FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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RONALD E. KEIM, III, Complainant	DISCRIMINATION PROCEEDING
v.	Docket No. WEST 2013-537D MSHA Case No. DENV-CD-2013-06
CORDERO MINING LLC, Respondent	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 Ronald E. Keim, II, ("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 December 14, 2012 pro se discrimination complaint filed with the Mine Safety and Health Administration (MSHA) essentially alleges that on August 28, 2012, Complainant was suspended without pay, placed on a "Last and Final Warning" and one-year performance plan, and threatened with discharge. The complaint further alleges that Keim was improperly disciplined during the previous two years. Complainant seeks back pay for the suspension, performance pay that was lost during the one-year action plan, expungement of disciplinary records, compensatory damages for pain and suffering to self and family, and transfer from "D Crew" to "C Crew" to work with his father, Scott Keim.

On April 2, 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, his pattern of subjecting his co-workers to lewd, offensive and threatening behavior.

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[1] Complainant's brother, Kip Allen Keim, filed a separate pro so complaint of discrimination against Respondent in Docket No. WEST 2013-442-D. As discussed below, my Notices of Hearing consolidated the brothers' discrimination cases for hearing. Respondent has filed a Motion for Summary Decision in both cases. Having reviewed Respondent's Motions for Summary Decision and Complainants' responses, I now sever the previously consolidated cases. I will address Respondent's Motion for Summary Decision in Kip Keim's case by separate Order.

By letter dated February 4, 2013, MSHA determined that the facts disclosed during the investigation did not constitute a violation of Section 105(c). By letter dated February 26, 2013, 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 post-complaint changes to crew personnel have improved morale and reduced workplace stress.

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 a letter addressed to MSHA dated December 14, 2013, and a copy of his statement provided to MSHA during the course of their investigation.

Keim's complaint alleges a novel theory of protected activity. He states that co-worker Dave Alaniz was the source of the complaints about Keim and that Alaniz is the reason that Keim is on an action plan. Complaint at 2. Keim further states that at some unspecified time in 2012, Keim and several other miners brought to management's attention that Alaniz was creating a disgusting and hostile work environment. Keim's complaint states that it was a hostile environment because Alaniz has complained to Human Resources about Keim and other miners and "threatened" to have them fired, but that Keim was the only one disciplined. *Id.* Keim alleges that Alaniz told Keim, in a statement laced with expletives, that he allows everyone to work there and he can fire any one he wants. Keim states that "this" is a "great safety issue" because the miners "deal with huge equipment and over head cranes that lift huge pieces of steel [that] are unforgiving and with having fellow workers (just out of college) worrying about their jobs is unsafe, because their minds are not on the task." *Id.* Keim also alleges that Alaniz comes to work with holes in his pants exposing his genitals, just daring co-workers to say something, and that management has acknowledged that Alaniz is a problem. *Id.*

Similarly, in his deposition, Keim testified that sometime in 2012, Keim complained to D Crew Lead, B.J. Hubble, that Alaniz was creating a hostile work environment that prevented others from safely performing their jobs. Ron Keim Depo. at 111:16-22; 115:9-16. Keim also complained to Clint Cooper, Rebuild Shop Maintenance Manager, that Alaniz was creating a hostile work environment. R. Ex. O at 2. Keim, however, has never alleged that his complaint to mine management was in any way related to the disciplinary measures imposed on him by Respondent. Instead, Keim contends that he initiated this proceeding with the hopes that a third party would intervene to stop what he perceived as preferential treatment towards Alaniz. *Id.* at 149:5-15.

On May 2, 2013, my office issued a Notice of Hearing for August 27, 2013 in Gillette, Wyoming consolidating Ron Keim and Kip Keim's discrimination cases for hearing. 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. After agreement, an Amended Notice of Hearing issued on August 20, 2013 setting this matter for hearing on October 15, 2013 in Casper, Wyoming.

On August 19, 2013, during a conference call with the parties, Keim was asked to state a specific example of his protected activity under the Mine Act. Keim responded that he had been reprimanded for "cussing in the break room and playing inappropriate music when even upper management cusses in the break room and on the shop floor." Conference Call Tr., p. 9 (Aug. 19, 2013). In addition, Keim confirmed that his complaint to MSHA completely covered the scope of his allegations in this case. *Id.*

On September 5, 2013, the undersigned ordered disclosure of certain documents to Complainant subject to Confidentiality Order in the originally consolidated matter.

On September 10, 2013, Respondent filed a Motion for Summary Decision, with attached exhibits.[2] Respondent argues that Keim's claim is time-barred because no adverse action occurred within sixty days of his complaint. Respondent also argues that Keim cannot establish a prima facie case because he did not engage in any protected activity and has failed to show any adverse action motivated by such activity. Finally, Respondent argues that Keim would have been disciplined for unprotected activity alone after he engaged in disruptive and inappropriate workplace behavior.

On October 1, 2013, Complainant Keim filed a one-page response in opposition to Respondent's motion, restating his earlier arguments and presenting new allegations of discrimination occurring in the spring of 2011. Complainant's Letter in Response to Motion to Dismiss (Oct. 1, 2013). In that letter, Keim contends that his problems with management first arose when Respondent allegedly violated the Health Insurance Portability and Accountability Act (HIPAA) privacy rules by disclosing a medical condition of Keim's that was discovered during a random drug screening in 2011. *Id.* Keim's letter did not mention any exercise of rights under the Mine Act. *Id.*

Thereafter, the federal government shutdown compelled rescheduling of the October 15, 2013 hearing. On November 8, 2013, an Amended Notice of Hearing issued setting this matter for hearing on February 18, 2014 in Casper, Wyoming. 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 enable Respondent to submit a Third Supplement to Motion for Summary Decision with the deposition transcript of a third party in the Kip Keim matter. On February 7, 2014, an Amended Notice of Hearing issued setting this matter for hearing on May 8, 2014 in Casper, Wyoming.

On March 10, 2014, Ron Keim wrote a letter to the undersigned and sent a copy separately to Respondent's counsel. In that letter, Keim states that on February 21, 2014, the Cordero Human Resources office, headed by Director Amy Clemetson, accused Keim of additional harassment, including drawing faces on cardboard boxes and overhead doors in the

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[2] Respondent's Motion for Summary Decision is designated "R. Mot." and the attached exhibits are designated "R. Exs. A-Q."

shop, and threatening Alaniz with physical harm if he ever saw him off mine property. Keim denied the allegations and signed a paper to this effect, purportedly to keep his job. He alleges that there were no problems with Alaniz or Hubble, who had been transferred off D-Crew, until recently, when Alaniz was put in the cat bay on straight days, such that Alaniz's break and Keim's D-Crew break coincided. Keim asserts that "all hell has broken lose meaning that anything and everything has become offensive to (Alaniz)" since Alaniz received a paper from management about witness preparation dates and court dates in this matter. Keim expresses the belief that the Clemetson and rebuild shop management are retaliating against him because of the instant "lawsuit" against the company, although Keim further acknowledges that other employees have been punished and also required to sign a paper, purportedly to save their jobs. Keim further asserts that "[w]ith all this going on it has been very difficult for me to perform my job properly and safely at the rebuild shop." Keim concludes that he and his co-workers were singled out by Alaniz because of the past problems that they have all had with him and Keim re-emphasizes that the recent harassment investigation began right after Alaniz received a paper from supervisor Roger Gillium setting forth witness preparation dates and court dates in this matter. Keim then writes, "on Sunday 2/23/2014 one of the DDS hands stopped me in the hall and told me that all DDS hands were basically threatened to lose their jobs by MSHA if the harassing faces don't stop." In a postscript, Keim asserts that he has been traveling from the rebuild shop to work at other Cloud Peak Energy mines, and that when he asked that his travel be reduced, his lead man, Kent Thurman, told him that Supervisor Gilliam said that Keim has to travel and would be sent home if he refused. *See* March 10, 2014 correspondence.

Keim has not filed a new or amended discrimination complaint with MSHA, which raises the new allegations in his March 10, 2014 letter. Therefore, MSHA has had no opportunity to investigate them. Accordingly, the issues raised by Keim's March 10, 2014 letter are not before me. *See Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544, 546 (April 1991). *Cf., SOL o/b/o Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1014-18 (June 1997); *Carmichael v. Jim Walter Res., Inc.*, 20 FMSHRC 479, 484 and n. 9 (May 1998).

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 1997 (the "Mine Act"), 30 U.S.C. §§ 801 *et seq.*

3. At all times relevant to this proceeding, Complainant, Ronald Keim, II ("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. Keim began working at the Cordero Mine during November 2007 as a welder.

6. Keim received a Written Warning for inappropriate behavior on July 15, 2011 as a welder.

7. Keim received a Last and Final Discipline for inappropriate behavior on August 28, 2012.

8. On or about December 21, 2012, Keim filed a discrimination complaint with MSHA under § 105(c) of the Mine Act.

III. Factual Background

Complainant works as a welder in Cloud Peak Energy's Rebuild Shop. In the year and a half prior to filing his complaint, Complainant has had a contentious relationship with management. Keim received his first written warning on July 15, 2011 for complaints of inappropriate language and music and a verbal altercation with a co-worker over the volume of his radio. R. Ex. F; Complaint at 1. Keim does not deny the allegations of misbehavior that lead to the warning, but feels that he was unfairly singled out for punishment by management. Ron Keim Depo. at 59:20-22. Keim alleges that other employees, including members of management, used vulgar language and regularly played music containing obscene lyrics. *Id.* at 58:20-22, 88:22, 144:5-12. In particular, Keim recalls that his co-worker, Dave Alaniz, regularly uses the "F-Word," but alleges that management does not punish Alaniz. *Id.* at 144:22-145:5.

In April 2012, Keim received a promotion to Welder 4 and a corresponding pay raise. R. Ex. A. Keim states that Tim Bishop, rebuild shop supervisor, told him that "[w]e just need to "move on and put stuff behind us so we can . . . keep moving forward." Ron Keim Depo. at 60:7-10.

On August 16, 2012, Keim was called into a meeting with Bishop, human resources site manager, Doug Nutting, and rebuild shop maintenance manager, Clint Cooper. Complaint at 1; Ron Keim Depo. at 66:9-67-17. Nutting informed Keim that despite his excellent welding skills, management had received new complaints about his attitude on the job. Complaint at 1; Ron Keim Depo. at 67-68. Keim alleges that Nutting yelled at him saying "[t]hat my f***ing attitude has to change and I am tired of hearing about your s***." Keim claims that he was not presented with any specific examples of offending conduct during this meeting. *Id.*

Keim alleges that on August 23, 2012, Bishop belittled and embarrassed him in front of

the crew by telling him to stay in the break room before another meeting was held to discuss complaints related to Keim's conduct toward co-workers. Complaint at 1; Ron Keim Depo. at 70:3-6. Bishop, Nutting, and human resource representative, Sheila Harshark, were present at the meeting. Complaint at 1. Nutting told Keim that management was again hearing complaints from the crew about Keim.[3] Bishop allegedly jabbed his finger toward Keim and said the whole crew is complaining and tired of Keim's "s***." Complaint at 1. Keim also claims that Bishop told Keim that he gave Keim the raise because he thought "it would clean up [Keim's] act." *Id.* At the end of the meeting, Bishop and Nutting informed Keim that he was suspended without pay for the remainder of the day and that they would recommend that Keim's employment be terminated. Ron Keim Depo. at 74:11-24; R. Ex. I.

On August 28, 2012, rather than terminating Keim's employment, Respondent gave him a "Last and Final Warning Letter." R. Ex. I. The warning states that because Keim's behavior has not improved since the 2011 written warning, Keim will be placed on an action plan for one year during which his behavior will be closely monitored by his supervisor. *Id.* It further states that Keim is no longer eligible for performance pay for the third quarter of 2012, and that Keim is precluded from promotions or application for other company positions until his behavior improves. *Id.*

Although Keim does not deny the workplace misbehavior that management has used to justify the disciplinary measures, he argues that his behavior was misinterpreted and that he was singled out for behavior that other employees and management engage in without reprimand. Ron Keim Depo. at 144:6. Keim also states that mine management was dismissive of his complaints against Alaniz, particularly his complaint that Alaniz was spitting on the bus. *Id.* at 113:24. Further, Keim's MSHA complaint specifically alleges that Bishop and Nutting told him that his size intimidates others and that Keim believes that management has "stereotyped" and discriminated against him because he spends time off in the gym and eats healthy, but other guys are taller and bigger than he is. Complaint at 2. When asked why he believed that he was singled out for discipline, Keim responded that someone had a "beef" with him, but he did not know why. Ron Keim Depo. at 59:2-9.

IV. Principles of Law

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*

[3] Keim admits that about this time he told bus driver Aaron McAllister to "open the door, man, or I'll kick it open." Keim testified that he "was just picking on him, just having fun, just trying to get home." Ron Keim Depo. at 60:22-24.

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).[4]

The Commission has held that 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 West Mining Co.*, 16 FMSHRC 1414, 1419 (July 1994) (quoting *Celotex Corp.*, 477 U.S. at 322).

V. Analysis

A. Keim's Alleged Failure to Timely File His Discrimination Complaint

Section 105(c)(2) states that a miner "who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within sixty days after such violation occurs, file a complaint with the Secretary alleging such discrimination." 30 U.S.C. § 815(c)(2). Complainant was issued his first written warning in July of 2011 and was placed on a Last and Final Warning on August 28, 2012. Keim's Complaint to MSHA, however, was not filed until December 14, 2012, 108 days after the issuance of the Last and Final Warning. Respondent argues that Keim's claim is time-barred because his allegations of adverse employment action did not occur within sixty days prior to the filing of his complaint of discrimination. Mem. of Points & Authorities in Support of R. Motion for Summary Decision at 10.

The Commission has found that the 60-day filing period for discrimination claims is not a jurisdictional bar and that timeliness questions must be examined on a case-by-case basis. *David Hollis v. Consolidation Coal Co.*, 6 FMSHRC 21, 24 (Jan. 1984), *aff'd mem.*, 750 F.2d 1093 (D.C. Cir. 1984). The relevant legislative history of the Mine Act supports this case-by-case approach when stating:

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[4] 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. Southern R. Co.*, 320 U.S. 476, 479-480 (1943); *Wilkerson v. McCarthy*, 336 U.S. 53, 62 (1949)).

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly where the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. 95-181, 95th Cong., 1st Sess. 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

It is clear from Keim's interactions with this tribunal and his pro se status, that Keim is unaware of many of his rights and responsibilities under the Mine Act. When asked why he filed his complaint in December 2012, Keim seemed unaware that the Mine Act imposed any time limit for filing a discrimination complaint. Ron Keim Depo. at 148:20-23. Rather, Keim indicated that he was motivated by alleged discrimination against his brother Kip Keim, who works at the same mine. *Id.*

Although Keim has not provided any justification for the delay in filing his complaint, I find that some leniency is warranted given his pro se status. *See Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 12-13 (Jan. 1984) (pro se miner's late filing may be excused in justifiable circumstances if filed thirty-one days late). Keim's 48-day delay in filing is relatively short. Respondent has failed to present any evidence that such delay resulted in any actual prejudice to its ability to mount a defense. Furthermore, dismissal is a drastic remedy that is disfavored when based solely on a procedural irregularity. *See, e.g., Salt Lake*, 3 FMSHRC 1714, 1717 (July 1981); *Long Branch Energy*, 34 FMSHRC 1984, 1992 (Aug. 2012). Accordingly, in the circumstances of this case, I decline to dismiss Keim's complaint on the basis of his untimely filing.

B. Keim's Alleged Failure to Establish a Prima Facie Case of Discrimination

To proceed on his discrimination complaint under the Mine Act, Keim has the burden of establishing a prima facie case of discrimination by presenting evidence "sufficient to support a conclusion that [he] engaged in protected activity and that the adverse action complained of was motivated in any part by that activity." *Sec'y of Labor on behalf of Donald E. Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 989 (Sept. 1999); *see also Tanglewood Energy, Inc., 19 FMSHRC 833* (May 1997); *Sec'y of Labor on behalf of David Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). 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.*

Keim offers only one example that arguably could be construed as protected activity. Keim told Hubble and other managers sometime in 2012 that co-worker Alaniz was creating a hostile work environment that made it difficult for Keim's crew to safely perform their jobs. *See* Ron Keim Depo. At 111:16-22; 115:9-16; Complaint at 2.

Keim's allegations of discrimination in 2011 clearly predate the complaint to Hubble and thus cannot be evidence of adverse employment action motivated by protected activity. The Last and Final Warning, however, occurred in 2012, possibly after Keim made his complaints to management. In examining the record on summary decision, I view the facts in the light most favorable to the non-moving party and thus infer that Keim's complaints predated the adverse employment actions. *See Hanson Aggregates N.Y., Inc.*, 29 FMSHRC 4, 9 (Jan. 2007) (quoting *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962)).

Even assuming, arguendo, that Keim's complaint to Hubble and other managers constituted protected activity, Keim has failed to establish a nexus between the protected activity and the adverse action taken by Respondent.[5] The Commission has found the following to be common circumstantial indicia of discriminatory intent: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F. 2d 86 (D.C. Cir. 1983); *see also Sec'y of Labor on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (Sept. 1999).

Although Keim's complaints concerning Alaniz were known to mine management and may have occurred in close temporal proximity to the adverse employment action, there is no evidence of disparate treatment or animus towards Keim's complaints. While Keim has claimed disparate treatment in disciplinary actions taken in 2011 (complaints of inappropriate language and music), Keim has not presented any facts in support of disparate treatment in 2012. Further, there are no facts that establish that management was hostile to Keim's complaints concerning Alaniz, nor are their any facts that suggest that management held any animus towards Keim for

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[5] Although the Commission has never addressed the issue, it is conceivable that under the particular facts and circumstances of a given case, reporting workplace violence or abuse that implicates concerns for safe performance of work tasks could raise to the level of protected activity under section 105(c) of the Mine Act. *Cf.* Complaint at 5, *Harris v. Duane Thomas Marine Contr., LLC*, No. 2:13-cv-00076-SPC-DNF (M.D. Fla. Feb. 5, 2013) (the Secretary brought a complaint under section 11(c) of the OSH Act of 1970 alleging that internal complaints to owner and/or external complaints to OSHA concerning workplace violence and verbal abuse constitute protected activity related to the OSH Act). The only allegations of workplace violence here concerns threats made by complainant Ron Keim.

bringing such complaints to the attention of management. In fact, Keim avers that other rank-and-file miners and even members of mine management had raised issues with Alaniz's behavior. Ron Keim Depo. at 110:24, 117:13; *see also* R. Ex. P, at 5; R. Ex. Q, at 7.

Rather, it is clear from conference calls and correspondence with the parties, that Keim is unhappy with what he perceives as longstanding inequities in Respondent's disciplinary procedures and managerial practices. Keim believes that Bishop is unreasonable in his belief that Keim should not be on the same crew as his father. Ron Keim Depo. at 167:10. Keim also asserts that because of his muscular physique, management gave undue credence to coworker's complaints of threats and intimidation from Keim, which Keim allegedly uttered in jest. Further, Keim believes that management has not done enough to address Alaniz's alleged overzealous reporting of workplace banter, which Alaniz finds objectionable. It is apparent that Keim seeks the aid of the Commission to arbitrate the aforementioned workplace disputes rather than address discrimination based on activities protected under the Mine Act.

It is well established that "[t]he 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." *Chacon, supra*, 3 FMSHRC at 2516. Thus, regardless of the merits of Keim's issues with management, a prima facie case of discrimination under the Mine Act cannot be established without some modicum of evidence supporting the contention that Keim's protected activity, at least in part, motivated the adverse action, and that management exhibited animus toward that activity. After careful review of the documents submitted by both parties, I find no such evidence here, even when viewing the facts in the light most favorable to Complainant.[6]

VI. Order

Complainant Ron Keim, II, has failed 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. Accordingly, Respondent's Motion for Summary Decision is **GRANTED**. This case is **DISMISSED,** with prejudice.

Thomas P. McCarthy
Administrative Law Judge

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[6] While I need not pass on the validity of Respondent's affirmative defense, it is worth noting that Keim has admitted to a history of inappropriate behavior. Specifically, Keim has admitted to the use of foul language, playing loud music with highly offensive lyrics, threatening to damage company property, threatening to fight colleagues, and posting a comment on Facebook that he was going to "kick [Hubble's] ass." Ron Keim Depo. at 44:1-22, 45:1-4, 53:23-25, 54:1-25, 55:1, 55:10-25, 56:1-8, 57:8-19, 60:13-24.

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