FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR

WASHINGTON, D.C. 20006

September 19, 2001

SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA)	:	
on behalf of LEONARD BERNARDYN	:	
	:	
v.	:	Docket Nos. PENN 99-158-D
	:	PENN 99-129-D
READING ANTHRACITE COMPANY	:	

BEFORE: Verheggen, Chairman; Jordan, Riley and Beatty, Commissioners

DECISION

BY: Verheggen, Chairman, and Riley, Commissioner

This discrimination proceeding, before us for a second time, arises under section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1994) ("Mine Act" or "Act"). In his original decision, Administrative Law Judge Avram Weisberger concluded that Reading Anthracite Company ("Reading") did not violate section 105(c)(1) of the Act when it discharged miner Leonard Bernardyn on November 10, 1998. 21 FMSHRC 819, 824 (July 1999) (ALJ). The Commission vacated Judge Weisberger's decision and remanded the matter for further analysis. 22 FMSHRC 298 (Mar. 2000) ("*Bernardyn I*"). On remand, the judge again concluded that Reading's discharge of Bernardyn did not violate section 105(c)(1). 22 FMSHRC 951, 955 (Aug. 2000) (ALJ). The Commission granted the Secretary's petition for discretionary review ("PDR") of the judge's remand decision. For the following reasons, we vacate that decision and remand for further analysis.

I.

Factual and Procedural Background

A. Facts and Initial ALJ Decision

Bernardyn had worked for Reading for nineteen years, including working as a haulage truck driver at Reading's Pit 33, a coal mine in Wadesville, Pennsylvania, for approximately four

and a half to five years before his discharge. 22 FMSHRC at 299. Around 7:00 a.m. on November 10, 1998, Bernardyn began driving his 190-ton Titan haulage truck on his usual route. *Id.* Overall, the road has a grade of approximately 8%, and parts of it are as steep as 10.3%. *Id.* When Bernardyn began driving, the weather was foggy and misty, and slippery road conditions caused Bernardyn to drive slower than usual. *Id.*

After prompting from Reading's general manager Frank Derrick, who had seen the Titan driving slowly, mine superintendent Stanley Wapinski stopped Bernardyn and asked him why he was driving slowly. *Id.* Bernardyn responded that the roads were getting slippery. *Id.* Wapinski told Bernardyn to drive faster. *Id.* Approximately 20 minutes later, Derrick again noticed a Titan truck driving slowly and asked Wapinski whether it was the same truck. *Id.* When Wapinski answered yes and identified Bernardyn as the driver, Derrick told him to remove Bernardyn from the haulage run. T. Tr. at 85-86.[1] Wapinski met Bernardyn at the pit and told him he was holding things up, and directed him to meet Wapinski at the dump after his current run. 22 FMSHRC at 299.

After the second conversation with Wapinski, Bernardyn used the C.B. radio in his truck to call Thomas Dodds, the United Mine Workers of America ("UMWA") safety committeeman. *Id.* Dodds was driving a truck on the same shift as Bernardyn. *Id.* Bernardyn told Dodds he was being asked to drive at a higher speed than he believed was safe given the poor road conditions. *Id.* During his 8-10 minute complaint to Dodds, Bernardyn repeatedly cursed and, referring to Wapinski, said "I'll get the little f----r." *Id.* Derrick overheard Bernardyn's complaints and profanity on the C.B. radio, but he testified that "it never crossed my mind to pick up the CB and tell him to stop." T. Tr. 116. Derrick fired Bernardyn after he had dumped the load in his truck, assertedly for profanity and threatening a supervisor over the C.B. radio. 22 FMSHRC at 299-300.

Within 30 minutes after Bernardyn's termination, road conditions worsened, and a layer of ice had formed on the road. *Id.* at 300 n.2. After a foreman's truck slid down the haulage road, the road was shut down due to the slippery conditions. *Id.*

On November 12, 1998, Bernardyn filed a discrimination complaint with MSHA alleging that he was discharged unlawfully. *Id.* at 300. The Secretary's application for temporary reinstatement was granted, and Bernardyn was ordered temporarily reinstated to his former position on March 19, 1999. 21 FMSHRC 339, 342 (Mar. 1999) (ALJ).

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[1] Hearings on Bernardyn's temporary reinstatement application and on the merits of his discrimination complaint were held on March 16 and May 18, 1999, respectively. References to the transcript of the temporary reinstatement hearing are in the form "T. Tr." References to the transcript of the merits hearing are in the form "M. Tr." The judge incorporated the transcript and exhibits from the temporary reinstatement hearing into the record of the merits proceeding. M. Tr. 9-10.

On the merits of the complaint, the judge found that Bernardyn engaged in protected activity when he drove at a speed consistent with the road conditions, that Reading's discharge of Bernardyn constituted adverse action, and that, based on the coincidence in time between Derrick's order to Wapinski to stop Bernardyn twice for driving too slowly, and Derrick's discharge of Bernardyn, the Secretary established a prima facie case of discrimination. 21 FMSHRC at 822. However, the judge determined that Reading would have fired Bernardyn in any event for the 8-10 minute cursing episode over the CB radio and his threatening language directed towards Wapinski. *Id.* at 823. The judge rejected the Secretary's argument that in discharging Bernardyn, Reading treated him disparately when compared with other employees who had cursed but had only received warnings. *Id.* at 822-23. The Secretary petitioned the Commission for review of the judge's decision.

B. *Bernardyn I*

On review, the Commission concluded that the judge failed to properly analyze evidence relevant to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and the operator's treatment of other miners who had cursed. 22 FMSHRC at 302-03 (citing *Sec'y of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984)). The Commission also ordered the judge to resolve the issue of which of two different disciplinary policies was in effect at the time of Bernardyn's discharge.[2] 22 FMSHRC at 303-04. The Commission further instructed the judge to resolve the inconsistency between his finding that Bernardyn did not believe he threatened Wapinski, and his statement that Derrick terminated Bernardyn because he threatened Wapinski. *Id.* at 304-05. The Commission also ordered the judge to analyze "how Bernardyn's words could constitute a threat when Wapinski . . . did not hear Bernardyn's supposedly threatening language;" "whether Wapinski perceived any threat at all — let alone a threat of physical harm;" and "whether the general words Bernardyn used, which named no person in particular, constituted a threat against Wapinski." *Id.* at 305. Finally, the Commission instructed the judge to determine whether Bernardyn's cursing and alleged threat were provoked by Reading's response to his protected refusal to drive faster, and, if so, "whether the particular facts and circumstances of this case, when viewed in their totality, place Bernardyn's conduct within the scope of the 'leeway' the courts grant employees whose 'behavior takes place in response to [an] employer's wrongful provocation.'" *Id.* at 307-08.

C. The ALJ's Remand Decision

In his remand decision, the judge found that the 1987 disciplinary policy was in effect at the time of Bernardyn's discharge. 22 FMSHRC at 952-53. Although taking "cognizance" of,

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[2] Reading's 1987 disciplinary policy established a system of progressive discipline for most offenses, and did not include cursing or insubordination among the four offenses subjecting employees to "immediate suspension subject to discharge." Gov't Ex. B at 1. Its 1998 disciplinary policy provided for immediate discharge for insubordination. R. Ex. 2 at 1.

and briefly discussing, four other incidents of miners cursing without being discharged, the judge concluded that, "based on Derrick's testimony, . . . I find credible, inasmuch as it was not impeached or contradicted, that, in contrast to these individuals who just received warnings, Bernardyn used threatening language over the C.B. radio . . . ." *Id.* at 953 (emphasis in original). The judge also found that "the other individuals made a profane remark only once, whereas Bernardyn used profanity 'non-stop' for approximately 8 to 10 minutes," and that Bernardyn's conduct was "more egregious, and thus not in the same category as the others who were merely warned." *Id.* (citations omitted).

In finding that Bernardyn threatened Wapinski, the judge found Bernardyn's "general statement [that he had never threatened anybody in his life] insufficient to contradict or impeach Derrick' testimony regarding the specific language used by Bernardyn." *Id.* at 952 (emphasis in original). The judge found Bernardyn's state of mind was not dispositive of whether Bernardyn threatened Wapinski. *Id.* Rather, he stated that he relied on "the objective context in which Bernardyn uttered the statement at issue" — namely that Bernardyn made the statement over the C.B. radio in an attempt to contact his union representative, and that he admitted he cursed, thereby exhibiting a degree of animus. *Id.* (emphasis in original). The judge concluded that Bernardyn's statement "constituted a threat, i.e., an expression of an intent to inflict harm on another." *Id.*

The judge also found that the record does not contain "any actions or conduct on the part of any of Reading's agents that might constitute an act of provocation," and concluded that "the Secretary has failed to establish that Reading provoked Bernardyn into using profanity and issuing a threat over a C.B. radio." *Id.* at 953 (emphasis in original). He also found that Wapinski's statements to Bernardyn "are devoid of any threat or expression of animus toward Bernardyn or his protected activity." *Id.* Finally, the judge also determined that Bernardyn's unprotected activities were "out of proportion to the one-time, brief statements Wapinski made to him." *Id.* at 953-54.

II.

Disposition

The Secretary submits that the judge erred in finding that Reading would have discharged Bernardyn for using profanity and making a threat even if Bernardyn had not engaged in protected activity. PDR at 8.[3] She argues that the judge failed to give any consideration to the fact that, in discharging Bernardyn, Reading departed from the plain terms of its 1987 disciplinary policy. *Id.* at 15. She also asserts that the judge's conclusion is erroneous because Bernardyn did not make a threat, cursing was prevalent among employees and management at Reading, and Bernardyn's 8-10 minute cursing episode was not more serious than other employees' histories of cursing. *Id.* at 18-19. The Secretary also argues that the judge erred in basing his conclusion that

[3] The Secretary designated her PDR as her opening brief.

there was no provocation on his finding that Reading's actions did not contain a threat or expression of animus. *Id.* at 23-24. The Secretary also maintains that Bernardyn's utterance of his statement that he would "get" a member of management is outweighed by Reading's provocative act of ignoring Bernardyn's expression of legitimate safety concerns. *Id.* at 25. The Secretary characterizes as without legal or logical basis the judge's finding that Reading did not provoke Bernardyn's cursing and alleged threat because Reading's allegedly provocative behavior consisted only of statements and not actions. *Id.* at 23.

Reading responds that the judge correctly found that Bernardyn's conduct was distinguishable from the conduct of Reading employees who had only received warnings for cursing in that Bernardyn's statements were broadcast over the C.B. radio, continued for eight to ten minutes, and contained a threat aimed at Wapinski, and that the operator would have discharged Bernardyn even if he had not engaged in protected activity. R. Br. at 6, 12. Reading disagrees with the judge's conclusion that the 1987 policy was in effect at the time of Bernardyn's discharge. *Id.* at 12. Reading submits that substantial evidence supports the judge's finding that Bernardyn threatened Wapinski. *Id.* at 11. Reading argues that none of Bernardyn's testimony supports the Secretary's assertion that his outburst was provoked by Reading or that he believed he was in danger of being disciplined. *Id.* at 15-19. Finally, Reading claims that, even though Bernardyn's statements arguably expressed a feeling that he was not comfortable driving as fast as Reading officials asked him to drive, his "extreme" and "disproportionate" response stripped him of the protection of the Mine Act. *Id.* at 17.

A. The *Pasula-Robinette* Framework

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y of Labor on behalf of Pasula v. Consol. Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part 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 also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also E. Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Here, Reading does not dispute the judge's finding that the Secretary established a prima facie case. The analysis therefore shifts to whether substantial evidence[4] supports the judge's conclusion that Reading would have terminated Bernardyn even if he had not engaged in protected activity. To make out its affirmative defense, the operator must prove by a preponderance of the evidence that it would have taken the adverse action in any event because of unprotected activity alone. *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 14 FMSHRC 1549, 1556 (Sept. 1992) (citing *E. Assoc. Coal Corp.*, 813 F.2d at 642).

The affirmative defense may be challenged on the ground that it is pretextual. *See Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2516 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983). The Commission has stated that, in considering an employer's business justification, "pretext may be found, for example, where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price & Vacha v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (citing *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937-38 (Nov. 1982)). The Commission held in *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833 (May 1997) that, "[i]n 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.* at 838 (citation omitted). The Commission has cautioned that this affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro*, 4 FMSHRC at 1938. However, "[o]nce it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate." *Chacon*, 3 FMSHRC at 2516.

B. Disparate Treatment

In *Chacon*, the Commission indicated that disparate treatment, in addition to serving as one of the possible bases of a prima facie case, may also be established by a complainant to refute an operator's affirmative defense. 3 FMSHRC at 2512-13, 2517. In analyzing whether a complainant was disparately treated in the context of termination for using offensive language, the Commission has looked to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and how the operator treated

[4] When reviewing an administrative law 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). "Substantial evidence" means "'such relevant evidence as a reasonable mind might accept as adequate to support [the judge's] conclusion.'" *Rochester & Pittsburgh Coal Co.*, 11 FMSHRC 2159, 2163 (Nov. 1989) (quoting *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)). In reviewing the whole record, an appellate tribunal must consider anything in the record that "fairly detracts" from the weight of the evidence that supports a challenged finding. *Midwest Material Co.*, 19 FMSHRC 30, 34 n.5 (Jan. 1997) (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

other miners who had cursed. *See Cooley*, 6 FMSHRC at 521; *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 532-33 (Apr. 1991).

Notwithstanding the Commission's conclusion in *Bernardyn I* that the judge "failed to adequately analyze the evidence relevant to the *Cooley* factors," 22 FMSHRC at 303, on remand the judge did not rely on *Cooley* and again failed to correctly apply the *Cooley* factors. Accordingly, we are constrained once more to vacate the judge's decision and remand for application of Commission precedent. On remand, the judge must reconsider his reiteration of his initial determination that Bernardyn did not suffer disparate treatment and discrimination under section 105(c), according to the principles set forth below.

1. Complainant's Prior Use of Profanity

In concluding in *Bernardyn I* that the judge had failed to adequately analyze evidence relating to the *Cooley* factors, we found that "the record does not contain any evidence of prior difficulties Reading may have had with Bernardyn swearing." 22 FMSHRC at 303. Yet in the two paragraphs he devoted to the disparate treatment issue on remand, the judge made no reference to this finding, which was dispositive of one of the *Cooley* factors and weighs against a finding that Reading established its affirmative defense. On remand, we direct the judge to apply this prong of the *Cooley* test in determining whether Reading treated Bernardyn disparately and would have terminated him solely for his unprotected conduct.

2. Disciplinary Policy on Cursing

The judge found that Reading's 1987 disciplinary policy was in effect at the time of Bernardyn's discharge. As the judge pointed out, an August 4, 1998 letter from Reading's attorney to a UMWA executive board member states that "the Company will implement the attached Code of Conduct following the conclusion of the current negotiations and ratification of the new collective bargaining agreement." 22 FMSHRC at 952. At the hearing, the UMWA District Executive Board Member testified that the new collective bargaining agreement was not ratified until November 16, 1998, after Bernardyn's November 10 discharge. M. Tr. 45-46. Moreover, a November 17, 1998 letter from Reading's attorney stated that Reading accepted the terms of the new 1998 code of conduct proposed by the UMWA, subject to a handful of new provisions described in the letter. Gov't Ex. A. Accordingly, we conclude that substantial evidence supports the judge's finding that the 1987 policy was in effect at the time of Bernardyn's discharge.

Having found that the 1987 disciplinary policy was in effect, however, the judge inexplicably failed to apply this finding to the issue of disparate treatment. In remanding this proceeding to the judge, we stated:

> Determining which disciplinary policy was in effect on November 10 *is a crucial factor to consider in deciding whether Bernardyn's discharge subjected him to disparate treatment and, more broadly, whether Reading established that it would have terminated Bernardyn for his unprotected activity alone.*

22 FMSHRC at 303 (emphasis supplied).

There is simply no provision in Reading's 1987 code of conduct establishing either cursing or threatening language as an offense warranting immediate termination. Gov't Ex. B. The 1987 policy classifies offenses into three groups. *Id.* Misconduct falling under the heading "Discharge for Just Cause" subjected employees to "immediate suspension subject to discharge." *Id.* at 1. Only four offenses were listed in this classification:

> 1. Stealing.
> 2. Possessing or using intoxicants or drugs in the area of work.
> 3. Carrying weapons on Company property.
> 4. Physical fighting.

Id.

Another group of offenses subjected employees to "discharge following complete exhaustion of disciplinary warning and suspensions." *Id.* at 2. Under Reading's 1987 policy, the penalty for the first act of misconduct for these offenses was "a verbal warning."[5] *Id.* Neither cursing nor threats was listed as an offense under this category. *Id.* Nevertheless, Reading administered progressive discipline to several employees who cursed or verbally abused members of management. However, the four other reported incidents of cursing at Reading also involved other acts of misconduct or insubordination. Gov't Ex. C; M. Tr. 29. Specifically, in addition to cursing, other miners who cursed and were disciplined by Reading also left assigned work areas early, arrived for work late, argued with foremen about job assignments, ignored a supervisor giving work assignments, and refused to perform a job out of classification as ordered. Gov't Ex. C; M. Tr. 29. In none of these cases was the employee discharged.[6] Gov't Ex. C; M. Tr. 29. Thus, Reading had no established practice of disciplining workers for cursing in the absence of accompanying insubordinate acts, or of treating cursing as conduct warranting immediate discharge. *Cf. Cooley*, 6 FMSHRC at 521 ("[T]here is no evidence that anyone had ever been disciplined by [the operator] for swearing . . . ."); *Knotts*, 19 FMSHRC at 838, 840

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[5] A third category of misconduct under the 1987 policy involved "willful safety violation[s]." Gov't Ex. B at 3.

[6] Four of the cases involved oral or written warnings. Gov't Ex. C. In one case, two miners were "fired for refusing to do a job out of their classification," not for cursing, but were returned to work one day after a grievance meeting. M. Tr. 28-30, 36-37.

(finding that operator failed to establish an affirmative defense because it "offered no evidence of past discipline, prior work record, or personnel practices showing that it would have terminated [complainant] regardless of his protected activity").

The judge failed to address the 1987 policy, or the policy prong of the *Cooley* standard, in his brief discussion of disparate treatment. 22 FMSHRC at 953. In his conclusion, the judge appeared to acknowledge that, under the terms of Reading's 1987 disciplinary policy and under its application of that policy prior to Bernardyn's discharge, Reading did not prohibit cursing or threats and did not permit immediate termination of miners who cursed or uttered a threat. The judge stated:

> The disciplinary policy of 1987 in effect when Bernardyn was terminated did not specifically grant Respondent the right to terminate an employee based upon the latter's use of profanity, and the issuance by the latter of a threat against a supervisor.

Id. at 955.

Based on the judge's findings that the 1987 disciplinary policy was in effect, that the policy did not permit summary termination for profanity or using threatening language, and that Reading nevertheless immediately discharged Bernardyn for those offenses, the conclusion is inescapable that Reading violated its policy in terminating Bernardyn. Yet the judge failed to apply these findings in deciding that Reading did not subject Bernardyn to disparate treatment. We direct the judge to do so when he revisits the disparate treatment issue on remand.

3. Treatment of Similarly Situated Miners

The judge distinguished Bernardyn's cursing from prior incidents of cursing at Reading on the following grounds: (1) Bernardyn's cursing was broadcast over the C.B. radio, (2) Bernardyn cursed for approximately 8 to 10 minutes, whereas other miners cursed only once, and (3) only Bernardyn threatened a supervisor. 22 FMSHRC at 953. We must decide whether the judge properly distinguished Bernardyn's cursing episode from prior cursing episodes at Reading that were either not cited at all as the basis for discipline, or resulted only in warnings.

a. Use of C.B. Radio

We understand the judge's finding regarding Bernardyn's use of the C.B. radio to mean that, because other people at the mine could hear his profane outburst, his case was distinguishable from prior cursing incidents. In this regard, Reading claimed at the hearing that the fact that other employees could hear Bernardyn's cursing influenced Derrick's decision to discharge Bernardyn. T. Tr. 127. However, like Bernardyn's cursing episode, other incidents of cursing at Reading involved miners who directed profanity at supervisors in the presence of other employees. Gov't Ex. C at 1, 4. For instance, one miner told a supervisor in front of other employees to

"kiss his Irish a--," and received only a verbal warning. *Id.* at 1. In another instance, at the same time the production foreman talked with other employees in front of the "Mine Comm. Chairman," an employee ignored the production supervisor, walked away from him and said, "Ah — f--- you, I'm sick of this f---in s--t." *Id.* at 4. This employee was given a one-day suspension for verbal abuse and failing to listen to a supervisor. *Id.* Accordingly, we conclude that substantial evidence does not support the judge's finding that Bernardyn's broadcast of his cursing over the C.B. radio materially distinguished his cursing episode from previous cursing incidents.

b. Duration of Cursing

The judge cited no authority for his assertion that the duration of Bernardyn's outburst was a factor distinguishing his from others. Commission precedent establishes that it is not the duration of various single incidents that is most relevant to disparate treatment analysis, but rather whether there was a prior problem with misconduct involving the complainant. *See Cooley*, 6 FMSHRC at 521. In addition, we note Derrick's concession that he could have contacted Bernardyn on the C.B. and told him to stop cursing, but "it never crossed [his] mind" to do so. T. Tr. 116. Thus, the record establishes that Reading could have terminated Bernardyn's outburst at any time.

Moreover, in comparing Bernardyn's cursing to prior cursing incidents, the judge found that the other miners who cursed at Reading had done so "only once." 22 FMSHRC at 953. Substantial evidence does not support this finding. One miner received at least two warnings for three separate incidents of verbal abuse within a two-month period, and yet was not terminated for cursing. *See* Gov't Ex. C at 2-3.[7] Bernardyn had no such history of cursing.

c. Bernardyn's Alleged Threat

We note at the outset that, even if Bernardyn's statement could be construed as a threat, it would not be dispositive of the disparate treatment issue because, under Reading's 1987 disciplinary policy, threats are not among the offenses justifying immediate discharge. That said, we are satisfied that substantial evidence does not support the judge's finding that Bernardyn threatened his supervisor.

Although the Commission instructed the judge to re-examine his holding that Bernardyn threatened Wapinski, given that Wapinski did not hear Bernardyn's statement, and in view of Bernardyn's use of only general words, the judge did not address either circumstance on his way to reiterating his initial finding that a threat was made. We find this lapse troubling. *See Dolan v. F&E Erection Co.*, 23 FMSHRC 235, 240-41 (Mar. 2001) (reiterating that judges must strictly follow Commission's remand instructions).

[7] This same miner had previously been given two verbal warnings and a written warning. Gov't Ex. C.

While delineating the parameters of a threat appears to be a question of first impression for the Commission, we now hold that a single, general statement that mentions no person by name, unaccompanied by coercive conduct or warning of specific harm, made in the course of a safety complaint to a safety representative, and not directed to any possible subject of the statement, does not constitute a threat. Our holding is consistent with decisions of the National Labor Relations Board ("NLRB" or "Board") and courts, which have looked to the words uttered, as well as the circumstances surrounding an alleged threat.[8] For example, in *Vought Corp.*, 273 N.L.R.B. 1290, 1292, 1295 (1984), *aff'd*, 788 F.2d 1378 (8th Cir. 1986), the NLRB held that an employee who, upon being ordered to sign a disciplinary statement the employee believed to be based on erroneous facts, said to his supervisor, "I'll have your a--" did not issue a physical threat, but rather made a threat to file an unfair labor practice charge or to report the supervisor to higher management. In *Heck's Inc.*, 280 N.L.R.B. 475, 479 (1986), the Board found that a discharged employee's statement that the employer "will get his, I guaran-d--n-tee you" was not a threat of bodily harm and was made when he was discussing with co-workers alleged grievances against management. In *Anaconda Insulation Co.*, 298 N.L.R.B. 1105, 1112-13 (1990), the Board determined that conduct of an employee who called a superintendent a "son of a b----" and threatened to "get" him did not constitute a threat of immediate harm or cause damage to property.

The Tenth Circuit's decision in *Midwest Solvents, Inc. v. NLRB*, 696 F.2d 763 (10th Cir. 1982), is also instructive. In that case, an economic striker went to a non-striking employee's apartment and stated that he had better "watch" himself, and that "some of the boys might get rowdy." *Id.* at 766. The Tenth Circuit stated that "[i]n the absence of other threatening statements or of some coercive action, this statement is too ambiguous to be considered a threat." *Id.*

However, threats have been found where employees threaten to kill or harm employees. For instance, in *NLRB v. R.C. Can Co.*, 340 F.2d 433, 434, 436 (5th Cir. 1965), the Fifth Circuit found that a wrongfully fired employee's statement to his supervisor that he "would kick the hell out of him the first chance I got," was deemed serious enough to justify the employer's refusal to reinstate the employee. In *Associated Grocers of New England, Inc. v. NLRB*, 562 F.2d 1333, 1336-37 (1st Cir. 1977), an employee's statement to three job applicants that they should not cross the picket line "if they valued their lives," was described by the First Circuit as a threat.

The substance and context of Bernardyn's statement closely parallels situations in which the NLRB and courts have concluded that no threat occurred. Here, as in *Midwest Solvents*, *Vought*, and *Heck's*, Bernardyn's statement that he would "get" an unnamed person was general

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[8] The Commission has looked to law developed under the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994) ("NLRA"), for guidance in interpreting similar provisions of the Mine Act. *See, e.g.*, *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990) (recognizing that "cases decided under the NLRA — upon which much of the Mine Act's antiretaliation provisions are modeled — provide guidance on resolution of discrimination issues under the Mine Act").

and vague, and it was not repeated or accompanied by any threatening action. Moreover, like the complainant in *Heck's*, Bernardyn did not speak directly to any possible object of his statement, and made his statement in the course of complaint to a union safety committeeman about management actions. Bernardyn's statement is distinguishable from those of the employees in *Associated Grocers* and *R.C. Can* in that his words were not spoken directly to Wapinski, and his vague statement lacked the evidence of a threat of bodily harm exhibited by the employees in those cases.

Reading cites *NLRB v. Bin-Dicator Co.*, 356 F.2d 210, 212-14 (6th Cir. 1966), for the proposition that an employee's statement that he would "get" his manager was deemed a threat. The employee in *Bin-Dicator* stated "[t]his is a personal feud between you and me. I don't know when, but some day we are going to meet, and I am going to get you." *Id.* at 212. However, unlike the present case, the employee went on to threaten that "[w]hen I get you, you can expect to spend some time in a wheelchair," made a physical threat with a leather work mitten, the back of which was covered in metal staples, and subsequently threatened to strike the supervisor with a six and a half pound casting. *Id.* at 212-13. Moreover, in contrast to the instant matter, the employee verbally and physically threatened the supervisor in a direct confrontation. *Id.*

Finally, in support of his finding that Bernardyn threatened Wapinski, the judge stated that Bernardyn's cursing evidenced "a degree of animus." 22 FMSHRC at 952. However, as suggested by *Vought*, *Heck's* and *Anaconda*, an employee's expression of anger towards a supervisor is not tantamount to a threat.

In light of our determination that Bernardyn's use of the C.B. radio and the duration of the cursing incident do not meaningfully distinguish Bernardyn from other Reading employees who were not terminated for cursing, we conclude that substantial evidence does not support the judge's finding that Bernardyn was not similarly situated to those employees. Consequently, as to the third *Cooley* factor, we conclude that substantial evidence fails to support the judge's finding that Reading did not treat Bernardyn more harshly than similarly situated employees. The record evidence that Reading merely warned other miners for engaging in conduct similar to Bernardyn's further detracts from the judge's finding that Reading did not treat Bernardyn disparately. Given our conclusions that the record evidence on the first two *Cooley* factors, past incidents of Bernardyn cursing and Reading's policy concerning profanity, also detract from the judge's negative disparate treatment finding, we direct the judge on remand to reanalyze, consistent with *Cooley*, whether Bernardyn was the victim of disparate treatment.

C. Provocation

If the judge determines on remand that Reading disparately treated Bernardyn by firing him, he need not reach the issue of whether Reading provoked Bernardyn's conduct. However, we address the problems with the judge's analysis of provocation in the hopes of avoiding further appellate proceedings in this matter.

The Commission has held that an employer may not provoke an employee and then rely on the employee's provoked unprotected activity as grounds for discipline. *Moses v. Whitley Dev. Corp.*, 4 FMSHRC 1475, 1482 (Aug. 1982). The complainant in *Moses* was accused on three occasions of reporting an accident at the mine to MSHA. *Id.* at 1476-77. Subsequently, a heated and profanity-laden exchange occurred between the complainant and his foreman, after which the foreman terminated the complainant. *Id.* at 1478. The Commission found that the operator failed to establish its affirmative defense in part because "much of the language and improper attitude [which the operator alleged motivated the complainant's discharge] arose in response to [the operator's] unlawful and provocative attempts to determine if [the complainant] had called the inspectors." *Id.* at 1482.

In *Bernardyn I*, the Commission noted that courts have excused employee outbursts when they are provoked by unjustified employer action. 22 FMSHRC at 306. Courts have recognized that unprotected actions will inevitably occur during otherwise protected activity, and that "not every impropriety is grounds for discharge." *NLRB v. W.C. McQuaide, Inc.*, 552 F.2d 519, 527 (3d Cir. 1977). In *NLRB v. Thor Power Tool Co.*, 351 F.2d 584. 587 (7th Cir. 1965), the court stated that if an employee's conduct is not egregious, there is "some leeway for impulsive behavior."[9]

The leeway provided to employees whose unprotected behavior was provoked by the employer is fairly broad. In *Trustees of Boston University v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977), the First Circuit stated that "the leeway [afforded employees for impulsive behavior] is greater when the employee's behavior takes place in response to the employer's wrongful provocation." In that case, the court upheld an NLRB decision excusing an employee's brandishing of a pair of scissors as provoked by the employer's own wrongful conduct. *Id.* at 392-93. In *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965), the Fourth Circuit recognized that "[t]he more extreme an employer's wrongful provocation the greater would be the employee's justified sense of indignation and the more likely its excessive expression." The court upheld the reinstatement of a complainant who, after her discriminatory layoff, threatened a supervisor and was rude to a vice-president. *Id.* The court noted that "the unjust and discriminatory treatment of [the complainant] gave rise to the antagonistic environment in which these remarks were made." *Id.* In *Coors Container Co. v. NLRB*, 628 F.2d 1283, 1285, 1288 (10th Cir. 1980), the Tenth Circuit held that the complaining employees' unprotected behavior — cursing at employer-hired security guards who attempted to prevent the employees from engaging in protected activity — was excusable impulsive behavior which did not justify discharge. In *NLRB v. Steinerfilm, Inc.*, 669 F.2d 845, 852 (1st Cir. 1982), the First Circuit

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[9] Decisions addressing the question whether an employee's unprotected conduct provides an employer justification for disciplining the miner have utilized an objective standard. *See, e.g.*, *McQuaide*, 552 F.2d at 527 (adopting objective standard which looks at the relevant circumstances to determine whether strikers' statements and actions directed towards non-strikers are sufficiently egregious to justify denying reinstatement of the strikers); *Associated Grocers*, 562 F.2d at 1336 (applying objective standard enunciated in *McQuaide*).

upheld a decision of the NLRB excusing a complainant's offensive and abusive language which occurred during a confrontation with a supervisor in reaction to the supervisor's unjustified warning of the complainant.

Here, Wapinski ordered Bernardyn to drive faster under highly unsafe driving conditions. Because Bernardyn was driving slowly, Derrick ordered Wapinski to remove Bernardyn from the haulage run. Twenty minutes after first ordering Bernardyn to drive faster, Wapinski again approached Bernardyn at the pit, told him he was holding things up, and directed him to meet Wapinski at the dump after his current run. Absent Wapinski's response to Bernardyn's protected refusal to drive faster, Bernardyn would not have had any reason to make the complaint to Dodds during which he used profanity. These facts in the record detract from the judge's conclusion that Reading did not provoke Bernardyn's outburst.

In his remand decision, the judge attempted to distinguish the cases discussed in *Bernardyn I*. The judge stated that the court's decision in *Steinerfilm* was inapposite because "Bernardyn's use of excessive profanity did not follow any unlawful warning or other unlawful act on the part of Respondent." 22 FMSHRC at 954 n.1. The judge also declined to follow *Trustees of Boston University* because, according to the judge, "the plain meaning of the words used by Wapinski in response to Bernardyn's driving slowly due to slippery conditions, do not contain any threat or animus toward Bernardyn relating to his protected activity under the Act, i.e., driving slow due to slippery conditions, and hence were not 'wrongful.'" *Id.*

We are at a loss to understand the reasoning in support of these statements. In his initial decision, the judge stated: "Based on the essentially uncontroverted evidence I find that Bernardyn engaged in protected activities *by driving at a speed consistent with the road conditions* . . . ." 21 FMSHRC at 822 (emphasis supplied). This finding was not before the Commission in *Bernardyn I*, was not remanded to the judge, and is the law of the case. *See Lion Mining Co.*, 19 FMSHRC 1774, 1777 (Nov. 1997) (holding that on remand, judge may not revisit on appeal portions of initial decision). The Secretary's mandatory safety standards require that "[e]quipment operating speeds shall be prudent and consistent with conditions of roadway, grades, clearance, visibility, traffic, and the type of equipment used." 30 C.F.R. § 77.1607(c). It is undisputed that the roadway was not only pitched at a grade of 8%, ranging in places up to 10.3%, but that conditions were foggy and misty, the roadway was slippery, conditions were worsening, a layer of ice later formed on the road, and the road was shut down within 30 minutes of Bernardyn's termination after a foreman's truck slid down the haulage road.

Moreover, once Bernardyn communicated to Reading his reasonable concern about driving faster on the slippery roads, Reading was obligated to address the perceived danger in a manner that his fears reasonably should have been quelled. *Gilbert v. FMSHRC*, 866 F.2d 1433, 1441 (D.C. Cir. 1989); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 (Feb. 1984), *aff'd sub nom. Brock on behalf of Parker v. Metric Constructors, Inc.*, 766 F.2d 469 (11th Cir. 1985); *Sec'y of Labor on behalf of Pratt v. River Hurricane Coal Co.*, 5 FMSHRC 1529, 1534 (Sept. 1983). Here, far from addressing Bernardyn's legitimate safety concerns in a manner that should

have allayed them, Reading exacerbated the situation by directing Bernardyn to drive faster and then removing him from the haulage run when he refused. Based on these uncontroverted facts, if the judge finds it necessary to reach the provocation issue on remand, he must revisit his determination that Reading's instruction to Bernardyn to speed up was not wrongful.

Further, Wapinski's order that Bernardyn drive faster, his accusation that Bernardyn was holding things up, and his directive, in compliance with Derrick's instruction to remove Bernardyn from the haulage run, that Bernardyn meet him at the dump, were all in response to what the judge found to be Bernardyn's protected activity — driving at a speed consistent with road conditions. Whether Wapinski's order to Bernardyn to essentially operate the haulage truck in an unsafe manner is itself a "threat" or constitutes "animus" is entirely beside the point. The judge does not cite any authority for the novel proposition that an order to work unsafely is insufficient to constitute provocation.[10]

If the judge addresses the provocation issue on remand, he must also revisit his characterization of Bernardyn's conduct as "most egregious." 22 FMSHRC at 955 n.1 (emphasis in original). The judge based this conclusion on his findings on the duration of Bernardyn's cursing over the C.B. radio, and the "threat" uttered by Bernardyn. But as we have already found, substantial evidence in the record does not support the finding that Bernardyn threatened anybody, the duration of the episode was due in part to Derrick's unexplained failure to stop the outburst, and the fact that others heard the outburst does not materially distinguish this case from others involving Reading miners. Bernardyn's conduct was no more serious than the actions of employees found to have been provoked under the NLRA. *See, e.g.*, *M & B Headwear*, 349 F.2d at 174 (involving employee provoked into threatening a supervisor and being rude to a vice-president); *Blue Jeans Corp.*, 170 N.L.R.B. 1425, 1425 (1968) (holding that employee's statement that she "would kill the S.O.B." who told the company about her union activities, and her actions in threatening the plant manager with scissors in hand, were provoked by employer's discriminatory treatment of her).

Moreover, contrary to the judge's finding, neither Commission precedent nor other case law draws a distinction between provocative "words" and provocative "actions." In any event, the direct order by Bernardyn's supervisor to drive faster under poor road and weather conditions gave Bernardyn the unfortunate choice of either complying with the order and risking the consequences to life and limb of driving faster, or disobeying the order and risking discipline for insubordination. *See Anaconda Insulation Co.*, 298 N.L.R.B. at 1111, 1113 (holding that supervisor giving employee "Hobson's choice" to either cross picket line or quit justified complainant's unprotected cursing and alleged threat). This order, and indeed the order removing Bernardyn from the haulage run, effected management action.

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[10] The judge also stated that, in contrast to the facts in *M&B Headware*, in the present case "there is no evidence of any unjust and discriminatory treatment of Bernardyn to lead to a conclusion that any wrongful provocation existed." 22 FMSHRC at 954 n.1. As we have already held, however, the judge's analysis of the disparate treatment issue was erroneous.

In *Bernardyn I*, the Commission instructed the judge to consider "whether the particular facts and circumstances of this case, when viewed in their totality, place Bernardyn's conduct within the scope of the 'leeway' the courts grant employees whose 'behavior takes place in response to [an] employer's wrongful provocation.'" 22 FMSHRC at 307-08. The judge did not directly address the "leeway" question. 22 FMSHRC at 953-54. On the other hand, he determined that Bernardyn's statement was "out of proportion to the one-time, brief statements Wapinski made to him." *Id.* at 954.

We observe initially that the judge's reference to "one-time" statements is puzzling. The record establishes that Wapinski spoke to Bernardyn on two occasions, during which he ordered Bernardyn to speed up and directed him to meet Wapinski at the dump for the purpose of removing Bernardyn from the haulage run. Further, the judge's characterization is contradicted by the record in two other respects. As already noted, Wapinski's response to Bernardyn's protected activity was not only a "statement," it was a direct order to drive faster under hazardous road conditions. In addition, the judge's finding ignores the factual setting in which Bernardyn's outburst occurred. The Commission specifically noted that it was during "the complaint to Dodds [when Bernardyn] cursed and made the allegedly threatening remark." 22 FMSHRC at 307. Yet, in his discussion of the provocation issue, the judge failed to address the crucial context in which this incident took place, namely, the making of a safety complaint by a miner to his committeeman over an order from management to drive a truck in a manner that the miner legitimately considered to be unsafe.

We do not mean to suggest that we approve of the profanity used by Bernardyn, or that he could not have chosen a more civil (and effective) means of communicating his legitimate safety concerns to his safety representative. Nevertheless, the occurrence of this incident in the course of a safety complaint is a significant factor that the judge should not have ignored. We conclude that Bernardyn's cursing in the midst of a safety complaint to his safety committeeman is a factor which mitigates the seriousness of his cursing and detracts from the judge's conclusion that Bernardyn's use of profanity was not excusable. In sum, the record as a whole casts considerable doubt on the judge's conclusion that Bernardyn's actions were not provoked by Reading.

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Reading's discharge of Bernardyn did not violate section 105(c) of the Mine Act. This matter is remanded for further proceedings consistent with this opinion.

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Theodore F. Verheggen, Chairman

_____
James C. Riley, Commissioner

Commissioner Beatty, concurring:

While I concur in the result reached by my colleagues in the majority, I write separately to indicate a slightly different focus on how I would reach this result.

In my view, the resolution of this case should turn on the judge's finding that Reading's 1987 disciplinary policy was in effect at the time of Bernardyn's discharge. The 1987 policy lists only four offenses that warrant an employee's immediate discharge: stealing, possessing or using intoxicants in the area of work, carrying weapons on company property, and physical fighting. Since Bernardyn's cursing incident, which the operator claims is the reason for his discharge, does not fall within one of those categories, it is my opinion that the discharge was per se discriminatory because it violated the company's 1987 disciplinary policy with respect to conduct that warrants immediate termination of an employee. Therefore, in my view, this case does not require, in order to show disparate treatment, a comparison of Bernardyn's cursing with other incidents of cursing on the job by Reading employees. In a "mixed motive" analysis, as we have in this case, the judge is required to examine Reading's affirmative defense (cursing on the job) to determine if the company's actions were out of line with their normal business practices. Since Bernardyn was *discharged immediately* — a practice that violates Reading's own disciplinary policy — I see no need to compare him to the other employees to determine disparate treatment. Indeed, I cannot think of any situation that more clearly illustrates an operator being "out of line with normal business practices" than one where the company ignores its own disciplinary policy in the discharge of an employee.

In accordance with this alternative approach, I would instruct the judge, on remand, to consider his finding that Reading's 1987 disciplinary policy was then in effect in deciding whether Bernardyn was discharged in violation of section 105(c) of the Mine Act. Although I would normally go no further than this single instruction, I nevertheless join Chairman Verheggen and Commissioner Riley in their remand instructions so that we may dispose of this case with a clear majority.

Robert H. Beatty, Jr., Commissioner

Commissioner Jordan, dissenting:

I stated in *Bernardyn I* that section 105(c) of the Mine Act precludes an operator from firing a miner for peripheral statements made while reporting a hazardous condition to a safety committeeman, unless the complaint was made in such a reprehensible manner that the miner is no longer entitled to the protection afforded by that statutory provision. 22 FMSHRC 298, 309-16 (Mar. 2000). In reaching that conclusion, I relied on *Caterpillar Inc.,* 322 N.L.R.B. 674 (1996) in which the National Labor Relations Board ruled that when "an employee is discharged for conduct occurring during a grievance meeting, the inquiry must focus on whether the employee's language is '*indefensible* in the context of the grievance involved.'" *Id.* at 677 (quoting *Crown Cent. Petroleum Corp. v. NLRB,* 430 F.2d 724, 731 (5th Cir. 1970)) (emphasis in original) (citation omitted). My opinion also referred to *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.,* 19 FMSHRC 833, 840 (May 1997), in which the Commission held that, because a discharged miner's protected safety concerns were expressed in the same conversation as his disparaging views about mine management, the employer bore the risk that the influence of legal and illegal motives could not be separated.

In *Bernardyn I*, I wrote that one could not reasonably conclude from the record in this case that Bernardyn's conduct, in the context of the safety complaint involved here, was so indefensible as to deprive him of the protection afforded under the Act. 22 FMSHRC at 311. Accordingly, I stated my view that Reading's affirmative defense failed and that the judge's decision should be reversed. *Id*. at 315. That conclusion is now bolstered by the judge's finding that the 1987 disciplinary policy was in place at the time of Bernardyn's termination, 22 FMSHRC 951, 952-53 (Aug. 2000) (ALJ), and by my colleagues' finding that Reading violated this policy in terminating Bernardyn, slip op. at 9, 18. Moreover, my colleagues' rejection of several of the findings upon which the judge based his decision on remand serves to reinforce my earlier view as to the conclusions that could reasonably be drawn from the evidence in this case.[1]

[1] Chairman Verheggen and Commissioner Riley reject the judge's finding that because Bernardyn's cursing episode took place over the CB radio, it was materially distinguished from previous cursing incidents involving other employees. Slip op. at 9-10. They also reject his finding that Bernardyn threatened his supervisor, *id.* at 11, and that Reading did not treat Bernardyn more harshly than other employees who were not terminated for cursing, *id.* at 12. They have also determined that several facts in the record detract from the judge's conclusion that Reading did not provoke Bernardyn's cursing. *Id.* at 14. Indeed one wonders why, given these findings, my colleagues find it necessary once again to remand this case to the judge instead of reversing his decision.

For the foregoing reasons, I again conclude that a remand in this case would serve no purpose, and I would therefore reverse the judge's decision and find in favor of Bernardyn.

_____
Mary Lu Jordan, Commissioner

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