FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

December 22, 2000

PAMELA BRIDGE PERO	:	
	:	
v.	:	Docket No. WEST 97-154-D
	:	
CYPRUS PLATEAU MINING CORPORATION	:	

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

DECISION

BY: Jordan, Chairman; and Riley, Commissioner

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act" or "Act"), Administrative Law Judge August F. Cetti determined that Cyprus Plateau Mining Corporation ("Cyprus") did not violate section 105(c) of the Act,[1] 30 U.S.C. § 815(c), when it discharged Pamela Bridge Pero from her position as an assistant in its human resources department. 20 FMSHRC 1104, 1117 (Sept. 1998) (ALJ). The Commission granted Pero's petition for discretionary review challenging the judge's decision. For the following reasons, we vacate the judge's decision and remand this matter for further consideration consistent with this decision.

I.

Factual and Procedural Background

Pero started working for Cyprus in 1985 at its mining facility in Price, Utah. Ex. 2 at 1. During the last several years of her employment, she worked as an assistant in its human resources

[1] Section 105(c)(1) provides in pertinent part:

> 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, [or] representative of miners . . . because of the exercise by such miner, [or] representative of miners . . . of any statutory right afforded by this Act.

department. 20 FMSHRC at 1107. Her duties included helping to fill out Utah workers' compensation forms and "7000-1" forms for reporting mine accidents, injuries, and illnesses to the Department of Labor's Mine Safety and Health Administration ("MSHA"). *Id.* From the time she was hired until she was terminated, Pero received satisfactory or better performance reviews and was even occasionally rewarded with dinner certificates. *Id.*; Tr. 142-43, 148-49.

Pero testified that she began to suspect Cyprus was falsifying work place injury and illness information on its reporting forms in order to reduce the number of lost days reported. 20 FMSHRC at 1107. She testified that her suspicion was confirmed when she talked about it with her brother who was the safety director of a rival mining company. *Id.* She also testified that Cyprus pressured injured miners to return to work as soon as possible to avoid lost days and that this practice endangered their safety. Tr. 60, 86-90, 109, 212.[2] Starting in approximately April 1996, Pero discussed her concerns about the forms with Lou Grako, her supervisor and manager of the human resources department, Alan Childs, the new vice president and general manager, and Bill Snyder, the safety director. 20 FMSHRC at 1109; Tr. 109-10, 135, 137.

Cyprus had a three-step disciplinary procedure set forth in its employee handbook. 20 FMSHRC at 1111; Ex. 22. In May 1996, Pero received step 1 discipline for allegedly forging Grako's name on two dinner certificates, one for herself and one for her husband. 20 FMSHRC at 1111. In July 1996, she received step 2 discipline for allegedly failing to inform Grako in a timely manner that she would be off work undergoing surgery for cancer. *Id.* at 1112-13. On September 11, 1996, the day she returned from a six week medical leave for that surgery, Pero received a termination letter from Childs, the third and final disciplinary step. *Id.* at 1113-15; Tr. 156-58. The letter, which relied exclusively on Pero's job performance prior to her medical leave, alleged that, after receiving several days of special training, Pero failed to implement a new reporting system at Cyprus. 20 FMSHRC at 1113-14. It also claimed that she failed to correctly complete I-9 immigration forms, which had been the subject of an Office of Federal Contract Compliance audit in early September 1996. *Id.* at 1114; Ex. 16. Finally, it alleged that Pero told various persons, both employees and non-employees of Cyprus, that Grako was committing illegal acts in his handling of workers' compensation claims. 20 FMSHRC at 1114-15.

Pero initially filed her discrimination complaint with MSHA's field office in Price, Utah, on September 12, 1996, alleging that she was discharged because she complained about "dishonest acts" by Grako. *Id.* at 1105. After conducting an investigation, MSHA concluded that a section 105(c) violation had not occurred. *Id.* Pero then filed a complaint on her own

[2] Injured miners who returned early were sometimes assigned light physical duties such as performing clerical work in the human resources department. Tr. 86-90. In addition, Cyprus offered incentives such as monthly and end-of-year bonuses to miners with no lost time. Tr. 60.

behalf with the Commission pursuant to section 105(c)(3).[3] *Id.* at 1106.

The judge determined that Cyprus did not violate section 105(c) when it discharged Pero. *Id.* at 1117. He "assum[ed] arguendo" that Pero engaged in protected activity and concluded that even if her termination was motivated in part by her protected activity, Pero would have been discharged in any event for her unprotected activity, i.e., her poor work performance as described by Cyprus in the disciplinary action taken against her. *Id.* at 1116-17.

II.

Disposition

Pero argues that the judge erred by requiring that her complaints involve her own safety in order to be protected. P. Br. at 17-20.[4] She further contends that the judge erroneously excluded relevant evidence of disparate treatment during discovery and at the hearing. *Id.* at 9-10, 14-17, 20. Pero also argues that the judge erred when he found that the reasons given by Cyprus for terminating her were not pretextual. *Id.* at 20-21; PDR at 2-3.

Cyprus responds that the judge did not require that Pero's complaints involve her own safety in order to be protected. C. Br. at 16-17. It also argues that, because Pero's complaints only concerned workers' compensation issues which are not covered by the Act, the judge correctly concluded that her complaints were not protected. *Id.* at 17-32. Cyprus contends that the judge determined correctly that Pero's termination was in no part motivated by her alleged protected complaints but rather was motivated by legitimate business reasons concerning her poor work performance. *Id.* at 32-40. It also argues that any procedural errors the judge may have made were harmless. *Id.* at 42-46.

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 Sec'y of Labor 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*

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[3] Section 105(c)(3) provides that "[i]f the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1)." 30 U.S.C. § 815(c)(3).

[4] The judge noted that, in Pero's original complaint filed with MSHA, she did not mention "any safety concerns for herself *or anyone else*." 20 FMSHRC at 1116 (emphasis supplied). We therefore conclude that, contrary to Pero's assertion, the judge did not require that Pero's complaints involve her own safety in order to qualify as protected activity.

of Labor on behalf of Robinette v. United Castle Coal Co., 3 FMSHRC 803, 817-18 (Apr. 1981).

Although the judge stated that he was "assuming arguendo that Pero engaged in protected activity" (20 FMSHRC at 1116), the evidence in the record as a whole supports that same conclusion. For example, Pero testified that she told Snyder, the safety manager, and Grako, her supervisor, that Cyprus was making illegal reports concerning lost days. Tr. 94-95, 188-90, 233. She testified that she told them that the company's policy of giving injured miners a day to go to a doctor but not reporting it as a lost day violated MSHA requirements.[5] Tr. 93-95, 188-90. She also testified that she told Childs, the new vice president and general manager, about safety issues relating to illegal reporting. Tr. 101, 231. No remand is necessary for a substantial evidence determination because company officials confirmed these reports. Snyder testified that Pero talked to him about "illegal MSHA reporting" and that he was aware of her concerns about the company's use of a doctor's day to avoid lost days. Tr. 498-99. Childs testified that Pero informed him about illegal reporting activities at the company involving MSHA and about "improper representation in the filing [of] MSHA . . . issues." Tr. 388, 454, 458.

Section 105(c) of the Mine Act protects a miner who makes "a complaint under or related to [the] Act." 30 U.S.C. § 815(c). Accurate reporting of lost days on MSHA 7000-1 forms relates to the reporting requirements of section 103(d) of the Act. 30 U.S.C. § 813(d). Section 103(d) requires operators to keep accident records and that such reports must "include man-hours worked." *Id.* It is also important to note that one of the purposes of the reporting requirements under 30 C.F.R. Part 50 is to allow MSHA "to identify those aspects of mining which require intensified attention with respect to health and safety regulation." 42 Fed. Reg. 55,568, 55,568 (1977). Falsification of information on MSHA 7000-1 forms concerning lost days could negatively impact the allocation of agency resources to protect the safety and health of miners. Pero's allegations about falsification of lost days information on MSHA 7000-1 forms therefore

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[5] Section 50.20-7 requires reporting mine accidents, injuries, and illnesses on MSHA 7000-1 forms and states in pertinent part:

> (c) Item 30. Number of days away from work. Enter the number of working days, consecutive or not, on which the miner would have worked but could not because of occupational injury or occupational illness. The number of days away from work shall not include the day of injury or onset of illness or any days on which the miner would not have worked even though able to work. If an employee loses a day from work solely because of the unavailability of professional medical personnel for initial observation or treatment and not as a direct consequence of the injury or illness, the day should not be counted as a day away from work.

30 C.F.R. § 50.20-7.

relate to safety and health issues, as well as the requirements of section 103(d) of the Mine Act, and are thus protected under section 105(c).[6]

The record also indicates that Cyprus knew about Pero's protected activity and discharged her, at least in part, because of that activity. Snyder and Childs both testified that Pero told them about alleged illegal reporting activities involving MSHA. Tr. 388, 454, 498-99. The Commission noted in *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983), that the operator's knowledge of the miner's protected activity is "probably the single most important aspect of the circumstantial case." There is also close temporal proximity between Pero's protected activity and her termination. Pero worked for Cyprus for eleven years and received satisfactory or better performance evaluations. 20 FMSHRC at 1107; Tr. 50-51. However, after starting to make protected complaints in April 1996, she received her first disciplinary warning in early May and was discharged within the next four months. 20 FMSHRC at 1111-13; Tr. 137. This uncontradicted record evidence of protected activity, employer knowledge of that activity, adverse action, and a close temporal proximity between protected activity and adverse action established a motivational nexus sufficient to make out a prima facie case of discrimination.

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. Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

In *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982), the Commission enunciated several indicia of legitimate non-discriminatory reasons for an employer's adverse action. These include evidence of the miner's unsatisfactory past work record, prior warnings to the miner, past discipline consistent with that meted out to the complainant, and personnel rules or practices forbidding the conduct in question. *Id.* The Commission has explained that an affirmative defense should not be "examined superficially or be approved automatically once offered." *Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1938 (Nov. 1982). In reviewing affirmative defenses, the judge must "determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed." *Bradley*, 4 FMSHRC at 993. The Commission has held that "pretext may be found . . . where the asserted justification is weak,

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[6] We disagree with Cyprus' argument that Pero's complaints were not protected because she did not voice safety or health concerns when making complaints about false MSHA reporting. C. Br. at 22-32. There is no requirement that complaints must include explicit statements about specific safety or health hazards in order to be protected. So long as her complaints reasonably related to the safety and health of miners under the Act, they were protected. 30 U.S.C. § 815(c)(1).

implausible, or out of line with the operator's normal business practices." *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990).

Pero's challenge to the judge's acceptance of Cyprus' business justification is based on his exclusion of certain evidence that is argued by Pero to illustrate disparate treatment. When reviewing a judge's evidentiary ruling, the Commission applies an abuse of discretion standard. *See In Re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1873-75 (Nov. 1995) (applying an abuse of discretion standard to judge's exclusion of testimony during trial), *aff'd on other grounds sub nom Sec'y of Labor v. Keystone Coal Mining Corp.* 151 F.3d 1096 (D.C. Cir. 1998). Abuse of discretion may be found when "there is no evidence to support the decision *or if the decision is based on an improper understanding of the law.*" *Mingo Logan Coal Co.*, 19 FMSHRC 246, 249-50 n.5 (Feb. 1997) (citing *Utah Power & Light Co., Mining Div.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991)) (emphasis added).

During the hearing, Pero's counsel attempted to offer evidence of Cyprus' treatment of other employees who had violated company rules or caused costly errors. Tr. 196-99. Following an objection by Cyprus on relevancy grounds, the judge sustained the objection, thereby preventing that testimony from entering the record. Tr. 196, 201. In an offer of proof at the hearing as to what Pero wanted to testify to, her counsel described a number of violations and errors made by miners who were not discharged by Cyprus for their actions.[7] Tr. 199-201. The judge sustained Cyprus' relevancy objection based on his determination that the actions of the other employees were not sufficiently related to Pero's case, which he characterized as involving "filling out forms." Tr. 198-99, 201.

Commission Procedural Rule 63(a) states that "[r]elevant evidence . . . that is not unduly repetitious or cumulative is admissible." 29 C.F.R. § 2700.63(a). Although the Commission has not defined "relevant evidence," it is defined in Rule 401 of the Federal Rules of Evidence[8] as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The federal courts have viewed Rule 401 as having "a low threshold of relevancy." *In Re: Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 782-83 (3d Cir. 1994); *see also Hurley v. Atlantic*

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[7] These included: (1) tampering with a respirable dust sample which resulted in a section 110 MSHA investigation, an MSHA fine, lost production, and bad publicity; (2) making a major engineering error which cost Cyprus a large amount of money and later damaging a vehicle by driving too fast; (3) causing Cyprus to receive an MSHA fine for a roof control violation; (4) removing too much bottom and top coal that cost Cyprus thousands of dollars to correct; (5) using foul language and being abusive during a job interview; and (6) making numerous mistakes over a period of many years. Tr. 199-201.

[8] "While the Federal Rules of Evidence may have value by analogy, they are not required to be applied to [Commission] hearings" by the Mine Act or Commission procedural rules. *Mid-Continent Res., Inc.*, 6 FMSHRC 1132, 1136 n.6 (May 1984).

City Police Dep't, 174 F.3d 95, 109-10 (3rd Cir. 1999) ("Rule 401 does not raise a high standard.").

By using an overly narrow relevancy standard that required the examples to be nearly identical to Pero's alleged misconduct, the judge excluded evidence probative of whether Cyprus treated Pero differently from other similarly situated employees. Such evidence is relevant to the question of whether Cyprus' business justification is valid or pretextual.[9] *See Bradley*, 4 FMSHRC at 993; *Price*, 12 FMSHRC at 1534. For example, Pero's termination letter stated that she was discharged in part because her accusations led to a costly investigation. 20 FMSHRC at 1115. Several of the excluded examples dealt with employees who allegedly made costly mistakes but who were not discharged.

Our dissenting colleague, Commissioner Verheggen, would uphold the judge's ruling prohibiting Pero from introducing evidence she believes is relevant to the issue of disparate treatment, and cites *Neuren v. Adduci, Mastriani, Meeks & Schill*, 43 F.3d 1507, 1514 (D.C. Cir. 1995) as somehow supportive of the exclusion of such evidence. Slip op. at 22, 25. In *Neuren*, however, there was no question that the plaintiff's evidence of disparate treatment was admissible. Rather, the question was whether the evidence was sufficient to *establish* disparate treatment. *See Neuren*, 43 F.3d at 1514 (reviewing evidence admitted at trial and agreeing that it "fails to demonstrate disparate treatment"). The question of whether Pero can establish disparate treatment can only be decided *after*, like the plaintiff in *Neuren*, she is permitted to put on evidence of disparate treatment. In the absence of authority to do so, we will not apply *Neuren* to an offer of proof, which is designed to provide only the general tenor of the evidence to be offered. 1 *McCormick on Evidence* § 51, at 218 (John W. Strong ed., 5th ed. 1999).[10]

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[9] We thus agree with Commissioner Beatty that the focus of this case should be on Cyprus' affirmative defense and "whether or not the judge was correct in finding that Cyprus' business justification was not pretextual." Slip op. at 14-15.

[10] Our dissenting colleague makes much of the lack of record evidence regarding the similarity between Pero's job and those of the other employees. Slip op at 23-25. Because the judge prevented Pero from introducing such evidence, it is decidedly premature to hold such distinctions against her at this point. Nor is there merit to our dissenting colleague's suggestion that Pero's offer of proof was deficient because it failed to indicate "'*why the evidence is logically relevant*.'" Slip op. at 25 (quoting 1 *McCormick on Evidence* § 51, at 218) (emphasis added). Although the claimed relevance of the proffered evidence is readily apparent from the very excerpt of the offer of proof cited by Commissioner Verheggen (*id*. at 23-24), in that it refers to other employees who engaged in serious misconduct or committed costly errors and were not terminated, Pero's counsel also expressly explained: "An employee can put on evidence of disparate treatment to show that the Company is singling him or her out in comparison to other employees. This goes to the issue of whether the Company would have fired him or her for nonprotected activity." Tr. 196-97. He also indicated that Pero would testify about the actions of other employees "that cost the Company hundreds of thousands of dollars, millions of dollars .

A finding of disparate treatment, however, need not, as the dissent suggests, be restricted to only circumstances where other employees have engaged in the same improper conduct or combination of misdeeds as the alleged discriminatee and held a similar job (slip op. at 25-26). It has been recognized that, in analyzing a claim of disparate treatment under traditional employment discrimination law, "precise equivalence in culpability between employees" is not required. *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 283 n.11 (1976). Rather, the plaintiff must simply show that the employees were engaged in misconduct of "comparable seriousness." *Id*. The dissent's overly restrictive interpretation of what is required to establish disparate treatment, like the judge's flawed analysis in evaluating Pero's claim, would seriously constrain, if not eliminate, this important component of discrimination analysis. Consequently, we decline to adopt such a narrow approach to the admission of evidence proving disparate treatment, and would not require that such evidence involve the same type of misconduct, or misconduct by someone with a similar position as the complainant.

Furthermore, in *Chacon,* 3 FMSHRC at 2508 (relied on by the dissent), and subsequent cases, the Commission has repeatedly made clear that the misconduct being compared need not be identical. *See Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 16 (Jan. 1984). We recently reaffirmed that "it is incumbent on the complainant to introduce evidence showing that another employee guilty of the same *or more serious* offenses escaped the disciplinary fate suffered by the complainant." *Dreissen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 332 n.14 (Apr. 1998) (citing *Chacon*, 3 FMSHRC at 2512) (emphasis added).

The concept of permitting comparisons between different types of employee misconduct is consistent with analogous case law under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 141 et seq.[11] For example, in *Ferland Management. Co.*, 233 NLRB 467 (1977), when an employee complained that his discharge for failing to report that he was absent due to illness was actually motivated by his union activities, the National Labor Relations Board ("NLRB") held that the asserted reasons for discharging the employee were pretextual. Its analysis of the employee's pretext argument included a review of the employer's records which revealed that offenses such as "loafing on the job, checking in early, sleeping on the job, nonreported absences, refusal to wear company uniforms, the use of abusive language to tenants, repeated horseplay on the job, use of company property for personal gain, and drinking on the job, all occasioned only a warning

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. . and no disciplinary action [was] taken." Tr. 197. Since the judge denied the admission of this evidence strictly because the misconduct of the other employees was not precisely the same as that attributed to Pero, i.e., "filling out forms" (Tr. 198), any other issues relating to the sufficiency of Pero's offer of proof regarding the evidence of disparate treatment she sought to introduce are not properly before us.

[11] We have often looked to case law interpreting similar provisions of the NLRA in resolving questions about the proper construction of Mine Act provisions. *Berwind Natural Res. Corp*., 21 FMSHRC 1284, 1309 (Dec. 1999); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-43 (Dec. 1990).

for the employee concerned until a number of these occurrences accumulated." *Id.* at 475. Clearly, the NLRB did not restrict its analysis to misconduct identical to that of the alleged discriminatee.

In *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344 (6th Cir. 1998), the Sixth Circuit explained why it is advisable to eschew rigid categories in making these types of comparisons. There the court reversed a district court's conclusion that the plaintiff failed to identify one or more similarly-situated employees outside the protected class who received more favorable treatment, because the individuals with whom he sought to compare his treatment did not perform the same job activities.[12] It emphasized that "[c]ourts . . . should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee. The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated' . . . ." *Id.* at 352. The Sixth Circuit reasoned that a bright-line rule

> that requires the plaintiff to demonstrate that he or she was similarly-situated in every aspect to an employee outside the protected class receiving more favorable treatment removes from the protective reach of the anti-discrimination laws employees occupying 'unique' positions, save in those rare cases where the plaintiff produces direct evidence of discrimination. . . . [I]f the non-protected employee to whom the plaintiff compares himself or herself must be identically situated to the plaintiff in every single aspect of their employment, a plaintiff whose job responsibilities are unique to his or her position will *never* successfully establish a prima facie case (absent direct evidence of discrimination). . . . Thus, under the district court's narrow reading of *Mitchell*, an employer would be free to discriminate against those employees occupying "unique" positions. . . . A contrary approach would undermine the remedial purpose of the anti-discrimination statutes.

Id. at 353 (emphasis in original).[13]

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[12] In *Ercegovich*, the plaintiff (a quality systems coordinator who trained retail managers) claimed that, due to age discrimination, he, unlike two younger employees, was not offered a transfer when his job was eliminated. 154 F.3d at 348, 350. One of the other employees was the manager of human resources, to whom Ercegovich's supervisor reported. *Id.* at 348-49. The Court found that he was similarly situated to Ercegovich, despite the fact that they clearly did not share the same supervisor. *Id.* at 353.

[13] In *Ercegovich*, the Court held that the district court, by insisting on a "same job" requirement, applied an overly narrow reading of *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992). 154 F.3d at 352. The Sixth Circuit emphasized that

The dissent's narrow view regarding the relevant aspects of a disparate treatment analysis (slip op. at 25-26) could conceivably lead to the consequences foreseen by the *Ercegovich* court. This is particularly true in a small mining operation, where comparison to identical acts of misconduct or to employees in similar job categories may be difficult if not impossible. It could even be problematic in a large mining operation, as demonstrated by this case, in which there were a limited number of clerical employees with whom to make comparisons to Pero.[14]

Moreover, the dissent's reference to the *Mitchell* "same supervisor" test (slip op. at 21-22)[15] is particularly troublesome given that the entire workforce at Cyprus was subject to an established three-step disciplinary procedure. 20 FMSHRC at 1111; Ex. 22. *See Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697, 705 n.17 (D. Mass. 1996) (disagreeing with the *Mitchell* "same supervisor" test where corporation instituted company-wide standards of discipline intended to provide guidance to all supervisors).[16]

> [c]ourts should not assume . . . that the specific factors discussed in *Mitchell* are relevant factors in cases arising under different circumstances, but should make an independent determination as to the relevancy of a particular . . . status and that of the non-protected employee. The plaintiff need not demonstrate an exact correlation with the employee receiving more favorable treatment in order for the two to be considered 'similarly-situated' . . . .

Id.

[14] Commissioner Verheggen suggests that Shirley Tucker-Spears is the only employee "even remotely similarly situated to Pero." Slip op. at 25. His observation, however, that she is another clerical employee who was not discharged, despite raising similar concerns to Cyprus management, is only partly correct. Although Tucker-Spears testified that she communicated her concerns about Cyprus' policies regarding injured miners to management (Tr. 378), the record does not indicate that she voiced such concerns with the same intensity or frequency as did Pero.

[15] The dissent quotes *Mitchell*, 964 F.2d at 583, which requires individuals to have "the same supervisor . . . same standards *and* . . . same conduct" in order to be similarly situated (emphasis added).

[16] We note that the court in *Petsch-Schmid*, a case involving a state law discrimination claim based on the termination of a human resources administrator for poor job performance and a verbal threat, denied the employer's motion for summary judgement on the plaintiff's disparate treatment claim. 914 F. Supp. at 702, 704. The workers with whom the plaintiff compared herself did not have the same supervisor and had not threatened their supervisors. *Id.* at 704. The court permitted a comparison between the plaintiff and other employees with work problems "at least as severe" as those attributed to the plaintiff, including one held accountable for a serious power outage. *Id.* at 704-05.

The dissent also appears to require that any example cited by Pero must include an employee who has engaged in a combination of actions identical to her own. Slip op. at 25. This prerequisite further limits the disparate treatment analysis, and would essentially deprive almost every complainant accused of more than one act of misconduct of a disparate treatment defense. This is because, as difficult as it may be to find an employee who has engaged in one identical act of misconduct (particularly at a small mining operation) the chances become even slimmer — and eventually non-existent — if the complainant is accused of two or more transgressions (which is quite likely to occur in mines, like this one, with progressive disciplinary policies). *See Busby v. City of Orlando*, 931 F.2d 764, 781 (11th Cir. 1991) (airport security officer fired for several cumulative acts was permitted to introduce evidence of disparate treatment regarding her individual acts of misconduct).[17]

Commissioner Verheggen expresses concern that if the evidence at issue is admitted, we will somehow be embarking on an "unworkable" approach in disparate treatment cases. Slip op. at 28. Of course, if one needs to compare the seriousness of two acts of employee misconduct, it is admittedly easier to do so if the two employees held similar jobs and performed the same misdeed. However, the varied size and nature of today's workplace makes such a scenario more and more uncommon.

Unlike our dissenting colleague, we are confident in the ability of our judges to compare different offenses or those committed by employees in different jobs. For example, a judge could determine that a shop mechanic terminated for unintentionally damaging equipment was treated more severely than a roof bolter who smuggled smoking materials into an underground mine and was only given a written warning. As long as sufficient record evidence is presented providing adequate details concerning such incidents, our judges can certainly evaluate these types of claims in deciding whether the rationale for firing a miner was pretextual. *See McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir. 1988) ("The fact that these other employees did not commit the exact same offense as [the plaintiff] does not prohibit consideration of their testimony.").

Applying the concept of "comparable seriousness" to the allegations contained within Pero's offer of proof, we find the offer includes allegations that other employees had engaged in misconduct at least as serious as that of Pero. For example, in response to Cyprus' evidence that Pero made a number of work errors, she offered to show that at least two other employees were not terminated by Cyprus even though they made repetitive and serious mistakes that were costly to the company. Tr. 199-201. More importantly, Pero intended to show that a Cyprus employee

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[17] Our dissenting colleague relies on a statement in Justice Scalia's dissenting opinion in *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997), to support his unduly narrow view of disparate treatment analysis. *See* slip op. at 21 n.5. We fail to see the relevance here of the opinion of a single dissenting Justice in a case involving not employment discrimination (for which there is copious law to apply), but the wholly unrelated subject of the validity of a state property tax exemption.

was not discharged despite tampering with a respirable dust sample in plain view of other miners (Tr. 199), certainly a serious infraction. *See* 30 C.F.R. §§ 70.209(b), 71.209(b) (MSHA regulations prohibiting dust sample tampering).[18] Because the judge failed to admit evidence regarding the details of these other incidents, we cannot agree with our dissenting colleague that none of the examples Pero cited "came even close to approximating" the conduct purportedly relied upon to discharge Pero. Slip op. at 25.

Accordingly, we conclude that the excluded evidence is probative of the plausibility of Cyprus' business justification, and that the judge abused his discretion by excluding evidence that directly relates to Pero's pretext argument.[19] In light of our conclusion, we find that the judge did not adequately evaluate Cyprus' rebuttal case or affirmative defense. In addition, we are troubled by the judge's overly terse analysis of Cyprus' defenses, and his wholesale adoption of the business justification without explaining his conclusion that Cyprus' reasons were not pretextual. *See Bradley*, 4 FMSHRC at 993. We therefore vacate the judge's decision and remand to permit Pero to adduce the additional evidence in her offer of proof concerning Cyprus' treatment of other employees who violated company rules or caused costly mistakes, and for further consideration of Cyprus' rebuttal argument and affirmative defense.

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[18] *See also Consolidation Coal Co.*, 8 FMSHRC 890, 895-97 (June 1986) (unambiguous goal of Mine Act is to prevent pneumoconiosis and other occupationally-related diseases), *aff'd*, 824 F.2d 1071 (D.C. Cir. 1987).

[19] In an analogous context, the Eighth Circuit has held that "[t]he effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1102-04 (8th Cir. 1988) (holding that lower court erred in discrimination case by excluding evidence of employer's past practice of race and age bias).

III.

Conclusion

For the foregoing reasons, we vacate the judge's determination that Cyprus did not discriminate against Pero and remand to the judge for further consideration consistent with this opinion.

Mary Lu Jordan, Chairman

James C. Riley, Commissioner

Commissioner Beatty, concurring:

Although I agree with the majority's decision to vacate and remand this matter, I write separately to offer an analysis of this case that focuses on a different question than that discussed by my colleagues. In both the majority and dissenting opinions, my colleagues, by the cases they cite, appear to be fixated on the correct standard to be used in determining what evidence is admissible to establish a prima facie case of discrimination in a disparate treatment case. Although the judge's analysis in the instant case is anything but a model of clarity, it appears from his discussion of the reasons offered by the operator for the discharge and his finding that Cyprus "would have taken the adverse action in any event on the basis of Pero's unprotected activity alone" (20 FMSHRC 1104, 1117 (Sept. 1998) (ALJ)), that he did find that Pero established a prima facie case of discrimination and that the operator had affirmatively defended the case.[1]

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[1] While Commissioner Verheggen takes issue with my reading of the judge's decision (slip op. at 19), I suggest that a comprehensive reading of the language used by the judge on the issue of motivation clearly establishes the judge's intentions on this crucial issue. For purposes of clarity, I offer the judge's complete findings on this point:

> I find that the preponderance of the evidence established that Pero was discharged for her unprotected activity alone. The reasons for her discharge stated in the [termination notice] are not *pretext* and are supported by the record.
>
> * * *
>
> The record clearly demonstrates that the reasons given by the employer for the adverse action were not "*plainly incredible or implausible*." I conclude and find that the stated reasons for the adverse action taken by Cyprus were not *pretextual*.

20 FMSHRC at 1116, 1117 (emphasis added).

Beyond the obviousness of the judge's intentions in the above-reference paragraph, it is also important to note that he buttressed his findings in language taken directly from Commission decisions that evaluated an operator's affirmative defense. *See Haro v. Magma Copper Co.*, 4 FMSHRC 1935, 1937 (Nov. 1982) ("Once it appears that a proffered business justification is not *plainly incredible or implausible*, a finding of pretext is inappropriate.") (quoting *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)) (emphasis added). If the judge found that Pero had failed to establish a required element of her prima facie case, as Commissioner Verheggen contends (slip op. at 19), why did he bother to take the added step of analyzing Cyprus' business justification, and make an explicit finding that its explanation was not pretextual? While the judge's section 105(c) analysis is somewhat muddled, one thing is certain — he clearly conducted

Accordingly, to decide this case, the focus should not be on reevaluation of the prima facie case, but instead on determining whether or not the judge was correct in finding that Cyprus' business justification was not pretextual. *Id*. at 1116-17.

I begin with the language routinely cited in Commission discrimination decisions that provides the framework for analyzing Mine Act discrimination cases. As set forth by the majority in its opinion:

> 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 Sec'y of Labor 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 of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981).
>
> * * *
>
> [Once the miner makes a prima facie case of discrimination, t]he 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. Associated Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Slip op. at 3-4, 5 (emphasis added).

While the *Paula/Robinette* test has been an effective tool in providing a framework from which to begin the section 105(c) discrimination analysis, it appears that recent decisions have taken a "learn by rote" approach to the test, offering little in the way of analytical guidance for resolving particular factual situations. This case provides a clear example of this phenomenon since the judge failed to recognize or analyze this case as a "mixed motive" discrimination case. *See Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 993 (June 1982). As a result, the judge erred by

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an evaluation of Cyprus' affirmative defense, a step that occurs only when a prima facie case of discrimination has been established.

failing to follow established Commission case law regarding the burdens placed on the litigants, and the affirmative duty placed on the judge to consider not only evidence offered to establish the defense, but also evidence offered by the complainant to refute it.

Under the *Pasula/Robinette* test, if an operator cannot *rebut* the prima facie case it is left with no other option than to affirmatively defend the charge of unlawful discrimination. In so doing, the operator essentially argues that the adverse action was motivated by the miner's unprotected activities and that it would have taken the adverse action against the miner for the unprotected activities alone. In a mixed motive case, the burden is on the operator to "prov[e] by a preponderance of *all* the evidence that . . . he would have taken the adverse action against the miner in any event for the unprotected activities alone." *Pasula*, 2 FMSHRC at 2799-2800 (emphasis added). On this issue, "the *employer* must bear the ultimate burden of persuasion." *Id*. at 2800 (emphasis added). Ordinarily, operators will attempt to meet this burden by showing, for example, "past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question." *Bradley*, 4 FMSHRC at 993.

This is, however, not the end of the inquiry in the mixed motive analysis. While the initial burden is placed on the operator, Commission case law makes it abundantly clear that the *ultimate* burden of persuasion remains with the complainant. *Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 16 (Jan. 1984). Simply stated, the complainant has a burden to produce evidence designed to refute the operator's affirmative defense by showing that the affirmative defense offered by the operator is merely pretext and not the true reason for the adverse action. This can be accomplished by showing, among other things, that the adverse action would not have been taken in any event for such unprotected activities alone. *Robinette*, 3 FMSHRC at 818 n.20.

In cases where the Commission has examined these burdens, we have held that an affirmative defense should not be "*examined superficially or be approved automatically once offered*." *Haro*, 4 FMSHRC at 1938 (emphasis added). It is the operator's burden to show that its justification is credible and that it would have moved the operator to take the adverse action against the miner. *Sec'y of Labor on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990). Therefore, Commission judges must closely scrutinize the merits of an operator's evidence because "[i]t is not sufficient for the employer to show that the miner *deserved* to have been fired for engaging in the unprotected activity; if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, [it should] not [be] consider[ed] . . . ." *Pasula*, 2 FMSHRC at 2800 (emphasis added). We have stated that "pretext may be found . . . where the [operator's] asserted justification is weak, implausible, or *out of line with the operator's normal business practices*." *Price*, 12 FMSHRC at 1534 (emphasis added).

In the instant case, Cyprus' termination letter indicates that Pero was discharged in part because her accusations led to a costly investigation. *See* 20 FMSHRC at 1115. In an attempt to refute Cyprus' affirmative defense, Pero's counsel attempted to introduce evidence during the

hearing to illustrate how Cyprus dealt with other employees who had violated company rules or caused costly errors. Tr. 196-99. Cyprus' counsel objected to this evidence on relevancy grounds, and the judge sustained the objection stating that the actions of the other Cyprus employees were not sufficiently related to Pero's case, which he characterized as involving "filling out forms." Tr. 198-99, 201.

Following the judge's ruling, Pero's counsel vouched the hearing record by providing an offer of proof that related to the following actions by other Cyprus employees: (1) tampering with a respirable dust sample which resulted in a section 110 MSHA investigation, an MSHA fine, lost production, and bad publicity; (2) making a major engineering error which cost Cyprus a large amount of money and later damaging a vehicle by driving too fast; (3) causing Cyprus to receive a MSHA fine for a roof control violation; (4) removing too much bottom and top coal that cost Cyprus thousands of dollars to correct; (5) using foul language and being abusive during a job interview; and (6) making numerous mistakes over a period of many years. Tr. 199-201. Pero's counsel further noted that in none of the aforementioned situations were the employees discharged by Cyprus for their transgressions. Tr. 199-201.

If we employ the analysis set forth in our case law involving mixed motive cases, the key issue presented here becomes: was the evidence offered by Pero's counsel something the judge should have admitted and *considered* in the course of carrying out his duty to evaluate the plausibility of Cyprus' affirmative defense. In answering this question, it is important to reemphasize that the judge's obligation is to ascertain whether or not Cyprus' actions were "weak, implausible, or *out of line with the operator's normal business practices*." *Price*, 12 FMSHRC at 1534 (emphasis added). As we stated in *Pasula*, 2 FMSHRC at 2800, if the unprotected conduct did not originally concern the employer enough to have resulted in the same adverse action, it should not be considered. The only way the judge could make a reasoned assessment of whether or not Cyprus' asserted justification for the termination of Pero was "out of line with the operator's normal business practices" would be to compare Pero's discharge with the discipline meted out to the other Cyprus employees whose transgressions, regardless of job classification, also led to costly investigations.

I find nothing in my review of the Commission's case law, discussing the judge's role in this stage of the mixed motive analysis, that places restrictions on the evidence considered by our judges of the type arising under Title VII case law that is discussed by my colleagues in their analysis of this case.[2] While I agree with my dissenting colleague that a "rule of reason" should apply with respect to types of evidence that may be offered by complainants to refute the operator's affirmative defense (slip op. at 27), I believe that any such limitation should be firmly

[2] As my colleagues in the majority recognize, the Eighth Circuit has held in an analogous context, that "[t]he effects of blanket evidentiary exclusions can be especially damaging in employment discrimination cases, in which plaintiffs must face the difficult task of persuading the fact-finder to disbelieve an employer's account of its own motives." Slip op. at 12 n.19 (quoting *Estes v. Dick Smith Ford, Inc.*, 856 F.2d 1097, 1103 (8th Cir. 1988)).

grounded in objective standards governing the relevancy of evidence. Although the Commission has not defined "relevant evidence," it is defined in Rule 401 of the Federal Rules of Evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. In my view, the evidence referred to in Pero's offer of proof concerning costly errors by other employees who were not discharged clearly satisfies this standard of relevance in determining whether the discharge of Pero was "out of line with the operator's normal business practices" (*Price*, 12 FMSHRC at 1534), and therefore should have been admitted and considered by the judge.

Accordingly, it is my conclusion that the judge abused his discretion by his wholesale exclusion of evidence offered by Pero that may have been relevant in evaluating the plausibility of Cyprus' affirmative defense. I would therefore vacate the judge's decision and remand with instructions to the judge to treat this case as one involving mixed motive and, in the context of this analysis, allow Pero to adduce the additional evidence referred to in her offer of proof as a means of attempting to refute Cyprus' affirmative defense.[3]

Robert H. Beatty, Jr., Commissioner

[3] I disagree with Commissioner Verheggen's assertion that my view of this case is "inconsistent" with that taken by Chairman Jordan and Commissioner Riley in their separate opinion, with which I concur. Slip op. at 28-29. To the contrary, I agree entirely with the result reached by my other colleagues — that is, to vacate the judge's decision and remand with instructions to allow Pero to adduce the additional evidence referred to in her offer of proof, concerning other employees who violated company rules or committed costly mistakes, and to consider such evidence in further evaluating Cyprus' rebuttal argument and affirmative defense. I write separately only to explain that I reached this result by a slightly different route, relying only on Commission discrimination law and not on the Title VII disparate treatment analysis.

Commissioner Verheggen, dissenting:

I find that substantial evidence[1] supports the judge's conclusion that Cyprus Plateau Mining Corporation ("Cyprus") did not violate section 105(c) of the Act, 30 U.S.C. § 815(c), when it discharged Pamela Bridge Pero. I would affirm the judge's decision, and therefore I respectfully dissent.

As a threshold matter, I note that it is not as clear to me as it apparently is to the Chairman and Commissioner Riley (whose opinion I will hereinafter refer to as the "plurality opinion" to distinguish it from the concurrence of Commissioner Beatty) that the record evidence compels a finding that Pero engaged in protected activity.[2] Slip op. at 4. At trial, Pero ascribed Cyprus' treatment of her to a variety of non-safety-related causes, i.e., the personality of her supervisor, the management style in the office, and management's reaction to a sexual harassment complaint she filed against Cyprus' vice-president and general manager. 20 FMSHRC 1104, 1107-08 (Sept. 1998) (ALJ). The judge clearly questioned the legitimacy of Pero's complaint, declining to "credit the sincerity or reasonableness of her safety concerns." *Id*. at 1116. A judge's credibility determinations are normally entitled to great weight. *Farmer v. Island Creek Coal Co.*, 14 FMSHRC 1537, 1541 (Sept. 1992); *Penn Allegh Coal Co.*, 3 FMSHRC 2767, 2770 (Dec. 1981).

Commissioner Beatty goes even further than the plurality opinion and concludes that the judge found "that Pero established a prima facie case of discrimination." Slip op. at 14. To the contrary, the judge explicitly ruled that "Cyprus[,] in terminating Pero's employment[,] was motivated by Pero's unprotected activity and would have taken the adverse action in any event on the basis of Pero's unprotected activity alone." 20 FMSHRC at 1117. In other words, the judge found that Pero failed to prove one of the elements of her prima facie case, that Cyprus was motivated in any part by her purported protected activity.

Nonetheless, I am prepared to assume, as the judge did, that Pero at least engaged in

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[1] 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 *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229 (1938)).

[2] My colleagues base this conclusion in part on Pero's testimony. According to the majority, Pero testified that she told management that "the company's policy of giving injured miners a day to go to a doctor but not reporting it as a lost day violated MSHA requirements." Slip op. at 4. But while Pero did testify she had "problems" with the reporting policy and thought it was wrong (Tr. 189-190), she never testified that she knew at the time that it violated MSHA's requirements. *See* Tr. 94 (Pero testifying as to her knowledge of MSHA regulations at the time of the hearing).

protected activity. The judge concluded that "Pero was discharged for her unprotected activity alone." *Id.* at 1116. He stated that Cyprus' reasons for terminating Pero were "not a pretext" and that Cyprus "would have taken the adverse action in any event on the basis of Pero's unprotected activity." *Id*. at 1116, 1117. Specifically, the judge found that Pero forged Grako's name on two dinner certificates, one for herself and one for her husband, the action that began the disciplinary process which led to Pero's termination.[3] *Id.* at 1111.

The judge also found that Cyprus' reasons for discharging Pero were "supported by the record" (*id*. at 1116), which includes the following: As charged in Cyprus' termination letter, Pero failed to implement a new health and safety reporting system despite receiving several days of special training "at significant expense to Cyprus." *Id.* at 1113-14. Although Pero testified that she could not implement the new system because of scheduling and computer problems, she admitted that some of the delay was her fault. Tr. 168-71, 280-81. Pero also failed to correctly complete I-9 immigration forms, another charge contained in the termination letter. 20 FMSHRC at 1114. Although Pero claims that she was not trained to complete the forms, did not know they contained errors, and completed them in the same way she had always done, she admitted that she did not complete them correctly. Tr. 171-75, 282-83.

The record also contains evidence that supports the allegation in the termination letter that Pero had a poor working relationship with Grako and, with no factual basis for doing so, told Cyprus employees and others that Grako was committing illegal acts in the handling of workers' compensation claims. 20 FMSHRC at 1114-16. Although Pero argues that the human resources department as a whole was dysfunctional and had communication and morale problems (P. Br. at 14; *see also* Tr. 352-57, 425-26), the record evidence indicates that she had a poor working relationship with Grako and that she told Cyprus employees and others that Grako was making illegal reports involving workers' compensation claims. Tr. 84, 131-33, 167-68, 175-76, 401, 515. However, there is no clear record evidence that Grako committed illegal acts in the handling of workers' compensation claims. Although three of the MSHA citations (Nos. 3585716, 4525875, and 4525878) of which the judge took administrative notice (Tr. 452) alleged that Cyprus failed to correctly report lost days information on MSHA 7000-1 forms, these citations did not deal with workers' compensation claims. Pero Letter dated April 10, 1997, Attach. In addition, Childs' internal investigation carried out by Jack Trackemas, Cyprus' safety manager at the time, did not find any evidence of illegal acts involving workers' compensation claims. Tr. 398-400, 402. Thus, I find the judge's conclusion that Pero's discharge was based on unprotected activity alone to be supported by substantial evidence.

My colleagues, however, vacate the judge's decision, finding that he abused his discretion when he prevented Pero from testifying about Cyprus' treatment of employees who had violated company rules or caused costly errors. Pero claimed this evidence was relevant to proving her claim that Cyprus subjected her to disparate treatment when she received harsher discipline than

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[3] Cyprus admits that it may have legitimately given Pero one of the certificates but that she signed Grako's name to both certificates without authorization. 20 FMSHRC at 1111.

the other Cyprus employees.

Abuse of discretion may be found when "'there is no evidence to support the decision or if the decision is based on an improper understanding of the law.'" *Mingo Logan Coal Co.*, 19 FMSHRC 246, 250 n.5 (Feb. 1997) (quoting *Utah Power & Light Co.*, 13 FMSHRC 1617, 1623 n.6 (Oct. 1991)). For a number of reasons, I do not agree with my colleagues that the judge abused his discretion. To the contrary, I find the judge had sufficient bases in law and fact to deny Pero's request to testify on incidents involving certain miners who, despite their errors and violations disciplinary problems, were not discharged by Cyprus.

There is copious case law on what a plaintiff must do to establish a prima facie case of discrimination based on disparate treatment.[4] In the discussion that follows, I set forth a summary of this case law, then I look to this body of law to determine whether the judge's evidentiary ruling "is based on an improper understanding of the law" or lacks any evidentiary basis. *Mingo Logan*, 19 FMSHRC at 250 n.5.

The most important initial element of any such case is that those to whom the plaintiff compares his or her treatment be "similarly situated" to the plaintiff.[5] In *Mitchell v. Toledo Hospital*, the Sixth Circuit held:

> It is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of [fellow] employees, the plaintiff must show that the "comparables" are similarly-situated in all respects. Thus, to be deemed "similarly-situated," the individuals with whom the plaintiff seeks to compare his/her

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[4] Most of the appellate cases I cite in the following discussion arose under various federal civil rights statutes, such as Title VII of the Civil Rights Act of 1964 ("Title VII"), 42 U.S.C. § 2000e et seq. In resolving questions concerning the proper construction of the discrimination provisions of the Mine Act, the Commission has often looked for guidance to case law interpreting such civil rights statutes. *See, e.g.*, *Meek v. Essroc Corp.*, 15 FMSHRC 606, 616-18 (Apr. 1993); *Bradley v. Belva Coal Co.*, 4 FMSHRC 982, 987-88 (June 1982); *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2794-95 (Oct. 1980).

[5] In a different context, the Supreme Court has held that "[d]isparate treatment constitutes discrimination only if the objects of the disparate treatment are, for the relevant purposes, similarly situated." *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 601 (1997) (Scalia, J., dissenting, but joined by the majority on this point, *id*. at 583 n.16). At issue in the *Camps Newfound* case was a Maine property tax statute exempting from taxation charitable institutions serving mostly state residents, but not institutions engaged primarily in interstate business. *Id*. at 568. The Court held that the tax discriminated against the institutions not covered by the exemption, in violation of the dormant commerce clause, U.S. Const. art. I, § 8, cl. 3. 520 U.S. at 571-95.

> treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it.

964 F.2d 577, 583 (6th Cir. 1992) (citations and emphasis omitted). *Accord Harrison v. Metro. Gov't of Nashville*, 80 F.3d 1107, 1115 (6th Cir.) ("The plaintiff must also demonstrate that the [other] employees to be compared with himself were 'similarly-situated *in all respects*.'" (quoting *Mitchell*, 964 F.2d at 583) (emphasis in original)), *cert. denied*, 519 U.S. 863 (1996).

In a later case, the Sixth Circuit further stated that "the plaintiff and the employee with whom the plaintiff seeks to compare himself or herself must be similar in 'all of the *relevant* aspects.'" *Ercegovich v. Goodyear Tire & Rubber Co.*, 154 F.3d 344, 352 (6th Cir. 1998) (citation omitted, emphasis in original). *Accord Holifield v. Reno*, 115 F.3d 1555, 1562 (11th Cir. 1997) ("to make a comparison of the plaintiff's treatment to that of non-minority employees, the plaintiff must show that he and the employees are similarly situated in all relevant respects"); *Byrd v. Ronayne*, 61 F.3d 1026, 1032 (1st Cir. 1995) ("A disparate treatment claimant bears the burden of proving that she was subjected to different treatment than persons similarly situated in all relevant aspects." (emphasis and internal quotations omitted)). The *Ercegovich* court explained that courts "should make an independent determination as to the relevancy of a particular aspect of the plaintiff's employment status and that of the non-protected employee." 154 F.3d at 352.

The Court of Appeals for the District of Columbia Circuit explained "similarly situated" as follows:

> In order to show that she was similarly situated to the male employee [whose treatment by the employer was offered as evidence of disparate treatment], Neuren [the plaintiff] was required to demonstrate that all of the relevant aspects of her employment situation were "nearly identical" to those of the male associate. *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 802 (6th Cir. 1994).

Neuren v. Adduci, Mastriani, Meeks & Schill, 43 F.3d 1507, 1514 (D.C. Cir. 1995). In *Neuren*, the court found that the plaintiff was not similarly situated to the male associate because there was no evidence he had difficulties similar to Neuren's in "getting along with others in the firm," the male associate "was lower in seniority," and the problems in the male associate's work were "entirely different [from] Neuren's." *Id*.

Thus, to be similarly situated to a plaintiff, a fellow worker thus must share with the

plaintiff "relevant aspects of [his or] her employment situation." *Id*. The Commission case cited in the plurality opinion (slip op. at 8), for example, *Secretary of Labor on behalf of Chacon v. Phelps Dodge Corp.*, involved "data concerning the frequency of derailments and of resulting discipline" meted out to *engineers*. 3 FMSHRC 2508, 2512 (Nov. 1981), *rev'd on other grounds* 709 F.2d 86 (D.C. Cir. 1983). After explaining that disparate treatment may be shown "where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the same disciplinary fate which befalls the latter," the Commission concluded that in the record before them, there was "no evidence that *engineers* who had excessive speed derailments causing serious damage, or who were involved in similar incidents, escaped discipline." *Id*. at 2512-13 (emphasis added).

Here, the only "relevant aspects of [Pero's] employment situation" (*Neuren*, 43 F.3d at 1514) contained in the record are her position as a clerical worker in the operator's human resources office and a string of offenses that include forgery, failure to complete work assignments, work errors, and making unsubstantiated statements to others about her supervisor. In support of Pero's claim of disparate treatment (*see* Discrimination Compl. at [8-9]), at the hearing, her counsel made the following offer of proof:

> JUDGE CETTI: If you want to make an offer of proof, you may.
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> MR. GILL: Yes, I would like to.
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> [Pero] would testify that a number of instances, for example, in an instance of Reed Wilson, he was the ultimate cause of a 110 investigation for tampering with a respirable dust sample underground in front of his crew which caused a $3,000.00 fine, plus legal expenses, lost production and bad publicity to the Company. He did not receive any time off, nor was he terminated. In fact, the Company may well have paid his fine.
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> She will also testify that John Citpathus [sic, *see* Discrimination Complaint at [8], where this employee's name is noted as "John Kit Pappas"][6] had a major engineering error which cost the Company a significant amount of money due to lost coal revenue. He also received a lot of flack for failure to mine all of the coal reserves. He was not fired.
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> He later damaged a vehicle by driving too fast in an entryway which resulted in property damage. Again, he was not fired or reprimanded. These are things that she knows because she

[6] The offer of proof made by Pero's counsel largely reiterated the allegations made in Pero's Discrimination Complaint at pages 8 and 9.

works in the HR Department.

She would also testify that Robert Powell received an order from MSHA for a roof control violation underground which resulted in a major assessment from MSHA and he was not fired. She would testify that Vern Watson has received several severe citations and closure notices. He has not been fired.

MR. GILL: She will testify that Joe Rukavina, while spellbossing, which is a term of art, I suppose, decided to mine more coal than he should so he would have a higher tonnage for a shift. He cut the bottom and top coal out and the Company had to spend thousands of dollars building a wooden support to allow the long wall support system to operate. There was a gap and it would not support the top coal. He was not fired, but was hired as a foreman the next month.

Mr. Grako was not reprimanded for using fowl [sic] language and being abusive to Nathan Marvidikis during a job interview. There was a threatened lawsuit involved there.

Mr. Grako, to my knowledge at least, was not disciplined in any way for sexual harassment allegations that were brought out in this Shaman investigation.

Gary Marx made numerous mistakes over a period of many years and was demoted to an hourly employee, but not terminated.

JUDGE CETTI: That is your offer of proof?

MR. GILL: Yes.

Tr. 199-201.[7]

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[7] Commissioner Beatty believes that Cyprus "affirmatively defended the case," and that the offer of proof I have excerpted from the record was made in an effort to rebut Cyprus' affirmative defense. Slip op. at 14, 18. An affirmative defense is raised, however, against a plaintiff who has established a prima facie case, which here, as I point out above, Pero did not do. This offer of proof was intended to establish retaliatory motive based on disparate treatment, an element of Pero's prima facie case.

At any rate, this is a distinction that makes no difference. Even if the proffer was offered to rebut an affirmative defense, I believe it would still have been evidence of disparate treatment,

An offer of proof "must be reasonably specific identifying the purpose of the proof offered . . . [and] must tell the judge what the tenor of the evidence would be and why the evidence is logically relevant." 1 *McCormick on Evidence* § 51, at 218 (John W. Strong ed., 5th ed. 1999). I note that Pero's counsel made no attempt in this offer of proof to show that any of the employees he mentions were similarly situated to Pero. Wilson, Pappas, Powell, and Rukavina appear to have been underground miners with isolated disciplinary problems. Grako was a member of management. Pero's counsel said nothing whatsoever about Watson and Marx, other than very general statements that they had many disciplinary problems.

Keeping in mind the "relevant aspects of [Pero's] employment situation" (*Neuren*, 43 F.3d at 1514), I find nothing in this offer of proof that could have led the judge to conclude that the employees held jobs similar to Pero's. I also find that the judge could have reasonably concluded that none of the these employees came even close to approximating such a *combination* of improper conduct as Pero's. Indeed, I fail to see any reasonable basis on which the judge could have compared the underground miner Wilson's tampering with a respirable dust sample to Pero's combination of offenses as a clerical worker. Similarly, I find no reasonable basis for comparison between Pero's situation and those of three other underground miners, Pappas, Powell, and Rukavina. In each instance, on the one hand we have Pero's combination of offenses in the course of her duties as a clerk, while on the other hand we have miners making an "engineering error" and getting into a motor vehicle accident (Pappas), committing a "roof control violation" (Powell), and making a coal production error (Rukavina). Any such comparisons are of apples to oranges. On its face, I thus find this offer of proof insufficient to establish the relevancy of the evidence Pero sought to adduce.[8]

The only comparison in the record of an employee even remotely similarly situated to Pero is the case of Shirley Tucker-Spears, who, like Pero, was a clerical worker (in fact, she worked with Pero), and who made similar complaints to management about Cyprus' injury policy, but who, unlike Pero, was never discharged. Tr. 330, 378. Her work record, however, apparently did not contain instances of forgery, incompetence, and insubordination. But in any event, I find that the example of Tucker-Spears not only further supports the judge's conclusion that Pero was discharged for her unprotected activity alone, but also supports his decision to exclude the evidence of alleged disparate treatment that Pero sought to introduce.[9]

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and the employees would still have to have been similarly situated to Pero and share with her the "relevant aspects of her employment situation." *Neuren*, 43 F.3d at 1514.

[8] As for Watson and Marx, the offer of proof fails to provide any details whatsoever as to the relevance of the two employees. Nor does Pero's counsel bother to indicate how Pero can be compared to Grako, a member of management.

[9] I also note that Pero failed to object earlier in the proceeding to a protective order prohibiting disclosure of this information. On October 22, 1997, pursuant to 29 C.F.R. § 2700.56(c) and Rule 26(c) of the Federal Rules of Civil Procedure, Cyprus moved for issuance

In sum, I conclude that the judge did not abuse his discretion when he refused to admit Pero's testimony regarding the work histories of several of her co-workers. I find the judge's ruling sound both as a matter of law and fact.

The absence of any similarly situated employees in Pero's offer of proof does not prevent my colleagues in the plurality from turning the law of disparate treatment on its head and remanding this case to the judge with the instruction "to permit Pero to adduce the additional evidence in her offer of proof concerning Cyprus' treatment of other employees who violated company rules or caused costly mistakes." Slip op. at 12. I find their decision problematic for several reasons.

First, my colleagues' state in their plurality opinion that my "reference to the *Mitchell* 'same supervisor' test is particularly troublesome." Slip op. at 10. Yet, none of the cases I have discussed can be interpreted so as to make having the same supervisor the linchpin in a disparate treatment claim. It is but one of many factors that may be relevant in a particular case. In fact, I explicitly state that "the only 'relevant aspects of [Pero's] employment situation' (*Neuren*, 43 F.3d at 1514) contained in the record are her position as a clerical worker in the operator's human resources office and a string of offenses that include forgery, failure to complete work assignments, work errors, and making unsubstantiated statements to others about her supervisor." Slip op. at 23, *supra*. Nowhere do I mention Pero's supervisor.

More to the point, though, is that, as my discussion of the relevant case law demonstrates, the law of disparate treatment has evolved into something more than *Mitchell*. As stated above, it now requires a plaintiff alleging disparate treatment to show that his or her fellow workers share with the plaintiff "relevant aspects of [his or] her employment situation." *Neuren*, 43 F.3d at 1514.

My colleagues in the plurality appear unable to focus on the issue at hand — first to determine what the law states, which in case after reported appellate case is that employees being compared must be similarly situated in "all of the relevant aspects," *Pierce*, 40 F.3d at 802, then

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of a protective order prohibiting discovery of information about the treatment of other employees, contending that such information was not relevant, was not likely to lead to relevant evidence to support Pero's discrimination complaint, and would cause Cyprus oppression, undue burden, or expense. C. Mot. for Protective Order at 1-2. Pero did not oppose the motion and the judge granted the protective order on November 13, 1997, on the ground that the requested information was "not reasonably calculated to lead to evidence relevant to" Pero's discrimination complaint. On December 12, 1997, Pero moved for relief from the protective order, but the judge denied the motion on December 30, 1997, on the same ground on which he had issued the protective order. Pero did not request interlocutory review by the Commission under Commission Procedural Rule 76, 29 C.F.R. § 2700.76, of the judge's order denying relief. *See Consolidation Coal Co.*, 19 FMSHRC 1239 (July 1997) (interlocutory review of discovery order). Pero's failure to challenge Cyprus' motion further supports the judge's decision.

determine whether the judge's evidentiary ruling was contrary to the law or the evidence. As to what the law says, the plurality opinion appears muddled. My colleagues state: "It has been recognized that, in analyzing a claim of disparate treatment . . . 'precise equivalence in culpability between employees' is not required. Rather, the plaintiff must simply show that the employees were engaged in misconduct of 'comparable seriousness.'" Slip op. at 8 (citations omitted). What my colleagues fail to grasp, and what case after case demonstrates, is that any employees who are held up for comparison must first be shown to be similarly situated to the plaintiff in all relevant aspects. The comparable seriousness of disciplinary offenses held up for comparison is but one of many possible factors a court must consider in determining whether those committing the offenses are similarly situated.

I also believe a rule of reason must apply here. In Pero's case, I fail to see how any of our judges would be able to distinguish between the "comparable seriousness" of forgery committed by a clerical worker (to say nothing of the combination of offenses that led to Pero's termination) and tampering with respirable dust samples committed by a miner. Moreover, although an employer's policies towards widely differing offenses may strike some as not rationally related to the relative seriousness of the offenses, it is nevertheless not the job of this Commission to substitute its judgment for that of an employer in such instances. While our judges may determine whether "a proffered business justification is . . . plainly incredible or implausible," more importantly, "[t]he Commission and it judges have neither the statutory charter nor the specialized expertise to sit as a super grievance or arbitration board meting out industrial equity." *Chacon*, 3 FMSHRC at 2516.

My colleagues in their plurality opinion appear to read the law not for what it says, but rather for what they apparently wish it said. A case in point is their misreading of the case *Petsch-Schmid v. Boston Edison Co.*, 914 F. Supp. 697 (D. Mass. 1996), in which they claim the district court disagreed "with the *Mitchell* 'same supervisor' test." Slip op. at 10. This is not the point that case made. Instead, the judge stated that "[t]o the extent that *Mitchell* . . . can be read as Edison [the defendant] suggests, to require an employee to compare herself only with other employees disciplined by the same supervisor, I cannot agree." 914 F. Supp at 705 n.17. In other words, the judge is responding to an argument made by a party taking as true that party's underlying premise for the sake of responding to their argument. In fact, *Mitchell* did not set forth a "same supervisor" test. Instead, *Mitchell* and its progeny in the appellate courts set forth a circumstantial test that requires courts to make "an independent determination as to the relevancy of [the] particular aspect[s] of the plaintiff's employment status and that of the [other] employee[s]." *Ercegovich*, 154 F.3d at 352.[10]

Another problem I have with the plurality opinion is that it is at odds with the deferential

[10] The majority's reliance on *Petsch-Schmid* is misplaced for another reason. I fail to see the relevance of dicta in a district court opinion deciding a question of *state* law. *See* 914 F. Supp. at 700 n.2, 704-05 (note in which dicta appears related to discussion of count III of the plaintiff's complaint alleging sex discrimination in violation of *Massachusetts* law).

standard of review governing this case on appeal, the abuse of discretion standard. As I stated earlier, a judge abuses his or her discretion when "there is *no evidence* to support [his or her] decision or if the decision is based on an *improper understanding of the law*." *Mingo Logan*, 19 FMSHRC at 249-50 n.5 (emphasis added, internal quotations omitted). Here, I find sufficient evidence for the judge to have reasonably concluded that none of the employees cited by Pero in her proffer had work situations comparable to her own. I also find that the judge's decision is consistent with the well-established principles of law governing disparate treatment set forth in the appellate case law that both I and the plurality opinion cite.

Although the plurality opinion states that it will apparently "not apply [these cases, including] *Neuren* to an offer of proof" (slip op. at 7), this is just what a judge must do when evaluating such an offer — i.e., he or she must determine whether the evidence contained in an offer is relevant under the legal principles governing the proceeding over which he or she presides. I am confident in the ability of our judges to undertake this task, as illustrated in this case where the judge effectively made "an independent determination as to the relevancy of [the] particular aspect[s] of the plaintiff's employment status and that of the . . . employee[s]" in Pero's offer of proof. *Ercegovich*, 154 F.3d at 352. The majority apparently does not share my confidence in our judges, and insists on substituting its views for that of the judge. Such a result is simply not appropriate under the deferential abuse of discretion standard.

My colleagues in their plurality opinion state that "the claimed relevance of the proffered evidence is readily apparent from the very excerpt of the offer of proof" I quote above. Slip op. at 7 n.10. But to establish the relevance of the evidence she sought to adduce, Pero needed to demonstrate at the very least that the employees with whom she wanted to be compared were similarly situated in some relevant aspect. I find that the judge properly recognized that Pero failed to do this. Her offer of proof simply does not include any such evidence, much less anything that might be "readily apparent." The only thing readily apparent to me is that Pero's offer of proof is unsubstantiated and merely a repetition of points already made in the complaint. By trial, a lawyer should have more to put into an offer of proof, at least enough to establish legal relevance, if he or she expects to have the evidence admitted.

If the plurality opinion were binding law, the end result would be a singularly unworkable legal construct. The door would be open in discrimination cases to complainants raising disparate treatment arguments based on the most tenuous of connections between them and their fellow workers. Section 105(c) complainants would be allowed to bring in ream upon ream of irrelevant evidence on other employees as alike to them as apples are to oranges. Under my colleagues plurality reasoning, the plaintiff in *Chacon*, an engineer, should have relied upon the discipline meted out to clerical workers. Even in the *Ercegovich* case on which they rely, the court found a legitimate allegation of disparate treatment "[b]ecause the positions previously held by Ercegovich, Evert, and Cohn were *all related human resources positions*." 154 F.3d at 353 (emphasis added).

Under this decision, Pero will now be allowed to compare an underground miner's respirable dust sample tampering, or another miner's cutting too much coal, to the combination of forgery, incompetence, and insubordination that served as the basis for her termination from her position as a clerical worker. But to what end? The Chairman and Commissioner Riley have one view of this case, Commissioner Beatty another view fairly inconsistent with that of his colleagues. This case thus returns to the judge with no clear rationale under which he can render a decision. I do not envy the judge the task assigned to him by my colleagues.

For the foregoing reasons, I would affirm the judge, and therefore, I dissent.

Theodore F. Verheggen, Commissioner

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