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WALTER SCHULTE V. LIZZA INDUSTRIES
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
January 9, 1984
WALTER A. SCHULTE

v. Docket No. YORK 81-53-DM

LIZZA INDUSTRIES, INC.

DECISION

This case involves a discrimination complaint brought by Walter A. Schulte against Lizza Industries, Inc. ("Lizza"), pursuant to the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1976 & Supp. V. 1981). At issue is whether Lizza's discharge of Schulte on October 15, 1980, was in violation of section 105(c)(1) of the Act, 30 U.S.C. $ 815(c)(1)(Supp. V. 1981). Following a hearing on the merits, the Commission's administrative law judge determined that Lizza did not violate section 105(c)(1) and dismissed Schulte's complaint. 4 FMSHRC 1239 (July 1982)(ALJ). For the reasons that follow, we affirm the judge's decision.

Lizza operated a gravel quarry and preparation plant in Mount Hope, New Jersey, known as the Mount Hope Quarry. Lizza operated the quarry on a full-time basis, Monday through Friday, and with a reduced work force on Saturday. Employees were required to report to work daily at 7:00 a.m. The work day ended at 4:30 p.m. Lizza had a policy requiring employees to notify the operator between the hours of 6:00 a.m. and 7:00 a.m. of unforeseen absences, in order that they might be excused. Lizza also had a policy requiring employees to work overtime each day. Failure to comply with either policy was grounds for disciplinary action.

Schulte was hired by Lizza on May 27, 1980. On September 10, 1980, Schulte left work two hours early. Plant Manager Fred Oldenburg told Jesse Parzero, Schulte's foreman, to have a talk with him regarding his early departure. Schulte previously had received two verbal warnings from Oldenburg concerning his attendance in the period leading up to September 23, 1980.

Schulte reported for work six to ten minutes late on both September 23 and 24, 1980. On the first occasion, Oldenburg prepared a letter alerting Schulte to the possible consequences of his actions and personally

delivered it to him. By his signature, Schulte acknowledged receipt of the letter and the accompanying postscript. 1/ On September 30, 1980, Schulte left work one half hour early. He failed to report for work on October 2, 1980, and failed to notify Lizza of his absence. Tension between Schulte and Lizza surfaced on October 4, 1980, when Schulte was demoted from the position of bulldozer operator to the position of laborer for his alleged unsafe practices as an operator. Schulte contended at the Commission hearing that he was removed in order to make room for a friend of the plant manager. Later that day, an altercation developed between Schulte and Parzero, his foreman, and disparaging remarks were exchanged. Ultimately, Oldenburg had to make peace between the two men. That same day, Oldenburg informed Schulte that he was being suspended without pay for three days.

On October 6, 1980, the first day of this three-day suspension, Schulte reported safety complaints to the Department of Labor's Occupational Safety and Health Administration and Mine Safety and Health Administration ("MSHA"). Apart from these documented complaints, Schulte indicated at the hearing that he also reported safety complaints to both his foreman and his shop steward. Both individuals denied the allegations.

Upon Schulte's return from the three-day suspension, Oldenburg gave him a letter, dated October 6, 1980, advising him of the suspension. Schulte acknowledged receipt of the letter and the accompanying postscript. 2/ On October 10, 1980, Schulte again left work one half hour

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1/ The body of the letter dated September 23, 1980, reads:

Your attendance practices leave much to be desired. These practices cannot be tolerated. I am, therefore, formally informing you that if these practices continue you will be suspended and subsequently terminated. If you have any questions, please let me know.

The postscript reads:

I hereby understand that if my poor attendance practices continue I will be suspended for three days and terminated thereafter if the practices continue.

2/ The body of the letter dated October 6, 1980, reads:

Your attendance practices and work attitude leave much to be desired. You have been warned about these practices, yet you continue to be insubordinate. You are therefore suspended without pay for three days. If your performance does not improve, your employment will be terminated. If you have any questions, please let me know.

The postscript reads:

I hereby understand that if my poor attendance practices and work attitude continue, I will subsequently be terminated.

early. He also left work one half hour early on October 14, 1980. On October 15, 1980, he reported for work six minutes late.
Responding to Schulte's safety complaints of October 6, 1980, two MSHA inspectors conducted an inspection of Lizza's Mount Hope Quarry on October 14 and 15, 1980. On October 14, 1980, MSHA cited Lizza for the inadequate guarding of a conveyor belt in a walkway near an area where Schulte worked. MSHA Inspector Robert Held testified that he mentioned to management that the miner's safety complaint which MSHA had received involved the guarding of the conveyor belt. Held did not identify Schulte as the complainant. Schulte testified that Oldenburg, Parzero and Vincent Crawn, his shop steward, were present when he directed the MSHA inspectors to other alleged safety violations.
The decision to terminate Schulte was reached at a meeting of management personnel on the second day of the MSHA inspection, October 15, 1980. Those participating included Oldenburg, Parzero, Crawn and senior company official James Granito. Both Oldenburg and Parzero admitted that at the time of the meeting they were aware of rumors that Schulte had initiated the MSHA inspection. At the hearing, Oldenburg testified that Granito may have brought up the fact that Schulte's discharge had absolutely nothing to do with the MSHA inspection.
Schulte was called into the meeting and discharged by Oldenburg, who gave him a letter detailing the reasons for his discharge. 3/ The two MSHA inspectors on the mine site were notified by management of Schulte's termination.
Following his discharge, Schulte's union filed a grievance on his behalf and the question of whether his dismissal was for just cause under the applicable collective bargaining agreement was submitted for

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3/ The body of the letter dated October 15, 1980, reads:
You had been warned several times and subsequently suspended without pay as a result of poor attendance practices and insubordination. At a meeting held on Wednesday, October 15, 1980, you stated that your attitude had not improved and would not improve as a result of your no longer operating the bulldozer at our Mt. Hope plant.
You were reminded on several occasions, and specifically on Thursday, October 9, 1980, by your foreman, Jesse Parzero, that your job required overtime each day. You have opted to neglect these instructions and have left your work area prior to the designated quitting time.
Our prior verbal warnings, written warnings and disciplinary suspension have obviously failed to rehabilitate you. You

have therefore left us no choice but to terminate your employment, effective today, October 15, 1980, at 1:30 p.m.
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arbitration. 4/ On January 15, 1981, Schulte filed a complaint of discrimination with MSHA pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. $ 815(c)(2). Upon investigation, MSHA determined that no provisions of the Act had been violated and so informed Schulte on May 4, 1981. On May 14, 1981, Schulte filed his own complaint of discrimination directly with this independent Commission pursuant to section 105(c)(3) of the Act, 30 U.S.C. $ 815(c)(3). 5/ Three separate evidentiary hearings were held. On July 6, 1982, the Commission's judge issued his written decision dismissing Schulte's complaint. Both parties filed cross petitions for discretionary review, which we subsequently granted.

In reaching his decision, the judge employed the discrimination analysis which we enunciated in Secretary on behalf of Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (October 1980), rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3rd Cir. 1981), and Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803 (April 1981). The judge found Schulte's safety complaints to MSHA on October 6, 1980, constituted activity protected by section 105(c)(1) of the Act and, thus, that Schulte had established the first element of his prima facie case under Pasula. As to the second element of that case, whether Schulte's discharge by Lizza was motivated in any part by his protected activity, the judge found from the circumstantial evidence available that "it could very well be inferred that Mr. Schulte's discharge was at least partially motivated by his protected activities." 4 FMSHRC at 1241. However, given the uncontradicted evidence regarding his work attendance, the judge further found that "while Lizza may very well have had a 'mixed motivation' for discharging Schulte, it had credible 'business justifications' to discharge Schulte exclusive of any protected activities and it clearly would have discharged Schulte in any event for his unprotected activities alone." 4 FMSHRC at 1244. The judge also found that Schulte's contention of disparate treatment, without credible evidence to support it, was not sufficient to rebut Lizza's affirmative defense. Id.

4/ The arbitrator's subsequent decision, dated February 23, 1981, was admitted as evidence at the hearing before the Commission's administrative law judge. Although the Commission judge did not refer to the arbitral decision in his own decision, we note in passing that the arbitrator concluded that Schulte was dismissed for a poor work attitude and attendance problems, and that his discharge was therefore for just cause within the meaning of the contract. This

result accords with that reached by the judge.

5/ After investigation of a miner's complaint, the Secretary of Labor, acting through MSHA, is required to file a discrimination complaint with this Commission on the miner's behalf if he determines that the Act was violated. 30 U.S.C. $ 815(c)(2). If the Secretary determines that the Act was not violated, as happened in this case, he shall so inform the miner and the miner may then file his own complaint directly with the Commission. 30 U.S.C. $ 815(c)(3).

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On review Schulte contends that the judge erred in concluding that Lizza established a successful affirmative defense to his prima facie case. As a preliminary matter, Lizza argues that Schulte's discrimination complaint to MSHA was not timely filed under the 60-day time limit contained in section 105(c)(2) of the Mine Act, 30 U.S.C. $ 815(c)(2), and should have been dismissed on that basis. Lizza also contends that, even if the complaint were timely, the judge erred in finding that Lizza had knowledge of Schulte's protected activity and in concluding that Schulte established a prima facie case. We first address the timeliness question.

Lizza initially raised its limitations defense before the judge during the last evidentiary hearing on April 16, 1982, and, again, by written motion prior to issuance of the judge's written decision. At the hearing, the judge expressed doubt about Lizza's own timeliness in raising the issue at that late stage of the proceedings. He seemed to be of the opinion that Lizza had waived the affirmative defense by not raising it in its pleadings and by proceeding with the hearing on the merits. Lizza maintained that it had not received a copy of the complaint Schulte originally filed with MSHA until April 5, 1982, when it obtained a copy from the Secretary pursuant to a Freedom of Information Act ("FOIA") request. Only then, Lizza asserted, was it able to ascertain that Schulte's complaint was filed out of time. The judge did not specifically address Lizza's limitations defense in his decision. From the fact that the judge proceeded to decide the case based upon the merits, however, it appears, by necessary implication, that he rejected it. That is the construction of his decision which Lizza urges on review and is the one which we adopt.

Section 105(c)(2) of the Act establishes the relevant period of limitations:

> Any miner ... who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the

complaint to the respondent and shall cause such
investigation to be made as he deems appropriate....
30 U.S.C. $ 815(c)(2)(emphasis added). In Herman v. Imco Services,
4 FMSHRC 2123 (December 1982), we held that the purpose of the 60-day
time limit is to avoid stale claims, but that a miner's late filing
may be excused on the basis of "justifiable circumstances." We relied
on the Mine Act's relevant legislative history, which states:
While this time limit is necessary to avoid stale
claims being brought, it should not be construed
strictly where the filing of a complaint is delayed
under justifiable circumstances. Circumstances
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which could warrant the extension of the time-limit
would include a case where the miner within the
60-day period brings the complaint to the attention
of another agency or to his employer, or the miner
fails to meet the time limits because he is misled
as to or misunderstands his rights under the Act.
S. Rep. No. 181, 95th Cong., 1st Sess. 36 (1977), reprinted in
Senate Subcommittee on Labor, Committee on Human Resources,
95th Cong., 2d Sess., Legislative History of the Federal Mine
Safety and Health Act of 1977, at 624 (1978)(emphasis added).
"Timeliness questions must be resolved on a case-by-case basis,
taking into account the unique circumstances of each case." Hollis v.
Consolidation Coal Co., FMSHRC Docket No. WEVA 81-480-D, slip op. at 4
(January 9, 1984).
In the present case, Schulte filed his initial discrimination
complaint with MSHA on January 15, 1981, 91 days after his discharge
on October 15, 1980, and, thus, 31 days out of time. In its motion
to amend its answer to include a period of limitations defense, Lizza
apparently concedes that the reason Schulte did not file his complaint
with MSHA on a timely basis was due to his ignorance of any such
requirement. To support this contention, Lizza points to the
transcript of MSHA's March 4, 1981, interview with Schulte, wherein
Schulte stated:
Q. Are you familiar that there's a time limit on
the discrimination complaint.
A. No. I was not aware of that.
* * *
Q. Ok. Now, so you weren't familiar with the
time limit on this?
A. No, sir.
Operator's Exhibit 24, p. 4. On the basis of this uncontroverted
evidence, we conclude that Schulte failed to file his complaint with
MSHA within 60 days of the alleged violation because he was unaware of

the Act's provisions in this regard.

We also conclude that the operator was not prejudiced by Schulte's 31-day delay in filing. Lizza's only claim of prejudice is that, due to the judge's failure to dismiss Schulte's complaint based upon its period of limitations defense, it was required to expend the time and expense of litigating this case. While the expenditure of time and money involved in litigation should not be discounted, neither should it be overstated. Lizza has not demonstrated to us the kind of legal prejudice which we recognized in Herman, supra, namely, tangible evidence that has since disappeared, faded memories, or missing witnesses. 4 FMSHRC at 2139. In any event, the record reveals significant evidence which leads us to conclude that Lizza's conduct before raising the limitations argument was tantamount to waiver.

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The copy of Schulte's complaint to MSHA, which Lizza relies upon as "newly discovered" evidence, is really not new. In a letter addressed to Oldenburg dated January 26, 1981, the Secretary of Labor notified Lizza that Schulte had filed a complaint with MSHA alleging discriminatory treatment by Lizza. A Summary of Discriminatory Action, also dated January 26, 1981, was attached to the letter. Included on each item was the discrimination number, MD 81-46, which MSHA had assigned to the complaint. By letter dated August 3, 1981, Lizza's attorney communicated with then Chief Judge Broderick, concerning Schulte's May 14, 1981, complaint of discrimination pending before the Commission. MSHA's letter to Oldenburg of January 26, 1981, was appended to this letter. In the body of his letter, Lizza's attorney stated, "For your information, Mr. Schulte had filed a complaint against the Company in January of this year in case No. MD 81-46."

A complaint filed by Schulte anytime in January 1981 would have been outside the 60-day limit. Lizza's August letter thus reveals that Lizza, in January of 1981, but certainly no later than in August of 1981, had actual notice of Schulte's late filing. This notice substantially predated receipt of its FOIA request in April 1982. 6/ Under these circumstances, Lizza's own delay of many months after it had such notice before complaining of Schulte's 31-day delay was tantamount to waiver of its period of limitations claim. Cf. Rule 8(c), Fed. R. Civ. P.

On the basis of the foregoing considerations, Schulte's delay in filing his complaint is excused. We emphasize, however, that although a miner's lack of understanding regarding his rights under the Mine Act is one of the circumstances that may possibly justify excuse of a delayed filing, any delay is a potentially serious matter. 7/

6/ While the document Lizza received from the Secretary pursuant to

its 1982 FOIA request clearly identifies January 15, 1981, as the date Schulte's complaint was actually filed, MSHA's letter to Oldenburg dated January 26, 1981, nevertheless provided Lizza with sufficient independent information from which to determine the timeliness of Schulte's complaint. The newly discovered evidence did little more than advise Lizza that the complaint was actually filed 11 days earlier than it first might have been led to believe.

7/ This case is distinguishable from Herman and Hollis, supra, where the miners' late filings were not excused. The delay involved here was less than in those cases. In Herman, we concluded that the delay prejudiced the operator's ability to prepare and present its case. 4 FMSHRC at 2138-39. In Hollis, the Commission concluded (Commissioner Lawson dissenting on this issue) that the miner knew of his Mine Act rights, but deliberately chose to pursue other avenues of relief. Slip op. at 3-5.

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We now turn to the substantive discrimination issues. Under Pasula and Robinette, supra, a complainant alleging a violation of section 105(c) of the Act must make a prima facie showing that (1) he engaged in protected activity and (2) the adverse action complained of was motivated in any part by the protected activity. In order to rebut a prima facie case, an operator must show either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. If an operator cannot rebut the prima facie case in this manner, it may nevertheless affirmatively defend by proving that (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken the adverse action in any event for the unprotected activities alone. The operator bears an intermediate burden of production and proof with regard to these elements of defense. This further line of defense applies only in "mixed motive" cases, i.e., cases where the adverse action is motivated by both protected and unprotected activity. Haro v. Magma Copper Co., 4 FMSHRC 1935, 1937 (November 1982). The ultimate burden of persuasion does not shift from the complainant. Secretary on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC at 818 n. 20. The Supreme Court recently approved the National Labor Relations Board's virtually identical analysis for discrimination cases arising under the National Labor Relations Act. NLRB v. Transportation Management Corp., 76 L.Ed. 2d 667 (1983). See also Boich v. FMSHRC, 719 F.2d 194 (6th Cir. 1983)(approving the Commission's Pasula-Robinette test).

At this stage of the proceedings, no one disputes that Schulte engaged in protected activity. Lizza takes exception only to the judge's factual conclusion that it had knowledge of Schulte's protected activity. It contends that such a conclusion is not

supported by the evidence and, consequently, that the judge erred in holding that Schulte had established his prima facie case.

In Secretary on behalf of Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (November 1981), rev'd on other grounds, 709 F.2d 86 (D.C. Cir. 1983), we stated that direct evidence of motivation is rarely encountered and that reasonable inferences of motivation may be drawn from circumstantial evidence showing such factors as knowledge of protected activity, coincidence in time between the protected activity and the adverse action, and disparate treatment. 3 FMSHRC at 2510. We also indicated that knowledge was probably the single most important aspect of a circumstantial case. Because knowledge also involves subjective factors, it may be proved by circumstantial evidence and reasonable inferences. Id. The judge evaluated the evidence and concluded that Schulte had made a prima facie showing on the issues of knowledge and motivation. The judge found that officials of Lizza "had some knowledge, albeit 'rumors', that Schulte had called in the MSHA inspectors," that there was a coincidence in time between the MSHA inspection and Schulte's discharge, and that the "peculiar gratuitous denial [by Granito] that Schulte's discharge was the result of the MSHA inspection" cast doubt on Lizza's denial of any discriminatory intent. 4 FMSHRC at 124.

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Although other inferences could have been drawn from the available evidence, there is a substantial evidentiary basis in the record to support the judge's conclusion that Schulte's discharge was at least partially motivated by his protected activity. We find no persuasive reason to overturn the judge on this point. The next question is whether Lizza affirmatively defended by showing that it would have discharged Schulte in any event for his unprotected activity alone. The judge found that, although Schulte engaged in protected activity, he also engaged in unprotected activity as well. The judge concluded that the uncontradicted evidence of Schulte's poor work attendance clearly supported Lizza's business justification for discharging him. Schulte argues that the judge erred by imposing on him, as complainant, the burden of proving disparate treatment. Schulte contends that once a prima facie case has been established, the burden of proof shifts to the operator. Schulte also argues that the judge erred in concluding that he would have been discharged for his unprotected activity alone. He maintains that the evidence shows that the discipline meted out to him was not consistent with that given to other employees similarly situated. He also asserts that the judge was extremely vague in analyzing the record evidence in this regard.

Regarding Schulte's burden of proof arguments, we indicated in Chacon, supra, that if a complainant wishes to allege disparate

treatment, it could serve as one of the possible bases of a prima facie case. 4 FMSHRC at 2412-13. It may also be presented by a complainant in order to refute an operator's affirmative defense. 4 FMSHRC at 2517. In the latter instance, the ultimate burden of persuasion still remains with the complainant who must refute a facially meritorious affirmative defense in order to prevail. Robinette, 3 FMSHRC at 818 n. 20. Conversely, in bearing the intermediate burden of proof of establishing an affirmative defense, the operator is equally free to show consistent treatment. We do not read the judge's decision as requiring Schulte to prove disparate treatment. 4 FMSHRC at 1244. A prima facie case can be made without such a showing. In this case, the evidence presented by Schulte to demonstrate disparate treatment, however characterized theoretically, simply amounted to evidence to be weighed against the evidence favoring Lizza. The judge did so, and found Schulte's evidence lacking. We find no merit in Schulte's argument regarding any possible misallocation of evidentiary burdens.

Turning to the merits of the issue of whether Schulte would have been discharged for his unprotected activity alone, we set forth in Bradley v. Belva Coal Co., 4 FMSHRC 982 (June 1982), some of the indicia tending to show that a miner's unprotected activity alone would have resulted in the disciplinary action taken:

> Ordinarily, an operator can attempt to demonstrate [that it would have disciplined the miner in any event for his 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.

Id. at 993.

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To support its position that it would have discharged Schulte in any event, Lizza points to significant evidence. It maintains that not only did it discipline Schulte in accordance with its established company disciplinary policy, but the discipline it administered was consistent with past discipline and warnings meted out to Schulte prior to his protected activity. Following repeated oral warnings, Schulte was given a written warning regarding his unsatisfactory attendance. Schulte continued to be both late and absent. Following his argument with Parzero, Oldenburg informed Schulte that he was suspended for three days without pay. During his suspension, Schulte engaged in his protected activity, that is, made his safety complaints to OSHA and MSHA. When he returned to work, Schulte was given both written confirmation of the previous

disciplinary action and admonished that termination would follow if his conduct did not improve. Furthermore, following the suspension, Schulte again was caught in the act of leaving work early and again was warned (orally) that severe disciplinary action could be provoked by such a violation of the rules. Lizza argues that, even when Schulte was discharged, he indicated to his supervisors that his attitude would not improve as long as he was not permitted to work on the bulldozer.

On the specific issue of consistent treatment of other employees similarly situated, Lizza argues that even though it had been in operation for less than six months, two other miners had received written warnings. Shortly after Schulte received his written warning, two other miners were suspended for three days without pay under the same disciplinary policy. Lizza also notes that on the same day that Schulte was terminated, miner Boisvert was suspended for three days without pay for refusing to work overtime as required by the company. To support his contention of disparate treatment, Schulte maintains that the timing of his discharge in relation to Lizza's treatment of seven other employees with similar attendance records is more than just coincidence. Not one of these other miners was terminated as early as Schulte. The only other miner whose employment was terminated on a date even close to his own termination was Boisvert, who was terminated nine days after Schulte's discharge. Schulte also relies upon the fact that the three other miners actually discharged were not terminated until much later, specifically November 1980, April 1981, and September 1981, and that the three remaining miners were never terminated and are still employed by Lizza.

The judge credited Lizza's evidence. There is no question that Schulte had a poor attendance record, and indications are that he was also insubordinate. As a matter of bona fide company policy, Lizza employed a system of progressive discipline, which incorporated both notice and an opportunity to conform errant conduct. Schulte was warned of the possibility of discharge and disciplined within the strictures of established company policy. While the evidence concerning consistent and disparate treatment is not totally harmonious, the substantial

evidence standard governs our review. We conclude that sufficient credible evidence exists to support the judge's conclusion that Schulte's discipline was consistent with that administered to other employees. 8/

We briefly address Schulte's final argument that the judge was vague in his analysis of the evidence regarding disparate treatment. In his decision, the judge stated:

Schulte claims that co-workers Harley, Bell, and

Brock had attendance records as poor as his own but were not similarly discharged. The time cards for those employees are in evidence, however, and Schulte has not shown how those records support his argument. Moreover, from my own independent appraisal of those records, I do not find that they support Schulte's contention in this regard.

4 FMSHRC at 1244. While we can agree with Schulte that the judge was extremely brief in his analysis of the evidence regarding disparate treatment, we do not find his decision to be impermissibly vague. Both at the hearing level and on review, Schulte has failed to show specifically how the time cards in evidence support his position. Presented as raw data, the evidence is open to various interpretations. We will not disturb the interpretation adopted by the judge because, as we have already indicated, it is supported by substantial evidence.

In sum, the evidence shows that other miners received warnings, suspensions, and discharges under the company's disciplinary policy. Taken in conjunction with the evidence of Schulte's poor attendance and insubordination over a relatively limited period of time, we find substantial evidence to support the judge's conclusion that Lizza would have discharged Schulte in any event for his unprotected activity alone.

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8/ At the hearing, Schulte testified that immediately following the meeting on October 15, 1980, when he was terminated, his foreman, Parzero, stated to him "This is what you get, mister, for bringing in MSHA...." Parzero denied the statement. Boisvert, who was in the vicinity at the time, testified that he was not able to hear their conversation. Schulte additionally testified that shop steward Crawn, stated to him, "[Y]ou stirred up a hornet's nest. It's a new company. They didn't need the trouble. That's why they routed you out." Had this evidence been credited, it would have cast severe doubt on Lizza's defense. The judge specifically discredited Schulte's testimony regarding Parzero and discounted his testimony regarding Crawn. Nothing appears in the record that would support the extraordinary step of reversing these credibility resolutions. 4 FMSHRC at 1241 n. 3. We also note that the record in this case does not support Schulte's further argument that Boisvert, terminated after Schulte's discharge, was also a victim of discrimination.

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For the reasons stated above, we affirm the decision of the administrative law judge.

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