

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
1331 PENNSYLVANIA AVE., N.W., SUITE 520N
WASHINGTON, DC 20004-1710
TELEPHONE: 202-434-9958 / FAX: 202-434-9949

MAY 28 2014

KIP ALLEN KEIM,
Complainant

v.

CORDERO MINING LLC,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2013-442-D
MSHA Case No. DENV-CD-2013-02

Mine: Cordero Mine
Mine ID: 48-00992

**ORDER GRANTING RESPONDENT'S
MOTION FOR SUMMARY DECISION**

Before: Judge McCarthy

I. Procedural Background

This case is before me upon a discrimination complaint filed by Kip Allen Keim, ("Keim" or "Complainant") pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(3).¹ Complainant's November 14, 2012 pro se discrimination complaint filed with the Mine Safety and Health Administration (MSHA) alleges that on October 26, 2012, Complainant was fired for making an alleged safety complaint to Respondent's internal reporting hotline. Complainant seeks back pay, compensatory damages for pain and suffering to self and family, and reinstatement to his former position as a welder in Cordero's rebuild shop.

On March 1, 2013, Respondent filed an Answer denying that Keim engaged in any protected activity, denying that Keim suffered any adverse action motivated by any protected activity, and alleging that Keim was disciplined for unprotected activity, specifically, for insubordination.

By letter dated January 16, 2013, MSHA determined that the facts disclosed during the investigation did not constitute a violation of Section 105(c). By letter dated February 1, 2013,

¹ Complainant's brother, Ronald E. Keim ("Ron"), filed a separate pro so complaint of discrimination against Respondent in Docket No. WEST 2013-537-D. As discussed below, my Notices of Hearing consolidated the brothers' discrimination cases for hearing. Respondent filed a Motion for Summary Decision in both cases. On April 16, 2014, I issued a Order Granting Respondent's Motion for Summary Decision in Ron Keim's discrimination case. In my order, I severed the previously consolidated cases and dismissed Ron Keim's case for failure to establish any genuine issue of material fact that the adverse discipline taken against him was motivated, at least in part, by any protected activity in which he engaged, or that management harbored any animus toward such activity.

Keim appealed MSHA's determination of no discrimination to the Commission and claimed that review would establish that he had been "treated unfairly" and that Respondent's justification for his termination was based on faulty assumptions.

This case was assigned to the undersigned on March 28, 2013. The next day, I instructed Keim to provide a copy of his original complaint to MSHA, which set forth his allegations of discrimination or adverse treatment and any instances of protected activity in which he engaged. In response, Keim provided an undated letter addressed to MSHA, and a copy of his statement provided to MSHA during the course of its investigation.

On May 2, 2013, my office issued a Notice of Hearing for August 27, 2013 in Gillette, Wyoming. On August 9, 2013, the hearing location was moved to Casper, Wyoming. In the interim, several conference calls were held with the parties regarding pre-hearing issues and discovery matters. Upon agreement of all parties, an Amended Notice of Hearing issued on August 20, 2013 setting this matter for hearing on October 15, 2013 in Casper, Wyoming.

On September 5, 2013, the undersigned ordered the disclosure of all documents related to an internal investigation of a related workplace harassment complaint at Cordero Mine. The allegations that prompted the investigation blamed Complainant and members of his family for creating a hostile work environment and for making threats of violence towards a coworker, David Alaniz. After reviewing the documents in camera, it was apparent that the documents contained information relevant to these proceedings. Given the sensitive nature of Cordero's investigation, the discovery of such documents was subject to a Confidentiality Order.

On September 10, 2013, Respondent filed a Motion for Summary Decision, with attached exhibits. In its motion, Respondent argued that Keim had not engaged in any protected activity and that Keim cannot prove that Cordero had knowledge of his alleged protected activity. Respondent submitted affidavits and other supporting documentation showing that between September 1, 2012 and February 27, 2013, calls to Cordero's internal reporting hotline were mistakenly routed to The Network, a call-monitoring company employed by Cordero's former owner, Rio Tinto. As such, Respondent argues that it was not aware of the hotline complaint that Keim relies on to establish that he engaged in protected activity. Even if Cordero had knowledge of the hotline call, Respondent argues that Keim has failed to demonstrate that his hotline complaint involves a health or safety concern that would qualify as protected activity under the Mine Act.

On September 20, 2013, a conference call was held with the parties and the undersigned to discuss the Motion for Summary Decision and the upcoming hearing. During the call, I requested that Respondent provide additional information regarding the processing of Keim's hotline complaint. In particular, Respondent was asked to provide the names of The Network employee who took Keim's call, and the Rio Tinto officials who investigated Keim's complaint, so that they could be subpoenaed to testify at hearing. Counsel for Respondent agreed to look into the matter and report back to the undersigned.

On September 26, 2013, Respondent filed the First Supplement to its Motion for Summary Decision. The First Supplement sets forth Respondent's general understanding about how the call-routing problem was discovered, and argues that Complainant has not offered any evidence of Cordero's hostility to the concerns raised in Keim's hotline complaint.

On September 27, 2013, a subpoena duces tecum was issued to Joseph Foltz, registered agent of The Network, upon the application of Respondent. The subpoena ordered The Network to produce by October 3, 2013, the name of the individual who took Keim's hotline call and all records, correspondence, emails, and/or documents related to Keim's call.

On September 8, 2013, Keim filed a letter in response to Respondent's Motion to Dismiss. In his letter, Keim sets forth circumstantial evidence that he believes demonstrates that Cordero management was aware of his hotline complaint. In particular, Keim alleges that after he made his hotline complaint to management, Doug Nutting, human resources site manager for Cordero, held an unprecedented meeting with D crew to discuss the issues that Keim had raised in the hotline call.² Keim also informed the undersigned of personnel changes that Cordero made after his termination which Keim believes is somehow evidence of discriminatory intent.³ Keim, however, does not offer any evidence directly refuting Respondent's claim that calls to Cordero's hotline were inadvertently forwarded to a third party, or supporting his assertions that the changes in Cordero personnel were related to his termination or to these proceedings.

On October 11, 2013, Respondent filed a Second Supplement to its Motion for Summary Decision. The Second Supplement stated that The Network had refused to comply with the aforementioned subpoena duces tecum on the grounds that it was unreasonable in scope and gave The Network insufficient time to respond. In lieu of the requested information, The Network provided the sworn statement of Thomas Kelly, Director of Professional Services. In his statement, Kelly sets forth the procedures that The Network's interview specialists employ when speaking to a caller, but Kelly does not provide any additional information related to Keim's call. In addition, the Second Supplement included sworn declarations from Peggy Leonard and Adam Bennett, who manage Rio Tinto's compliance hotline from Brisbane, Australia.

Thereafter, the federal government shutdown compelled the rescheduling of the October

² Keim fails to add that Nutting's meeting with D crew came on the heels of an investigation of Alaniz's hostile workplace complaints made to MSHA and Wyoming mine inspectors. At the conclusion of Cordero's investigation, management informed Alaniz that they would discuss "a few concerns with the shop" with the intent "to provide additional training regarding what CPE expects." R. Mot. for Protective Order, Ex. B, at 39.

³ Keim alleges that Nutting was either terminated or resigned after Keim told Respondent's counsel that Nutting made false representations concerning whether Keim resigned or was terminated. Letter from Kip Keim (Oct. 8, 2013). Keim also alleges that his manager, Clint Cooper, and supervisor, Tim Bishop, were transferred to new positions at Cordero. *Id.*

15, 2013 hearing. After consultation with the parties, the undersigned issued an Amended Notice of Hearing setting this matter for hearing on February 18, 2014 in Casper, Wyoming.

On October 28, 2013, Keim filed a letter in response to Respondent's Motion for Summary Decision and supplements in support thereof. In the letter, Keim called into question the credibility of the sworn statements of the employees of Cordero, Rio Tinto, and The Network, but did not offer any contrary evidence. In addition, Keim moved that this administrative tribunal compel "everyone immediately involved in this case [to submit to] a poly graph [sic] test so you know who is telling you the truth."

On November 6, 2013, in consideration of Complainant's pro se status, I issued a subpoena duces tecum to Foltz pursuant to my authority under Commission Procedural Rule 60(a). *See* 29 C.F.R. § 2700.60. The subpoena ordered The Network to produce the name of the individual who took Keim's hotline call, and all records, correspondence, emails, and/or documents related to Keim's call. On November 14, 2013, The Network filed an objection to the subpoena duces tecum on the grounds that it seeks proprietary and confidential information, is burdensome and unreasonable, and seeks information that The Network has already produced in this matter.

On November 21, 2013, Respondent filed its Response in Opposition to Complainant's Motion to Compel Respondent's Agents to Submit to Polygraph Examination. Respondent argued that Complainant's Motion to Compel should be denied because polygraph evidence is unnecessary in Commission proceedings and is inherently unreliable. Respondent further argued that Complainant's letters in response to the Motion for Summary Decision and supplements in support thereof failed to include a concise statement of each genuine issue of material fact necessary to be litigated, or supporting affidavits or other verified documents. *See* 29 § C.F.R. 2700.67(d).

During a conference call on January 24, 2014, the parties agreed to reschedule the hearing until May 8, 2014 to enable the parties to complete outstanding discovery requests and to allow Respondent to depose Thomas Kelly. Additionally, Keim was asked to further explain his request that witnesses be compelled to submit to polygraph tests. Essentially, Keim justified his polygraph motion by arguing that he thought that a polygraph test would likely to lead to the discovery of admissible evidence, but that he could not afford to pay for the polygraph tests. Finding no authority under the Act, Commission Procedural Rules, or legal precedent for the Commission to authorize, much less underwrite, the administration of polygraph tests, Complainant's Motion to Compel was denied orally during the conference call.

On February 4, 2014, Respondent filed a Third Supplement to its Motion for Summary Decision, attaching the transcript of Respondent's telephonic deposition of Kelly. Complainant did not participate in the deposition, although he was afforded an opportunity to do so.

On February 7, 2014, an Amended Notice of Hearing issued setting this matter for

hearing on May 8, 2014 in Casper, Wyoming. On April 28, 2014, the hearing was continued during pendency of my consideration of Respondent's Motion for Summary Decision and supplements in support thereof.

For the reasons that follow, Respondent's Motion for Summary Decision is granted.

II. Stipulations

Pursuant to their respective pre-hearing reports, the parties have agreed to the following stipulations:

- 1) Respondent is an operator within the meaning of the Mine Act.
- 2) Cordero Mining LLC; Cordero Mine, Mine I.D. No. 48-00992, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977 (the "Mine Act"), 30 U.S.C. §§ 801 *et seq.*
- 3) At all times relevant to this proceeding, Complainant, Kip Allen Keim ("Kip Keim"), was a "miner" within the meaning of Sections 3(g) and 105(c) of the Mine Act, 30 U.S.C. §§ 802(g) and 815(c).
- 4) The Administrative Law Judge has jurisdiction in this matter.
- 5) Kip Keim began working at the Cordero Mine on September 11, 2006.
- 6) Kip Keim was a welder at the time of termination in October 2012.
- 7) On or about November 14, 2012, Kip Keim filed a discrimination complaint with MSHA under § 105(c) of the Mine Act.
- 8) Kip Keim's employment was terminated effective October 26, 2012.

III. Factual Background

Cordero Mine is a surface coal mine in Gillette, Wyoming. On September 11, 2006, Kip Keim and his father, Scott Keim, were hired by Rio Tinto to work as welders in Cordero's rebuild shop. Kip Keim Depo. at 11:9; 15:12-23, 18:10. A year later, Cordero hired Kip's brother, Ron Keim, as a welder in the Cat Rebuild Bay. *Id.* at 17:24-18:23.

In 2009, Cloud Peak Energy Resources, LLC ("CPE") purchased Cordero Mine from Rio Tinto. R. Mem. of Points & Authorities, Ex. A., at 1. Keim alleges that Rio Tinto initially told him that he could work on the same crew as his father. Sometime thereafter, however, Keim and his father were assigned to separate crews when a new manager, Bill Hopson, took over. Kip

Keim Depo. at 19:7-20:9.

In the years preceding his termination, Keim acted in an unofficial capacity as the primary step-up lead for B Crew. Kip Keim Depo. at 22:7-24:20. As unofficial step-up lead, Keim would direct B Crew when the leadman and official step-up lead were unavailable or while those positions were vacant. *Id.*; R. Mem. of Points & Authorities, Ex. B., at 3. Serving in an unofficial capacity did not require additional training, did not result in a permanent change in pay grade, and was not viewed as a desirable position by other welders on B Crew. Kip Keim Depo. at 24:14 (“nobody else wanted the headache” of being unofficial step-up lead), 33:6-13. Keim, however, did receive an increase in pay during the time he actually worked as leadman. R. Mem. of Points & Authorities, Ex. B., at 2.

When a position as official step-up lead became available, Keim’s supervisor, Tim Bishop, and others encouraged Keim to apply for the job. Kip Keim Depo. at 26:8-14. Keim stated in his deposition, however, that he did not seek the promotion or the prerequisite training because the pay raise would increase his child support obligations. *Id.*; Kip Keim Depo. at 24:13-25:4. Although Chuck Burgess was ultimately promoted to official step-up lead under leadman Kent Thurman, Keim continued to serve as unofficial step-up lead when Thurman and Burgess were unavailable. Kip Keim Depo. at 39:17-41:6.

A. The Keim-Alaniz Feud

David (“Dave”) Alaniz is a welder in Cordero’s rebuild shop. Alaniz was assigned to D crew with Keim’s brother, Ron Keim, during 2012. Keim alleges that for three years, welders in the rebuild shop have had trouble working with Alaniz. Kip Keim Depo. at 108:18-25. Keim states that Alaniz quickly developed a reputation as a “super document-taker” and that he regularly brought complaints against his coworkers to the attention of management. *Id.* In particular, Keim alleges that Alaniz’s complaints to management specifically targeted his brother, and Keim blames Alaniz’s complaints as the impetus for a disciplinary warning and action plan that his brother Ron was given. Kip Keim Depo. at 109:20-110:8. Keim avers that he and other miners had made complaints to management about Alaniz’s behavior, but management never took any action against Alaniz. *Id.* at 112:16-113:7; 137:18.

On or about October 2, 2012, Alaniz filed a letter with MSHA and Wyoming mine inspectors complaining of harassment and physical intimidation by Kip, Ron, and Scott Keim. R. Mot. for Protective Order, Ex. B, at 3. In his letter, Alaniz sought the aid of inspectors to defuse a situation that he believed would “lead to extreme violence without [their] intervention.” *Id.* Alaniz alleged that the Keim family, in particular Ron and Scott, had unfairly disparaged the quality of his welds, made threats of violence against him and others, and brought weapons and ammunition onto mine property. *Id.* at 3-8. Alaniz’s letter further alleges that Ron Keim created a hostile work environment by playing sexually explicit music in the shop and disparaging Matthew Shepard, whose brutal murder in Laramie, Wyoming drew national attention to the issue of bias-motivated violence. *Id.*; see also James Brooke, *Gay Man Dies from Attack*,

Fanning Outrage and Debate, N.Y. Times, Oct. 13, 1998, www.nytimes.com/1998/10/13/us/gay-man-dies-from-attack-fanning-outrage-and-debate.html.

On October 5, 2012, during the shift change, Ron and several miners complained to Kip Keim that “they were just completely sick and tired of [Alaniz’s] crap.” Kip Keim Depo. at 141:10-17. When Alaniz joined them upstairs, Keim alleges that Alaniz sat on his lunch box, exposing his genitals through the holes in his pants. *Id.* This incident prompted Keim to call what he believed to be Cordero’s internal complaint hotline to report Alaniz’s behavior. R. Mem. of Points & Authorities, Ex. E. Keim’s hotline complaint, as set forth in the Ethics and Compliance Report, states in pertinent part:

WHO: Caller, KIP KEIM, reported DAVID ALVAREZ.⁴
WHAT: Bullying/Harassment
WHEN: ONGOING SINCE 2010, EXACT DATE UNKNOWN
WHERE: IN THE SHOP, IN THE BREAKROOM

Incident Description

...

10/5/2012 3:46:10 PM - Original Call

Caller, KEIM, reported that ongoing since 2010, exact date unknown, Welder, David ALVAREZ, has created a hostile work environment. Keim stated that ALVAREZ is looking for any opportunity to sue the company so that he does not have to work anymore. KEIM stated that the employees feel that they cannot say anything without ALVAREZ finding it offensive and reporting them to Human Resources. KEIM stated that the employees have been called racist because they were talking about Mexican and Chinese food.⁵ KEIM also stated that ALVAREZ specifically picks on the younger employees, names DECLINED. KEIM asked ALVAREZ to stop picking on the younger employees and ALVAREZ told him, “They are f*cking working here because I let them f*cking work here.”

⁴ Although the Ethics and Compliance Report refers to David *Alvarez*, it is undisputed that Keim’s hotline complaint was referencing David *Alaniz*.

⁵ Keim mentions the incident concerning Mexican and Chinese food multiple times in his complaints and deposition, but does not give an explanation or provide a context for those incidents. *See* R. Mem. of Points & Authorities, Ex. E, at 1; Kip Keim Depo. at 91:19, 104:4-6, 107:8-20. According to Cordero’s investigation into Alaniz’s complaints, Alaniz objected to comments by his coworkers that perpetuate the racial pejorative that Chinese food always contains cat and/or dog meat. R. Mot. for Protective Order, Ex. B, at 16.

KEIM also stated that ALVAREZ has done things to purposely provoke the employees to say something to him.

KEIM stated that in 2011, exact date unknown, he reported the issues with ALVAREZ to Supervisor, Tim BISHOP. KEIM stated that no action was taken by BISHOP. KEIM does not want to report BISHOP.

KEIM stated that several employees will be seeking legal help in regards to the issues. KEIM would like for ALVAREZ to be terminated.

How does the caller know about the incident?: Witnessed

What documentation is available?: None

Involved Parties

Reported Individuals:

Name: DAVID ALVAREZ

Title: WELDER

Management Notified: YES⁶

Date: 2011, EXACT DATE UNK

Phone: [blank]

Name: TIM BISHOP

Title: SUPERVISOR

Action Taken: None.

Involved/Aware Parties: YES

Name: NAMES DECLINED

Title: EMPLOYEES

Role: Alleged Victim

Title: YOUNGER EMPLOYEES

...

⁶ During conference calls with the parties and the undersigned, Keim suggested that the words “Management Notified: YES” indicated that the hotline complaint was forwarded to Cordero. Read in context of the complete Compliance Report, however, it is clear that these words merely restate Keim’s allegations that he had notified Bishop sometime in 2011 of Alaniz’s behavior. *See* R. Third Supplement to Mot. for Summary Decision, Ex. A, at 22:7-24 (confirming that this section of the report is a summary of the information set forth in the incident description).

Escalation Information

IS ONLY: Is there the potential for a serious threat to life to occur in the next 48 hours? NO

*Id.*⁷

The hotline number that Keim called was listed on posters or brochures distributed throughout the mine, and Keim believed that such calls would be forwarded to Cordero's top management officials. *Id.*; Kip Keim Depo. at 90:19-91:3. Due to a routing mistake, however, Cordero's hotline number was directed to The Network, the company that manages the ethics and compliance complaint hotline for Cordero's former owner, Rio Tinto, and not to In Touch, the contractor hired to manage CPE's complaint hotline. R. Second Supplement to Mot. for Summary Decision, at 2.

On October 6, 2012, Keim's complaint was forwarded to Adam Bennett, Group Counsel Investigator for Rio Tinto in Brisbane, Australia. R. Second Supplement to Mot. of Summary Decision, Ex. C. According to Bennett's sworn affidavit, he was unsure where the complaint had originated because the caller specified a Gillette, Wyoming location, but Rio Tinto no longer had any mines in Gillette. *Id.* Bennett was able to locate a Rio Tinto employee with a similar name in France. *Id.* Upon his belief that the call originated in France, Bennett posted a response to Keim advising, "Dear caller, the laws of the EU and France do not permit us to accept a speak-OUT report for matters other than financial, accounting, banking, competition/antitrust law and anti-bribery. If you wish to continue with this complaint please do so via your normal management/HR processes." *Id.*

Although Keim has no evidence that his hotline complaint was forwarded to Cordero, Keim believes that Bishop knew about the hotline complaint and was angry at Keim for raising his concerns above the heads of his immediate supervisors. Kip Keim Depo. at 153:10-13; 154:9-11. Keim claims that after the hotline call, he noticed a marked change in Bishop's attitude towards him. *Id.* at 70:15-17. Keim further alleges that on October 15, 2012, Bishop told his father and Chad Zurowski that "he hated that everyone liked [Keim]." R. Mem. of Points & Authorities, Ex. B., at 5.

⁷ The Network instructs interview specialists who document employee hotline complaints to employ what they call a "three pass-system." Thomas Kelly Depo at 8:1-9:18. Under this system, the interview specialist begins by asking the caller to explain what happened. *Id.* Based on this initial information, the interview specialist classifies the type of complaint (i.e., harassment, fraud, etc.) and will ask the caller additional questions that relate to the complaint's classification. *Id.* Next, the caller will ask a series of questions that have been requested in advance by their client. *Id.* Throughout the call, the interview specialist repeats back the information provided by the caller, allowing the caller an opportunity to confirm the accuracy of the interview specialist's report. *Id.*

B. Keim's Termination

In the six months prior to Keim's termination, Thurman was out on medical leave, and Burgess and Keim were alternating as B Crew lead. R. Mem. of Points & Authorities, Ex. B., at 3. According to Keim, Burgess had advised Keim in advance that he planned to take off four night shifts for a hunting trip beginning on October 19, 2012. *Id.*; Kip Keim Depo. at 38:16-24.

On the morning of October 18, 2012, Keim sent a text to Burgess asking him if he needed Keim to fill in as lead. Kip Keim Depo. at 42:7-44:4. Later that day, at 7:10 p.m., Keim received a text message from Dan Oliver, another welder on B Crew, stating that Bishop had asked Oliver to come in early to work and fill in as step-up lead on October 19, 2012. R. Mem. of Points & Authorities, Ex. B., at 4. At 7:24 p.m., Keim received a text from Burgess responding, "yes, you do" or "yes, you need to come in." Kip Keim Depo. at 42:7-44:4.

Confused, Keim called Clint Cooper, rebuild shop manager, at 7:27 p.m. to seek further guidance. R. Mem. of Points & Authorities, Ex. B., at 4. Cooper, however, was unaware of the situation and suggested that Keim should contact Bishop. *Id.* At about 7:29 p.m., Keim called Bishop twice and left a voice mail asking Bishop to explain who was expected to fill in as lead the next day. *Id.*; Kip Keim Depo. at 47:17-48:3.

Later that evening, Keim met with Oliver at the Montgomery Bar in downtown Gillette, Wyoming. Kip Keim Depo. at 48:4-13. Oliver confirmed that Bishop had sent him a text message instructing Oliver to fill in as step-up lead during the evening shift the next day. *Id.* at 48:4-7. Oliver, however, drew Keim's suspicion when he told Keim that Oliver had erased the text message from Bishop. *Id.* at 54:12-55:8. After discussing the problem, Oliver ultimately conceded that he did not want to go in as step-up lead and suggested that he would be more comfortable if Keim took his place. R. Mem. of Points & Authorities, Ex. B., at 4. Keim recalls Oliver saying, "Well, if you want to do it, go ahead." Kip Keim Depo. at 48:17-20. Keim replied, "No problem, dude. I've done it before. No problem." *Id.*

On October 19, 2012, at 9:40 a.m., Keim received a text message from Bishop confirming that he wanted Oliver to fill in as B Crew lead. R. Mem. of Points & Authorities, Ex. B., at 4. Keim sent Bishop two follow-up text messages seeking an explanation for the change in step-up lead policy and informing Bishop that Oliver did not want to assume the responsibility of lead. *Id.* When Bishop did not respond, Keim decided it was too late to ask Oliver to come in early. Instead, Bishop went to the mine at noon to serve as B Crew leadman. *Id.*; Kip Keim Depo. at 49:1-21.⁸

⁸ Keim explained that the leadman is required to arrive at the mine at noon, well in advance of the start of the evening shift, so that the morning shift can apprise the leadman of the status of any ongoing projects. Kip Keim Depo. at 49:1-21. Keim went to bed early the night before, but was unsure if Oliver had done so. *Id.* at 51:6-14; 67:21-67:1.

When Keim arrived at the rebuild shop, Cooper came out of his office and told Keim, “Yeah, I spoke to Tim [Bishop] and he was telling me that he wants to get more people familiar with doing the step-up lead.” Kip Keim Depo. at 59:12-20; 60:9-14. Keim replied, “Oh, that makes total sense. You bet. I am so sorry . . . I didn’t even – I didn’t hear back from Tim until it was too late.” *Id.* Keim, however, did not tell Cooper about the text message from Bishop that he had received that morning. *Id.* at 61:8-24.

After working as step-up lead on October 19, Keim continued to work the position for the next two night shifts. Kip Keim Depo. at 38:24. On the morning of October 22, 2012, Bishop returned to the rebuild shop to discover that Keim, not Oliver, was filling in as step-up lead of B Crew. *Id.* at 64:11-65:11. Bishop pulled Keim and Oliver aside and asked them why they had not followed his instructions. Keim replied that he had done so because he never heard back from the texts that he had sent Bishop on October 19, adding “a little bit of communication would be great.” *Id.* According to Keim, Bishop responded by stepping in close, jabbing his finger in his chest, and yelling at Keim, “I do not have to communicate with you.” *Id.*; R. Mem. of Points & Authorities, Ex. B., at 4. Keim replied, “ok, if that’s how you want it, that’s fine” and walked away in an effort to defuse the situation. R. Mem. of Points & Authorities, Ex. B., at 4.

Keim worked the night shift on October 22, 2012, and then was off for three days. Kip Keim Depo. at 68:23-69-2. On October 26, when Keim returned to work, Keim was called into a meeting with Bishop, Cooper, and Nutting. R. Mem. of Points & Authorities, Ex. D., at 3. During the meeting, Keim was given a chance to explain why he had disregarded Bishop’s instructions and assumed the role of step-up lead. Kip Keim Depo. at 74:22-76:19. When Keim offered his explanation that he had done so because Bishop’s text came too late, management asked Keim why he continued to work as step-up lead on subsequent nights. *Id.* Keim responded, “I couldn’t tell you.” *Id.* At the end of the meeting, management concluded that Keim would be suspended and that they would recommend that he be terminated for insubordination. R. Mem. of Points & Authorities, Ex. D., at 3. On October 29, 2012, Cooper called Keim to tell him that he had been terminated. *Id.*

On or about November 14, 2012, Keim filed a discrimination complaint with MSHA alleging that he was terminated because he had engaged in protected activity. R. Mem. of Points & Authorities, Ex. C., at 1. In his letter to MSHA, Keim essentially claims that he was fired for his October 5 hotline complaint and that the allegations of insubordination were pretextual. R. Mem. of Points & Authorities, Ex. D., at 1. Keim’s letter to MSHA explained:

This is my safety concern: Dave [Alaniz] has created such a hostile work environment in the last four years. Clint [Cooper], which is our manager and Tim, who is our supervisor, also Doug Nutting, head of HR has known about what is going on and to the best of my knowledge no action has been taken. Therefore I felt compelled to call the hot line.

The few things that have taken place: start with the mental anguish I have witnessed on D crew. It is just unbelievable. It becomes a Safety Issue when these young men can not keep their minds on the job, because of the constant worry of loosing (sic) their jobs. It has gotten so bad that they can't even text or talk about Mexican food at break time, because it offends Dave and he will take them to HR. There is documentation of this! With the job of working in the Rebuild shop you have to be so alert and focused on the task at hand because dealing with the massive size of shovel dippers, dragline buckets, and haul truck beds that are unforgiving if handled improperly.

The next concern is on several occasions Dave has come to work with holes in improper areas in his clothing which expose his genitals. Witness to Dave's actions are all of D crew and others from other crews. Dave looks for anything to take anyone to HR. Also Dave has told other co workers and I quote "They f----- work here because I f----- let them! Also I will f----- fire any one I want." Meaning everyone who works at CPE.

With all of this said Dave is still employed with CPE.

R. Mem. of Points & Authorities, Ex. D., at 1.

In his letter to MSHA, Keim also briefly discussed two other "safety concerns" that occurred in 2011. *Id.* at 2. Keim does not allege that he reported these events to MSHA or management. Rather, Keim appears to intend to use these allegations of unsafe practices to show that Cordero has attempted to cover up safety hazards and does not discipline miners responsible for creating such hazards. *Id.*

IV. Principles of Law

A. Summary Decision

Under Commission Rule 67, "a motion for summary decision shall be granted only if the entire record . . . shows: (1) [t]hat there is no genuine issue as to any material facts; and (2) [t]hat the moving party is entitled to summary decision as a matter of law." 29 C.F.R. § 2700.67(b); *see also Missouri Gravel Co.*, 3 FMSHRC 2470, 2471 (Nov. 1981) ("[A] party must move for summary decision and it may be entered only when there is no genuine issue as to any material fact and when the party in whose favor it is entered is entitled to it as a matter of law."); *see also Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464, 467 (1962) (holding that summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions show no

genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law).⁹

Summary judgment is an extraordinary procedure that must be entered with care because erroneous invocation denies a litigant the right to be heard. Thus, when considering a motion for summary decision, the judge must draw all “justifiable inferences” from the evidence in favor of the non-moving party. FED. R. CIV. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). The judge should only grant a summary decision “upon proper showings of the lack of a genuine, triable issue of material fact.” *Energy W. Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp.*, 477 U.S. at 322).

In reviewing the record on summary judgment, I evaluate the evidence in the light most favorable to the Complainant. See *Hanson Aggregates New York, Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller*, 368 U.S. at 473). Any inferences drawn from the underlying facts contained in the materials supporting the motion have been viewed in the light most favorable to the Complainant. See *Hanson Aggregates*, 29 FMSHRC at 9 (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)).

B. Commission Discrimination Precedent

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act.¹⁰ The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] Act” by recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any

⁹ Summary judgment is proper only if there is no reasonably contestable issues of fact that are potentially outcome determinative. See, e.g., *Wallace v. SMC Pneumatics, Inc.*, 103 F.3d 1394, 1396 (7th Cir. 1997). This standard mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50(a). Under that standard, the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1986) (citing *Brady v. S. Ry. Co.*, 320 U.S. 476, 479-480 (1943); *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949)).

¹⁰ Section 105(c)(1) of the Act provides that, “[n]o person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . on behalf of himself or others of any statutory right afforded by this Act.”

possible discrimination [that] they might suffer as a result of their participation.” S. Rep. No. 95-181 at 35 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978) (quoted in *Sec’y of Labor on behalf of Anderson v. Stafford Constr.*, 732 F.2d 954, 960 (D.C. Cir. 1984)).

In order to establish a prima facie case of discrimination under section 105(c)(1) of the Mine Act, a miner alleging discrimination must show: 1) that he engaged in protected activity, and 2) that the adverse action complained of was motivated in part by that protected activity. *Sec’y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980), *rev’d on other grounds*, 663 F.2d 1211 (3rd Cir. 1981); *Sec’y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). Such a burden is “lower than the ultimate burden of persuasion, which the complainant must sustain as to the overall question of whether section 105(c)(1) has been violated.” *Jayson Turner v. Nat’l Cement Co. of Cal.*, 33 FMSHRC 1059, 1065 (May 2011). To establish a prima facie case, a complainant need only provide evidence from which the trier of fact could infer employer retaliation for protected activity. *Id.*

In determining whether a mine operator’s adverse action was motivated by protected activity, a judge must bear in mind 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’d on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983). Factors to be considered in assessing whether a prima facie case exists include: 1) the operator’s knowledge of the protected activity; 2) hostility or “animus” towards the protected activity; 3) coincidence in time between the protected activity and the adverse action; and 4) disparate treatment of the complainant. *Chacon*, 3 FMSHRC at 2510.

A mine operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was not motivated in any part by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it was also motivated by the miner’s unprotected activity and would have taken the adverse action for the unprotected activity alone. *Id.* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987). The Commission has also held that judges may conclude that [such] justification is so weak, so implausible, or so out of line with normal practice that it was a mere pretext seized upon to cloak discriminatory motive. *Chacon*, 3 FMSHRC at 2516.

V. Analysis

A miner engages in protected activity when, inter alia, making a complaint “under or related to” the Mine Act. 30 U.S.C. § 815(c). The Mine Act provides that no miner shall be

discriminated against when making a complaint of an “alleged danger or safety or health violation” *Id.* Keim alleges that his termination was motivated by a complaint made to an internal hotline that Cordero promotes as a means of voicing concerns to management.¹¹ After careful examination of Keim’s hotline complaint, however, I find that the concerns that Keim attempted to share with management do not relate to violations of health and safety standards or more generally to the safety of his fellow miners. Rather, Keim’s concerns were that of a personality dispute arising from an ongoing conflict between members of the Keim family and Dave Alaniz. Even viewing the facts in the light most favorable to Keim, Keim has failed to show that he engaged in protected activity, a necessary element to establish a prima facie case of discrimination under the Act.

While Keim’s post-termination complaint to MSHA is couched in terms of a safety complaint, Keim’s underlying hotline complaint did not voice *any* safety or health concerns. The complaint report compiled by The Network did not mention that Keim believed that Alaniz posed a danger to the health and safety of miners. R. Mem. of Points & Authorities, Ex. E. Instead, the report was classified as a bullying/harassment complaint, where Alaniz had created a hostile work environment by zealously bringing complaints about coworkers to human resources. *Id.* The only instance where safety was even mentioned was in a question posed by The Network operator. That is, when Keim was asked by the interview specialist whether Alaniz’s behavior created a potentially serious threat to life in the next 48 hours, Keim replied, “No.” *Id.*

It was not until Keim complained to MSHA that his hotline complaint morphed into a potential safety complaint whereby Keim expressed concern that the young men in the Rebuild shop were unable to “keep their minds on the jobs, because of the constant” fear of losing their jobs when Alaniz complained about them to management.¹² Keim cannot transform a quintessential personality dispute into a protected activity simply by invoking the word “safety” in his subsequent complaint to MSHA. For this reason alone, Keim is unable to establish that he engaged in protected activity under the Mine Act prior to his termination.

Even if Keim’s hotline complaint could be construed as an attempt to characterize Alaniz’s behavior as a safety concern, it is apparent that his hotline complaint was not “under or related to” the Mine Act. For Keim’s complaint to fall within the protection of the statute, the subject of his complaint must concern an “alleged danger or safety or health violation” under or

¹¹ Keim’s concerns about Alaniz’s exposed genitals falls beyond the scope of this administrative tribunal’s inquiry. Keim has not expressed a belief that the holes in Alaniz’s pants posed a safety risk to himself or others. Rather, Keim alleges that Alaniz’s purposely exposed himself thereby creating a hostile work environment. Without passing on the validity of Keim’s concerns, it is noteworthy that such matters, if related to a protected class, appear to fall within the purview of Title VII to the Civil Rights Act of 1964, not the Mine Act.

¹² As noted, Keim’s MSHA complaint also alluded to unrelated safety concerns that arose back in 2011, but Keim did not report these concerns to management or MSHA.

related to the Mine Act. Any claim of protected activity not grounded in an alleged violation of a health or safety standard must result in some hazardous condition or practice that the operator is responsible to correct. *See Bryant v. Clinchfield Coal Co.*, 4 FMSHRC 1380, 1421 (1982) (ALJ) (citing *Kaestner v. Colorado Westmoreland, Inc.*, 3 FMSHRC 1994 (1981)(ALJ)).

Keim's hotline complaint did not allege that Alaniz was violating a mandatory safety or health standard nor did it allege a hazardous condition or practice that Cordero was responsible for correcting. In his hotline complaint, Keim requested that management terminate Alaniz because of Alaniz's zealous reporting of alleged obscene, racist, anti-gay, and threatening comments and actions to management, Wyoming mine safety inspectors, and MSHA. There is, however, nothing inherently unsafe about Alaniz reporting such issues to management, Wyoming mine safety inspectors, or MSHA. In fact, such reporting is clearly endorsed by the Mine Act or other legislative schemes established to encourage and protect employees who bring workplace complaints to management or state or federal officials. *See, e.g.*, Civil Rights Act of 1964 § 704(a), 42 U.S.C. § 2000e-3(a); National Labor Relations Act §§ 7, 8, 29 U.S.C. §§ 157, 158(a)(1).

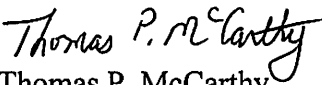
In these circumstances, extending the protections of the Mine Act to Keim would frustrate both the Mine Act and Title VII since Keim essentially seeks the termination of Alaniz, an activity unprotected under the Mine Act, because Alaniz engaged in arguably protected activity under Title VII. In the same breath, Keim seeks both the protections afforded to miners under section 105(c), while simultaneously asking management to terminate Alaniz for exercising Alaniz's rights to bring workplace complaints to the attention of management and inspectors. While Congress directed the courts and the Commission to construe "protected activity" broadly, the term should not be interpreted to thwart the Act's objectives or those under other federal laws. *Cf. Collins v. FMSHRC*, 42 F.3d 1388, 1994 WL 683938, at *5 (6th Cir. 1994) (unpublished per curiam table decision) (finding that a miner did not engage in protected activity when he documented safety hazards "for the sole purpose of protecting his own job should he ever be confronted with his own violations"). 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 when those policies conflict with rights granted under section 105(c) of the Mine Act. *See, e.g., Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (Dec. 1990) (citing *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1532 (Aug. 1990)); *Mullins v. Beth-Elkhorn Coal Corp.*, 9 FMSHRC 891, 899 (May 1987) (citing *Local Union No. 781, Dist. 17, UMWA v. E. Assoc. Coal Corp.*, 3 FMSHRC 1175, 1179 (May 1981)).

In sum, Keim did not engage in protected activity under the Mine Act.

V. Order

Complainant, Kip Allen Keim, has failed to establish any genuine issue of material fact that he engaged in protected activity under the Mine Act. Accordingly, Respondent's Motion for

Summary Decision is **GRANTED**. This case is **DISMISSED** with prejudice.


Thomas P. McCarthy
Administrative Law Judge

Distribution:

Kristin R.B. White, Esq., Jackson Kelly, PLLC, 1099 18th Street, Ste. 2150, Denver, CO 80202

Kip A. Keim, P.O. Box 3172, Gillette, WY 82717

/tjr