

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

March 28, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. CENT 2000-182-DM
on behalf of DILLARD PETTUS,	:	SC MD 99-14
Complainant	:	
v.	:	
	:	
ALCOA ALUMINA & CHEMICAL, L.L.C.,	:	Bauxite Facility
Respondent	:	Mine ID No. 03-00257

## DECISION

Appearances: Richard M. Muñoz, Esq., Janice H. Mountford, Esq., Office of the Solicitor, U.S. Department of Labor, Dallas, Texas, on behalf of the Secretary of Labor;  
Lee Garrett, United Mine Workers of America, Benton, Arkansas, on behalf of Dillard Pettus;  
Harold J. Engel, Esq., Arent, Fox, Kintner, Plotkin & Kahn, P.L.L.C., Washington, D.C., on behalf of the Respondent.

Before: Judge Melick

This case is before me upon the complaint by the Secretary of Labor, on behalf of Dillard Pettus, under Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 (1994) *et seq.*, the “Act.” The Secretary alleges in her complaint that Alcoa Alumina and Chemical, L.L.C. (Alcoa) violated Section 105(c)(1) of the Act, when it suspended Mr. Pettus on June 15, 1999, for three days for his participation in unspecified protected activity.<sup>1</sup>

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<sup>1</sup> Section 105(c)(1) of the Act provides as follows:

No 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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment 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, representative of miners or applicant for employment is the subject of medical

In his initial complaint to the Department of Labor's Mine Safety and Health Administration (MSHA) filed July 2, 1999, Mr. Pettus alleged that "I was discriminated by Alcoa management for stating safety concerns[sic] while performing my job at Alcoa." In an amended discrimination complaint filed August 16, 2000, the Secretary seeks a civil penalty of \$5,000.00, for Alcoa's alleged discriminatory conduct in suspending Pettus.

### Background

The tabular operator job at Alcoa's Benton Arkansas facility includes the functions of crusher operator, screener and converter operator. In 1998 Alcoa's management decided to cross-train employees designated as tabular operators in all three functions to reduce the amount of overtime worked. The tabular operators had been frequently working overtime because most had not been trained to perform all of the job functions.

Complainant Pettus had been employed by Alcoa for 30 years and had worked as a tabular operator performing the crusher function from 1989 through June 2000. As a crusher operator Pettus worked in a ten-story building that contained a computer control room, and various other equipment including a gyro disc, transfer devices and large bins. Pettus' job as a crusher operator required him to operate the computer equipment in the control room, walk around the building several times each shift to visually examine the operations and take samples for quality control testing. Pettus testified that his job as a crusher operator was "very complex."

Pettus had also trained several other employees to perform the crusher job. The trainees were taken to the top (tenth) floor of the crusher and examined the equipment while walking to the ground level. During the walk-around examinations of the crusher, Pettus showed the trainees the location of the crusher components, the operation of the components and the testing methodology. During the examinations, the trainees questioned Pettus about the operation of the crusher and they would engage in running dialogues about the crusher operation. Pettus acknowledged that the walk-around examinations and related questioning by the trainees were important parts of the training process. Indeed, Pettus acknowledged that the trainees could not learn the crusher operator's job without participating in the walk-around examinations. None of the persons Pettus trained to operate the crusher ever refused to participate in a walk-around examination.

On January 7, 1999, Alcoa supervisor Mike Swinderman informed Pettus that he was to

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evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment 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, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by the Act.

be trained as a converter operator.<sup>2</sup> Pettus admitted that he did not want to be trained as a converter operator and told Swinderman that he did not want to participate. Pettus also told some of his fellow employees that he did not want to be trained as a converter operator. Pettus initially argued that, pursuant to the union contract with Alcoa, he was not required to take the converter training because of his seniority as a crusher operator. He asserted that he was exempt from training by a "grandfather clause" in the union contract. He also argued that he was not required to accept the training because he never signed a notice indicating that he wanted to be trained as a converter operator. After notification that he was to be trained as a converter operator, Pettus decided that he would take any measures to avoid such training.

Pettus nevertheless started training on January 7, 1999. He stopped however after a few hours on January 8, after becoming ill, and his training remained on hold until February 3 as he sought his union's support for his claim that he did not have to accept the training. The union ultimately told Pettus that his claim regarding the contract was wrong and that he was required to take the converter training. Neither Pettus nor the union filed a grievance regarding this issue. Pettus remained unhappy about the required training and was admittedly angry at Swinderman,

On February 3, 1999, Pettus and two union representatives, including union president Dan Henry, met with Alcoa supervisors Eddie Black and Travis Porter to discuss Pettus' converter training. During the meeting the management representatives reiterated that Pettus would have to be trained as a converter operator and Porter asked Pettus if he would give a good faith effort to learn the converter job. In response Pettus stated only that he wanted to talk to his union representatives before he responded. Pettus in fact never responded to Porter or any other Alcoa supervisor that he would make a good faith effort to learn the converter job. While Pettus subsequently resumed his converter training, Porter opined that Pettus never gave a good faith effort to learn the job.

Pettus admitted that there were many times during his converter training that he did not walk around with his trainer, Jimmy Chism as Chism conducted inspection tours of the converter. He also admitted that it was important to do so as often as possible to see Chism perform his tasks. During the training Pettus also refused to answer supervisor Swinderman's questions and appeared to avoid contact with Swinderman. Swinderman found Pettus' conduct during training

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<sup>2</sup> Mike Swinderman has a college degree and additional experience in the industry as a production foreman, maintenance mechanic and lab technician. As a tabular shift supervisor his job was to ensure the proper operation of the tabular building and maintain production schedules while directing an eight to ten man crew. As a certified MSHA training instructor he also provided required safety training to his employees. Swinderman had been trained by the process engineer in the operation of the converter and had on-the-job training in converter operations. He was also trained to operate the computer consol in the converter control room by both the process engineer and several supervisors. Through this training he learned to use the computer screens and the various buttons associated with them."

to have been insubordinate so on February 16, 1999, Swinderman began documenting Pettus' actions (Resp. Exh. 11-16).

After more than two months' training Pettus first operated the converter by himself on April 30, 1999. He continued to operate the converter by himself until May 21, 1999. He acknowledged that he was able to perform the converter job and did not tell any supervisor that he felt unsafe performing the job during this period. When a fire started in one area of the converter on May 7, 1999, Pettus took appropriate action to identify the location of the fire and to bring it under control. He did not contribute to the cause of the fire.

On June 12, 1999, Swinderman informed Pettus that he would be operating the converter on the "C" shift and for the remainder of the week because the regular operator, Jimmy Chism, was on vacation. Pettus admitted that he was not happy with this news because he did not want to run the converter and told Swinderman that Swinderman could not assign him to work on the converter because of his seniority within the department. Pettus admitted, however, that he then knew that seniority in the department was not a basis for job assignments and that he raised this claim only in another attempt to avoid operating the converter. Pettus nevertheless began operating the converter on June 12.

Two days later, on June 14, during the regular pre-shift meeting Swinderman asked Pettus how the converters were running and if there were any problems. Pettus responded "I don't know why don't you tell me." Pettus admitted that when he made that comment he was not sincere. Swinderman documented these and the other events that occurred on June 14 and 15, 1999. (Resp. Exh. 20).

### The Alleged Protected Activity

Pettus began working as a converter operator on the June 14, 1999, "C" shift. During the same shift, around 2:15 a.m. on June 15, 1999, Swinderman began checking the converter settings on the computer in the control room by scrolling through the computer screens.<sup>3</sup> While standing outside the control room Pettus observed Swinderman scrolling through the screens. Pettus admitted that he was "probably angry" and decided to confront Swinderman.

According to Pettus, sometime during the previous "C" shift an incident occurred in which a converter operator had pushed the wrong button in the control room causing alumina balls to overflow onto the floor. When Pettus started his shift on June 14<sup>th</sup> he was helping to clean up the these balls. Pettus testified that he did not feel safe working on the converter with Swinderman at

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<sup>3</sup> Scrolling through the screens" is the procedure of viewing data (settings) on the different pages that appear on the computer monitor. It does not have any effect on the converter settings. This is a routine procedure performed by all the supervisors up to eight times a shift to make sure they are operating in compliance with the settings established by the process engineer.

the controls because he purportedly believed Swinderman could change the settings on the converters and he believed that Swinderman was not trained to operate the converter. Rather than explain these specific concerns to Swinderman however, Pettus confronted Swinderman and told him, "If you want to operate the job then I'll do something else." According to Pettus, Swinderman responded, "I can scroll anything I want to." Pettus testified that he then explained "I don't feel safe . . . with me being outside and you inside doing that." According to Pettus, Swinderman then told him that if he did not feel safe he could go home. Pettus claims that he responded that he was not going home and that he was going to do his job, then walked out of the control room and continued working.

Pettus' co-worker, Lewis Grant, was in the control room at the time eating breakfast with another co-worker Michael Halpin. According to Grant, Swinderman was at the control panel bringing up graphs for about six or seven minutes before Pettus entered the room. Grant explained at hearing what happened when Pettus entered the room:

- Q. Would you please, tell the Judge what happened when Mr. Pettus entered the room?
- A. Mr. Pettus entered the room, he asked Mr. Swinderman did he want him to run the job or want him to run another job. Mr. Swinderman said, all I'm doing is pulling up graphs. Pettus said, I don't feel safe with you pulling up graphs and me outside working. Mr. Swinderman says, I can do anything I want to do. So Pettus said, well, I don't feel safe because I'm outside and you're in here pulling up graphs. And Pettus said that he knew that Mr. Swinderman didn't know how to run the job, because he couldn't help the night before or some night. Mr. Swinderman said, well, I know that you don't know how to run the job, but you should with all the hours that you've had to train. And Pettus said, well, I still don't feel safe with you here. And Mr. Swinderman said, well, if you don't like it, you can go home. Mr. Pettus said, no, I don't want to go home, I want to run my job, but I don't want you here mashing buttons with me outside working, I don't feel safe. Mr. Pettus left the room. Mr. Swinderman sat back down, he started drawing up graphs for four or five minutes, and then he left.

By Mr. Muñoz

- Q. Okay. Do you recall where Mr. - - Mr. Pettus first entered the room, where he was standing?
- A. He was standing behind Mr. Swinderman. Mr. Swinderman's chair would rotate around, and he rotated around and they was talking face to face.
- Q. Do you recall how long Mr. Pettus stood behind Mr. Swinderman before Mr. Swinderman turned around?

A. It was almost automatic.

Q. Do you recall - -

The Court: When you say “automatic,” that doesn’t reflect the time sequence. What time period are we talking about?

The Witness: Well, as soon as Pettus started talking to him, he turned around.

The Court: How long was Pettus standing there before he started talking to him?

The Witness: Maybe he was standing there a little bit. I don’t know the exact time, but it was a little bit.

By Mr. Muñoz

Q. How would you define “a little bit?”

A. Maybe a minute, minute or two. I think he was standing there a minute or two.

The Court: A minute or two did you say?

The Witness: I’m not sure . It’s been a year ago, you know.

By Mr. Muñoz

Q. I understand. Do you recall how close Mr. Pettus was standing to Mr. Swinderman before he started talking to Mr. Swinderman?

A. Foot, two feet.

(Tr. I 222-224).

According to Grant the conversation lasted three to five minutes and both Pettus and Swinderman were speaking loudly. Grant had seen Swinderman as well as the other supervisors over the previous 14 years scrolling through the computer screens and testified that it was not unsafe for them to do so. He confirmed that scrolling through the screens has no effect on the converter settings. Grant uses the same computer for his work.

Co-worker Michael Halpin was also in the converter control room at the time of the confrontation. He also uses one of the computer screens to check temperatures and fill out reports. According to Halpin, in order to start or stop equipment you must push a minimum of

six buttons in a proper sequence. Halpin described the events following Pettus' arrival at the control room in the following colloquy:

By Mr. Muñoz

- Q. Okay. What was Mr. Pettus doing when you first saw him?
- A. He walked into the shack, into the control room, and walked over to the supervisor.
- Q. Okay. And who was the supervisor he walked over to?
- A. Michael Swinderman.
- Q. Where was Mr. Swinderman at this time?
- A. He was sitting at the far north control panel in the control room.
- Q. Okay. Which direction was he facing now?
- A. Mr. Swinderman would have been facing east.
- Q. Could you see where Dillard Pettus' hands were?
- A. No, sir.
- Q. Did you see any gestures that Mr. Pettus made?
- A. No, sir.
- Q. Do you recall what Mr. - - do you recall whether there was a conversation between Mr. Pettus and Mr. Swinderman?
- A. Do I recall the conversation?
- Q. Do you recall whether there was one?
- A. Yes.
- Q. Okay. Do you recall what Mr. Pettus said or - - I'm sorry.
- A. Yes.

Q. Would you tell this Court what you heard?

A. What I had heard was Dillard Pettus had walked into the control room and asked Mike Swinderman what he was doing. Mr. Swinderman said that he was pulling graphs up, charts on the graph.

Q. Okay.

A. Mr. Pettus then said that he felt unsafe with him not being in the control room with him when he's pushing buttons because of a mess-up that had been earlier that night in a piece of equipment that had functioned improperly.

Q. Would you explain what you mean by "mess-up" earlier that night?

A. Okay. An operator on the previous shift had pushed the wrong button and it caused a piece of equipment to overflow into the floor.

Q. Okay. What did Mr. Swinderman say in response?

A. Mr. Swinderman said that he was only pulling up graphs, he wasn't operating any machinery. Dillard asked him - - Dillard Pettus asked him, well - - wanted to know whether he was doing the job or was Mr. Pettus going to be doing the operation of the job.

Q. What did Mr. Swinderman say in reply?

A. He said, no, all that he was going - - he was doing was pulling up graphs, and that if Mr. Pettus did not like that, then he could go home.

Q. Did Mr. Swinderman say anything about his ability to pull graphs.

A. No.

Q. Did Mr. Swinderman say he could - -

The Court: I don't think you should lead the witness here. You can ask him what he heard him say, but don't lead the witness.

By Mr. Muñoz:

Q. Was anything else said by Mr. Pettus at this time?

A. He kept emphasizing that he felt unsafe with him doing this and he would rather he



be in there with Mr. Swinderman when he was pulling the graphs.

Q. Okay. Was anything else said by Mr. Swinderman at this time?

A. No.

Q. Okay. How long did this conversation between Mr. Swinderman and Mr. Pettus last?

A. Five to 10 minutes.

Q. What happened next?

A. Okay. After Mr. Swinderman said that, if you did not like this, that you could go home, Mr. Dillard said - - Mr. Pettus said that, no, sir, I'm not going to go home, I'm going to do my job, I just feel unsafe with you pushing buttons in here without me in here. And then at that time, Mr. Pettus turned and walked back out.

Swinderman testified that he, as well as all of the other supervisors, were required to use the computer in the control room to scroll through the screens and examine graphs which provide data for the basic operating parameters of the converters. Each day the process engineer prepares instructions regarding gas settings, dryer temperatures, combustion information, the air-gas ratio, etc., and Swinderman has to verify, sometimes as many as eight times a shift, that the actual performance of the converters is within the parameters established by the process engineer. If a change in settings has to be made Swinderman discusses it with the converter operator who makes the actual changes. These were the established procedures understood by Pettus and the rest of his crew. It was indeed customary for all the tabular supervisors to scroll through the computer screens several times during a shift.

According to Swinderman, Pettus had seen him scrolling through the screens on a number of occasions before June 14. Pettus had never before asked him to refrain from scrolling through the screens. Swinderman testified that it is obvious when one is just scrolling through the screens because the screens then show only the graphs and the operating status of the converters.

Swinderman described the confrontation with Pettus in the following colloquy at hearing:

Q. Now, let's go to the night of June 14<sup>th</sup>, C shift, 1999. Were you working that evening?

A. Yes, I was.

Q. And what time does the C shift run from and to?

- A. C shift runs from 11:00 p.m. to 7:00 a.m.
- Q. So it would have started at 11:00 p.m. June 14<sup>th</sup> and ended 7:00, June 15<sup>th</sup>.
- A. That's correct.
- Q. Did you hold one of your pre-shift meetings June 14<sup>th</sup>?
- A. Yes, I did.
- Q. Did you have a discussion with Mr. Pettus during that meeting?
- A. Yes. Basically we lined out assignments and his assignment was to run the converters and at one point I asked him how they were running and he snapped back at me and said, "I don't know. Why don't you tell me?" I sort of sloughed that off and continued lining out my crew.
- Q. Did you respond to his snapping back at you?
- A. Not at that time, no. Basically the C shift - - everybody - - everybody can be irritable here and there and I sort of let that go.
- Q. Then did there come a time later in the C shift around 2:00 in the a.m. that you had another conversation with Mr. Pettus?
- A. Yes.
- Q. First of all, can you tell us where that occurred?
- A. That occurred in the 6<sup>th</sup> floor control room.
- Q. And before that conversation began, what were you doing?
- A. I was scrolling through the screens checking the different settings on the converters and dryer levels and things of that nature.
- Q. Who else was, if anybody, present in the control room as you were doing that?
- A. I believe Lou Grant and Mike Helman [sic] were present.
- Q. And where were they sitting in relationship to the control panel?

- A. I was sitting facing the control panel and they were to my right.
- Q. Do you know what they were doing?
- A. They were on break. They were eating.
- Q. Did there come a time while you were sitting at the control panel that Mr. Pettus entered the room?
- A. Yes.
- Q. Can you please tell us what happened after he came into the room.
- A. Basically he came up real close to the chair and put his finger in my face and said, "You have no right to scroll through my screens or look in my screens for operation."
- Q. What did you say at this time?
- A. I basically said I had every right to look at the operation of the converters at that time.
- Q. Did you indicate to him what you were doing?
- A. Yes.
- Q. What did you tell him you were doing?
- A. I told him I was basically checking the settings on the converters and seeing where the dryers levels were - - doing my normal routine.
- Q. How close was Mr. Pettus to you?
- A. He was actually leaning up against the arm of the chair that I was sitting in?
- Q. You were sitting in.
- A. Yes.
- Q. Was he sitting or standing?
- A. He was standing.

- Q. And you said he spoke in a loud voice. Does he normally speak in a loud voice or have a loud voice?
- A. Yes. Dillard normally has a loud voice, but in working with him for over a year - - year and a half at this point, I know the difference between his normal conversation and when he's raising his voice.
- Q. And how would you characterize what he did at 2:00 a.m. on the C-shift?
- A. Very threatening at that time.
- Q. Did you feel intimidated in any way?
- A. Yes, I did.
- Q. I want to show you what has been marked - - well, let's back up. After you told Mr. Pettus what you were doing, then what happened?
- A. Basically I told him what I was doing. He was upset and basically accused me of changing numbers on the screen without his knowledge, which I denied. Which I would never do. And then he basically left the room.
- Q. When you say something you would never do, you mean you would never do, you mean you would never change numbers on the settings on the screen?
- A. No.
- Q. Did Mr. Pettus say that you were lying to him when you denied changing the settings?
- A. Not at that point, no.
- Q. Did he ever accuse you of lying about changing the settings?
- A. No . . . .
- Q. And what actions do you consider insubordinate?
- A. Threatening gestures with the finger and loud voice and the accusations and just down right disrespect.
- Q. When we talked about threatening - - was the place where he was standing

part of what you considered?

A. Yes.

Q. About how far from you was he?

A. He was leaning right up against me in the chair.

Q. The chair that you was sitting in?

A. That I was sitting in?

Q. Okay . . . .

By Mr. Engel:

Q. So you have a clear recollection that Mr. Pettus was touching your chair?

A. Yes. . . .

Q. After you left Mr. Pettus up in the control room, what did you do?

A. That's when I decided to send him home for insubordination and I made my way through the building to contact Paula Higgs, who was our Human Resources person.

Q. About what time was this?

A. Approximately 2:00 or 2:15.

Q. And what did you tell Paula Higgs? Where did you get her?

A. I got her at home and I talked to her and she thought I had grounds to send him home for insubordination.

Q. What did you tell her?

A. I told her about the threatening gestures and the loud voice and just insubordination of the incident.

Q. Did you at all mention Mr. Pettus' comments about safety at all?

A. No, I did not.

Q. Did Mr. Pettus's comment about safety play even the smallest - -

Hearing Officer Melick: What comment are you talking about?

By Mr. Engel:

Q. What did Mr. Pettus say that was related to safety? That you understood related to safety?

A. It was in the Exhibit. He said he felt unsafe operating the converter. . . .

Hearing Officer Melick: What else happened during this meeting?

Witness: During this time he claimed that he was - - felt unsafe running the converters.

Hearing Officer Melick: These are his words. "I feel unsafe running the converter"?

Witness: That's correct.

Hearing Officer Melick: Were you running the converters?

Witness: No. Himself.

Hearing Officer Melick: And is this after he pointed the finger at you and a loud voice told you that you had no right to scroll through the screen?

Witness: This was before he approached me in the - -

Hearing Officer Melick: Well, let's start it from the top. He first came into the control room and what did he say?

Witness The first thing he talked about is me scrolling through the screen.

Hearing Officer Melick: What exactly was his first - - what were his words to the best of your recollection?

Witness: His words were, "I don't" - - "What are you doing scrolling through my screen?" And I said, "Well, I'm checking, you know, the settings on the converter and whatever." He said, "I don't feel

comfortable with you changing the settings on my screen.” I said, “Well, I’m not changing the settings on your screen. I’m reviewing what the operation of the converters are at right now.” And he said, “Well, I don’t feel safe running converters and I don’t feel safe running converters and I don’t feel comfortable with you scrolling through the screen.” I said, “If you feel uncomfortable, you can go home.”

At that point - - I gave him the option if he didn’t feel comfortable at that point running the converter safely then he could go home. And basically it’s in Article 19 contract.

Hearing Officer Melick: Now, what point in time did he use a loud voice?

Witness: That was after that.

Hearing Officer Melick: After what?

Witness: After he said he wasn’t refusing to run the converters. He stepped up and - - you know, it was during that time period when all that discussion was taking place.

Hearing Officer Melick: But his voice didn’t get loud until - -

Witness: Well, it was - -

Hearing Officer Melick: What was the conversation?

Witness: It was loud right from the get go - - right from the start.

Hearing Officer Melick: When did he point his finger at you?

Witness: Right when he came in and was talking about me going through the screens.

Hearing Officer Melick: And he continued to point his finger at you the entire conversation?

Witness: Through a majority of it and then he would back off and talk about him being uncomfortable running the converters.

(Tr. II, 159-174).

At the end of the June 15 “C” shift, Swinderman and Paula Higgs, Alcoa’s human resources expert, met with supervisors Dave Balok and Travis Porter to discuss Pettus’ conduct. Higgs and Balok decided that Pettus should be given a three-day disciplinary lay-off because of his comments during the pre-shift meeting at 11:00 p.m. on June 14, his insubordinate conduct later that shift during his confrontation with Swinderman, his conduct throughout his training during which he did not show willingness to learn how to operate the converter; and his prior disciplinary history of insubordination. The latter incident occurred on August 29, 1997, when Pettus threatened Swinderman and slapped a placard on Swinderman’s chest. Swinderman had issued a written warning to Pettus on that date for insubordination.

### Legal Analysis

It is the well established law that a miner seeking to establish a *prima facie* case of discrimination under Section 105(c) of the Act bears the burden of persuasion that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *Secretary on behalf of Pasula v. Consolidated Coal Co.*, 2 FMSHRC 2786, 2797-2800 (October 1980), rev’d on grounds, *sub nom. Consolidated Coal Co. v. Marshall*, 663 F.2d 1211 (3<sup>rd</sup> Cir. 1981); and *Secretary on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 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 part motivated by the protected activity. If an operator cannot rebut the *prima facie* case in this manner, it may nevertheless defend affirmatively by proving that it would have taken the adverse action in any event on the basis of the miner’s unprotected activity alone. *Pasula, supra*; *Robinette, supra*. See also *Eastern Assoc., Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4<sup>th</sup> Cir. 1987); *Donovan v. Stafford Construction Co.*, 732 F.2d 194, 195-196 (6<sup>th</sup> Cir. 1983) (specifically approving the Commission’s *Pasula-Robinette* test). Cf. *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 397-413 (1983) (approving nearly identical test under National Labor Relations Act.)

Respondent first argues that because Pettus’ complaints to Swinderman about scrolling through the computer screens and his declaration that he did not feel safe with Swinderman working at the computer consol, were not reasonable good faith safety complaints, they were not protected under the Act. While there is indeed significant credible evidence that Pettus knew that scrolling through the computer screens, the procedure he observed Swinderman performing, was not an unsafe procedure, and that his confrontation with Swinderman, that is the basis for his claims herein, was made not to promote safety but was a continuation of a patten of disrespectful and insubordinate behavior toward Swinderman, the law is not at all clear that safety complaints, not incorporating a work refusal, must be reasonable or be made in good faith in order to be protected under the Act.

In any event, even assuming, *arguendo*, that Pettus’ complaints were protected activities I find, based on the credible evidence, that Alcoa would have rebutted any *prima facie* case by showing that the adverse action (the three-day suspension) was in no part motivated by the protected activities. In this regard I find for the reasons stated below that the adverse action was



clearly based on Pettus' opprobrious and insubordinate conduct and not on any safety content of his speech. Opprobrious conduct is not protected under the Act. *Secretary on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC at 521 (March 1984).

First, I find credible Swinderman's testimony evidencing Pettus' disrespectful and insubordinate behavior. At the pre-shift meeting on June 14, when Swinderman asked Pettus in the presence of the work crew how the converters were running, Pettus "snapped back" with the response "I don't know. Why don't you tell me?" Then, later on the shift while Swinderman was in the control room performing the routine procedure of scrolling through the computer screens checking the converter settings Pettus, in a threatening and intimidating manner "came up real close to" Swinderman, leaned up against the arm of his chair, put his finger in Swinderman's face and in an abnormally loud voice told Swinderman his supervisor "you have no right to scroll through my screens or look in my screens for operation."

Second, since the alleged safety complaint required no action to resolve, i.e., since no repairs or interruption of production was required to remedy any safety hazard, no retaliatory motive based on safety would reasonably be expected. Third, Pettus had a documented history of insubordinate and disrespectful behavior. Fourth, the testimony of Paula Higgs, one of the two persons who decided to suspend Pettus, provided a credible non-protected business justification for the suspension. Fifth, the temperate and relatively moderate response of management to Pettus' behavior, i.e., to impose only a three-day suspension, suggests an absence of hostility to any safety-related aspects of his complaint.<sup>4</sup>

Under all the circumstances this discrimination complaint must be dismissed.

### **ORDER**

Discrimination Proceeding Docket No. CENT 2000-182-DM, is hereby dismissed.

Gary Melick  
Administrative Law Judge

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<sup>4</sup> It is noted that the analysis set forth in the preceding paragraphs would also provide an affirmative defense by Alcoa that it would have taken the adverse action in any event on the basis of Pettus' unprotected activity alone.

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