FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

June 25, 2001

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION, on behalf of	:	
GARY DEAN MUNSON,	:	Docket No. WEVA 2000-58-D
Complainant	:	MORG-CD-2000-01
v.	:	
	:	Federal No. 2
EASTERN ASSOCIATED COAL CORP.,	:	Mine ID 46-01456
Respondent	:	

DECISION ON LIABILITY

Appearances: Douglas N. White, Esq., Associate Regional Solicitor, U.S. Department of Labor, Arlington, Virginia, for Complainant;
Rebecca Oblak Zuleski, Esq., Furbee, Amos, Webb & Critchfield, P.L.L.C., Morgantown, West Virginia, for Respondent.

Before: Judge Zielinski

This matter is before me on a complaint of discrimination filed by the Secretary on behalf of Gary Munson pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (the "Act"). 30 U.S.C. § 815(c)(2). The complaint seeks an order requiring Respondent, Eastern Associated Coal Corporation (EACC) to reinstate Munson as an employee and other relief including back pay and benefits, as well as a civil penalty in the proposed amount of $8,500.00. A hearing was held in Morgantown, West Virginia on November 28, 2000 and the parties submitted briefs following receipt of the transcript.[1] The Secretary had previously filed an Application for Temporary Reinstatement on behalf of Munson. A hearing was held on the application and on March 10, 2000, an order was issued directing that Munson be temporarily

[1] Respondent sought to introduce transcripts of depositions of Donald Livengood, Frank Peduti, Richard Eddy, Stanley Eddy and James Taylor. The Secretary's objections to those exhibits were sustained and all of those witnesses subsequently testified at the hearing. Following briefing, those evidentiary rulings were reviewed and the views of the parties expressed during a recorded telephonic conference on June 7, 2001, were considered. The original evidentiary rulings were reaffirmed. *See* Commission Procedural Rule 1(b) and Fed. R. Civ. P. 32(a) and 43(a).

reinstated pending completion of the investigation of his allegations and final decision on any formal complaint that might be filed.[2] The parties have stipulated that the record of proceedings from the temporary reinstatement hearing be included in the record of this case. For the reasons set forth below, I find that Respondent discriminated against Munson in violation of the Act, and direct the parties to confer and attempt to reach agreement on the relief to be awarded to Munson and on the amount of an appropriate civil penalty.

Findings of Fact

Gary Munson was discharged from employment by EACC on December 6, 1999. He had been employed by EACC for 28 years and for the three years prior to his discharge held the position of control room operator in the preparation plant working the afternoon shift. Munson was a good worker. He was not regarded as a person with attendance problems, had no disciplinary record and there were no complaints about his work performance. Throughout his tenure with EACC, Munson was active in bringing complaints to management about safety and union contract issues. There is no dispute that he frequently raised safety concerns at, or in conjunction with, weekly safety meetings held by his immediate supervisors, foremen Stanley Eddy and Donald Livengood.[3] When his safety concerns were not addressed in a timely fashion, Munson complained about the inaction and told his supervisors that he would call the complaints in to the Department of Labor's Mine Safety and Health Administration (MSHA) on a confidential complaint line, referred to as the "code-a-phone." He posted the MSHA phone number openly at his work station. He also raised concerns about inaction with union officials in EACC's safety office in the presence of EACC managers, stating that he would call MSHA and had done so in the past. Munson's foremen had told him that his safety and contract complaints could result in the mine being shut down. Munson also raised safety concerns with Frank Peduti, EACC's manager of preparation and electrical engineering. Peduti occasionally called meetings to discuss issues and, like other management officials, did not like to have "code-a-phone" complaints made, preferring that employees' safety concerns be handled "in-house" rather than through the more disruptive "code-a-phone" complaint process and its attendant investigation by MSHA. Munson did not raise safety concerns through the formal union contract grievance process because he was unaware that he could file a grievance on a safety complaint.

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[2] The Temporary Reinstatement Proceeding was conducted under Commission Docket No. WEVA 2000-31-D.

[3] As control room operator, Munson was required to start work 15 minutes earlier than other shift workers and was unable to attend the safety meetings held at the beginning of the shift. The foreman would generally speak individually with Munson after the meeting, giving him a synopsis of the meeting and an opportunity to provide input.

Munson did file grievances related to labor contract issues and EACC records showed that for calendar years 1998 and 1999 he had filed 22 grievances over various labor matters, substantially more than any other miner at the preparation plant. Munson's foremen had told him that his grievances and safety complaints could result in the plant being shut down. Munson was authorized by the union to accompany MSHA and state mine inspectors on inspections of EACC's surface facilities. Because the inspections usually started on the day shift and initially focused on the underground operations, his involvement generally lasted only an hour or two, during which he pointed out any safety concerns then existing. He performed this function when a member of the union's safety committee was not available, which limited his involvement to no more than two or three inspections in a year.

The developments that lead to Munson's discharge commenced on Friday, November 19, 1999, when he did not report to work his assigned shift. He had told his foreman, Stanley Eddy, the previous day that he was going to purchase a "four wheeler" on the 19th and that he might have trouble getting to work if he encountered delay in obtaining a title and registration for the vehicle. He was told to come in if he was going to be less than sixty minutes late. A miner could report tardy by up to sixty minutes without significant repercussions. Munson encountered delays in purchasing and registering the vehicle and did not report to work on November 19, 1999. He did not call in and specifically report that he would not be in or request a personal vacation day. He was not scheduled to work that Saturday or Sunday and had applied for vacation days[4] for Monday through Wednesday, November 22-24, 1999, to go hunting. Like many of the employees at EACC, Munson was an avid deer hunter and had taken off that first week of the firearm deer season, referred to as "gun week," for several years. Normal mining operations were not scheduled for the Thanksgiving holiday period, November 25 and 26, 1999.

In accordance with required procedure, his application for vacation days had been submitted prior to January 1999 and decisions were made at that time based upon the number and seniority of persons applying for vacation on a particular day. His request for vacation was approved for November 22 and 24, but was denied for the 23rd, and he was given a form noting the decisions made on his vacation requests. He inadvertently had referred to his 1998 vacation leave schedule, mistakenly thought that he had also been granted a vacation day on November 23, 1999, and did not come in to work.[5] On the 18th, Stanley Eddy had inquired who

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[4] With his seniority level, he was entitled to specified numbers of "graduated" and "floating" days off. In addition, he was entitled to 5 "personal days" off, which he did not need management's permission to take. It appears that as of November 19, 1999, Munson had at least one personal day remaining.

[5] EACC argues that Munson's absence on November 23, 1999, was not inadvertent, but, rather, was an attempt to secure a day off to which he was not entitled. I reject that argument. Following his discharge, Munson prevailed in an administrative claim for unemployment compensation benefits that was opposed by EACC. The administrative law judge who decided the claim held that EACC had failed to prove that Munson had been discharged for

was going to be working the following short Thanksgiving week, and Munson indicated that he had scheduled days off. The fact that his vacation request for the 23rd had been denied was not raised at that time. On or around November 24, his foreman called him and asked that he sign up to work the holiday on Friday, November 26, 1999. Despite the opportunity for triple pay, he declined, but did agree to work the following day, Saturday, and otherwise worked his normal schedule the following week. At the beginning of his shift on December 6, 1999, he was called to a meeting and served with a letter advising him that he was suspended with the intent to terminate his employment for missing two consecutive work days without a viable excuse.

The formal policies for addressing absenteeism at EACC are found in the National Bituminous Coal Wage Agreement of 1993. Article XXII, Section (i) "Attendance Control" provides in pertinent part:

> (4) Absences of Two Consecutive Days
> When any Employee absents himself from his work for a period of two (2) consecutive days without the consent of the Employer, other than because of proven sickness, he may be discharged. * * *

The 19th and 23rd were considered consecutive days for Munson, even though there were intervening weekend days and one scheduled vacation day. The term "two (2) consecutive days" had been interpreted in a prior arbitration proceeding to mean two consecutively scheduled work days. Not surprisingly, neither Munson nor his foremen initially considered his absences to have been on consecutive days. As the language indicates, EACC had the discretion to terminate an employee who missed two consecutive days, i.e., the significance of the word "may" was that termination was "not automatic."

Subsection (2) of the contract describes a procedure to address employees who accumulate unexcused absences. An employee who accumulates six days of unexcused absences in a 180-day period or three days of unexcused absences within a 30-day period is designated an "irregular worker" and is subject to "progressive steps of discipline." If an "irregular worker" has an unexcused absence within 180 days of his last unexcused absence he may be given a written warning, if another unexcused absence occurs within 180 days of the warning, he may be suspended for 2 working days and if another unexcused absence occurs within 180 days of the suspension, he may be suspended with intent to discharge.

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an act of misconduct. Munson would not have been paid for the unexcused absence and could easily have preserved his pay status and taken the day off by taking one of his personal days. All he had to do was to call in that morning and leave a message on a recording machine. In any event, there is no evidence that Munson's termination was based on a suspicion that he had knowingly subjected himself to discharge by taking two consecutive, unexcused days off.

In addition to these formal policies, EACC had for many years applied an informal, procedure referred to as "last chance agreements." Under this procedure, an employee who was subject to discharge would be given a "last chance" to retain his job, by entering into an agreement to maintain required attendance and possibly take other actions to address the cause of his absenteeism. Whether an employee subject to discharge would be given a last chance agreement was within the discretion of EACC. In a 1989 arbitration decision, it had been held that because some employees had been discharged without being offered last chance agreements, there was no legitimate expectation that a last chance agreement would automatically be offered. That same decision noted that in determining whether to offer a last chance agreement, the employer considered factors such as, "whether an employee's poor attendance is of recent origin or has been a longstanding problem" and whether, in light of the assurances made by the employee, there was a reasonable expectation that if given a last chance agreement the employee "will develop into a reliable member of the work force."[6]

EACC records indicate that approximately 38 last chance agreements had been entered into between December 14, 1980 and February 4, 1999. A summary of the agreements indicated that the underlying reason for the disciplinary action was generally absenteeism. On seven occasions the absenteeism was related to a substance abuse problem. Sixteen of the agreements involved unexcused absences on two or more consecutive days and the discipline imposed in conjunction with the last chance agreement ranged from a 1-day suspension to an 18-day suspension. In some instances, it appears that employees were allowed to substitute vacation or personal days in lieu of actual suspension.

Examples of circumstances in which last chance agreements were entered into included a December 9, 1997 agreement with an employee who had seven unexcused absences over a sixteen day period, including two absences of three consecutive days, because he had misunderstood that his vacation day requests had been disapproved. Another employee who had two consecutive unexcused absences was allowed to enter into a last chance agreement in November of 1998. Other examples included an employee who misunderstood the consequences of consecutive absences because he was considered developmentally slow; an employee who had a substance abuse problem related to the death of his wife and needed only a short period of employment to qualify for retirement; and, an employee who misunderstood the pre-scheduling of vacation day policy, had vacation days available to take and needed only one more year to qualify for retirement.

The status of EACC's policy on last chance agreements at the time of Munson's discharge was the subject of conflicting testimony. Bradley Hibbs had become the operations manager shortly before Munson was discharged. Hibbs and other EACC management officials testified that he had the final authority to offer or withhold a last chance agreement. He testified that last chance agreements were no longer viable at the mine. In his opinion last chance agreements had "proven not to be successful" and, "if it was strictly up to [him]" they would not

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[6] Resp. Ex. 7, at pp. 15-16.

be available. EACC's responses to discovery also indicated that Hibbs exercised final authority on the question of whether Munson would be offered a last chance agreement. When Stanley Eddy, Munson's foreman, attempted to intervene following the discharge and obtain a "second chance" for Munson, he was told by Peduti that last chance agreements were no longer available. However, despite his claimed "final authority" on last chance agreements, Hibbs also testified that each case was considered on its individual facts and that his superiors might override a decision to deny a last chance agreement. Robert Areford, the Human Resources Manager at the time, testified that he would "never say never" to the availability of last chance agreements.

On December 7, 1999, Richard Eddy, the union's district president, was advised of the proposed termination action against Munson. He generally tried to resolve termination cases at the earliest opportunity. The following day he phoned Hibbs, who he had known since childhood, to see if he could settle the case so that Munson could keep his job. Hibbs said that he would call Eddy back and did so a day or two later. Hibbs told Richard Eddy that the case could not be settled. Eddy had handled a lot of "worse cases" where last chance agreements were entered into. When he asked Hibbs to explain why he would not settle the Munson case, the response was that Munson was very outspoken on safety and grievance issues, had called in code-a-phone complaints and was not liked by his fellow miners and supervisors. Hibbs also made clear that the determination was not about absenteeism. Richard Eddy disputed the comment about Munson's relationship with other miners, because he felt that the union local was a very close knit group. He felt that Hibbs was more candid with him than he would have been with other union officials because of their long-standing relationship. Subsequently, Richard Eddy handled another discharge case and was told by Hibbs that that case would not be settled, but could have been, had it not been for the decision in Munson's case. In November of 2000, following Hibbs departure from EACC, another miner who had missed two consecutive days of work was allowed to enter the first stage of the attendance control plan, rather than being discharged.

When an employee is served with a notice of intent to terminate, the next step in the process is a meeting, referred to as a "24-48 meeting," involving management and union representatives and the employee at which various issues are discussed, including the validity of the asserted grounds for termination and any mitigating circumstances. If management determines to go forward with the termination, union officials also uniformly make every attempt they can to keep the employee's job, including asking for a last chance agreement. The 24-48 meeting on Munson's termination was held on December 9, 1999. In addition to Munson, local union officials James Taylor, Joe Reynolds, William Deegan, Vic Alverez, and district union officials Ricky Yanero and Jack Rinehart attended. EACC was represented by Hibbs, Peduti and Areford. Munson readily admitted that he was absent on the 19th because he was procuring a vehicle and that he mistakenly thought that he had an approved vacation day for the 23rd. He questioned whether the absences were on consecutive days, but that issue was summarily dismissed because of a previous arbitration decision.

Union officials repeatedly asked whether there was anything short of termination that could be done and specifically cited prior successful last chance agreements as examples of discipline short of discharge. They, as well as Munson himself, expected that he would be offered a last chance agreement that would involve a period of suspension, substitution of vacation days for the days he missed and a commitment to appropriate future attendance. Their expectations were based upon their experience with the use of last chance agreements and their knowledge that Munson's case compared quite favorably with other cases in which last chance agreements had been entered into. As Ricky Yanero, the union board member who handled the case stated, although EACC management was concerned about absenteeism, they acknowledged that Munson was not a problem with respect to absenteeism. Union officials normally looked to the miner's employment background for mitigating factors and management acknowledged that Munson had never been disciplined and there were no problems or complaints about his work. He had made a mistake as to one vacation day. After recessing the meeting for a few minutes, management representatives returned and Hibbs announced that EACC would proceed with the termination. The union representatives were surprised by Hibbs' decision. Yanero felt that Munson had a better record "by far" than many people who had been offered last chance agreements. Feeling that the "real" reason for the termination decision had not been articulated, Yanero questioned whether it had anything to do with Munson's filing of contract grievances. Hibbs responded that it did not. Yanero's union responsibilities did not involve safety issues and he was unaware of Munson's involvement in safety issues until after the meeting. Union officials indicated that the decision would be arbitrated, normally the next step in the process. However, arbitration was not pursued. The decision not to pursue arbitration was based on concerns about the merits of the case and the knowledge that Munson intended to pursue a discrimination complaint under the Act. They felt that the discrimination complaint process was a preferable remedy because arbitrators were reluctant to deal with claims based on statutory rights.[7]

Following Munson's discharge, the number of safety complaints made on the second shift declined dramatically. Miners discussed Munson's discharge and its relationship to his safety complaints and grievances. They also voiced their expectation that Munson would be offered a last chance agreement. However, Stanley Eddy and Donald Livengood told them that it was Munson's grievances and safety complaints that got him "in trouble," that he was "done" even before he was completely discharged and that he would not be offered a last chance agreement because there were no more last chance agreements.

Munson filed a complaint of discrimination with MSHA on January 4, 2000, alleging that he was discharged and was subject to disparate treatment when he was not given a last chance agreement because he had made numerous safety complaints to his immediate supervisors and had informed management that he had made code-a-phone complaints to MSHA when his safety

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[7] Judging from the 1989 arbitration decision referenced previously, however, it appears that a claim of disparate treatment in the administration of the informal last chance agreement policy might have been entertained by an arbitrator.

complaints were not satisfactorily addressed. An Application for Temporary Reinstatement was filed on Munson's behalf. A hearing was held on the application on March 7, 2000. On March 10, 2000, an Order was entered directing Munson's reinstatement pending completion of the investigation of his MSHA complaint and a decision on any subsequent complaint of discrimination that might be filed on his behalf. EACC and Munson agreed that he would accept economic reinstatement, i.e. continued receipt of pay and benefits, in lieu of actually returning to work. The Secretary filed the instant complaint on May 1, 2000. On November 6, 2000, Munson filed a complaint with the United States Equal Employment Opportunity Commission alleging that his discharge was the result of discrimination based upon his age. The EEOC eventually issued a decision in EACC's favor.

There were some problems with Munson's receipt of pay and benefits during his economic reinstatement, but they were resolved after discussions between the parties' representatives. Munson also later determined that he would prefer to report to work, rather than continue on economic reinstatement. One of his concerns was the unavailability of training. EACC declined to alter the economic reinstatement agreement. Frank Peduti explained that there were concerns about whether an employee involved in litigation over his termination could maintain adequate attention to his job duties. The Secretary filed a motion in the Temporary Reinstatement Proceeding, seeking enforcement of the Order entered in that case and maintains that EACC's determination not to allow Munson to return to work should be considered evidence of hostility to Munson's rights under the Act and should be taken into consideration in the determination of a civil penalty.

Conclusions of Law - Further Factual Findings

A complainant alleging discrimination under the Act 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); *Secretary 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 (3rd Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator my 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).

Complainant clearly established a prima facie case of discrimination. He suffered adverse action when he was discharged on December 6, 1999. He frequently engaged in activity protected by the Act, making safety complaints to his immediate supervisors and other officials of EACC. A complaint made to an operator or it's agent of "an alleged danger or safety or health violation" is specifically described as protected activity in § 105(c)(1) of the Act. Munson frequently raised safety issues with his supervisors and, on occasion, with the manager of the preparation plant. He also freely told his supervisors that he had and/or would phone complaints directly to MSHA when his safety concerns were not timely addressed. In addition to the findings made earlier, Daniel Conaway, EACC's safety supervisor acknowledged that he had heard that Munson had phoned complaints to MSHA. I accept the testimony of Richard Eddy and find that Hibbs believed that Munson had made complaints to MSHA and find that Hibbs was well aware of Munson's frequent raising of safety issues and contract grievances.

There is also abundant evidence that Munson's discharge was motivated, at least in part, by his protected activity. Aside from the fact that Munson was treated differently than similarly situated miners with past absentee problems, Hibbs' statements to Richard Eddy clearly indicate that he determined to discharge Munson, in part, because of his protected activity. As Munson's foremen told his fellow workers after the discharge, it was Munson's safety complaints and grievances that got him in trouble and resulted in his discharge.

The Commission has frequently acknowledged that it is very difficult to establish "a motivational nexus between protected activity and the adverse action that is the subject of the complaint." *Secretary on behalf of Baier v. Durango Gravel*, 21 FMSHRC 953, 957 (September 1999). Consequently, the Commission has held that "(1) knowledge of the protected activity; (2) hostility or animus towards the protected activity; and (3) coincidence in time between the protected activity and the adverse action" are all circumstantial indications of discriminatory intent. *Id.* Here all three factors are present. The responsible official was aware of Munson's protected activity, was hostile to it, and the adverse action occurred during the course of Munson's ongoing protected activity.

EACC has vigorously disputed Munson's allegations throughout the litigation. It argues that Munson's raising of issues involving safety with his immediate supervisors was not protected activity -- that only formal complaints to management, such as written grievances on safety issues pursuant to the union contract, constitute activity protected under the Act. Not surprisingly, Respondent cites no authority for this remarkable proposition. Despite Respondent's protestations, informal or verbal raising of safety issues is activity protected by the Act. The record is replete with evidence of Munson's protected activity, including his numerous verbal reports of safety concerns to his foremen, similar complaints to the preparation plant manager and announcements to his foremen and to others that he had phoned complaints to MSHA. There is also abundant evidence, as noted above, that EACC management officials were aware of Munson's protected activity.

Respondent's primary defense is that the sole reason for Munson's termination was his unexcused absences on two consecutive work days and his inability to advance "extenuating circumstances" that would have justified something short of termination, e.g., a last chance agreement. This contention rebuts Munson's prima facie case, in that it is urged that Munson's protected activity was not a factor in the decision to discharge him, and constitutes an affirmative defense, i.e., that even if protected activity was found to be a motivational factor for Munson's discharge, he would have been terminated solely for his unprotected activity. As noted above, the first prong of Respondent's argument is rejected because there is ample evidence that Munson engaged in protected activity and that his discharge was motivated, in part, by his protected activity. The issue that must be resolved with respect to Respondent's affirmative defense is whether EACC would have discharged Munson for his unprotected activity alone. As explained in *Ankrom v. Wolcottville Sand and Gravel Corp.*, 22 FMSHRC 137, 141-42 (Feb 2000):

> An operator bears the burden of proving an affirmative defense to a discrimination complaint. *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982). This line of defense applies in "mixed motive" cases, e.g., cases in which the adverse action is motivated by both protected and unprotected activity. *Id*. The ultimate burden of persuasion does not shift from the complainant. *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 15 (Jan. 1984). An operator may attempt to prove that it would have disciplined a miner for unprotected activity alone by "showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Id*.
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> A complainant may attempt to refute an affirmative defense by showing that he did not engage in the unprotected activities complained of, that the unprotected activities played no part in the operator's motivation, or that the adverse action would not have taken place in any event for such unprotected activities alone. *Robinette*, 3 FMSHRC at 818 n. 20. Because the ultimate burden of persuasion never shifts from the complainant, if a complainant who has established a prima facie case cannot refute an operator's meritorious affirmative defense, the operator prevails. *Id*.

There is no dispute that Munson's unexcused absences on November 19 and 23, 1999, were unprotected activity and that EACC had the discretion under the personnel rule specified in the union contract to discharge him for that activity. I am persuaded, however, that EACC's claim that Munson would have been terminated for the unprotected activity alone is not credible and that the termination would not have occurred in the absence of Munson's protected activity. This determination is based upon the conflicting explanations of the discharge decision offered

by Hibbs, the evident disparity between the treatment accorded to Munson and that accorded to other miners who had two or more consecutive unexcused absences, and admissions made by Hibbs regarding his motivation for Munson's termination.

Hibbs is a key figure because it was his determination to discharge Munson rather than offer him a last chance agreement or some other discipline short of discharge. He has provided at least three explanations as to why Munson was discharged: 1) last chance agreements were no longer available at EACC; 2) he never considered a last chance agreement for Munson because he was never asked to; and 3) there were no "extenuating circumstances" to justify offering him one. Hibbs' conflicting testimony substantially undermines his credibility.

I find none of the explanations credible. While EACC argues that there "is no long standing Company policy and/or procedure entitled 'last chance agreements,'"[8] it clearly employed last chance agreements over the course of many years on some consistent basis. As the arbitration decision upon which EACC relies notes, in situations involving unexcused absences factors used in determining whether to offer a last chance agreement included the miner's attendance record and an assessment of whether the employee would develop into a reliable member of the work force. There was no evidence that prior to Munson's discharge Hibbs or anyone else at EACC communicated to the miners, their union representatives, or anyone else, that last chance agreements would no longer be available. While there is evidence that EACC was more closely scrutinizing last chance agreements, such agreements were available at the time of Munson's discharge, one could have been offered to Munson and it was Hibbs' decision whether or not to do so.[9]

Hibbs' testified at the Temporary Reinstatement Proceeding hearing that he made no decision on whether to offer Munson a last chance agreement because he was never asked to do so and that he never considered a last chance agreement for Munson.[10] That testimony is directly contradicted by virtually every other participant in that meeting, including EACC's officials. One of the union officials, James Taylor, was present at the Temporary Reinstatement hearing and questioned Hibbs subsequently as to how he could so testify when last chance agreements had been discussed and there had been repeated requests for an alternative to discharge. Hibbs

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[8] Respondent's brief, p. 3.

[9] There is evidence that EACC has not entered into any last chance agreements since Munson's termination, although one miner was recently given an alternative to termination that was not called a last chance agreement. Based upon Hibbs' statements to Richard Eddy regarding a subsequent case, I find that to the extent that EACC had a policy precluding the use of last chance agreements, it was a policy implemented following Munson's discharge as a necessity to support its defense against his allegations.

[10] Hibbs did not testify at the November 28, 2000, hearing. His subsequent deposition was introduced into evidence.

responded that he so testified because no-one at the 24-48 meeting used the specific words "last chance agreement." The weight of the evidence is that last chance agreements were specifically discussed. In any event, there is no question that the union officials at the 24-48 meeting made repeated requests for, what all in attendance including Hibbs understood to be, a last chance agreement for Munson. Those requests were considered and rejected. Richard Eddy made a similar request in his conversation with Hibbs.

The explanation ultimately relied on by Respondent, that there were no "extenuating circumstances" to justify the offering of a last chance agreement, also lacks credibility. While Munson could not proffer an acceptable excuse for his two absences, he had worked for EACC for some 28 years and made a mistake in believing that he had an approved vacation day on a day he had traditionally taken off in the past.[11] The factual circumstances presented by Munson compared favorably to those that EACC had determined in the past to constitute "extenuating circumstances" justifying a last chance agreement.

EACC argues that Munson was treated the same as other employees who were discharged for violating the provisions of the union contract. Its argument is based on testimony that there had been past instances where other miners had been terminated without being offered last chance agreements. That fact was also noted in the arbitrator's decision previously discussed and there is little doubt that some transgressions could be of such a nature to cause EACC to terminate employment with finality. What EACC completely failed to prove, however, is that any such miners were situated similarly to Munson, i.e., instances of past discipline consistent with that meted out to Munson. Respondent offered no evidence of any specific instance where a miner was terminated without being offered a last chance agreement. The only evidence concerning miners situated similarly to Munson, i.e., with two or more consecutive unexcused absences, is that they were offered last chance agreements. Neither Taylor nor Richard Eddy, long-time union officials, could recall any case involving such absences where a last chance agreement had not been entered into and a third official, Yanero, testified at deposition that it was rare that a case involving absences on consecutive days would be taken to discharge, citing no instance when that had actually occurred. The records of last chance agreements include numerous instances where there were two or more days of consecutive absences, often with other negative factors.

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[11] As to his first absence, Peduti observed that if Munson had personal days available, he should have made some attempt to contact management when he realized that he would not be coming into work. However, Munson had told his foreman the day before of his planned activities on the 19th and the possibility that he might be absent. While this may not have been adequate to excuse his absence, management had reason to anticipate his absence and the reasons therefore.

Munson's primary theory to establish unlawful discriminatory motivation by EACC was that he was subjected to disparate treatment. The most critical element of EACC's affirmative defense, on the facts of this case, was that Munson was not treated disparately — that his discharge was consistent with past discipline. It completely failed to rebut Munson's proof of disparate treatment or establish consistent past discipline.

I have little trouble concluding that Munson was subject to disparate treatment. I accept the testimony of the several union officials that expressed surprise that Munson was not offered a last chance agreement because his case compared favorably, sometime much more favorably, to prior cases in which such agreements had been offered. Munson also easily satisfied the factors cited in the arbitration decision. His absentee problem was of recent origin, a one-time occurrence, and there was little doubt that he would be a reliable member of the work force if offered such an agreement because he had conclusively demonstrated his competence and reliability over the course of his twenty-eight years of employment.

Hibbs' statements to Richard Eddy evidence his true motivation. Hibbs made clear that Munson's termination was not about absenteeism. While Munson was not an elected representative of miners, he was relatively outspoken on a variety of issues and occasionally voiced complaints that other miners had brought to his attention. He frequently raised complaints involving safety issues as well as union contract issues. I find that Munson's complaints about safety issues were a significant motivational factor in Hibbs' decision to terminate him and that, in the absence of that factor, he would not have been terminated, but would have been offered a last chance agreement or some other discipline short of termination.

Respondent makes much of the fact that neither Munson, who testified that he was somewhat in shock, nor anyone on Munson's behalf, raised a claim of discrimination or otherwise complained that his discharge was motivated by his making of safety complaints, until after the discharge process was completed. It argues that his complaint of discrimination is nothing more than an after-the-fact attempt to gain access to another forum to challenge his discharge. I find little significance in the timing of Munson's allegation. He filed his complaint with MSHA some 26 days after the 24-48 meeting, well within the 60 days provided in the Act.[12] Munson and the union officials, even Munson's foreman, fully expected that he would not actually be discharged and it was only at the conclusion of the December 9, 1999, meeting that they found out otherwise, to their considerable surprise. The motivational nexus between his protected activity and the adverse action was not overtly stated and may well have not been realized or suspected immediately. Even if it had been, there was a limited opportunity to raise such an issue and virtually no prospect of changing the outcome.[13]

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[12] 30 U.S.C. § 815(c)(2).

[13] When Yanero suspected that the "real reason" for Munson's termination was not being voiced at the meeting, he questioned whether it had anything to do with Munson's contract grievances (he was unaware of his safety complaints) and received the curt reply that it did not.

Respondent also argues that Munson's later filing of an EEOC age discrimination complaint, that did not also refer to discrimination based on activity protected by the Act, somehow undercuts the credibility of his present claims. It is hardly surprising, however, that his respective discrimination complaints were each raised in the forum that had jurisdiction to hear them. It is also unremarkable that Munson believed that there may have been more than one unlawful motivation for his discharge. Under the federal rules a party is permitted to assert alternative, and even inconsistent, legal and factual allegations in a single pleading. *See Independent Enterprises Inc. v. Pittsburgh Water and Sewer Authority*, 103 F.3d 1165, 1175 (3rd Cir. 1997). Munson's age discrimination complaint does not undercut his present claims in the slightest.

ORDER

Respondent discriminated against Complainant when it discharged him because of his activities protected by the Act. The parties are **ORDERED** to confer within 21 days from the date of this decision in an attempt to reach agreement on the specific relief to be awarded, including the amount of a civil penalty. In discussing the civil penalty issues, the parties are advised that I reject the Secretary's argument that EACC's determination to decline Complainant's request to return to work, rather than continue on the agreed-to economic reinstatement, evidences hostility toward Complainant's rights under the Act. Given this decision establishing Munson's entitlement to relief, any agreement as to the scope of that relief will not preclude either party from appealing this decision.

It is **FURTHER ORDERED** that within 30 days after the date of this decision, the parties shall submit any stipulations that they may have entered into as to appropriate relief and their respective positions on any contested relief provisions. Arguments as to contested issues shall be supported with references to the record, affidavits, and citations to legal authority, as appropriate. If either party requests a hearing on remedial issues, such request shall identify the specific issue(s) on which a hearing is deemed necessary and provide a proffer of the evidence intended to be introduced. The other party shall submit a similar proffer within five days. Any hearing on remedial issues will be scheduled expeditiously.

Jurisdiction of this case is retained by the undersigned Administrative Law Judge. This is not a Decision of the Judge within the meaning of Commission Procedural Rule 69(a). 29 C.F.R. § 2700.69(a). It will not become a final decision until a supplemental decision is issued resolving all remaining contested issues and awarding specific relief.

Michael E. Zielinski
Administrative Law Judge

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