FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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December 16, 2010

SECRETARY OF LABOR, MSHA, on behalf of OKEY SARTIN, Complainant	:	DISCRIMINATION PROCEEDING
	:	Docket No. WEVA 2010-1004-D
v.	:	HOPE CD 2010-04
KIAH CREEK TRANSPORT, LLC, Respondent	:	Mine ID 46-07809 Kiah Creek Preparation Plant

DECISION

Appearances: Karen Barefield, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant.
Mark E. Heath, Esq., Spilman, Thomas, Battle, PLLC, Charleston, West Virginia, for Respondent.

Before: Judge Zielinski

This case is before me on a complaint of discrimination filed by the Secretary of Labor, on behalf of Okey Sartin, pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2).[1] The Secretary alleges that Kiah Creek Transport, LLC, unlawfully discriminated against Sartin by terminating him in retaliation for his complaints about safety. A hearing was held in Charleston, West Virginia, and the parties filed briefs following receipt of the transcript. For the reasons set forth below, I find that the Secretary has failed to prove that Sartin was discriminated against in violation of the Act.

Findings of Fact

Argus Energy WV, LLC, operates a large surface and sub-surface coal mine in Wayne County, West Virginia. Kiah Creek Transport is a trucking company that contracted with Argus Energy to transport coal from stockpiles to a tipple at the mine, known as the Kiah Creek

[1] Pursuant to section 105(c)(2) of the Act, a miner may submit a complaint of discrimination to the Secretary of Labor, who must conduct an investigation and file a complaint with the Commission if she determines that the Act has been violated. If the Secretary finds that the complaint "was not frivolously brought," she may also seek an order temporarily reinstating the miner. 30 U.S.C. § 815(c)(2). The Secretary filed a Temporary Reinstatement Proceeding on behalf of Sartin. *Sec'y of Labor on behalf of Sartin v. Kiah Creek Transport, LLC.*, Docket No. WEVA 2010-771-D. Pursuant to agreement of the parties, an order was entered on April 5, 2010, economically reinstating Sartin effective March 31, 2010.

Preparation Plant. Large tractor-trailer trucks, typically carrying 60 tons, are used to transport the coal. Kiah Creek operated approximately 20 trucks, loaders and other equipment, and its operations were based in a shop building on the mine site, where maintenance and repairs were done. Truck drivers worked on two shifts, six days a week. Generally, eight truck drivers would work on the second shift, from 5:00 p.m. to 5:00 a.m., Monday through Friday, and every other Saturday. Ricky Vance was the second shift supervisor. Kevin Fields was the superintendent of Kiah Creek's trucking operations, which included the off-road mine site work and an operation transporting coal to river docks in Kenova, Wisconsin. Shane Farley was the truck boss at Kiah Creek, and worked under Vance.

In March of 2009, Sartin was unemployed because of chronic medical problems. Tr. 19. He had previously worked in underground coal mines. While he had not operated large trucks in some time, he was familiar with them because his father worked with heavy equipment and trucks. Ex. P-4. One of Sartin's friends happened to work with Vance's wife, and mentioned Sartin's situation to her. Vance's wife talked to him, recommending that Kiah Creek consider Sartin. Vance suggested to Fields that they hire Sartin and give him a chance to "get back on his feet." Tr. 158. Sartin submitted an application to Kiah Creek, was interviewed by Fields, and was hired as a second shift haul truck driver on March 13, 2009. Tr. 20, 210; Ex. R-1.

The employment agreement signed by Sartin provided that, after a probationary period, his employment could be terminated as part of a progressive disciplinary process, or without prior disciplinary action if his actions, in the Company's judgment, warranted immediate termination. Examples of actions that could result in termination without prior disciplinary action included: absence without approved leave, disorderly conduct, and excessive absenteeism or tardiness. Ex. R-1.

Vance and Farley were very supportive of Sartin, who was living out of his vehicle. Vance occasionally gave him rides to and from work, brought him food, and gave him money to buy gasoline. Tr. 22, 70, 159; Ex. P-5. Later, when Sartin experienced health problems, Vance transported him home from the hospital. Tr. 159; Ex. P-5. Farley also occasionally provided transportation for Sartin to and from work, and gave him gasoline and food. Tr. 197. Sartin agreed that the company bent over backwards to help him out in the spring of 2009. Tr. 71. After Sartin started receiving paychecks, he acquired a small trailer. Although he may have had a disagreement with one co-worker, Sartin's relationships with co-workers and supervisors were unremarkable. Tr. 72. Sartin and Vance agreed that they got along well. Tr. 71, 80, 159. Farley also got along well with Sartin, and went fishing with him a couple of times. Tr. 83, 197.

For the first several months of his employment, Sartin performed very well. Tr. 160, 198. Around June or July, he was victimized in an internet scam. He was tricked into sending money to a woman who would supposedly come to the United States and live with or marry him. He lost about $2,600.00 before he realized that he was being taken. Sartin testified that the incident did not affect his work performance. Tr. 24. However, his supervisors noticed that his attitude began to change. Tr. 160-61, 211-12. Vance reported that Sartin started missing work and didn't seem to care about anything. Ex. P-5.

Beginning in July 2009, Sartin experienced serious health problems, mainly related to high blood pressure. He was taken from mine property in an ambulance a few times, and suffered a minor stroke while on mine property. Argus Energy's human resources and payroll administrator, Rebecca Hall, compiled a list of Sartin's absences from July 1, 2009, through February 6, 2010, along with a statement of reasons, or excuses, claimed for such absences.[2] Ex. P-1. The list is inaccurate in several respects.[3] The period beginning on Monday, December 14, 2009, through Tuesday, January 12, 2010, is the more critical time. Sartin was absent 14 of the 22 work days. He was hospitalized on four of those days, although it is unclear whether Respondent was aware of that.[4] He submitted an excuse for five days, admitted that he had no excuse for absences on January 5 and 8, and claimed that Fields had told him to take Friday the 9th off and that he was suspended beginning on Monday the 11th. Tr. 34-35.

Fields testified that he was running out of patience with Sartin's poor attendance. He and Vance had talked to Sartin about the problem. Tr. 228. Following Sartin's absence on January 8, Fields told Sartin that he needed to have a doctor's excuse before he could come back to work. Tr. 226, 230. When Sartin advised that he could not produce an excuse, Fields told him that he was going to be suspended for four days. Tr. 230.

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[2] The concept of an "excused" absence is somewhat misleading. Aside from vacation days, for which they were paid in a lump sum in July, miners, like Sartin, were not paid for days they did not work, regardless of the reason. Miners who worked all assigned days in a month received a $150 attendance bonus. Any day missed, except for a vacation day, voided the bonus. Tr. 147. Excuses, apparently were relevant only as in indication of an employee's reliability, and to provide an opportunity to manage work schedules and seek possible replacements. If a driver simply failed to show up, Fields explained that his truck sat, production was disrupted, and the driver's performance was adversely affected. Tr. 216.

[3] Sartin's time sheet for December 4 through 20, shows that he did not work on six of the 10 week days, whereas, the list shows that he was absent on only four days. Ex. P-1, P-13 at 11. The time sheet for December 21 through January 3, bears a notation "Had [Dr?] excuse for all days off," whereas Argus's list does not note an excuse for five absences in that time period. Ex. P-1, P-13 at 12. Argus's list shows that Sartin was absent on January 6 and 7. Sartin testified that he worked on January 6 and 7, and his time sheet appears to confirm his claim. Tr. 34, 52; Ex. P-13 at 13.

[4] The Secretary introduced medical records establishing that Sartin was hospitalized from December 15 through 18. Ex. P-12. The hospitalization apparently was not reflected in Argus's payroll records, and is not reflected on Argus's list of absences.

On January 13, Sartin was called in, was counseled by Vance and Fields about excessive absenteeism, and was suspended for four days.[5] A form signed by all parties memorializes that Sartin was counseled about "missing too much work no excuses," and notes that "any other infraction(s) of company rules or policies could lead to [his] suspension and or . . . termination." Ex. R-3. Sartin was told to come back on January 18, a Monday, at which time he would have to sign a "last chance agreement."[6] Ex. R-3. On January 18, Sartin reported for work, and signed an agreement, reflecting that he had received one written and three verbal warnings regarding his "work performance or attendance," and was requesting a "Last Chance" to improve. Ex. R-4. Following his suspension, and when working under the last chance agreement, Sartin was essentially on probation, and could be terminated for any violation of work rules or regulations. Tr. 168; Ex. R-3, R-4. Sartin understood that, having signed the agreement, he could be terminated for any breach of company rules, or further absences. Tr. 37, 68, 72.

From January 18 through February 4 there were no significant problems with Sartin's attendance or work performance.[7] On February 5, he reported for work and was told by the day shift driver and others that his assigned truck, truck #6, had been leaning when dumping. He checked potential causes when he did his pre-operational checks, but did not find anything wrong. Vance had overheard the first shift driver's report about the truck leaning. Tr. 170. There was also mention that the leaning might be attributable to uneven loading as a result of frozen coal. Tr. 170. Vance also checked the truck's tires, springs, frame and dump chutes: things that might cause leaning. He found no problems. Tr. 171. Vance told Sartin to "light-load" the truck. He also told Farley, who was operating the loader at the stockpile, to light-load the truck until they figured out what was wrong with it. Tr. 173. The truck was loaded with 40-45 tons of coal, as opposed to a normal load of 60 tons or more. It leaned some when dumping, but was within acceptable limits for the first five loads. Tr. 200. Sartin did not feel that the truck was unsafe to operate.[8] Tr. 76. Farley, felt that the fifth load leaned a little more, so he loaded the sixth load more toward the back of the trailer to make it easier to dump. Tr. 201. However,

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[5] The suspension ran from January 13 through January 16. January 16 was a Saturday. It is not clear whether Sartin was scheduled to work that Saturday, because he had been scheduled to work the previous Saturday, January 9. The list of absences prepared by Argus does not show him absent or on suspension on January 16. Ex. R-2.

[6] Fields explained that a last chance agreement is used when they have worked with an employee to try and save his job, but are ready to terminate him. The agreement affords the employee one last opportunity keep his job. Tr. 217.

[7] Vance testified that Sartin's attendance was good. He was tardy a couple of times, but he called in and was on the property. Tr. 169.

[8] Sartin testified that he told Vance, over the radio, that the truck was leaning after the fifth load, and that Vance told him to haul coal. Tr. 76. Vance testified that he did not hear from Sartin before he brought the truck back to the shop. Tr. 174. As noted above, Sartin did not feel that the truck was unsafe to operate at that time.

the trailer leaned badly when dumping the sixth load, and Tony, the loader operator at the tipple, told Sartin to take the truck back to the shop because it was too dangerous to keep operating. Tr. 43.

Sartin drove the truck to the shop about 1:30 a.m. or 2:00 a.m., on February 6, 2010, and stopped outside because all three shop bays were full. He approached Vance, who was on an elevated platform greasing jack pins on a loader. Farley, who had been operating the loader at the stockpile, had brought it in for greasing when the belt shut down. He was standing on the ground, handing things to Vance. Sartin walked up next to Farley, and a critical conversation ensued.

Sartin testified that he told Vance that the truck just about rolled over and that Tony (the loader operator at the tipple) said to bring it to the shop and not to bring it back until they found out what was wrong with it. Tr. 43. Vance replied that there was nothing wrong with the truck and instructed Sartin to haul coal. Tr. 44. Sartin responded that the truck just about turned over, and Vance asked whether Sartin told Tony that Vance had looked at it. Sartin replied that he had, and that Tony said not to bring it back down there. After three to four minutes, Vance told Sartin to park the truck and that he could "go on unemployment." Tr. 44. Sartin felt that Vance was "threatening" his job and replied "do it," meaning fire me. Tr. 44. Vance replied, "you get smart with me and I'll fire you now." Tr. 44. Sartin said "you f-king fire me then," and Vance fired him. Tr. 44.

Vance testified that Sartin told him that the loader man at the tipple told him that the truck was leaning too bad and to bring it to the shop. Vance told him to park it, and looked at Farley and Sartin, "winked," and said "the way things [are] going we all [are] going to be on unemployment."[9] Tr. 178. Sartin started cussing and said "I don't f-king care, you can go ahead and f-king fire me." Tr. 178. Farley said that Vance was just joking, and Sartin said "f-king fire me." Tr. 178. Vance then fired Sartin.

The only material differences in the parties' respective versions of these events is whether Vance's comment about unemployment compensation was made in a joking manner, or whether it was a genuine threat to fire Sartin, and whether Farley made a comment to the effect "he's joking."[10] There is general agreement on other aspects of the interchange, including that Sartin was loud and cursed at Vance. Sartin admitted that he was loud, and that he cursed at Vance in an angry voice. Tr. 44, 82. Vance and Farley also testified that Sartin spoke in a loud, angry voice and cursed. Tr. 178-79, 189, 203-04.

Vance made a note of what happened, and he and Farley signed it. Exh. R-6. Vance

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[9] There were typically eight trucks operating on the second shift. That evening, there were seven, and loss of Sartin's truck would have taken that number down to six.

[10] Vance and Farley testified that Farley interjected with the "he's just joking" comment. Tr. 178, 203. Sartin denied that Farley made such a statement. Tr. 44.

filled out an "Employee Termination Form," reporting that Sartin had been terminated "for having no respect for his job and going off on me." Exh. R-5. Vance called Fields about 5:00 a.m., and told him he had to let Sartin go. He explained what happened, and told Fields that the termination form was on his desk. Fields signed the form when he came in. Sartin called Fields that day, told him that he had gotten into it with Vance, and inquired whether he had lost his job. Fields replied that he had been fired. Sartin said that he had been fired over a safety issue, and Fields told him "no . . . you were fired for cussing your boss out." Tr. 222. Sartin offered to drop everything, if he could have his job back. Fields replied that he was going to honor Vance's decision, to which Sartin responded: "you've got a fight on your hands." Tr. 222. Sartin's testimony describing this conversation was essentially the same. Tr. 47.

On February 8, 2010, Sartin appeared at the MSHA field office in Mt. Hope, West Virginia, and filed a discrimination complaint. The complaint was assigned to MSHA special investigator James Humphrey, who visited Sartin at his residence, and obtained a statement from him. Exh. P-4. Humphrey also visited Kiah Creek's shop, interviewed Vance and Fields, and obtained statements from them. Ex. P-5, P-6. Humphrey did not interview Farley, because until his deposition was taken, he was not aware that Farley was standing right next to Sartin and Vance, and witnessed the critical conversation. Tr. 130. Humphrey testified that he specifically inquired of Sartin whether there were witnesses to the conversation, and that Sartin did not tell him that Farley was present. Tr. 132.

Humphrey did not examine the trailer on his first visit to the site. Kiah Creek was going to send the trailer to the manufacturer to correct whatever deficiencies were causing it to lean. It voluntarily kept the trailer on site until Humphrey could examine it. About two weeks later, Humphrey examined the trailer, including the upper end of the lift/dump mechanism, which was accessed by removing a cover plate high on the trailer's front side. He found that a pin attached to the end of the hydraulic lift piston was badly worn and bent, as was the eye bracket, and that several bolts were missing from brackets mounted on the trailer into which the ends of the pin fit. Tr. 114-16. Those conditions, which are depicted in pictures taken by Humphrey, were the apparent cause of the leaning problem. Ex. P-8, P-9. Humphrey knew that a number of things can cause leaning, and was disappointed that Kiah Creek had not gone further in its efforts to find the cause. Tr. 118. However, Fields noted that all of those defective parts were replaced, and that after $16,700.00 was spent on repairs, the trailer still had a tendency to lean. Tr. 224-25.

After Humphrey's initial investigation, the Secretary concluded that Sartin's complaint was not frivolous, and filed the aforementioned temporary reinstatement proceeding. At the conclusion of the investigation, the Secretary filed the instant Complaint of Discrimination, seeking permanent relief on behalf of Sartin and the imposition of a civil penalty in the amount of $10,000.00 against Kiah Creek for its alleged violation of the Act.

The Discrimination Claim

A complainant alleging discrimination under the Act typically establishes a *prima facie* case by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 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 (Apr. 1981). The operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no way motivated by protected activity. *See Robinette*, 3 FMSHRC at 818, n. 20. If the 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 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

While the operator must bear the burden of persuasion on its affirmative defense, the ultimate burden of persuasion remains with the complainant. *Pasula*, 2 FMSHRC at 2800; *Schulte v. Lizza*, 6 FMSHRC 8, 16 (Jan. 1984).

Prima Facie Case

Section 105(c)(1) of the Act prohibits discrimination against any miner who complains to an operator or its agent about "an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1). Sartin's report of the problem with the #6 truck related to safety and was an activity protected under the Act. He suffered adverse action when he was terminated.

The principle issue as to Sartin's *prima facie* case is whether the adverse action was motivated in any part by his protected activity. Even though there is no direct evidence of unlawful motivation, the Commission has recognized that such evidence seldom exists and that discrimination often must be proven through circumstantial evidence. *Sec'y of Labor on behalf of Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 354 (April 2002), *citing 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). Circumstantial evidence of unlawful motivation may include an operator's knowledge of the protected activity, hostility toward the protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *Id*.

Here the adverse action immediately followed the protected activity, a coincidence in time sufficient to raise an inference that it was the result of Sartin's protected activity, at least in part. Vance had examined the truck and found nothing wrong with it. He was concerned that another truck being taken out of service would further reduce his fleet of available trucks on that shift, which would adversely affect production. It would be permissible to infer that his decision

to terminate Sartin was motivated, in part, by the report of a safety problem.

While drawing such an inference would be permissible, it is not compelled, and I decline to do so. As explained in the discussion of Respondent's affirmative defense, I find that Vance's decision to terminate Sartin was motivated solely by Sartin's angry reaction to an innocuous comment about unemployment compensation. While Sartin's actions with respect to the truck related to a safety issue, he was not the initiator of the complaint. The initial reports that the trailer was leaning when dumping a load came, not from Sartin, but from the first shift driver, and were overheard by Vance. Vance examined the truck and instructed Sartin and Farley to light-load it. Sartin agreed that that was the proper approach to the problem. Tr. 74.

When the trailer leaned badly while dumping the sixth load, the loader man at the tipple told Sartin to bring the truck to the shop because it was too dangerous to operate. Sartin took the truck to the shop and reported the loader operator's instruction/suggestion to Vance. Again, Sartin was not the initiator of the safety related message. He had taken the truck to the shop at the instance of the tipple operator, and he did not refuse to drive the truck. While he was the bearer of news that would have an adverse effect on production, there was little reason for Vance to have focused a negative reaction on Sartin, especially to the extent of terminating his employment. The truck was carrying limited loads, and there were only about three hours left in the shift. Several persons had reported the leaning problem, and Vance knew that it had to be dealt with.

I find that Vance's statement about unemployment was a joking commentary on the problems that he was experiencing with haul trucks that evening.[11] That is how Farley understood it, and he tried to calm Sartin when he reacted angrily and started cursing. Sartin may have miss-perceived the comment as a "threat" to his job - but not, apparently, that he was being fired. As the Secretary notes, in her brief, Sartin was discharged "almost immediately *after*" Vance's reference to unemployment. Sec'y. Br. at 6. The discharge occurred seconds later because when Vance told Sartin that further abusive conduct would result in termination, Sartin, in a loud, angry cursing voice, specifically invited Vance to fire him, and Vance then fired him.

The Secretary attempts to limit Sartin's culpability by reference to Sartin's testimony that the use of "salty" language was normal conversation for miners at Kiah Creek. Tr. 23. Vance agreed that profanity was often used in the general discourse on the job. Tr. 188. However, that is an entirely different matter than personally directed comments made in anger. Farley stated that cursing, if made in a non-joking way, should be punished, and could result in termination if

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[11] Telling an employee to sign up for unemployment would be an unusual way to fire him. Persons terminated for cause typically are not eligible for unemployment benefits, at least initially. Kiah Creek "fought" the unemployment claim that Sartin made following his termination. Tr. 49. While it might be presumed that a fired employee would seek unemployment benefits, it strikes me as highly unlikely that Vance would have couched any decision to terminate Sartin in terms of his seeking unemployment benefits.

one was on a last chance agreement. Tr. 205. In his mind, there was no question that Sartin was angry.

I find that Vance's decision to terminate Sartin's employment was motivated entirely by Sartin's angry, cursing behavior, and not, in any part, by Sartin's protected activity. Consequently, the Secretary failed to establish a *prima facie* case of discrimination against Sartin.

In reaching this conclusion I have found facts that are adverse to the interests of the Secretary and Sartin. Those determinations have been based upon my favorable evaluation of the credibility of Vance, Fields and Farley, and a less favorable evaluation of Sartin's credibility. Two of the considerations that weighed on Sartin's credibility were his testimony about a drug test incident, and his failure to advise Humphrey that Farley was present and participated in the exchange that lead to his termination. The drug test issue was unremarkable, except for Sartin's inconsistent testimony about it. Sartin testified that he talked to Fields shortly after taking a random drug test in July, and reported that he was going to fail it because he had taken a pain pill given to him by another employee that "was not prescribed to [him]." Tr. 48. Sartin later testified that he had a prescription for the drug when he took it. Tr. 58-59. The drug test came up negative, and Sartin was never required to show a prescription to Fields. Sartin never explained why he was concerned about the test, if he had a prescription for the drug.[12]

Respondent's Affirmative Defense

While I have rejected the Secretary's argument on causation, that decision is not yet final. Assuming, for purposes of argument, that Sartin's termination was in some part the result of his protected activity, Respondent's affirmative defense will be considered. Kiah Creek contends that Sartin's termination was based upon his unprotected conduct, and that it would have taken the same action whether or not Sartin had engaged in protected activity.

In *Sec'y. of Labor on behalf of Bernardyn v. Reading Anthracite Co*. 22 FMSHRC 298, 302 (Mar. 2000) (*Bernardyn I*), the Commission reiterated the general principles for evaluating an operator's affirmative defense:

> [T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the

[12] Sartin also testified that drivers were required to report all prescription medications to the company. Tr. 58. But, when questioned about why the prescription he claimed to have had had not been reported, he stated that only prescriptions that bore a red label warning against operation of heavy equipment needed to be reported. Tr. 85. Respondent's actual policy on reporting of prescription drugs is unknown. If Sartin's initial statement were correct, it might explain why he was concerned about the test, even if he had a prescription.

> alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

quoting from Bradley v. Belva Coal Co., 4 FMSHRC 982, 993 (June 1982). As specifically as applied in cases involving the use of profanity, the Commission cited *Sec'y. of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984), and noted factors to be considered include whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and the operator's treatment of other miners who had cursed or used threats.

There is no question that Sartin's relationship with Kiah Creek had become quite strained in the months leading up to his termination. While Argus's listing of absences fails to note excuses for some days that should have been so recorded, it is apparent that Sartin missed a lot of work days from mid-December up to the date of his suspension. His absences on January 5, 8, 9, 11 and 12 were not excused. I find, as Fields testified, that he was not aware of any excuses for those days, and that he did not suspend Sartin prior to January 13. Tr. 218. Kiah Creek documented steps in its disciplinary process. The form memorializing the suspension and the fact that Sartin would have to sign a last chance agreement upon his return to work on January 18, documented the disciplinary action that was taken. It is possible that Sartin misunderstood Fields's statements about the suspension. Nevertheless, as of January 13, Sartin had been absent for several days and had tendered no excuse for his absences.

There is no evidence that Sartin had used profanity in the past, except possibly in general casual conversation. Tr. 187. But, Sartin had clearly established an unsatisfactory work record due to absences and tardiness. The tension that Sartin's absences caused with Vance and Fields was not attributable to protected activity, nor was the fact that Sartin was subject to termination for any breach of Kiah Creek's rules.

While Respondent did not have a written policy defining insubordination, its work agreement specifically prohibited disorderly conduct, and cited it as an example of conduct that could lead to immediate termination. Tr. 188; Ex. R-1. From the limited evidence of record, it appears that Sartin's termination was consistent with its written policy and previous disciplinary actions. Vance testified, in response to a leading question, that an employee could not talk to a supervisor like Sartin had and retain his job. Tr. 223. Farley testified that an employee engaging in conduct like Sartin's should be punished and could be terminated if he was on a last chance agreement. Tr. 205.

Evidence of disparate treatment can be highly probative of unlawful motive, just as evidence of consistent treatment can indicate the lack thereof. *Sec'y of Labor on behalf of Bernardyn v. Reading Anthracite Co.*, 23 FMSHRC 924, 929 (Sept. 2001) (*Bernardyn II*). Here, the Secretary introduced no evidence that there were other similarly situated miners that were treated more favorably in the disciplinary process. Respondent presented limited evidence on

that issue. Fields testified that an employee at the Kenova job had also been terminated for cursing his supervisor. Tr. 225.

Sartin understood his precarious employment situation. That understanding did not influence him to control his behavior. He was openly hostile and insubordinate to his supervisor in the presence of at least one other employee. His conduct was grounds for termination under his original employment agreement, and almost certainly would have occurred even if he had not been working under a last chance agreement. In his status as of February 6, 2010, his termination was virtually inevitable.

Upon consideration of all of these factors, I find that Kiah Creek's termination of Sartin was the result of his unprotected activity and that it would have taken that disciplinary action as a result of Sartin's unprotected activity alone.

The Secretary argues that Sartin's outburst was provoked by Vance's reaction to his report of the safety problem such that his conduct cannot be used as a justification for adverse action. In *Bernardyn I*, the Commission held that even where all elements of an affirmative defense have been established, the defense may nevertheless fail because the offensive conduct was provoked by an operator's response to protected activity. 22 FMSHRC at 305-06. As noted above, Vance did not provoke Sartin. He made an offhand comment about everyone going on unemployment. While Vance's statement was occasioned by Sartin's message about a safety problem with the truck, it was not provocative and Sartin's reaction was completely beyond any leeway for impulsive behavior to which an employee might be entitled. Sartin was openly abusive and insubordinate in his language and demeanor, and persisted in his conduct despite Farley's attempt to calm him. Respondent is not precluded from relying on Sartin's conduct as a justification for his termination.[13]

[13] The Secretary does not argue that Sartin's reaction was prompted by a misunderstanding of Vance's comment. Had she done so, I would find that as a matter of fact it was not, especially in light of Farley's intervention. However, I need not reach that issue, because the argument is unavailing. In a related context, an employee's refusal to perform work he mistakenly perceives to be unsafe can be protected if he held a good faith, reasonable belief that it was hazardous. *Dykhoff v. U.S. Borax, Inc.*, 22 FMSHRC 1194, 1198-99 (Oct. 2000). Any argument that Sartin's reaction to Vance was protected because he perceived Vance's comment to be a provocative reaction to his safety message would fail because any such perception would have been unreasonable.

ORDER

For the reasons stated above, I find that Kiah Creek's decision to terminate Sartin was not motivated in any part by Sartin's protected activity. Rather, it was based solely upon his abusive and insubordinate conduct toward his supervisor. It was a justifiable continuation of the disciplinary process, and would have been justifiable as an initial disciplinary action. In the alternative, I find that Kiah Creek would have taken the disciplinary action as a result of Sartin's unprotected activities alone. Accordingly, the Discrimination Complaint is hereby **DISMISSED**.

Michael E. Zielinski
Senior Administrative Law Judge

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