

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, DC 20004-1710

MAY 10 2018

JEFFREY PAPPAS

v.

CALPORTLAND COMPANY and
RIVERSIDE CEMENT COMPANY

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Docket No. WEST 2016-264-DM

BEFORE: Althen, Acting Chairman; Jordan, Young, and Cohen, Commissioners

DECISION

BY: Althen, Acting Chairman; Jordan, and Young, Commissioners

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2012) (“Mine Act” or “Act”). It concerns a complaint of discrimination filed by the Secretary of Labor on behalf of miner Jeffrey Pappas. The complaint alleged that Riverside Cement Company (“Riverside”) and CalPortland Company (“CalPortland”) discriminated against Pappas in violation of section 105(c) of the Mine Act.¹

Respondent companies contested the allegations, and the matter proceeded to a hearing before a Commission Administrative Law Judge. Following the hearing, the Judge issued a written decision dismissing the complaint of discrimination and concluding that no discrimination occurred. 39 FMSHRC 718 (Mar. 2017) (ALJ). Thereafter, Pappas filed a petition for discretionary review *pro se*, which we granted. The Secretary did not file a petition on Pappas’ behalf and did not otherwise participate in the case on appeal.

¹ Section 105(c)(1), 30 U.S.C. § 815(c)(1), provides:

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 . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent . . . of an alleged danger or safety or health violation in a coal or other mine, or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this Act

After reviewing the record and considering the issues raised in the petition, we affirm the decision of the Judge.

I.

Factual and Procedural Background

The Oro Grande Cement Plant is a surface quarry and cement manufacturing facility located in California that was operated by Riverside until October 2015. *Id.* at 721. Pappas worked at the Oro Grande Plant for approximately 16 years.

On October 1, 2015, CalPortland took over the Oro Grande Plant from Riverside, completing an asset purchase agreement. Pappas had applied to continue working at the mine with CalPortland, but he was not offered a position. Pappas lost his job upon the transfer of assets. The Secretary's complaint alleged that Pappas was not selected to be hired by CalPortland due to the unlawful discriminatory actions of Riverside and CalPortland.

A. Pappas' prior discrimination claim and reinstatement

In April 2014, Pappas had been discharged from his position with Riverside purportedly for disobeying the instruction of management to discontinue use of his personal truck on mine property. Thereafter, Pappas filed a complaint of discrimination with the Mine Safety and Health Administration ("MSHA") alleging that his discharge was actually in retaliation for his recent safety complaints. The parties subsequently reached an agreement to settle that complaint. Pappas was reinstated to the mine in January 2015.

The 2014 discrimination case concerned safety complaints Pappas made in December 2013 regarding a train operated in proximity to miners that Pappas had feared would hit him and other miners working with him. After a safety review, requested by Pappas, Riverside's safety director determined that all work was performed consistent with company policy and MSHA regulations. Pappas addressed the incident at the next monthly safety meeting. He accused his immediate supervisor of falsely representing to the safety director that he had failed to bring the issue to the supervisor's attention, and of brushing off the concerns Pappas expressed earlier. Pappas testified that David Salzborn, the plant manager, was visibly angered by these public remarks.

A few weeks later, Pappas spoke with an MSHA inspector at the mine on a regular inspection and communicated his safety concerns. After an investigation, the inspector issued citations to Riverside concerning the operation of the train.

Shortly thereafter, Riverside management instructed Pappas not to use his truck on mine property. Pappas continued to use his truck on mine property despite this instruction. On April 4, 2014, he was discharged for alleged "gross insubordination." Pappas filed a discrimination complaint with MSHA alleging his termination was actually in retaliation for his protected activities.

After an investigation, MSHA filed a discrimination complaint on Pappas' behalf. Thereafter, Riverside settled the case by agreeing to reinstate Pappas to his former position, expunge all records related to his discharge, and to pay a civil penalty. Pappas returned to work on January 5, 2015.

B. Events after Pappas' reinstatement

Pappas testified that he faced harassment from his co-workers after his reinstatement. In early February 2015, Pappas met with Jamie Ambrose, Riverside's human resources manager, to inform her of the perceived harassment. In response, Ambrose sent instructions to Pappas' supervisor to monitor the work environment and to report issues to human resources. Pappas decided to eat lunch by himself to reduce his contact with co-workers.

On April 30, 2015, Pappas was assigned to fix a broken dust door along with Stacey Portis. Portis, however, failed to arrive at the job site during the shift. As a result, Pappas was unable to complete the task and became upset. At the end of the day, Pappas confronted Portis in the breakroom. The two engaged in a heated exchange that lasted several minutes. Pappas cursed Portis, using obscenities and referring to him as "lazy," gathered his things, slammed his locker, and left the plant.

The next day, Portis filed a complaint with Riverside, stating that Pappas had verbally assaulted him. After Riverside's investigation, management suspended Pappas for five days, required him to undergo a psychological evaluation, and disqualified him from returning as a dust collector.

On June 22, 2015, Pappas returned to work. The United Steelworkers Union filed grievances concerning the discipline imposed upon him.

On June 30, 2015, CalPortland signed the asset purchase agreement with Riverside, which included an agreement to purchase and take possession of the physical assets at the Oro Grande Plant at a later date. Gov. Ex. 2.

On August 27, 2015, Riverside management met with union officials to resolve pending grievances. Riverside and the Union settled the Pappas grievance by Riverside paying Pappas for two days of the original five day suspension. At the conclusion of the meeting, Ron Espinosa, the union's international representative, called Pappas to join the group. In front of all those in attendance, Espinosa instructed Pappas to change his behavior at work going forward.

C. The decision not to rehire Pappas

On September 1, 2015, Ambrose accepted CalPortland's offer to be its human resources manager at the plant. On September 3, Ambrose met with Steve Antonoff, CalPortland's vice-president of human resources. Together they went through a list of current Riverside employees. For each employee, Ambrose recommended either hiring that employee or not hiring that

employee, or she stated that she was “unsure.”² Ambrose stated that she was unsure about Pappas. Antonoff highlighted every name that did not get a positive recommendation on a spreadsheet, making no distinction between a “no” and an “unsure.”

In mid-September, CalPortland informed all Riverside miners that they would need to apply for a position with CalPortland if they wished to continue to be employed at the mine. Miners, including Pappas, filled out applications and sat for brief interviews.

Rich Walters, CalPortland’s plant manager (replacing Salzborn), and Betsy Lamb, a CalPortland vice-president, were responsible for staffing the mine. Salzborn informed Walters that there were two problem employees at the plant — one of whom was Pappas. Salzborn informed him that Pappas had been disciplined for violating work rules and insubordinate behavior.

Walters delegated the job of selecting employees to Lamb. She was provided with the interviewers’ notes, the applications, and Ambrose’s recommendations. On September 25, Lamb presented her list of recommended hires of hourly employees to Walters, who agreed to it completely. In total, CalPortland hired 125 employees, about 100 of which were hourly miners. CalPortland did not offer jobs to 15 applicants from Riverside, including Pappas. Lamb testified that Pappas’ application demonstrated no progression in employment or salary and the answers he gave during his interview did not reflect the type of answers CalPortland sought.

On February 11, 2016, the Secretary filed a discrimination complaint with the Commission on behalf of Pappas.³ The complaint alleged that CalPortland discriminated against Pappas when he was identified as someone who should not be retained and who was in fact not hired by CalPortland. The Secretary later amended the complaint to add Riverside as a respondent.

² CalPortland used this process in lieu of reviewing Riverside’s employment files.

³ The Secretary also filed an application for temporary reinstatement pursuant to section 105(c)(2). A Commission Judge determined that the complaint was not frivolously brought and granted Pappas temporary reinstatement. *Sec’y of Labor on behalf of Pappas v. CalPortland Co.*, 38 FMSHRC 53 (Jan. 2016) (ALJ). The Commission affirmed. *Sec’y of Labor on behalf of Pappas v. CalPortland Co.*, 38 FMSHRC 137 (Feb. 2016).

The D.C. Circuit reversed the Commission, vacated the Judge’s order, and determined that Pappas, as an applicant for employment, was not eligible for temporary reinstatement. *CalPortland Co. v. FMSHRC*, 839 F.3d 1153 (D.C. Cir. 2016) (concluding that Pappas was not a miner at CalPortland, but instead was an applicant for employment and accordingly was not eligible for the temporary reinstatement remedy).

II.

The Judge's Decision

A. Riverside

The Judge first considered whether the Secretary had established the elements of a prima facie case of discrimination against Riverside.

1. Prima Facie Case

A complainant establishes a prima facie case under section 105(c) by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity; that there was an adverse action; and that the adverse action complained of was motivated in any part by that activity. *See Turner v. Nat'l Cement Co. of California*, 33 FMSHRC 1059, 1064-67 (May 2011); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).

The Judge found that Pappas engaged in activities protected by the Mine Act, including filing a discrimination complaint with MSHA and complaining to Riverside management that he faced harassment from co-workers following his reinstatement to the mine.⁴ 39 FMSHRC at 739. The Judge also found that the negative employment references from Ambrose and Salzborn were adverse actions.⁵ *Id.* at 740.

The Judge next considered whether the Secretary demonstrated a relationship between the protected activities and the adverse actions.⁶ He concluded that Salzborn exhibited animus toward Pappas' protected activities. The Judge relied on Pappas' testimony that Salzborn was angered by Pappas' public accusations regarding management's response to the train incident. *Id.* at 749; Tr. 75-76. He also relied on Salzborn's statements to Walters, which referred to the

⁴ Both Ambrose and Salzborn knew of Pappas' prior protected activities: Salzborn was the plant manager who terminated Pappas in 2014, and Pappas complained to Ambrose about harassment following his reinstatement. *Id.* at 741.

⁵ An adverse action is "an act of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y of Labor on behalf of Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1847-48 (Aug. 1984).

⁶ In evaluating whether a causal relationship between Pappas' protected activity and Riverside's action existed, the Judge considered the four *Chacon* factors: (1) knowledge of the protected activity; (2) hostility or animus toward the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. 39 FMSHRC at 741 (citing *Sec'y of Labor on behalf of Chacon*, 3 FMSHRC 2508, 2510 (Nov. 1981)).

circumstances surrounding Pappas' prior discharge in "deliberate disregard" of the settlement agreement. 39 FMSHRC at 749-50. Furthermore, the Judge found that Salzborn's declaration that Pappas was one of two "problematic" employees was somewhat illustrative of disparate treatment. *Id.* at 753. The Judge also found a coincidence in time between the protected activity and Riverside's adverse actions. *Id.* at 751. The Judge concluded that the Secretary established the necessary elements of a prima facie case based on Salzborn's conduct.

However, the Judge found that the Secretary failed to substantiate allegations that Ambrose manifested hostility toward Pappas. The Secretary had alleged that Ambrose failed to adequately investigate Pappas' reports of harassment and that this was indicative of hostility toward his protected activity.⁷ The Judge disagreed. He concluded that Ambrose responded to Pappas' concerns: She took steps to see that Pappas' direct supervisor would monitor the situation and notify human resources if the problems persisted. The Judge noted that Ambrose did not hear back from Pappas, his managers, or his co-workers after their February meeting. The Judge also found it persuasive that Pappas described Ambrose's demeanor toward him as "polite" and "professional." Importantly, the Judge specifically credited Ambrose's testimony that her decision not to recommend that CalPortland hire Pappas was based on his disciplinary issues and not protected activity. *Id.* at 754. Accordingly, the Judge found neither indications of discriminatory animus from Ambrose's conduct nor a motivational nexus between the negative reference by Ambrose and Pappas' prior protected activity. *Id.* at 743.

In sum, the Judge found that the Secretary established a prima facie case against Riverside only on the basis of Salzborn's conduct, holding that his "warning to CalPortland [about Pappas] was in part motivated by discriminatory intent." *Id.* at 756.

2. Affirmative Defense

The Judge next considered whether Riverside established an affirmative defense. An operator may defend affirmatively against a prima facie case 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. *See Robinette*, 3 FMSHRC 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).

Riverside asserted that Salzborn and Ambrose would have provided the negative references based on Pappas' unprotected activity alone — his recent suspension for a violation of the hostile work place rule was fresh in their minds when they provided their opinions.

The Judge found the defense to be based in fact; Salzborn and Ambrose had attended the third step grievance meeting regarding Pappas' suspension shortly before providing their negative references. *Id.* at 756. The Judge credited Salzborn's testimony, finding that Pappas'

⁷ The Judge noted that what Pappas perceived to be harassment was not clearly related to his protected activity, and instead may have been reasonably interpreted by others to be "banter" due to the topics at issue and prior relationships of the parties. *Id.* at 744.

issues were recent, recurrent, and unprecedented in provoking a union representative to summon Pappas, a union-represented miner, to a grievance meeting and then directly instructing him to improve his behavior in the presence of management representatives. *Id.* at 757. The Judge found that Riverside successfully established an affirmative defense and held that “[w]hile Riverside may have been motivated in part by discriminatory animus, I find that the operator would have given the same negative references as a result of Pappas’ unprotected activity alone.” *Id.* at 758.

Therefore, the Judge concluded that the Secretary failed to demonstrate that Riverside unlawfully discriminated against Pappas in violation of the Mine Act.

B. CalPortland

The Judge found that CalPortland’s failure to hire Pappas was an adverse action. However, he concluded that the Secretary failed to prove that its decision was motivated by Pappas’ protected activity. The Judge also concluded that, although Ambrose was acting as an agent for CalPortland when she provided the negative employment reference, she did not demonstrate any animus toward Pappas’ protected activity.

The Judge further found that the Secretary failed to demonstrate that any other CalPortland agent had knowledge of, and animus towards, Pappas’ protected activity or that Pappas was treated any differently than similarly situated employees. *Id.* at 762.

The Judge found that the Secretary did not establish a prima facie case of discrimination against CalPortland. He found further that even if a prima facie case had been established, CalPortland had proven an affirmative defense. The Judge credited Lamb’s testimony that Pappas provided poor answers to interview questions and that his work history contained “red flags” such as a failure to progress, indicating possible performance issues. *Id.* at 767.

III.

Disposition

A. The claims against Riverside

Pappas argues that the Judge erred in crediting the testimony of Ambrose and Salzborn in support of the Judge’s conclusion that Riverside was not liable for discrimination.⁸

⁸ On review, CalPortland argues that Pappas’ *pro se* petition for discretionary review failed to comply with the statutory requirements set forth at 30 U.S.C. § 823(d)(2)(A). Our practice has been to liberally construe the filings of *pro se* litigants. *See Rostosky Coal Co.*, 21 FMSHRC 1071 (Oct. 1999); *see also Original Sixteen to One Mine, Inc.*, 23 FMSHRC 1217 (Nov. 2001). We find that Pappas sufficiently identifies and supports assignments of error in his petition; Pappas challenges the Judge’s credibility determinations and cites evidence in the record in support of his allegations. Accordingly, we review these issues.

1. Ambrose's testimony

Pappas alleges that the Judge erred in crediting Ambrose's testimony because it was (1) inconsistent with statements she made to the MSHA investigator and (2) inconsistent with Antonoff's testimony.

The Commission has recognized that a Judge's credibility determinations are entitled to great weight and may not be overturned lightly. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981). Accordingly, the Commission reviews a Judge's credibility determinations under an abuse of discretion standard. *See Jim Walter Res., Inc.*, 37 FMSHRC 1868, 1871 (Sept. 2015).

We conclude that Pappas has not met the burden of showing that the Judge erred in concluding that Ambrose's testimony was credible. The discrepancies between Ambrose's hearing testimony and other record evidence were considered and reconciled by the Judge. 39 FMSHRC at 753-54.

Ambrose testified that she provided CalPortland with a negative employment reference for Pappas because he had recently been suspended for engaging in threatening and intimidating behavior. *Id.* at 755-56. In crediting Ambrose's testimony, the Judge considered that it departed from her initial statements to the MSHA investigator: Ambrose originally stated that she had no involvement in CalPortland's hiring process and did not speak with CalPortland management about Riverside hourly employees. Gov. Ex. 17 (November 6, 2015, interview). However, in a subsequent MSHA interview, she acknowledged that she had in fact provided employment references for Riverside hourly employees to CalPortland. Gov. Ex. 18 (November 17, 2015). Ambrose clarified that she initially provided different information to the MSHA investigator because she had misunderstood what the investigator was asking. She understood him to have asked if she provided employee files or details regarding job performance, which she maintained she did not. Gov. Ex. 18; Tr. 715.

The Judge reasonably exercised his discretion when he credited Ambrose's hearing testimony and her explanation for the apparent conflict. The Judge noted that while Ambrose's prior statements were at times inconsistent, her rationale for providing a negative reference for Pappas did not change, and her testimony at the hearing was "reasonable, detailed, and consistent." *Id.* at 754.

Pappas also asserts that the Judge erred in crediting Ambrose's testimony because it differed at times from the testimony of Steve Antonoff (CalPortland's Vice-President for Human Resources). He points out that Antonoff testified that Ambrose sometimes explained why she had provided a negative reference for a particular employee (in contrast with Ambrose's insistence that she had not). Tr. 832-33. However, with respect to Ambrose's recommendation of Pappas, Antonoff testified that Ambrose provided no additional information to explain her negative reference. Tr. 821. Therefore, Ambrose's testimony and Antonoff's testimony were consistent with respect to the negative reference she provided for Pappas. *See* Tr. 690. We find that the Judge did not abuse his discretion in crediting Ambrose's account.

For these reasons, we conclude that the Judge did not err in crediting Ambrose's hearing testimony. Because the Judge found that Ambrose was not motivated by Pappas' protected activity when she provided the negative employment reference, he found that the Secretary and Pappas failed to establish that Ambrose's conduct was part of the prima facie case of discrimination. We decline to disturb this ruling.

2. Salzborn's testimony

The Judge next considered whether Riverside established an affirmative defense for the prima facie case of discrimination concerning Salzborn's negative reference of Pappas. 39 FMSHRC at 756. Riverside asserted that Salzborn, the plant manager, would have provided the same reference even if Pappas had not engaged in protected activities.⁹ *Id.* The Secretary countered that Riverside's proffered rationale was mere pretext.

The Judge credited Riverside's explanation; he found that Salzborn would have given a negative reference for Pappas based on his unprotected activity alone. The Judge concluded that Riverside's proffered reasons were "plausible and had a basis in fact." 39 FMSHRC at 757 (citing *Turner*, 33 FMSHRC at 1073) ("A plaintiff may establish that an employer's explanation is not credible by demonstrating 'either (1) that the proffered reasons had no basis *in fact*, (2) that the proffered reasons did not actually motivate [the adverse action], or (3) that they were *insufficient* to motivate [the adverse action].'" (emphasis included).

Salzborn testified that he provided the negative employment reference based on Pappas' history of discipline for behavioral problems. Tr. 633. The most recent disciplinary issue was still fresh in his mind due to the recent settlement of Pappas' related grievance and the unusual step Espinosa (the Union's International Representative) took in directly addressing Pappas about his behavior in front of attendees at the grievance meeting. Tr. 633, 646-47. In addition, Salzborn recalled Pappas' 2010 suspension and removal from the shipping department, which he testified was the result of Pappas' behavior toward staff and customer truck drivers. Tr. 633. Furthermore, Salzborn recalled that a department manager had complained that Pappas was "causing problems" when he traveled off his assigned job site to other areas of the mine in his truck. Tr. 634-35. As a result, Salzborn had ordered him to cease use of his truck on mine property. Salzborn testified that despite this warning, Pappas continued using his truck. Tr. 637-39. *See supra* at 2.

Pappas argues that the Judge erred in crediting Salzborn's testimony, arguing essentially that Salzborn's testimony was unreliable because he was motivated, in part, by animus against Pappas' prior engagement in protected activities.

The Judge found that although Salzborn harbored some animosity toward Pappas' prior engagement in protected activity, Salzborn would have provided Pappas with a negative

⁹ Salzborn retired from Riverside at the end of 2014, and then returned as interim plant manager in 2015 to assist in the transfer of assets to CalPortland.

employment reference to CalPortland even if Pappas had not engaged in protected activities.¹⁰ The Judge was persuaded to believe Salzborn because his asserted rationale — Pappas’ history of discipline — was corroborated by the record.

We conclude that the Judge acted within his discretion in crediting Salzborn’s testimony. We do not find reason in the type of inconsistencies in the record or Salzborn’s testimony to disturb the Judge’s findings. As a result, we affirm the Judge.

B. The claims against CalPortland

The Judge found that the Secretary failed to establish a prima facie case for discrimination against CalPortland. Although the Judge found Ambrose was a “de facto agent of CalPortland” at the time she provided the negative references, 39 FMSHRC at 761, he further found that she was not motivated by discriminatory animus. We have previously explained that this finding was within the Judge’s discretion. *See supra* at 9-11. We affirm the finding as it relates to CalPortland’s liability.

We also affirm the Judge’s holding that CalPortland was not liable for Salzborn’s conduct. The Secretary did not claim that Salzborn was an agent of CalPortland. Moreover, the Judge explicitly ruled that he was not an agent of CalPortland whose knowledge and animus could be imputed to that operator. 39 FMSHRC at 760-62. Pappas has not sought review of this finding. Thus, it was neither contended nor demonstrated that Salzborn was an agent of CalPortland.

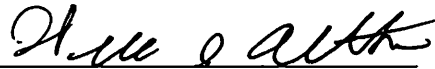
For these reasons, we affirm the Judge’s finding that the Secretary failed to successfully establish a prima facie case of discrimination against CalPortland. In the absence of a prima facie case of discrimination, Pappas does not have a valid claim against CalPortland.

¹⁰ The Commission has recognized that, because the Judge “has an opportunity to hear the testimony and view the witnesses[,] he [or she] is ordinarily in the best position to make a credibility determination.” *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995) (quoting *Ona Corp. v. NLRB*, 729 F.2d 713, 719 (11th Cir. 1984)), *aff’d sub nom. Sec’y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998).

III.

Conclusion

We conclude that although Pappas did identify some inconsistencies in witness testimony, the Judge's decision demonstrates that he considered those inconsistencies and reconciled witness testimony against the record evidence. Accordingly, the Judge acted within his discretion as the finder of fact to make credibility determinations. The Judge's decision is hereby affirmed.



William I. Althen, Acting Chairman



Mary Lu Jordan, Commissioner



Michael G. Young, Commissioner

Commissioner Cohen, concurring in result,

I agree with the conclusions of my colleagues, but write separately to address what I consider to be error in the Judge's analysis of Riverside Cement Company's affirmative defense.¹ I believe that the Judge's finding that Oro Grande plant manager David Salzborn, individually, would have supplied a negative reference based on Jeffrey Pappas's unprotected activity alone is not supported by substantial evidence. Nevertheless, the issue before the Commission is whether Riverside (not Salzborn or Ambrose individually) established an affirmative defense. As explained below, I conclude that substantial evidence supports the Judge's ultimate conclusion that Riverside established an affirmative defense. Thus, the Judge's error in finding that Salzborn would have given a negative reference based on unprotected activity alone is not outcome determinative.

A. The Prima Facie Case

I begin my analysis by reviewing the Judge's findings regarding Pappas's prima facie case of discrimination against Riverside.² Here, the Judge relied on the discriminatory animus exhibited by Salzborn in providing a negative job reference to CalPortland's incoming plant manager Rich Walters. As the Judge noted, Salzborn described Pappas as a "problematic employee" and identified several disciplinary incidents involving Pappas including his alleged "gross insubordination" for use of a company truck on mine property. This incident had led to Pappas's termination in 2014, his first section 105(c) complaint to MSHA, and the settlement in which Pappas was reinstated and his personnel record was expunged of all records relating to discipline for use of the truck. 39 FMSHRC at 724, 740.

In finding animus on the part of Salzborn, the Judge relied on Salzborn's expression of anger directed at Pappas at a safety meeting following an incident with the train at the mine's

¹ I agree with my colleagues' conclusion that the Judge did not err in his findings that the Secretary and Pappas failed to establish a prima facie case with regard to alleged discrimination by other Riverside employees including Jamie Ambrose, Riverside's human resources manager, and by CalPortland Company.

² Like the Judge and my colleagues, I apply the Commission's analytic framework for discrimination cases arising under section 105(c) of the Mine Act, 30 U.S.C. § 815(c), set forth in *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds* 663 F.2d 1211 (3d Cir. 1981) and *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). Under the *Pasula-Robinette* test, it is first determined whether the complainant miner has made out a prima facie case of discrimination by showing that he engaged in protected activity, and that there was adverse action motivated in any part by the protected activity. If the complainant makes out a prima facie case, the operator may raise an affirmative defense by establishing that it was also motivated by the miner's unprotected activity, and would have taken the adverse action based on the unprotected activity alone.

pack house. *Id.* at 723-24, 749.³ In addition, the Judge found that Salzborn's mention to Walters of Pappas's discipline for use of the company truck represented animus, in that Salzborn disregarded Riverside's agreement to expunge all reference to the events that led to Pappas' prior termination. As the Judge stated, "Salzborn's deliberate disregard of a Commission order and settlement resolving Pappas's section 105(c) claim is an expression of animus toward Pappas's section 105(c) rights that should not be tolerated." *Id.* at 750.

The Judge also relied on Salzborn's disparate treatment of Pappas as demonstrative of animus. Salzborn had identified only one hourly employee to Walters as a problem – Pappas. Yet, Jamie Ambrose testified that there were at least three other hourly employees with "multiple or recent disciplinary issues" and numerous others with related problems who she had identified to CalPortland. *Id.* at 753. These disciplinary issues were significant enough for Ambrose to provide those employees with negative references, as she did with Pappas. Furthermore, while Salzborn testified that Pappas's disciplinary problems were at the forefront of his mind as he had recently attended Pappas's grievance meeting, Salzborn had also contemporaneously attended grievance meetings involving other miners with disciplinary issues. *Id.* at 753 n.32. He did not give negative recommendations about those other miners.

Although the Judge found that Salzborn exhibited animus based on his anger at the safety meeting, the Judge did not mention an even greater basis for Salzborn's animus towards Pappas. A few weeks after the train incident, Pappas approached an MSHA inspector at the mine, and reported the incident. After speaking with Pappas, the inspector began an investigation of the train incident, which resulted in the issuance of citations to Riverside, the temporary closure of the shipping facility, and the mandatory installation of an additional lock on the rail tracks. *Id.* at 724. Shortly after receiving these citations, Salzborn restricted Pappas' ability to use the company truck. When Salzborn discovered that Pappas used the truck again, he terminated Pappas for "gross insubordination." *Id.*; Tr. 648. In settling the resulting section 105(c) discrimination complaint, Riverside was required to pay a \$5,000 penalty in addition to reinstating Pappas with back pay and expunging his personnel file of related records.

The clear implication of the settlement was that Salzborn's firing of Pappas for "gross insubordination" was a pretext for unlawful discrimination. The acceptance of the settlement by Riverside amounted to a rebuke of Salzborn's management of the plant. The evidence certainly

³ In December 2013, Pappas was working with two other miners replacing filters on the chutes which loaded rail cars at the mine's pack house. There were three tracks at that location, and the crew was working on manlifts elevated above two of the tracks. A train of cars emerged, backing up on the one track which fed the three tracks, heading for the location where the crew was. There was no lock on that track, and no miner stationed as a lookout at the back of the train, and thus no way to notify the locomotive operator to stop because there were other miners working on the tracks. Pappas's crew were not able to move out of the train's way, but fortunately the train ended up coming down the third track and stopping, so no one was injured. Pappas felt that his life and the lives of his co-workers had been endangered by the moving train. 39 FMSHRC at 723.

supports the Judge's conclusion that Salzborn's statement to Walters about Pappas was in part motivated by animus against his protected activity.

B. The Affirmative Defense – Salzborn

In evaluating whether Riverside established an affirmative defense, the Judge expressly found that Salzborn would have provided Pappas with a negative reference based on Pappas' unprotected activities alone. 39 FMSHRC at 758. Salzborn testified about three disciplinary incidents that formed the basis of his negative reference – the most recent incident involving Pappas's dispute with Stacy Portis, a prior 2010 suspension, and the aforementioned truck incident. Tr. 638-39.

It is the Commission's task to review the Judge's finding to determine if it supported by substantial evidence. When reviewing a Judge's factual determinations, the Commission is bound by the terms of the Mine Act to apply the substantial evidence test. 30 U.S.C. § 823(d)(2)(A)(ii)(I). In reviewing the whole record, we must consider anything in the record that "fairly detracts" from the weight of the evidence. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

I find that the Judge erred in failing to consider that Salzborn's asserted rationale for the negative reference included, in part, events that Riverside was ordered to expunge from Pappas' disciplinary history. 39 FMSHRC at 756-57. One cannot rely on an event that the Commission had previously ordered to be expunged from a miner's disciplinary history in a subsequent case to establish that the miner had a history of disciplinary issues.

The Judge further erred when he failed to consider his previous finding that Salzborn had disparately treated Pappas, *see id.*, when he analyzed Riverside's affirmative defense. Specifically, in the context of the affirmative defense the Judge held that there was "very little evidence of disparate treatment" and "the Secretary's case lacked detailed comparisons between employees who were and were not recommended." *Id.* at 757. However, as noted, the Judge had already found disparate treatment of Pappas on the part of Salzborn. Ambrose provided negative references for multiple employees with disciplinary issues, but Salzborn singled out Pappas. It was Riverside's burden to establish an affirmative defense, not the Secretary's. *See Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817-18. Accordingly, the fact that the Secretary did not provide a detailed comparison of employees who were and were not recommended is irrelevant.

For these reasons I find that evidence in the record as well as the Judge's own findings detract from his conclusion that Salzborn would have given a negative recommendation about Pappas based on unprotected activity alone.

C. The Affirmative Defense – Riverside

However, whether Salzborn would have given a negative recommendation based on Pappas' unprotected activity alone is not determinative. The question is whether *Riverside* would have provided a negative recommendation to CalPortland about Pappas based on his

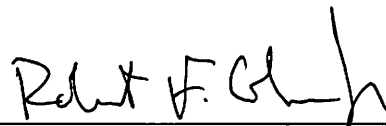
unprotected activity alone. Accordingly, the negative reference supplied by Ambrose is also relevant to the establishment of an affirmative defense. To analyze this issue, we can look at the relative weight of the statements of Salzbom and Ambrose.

CalPortland had established a system for the evaluation and hiring of Riverside's hourly employees. Betsy Lamb, CalPortland's vice president of organizational planning and development, made recommendations to Walters based on the job applications and interviews, with additional input provided by Steve Antonoff's summary of Ambrose's recommendations. Walters accepted all of Lamb's recommendations. Lamb testified that she did not recommend Pappas because his application did not demonstrate that he was progressing as an employee, and because she believed that he answered the interview questions poorly. 39 FMSHRC at 731-32.

Although Ambrose's recommendation about Pappas had some significance to Lamb's decision, there is insufficient evidence in the record to demonstrate any effect by Salzbom's statement. Salzbom's negative reference was made to Walters, who was not called as a witness. The only evidence from Walters is the MSHA investigator's interview summary, Gov. Ex. 22, and the investigator's hearsay testimony. According to the investigator, Walters said that he did not personally make any decisions about hourly employees; he left that up to Lamb. Walters acknowledged talking with Salzbom, and that Salzbom had told him that Pappas was not a good employee. Although Salzbom's statement made Pappas a "No", Pappas was already on the "No" list compiled by Human Resources. *Id.* Thus, since Walters followed all of Lamb's recommendations for the hiring of hourly employees, and since Lamb did not recommend that Pappas be hired, Salzbom's negative reference was ultimately inconsequential.

Accordingly, I believe that the relative weight of the recommendations by Salzbom and Ambrose support the Judge's conclusion that Riverside established an affirmative defense. Riverside's negative reference of Pappas would have been made based on unprotected activity alone.

Hence, I concur with the majority that the Judge's decision should be affirmed in result.



Robert F. Cohen, Jr., Commissioner

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