a pen at Webster's face and by displaying unstable behavior, leading Webster to fear Stache was dangerous. Complainant's Ex. 1-2; Tr. 88-89.

FACTUAL BACKGROUND

THE MINE

Alvin Coleman is a construction company that employs engineers and skilled construction workers for construction projects. *Alvin J. Coleman & Son*, Alvin J. Coleman company website, http://www.ajcoleman.com (last visited Aug. 20, 2013).[6] The company also operates a crushing division, consisting of a rock quarry (the Conway quarry), three crushers and two screening plants. The crushing division supplies the material needed for the company's construction projects. *Id.* On March 15, 2008, Stache was hired by the company to perform general maintenance on equipment. Discrim. Compl. to MSHA (Sept. 6, 2012). On December 13, 2008, he was laid off. *Id.* On April 3, 2009, Stache was recalled and became a haul truck

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[3] In his complaint to MSHA, Stache conceded that he would have been seasonally laid off on December 14, 2012. Discrim. Compl. to MSHA (Sept. 6, 2012).

[4] The parties did not submit post-hearing briefs, and did not agree to any stipulations.

[5] Complainant's Exhibit 2 is comprised of a single page. The front, hereinafter referred to as page 1, contains Stache's notice of suspension. The back, hereinafter referred to as page 2, contains Stache's notice of termination.

[6] Due to the paucity of evidence regarding the nature of the mine, the court consulted the company's website for relevant information.

driver in the crusher division at the Conway quarry. *Id;* Complainant's Ex. 2, at 1. Stache operated the same Caterpillar 769 truck ("769 C") from April 2009 to his termination on August 8, 2012. Tr. 47, 59-60. While not explicitly stated, Stache's daily duties seemed to primarily comprise of hauling large pieces of rock within the quarry. Complainant's Ex. 6-7; Tr. 26-28, 48-51.

DRIVER'S VEHICLE INSPECTION REPORT

The Driver's Vehicle Inspection Report ("DVIR") is a daily report prepared by haul truck drivers regarding any defects with their haul trucks. Discrim. Compl. to MSHA (Sept. 6, 2012); Complainant's Ex. 3. The DVIR instructs drivers to "check any defective item and give details under remarks." *Id.* Below this instruction are three columns which list approximately 35 components of the truck such as wheels and steering (though the component "emergency steering" is not explicitly listed). To the left of each component is a small box. A driver must report a defect by checking the corresponding box, provide details about the defect in a remarks section, and report whether the defect was corrected. Complainant's Ex. 3. Stache testified that he completed the DVIR at the beginning of each shift and submitted it to Webster at the end of each shift. Webster received the original copy of each DVIR, while Stache retained a carbon copy. Tr. 39-40. Stache testified that Webster reviewed the DVIR of each driver in his office, recorded any reported defects, and communicated them to a company mechanic who was supposed to fix the defects in a timely fashion. Tr. 40. Stache testified that the mechanic might take two weeks or more to repair defects. *Id.*

HISTORY OF REPORTING SAFETY ISSUES

Stache had a history of reporting safety concerns with his 769 C haul truck. In June and September 2011, and in July 2012, he complained to Webster that his truck was being over-loaded with large pieces of rock and that the over-loading almost resulted in the truck tipping over. Complainant's Ex. 6-7; Tr. 26-28, 48-51. Subsequently, in April 2012, he complained to Webster of an oil leak; he testified that the oil leak had existed since 2010 without being repaired.[7] Complainant's Ex. 8-9; Tr. 51-56. In his DVIRs for the 769 C, betwen July 25-27, 2012, July 30-August 1, 2012, and August 7-8, 2012, Stache reported a defective air conditioning system, oil, hydraulic and exhaust leaks, a crack in the muffler, a broken seat, and

[7] It is unclear whether Stache's complaints regarding the overloading of his truck and the April oil leak were communicated orally to Webster or were simply reported on his DVIR. Regardless, Webster did not dispute that Stache made these complaints and that he, Webster, was aware of them.

that the body of the truck needed welding.[8] Complainant's Ex. 3; Tr. 35-39. Stache testified that Webster was aware of all these safety concerns.[9] Tr. 60.

Stache also testified that Webster was not responsive to his safety concerns, in that multiple safety issues on his truck had not been addressed for several years. Tr. 40-41. In this regard, Webster conceded that he pondered installing a new air conditioning system in Stache's truck for several years instead of immediately installing it upon Stache's request. Tr. 100-01. However, Webster maintained that he was responsive to Stache's safety concerns, at least those made in July and August 2012. Specifically, he discussed the broken seat with Stache, and informed Stache that the cracked exhaust system was not leaking since it was double-lined. Tr. 69-70. Stache continued to insist that the exhaust was leaking despite being double-lined, but conceded that a mechanic, presumably on Webster's instructions, in August 2012, repaired the oil leak and informed Stache that the broken seat would be replaced. Tr. 67-68, 70.

SAFETY MEETINGS

At the hearing, Webster testified that Alvin Coleman's policy since 2008 was to suspend employees who committed safety violations which resulted in MSHA citations. Tr. 80-81. The company regularly communicated this policy to employees at safety meetings in the hope that it would make employees more vigilant about the defects on their equipment, and thus reduce the number of MSHA citations received by the company. *Id.* At the hearing, the company introduced records of three safety meetings between 2011 and 2012. On April 21, 2011, employees were informed of the company's progressive discipline policy; the first violation of the policy would result in a one day suspension, the second violation would result in a one week suspension, and the third violation would result in termination.[10] Resp't Ex. 4. On March 30, 2012, the company informed employees that it had "zero tolerance for [MSHA] citations if [preventing violations is] in your control." Resp't Ex. 2. The company further informed employees that the punishment for preventable citations would be "time off without pay or termination." *Id.* On April 13, 2012, employees were reminded by the company that "if [you're] caught with a violation from MSHA and you hadn't [sic] reported it on your paperwork[,] you will be getting time off without pay. [Y]ou are all responsible for your piece of equipment." Resp't Ex. 3. Stache was present during all three of these safety meetings. Resp't Ex. 2-4, list of signatures.

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[8] Complainant's Exhibit 3 is comprised of loose-leaf carbon copies of nine DVIRs submitted by Stache to Webster between July and August 2012. Eight of these DVIRs pertained to the 769 C truck operated by Stache, while one pertained to an AT-18 truck. As will be discussed, on August 8, 2012, Stache temporarily operated an AT-18 truck.

[9] Stache failed to clarify at the hearing whether he directly handed his daily DVIR to Webster, placed it in Webster's office, or gave it to another individual who delivered it to Webster. Tr. 39-40.

[10] The evidence suggests that actual discipline often varied from the progressive discipline policy. In this regard, after April 2011, at least three employees were suspended for three days, similar to Stache's two day suspension on August 8, 2012, but inconsistent with the progressive discipline policy where a one day suspension is followed by a one week suspension. Resp't Ex. 1.

MSHA CITATION

On the morning of August 8, 2012, between 6:15 a.m. and 8:00 a.m., Stache was temporarily operating an AT-18 haul truck (the 769 C, which he normally operated, had an oil leak that was being repaired). Discrim. Compl. to MSHA (Sept. 6, 2012); Complainant's Ex. 3; Tr. 20, 38, 67. At approximately 8:00 a.m., after a mechanic finished repairing the 769 C and informed Stache that the truck "was running," Stache began operating the 769 C haul truck. *Id.*, Tr. 73-75. Stache testified at the hearing that while he quickly inspected the 769 C, "due to production," he did not have time to shut down the truck in order to inspect the emergency steering. Tr. 68.

On the same day, a federal inspector from MSHA arrived at the mine to conduct an inspection. The inspector approached Stache's truck, the 769 C, and began inspecting the truck for any defects while Stache remained inside. Tr. 20-21. The inspector found that the emergency steering on the truck was defective due to a broken wire. Tr. 21. A mechanic was called to the truck to fix the defect. Complainant's Ex. 3; Tr. 21, 38-39. After the emergency steering was repaired, the inspector instructed Stache to note in his DVIR for August 8 that the defect had been corrected. Tr. 38-39. Later on August 8, at some point between 8:00 a.m. and 3:15 p.m., the inspector issued a citation to the company due to the defective emergency steering on Stache's truck. Complainant's Ex. 2. Stache was not aware that his truck had been cited, and he continued to operate the haul truck until approximately 3:15 p.m. when he learned from Webster of the citation Tr. 21-22.

SUSPENSION

At approximately 3:15 p.m., Stache finished his shift, parked and then exited his truck. Tr. 22, 24-25, 82. At that time, he noticed Webster driving towards him. Tr. 22. After parking in front of Stache, Webster got out of his truck, walked over to Stache, and informed him that he was suspended because he "did not do [a] complete daily inspection[.] [The] back-up steering on [Stache's 769 C haul truck] was not checked daily and was not reported on [Stache's] daily inspection book." Complainant's Ex. 2. Webster further told Stache that his failure to inspect the emergency steering on his truck had resulted in a citation which would cost the company $5,000. Tr. 18, 23.[11]

TERMINATION

Upon learning that he was suspended and might cost the company $5,000, Stache thought "it was going to be a personal fine" and he "became concerned about the safety issues on [his] truck." Tr. 18. While the testimony is not entirely clear, the court finds that the most reasonable inference to draw from the record is that Stache became worried that he would be fined $5,000 for receiving a citation, and would also be fined for all future safety issues with his truck. Stache

[11] At the hearing, Stache claimed that at the beginning of the conversation, Webster handed him a pen and a copy of the notice of suspension, and asked him to sign it without explaining why his signature was required. Tr. 17-18. As indicated below, Webster claimed that he asked for Stache's signature towards the end of the conversation.

then mentioned to Webster that the driver's seat in his truck was broken. Tr. 18, 97. Specifically, he claimed that a broken adjustment tool on the seat rendered him unable to adjust the backrest, thus hurting his back. Tr. 70-71. While it is agreed that Stache mentioned the broken seat, [12] it is ambiguous as to whether he mentioned other safety concerns during this conversation with Webster. At the hearing, Stache claimed that on August 8, "I explained to [Webster] that I had a cracked exhaust in the truck; I had no air conditioning in the truck; excessive noise level; and broken seat." Tr. 18. However, Webster testified that Stache did not mention the crack in the exhaust or the lack of air-conditioning during this conversation.[13] Tr. 97.

After Stache mentioned the safety issue(s) with his truck, Webster told Stache that he was not going to fix "petty ante stuff." Tr. 18, 30-31.[14] Stache, who testified that he felt insulted and degraded after Webster dismissed his safety concern(s) as "petty," responded by mentioning section 105(c), presumably complaining that Webster's "petty" comment was retaliatory.[15] Tr. 18-19, 30-31. Webster testified that during the conversation, Stache said "what about [section] 105(c)." Tr. 97. However, Webster argued that on August 8, he did not know the meaning of section 105(c) and that Stache "knew more about [section 105(c)] than [Webster] did." *Id.*

While there were no stipulated facts, the parties did not dispute the sequence of events leading up to Stache's mention of section 105(c). In this regard, the parties did not dispute that at approximately 3:15 p.m., Stache was suspended by Webster who informed him that he had cost the company $5,000, that Stache reacted to this news by mentioning safety issues which Webster characterized as "petty," and that Stache responded by mentioning section 105(c).[16] However, the parties diverge sharply as to the events which occurred after Stache's mention of section 105(c).

Stache claims that his mention of section 105(c) caused a furious Webster to immediately terminate him. Stache testified that Webster responded by telling him to "get the f*** off the

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[12] Webster conceded that Stache mentioned the broken seat during their August 8 conversation. Tr. 97.

[13] Webster did not address Stache's claim that Stache made a complaint about excessive noise during this conversation. Tr. 97.

[14] The court finds that Webster characterized Stache's broken seat complaint as "petty," as testified by Stache, since Webster, who was unable to recall how he responded to Stache's safety concern(s), conceded that he viewed the broken adjustment tool on the backrest as more of a comfort issue than as a safety issue, and did not dispute using the word "petty." Tr. 97-98, 101-02.

[15] While neither party provided a clear chronology of events, the court finds that Stache mentioned section 105(c) after, not before, Webster's "petty" comment, since it is reasonable to infer that the "petty" comment triggered Stache's reference to the statutory provision.

[16] Regarding the sequence and timing of events leading up to Stache's mention of section 105(c), the court is relying largely on Stache's testimony since Webster did not mention the chronological order for the events on August 8.

property, you're f****** fired." Tr. 31. Stache testified that after being terminated, he threw a pen at Webster's truck. The pen bounced off the truck's windshield and almost hit Webster, who was still standing outside his truck. Tr. 31-32.

Webster claims that Stache was terminated after he threw a pen at Webster's face. Webster testified that during the end of the heated discussion, he asked for Stache's signature on the notice of suspension. At that point, Webster testified that Stache "came unglued," screaming and shouting that he was "not signing any f****** paperwork" before finally throwing a pen that narrowly missed Webster's face; the pen flew across Webster's face and hit the windshield of Webster's truck. Complainant's Ex. 2; Tr. 101. Webster then decided to terminate Stache, testifying as follows:

> [Stache] went off the wall on me, and threw the pen at me. And, like I said, I considered that a projectile. I mean, that could have pierced my eye. And he - I don't know what [is] the word to use. He acted like he was getting very unstable. He was getting very red in the face and his eyes were wandering around. I mean, there's rocks, sticks and everything there, I could only imagine what was coming at me next. So I decided to defuse the situation, and that's when I discharged him.

Tr. 88-89.

THE LAW

In order to establish a *prima facie* case of discrimination under section 105(c) of the Mine Act, a miner must demonstrate by a preponderance of the evidence "(1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity." *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981). The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev. on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action, (2) knowledge of protected activity, (3) hostility or animus toward the protected activity and (4) disparate treatment. *Chacon*, 3 FMSHRC at 2510.

Once the complainant has established a *prima facie* case of discrimination "[t]he operator may attempt to rebut a *prima facie* case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity." *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981). The operator may also affirmatively defend by proving by a preponderance of the evidence that it was motivated by both the miner's protected and unprotected activities and would have taken the adverse action for the unprotected activity alone. *Robinette*, 3 FMSHRC at 818 n.20. The Commission has explained that an affirmative defense should not be "examined

superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). The Commission has held that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). However, the Commission has also held that "our judges should not substitute for the operator's business judgment our views of good business practice." *Chacon*, 3 FMSHRC at 2516.

***PRIMA FACIE* CASE**

COMPLAINTS DURING CONVERSATION ON 8/8/12

On August 8, 2012, at approximately 3:15 p.m., immediately after being informed of his suspension, Stache allegedly mentioned four safety issues with his truck to Webster - cracked exhaust, defective air conditioning, excessive noise, and a broken seat. Tr. 18, 70-71, 97. Webster responded by calling Stache's safety concerns "petty" prompting Stache to ask "what about [section] 105(c)," presumably complaining that Webster's "petty" comment was retaliatory. Tr. 18-19, 30-31. At the hearing, Webster did not dispute that Stache complained about the broken seat and mentioned section 105(c) during the August 8 conversation. Tr. 97. Webster also did not dispute that these complaints were protected under the Mine Act. *Id.* Webster denies, however, that Stache complained about the exhaust or air conditioning during the conversation. Tr. 97.[17]

First, the court considers whether Stache can establish a *prima facie* case based on his undisputed complaints during the August 8 conversation - that he was unable to adjust the backrest on the driver's seat of his truck and that he mentioned section 105(c). Tr. 18, 70-71, 97. The court finds that both these complaints were protected. Stache's complaint regarding the broken seat was protected as a safety complaint, despite Webster's opinion that the broken seat was more an issue of comfort than safety. Tr. 97-98, 101-02. In this regard, the court credits Stache's testimony that an inability to adjust the backrest on the driver's seat could result in accumulated back pain to the haul truck driver, who spends multiple hours each working day operating his truck. Tr. 70-71. Further, Stache's mention of section 105(c) was protected as an exercise of Stache's rights under the Act, as undisputed by the company.

Regarding Webster's motivation for terminating Stache, since there is no direct evidence that Stache's termination was motivated by his protected activity, the court must rely on circumstantial evidence of motivation. The Commission has noted that "direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Chacon*, 3 FMSHRC at 2510 (Nov. 1981). Circumstantial evidence may include: (1) coincidence in time between the protected activity and the adverse action, (2) knowledge of

[17] Webster failed to address whether Stache complained about excessive noise during the conversation on August 8. Tr. 97.

the protected activity, (3) hostility or animus toward the protected activity and (4) disparate treatment. *Id.*

Regarding temporal proximity, the Commission has found that a discharge occurring approximately two weeks after protected activity is sufficiently coincidental in time to support a finding of discriminatory motive. *Secretary of Labor on behalf of Clay Baier v. Durango Gravel*, 21 FMSHRC 953, 959 (Sept. 1999). This case presents an even stronger causal connection since Stache was terminated on the same day, and within a few minutes of making these protected complaints. Complainant's Ex. 2; Tr. 88-89.

Regarding knowledge, the Commission has recognized that an operator's knowledge of protected activity "is probably the single most important aspect of a circumstantial case." *Chacon,* 3 FMSHRC at 2510. Webster conceded that Stache complained about the broken seat and mentioned section 105(c) during the August 8 conversation.[18] Webster, who directly terminated Stache, thus had knowledge of both instances of protected activity.

Regarding animus, the Commission has recognized that the more that animus is specifically directed toward the protected activity, the more probative it is of discriminatory intent. *Chacon*, 3 FMSHRC at 2511. There is evidence that Webster was hostile towards Stache's complaint of a broken seat. Webster, who called this complaint "petty," clarified at the hearing that he personally viewed the broken seat as more of a comfort issue than an actual safety issue. Tr. 101-02. However, there is no evidence that Webster was hostile towards Stache's mention of section 105(c).

The Commission has stated in *Bradley* that "evidence of knowledge and timing present in [*Bradley*] constitutes substantial evidence that [the complainant's] discharge was at least partially motivated by his protected refusal to work." *Bradley,* 4 FMSHRC at 993. The Commission has recently stated in *Metz v. Carmeuse Lime,* 34 FMSHRC 1820, 1826 (Aug. 2012) that "the supervisors' knowledge of the complaints and the timing of those complaints constitute evidence that would allow a factfinder to conclude that [the complainant's] discharge was at least partially motivated by his protected safety complaints." In *Bradley* and *Metz,* the Commission found that the complainant made out a *prima facie* case based solely on management's knowledge of protected activity and coincidence in time between the protected activity and the adverse action.

In the case at bar, regarding the broken seat complaint and Stache's mention of section 105(c), Webster clearly knew of the protected activity, and terminated Stache mere minutes after he engaged in the protected activity. The indicia of knowledge and temporal proximity are

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[18] Webster argued that he was not aware of the precise meaning of section 105(c) on August 8, 2012. Tr. 97. However, Stache mentioned section 105(c) during a conversation regarding safety issues and immediately after Webster characterized Stache's safety complaints as "petty." Tr. 18-19, 30-31. In this regard, even assuming that Webster was unaware of the precise meaning of the statutory provision, the court finds that Webster was aware that Stache was referring to a legal provision concerning mine safety. Therefore, the court concludes that Webster knew that Stache's invocation of section 105(c) constituted protected activity under the Mine Act

sufficient to suggest a discriminatory motive. *Bradley,* 4 FMSHRC at 993; *Metz* 34 FMSHRC at 1826. However, even if these indicia were insufficient, there is also evidence that Webster was hostile towards Stache's broken seat complaint. Therefore, the court finds that Stache has established a *prima facie* case regarding the broken seat complaint and his mention of section 105(c).

Second, the court considers whether, under *Bradley* and *Metz,* Stache can establish a *prima facie* case based on his alleged complaints during the August 8 conversation regarding the defective exhaust, the defective air conditioning, or the excessive noise. *Bradley,* 4 FMSHRC at 993; *Metz* 34 FMSHRC at 1826. Webster testified that during this conversation Stache failed to complain about the defective exhaust or defective air conditioning. Tr. 97. Webster did not testify about Stache's alleged complaint about excessive noise.[19] *Id.*

The court finds that these additional complaints relate to safety issues with Stache's truck, as undisputed by the company. Therefore, the court finds that these additional complaints, if they occurred, were protected activity under the Mine Act. Since these complaints were allegedly made at the same time as the broken seat complaint, a few minutes prior to Stache's termination, there was a close coincidence in time between the alleged protected activity and adverse action. Tr. 18. The next step would be to determine whether the operator knew of these safety complaints, *i.e.* whether or not Stache made additional complaints to Webster during the conversation. However, since it is ambiguous as to whether Stache made additional complaints to Webster during the August 8 conversation, and since the court earlier found that Stache proved a *prima facie* case based on his complaint regarding the broken seat and his mention of section 105(c), it is unnecessary to resolve this issue.[20]

COMPLAINTS PRIOR TO CONVERSATION ON 8/8/12

Third, the court considers whether, under *Bradley* and *Metz,* Stache can establish a *prima facie* case based on his safety complaints prior to the conversation on August 8, 2012. *Bradley,* 4 FMSHRC at 993; *Metz* 34 FMSHRC at 1826. Stache testified that he complained that his truck, the 769 C, was being overloaded in June 2011, September 2011 and July 2012. Complainant's

[19] Stache failed to explain the cause for the excessive noise in his truck, though the court notes that in the preceding days, Stache had complained in his DVIR that the muffler of his truck was malfunctioning. Complainant's Ex. 3.

[20] Upon reviewing the evidence, the court has determined that it is ambiguous as to whether Stache complained about the exhaust, the defective AC or the excessive noise during the conversation on August 8, 2012. Since Stache had reported the exhaust and the defective AC on his DVIR in the morning of August 8, it is possible that he again raised those safety concerns after being suspended by Webster. Complainant's Ex. 3. However, Webster admitted that Stache made a safety complaint regarding the broken seat and mentioned section 105(c) during the August 8 conversation. Tr. 97. Webster thus established that he knew Stache had engaged in protected activity minutes before his termination. Therefore, Webster would seemingly have no incentive to falsely assert that Stache did not make any other safety complaints during the same conversation.

Ex. 6-7; Tr. 26-28, 48-51. He also testified that in April 2012, he complained of an oil leak. Complainant's Ex. 8-9; Tr. 51-56. During July and August 2012, he reported in his DVIRs numerous safety issues with the 769 C - the defective air conditioning; oil, hydraulic and exhaust leaks; a crack in the muffler; a broken seat; and that the truck's body needed welding. Complainant's Ex. 3; Tr. 35-39.

The court finds that these complaints relate to safety issues with Stache's truck and thus were protected under the Mine Act, as undisputed by the company. Stache's undisputed testimony that Webster was aware of these complaints established the operator's knowledge of protected activity. Tr. 60. However, Stache can only establish that some of these complaints were sufficiently close in time to his termination to indicate a causal connection. The complaints in Stache's DVIR were made between July and August 2012, and the most recent complaint regarding overloading was made in July 2012. Since these complaints were made within a month of Stache's termination on August 8, 2012, there is a close coincidence in time between the protected activity and the adverse action. However, the April 2012 complaint regarding an oil leak was made approximately four months prior to Stache's termination, and the complaints of overloading made in June and September 2011 were respectively made 14 and 11 months prior to Stache's termination on August 8, 2012. Therefore, these complaints are not temporally proximate to Stache's termination.[21]

Under prior Commission decisions, evidence of the operator's knowledge of protected activity and coincidence in time between protected activity and the adverse action is sufficient to establish a *prima facie* case. *Bradley,* 4 FMSHRC at 993; *Metz* 34 FMSHRC at 1826. As to the DVIR complaints and the July 2012 complaint regarding overloading, Stache established that the operator knew of these complaints and that these complaints were made within a month of his termination. Therefore, the indicia of knowledge and temporal proximity are sufficient to suggest a discriminatory motive. *Id.* However, as to the April 2012 complaint of an oil leak, and the overloading complaints made in 2011, Stache failed to establish that these complaints were sufficiently close in time to his termination to indicate a causal connection. Therefore, the court finds that Stache has established a *prima facie* case only regarding the DVIR complaints and the July 2012 complaint concerning overloading.

In conclusion, Stache has established a *prima facie* case on the basis of several complaints, made orally or verbally at different times, concerning different components of his truck. As discussed above, Stache proved a *prima facie* case regarding his complaint of a broken seat and his mention of section 105(c) to Webster during the August 8 conversation. Stache also proved a *prima facie* case regarding his complaints in his DVIRs of July and August 2012 concerning the defective air conditioning; oil, hydraulic and exhaust leaks; a crack in the

[21] The court briefly notes that there is no evidence that Webster was hostile towards any of Stache's complaints made prior to the August 8 conversation. While Webster had delayed installing a new air conditioning system in Stache's truck, other issues such as the oil leak were addressed, though perhaps not as promptly as Stache preferred. Tr. 67-68, 100-01. Stache also conceded that Webster discussed the broken seat with him, presumably prior to August 8, and explained to him that the cracked exhaust was not leaking since it was double-lined, though Stache rejected this explanation. Tr. 69-70.

muffler; a broken seat; and the truck's body needing welding. Finally, Stache proved a *prima facie* case regarding his complaint that his truck was overloaded on July 2012.

REBUTTAL

Alvin Coleman has failed to rebut the *prima facie* case by either proving there was no protected activity, or that Stache's termination was in no way motivated by his protected complaints. *See Robinette*, 3 FMSHRC at 818 n.20. In this regard, the court finds that Webster, who argued that Stache was terminated solely for his unprotected misconduct, failed to show that Stache's protected complaints did not have any impact on the termination. Complainant's Ex. 2, at 2; Tr. 88-89. Therefore, the court will now consider whether the company has established an affirmative defense.

AFFIRMATIVE DEFENSE

As indicated above, Alvin Coleman has failed to rebut Stache's *prima facie* case. Thus, it is clear that Stache's termination was motivated in part by his protected activity. However, the company can still avoid liability by proving an affirmative defense. In this regard, the company must show that even though Stache's termination was motivated in part by his protected activity, it was also motivated by his unprotected misconduct. *See Robinette,* 3 FMSHRC at 818 n.20. The company must further show that Stache would have been terminated for his unprotected misconduct alone, *i.e.* in the absence of the protected activity. *Id.*

Webster testified that Stache was terminated for his unprotected misconduct.[22] Specifically, Webster testified that Stache was terminated for physically intimidating Webster by throwing a pen at Webster's face and by displaying unstable behavior.[23] Complainant's Ex. 2; Tr. 88-89, 101. According to Webster, the pen was a projectile that could have harmed one of his eyes. Moreover, after Stache threw the pen, Webster testified that Stache's face was red and his "eyes were wandering around." Tr. 88-89. Webster testified that he feared that Stache, who seemed unstable, was capable of throwing other objects, such as rocks or sticks, at him. *Id.* Webster then immediately terminated Stache. *Id.*

The Commission has explained that an affirmative defense that the employee was terminated for his unprotected misconduct alone should not be "examined superficially or be approved automatically once offered" and that "pretext may be found . . . where the asserted

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[22] As stated earlier, Webster argued that Stache was terminated solely for his unprotected misconduct, rather than arguing Stache was terminated for both protected and unprotected activity. Complainant's Ex. 2, at 2; Tr. 88-89.

[23] The un-contradicted evidence indicates that the pen was thrown at Webster's face. Webster testified that the pen flew across his face and narrowly missed hitting him. Tr. 82-83. Stache testified that he threw the pen at the windshield of Webster's truck. Tr. 31-32. Since it is undisputed that Webster was standing in front of his truck at the time, it is clear that the pen was thrown in Webster's direction, at the same height as the truck's windshield. Tr. 32, 82-83. Therefore, based on both parties' testimony, the court finds it reasonable to conclude that the pen was thrown at Webster's face.

justification is weak, implausible, or out of line with the operator's normal business practices." *Haro,* 4 FMSHRC at 1938; *Price,* 12 FMSHRC at 1534. Taking cues from other federal statutes on discrimination, the Commission analyzed the issue of pretext in *Turner v. National Cement,* 33 FMSHRC 1059, 1073, listing three ways in which a complainant can show that the operator's affirmative defense is not credible but rather a pretext for prohibited discrimination. First, a complainant can establish that the employer's proffered reason(s) have no basis in fact, that they are factually false. *Id.* Second, a complainant can show that the proffered reason(s) did not actually motivate the termination, *i.e.* the complainant admits the factual basis underlying the employer's proffered reason(s), and that such conduct could motivate dismissal, but attacks the credibility of the proffered reason(s) indirectly by showing circumstances which tend to prove that an illegal motivation was more likely than the legitimate business reason(s) proffered by the employer. *Id.* Third, a complainant can show that the employer's proffered reason(s) were insufficient to motivate termination, *i.e.* other employees were not terminated even though they engaged in conduct substantially similar to that which formed the basis of complainant's termination. *Id.*

Stache primarily sought to use the first approach to demonstrate pretext. In this regard, Stache sought to prove that the company's proffered reason for his termination, that he engaged in physical intimidation by throwing a pen at his supervisor and by displaying ensuing unstable behavior, was factually false. The court will also consider whether Stache could have used the second approach to demonstrate pretext, by proving that the company's affirmative defense did not actually motivate termination. *Turner,* 33 FMSHRC at 1073. However, the court concludes that it is unnecessary to consider whether Stache could have used the third approach to prove pretext as Stache did not argue that the company's affirmative defense was insufficient to motivate termination. In this regard, Stache did not provide any evidence of disparate treatment, *i.e.* that other employees were not terminated despite engaging in the misconduct at issue.

TURNER FIRST APPROACH

Under the first approach in *Turner,* 33 FMSHRC at 1073, Stache sought to prove that Alvin Coleman's affirmative defense was factually false. Stache claimed that since he threw the pen *after* his termination, it could not have been a basis for his termination, and he was actually terminated solely for making protected complaints during and before the August 8 conversation. Tr. 32. Webster responded by alleging that Stache, who he claimed threw the pen *before* his termination, was terminated for throwing the pen and for his ensuing unstable behavior, not for his protected activity. Complainant's Ex. 1-2; Tr. 88-89. As indicated below, the court finds that Stache's testimony that he threw the pen after his termination is not credible.

First, the notice of termination, presumably written on August 8, 2012, corroborates the company's position that Stache was terminated for throwing the pen and for his ensuing unstable behavior. In the termination notice, Webster wrote "[Stache] threw his pen at me and refused to sign violation paper. David has a temper and I'm all done with that. I fired him at 3:15 p.m. 8-8-12."[24] Complainant's Ex. 2, at 2. While neither party addressed when the notice of termination

[24] While Webster noted that he terminated Stache at 3:15 p.m., Stache testified that Webster approached his truck at approximately 3:15 p.m., implying that Stache was terminated a few

was written, it is reasonable to infer that it was written immediately following the termination. Therefore, the contemporary notice of termination deserves more weight than Stache's testimony at a hearing nine months later.

Second, Stache's failed attempt to minimize the misconduct that led to his suspension harms his credibility. During direct examination, Stache implied that since he was neither trained nor instructed to check emergency steering, his suspension on August 8 was wrongful. He claimed that the DVIR, which lists steering but not emergency steering, fails to instruct drivers to check emergency steering. Tr. 15-16, 104-05. However, on cross-examination, Stache conceded that on August 8, he knew the proper procedure for inspecting emergency steering but failed to inspect it due to time constraints, testifying that "the proper procedure to check the emergency steering is to shut down the vehicle. And due to production, I didn't have time to shut the truck off to do that procedure. That was the next step." Tr. 68. Stache's knowledge of the proper procedure for inspecting emergency steering suggests that he was properly trained to inspect his truck. Stache also conceded that he should have inspected emergency steering on August 8, testifying "Yeah. I should have checked it." Tr. 69. Stache's own testimony thus indicates that he was trained, and knew that he was required to inspect emergency steering, contradicting his earlier claim that he was neither trained nor instructed to check emergency steering.

Stache's failed attempt to minimize the misconduct for which he was suspended undermines the credibility of his attempt to again minimize his misconduct, this time the misconduct for which he was terminated. In the former situation, Stache argued that he was not trained or unaware that he had to inspect emergency steering. In the latter situation, Stache argued that he threw the pen after his termination. The court finds that these two attempts by Stache to minimize his misconduct are strikingly similar. In both situations the alleged misconduct resulted in a disciplinary action, and Stache sought to minimize his misconduct at the hearing. In addition, in both situations the company disputed Stache's attempts to minimize his misconduct, arguing respectively that Stache was trained and aware of his duty to inspect emergency steering, and that the pen was thrown before his termination. Given the similarity between these two situations, it is reasonable to infer that if Stache's excuse regarding his failure to inspect emergency steering is not credible, his claim that he threw the pen at Webster after his termination is similarly not credible.

For the reasons above, the court finds that Stache's testimony that he threw the pen after his termination is not credible. Instead, the court credits Webster's testimony that Stache threw the pen prior to his termination since Webster was a forthright, credible witness whose testimony is corroborated by the contemporary notice of termination. Accordingly, the court finds that Stache failed to prove that the company's affirmative defense was factually false.

TURNER SECOND APPROACH

Under the second approach in *Turner*, Alvin Coleman's affirmative defense can be found to be pre-textual if the evidence shows that the alleged misconduct was not substantial enough to

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minutes after 3:15 p.m. Given that the precise time of termination is not determinative, the court, as explained earlier, will rely on Stache's testimony regarding the times for specific events.

credibly motivate termination. *See Turner,* 33 FMSHRC at 1073-77. In *Turner*, the Commission implicitly used the *Bradley* factors to determine the substantiality of an affirmative defense. *Id.* In *Bradley*, the Commission recognized that in order to determine whether an operator would have "disciplined the miner anyway for the unprotected activity alone," a judge must consider "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." 4 FMSHRC at 993. As shown below, the court finds that Stache's misconduct, his physical intimidation of a supervisor, was substantial enough to motivate Stache's termination and thus was not pre-textual.

First, the court assesses whether the record establishes that the company previously terminated other employees for intimidating a supervisor, and the court finds that it does not. The company provided five examples of employees who were suspended in the past. Resp't Ex. 1. However, none of these employees physically intimidated a supervisor, or were terminated for their misconduct. *Id.* Therefore, the court finds that none of them were similarly situated as Stache or received the same discipline as Stache.[25] *Id.*

Second, the court assesses Stache's past work record. At the time of his termination, Stache had worked approximately four years for the company. Discrim. Compl. To MSHA (Sept. 6, 2012). Webster, Stache's supervisor since April 2009, testified that Stache was a good, hardworking employee who, prior to his suspension on August 8, 2012, had only been disciplined once, several years prior to his August 8 suspension, for guarding issues at a crusher. Tr. 98. Therefore, the court concludes that Stache had a satisfactory past work record with the company.

Third, the court assesses whether Stache received any prior warnings from the company for insubordination, the misconduct for which he was terminated. There is no evidence that Stache was ever previously warned about insubordination. Tr. 98.

Fourth, the court assesses whether any personnel rules or policies prohibited the misconduct at issue. In this regard, although the company failed to submit a copy of its official policy on employee misconduct, the disciplinary forms used by the company list unsafe behavior and insubordination as grounds for discipline. Resp't Ex. 1. It is reasonable to infer that physical intimidation of a supervisor would be prohibited generally as unsafe behavior, and specifically as insubordination.

Fifth, the court assesses the nature of the employee's misconduct.[26] Stache's misconduct, throwing a pen at his supervisor's face, can be characterized either as a form of extreme

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[25] Respondent's Exhibit 1 is comprised of five notices of suspension, issued for offenses of absenteeism, unsafe driving, unsafe use of equipment, failure to follow instructions, and unsafe use of equipment respectively.

[26] This factor is not explicitly enumerated in *Bradley,* 4 FMSHRC at 993. However, since the *Bradley* factors are not exhaustive, the court can consider other factors that will allow the court to determine the substantiality of the affirmative defense. *Id.*

insubordination or extreme intimidation. As compared to lesser forms of insubordination such as a failure to follow instructions, or lesser forms of intimidation such as making an obscene gesture, Stache engaged in extreme misconduct by not merely ignoring instructions or making gestures but by angrily throwing a projectile at his supervisor. Webster's post-hearing letter to the court (July 15, 2013); Complainant's Ex. 2, at 2. The court credits and finds reasonable Webster's fear that the pen could have potentially blinded him, and that Stache, after throwing the pen, might start throwing other objects such as rocks or sticks. Tr. 88-89. As stated previously, the court found that Webster was a forthright witness and the court notes that Stache failed to dispute the potential harm to Webster, or Webster's contention that Stache seemed unstable.

Weighing all of the factors, the court finds that Stache's misconduct was substantial enough, by itself, to credibly motivate his termination. In this regard, while the court recognizes that Stache's work record was satisfactory and that the company failed to provide evidence of prior similar terminations of other employees or prior warnings to Stache for insubordination, the court cannot overlook the extreme nature of Stache's misconduct, which could have resulted in lasting harm to his supervisor. Therefore, the court finds that Stache would have failed to show that the company's affirmative defense was pre-textual under the second approach in *Turner*.

PROVOCATION

Finally, the court will consider whether Alvin Coleman's affirmative defense should fail because the misconduct for which Stache was terminated was provoked by the company's misconduct. The Commission has recognized that wrongful provocation by an employer may be grounds for excusing an employee's misconduct:

> Even if the judge determines that [the employer] has established the elements of its affirmative defense, the question remains whether that defense must nevertheless fail because [the employee's] conduct was provoked . . . [I]n many cases decided under the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994) ("NLRA"), courts have recognized that an employer cannot provoke an employee into an indiscretion and then rely on that indiscretion as grounds for discipline . . . . The question thus remains for the judge to determine on remand whether [the employee's misconduct] was provoked by [the employer's] response to his protected [activity]. The judge must also determine whether the particular facts and circumstances of this case, when viewed in their totality, place [the employee's] conduct within the scope of the "leeway" the courts grant employees whose "behavior takes place in response to [an] employer's wrongful provocation. If [the employee's] conduct was provoked and excusable, [the employer's] affirmative defense must fail."

Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite ("Bernardyn I"), 22 FMSHRC 298, 305-08 (Mar. 2000) citing in part *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st

Cir. 1977); *see also Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite ("Bernardyn II")*, 23 FMSHRC 924, 935-39 (Sept. 2001); *see also NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965).[27]

The Commission in *Bernardyn I* recognized that to assess a claim of provocation, the court must resolve two issues. First, the court must resolve whether the employer wrongfully provoked the employee. In *Bernardyn I,* 22 FMSHRC at 306, the Commission implied that the alleged provocation must consist of wrongful and unjustified employer conduct, recognizing that "other courts . . . have found layoffs, based ostensibly on vulgar employee outbursts to be improper where the employee's conduct was provoked by unjustified employer action."[28] Second, assuming wrongful provocation, the court must resolve whether the employee's misconduct after being provoked was excusable, *i.e.* whether, under the circumstances of the case, the employee's misconduct in response to the employer's provocation fell within the leeway courts grant such employees. *Bernardyn I,* 22 FMSHRC at 307-308.

Regarding whether Webster wrongfully provoked Stache's misconduct, Stache argued that Webster engaged in wrongful conduct on four occasions during the conversation on August 8, which could have contributed to Stache's emotional outburst minutes later. The evidence suggests that Webster's conduct on the first three occasions was not wrongful, but that his conduct on the fourth occasion was wrongful, and provoked Stache into throwing the pen.

First, Stache argued that his two day suspension for failing to inspect or report defective emergency steering was unjustified. Tr. 15-16, 104-05. However, as discussed earlier, the company, which required employees to inspect and report defective equipment in their DVIRs daily, clearly prohibited the misconduct for which Stache was suspended. Tr. 68-69, 80-81. Moreover, the company had repeatedly warned employees at safety meetings in March and April 2012, which Stache attended, that if their unsafe behavior resulted in a citation, they would be suspended. Resp't Ex. 2-3. Therefore, the court finds that Webster justifiably suspended Stache, and that the suspension was not wrongful provocation.

Second, Stache argued that Webster wrongly scolded him for allegedly costing the company $5,000. Tr. 18-23. This caused Stache, who mistakenly believed that he might have to pay a personal fine of $5,000, to become very nervous about other safety issues on his truck which he feared also might result in other personal fines. Tr. 18. At the hearing, Webster conceded that the proposed penalty for the citation was later assessed as $100. Tr. 103. However, Webster's explanation that he estimated the penalty would be $5,000 because of the company's history of prior violations was undisputed. Tr. 103. Since Stache failed to show that Webster's penalty estimate was unreasonable, and since Stache's own mistaken belief that he would be

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[27] In *Bernardyn I,* the Commission vacated and remanded the Administrative Law Judge's decision. The Judge then issued a decision on remand. After granting the Secretary's petition for discretionary review of the judge's remand decision, in *Bernardyn II,* the Commission vacated and remanded the judge's remand decision. *Bernardyn II,* 23 FMSHRC at 924.

[28] *See also Bernardyn II,* 23 FMSHRC at 938 where the Commission stated that "if the judge finds it necessary to reach the provocation issue on remand, he must revisit his determination that [the employer's] instruction to [the complainant] to speed up was not wrongful."

personally fined $5,000 contributed to his emotional state, the court finds that Webster's conduct was not wrongful, and did not provoke Stache into physically intimidating Webster.

Third, Stache argued that Webster wrongly asked him to sign the notice of suspension without explaining why his signature was required. Tr. 17-18. However, the notice of suspension clearly states that an employee must acknowledge receipt of the disciplinary form by signing it, and clarifies that the employee's signature is not an admission of employee misconduct. Complainant's Ex. 2, at 1. Given the clear language of the form, Webster need not have orally explained to Stache why the signature was required; by simply glancing at the form, Stache would have understood his signature's purpose. Therefore, the court finds that Webster did not engage in wrongful conduct by asking Stache to sign the notice of suspension

Fourth, Stache argued that Webster's characterization of his complaint regarding the broken seat as "petty" was degrading and unjustified. Tr. 18, 30-31. During their conversation on August 8, Stache complained that the adjustment tool for the backrest of the driver's seat was broken. Tr. 18, 70-71, 97. He believed that the inability to adjust the backrest was hurting his back. Tr. 70-71. In response, Webster, who viewed the broken adjustment tool as more of a comfort issue than as a safety issue, told Stache that he was not going to fix "petty ante stuff." Tr. 18, 30-31, 101-02. Stache's complaint about the broken seat was a protected complaint under the Mine Act, and at the hearing, Webster conceded that on August 14, 2012, an MSHA inspector confirmed that the adjustment tool for the backrest of the driver's seat was indeed broken. Tr. 101. The protected complaint regarding the broken seat should not have been characterized as "petty," a comment that angered Stache, leading to the conversation becoming heated and eventually resulting in Stache angrily throwing a pen at Webster. Tr. 30-31. The court finds that Webster's "petty" comment was wrongful conduct that directly provoked Stache into committing the misconduct for which he was terminated. However, this does not end the inquiry.

Regarding whether Stache's physical intimidation of Webster was excusable, the court, similar to the Commission, relies on decisions by the U.S. Courts of Appeals regarding when, under the National Labor Relations Act, an employee's misconduct is excusable due to the employer's provocative conduct. *Bernardyn I,* 22 FMSHRC at 306-308. In this regard, the Commission has relied on the First Circuit decision in *Trustees of Boston Univ. v. NLRB,* 548 F.2d at 393, which distinguished between minor employee misconduct, *i.e.* cursing, which may be excusable, and major employee misconduct, *i.e.* physical intimidation, which is rarely excusable. *Id., see Trustees,* 548 F.2d at 393, 393 n.4 citing *Florida Steel Corp. v. NLRB,* 529 F.2d 1225 (5th Cir. 1976) ("[c]ourts have been unwilling to overlook blatant misconduct such as physical intimidation.")

The Eighth Circuit succinctly stated:

> An employer may not provoke an employee and then rely on the employee's intemperate response as a ground for not reinstating him . . . . Yet, an employee is not free to engage in wanton conduct following an unlawful discharge and then hide behind the Act's protections . . . . As always in cases such as this, the question is where to draw the line as to the type of conduct that forfeits an

> employee's right to reinstatement . . . . Courts may allow certain indiscretions by employees who are wrongfully terminated, but they cannot overlook blatant misconduct such as threats of violence and physical intimidation. [29]

Precision Window Manufacturing v NLRB, 963 F.2d 1105, 1108 (8th Cir. 1992) citing *Trustees,* 548 F.2d at 393 n.4.

When Stache angrily threw a pen at Webster's face, he engaged in blatant misconduct that could have partially blinded his supervisor. This is the type of conduct that lies outside the leeway courts grant employees whose misconduct was provoked by the employer. In addition, the court notes that Stache's misconduct was disproportional to Webster's provocation. While the court agrees with Stache that Webster's "petty" comment was wrongful, the court cannot condone employee conduct that could have resulted in lasting harm to his supervisor.

For the reasons stated above, the court finds that while Stache's physical intimidation of Webster was provoked, his blatant misconduct was not excusable, and that Alvin Coleman's affirmative defense survives Stache's allegation of provocation.

CONCLUSION

In conclusion, the court finds that Stache established a *prima facie* case of discrimination under section 105(c)(3) of the Mine Act. The court also finds that Alvin Coleman affirmatively defended its termination of Stache. Therefore, based on a thorough review of the record, the court concludes that Stache failed to prove, by a preponderance of the evidence, that Alvin Coleman discriminatorily terminated him in violation of section 105(c) of the Act.

ORDER

Having concluded that David Stache has not established that he was unlawfully discriminated against, the court **DISMISSES** his complaint and this proceeding.

David F. Barbour
Administrative Law Judge

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[29] In *Precision*, the employee's provoked misconduct occurred after his termination. However, the analysis in *Precision* regarding when an employer's wrongful provocation excuses an employee's subsequent misconduct is applicable to cases where the employee's misconduct occurs prior to his termination. *Precision,* 963 F.2d at 1108.

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