FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20004-1710

JAN 29 2020

ROBERT THOMAS	:	
	:	
v.	:	Docket No. WEST 2018-402-DM
	:	
CALPORTLAND COMPANY	:	

BEFORE: Rajkovich, Chairman; Jordan, Young, Althen, and Traynor, Commissioners

DECISION

BY: Rajkovich, Chairman; Young and Althen, Commissioners

This case arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (2018) ("Mine Act" or "Act"). It involves a complaint filed by miner Robert Thomas alleging that CalPortland Company ("CalPort") discriminated against him in violation of the Mine Act.[1] After a Commission Administrative Law Judge found that CalPort discriminated against Thomas, CalPort filed a petition for discretionary review challenging the Judge's decision on the ground that the miner had failed to establish a prima facie case of discrimination.

For the reasons discussed below, we hold that the Judge erred in concluding that Thomas established a prima facie case of discrimination. Accordingly, we reverse the Judge's decision and dismiss this case.

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[1] The Act states in pertinent part that:

> No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . filed or made a complaint under or related to this chapter, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine, . . . or because such miner . . . has instituted or caused to be instituted any proceeding under or related to this chapter . . . .

30 U.S.C. § 815(c)(1).

I.

Factual and Procedural Background

A. Factual Summary

The Sanderling Dredge is a surface sand mine located in Vancouver, Washington. CalPort is the owner and operator of the dredge and is a mine operator subject to the jurisdiction of the Mine Act. Robert Thomas worked for CalPort in Oregon and Washington from March 2002, through the beginning of 2018. At the beginning of 2018, Thomas worked as a dredge operator on the Sanderling dredge with deckhand Joel McMillan and Roger Ison, a contractor and captain of the Johnny Peterson tugboat. The Johnny Peterson pulls the Sanderling Dredge up and down the Columbia River between Vancouver, Washington, and Scappoose, Oregon. The Dredge requires two miners to operate it, and one person to operate the tugboat. Thomas was the most senior of the two dredge miners and was designated the Person in Charge ("PIC").[2] Tr. 40, 289; 40 FMSHRC 1503, 1504 (Dec. 2018) (ALJ).

At the beginning of 2017, when the mine changed from two shifts to a single day shift, the miners on the Sanderling Dredge began working long hours, sometimes around 80 hours per week. 40 FMSHRC at 1504. In July 2017, Dean Demers took over the job as Marine Manager, which gave him management authority over four sand and gravel barges, as well as the Sanderling Dredge. The barges under Demers' management are subject to the jurisdiction of the Occupational Safety and Health Administration ("OSHA") and the Sanderling Dredge is subject to the jurisdiction of the Mine Safety and Health Administration ("MSHA").

1. Thomas' Concerns and the Phone Call Hang-up

Thomas and McMillan grew concerned that working so many hours had resulted in them being exhausted, which caused difficulty in paying attention while working with equipment. The two men eventually voiced their concerns to Demers and asked for help to avoid the long days and safety concerns. *Id.* Thomas had expressed his concerns to Demers as recently as November 2017. Tr. 118-20; 40 FMSHRC at 1504. Demers responded that he "was working on it" and subsequently brought in personnel from the rock barges to work some of the shifts. This alleviated the problem of long hours for Thomas. Tr. 120-21.

Thomas also believed that the barge workers were not receiving adequate task training to safely perform their work on the Dredge. Tr. 121-22. When asked by Demers to sign the task

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[2] 30 C.F.R. § 56.18009 requires that: "When persons are working at the mine, a competent person designated by the mine operator shall be in attendance to take charge in case of an emergency."

training sheets of the barge workers, Thomas refused, responding that the barge workers were not being properly trained in his view.[3] Tr. 122.

In November 2017, Thomas called Demers saying that he would not be coming into work the following day and would be taking a sick day. Tr. 123-24. A disagreement ensued and Thomas abruptly hung up the phone on Demers. Tr. 47-48, 123-24, 371, 445. McMillan testified that the next day Demers said to him that "after the way Rob talked to him on the phone that Rob Thomas was done, he was f****** done at CalPortland." Tr. 48, 88. Thereafter, Thomas met with Demers and Candy Strickland in CalPort's Human Resources Department ("HR") to resolve the incident, which included discussing protocol, the proper way to call out sick, and how to communicate with your manager and peers in a professional manner. Tr. 445. CalPort did not discipline Thomas for this incident, and Thomas testified at the hearing that after the meeting "everything was fine." Tr. 202.

2. The Personal Flotation Device Incident and Suspension

At the end of the shift on January 24, 2018, the Sanderling Dredge was traveling downriver on its return to the dock in Vancouver. Thomas and McMillan were changing out a valve above deck on the dredge, which sits 14 feet above the waterline. Thomas stood on the ladder to help lower the valve down from its position. He and McMillan testified that they were both wearing their personal flotation devices ("PFDs") during the change out. McMillan then climbed up on the ladder in order to weld the studs while Thomas went to perform another task. As McMillan was welding, Thomas removed his PFD and hung it outside of the lever room, then walked over to the welding table, in the middle of the barge, to use the cutting torch.

At some point, McMillan had to pause his work and go over to the tugboat to help Ison with a transmission problem. He was gone for about 30 minutes during which he did not see Thomas working. As McMillan was returning to the dredge, and as Thomas had just completed cutting and was putting his PFD back on, they noticed MSHA Inspector Mathew Johnson standing on the dock. Tr. 51-57, 61, 124-25, 131-34; 40 FMSHRC at 1505.

As the dredge neared the dock, Inspector Johnson called out and asked if it was company policy to *not* wear a PFD. Thomas responded that CalPort's policy requires miners to wear PFDs. Once in port, Thomas admitted to Inspector Johnson that he had not worn his PFD while operating the cutting torch at the welding table. Thomas then called Demers, who was working at a different location, to explain what had happened and then handed the phone to Inspector Johnson. After speaking with Demers, Inspector Johnson completed his inspection of the dredge and issued a citation to CalPort for Thomas' failure to wear a safety device or to be tied off while

[3] Generally, Demers signed off on task training records as the "person responsible for health and safety training," while Thomas or McMillan were the competent persons conducting the training. Tr. 414-16.

working on the open portion of a dredge.[4] 40 FMSHRC at 1506. The inspector determined that Thomas engaged in aggravated conduct. He deemed the action an unwarrantable failure and a significant and substantial violation that could reasonably likely result in a fatality.[5]

The next day, Thomas told Demers that he was not on the ladder without his PFD.[6] Tr. 139. Inspector Johnson returned that day and met with Demers to discuss the previous day's violation. Demers called Thomas to join them. Thomas and Inspector Johnson disagreed about whether Thomas was on the ladder without his PFD. Tr. 141, 380-81. After Inspector Johnson left, Thomas returned to the tugboat to help McMillan, and Demers called David McAuley, CalPort's Regional Operations General Manager, to discuss the matter. Based on the differing versions of events by Inspector Johnson and Thomas, McAuley and Demers decided to suspend Thomas, without pay, pending further investigation. Having decided to suspend Thomas, Demers called the dock and instructed McMillan not to let Thomas go because he needed to come down to "get rid of him." Tr. 67.

During the course of Thomas' career at Calport, the record reflects that he had been involved in a previous disciplinary incident in 2012. He received a verbal warning, as well as a three-day suspension for violating company work rules after it was determined that he lied to government and CalPort officials during an investigation. Decl. of Erik M. Laiho, Ex. L at 1; Tr. 203-04.

3. The Draft Disciplinary Recommendation and Premature E-mail

Demers returned to the Dredge to notify Thomas that he was suspended pending an investigation. Tr. 142, 179, 180, 182-83. Thomas gathered his things and punched out for the day. The next morning, Demers contacted Thomas and asked him to provide a written statement about the incident that led to the citation. Thomas prepared and emailed his statement to Demers two days later. Tr. 142; Thomas Ex. 19. On Saturday, January 27, Demers called Thomas and asked him to come to the office on Monday, January 29, at 8:00 a.m.

When Thomas arrived that Monday, he met with Demers and Safety Manager Jeff Woods. Demers read the narrative portion of the MSHA citation aloud to Thomas. Thomas disagreed with the inspector's statement, proclaiming that: "This whole thing is nothing but a sham[]. . . . It's completely false." Tr. 145, 386. Woods asked Thomas if it was common practice for Thomas to not wear his PFD. Thomas refused to answer the question saying that he

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[4] 30 C.F.R. § 56.15020 states that: "Life jackets or belts shall be worn where there is danger from falling into water."

[5] McMillan also testified that Johnson told Thomas that he could be cited personally for the violation and that it could be a fireable offense, although unlikely, given Thomas' history of having no safety violations. Tr. 62.

[6] McMillan's position on whether or not Thomas was on the ladder without his PFD was inconsistent. Thomas Ex. 5; Tr. 54-55, 82-83.

did not believe they would listen to him and he did not want to "incriminate [him]self." Tr. 145, 385-86, 438. While at the meeting, Thomas was asked to fill out an employee incident report and to submit a lengthier statement, which he completed at home and emailed to Demers that afternoon. McMillan also completed an employee incident report that same day.

Following the meeting with Thomas, Demers met with McAuley and Strickland to discuss the matter further. McAuley asked Demers to work with Strickland to prepare a draft disciplinary recommendation. Demers sent the first draft of his recommendation in an email to Strickland entitled "Wordsmith Please" the same day. Tr. 306-07, 387, 443, 448; CPC Ex. N at 1. On January 30, Strickland, Demers, and McAuley participated in a meeting with upper management to brief them on the situation with Thomas. Demers was asked to set up another meeting with Thomas for 11:00 a.m. the next day, which he did.

After the management meeting, Demers sent a second draft of his recommendation to Strickland in an email entitled "Wordsmith Take II," attaching an unsigned and undated draft corrective action form. CPC Ex. N at 2-7. The form contained Demers' recommendation to discharge Thomas based on Thomas' violation of the PFD rule, his lack of cooperation with the company investigation, and his perceived lack of candor.[7] CPC Ex. N at 4-5. Mistakenly, Demers' had also sent the same email to the barge scheduling list, which included Thomas, other employees of CalPort, and contractors. Demers attempted to recall the email immediately. He then sent a follow-up email, which stated "Please delete last e-mail it was sent by mistake." Tr. 389-93; CPC Ex. N at 8. He also contacted McAuley and Strickland to let them know what had happened.[8]

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[7] In part, the memorandum states:

> Your explanation of what took place does not match what others had to say. During the interview, you were asked 'if it was normal policy to take off your PFD to conduct hot work' and you refused to answer the question. During the interview, you were uncooperative and aggravated with the questioning. You also stated that you thought that the whole process was 'a sham.' However, you admit to being on deck conducting work underway without wearing a PFD. It is impossible to work on that valve without a ladder or something to stand on.

CPC Ex. N at 5.

[8] Demers thereafter received a written warning from McAuley for his mishandling of the sensitive email. Tr. 314-15; CPC Ex. O.

4. The Engagement of Thomas' Attorney

Around 6:30 a.m. the following morning, January 31, Thomas was preparing to go to the 11:00 a.m. meeting when he received a phone call from Ison, the tugboat captain, telling him to check his email. When Thomas checked, he saw the email from Demers containing the corrective action stating "that [he] was terminated effective immediately," and that the email had been sent to his co-workers and to contractors. Tr. 149; Thomas Exs. 1 and 2, 71; CPC. Ex. N at 4-6. Thomas notified his wife that he had been terminated and then texted Demers to let him know that he would not attend the 11:00 a.m. meeting. There is no evidence that Thomas told Demers that he had seen his termination email. That same afternoon, Thomas hired an attorney and directed his attorney to send a letter to Demers and CalPort about his intent to file a discrimination claim against them.[9] Tr. 155-56. CalPort witnesses testified that they did not receive anything from Thomas' counsel until February 13. Tr. 158, 191.

The following morning, Thomas received a call from McAuley on his personal cell phone. With his stepdaughter present, and before hanging up, Thomas told McAuley that he should not be calling him on his personal phone, not to call him again, and to contact him by mail or contact his attorney.[10] Tr. 156-57, 186, 318-19, 452; CPC Ex. P. There is no evidence that the termination email was mentioned during the call. After speaking with Thomas, McAuley contacted Strickland the same day to discuss the situation, and they collectively determined that the matter was now one for HR to address. In light of Thomas' comments to McAuley and his failure to come in for the meeting, Strickland immediately began working on a letter advising Thomas that a failure to contact the company would result in his discharge.

5. The Voluntary Resignation

On February 2, Strickland was directed to begin processing a "voluntary resignation" for Thomas based on his actions foreshadowing violation of the company's attendance policy. CPC Ex. FF at 3. That same day, she drafted the letter to Thomas informing him that his continued silence would result in his voluntary resignation. That Monday, February 5, Strickland sent the letter to Thomas via standard mail and UPS, which stated that if Thomas did not contact HR by Thursday, February 8, "he will be considered to have voluntarily resigned." Tr. 456-57; CPC Ex. R. Thomas refused receipt of both copies of the letter and did not forward them on to his attorney. 40 FMSHRC at 1507-08.

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[9] Counsel for Thomas alleged that on February 2, 2018, he sent an email to Demers containing a letter notifying CalPort that Thomas was now being represented by an attorney. Demers testified that he did not receive the email until February 13 and that it did not have a letter attached. Tr. 157-160, 421-22.

[10] McAuley testified that he did not recall hearing Thomas mention an attorney during that phone call. Tr. 319-20.

On February 5 and 6, Demers spoke with MSHA Special Investigator Diane Watson who indicated that "she wasn't going to open a 101 case against Rob because she knew he had been terminated," and that he may be filing a "decimation" law suit.[11] Tr. 106-07, 403-05; Thomas Ex. 61. The following day, Demers called Watson back, in accordance with McAuley's instructions, to tell her that Thomas had not been "terminated."[12] On February 9, after Thomas did not respond to the letter of February 5, CalPort sent Thomas another letter, notifying him of his voluntary resignation.

6. The Discrimination Complaint

Thomas filed his written discrimination complaint with MSHA on February 13, 2018, pursuant to section 105(c)(2) of the Act.[13] Tr. 206; Thomas Ex. 46; 40 FMSHRC at 1508-09. He did not request temporary reinstatement. His attorney reviewed the complaint before it was filed. Oral Arg. Tr. 63. On February 21, 2018, MSHA Investigator Watson emailed Demers to notify CalPort that Thomas had filed a section 105(c)(2) complaint. Two months later, on April 23, 2018, MSHA declined to pursue a discrimination case on Thomas' behalf. *See* Thomas Compl. Ex. 1. On May 23, 2018, Thomas filed a section 105(c)(3) complaint with the Commission, which was contested by CalPort on June 18, 2018.[14]

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[11] While the Judge stated in her finding of facts that Watson said "discrimination" complaint, CalPort refutes the Judge's description and maintains that Watson said "defamation" complaint. Demers wrote "decimation" law suit in his notes. CPC PH Br. at 17-19; PDR at 22; CPC Op. Br. at 5, 17; Tr. 405-06; Ex. 61; 40 FMSHRC at 1508. The Judge did not resolve the discrepancy in her decision.

[12] The Judge inaccurately stated that "Demers told McAuley that Thomas thought he had been terminated *based on Demers' January 30 email.*" 40 FMSHRC at 1508 (emphasis added). According to Demers' testimony, which is consistent with McAuley's, Demers simply stated that Watson said that she understood that Thomas had been terminated. Tr. 323-24, 404. Demers never stated that Thomas believed he was terminated based on Demers' action.

[13] 30 U.S.C. § 815(c)(2) states that: "Any miner . . . who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary . . . shall cause such investigation to be made as he deems appropriate."

[14] 30 U.S.C. § 815(c)(3) states that:

> Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner . . . of his determination whether a violation has occurred. If 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

B. The Judge's Decision

After a hearing on the merits, the Judge issued a decision finding that CalPort had discriminated against Thomas in violation of the Mine Act and awarded Thomas back pay, lost benefits, and attorney's fees. 40 FMSHRC at 1517-18. The Judge found that Thomas engaged in four activities protected by the Act. First, she determined that Thomas' discussions with Inspector Johnson, beginning on January 24 arising from his unwarrantable failure to wear his PFD, were protected. Second, she found that he complained to Demers that he was tired from working so many hours, and that he could not concentrate, making it unsafe. Third, she found that Thomas expressed concern about the lack of task training for the rock barge employees. Lastly, she determined that Thomas let the mine know that he had hired an attorney and the mine was alerted that Thomas was filing this discrimination complaint with MSHA.[15] 40 FMSHRC at 1509.

The Judge also determined that there was adverse action against Thomas demonstrated by his suspension pending investigation, his termination under the company's voluntary resignation policy, and the accidental termination email sent out by Demers. In finding the elements of knowledge and timing most persuasive, she concluded that there was "sufficient circumstantial evidence to demonstrate a connection between Thomas' discharge and his protected activity." *Id.* at 1512.

II.

The Standard of Review

A. Substantial Evidence

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)). Under the substantial evidence test, the "possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence." *Sec'y on behalf of Wamsley v. Mutual Min., Inc.*, 80 F.3d 110, 113 (4th Cir. 1996).

B. Prima Facie Case of Discrimination

The Commission has held that a complaint alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to

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discrimination or interference in violation of paragraph (1).

[15] The Judge did not find the call between Thomas and Demers regarding sick leave to be protected activity.

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 Jayson Turner v. Nat'l Cement Co.*, 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817-18 (Apr. 1981).

The Complainant bears the burden of establishing protected activity. *Pasula*, 2 FMSHRC at 2797-2800, *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3rd Cir. 1981); *SOL on behalf of Riordan v. Knox Creek Coal Corp.*, 38 FMSHRC 1914, 1920-21 (2016). "Direct evidence of motivation is rarely encountered; more typically, the only available evidence is indirect." *Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981).

In evaluating whether there exists a causal connection between the protected activity and the adverse action, the Commission has identified several indicia of discriminatory intent, including: (1) knowledge of the protected activity; (2) hostility towards the protected activity; (3) coincidence in time between the protected activity and the adverse action; and (4) disparate treatment of the complainant. *Id.* at 2510.

It is upon these standards that we find that the Judge erred in concluding that Thomas had established a prima facie case of discrimination.

III.
Disposition

Thomas failed to introduce any evidence that his suspension and eventual discharge were in any way motivated by protected activity. In fact, the available evidence strongly suggests that the adverse actions he experienced were direct results of his own unprotected and dangerous activity of failing to wear a PFD and his walking away from the operator's necessary investigation.

Citing *Hatfield v. Colquest Energy, Inc.*, 13 FMSHRC 544 (Apr. 1991), the operator argued before the Judge and the Commission that Thomas' claim must be limited to the protected activities alleged in his initial section 105(c)(2) complaint because issues regarding his work hours, task training, and intent to file suit were not included in his section 105(c)(2) complaint, and thus, not investigated by MSHA. In *Hatfield*, the Commission held that a miner's section 105(c)(3) complaint could include any matter investigated by MSHA in response to the section 105(c)(2) complaint. *Id.* at 545-46. We need not address the operator's *Hatfield* objection. We do address those claims below only for the purpose of completeness and in case of appeal to show that even were we to consider activities beyond those arising out of Thomas' responding to the Inspector in January 2019, substantial evidence could not support a finding in Thomas' favor. Consequently, our discussion of those alleged activities does not portend any change in *Hatfield*. It only demonstrates that the evidence does not support the Judge's decision under any conceivable theory.

A. Cooperation with MSHA Inspection

The Judge found Thomas' cooperation with the MSHA inspection on January 24, to be protected. However, neither Thomas nor the Judge was able to identify any signs of hostility, circumstantial or direct, displayed by CalPort regarding Thomas' cooperation with MSHA Inspector Johnson. 40 FMSHRC at 1510-12. Instead, CalPort engaged in the necessary task of evaluating the circumstances resulting in issuance of an unwarrantable failure order.[16]

Thomas conceded at the hearing that the company did not display any animus or hostility towards his participation in the inspection. Tr. 208. Additionally, given Inspector Johnson's eyewitness account of Thomas' unsafe and violative conduct, the circumstances compelled Thomas' cooperation. There is no evidence that CalPort officials were upset with or suspended him because of his necessary cooperation in MSHA's investigation. Clearly, their investigation and meetings with him arose out of, and only out of, his failure to wear a PFD.[17]

B. Complaints about Long Hours

The evidence does not support a finding of any adverse action motivated by the complaint over hours. The Judge did not consider Thomas' continued testimony where he explained that "he knew [Demers] had a lot on his plate. . . . [H]e was trying to man – take care of three barges, shorthanded, and taking care of a new item, the dredge, Sanderling." Tr. 120-21. Demers explained to McMillan that he had a stack of applications, that he was trying to find someone, and that several successful applicants made it through the hiring process but turned out to be uninsurable due to DUIs. Tr. 79. McMillan did not testify that he felt or saw animus towards his request.

Thomas was asked if he thought that Demers did anything to alleviate his concerns about the hours, and even Thomas testified: "Yes, he started bringing out the rock barge guys . . ." Tr. 121; *see also* Tr. 43-44. He further stated that Demers' solution to this complaint resolved the issue of excessive hours for him. Tr. 210. Thomas conceded that Demers' response to his request to work fewer hours was not one of animosity or hostility. Tr. 208-11. Contrary to the Judge's determination, there was more than ample evidence through Thomas' own words that

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[16] As to the factors set forth in *Chacon* that might demonstrate motivation, CalPort obviously learned almost immediately from the MSHA Inspector that Thomas had committed a violation by failing to comply with CalPort's PFD policy and acted, as it should, to investigate such wrongful misconduct. Such events, therefore, were necessarily close in time and do not indicate any discrimination.

[17] Moreover, Thomas was well aware that company policy required his full participation with government investigations. In the 2012 incident, Thomas was disciplined for making false statements to government investigators and failing to cooperate with an investigation. He was specifically warned that such behavior could lead to termination in the future.

Demers did not develop animus toward Thomas as a result of his complaint about the hours being worked.[18]

C. Complaint about Task Training

The Judge found that the barge workers worked under OSHA regulations, and that they required task-training and "an introduction to MSHA regulations." 40 FMSHRC at 1505. However, the record shows that while the barge workers may have required task training for the Dredge, CalPort's dredge and barge workers are all trained miners. Tr. 210, 229. CalPort's Corporate Safety Director Chad Blanchard testified, without contradiction, that its employees undergo MSHA new employment training during their new-hire orientation and are trained in waterborne safety and their discrimination rights. There is undisputed testimony that CalPort had its task training records inspected by MSHA in December 2017 and March 2018, with no citations issued. Tr. 418; CPC Exs. DD, EE. There is no indication that MSHA found it improper that the person signing off on the task-training sheets was different from the "competent person" conducting the training.

There is no testimony or other evidence regarding Demers' response to Thomas' complaints about the lack of task training for the substitute miners. Obviously, there are many reasons unrelated to animus towards safety that might lead to not discussing Thomas' action, including, most likely, that Demers was not concerned by Thomas' refusal. Establishing discriminatory motivation as part of a complainant's prima facie case requires more than a lack of responsiveness to a miner's action. Again, it is most compelling that Thomas explicitly testified that he did not sense animus from Demers regarding his complaints, and he agreed that he did not believe anything MSHA-related motivated CalPort to take an adverse action against him. Tr. 205-08.

Moreover, McMillan made the same complaints and refused to sign task training sheets, just as Thomas. McMillan did not suffer any adverse action by Demers or any other CalPort official. *See Metz v. Carmeuse Lime*, 34 FMSHRC 1820, 1827 (Aug. 2012) (finding operator lacked animus against complainant's safety-related complaints where other employees complained of same safety issue and none of them experienced retaliation).

D. Notice of Legal Action

The first sign that Thomas was involving an attorney occurred on February 1, 2018, two days *after* Demers had already made his recommendation to terminate Thomas' employment on

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[18] The Judge relied on Demers' statement that "Rob Thomas is f---ing done." 40 FMSHRC at 1511. But this was not in response to the conversation involving hours. Rather, it resulted from a discussion of a sick day not found by the Judge to be protected activity. Moreover, the facts suggest the comment resulted from Thomas' insubordinate behavior of hanging up on Demers in the middle of the conversation on the prior day. There is no evidence to link that statement to any safety complaints. Finally, Thomas testified that after he and Demers discussed the telephone call "everything was fine." Tr. 202.

January 30, 2018. That was also six days *after* he was suspended pending investigation. Thus, any adverse action experienced by Thomas prior to February 1 cannot be attributed to Thomas' decision to involve his lawyer. According to the Judge's finding of fact, CalPort became aware of the discrimination complaint by February 6. 40 FMSHRC at 1509. That was four days *after* the decision was made to process Thomas as a voluntary resignation based on the company's last communication with Thomas about CalPort's attendance policy.

Thomas has not presented any evidence demonstrating that, after his February 1 statement that he was involving his lawyer, Demers, McAuley, Strickland, or any other CalPort official even knew of, let alone, harbored or directed any animus towards Thomas' decision to involve an attorney. Since February 1, Thomas had refused to communicate with his employer. Prior to issuing the voluntary resignation on February 9, CalPort made several attempts to reach Thomas to resolve the communication breakdown. He refused to communicate or even open his mail thereby choosing to forego the possibility of being retained as an employee.

Thus, there is insufficient evidence to support a finding that any animus resulted from Thomas' alleged protected activity. To the contrary, the evidence demonstrates that Thomas' suspension and then discharge arose from actions other than protected activity. These actions are, at least, the commission of an unwarrantable failure, his uncooperative and disrespectful conduct in a meeting with company personnel, and, ultimately, his ill-considered refusal to take or respond to calls and mail asking that he come to the office to discuss his situation.

III.

Conclusion

In conclusion, we hold that there is not substantial evidence in the record to establish that any protected activity by Thomas motivated the operator in any part to take any adverse action toward him. For the reasons set forth above, we reverse the Judge's finding of discrimination by CalPort and dismiss this case.

Marco M. Rajkovich, Jr., Chairman

Michael G. Young, Commissioner

William I. Althen, Commissioner

Commissioners Jordan and Traynor, concurring:

We concur with the majority, but write separately to address more fully the Respondent's argument that our decision in *Hatfield v. Colquest Energy Inc.*, 13 FMSHRC 544 (Apr. 1991), precludes our Judges from considering evidence of certain protected activities when examining what motivated a properly pled adverse action.

Section 105(c) of the Mine Act provides to miners a full administrative investigation and evaluation of an allegation of discrimination, as well as the right to commence a private action before the Commission in the event that the Secretary's administrative evaluation results in a determination that there is not evidence that the provisions of section 105(c) were violated. Section 105(c)(2) provides that, upon receipt of a complaint of discrimination or interference, the Secretary "shall cause such investigation to be made as he deems appropriate," and that "[i]f upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission. . . . " 30 U.S.C. § 815(c)(2). Section 105(c)(3) of the Act provides that, if the Secretary determines he has not found evidence that a violation has occurred, "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 [section 105(c)(1)]." 30 U.S.C. § 815(c)(3). Though section 105(c) contains no explicit restriction on the subjects a miner may include in the action he files on his own behalf, the structure of the subsection necessarily implies that an action a miner brings on his own behalf must be related to his initial complaint submitted for administrative investigation.

On occasion, we must determine whether a private action under section 105(c)(3) concerns matters that were first submitted for investigation and evaluation as required by section 105(c)(2). In *Hatfield*, an operator argued on interlocutory appeal that certain discrete allegations of protected activity a *pro se* miner included for the first time in his amended section 105(c)(3) complaint should be stricken for his failure to explicitly allege them in his initial administrative complaint. 13 FMSHRC at 544. We interpreted section 105(c) expansively to hold that a miner could allege in his private right of action any matter investigated by the Secretary, not merely those allegations explicitly alleged in the four corners of the administrative complaint. We therefore directed the Judge to determine whether protected activities alleged in the miner's amended complaint "were part of the matter that was investigated by the Secretary in connection with [the miner's] initial discrimination complaint to MSHA."[1] *Id.* at 546. Our

[1] Notably, the Secretary of Labor did not participate in the *Hatfield* case and had no opportunity to file an *amicus* brief as the Commission granted the operator's petition for interlocutory review, vacated the Judge's order, and remanded the proceeding without taking briefs. The Secretary has not had occasion to offer the agency's view as to how Mine Act provisions requiring him to investigate administrative complaints filed pursuant to section 105(c)(2) should be interpreted to accommodate his own investigatory role with the Congressional directive that we should "expansively" construe section 105(c) "to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." S. Rep. No. 95-181, at 35-36 (1977), reprinted in Senate Subcomm. on Labor, Comm. on Human Res., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 623-24 (1978).

decision preserved and balanced both the Secretary's investigatory role and a miner's right to file and process a complaint of discrimination through a system intended for use by laypersons unfamiliar with the technical science of pleading.

The *Hatfield* decision served to shelter from summary decision those allegations advanced in a section 105(c)(3) private right of action that were not explicitly referenced in the section 105(c)(2) complaint submitted for investigation, but were investigated. *See, e.g., Saffell v. National Cement Co.,* 14 FMSHRC 1053, 1055 (June 1992) (ALJ); *Womack v. Graymont Western U.S. Inc.*, 25 FMSHRC 235, 248 (May 2003) (ALJ). Under *Hatfield*, a miner's lay explanation in an administrative complaint of why he or she "believes that he has been discharged, interfered with, or otherwise discriminated against," 30 U.S.C. § 815(c)(2), is not scrutinized like a formal pleading in order to preclude a miner from advancing a related allegation the Secretary investigated. We extended this approach to hold a section 105(c)(2) complaint filed by the Secretary on behalf of a miner could include any allegations addressed in the administrative investigation. *Sec'y of Labor on behalf of Dixon v. Pontiki Coal Corp.*, 19 FMSHRC 1009, 1017 (June 1997).

Our approach in *Hatfield* and *Pontiki* was intended to preserve miners' rights to an administrative investigation and evaluation, while ensuring they are not denied their right to pursue a private section 105(c)(3) action for reasons unrelated to the merits of their claims. However, recent ALJ decisions applying *Hatfield* reveal miners are too frequently denied access to specific proof of the scope and content of the administrative investigation. *See, e.g., Willis v. Jeffrey Tyler for Heart of Nature (NV), LLC*, 2018 WL 2529561, Unpublished Order at 3 (May 11, 2018) (ALJ) (recounting Secretary's refusal to produce a transcript of the investigatory interview); *Justice v. Gateway Eagle Coal Co.*, 36 FMSHRC 2371 (Aug. 2014) (ALJ) (renewing motion to enforce a subpoena).[2] And sometimes a complainant has no access to facts about the scope of the administrative investigation because no adequate investigation was conducted. *See, e.g., Deuso v. Shelburne Limestone Corp.*, 41 FMSHRC 232, 242 (Apr. 2019) (ALJ); *Myers v. Freeport-McMoRan Morenci, Inc.*, 34 FMSHRC 1593 (July 2012) (ALJ). In these cases, *Hatfield* has been misapplied to the extent miners have been barred from advancing a case of discrimination solely because they are denied access to evidence delineating the scope of the Secretary's investigation of his or her protected activities, or denied an adequate investigation.

Our holding in *Hatfield* must not operate to prevent a miner complainant from identifying and offering instances of protected activity as evidence in support of a private action. *Hatfield* only precludes a miner from broadening his complaint to request relief for an *adverse action* that was neither pled in the initial administrative complaint or investigated by the Secretary after receipt of such complaint.

However, this is not surprising, given miners may only file a private action under section 105(c)(3) if and when the Secretary declines to pursue the complainant's case.

[2] MSHA should ensure its policies for responding to requests for information from section 105(c)(3) complainants do not thwart their ability to advance a claim on matters investigated by MSHA.

In the instant case, the only protected activity explicitly referenced in the administrative complaint filed in the wake of Thomas' suspension is his interaction with MSHA inspector Johnson at the dock. However, Thomas alleges in his section 105(c)(3) private action that his reports to his supervisor of inadequate training and excessive work hours are additional protected activities that also motivated, at least in part, his suspension and subsequent termination. These pleaded protected activities concern the adverse action raised in Thomas' administrative complaint. Importantly, Thomas did not seek additional or separate relief.

It is significant that the protected activities not referenced in Thomas' initial complaint but alleged in his private action are claimed to have motivated the same adverse action explicitly referenced in his initial complaint. The adverse action element of a discrimination case is a particularly helpful lens for understanding appropriate application of our *Hatfield* decision. A miner can be expected to be especially familiar with the facts establishing the adverse action prong of a discrimination case. He or she will be able to easily identify and explain in lay terms a termination, suspension, reassignment, threat, etc. These facts describing the adverse action are those a lay miner is most likely to identify as salient and necessary for inclusion in the initial filing explaining why he or she "believes that he has been discharged, interfered with, or otherwise discriminated against." 30 U.S.C. § 815(c)(2). By contrast, miners are comparatively less likely to specifically reference in their initial complaint other allegations critical to the evidentiary burden of establishing a discrimination case, such as protected activity and unlawful motivation, because their importance is only apparent to those familiar with the legal requirements of our *Pasula-Robinette* framework.[3] These are the types of facts an effective administrative investigation and evaluation is reasonably expected to uncover.[4]

Permitting a miner to plead other discrete instances of protected activity alleged to have motivated a properly pled and investigated adverse action does not interfere with or diminish the Secretary's ability to ensure every administrative complaint receives a full investigation. An

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[3] *Sec'y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds, Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817-18 (Apr. 1981).

[4] This point is echoed in both the majority and dissenting opinions accompanying our decision in *Hopkins County Coal, LLC*, 38 FMSHRC 1317 (June 2016), where the majority stated in footnote 11 of their opinion that "MSHA's initial interview with the miner can provide the investigator with much needed clarity regarding the allegations, and can possibly lead to the discovery of other violative conduct the miner did not know to allege or had trouble articulating in his charging complaint." The dissenters agreed, observing at footnote 2 of their opinion that "Miners may initially fail to assert in precise legal terms the elements of a discrimination claim in their written complaint. When, as here, a miner's complaint is facially invalid, MSHA is entitled to ask questions and investigate whether any facts asserted by the miner at that point might support a discrimination claim--that is, can the miner allege the elements of protected activity and adverse action because of such activity." *Id.* at 1339 n.2.

investigator helping determine whether Thomas' administrative complaint makes out a case for relief would have had a reasonable opportunity to investigate whether Thomas had engaged in other protected activity – in addition to the interaction with the inspector - that could have possibly motivated his suspension and termination. Though the Secretary's evaluation of Thomas' administrative complaint determined there was not sufficient evidence to establish a violation, a reasonably diligent investigation would have thoroughly examined Thomas' participation in protected activity.

To resolve this case, we considered whether Thomas' putatively protected complaints about inadequate training and excessive work hours motivated in any way the same adverse action referenced in his administrative complaint - his suspension and ultimate termination.[5] Along with the majority, we find no proof that they did.

Mary Lu Jordan, Commissioner

Arthur R. Traynor, III, Commissioner

[5] We do not address here whether these additional activities are the type that are protected under *Pasula-Robinette*.

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