FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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November 8, 2010

WILLIAM METZ,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. PENN 2009-541-DM
v.	:	NE MD 2009-02
	:	
CARMEUSE LIME, INC.,	:	Carmeuse Lime
Respondent	:	Mine 36-00017

DECISION

Appearances: Kim Lengert, Esq., Lengert Law LLC, Robesonia, Pennsylvania, for the Complainant;
R. Henry Moore, Esq., Jackson Kelly PLLC, Pittsburgh, Pennsylvania, for the Respondent.

Before: Judge Feldman

This case is before me based on a discrimination complaint filed on June 4, 2009, pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3) (2006) ("Mine Act"). The complaint, filed by William Metz, concerns his March 18, 2009, termination by Carmeuse Lime, Inc. ("Carmeuse") from a lime processing plant located in Annville, Pennsylvania.[1] Section 105(c)(1) of the Mine Act, 30 U.S.C. § 815(c)(1), provides, in pertinent part:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine . . . or because such miner . . . instituted any proceeding under or related to this Act . . . .

[1] Metz's complaint which serves as the jurisdictional basis for this matter was filed with the Secretary of Labor (the "Secretary") on March 28, 2009, in accordance with section 105(c)(2) of the Act, 30 U.S.C. § 815(c)(2). Metz's complaint was investigated by the Mine Safety and Health Administration ("MSHA"). On May 11, 2009, MSHA advised Metz that its investigation did not disclose any section 105(c) violations. On June 4, 2009, Metz filed his discrimination complaint with this Commission which is the subject of this proceeding. The hearing in this matter was delayed because Metz had difficulty obtaining counsel.

The hearing was conducted in Lancaster, Pennsylvania from April 13 to April 15, 2010. The parties have filed post-hearing briefs and replies that have been considered in disposition of this matter.

I. Statement of the Case

Metz's discrimination allegation primarily is based on his complaint, expressed shortly before his termination, concerning his belief that contract employees were dismantling a kiln in an unsafe manner. As discussed below, direct evidence of discriminatory motive is rare. More commonly, acts of discrimination are inferred from circumstantial indicia such as, coincidence in time between a safety related complaint and the adverse action, hostility or animus towards the complaint, and disparate treatment of the complainant. *Sec'y of Labor o/b/o Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516-17 (Nov. 1981) (citations omitted), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). Metz presented a *prima facie* case of discrimination as his safety related complaint occurred shortly before his March 18, 2009, termination of employment.

In response, Carmeuse seeks to rebut the *prima facie* case by demonstrating that the termination of Metz was not motivated by his protected activity. Rather, Carmeuse asserts that Metz was terminated as a direct result of an incident that occurred on March 12, 2009, in which Metz used profanity and expressed hostility towards a Carmeuse human resources official. This incident was unrelated to any protected activity under the Mine Act. The hostility occurred during a meeting in which Metz was protesting a company policy that denied retroactive back pay for on-call employees who now are receiving compensation for their on-call status. In the alternative, Carmeuse seeks to affirmatively defend by demonstrating that it would have terminated Metz regardless of any protected activity.

With the exception of coincidence in time, the evidence does not reflect any other circumstantial evidence of discriminatory motive to support Metz's complaint. Rather, the evidence reflects that his unprotected belligerent conduct provided an adequate independent basis for his termination. In this regard, Metz's hostile reaction to the company's refusal to provide him with a written denial of his back pay request was an unreasonable response that was not elicited by any wrongful provocation. Moreover, Metz's hostility was related to a personnel matter rather than any activity protected by the Mine Act. Accordingly, Metz's discrimination complaint must be denied.

II. Findings of Fact

a. Background

Carmeuse is an affiliate of Carmeuse Lime and Stone, Inc. (Resp. Br. 1). The company operates approximately 35 sites across the United States and Canada and employs approximately 2,400 people. (Tr. 368-69, 683). Its North American headquarters is in Pittsburgh, Pennsylvania. (Tr. 368). There are approximately 50 employees at the Annville, Pennsylvania plant. (Tr. 612).

The plant produces lime from stone extracted from an adjacent quarry that is owned and operated by an unaffiliated company. (Tr. 639). Raw stone extracted from the adjacent quarry is heated in kilns. (Tr. 639). The by-product is a powdery lime substance that can be crushed into different sizes for commercial sale. (Tr. 639).

William Metz was employed by Carmeuse and its predecessor companies at the Annville plant for approximately 22 years. (Tr. 32). At the time of his March 2009 termination, Metz was employed in the maintenance department as a millwright. (Tr. 33). His responsibilities included working on general maintenance, inspecting equipment, and welding and fabricating. (Tr. 33, 226). Metz also served on the safety committee and periodically accompanied mine inspectors as a miners' representative. (Tr. 35-37, 195).

Metz filed two previous discrimination complaints under section 105 of the Mine Act against Carmeuse and a predecessor company. Metz's initial complaint, filed against predecessor company Wimpy Minerals ("Wimpy") and Wimpy's successor Tarmac America, Inc, concerned his March 21, 1995, termination of employment. At that time, Metz was allegedly terminated for confronting a supervisor with "loud," "insubordinate" and "threatening behavior." Metz's employment was ordered to be reinstated after a Commission hearing on the merits. The decision was based on a finding that the conduct, relied on by Wimpy as an independent basis for Metz's termination, was provoked by the company's response to Metz's safety related protected complaints. *Metz v. Wimpy Minerals*, 18 FMSHRC 1087, 1089-90, 1100-01 (June 1996) (ALJ).

An investigation by MSHA following Metz's second complaint, filed in March 2007, found no evidence of discrimination. Metz did not pursue this complaint after MSHA informed him of the results of its investigation. Metz does not contend that his previous discrimination complaints were a motivating factor in his March 18, 2009, discharge.

b. Metz's Behavioral History

Metz is an assertive and opinionated individual who was not hesitant to express safety concerns to management, or, to act as an employee spokesman who communicated personnel grievances. (Tr. 228, 514, 547). Metz's brief characterizes Metz's reported safety related complaints as, "caus[ing] friction with management." (Metz Br. at 2). However, with the exception of Metz's termination 14 years earlier by a predecessor company, the evidence, including testimony by a Metz witness, does not reveal any history of animus or retribution by Carmeuse in response to safety related complaints.

Metz had a history of engaging in confrontational and abusive behavior. At trial, Metz was questioned about an incident that occurred on or about March 5, 2007, in which Metz was seeking the approval of area manager Ken Kauffman for four hours of compensation that had been docked from Metz for a previous incident. Metz was asked:

> Metz Counsel: In 2007 – and I only bring this up because it was part of the consideration that was used for your termination. In 2007, did you ever threaten Ken Kauffman?

Metz: Oh, yeah. Yeah.

Metz Counsel: How did you threaten him?

Metz: Well, I, actually, don't call it a threat. I didn't then until I looked it up, but it had to do with when I was helping Jim Smith. They sent me home. I filed a peer review. Ken Kauffman denied it.

(Tr. 112).

Contrary to Metz's characterization of his behavior as non-threatening, Kauffman testified that Metz told him, and an MSHA inspector who was present at the time, that he would "kick both of [their] asses." (Tr. 572). As a result of this incident, a written warning was placed in Metz's personnel file cautioning him of termination if his threatening behavior should reoccur. (Resp. Ex. 6).

Metz also had a history of abusive and harassing behavior towards a fellow employee. Metz teased the employee about the fact that the employee's mother, who had separated from his father, was in a relationship with another Carmeuse employee. Metz told the employee that his mother was "pretty hot," and he suggested that he wanted to have sexual relations with her in crude and obscene language. (Tr. 418).

Carmeuse's harassment assertion was presented through hearsay rather than direct evidence. (Tr. 418). However, Metz's inappropriate conduct was corroborated by Metz's witness, Robert Boehler, who testified that the victim of Metz's harassment quit his employment because Metz harassed him about his mother. (Tr. 312).

At trial, Metz again was equivocal when given the opportunity to deny that he had, in fact, teased this employee:

Metz Counsel: Did you ever tease [this employee]?

Metz: I don't remember teasing him.

Metz Counsel: Not the same thing. Did you ever tease him? . . .

Metz: I can't remember a specific incident, but we all teased around with him some, a little bit.

(Tr. 120).

c. Kiln Complaints

During Metz's employment at the Annville plant, there were four kilns that were used to process lime from limestone rock. These kilns were suspended on solid steel girders that were connected to a wheel called a truniuon that allows the kilns to spin. Kilns and their supporting structures weigh several tons. During approximately the first week in March 2009, independent contractors started to dismantle and remove two of the four kilns that had been inactive for several years. (Resp. Br. 12). Instead of being paid by Carmeuse, the contractor was allowed to sell the scrap metal salvaged during the dismantling and removal of the kilns. (Tr. 25, 50-55, 577, 669).

Metz was concerned that someone could be struck by falling material because the area being dismantled was not properly dangered-off. Metz was also concerned about possible electrocution because the kiln area was not de-energized. (Tr. 53-55). During the week preceding Metz's termination, Metz and several other hourly employees expressed their safety related concerns to mine management officials, Ron Popp, Greg Doll, Keith Lambert, Mark Miller, and area manager Ken Kauffman. (Tr. 56).

Although Kauffman could not specifically recall Metz's kiln related complaints, Kauffman testified, "it wouldn't be uncommon for [Metz] to come in and talk about issues at the plant." (Tr. 581). Kauffman testified that he had met with Metz and other employees numerous times about various safety issues. (Tr. 581-82). In this regard, Bruce Kercher, a friend of Metz, who was also an hourly employee at the plant, also complained to mine management about the kiln contractor. (Tr. 252, 284). Kercher testified that he did not experience any company retaliation as a consequence of his safety complaints. (Tr. 252). In fact, Kercher testified that he would feel comfortable making safety complaints to management. (Tr. 283-84).

The activities of the independent contractor were the subject of an MSHA inspection on March 5 and March 6, 2009. (Tr. 583-85, 669-70). The mine inspector spoke to the contractor but no violations were cited. (Tr. 583-84, 669-70). The contractor ultimately discontinued the work because the price of scrap metal was low and the job was unprofitable. (Tr. 276, 577). At trial, Carmeuse stipulated that "[t]here were complaints by any number of people," including Metz. (Tr. 59). Carmeuse also stipulated that these complaints were communicated within no more than two to three weeks prior to Metz's termination. (Tr. 60). Although Carmeuse maintains that the contractor was operating in a safe manner, Carmeuse stipulated that Metz's complaints were made in good faith. (Tr. 60-61).

d. The On-Call Policy

Carmeuse has an "on-call policy" that requires certain maintenance and electrical employees to be available to work on their days off if their services are needed at the plant. (Tr. 72-76, 219). On-call employees have always been paid for at least four hours if they were summoned to work. However, prior to January 2009, it was Carmeuse's policy not to pay on-call employees for their on-call status, even though their required availability disrupted their personal lives. (Tr. 169-71). In January 2009, in response to employee requests, a new on-call policy was implemented at the plant. (Tr. 74-76, 219, 718). On-call employees continued to receive at least

four hours pay if their services were required. However, the new policy paid employees $25.00 for each day that they were on-call, but not required to work. (Tr. 74-76, 219, 501, 718).

Some employees, including Metz, believed that they deserved back pay for at least the prior two-year period when the new on-call program had not been in place. (Tr. 169; Resp. Ex. 15). Determined to obtain the back pay he believed was owed to employees, Metz acted as a representative of the millwrights. (Tr. 76, 222). Metz approached several members of the human resources department, including Annville plant human resources representatives Becky Vinton and Ed Jones about this issue. (Tr. 427-28). Metz testified that Vinton promised that on-call compensation would be paid retroactively. (Tr. 93, 191). Consequently, the company's refusal to pay retroactively was a contentious issue. (Tr. 72).

e. Metz's Peer Review Request

Peer review is a method of addressing employee grievance and discipline issues. It is a process where aggrieved employees can request review by the employee's supervisor, the human resources area manager, and the plant manager. Alternatively, an employee can request peer review before a panel of hourly and salaried employees who have completed peer review training. (Metz Ex. 10). Certain subjects are excluded from the peer review process, including the setting or changing of company policy and issues concerning sexual harassment. (Metz Ex. 10).

On December 29, 2008, Metz filed a written peer review request concerning the back pay issue. Metz's request for peer review stated:

> Per HR Pittsburg [sic] agrees compensation for being on call is reviewable by peer review – maintenance has been on-call for over yr and hlf [sic] with no compensation for our lives being interrupted. Back pay for an agreed amount that's fair for the troubles on-call cause and has caused.

(Metz Ex. 15). Metz's request for peer review was denied by supervisor Ron Popp and area manager Ken Kauffman. (Resp. Ex. 15).

f. Croll's Account of the March 12, 2009, Meeting

Melissa Croll is a corporate human resources manager based out of Carmeuse's corporate headquarters in Pittsburgh, Pennsylvania. (Tr. 364-68). Croll's supervisor is Kathy Wiley. Wiley is a Vice President of Human Resources who also is based in Pittsburgh, Pennsylvania. (Tr. 367-68). Croll, who recently had been assigned to oversee the Annville plant, made her initial visit to the plant in February 2009. (Tr. 370).

On March 12, 2009, Croll returned to the plant to finalize her performance goals with human resources assistant Ed Saterstad. (Tr. 371-72). After the meeting, Saterstad informed Croll that an employee wanted to meet with her. (Tr. 372). Croll initially testified that Saterstad did not identify or tell her anything about the employee she was about to meet. (Tr. 373). However, when confronted with her deposition, Croll later admitted that Saterstad told her the employee

was Bill Metz and that Metz was a "complainer." (Tr. 453-54). Moreover, Croll admitted in a March 12, 2009, e-mail, sent to Wiley shortly after her meeting with Metz, that she had known that Metz was a "disgruntled employee" prior to the March 12, 2009, meeting. (Resp. Ex. 18).

Metz denies that he requested the March 12, 2009, meeting with Croll, claiming that it was Saterstad and Croll who initiated the meeting. (Tr. 71). However, Metz testified that he previously had called Croll in Pittsburgh in January 2009. (Tr. 81). At that time, Metz left Croll a message requesting that Carmeuse explain in writing why the men were not getting back pay for being on-call. (Tr. 81). However, Croll reportedly did not recall receiving a message from Metz, and she did not return his call. (Tr. 371). Regardless of who initiated the meeting, given Metz's December 2008 written request for peer review on the back pay issue, and his January 2009 telephone message to Croll, the company had reason to believe that Metz wanted to speak to Croll.

Saterstad called Metz to come to the plant conference room to meet with Croll. (Tr. 374). Upon entering the conference room, Metz was greeted by Croll who was sitting at the conference table. (Tr. 376). Saterstad, a human resources assistant who worked at the Annville plant and knew Metz, departed the conference room leaving Metz and Croll alone. Metz sat down next to Croll, a distance of approximately three to four feet, and they faced each other as the conversation began. (Tr. 377; Metz Ex. 24).

Metz began the conversation by stating that he wanted to invoke the company's peer review process to resolve whether maintenance workers were entitled to receive back pay for being on-call for the past two years. (Tr. 378-79). Croll informed Metz that the company's new on-call policy did not include back pay for employees who had been on-call. Croll reminded Metz that issues concerning company policy were not subject to the peer review process. (Tr. 379; Metz Ex. 10). Croll testified that Metz became agitated and irate and yelled at her, "that's fucking bullshit." (Tr. 379).

Croll testified that she tried to placate Metz, but he again yelled, "that's fucking bullshit." (Tr. 380). He reportedly repeated similar statements several more times. (Tr. 381). Croll stated she again attempted to diffuse the situation by offering to bring the back pay issue to the attention of her supervisor Kathy Wiley. (Tr. 381). Consistent with the prior telephone message he had left Croll requesting a written decision, Metz demanded, "I want a fucking formal response on this issue." (Tr. 382). Croll related that Metz continued to be loud and aggressive, and before exiting the room, he sprang from his chair in a manner that made it appear that he was lunging at Croll. (Tr. 382-83).

g. Metz's Account of the March 12, 2009, Meeting

Metz's account of the March 12, 2009, meeting cannot be reconciled with Croll's account of the meeting. Metz testified that he was summoned to Saterstad's office without explanation, where he was met by Saterstad and Croll. (Tr. 77, 85). Shortly thereafter, Croll exited her meeting with Saterstad and joined Metz who was waiting in the conference room. (Tr. 85). Saterstad left the area and did not participate in the meeting. (Tr. 93).

Although Croll testified that she initially became aware of a previous incident that occurred when Metz confronted Mei Lorick, a former human resources representative at the plant, after the March 12 meeting, Metz testified that Croll began the meeting by stating to him, "you are the one who hates Mei Lorick." (Tr. 85-8, 391-93). Metz testified that he denied hating Lorick, but he told Croll that "[Lorick] doesn't do her job." (Tr. 87).

Metz testified that Croll explained Carmeuse's position on peer review. Metz responded that he already understood the peer review policy. (Tr. 88). Metz testified that he requested a written document formalizing Carmeuse's refusal to provide back pay for retroactive on-call service. (Tr. 89). Metz stated that he sought this document as a means to extricate himself from his role as intermediary between Carmeuse and its employees on the back pay controversy. (Tr. 89). In this context, Metz instructed Croll to "have Ms. Wiley . . . make this document up." (Tr. 89). Croll reportedly responded, "[d]on't talk to me like that," to which Metz reportedly responded, "what do you mean?" (Tr. 89). Metz testified that he concluded that, "something screwy is going on here. I am going to get out of here and try to save myself," and then he left the conference room. (Tr. 89).

Conspicuously absent from Metz's account is any admission that he used profane language, or, that he acted in a hostile or otherwise inappropriate manner. Metz's testimony regarding his behavior on March 12, 2009, was evasive and lacking in credibility. In this regard, Metz testified:

> Metz Counsel: Did you swear at Melissa Croll?
>
> Metz: I don't remember swearing at her.
>
> Court: Mr. Metz, the question was: did you swear at Ms. Croll? You said you don't remember swearing at Ms. Croll or you didn't swear at Ms. Croll? What was your response?
>
> Metz: If I did, I wouldn't have had to ask her what I did or said. I don't remember swearing at her.
>
> Court: That's what I'm asking. Is your testimony that you didn't swear at her or is your testimony that you don't remember swearing at her?
>
> Metz: I would say it would be out of character for me to swear in front of a lady, first of all. Not that I don't; but, accidentally, you could maybe say something.
>
> Court: So I'll ask you again. Is it your testimony that you don't remember swearing at her or that you didn't swear at her?
>
> Metz: I would say I didn't because since she couldn't tell me what it was when I asked her a couple times.

Court: I am not asking you to tell me what she told you. I am asking you to try to remember what you said. Do you remember what you said or was your testimony that you remember what you said and you didn't swear at her?

Metz: I don't remember swearing at her. . . .

Court: So you don't remember what you said?

Metz: No.

Court: Was that a yes?

Metz: No.

Court: You do remember what you said?

Metz: Okay, no. You are confusing me.

Court: Well you are confusing me. My question is: do you remember what you said to her?

Metz: I don't recall swearing at her. I thought that's what you asked. I didn't swear at her.

Court: Your testimony is you didn't swear at all at her?

Metz: Not that I remember. I am confusing you again.

Court: No, you are not confusing me. Your testimony is that you don't remember swearing at her. That's the best we are going to get, right?

Metz: I am saying that there's – there could be sometimes when someone swears, and they don't remember swearing or – .

Court: I am not asking you to recall what happened on March 12 . . . I am asking you: since this was a topic of discussion all during that time, March 12, 13, 14 – when were you finally terminated? March 18?

Metz: Yes.

Court: So it was a topic of conversation. I don't find it credible that you don't remember what you said. Because this would have been discussed over the course of that week. Did you or didn't you swear at all at her.

Metz: I say I didn't swear at her.

Court: Your testimony is you didn't swear at her?

Metz: No, I didn't. I hate to say not that I know of. I am going to say no.

Court: All right.

Metz: I didn't swear at her.

Court: It's an equivocal no.

(Tr. 107-10).

h. The Events Following the March 12, 2009, Meeting

Metz's behavior reportedly startled Croll. (Tr. 384). She left the conference room and went to Kauffman's office where Kauffman testified he noticed she appeared "very shaken." (Tr. 385, 587). Croll reported to Kauffman what had happened. She was concerned about Metz returning to work in his agitated state. (Tr. 385). Croll asked Kauffman to call Metz to the office so that she could express her concerns and explain to Metz that his behavior in the conference room was inappropriate. (Tr. 385).

Kauffman called Maintenance Manager Keith Lambert, and Lambert escorted Metz to Kauffman's office. (Tr. 387, 587-88). When Croll explained to Metz that his behavior was unacceptable, Metz replied, "this is all bullshit." (Tr. 388, 588-89). Concerned by Metz's agitation, Croll suggested to Metz that he should look for another job if working at the plant was making him that unhappy. (Tr. 389). Metz promptly left the room at which time Croll, Kauffman and Saterstad left to go to lunch. (Tr. 391-92).

During lunch, Saterstad remembered an incident involving Metz and Mei Lorick. (Tr. 391). Saterstad explained that Metz had been upset about an incident where he was accused of intentionally burning an employee by giving the employee a recently welded hot piece of metal. The company ultimately found that Metz was not at fault. However, Saterstad recalled that Metz became hostile in his meeting with Lorick in that he yelled and pointed his finger in Lorick's face. (Tr. 392-93). Saterstad further related to Croll that Metz was known to exhibit anger and hostility in the workplace. (Tr. 393).

Upon returning from lunch, Croll, Kauffman and Saterstad were met by maintenance supervisor Ron Popp who had just spoken to Metz. (Tr. 394). Popp gave Croll written notes he had taken after his encounter with Metz. (Tr. 395; Resp. Ex. 20). Popp explained that he had asked Metz what was wrong after seeing Metz, who was apparently upset, standing by one of the kilns. (Tr. 396, 644). Metz responded, "who the fuck does she think she is," and "she is a waste of my fucking time." (Tr. 396, 644; Resp. Ex. 20). Metz then said, at least twice, that he needed to go home before "I hurt myself or someone else." (Tr. 396, 644, Resp. Ex. 20).

Concerned for the well being of Metz and the safety of the plant employees, Popp agreed that Metz should go home. (Tr. 644). Popp drove Metz to the locker room and waited until he observed Metz leave plant property. (Tr. 645). Popp opined to Croll that he believed Metz was "a time bomb ready to explode." (Tr. 395; Resp. Ex. 20).

After listening to Popp, Croll felt threatened and believed Metz was capable of workplace violence. (Tr. 397-98). Mark Miller, an area loss prevention manager, also testified that an hourly employee came to see him after the Metz incident because he too was afraid Metz could return and harm people at the plant. (Tr. 673-74, 679-80).

Kauffman and Croll called Roger Downham, Vice President of Operations, who is based in Toronto, Canada, as Croll's supervisor Wiley was unavailable because she was on jury duty. (Tr. 19, 398-99). They explained the series of events that had occurred. Downham decided that Metz should be suspended without pay pending further investigation. (Tr. 399). Pursuant to Downham's decision, Croll and Kauffman decided they would have Lambert meet Metz at the gate entrance to plant property the next morning at 5:30 a.m. before the start of the 6:00 a.m. shift to inform Metz of his suspension. (Tr. 399-400).

In the meantime, Croll decided to review Metz's personnel file and to interview employees about their interactions with Metz before speaking to Wiley. (Tr. 410). In addition to the incident involving Metz's hostile reaction to Lorick, Croll noted the March 6, 2007, discipline notice concerning Metz's threatening behavior towards Kauffman, and the warning that Metz would be terminated if his threatening behavior toward management should reoccur. (Tr. 404, 571-72; Resp. Ex. 6).

Croll e-mailed Wiley a detailed description of the March 12 events, including attachments of copies from Metz's personnel file. (Tr. 406, 685; Resp. Ex. 18). Wiley telephoned Croll to discuss the incident and they agreed on a plan to determine if this was an isolated event or a pattern of behavior. (Tr. 406, 685, 687). Wiley suggested contacting the local police to provide security at the plant if Metz became angry about being prevented from entering plant property. (Tr. 407). Carmeuse informed the North Landonderry Township Police of their concerns regarding Metz. (Tr. 406-08, 597; Resp. Ex. 27B).

Metz did not attempt to come to work on March 13, 2009. (Tr. 106, 407-08). Concerned that Metz would be upset by the investigation and suspension, Miller arranged for Metz's suspension notice to be delivered by the state constable as suggested by the Township Police. (Tr. 409; Resp. Ex. 21).

Croll continued her investigation by interviewing employees about their interactions with Metz. (Tr. 410; Resp. Ex. 26). Croll learned about the previously noted incident in which Metz harassed a fellow employee and made lewd comments about that employee's mother. (Tr. 418-20). After completing her interviews, Popp escorted Croll to the highway for her return to Pittsburgh. (Tr. 420).

Upon returning to Pittsburgh, Croll called Lorick and Jones as they were former human resources representatives at the Annville Plant who were familiar with Metz. (Tr. 424-28; Resp. Exs. 22, 23). Croll testified that each described Metz as a "hot head" with a bad temper. (Tr. 424-28). Lorick also described Metz as a "time bomb ready to explode." (Tr. 426). Jones told Croll that Metz also had previously contacted him about obtaining peer review for the on-call back pay issue. (Tr. 428).

Croll reported to Wiley a chronological account of the relevant events concerning Metz. (Tr. 695-96; Resp. Ex 18(a)). Wiley testified she reviewed the information and discussed the March 12 incident with Downham and Carmeuse's in-house counsel Kevin Whyte. (Tr. 699-700; Resp. Exs. 22, 23). Their conclusion was that Metz should be terminated. (Tr. 597, 685, 699).

In a telephone conversation on March 18, 2009, Wiley explained to Metz Carmeuse's decision to terminate his employment because of his "repeated use of profanity, vile, threatening and/or abusive conduct in the workplace with [his] peers and members of management." (Tr. 701-02; Resp. Ex. 1). Wiley informed Metz that his personnel file had been reviewed and it too demonstrated a "clear pattern of harassing, abusive and offensive behavior" that would not be tolerated in the workplace. (Tr. 702).

A letter from Wiley summarizing her conversation with Metz and outlining the reasons for his termination was sent to Metz on March 18, 2009. (Resp. Ex. 1). The letter stated, in pertinent part:

> Effective Wednesday, March 18th, 2009, you are being terminated from employment with Carmeuse Lime and Stone for violation of the Corporate Harassment Policy in addition to General Rules and Regulations as outlined in the Annville Handbook (plant specific). Your repeated use of profane, vile, threatening and/or abusive language in the workplace used with your peers and members of management, in addition to a thorough review of your personnel file, has demonstrated a clear pattern of harassing, abusive and offensive behavior in the workplace as well as a lack of respect for others. This behavior will not be tolerated in the workplace.

(Resp. Ex. 1).

Metz requested peer review of his termination. (Tr. 704). The request was denied due to the confidential nature of information obtained during the investigation concerning harassment of a Carmeuse employee. (Tr. 704-05; Resp. Ex. 27A). A formal letter dated March 23, 2009, was sent to Metz detailing the reasons for the denial of his request for peer review. (Resp. Ex. 27A).

III. Further Findings and Conclusions

a. Analytical Framework

Section 105(c) of the Mine Act prohibits discriminating against a miner because of his participation in safety related activities. Congress provided this statutory protection to encourage miners "to play an active part in the enforcement of the Act" recognizing that, "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." S. Rep. No. 95-181, at 35 (1977), *reprinted* in Senate Subcomm. on Labor, Committee on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978). It is the intent of Congress that, "[w]henever protected activity is in any manner a contributing factor to the retaliatory conduct, a finding of discrimination should be made." *Id.* at 624.

Metz, as the complainant in this case, has the burden of proving a *prima facie* case of discrimination. In order to establish a *prima facie* case, Metz must establish that he engaged in protected activity, and that the termination of his employment was motivated, in some part, by that protected activity. *See Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980) *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981).

Carmeuse may rebut a *prima facie* case by demonstrating, either that no protected activity occurred, or, that the termination of Metz was not motivated in any part by his protected activity. *Robinette*, 3 FMSHRC at 818 n.20. Carmeuse may also affirmatively defend against a *prima facie* case by establishing that it was also motivated by unprotected activity, and that it would have taken the adverse action for the unprotected activity alone. *See also Jim Walter Resources*, 920 F.2d at 750, *citing with approval Eastern Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987); *Donovan v. Stafford Constr. Co.*, 732 F.2d 954, 958-59 (D.C. Cir. 1984); *Boich v. FMSHRC*, 719 F.2d 194, 195-96 (6th Cir. 1983) (specifically approving the Commission's *Pasula-Robinette* test).

b. Metz's Prima Facie Case

As the complainant, Metz has the burden of proving that his termination violated the anti-discrimination provisions of section 105(c) of the Act. While Metz testified that he occasionally served as a miners' representative, the primary protected activity relied upon is Metz's safety related complaints concerning the contractor's method of dismantling the kilns. To establish a *prima facie* case, Metz need only demonstrate a proximity in time between his protected activity and the adverse action complained of, in this case his termination, and company knowledge of the protected activity. Although Carmeuse maintains that the contractor was dismantling the kiln in a safe manner, Metz's kiln related complaints are protected as long as he had a good faith belief that a hazard existed, regardless of whether the activities of the kiln contractor were in fact hazardous. *Robinette*, 3 FMSHRC 810-812.

Carmeuse has stipulated that several employees, including Metz, communicated kiln related safety complaints no more than two to three weeks prior to Metz's termination. (Tr. 60-61). Carmeuse also stipulated that Metz's complaints were made in good faith. (Tr. 61). Consequently Metz has satisfied his burden of demonstrating a *prima facie* case of discrimination.

As a threshold matter, Carmeuse contends that the protected activity relied upon by Metz is not material because Croll, Wiley, and Downham, who made the ultimate decision to terminate Metz, had no knowledge of Metz's safety related complaints. However, plant management personnel who knew Metz well, such as, Kauffman, Saterstad, and Popp, counseled Croll in her deliberations concerning Metz. Moreover, the Annville plant is a relatively small facility with approximately 50 employees. Notwithstanding whether actual knowledge of protected activity has been demonstrated, the Commission has held that the small size of a mine supports an inference that an operator was aware of a miner's protected activity. *Morgan v. Arch of Ill.*, 21 FMSHRC 1381, 1391 (December 1999) (citations omitted). Consequently Carmeuse is deemed to have had actual knowledge of Metz's protected activity when they decided to terminate him.

c. Carmeuse's Rebuttal

However the analysis does not stop there. In an effort to rebut Metz's *prima facie* case, Carmeuse contends that Metz's termination was motivated solely by his inappropriate and hostile conduct on March 12, 2009, as well as his history of abusive and threatening behavior. In this regard, Carmeuse contends that Metz's reported safety related protected activity was not considered in any way in the company's decision.

Having concluded that Carmeuse was aware of Metz's protected activity, the analysis shifts to whether Carmeuse's reported rationale for terminating Metz, *i.e.*, his profane, insubordinate and belligerent behavior, is a pretext for an ulterior motive of retaliation. Determining whether Carmeuse's reported rationale is a pretense requires analysis of the credibility of the differing accounts of Metz and Croll with respect to their March 12, 2009, meeting. In resolving credibility issues, the judge "[who] has an opportunity to hear the testimony and view the witnesses . . . is ordinarily in the best position to make a credibility determination." *In re: Contests of Respirable Dust Sample Alteration Citations,* 17 FMSHRC 1819, 1878 (Nov. 1995) (*quoting Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff'd sub nom. Secretary of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

Croll's initial testimony that she was totally unprepared for Metz's outburst, because she did not know prior to their meeting the identity of Metz nor his history, lacks credibility. (Tr. 353). Croll later admitted that Saterstad had told her, prior to the meeting, that Metz was a complainer. Moreover, Croll's e-mail to Wiley after the meeting reflects that Croll had reason to know before the meeting that Metz was a "disgruntled employee." (Tr. 353, 453-54; Resp. Ex. 18). Thus, the degree to which Croll contends that she was startled by Metz's conduct is suspect.

Despite her unsubstantiated claim that she was not forewarned about Metz, Croll's account of Metz's profane and belligerent conduct is entitled to great weight because it is corroborated by evidence of similar conduct both before and after the March 12 meeting. Kauffman testified about an incident that occurred in March 2007 when Metz threatened him. (Tr. 573). Metz's threat was taken seriously enough to warrant a written disciplinary notice cautioning Metz that he would be terminated if such threatening conduct directed at management reoccurred. (Resp. Ex 6). Metz had also reacted aggressively during a previous meeting with Lorick, a company human resources employee. (Tr. 391-93).

Popp encountered Metz shortly after the meeting with Croll, at which time Metz used profanity and threatened to hurt himself or someone else. (Tr. 394-96; Resp. Ex. 20). Popp escorted Metz off mine property because he was so concerned about Metz's hostile behavior. Miller also testified that employees were afraid that Metz was capable of harming people at the plant. (Tr. 673-74, 679-80). Saterstad also believed Metz had a reputation for exhibiting anger and hostility in the workplace. (Tr. 393). Even Metz's own witness, Jeffrey Englehart, related that Metz was known to be the one to confront management on employee issues because "[h]e has more balls than we do." (Tr. 222).

Finally, the company's claim that Metz's behavior could no longer be tolerated is supported by the information contained in Metz's March 18, 2009, termination letter. The termination letter described Metz's language as "profane, vile, threatening and/or abusive." (Resp. Ex. 1). In short, unless Croll, Kauffman, Lambert, Saterstad and Popp have all conspired to falsely report that they witnessed Metz's hostile and abusive conduct on March 12, 2009, the evidence amply supports Croll's testimony that Metz acted in a profane and hostile manner during their meeting.

Although Metz has attempted to discredit Croll, his testimony concerning whether he had acted inappropriately and used profane language was evasive. Moreover, Metz's testimony that he could not recall whether he used profanities during his meeting with Croll is not worthy of belief. Metz's March 12 conduct was the focus of discussion and consideration from March 12 until March 18, 2009. (Resp. Exs. 1, 21). On March 18, 2009, Wiley telephoned Metz to inform him that his employment was terminated because of his "repeated use of profanity, vile, threatening and/or abusive conduct in the workplace with [his] peers and members of management." (Tr. 701-02; Resp. Ex. 1). Wiley also informed Metz that his personnel file had been reviewed and it too demonstrated a "clear pattern of harassing, abusive and offensive behavior" that would not be tolerated in the workplace. (Tr. 702). Their telephone conversation was committed to writing in Metz's March 18, 2009, termination letter. (Resp. Ex. 1).

It is in this context that Metz's claim that he is not certain that Croll's accusations are true, because he cannot recall how he behaved during their meeting, is incredulous. It is also noteworthy that Metz also could not recall his behavior with regard to the Kauffman incident and the events concerning his harassment of a fellow employee. (Tr. 572, 312). Thus, in the final analysis, the great weight of the evidence supports Carmeuse's contention that Metz's conduct on March 12, 2009, was insubordinate and intolerable.

d. Metz's Reliance on Circumstantial Evidence

The focus now shifts to whether Carmeuse was also motivated, in any part, by Metz's protected activity. In determining whether Metz's conduct, alone, was the basis for Carmeuse's decision to terminate his employment, it is significant that the "Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Act." *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990) (citations omitted).

The Commission has addressed the proper criteria for considering the merits of an operator's asserted business justification:

> Commission judges must often analyze the merits of an operator's alleged business justification for the challenged adverse action. In appropriate cases, they may conclude that the justification is so weak, so implausible, or so out of line with normal practice that it was mere pretext seized upon to cloak the discriminatory motive.
>
> The Commission and its judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity. Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgement our views on "good" business practice or on whether a particular adverse action was "just" or "wise." The proper focus, pursuant to *Pasula*, is on whether a credible justification figured into the motivation and, if it did, whether it would have led to the adverse action apart from the miner's protected activities.

Chacon, 3 FMSHRC at 2516-17.

The Commission subsequently further explained that, while a proffered business justification must be facially reasonable, it is not the role of the judge to substitute his or her judgement for that of the mine operator. The Commission stated:

> [T]he reference in *Chacon* to a "limited" and "restrained" examination of an operator's business justification defense does not mean that such defenses should be examined superficially or be approved automatically once offered. Rather, we intended that a judge, in carefully analyzing such defenses, should not substitute his business judgement or a sense of "industrial justice" for that of

> the operator. As we recently explained, "Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they would have motivated the particular operator as claimed."

Haro v. Magma Copper Co., 4 FMSHRC 1935, 1938 (Nov. 1982) (citations omitted).

In determining whether Carmeuse's decision to terminate Metz is tainted, in any part, by a discriminatory motive, it must be remembered that direct evidence of discrimination is rare. Rather, the Commission looks to circumstantial evidence of discrimination. Thus, the Commission has stated:

> [D]irect evidence of motivation is rarely encountered; more typically, the only available evidence is indirect . . . . 'Intent is subjective and in many cases the discrimination can be proven only by the use of circumstantial evidence.'

Chacon, 3 FMSHRC at 2510 (quoting *NLRB v. Melrose Processing Co.*, 351 F.2d 693, 698 8th Cir. 1965). Some of the more common circumstantial indicia of discriminatory intent are knowledge of the protected activity, hostility or animus towards it, coincidence in time between the adverse action and the protected activity, and disparate treatment of the complainant. *Id*.

However, to demonstrate by indirect evidence that Carmeuse was motivated, at least in part, by Metz's protected activity requires a rational connection between the evidentiary facts and Metz's termination. *See Garden Creek Pocahontas*, 11 FMSHRC 2148, 2153 (Nov. 1989) *citing Mid-Continent Resources, Inc.*, 6 FMSHRC at 1132, 1138. Carmeuse's knowledge of Metz's kiln related complaints, that were communicated shortly before his termination, alone, does not provide an inherently reasonable basis for inferring that he was discriminated against.

Rather, the evidence must reflect that Metz was the victim of disparate treatment because of a company animus toward his protected activity. With respect to animus, the evidence does not reflect an atmosphere of general intolerance of safety related complaints. On the contrary, Metz's own witness testified that he felt comfortable making safety complaints to anyone in management. (Tr. 283-84). The company conceded that, in addition to Metz, numerous other employees complained about the kiln contractor. It has neither been contended nor shown that any of these employees experienced retaliation. Moreover, there is no evidence of a retaliatory motive for Metz's activities as a miners' representative, or, for his previous discrimination complaints that are remote in time. Significantly, despite his history of protected activity, Metz received only a written warning for his March 2007 insubordination.

The Commission has previously addressed the issue of disparate treatment in a matter where a mine operator relies on the use of profanity as a justification for termination. "In analyzing whether a complainant was disparately treated in the context of termination for using offensive language, the Commission has looked to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and how the operator treated other[s] . . . who had cursed." *Sec'y o/b/o Bernardyn v. Reading Anthracite* 23 FMSHRC 924, 929-30 (Sept. 2001) *citing Cooley v. Ottawa Silica,* 6 FMSHRC at 521, and *Hicks v. Cobra Mining,* 13 FMSHRC 532-33.

Here, Carmeuse had previously warned Metz for threatening Kauffman. In seeking to minimize the significance of his profane and hostile behavior, Metz claims the company has a permissive policy regarding the use of profanity. In this regard, Metz presented evidence that hourly employees in the maintenance department "routinely swear" during their conversations with each other. (Tr. 204). While I am certain that men at the plant did not always use the Queen's English to express themselves, such banter cannot be equated with the inappropriate language and hostile behavior witnessed by Croll, Kauffman, Lambert, Saterstad and Popp. (Tr. 379-80, 388, 392-93, 395-96, 572). Thus, the company's assertion that its termination of Metz was motivated by his profanities and threatening behavior is neither pretextual in nature, nor evidence of disparate treatment.

Metz also contends that the denial of peer review for his termination is an indicia of disparate treatment. Carmeuse's assertion that peer review did not apply because Metz's termination involved comments that constituted sexual harassment is supported by the peer review guidelines. (Metz Ex. 10; Resp. Ex. 27A).

Moreover, the company's concern about a potential violent situation, as evidenced by the company's request for a police presence after Metz's suspension and termination, provides an additional business justification for denial of peer review. In this regard, although Metz presented evidence that two employees were granted peer review prior to their discharge, the discharges apparently did not involve threatening behavior as a police presence at the plant was not requested immediately after their terminations. (Tr. 316, 325). *See Dreissen v. Nevada Goldfields, Inc.,* 20 FMSHRC 324, 332 n. 14 (Apr. 1998) *citing Schulte v. Lizza Indus., Inc.* 6 FMSHRC 8, 16 (Jan. 1984); *Chacon,* 3 FMSHRC at 2512 (disparate treatment requires evidence that another employee guilty of the same or more serious offenses escaped the disciplinary fate suffered by the complainant). Thus, there is no rational basis for concluding that the denial of peer review is an indicia of discriminatory motive.

Finally, a Commission judge is "obligated to determine whether the actions for which the miner was disciplined were provoked by the operator's response to the miner's protected activity." *Floyd Dowlin, III, v. Western Energy Co.*, 28 FMSHRC 23, 31 (Jan. 2006) (ALJ) *citing Sec'y of Labor o/b/o McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 992 (Sept. 2001). Consequently, at the culmination of the hearing, the parties were requested to address the issue of provocation in their briefs.

The Court of Appeals has noted that "[t]he more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression." *Bernardyn*, 23 FMSHRC at 936 *quoting NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965). In its brief, Carmeuse concedes that it "may not have handled Mr. Metz in the best manner possible, from a human resources standpoint . . ." (Resp. Br. at 36). Croll had never met Metz prior to their March 12 meeting. Given Metz's volatile history, his outburst may have been foreseeable. However, the failure of Carmeuse to anticipate Metz's aggressive behavior does not constitute the requisite intentional wrongful provocation that would mitigate, or otherwise justify, Metz's behavior on March 12, 2009. In the final analysis, Metz is responsible for his conduct.

Moreover, even if Metz was provoked by Carmeuse, such provocation would not give rise to a discrimination claim under the Mine Act because it was not in response to safety related protected activity. Consequently, Carmeuse's reliance on Metz's misconduct as the sole reason for his termination cannot be defeated by a claim of provocation.

Absent evidence of animus, disparate treatment or wrongful provocation, the evidence reflects that Metz's termination was not motivated in any part by his protected activity. Thus, Metz's *prima facie* case of discrimination has been successfully rebutted by Carmeuse.

As Carmeuse has rebutted Metz's claim that he was the victim of discrimination, further inquiry into whether Carmeuse has demonstrated an affirmative defense is unnecessary. *Gravely v. Ranger Fuel Corp.*, 6 FMSHRC 799, 803 (Apr. 1984). However, I note that even if Carmeuse was motivated, in any part, by Metz's protected activity, his hostile and threatening conduct during and immediately following the March 12, 2009, meeting provided Carmeuse with a rational and independent basis for his termination regardless of his protected activity. Accordingly, Metz's discrimination complaint must be denied.

ORDER

In view of the above, **IT IS ORDERED** that the discrimination complaint filed by William Metz **IS DENIED**. Accordingly, **IT IS FURTHER ORDERED** that Docket No. Penn 2009-541-DM **IS DISMISSED**.

Jerold Feldman
Administrative Law Judge

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