**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
Office of Administrative Law Judges
601 New Jersey Avenue, NW, Suite 9500
Washington, DC 20001

August 29, 2011

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| SECRETARY OF LABOR, | : | DISCRIMINATION PROCEEDING |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. KENT 2010-280-D |
| on behalf of LIGE WILLIAMSON, | : | PIKE CD 2009-06 |
| Complainant | : | |
| | : | |
| v. | : | |
| | : | |
| CAM MINING, LLC, | : | Mine ID: 15-18911 |
| Respondent | : | No. 28 Mine |

**DECISION**

Appearances: Mary Sue Taylor, Esq., U.S. Department of Labor, Nashville, Tennessee, on behalf of the Complainant;
Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, Charleston, West Virginia, on behalf of the Respondent.

Before: Judge Paez

This case is before me upon a complaint of discrimination filed by the Secretary of Labor ("Secretary"), on behalf of Lige Williamson against CAM Mining ("CAM"), pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 (the "Act" or "Mine Act"), 30 U.S.C. § 815(c).

## I. Statement of the Case

On May 29, 2009, Williamson filed a complaint alleging discrimination under section 105(c) of the Mine Act. After an investigation, the Secretary chose to pursue the case on behalf of Williamson.

The Secretary filed an application for temporary reinstatement pursuant to section 105(c)(2) of the Mine Act.[1] A hearing on the temporary reinstatement was held before

[1] Section 105(c)(2) of the Mine Act states, in relevant part:
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

Administrative Law Judge Jerold Feldman. Judge Feldman determined that the Secretary had not satisfied her burden by failing to demonstrate that the application was not frivolously brought, and he dismissed the case. *CAM Mining, LLC*, 31 FMSHRC 1187 (Sept. 2009) (ALJ). Upon review, the Federal Mine Safety and Health Review Commission ("Commission") reversed and ordered the retroactive reinstatement of Williamson. *CAM Mining, LLC*, 31 FMSHRC 1085 (Oct. 2009). Judge Feldman subsequently ordered Williamson's retroactive reinstatement. *CAM Mining, LLC*, 31 FMSHRC 1270 (Oct. 2009) (ALJ). Thereafter, the discrimination case was assigned to me for hearing and adjudication.

The Secretary subsequently filed an amended complaint requesting civil monetary penalties in the amount of $15,000, which was accepted by order dated March 16, 2010. By order dated April 26, 2010, the originally scheduled hearing was postponed by request of the Secretary due to MSHA personnel being called upon to assist in the Upper Big Branch Mine investigation. Thereafter, a hearing in the discrimination case was held on the merits of the case in Pikeville, Kentucky, pursuant to section 105 of the Act. At the conclusion of the hearing, the parties submitted written post-hearing briefs.[2]

Williamson alleges he was harassed and terminated from employment at CAM because of a ventilation complaint he made to his foreman and also for telling the mine superintendent that he wished to speak to MSHA. CAM denies that Williamson engaged in protected activity or that Williamson was harassed. CAM also denies that Williamson's termination was motivated in any part by protected activity and argues that he was terminated for assaulting and swearing at a mine foreman. Considering these arguments, the issues before me are (1) whether Williamson engaged in protected activity; and (2) whether the adverse action was motivated, at least in part, by protected activity.

For the reasons stated below, Complainant's discrimination claim is dismissed.

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discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as [s]he deems appropriate . . . If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, [s]he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, . . . alleging such discrimination or interference and propose an order granting appropriate relief.

30 U.S.C. § 815(c)(2).

[2] At hearing, the Secretary submitted Government Exhibit 4 into evidence but failed to provide a copy to the court. (Vol II: Tr. 293–94.) After several attempts by my office to secure the exhibit dating back to October 2010, I issued an Order to Submit Exhibit or Strike Exhibit From Record on February 16, 2011, ordering counsel for the Secretary to submit Government Exhibit 4 to the Commission by February 24, 2011, or the exhibit would be stricken from the record. Counsel for Respondent submitted Government Exhibit 4 to the Commission, and it was received on February 16, 2011.

## II. Findings of Fact

CAM operates the No. 28 underground coal mine near Pikeville, Kentucky, where Williamson worked. The No. 28 mine has multiple sections. During the relevant period in this matter, April and May 2009, Section 1 was being operated as a "walking super section." (Vol. I: Tr. 204–05, 214–15.) As a walking super section, Section 1 was ventilated by a single split of air which swept the working faces. (Vol. I: Tr. 188.) Sometime prior to April 2009, Section 1 was being operated as a "super section," and was therefore ventilated by two splits of air. (Vol. I: Tr. 22.) Section 1 contained two continuous miners, machines that cut coal from the working faces, while being operated as both a walking super section and a super section. (Vol. I: Tr. 22.) When ventilated by two splits of air, both continuous miners were legally allowed to operate at the same time. (Vol. I: Tr. 214–15.) However, the continuous miners were not legally allowed to operate at the same time if the section was ventilated by only a single split of air. (*Id.*) Both continuous miners were prohibited from operating at the same time due to the danger of dust and noxious fumes, such as methane, drifting from the right continuous miner to the left miner. (*Id.*)

Section 1 had seven entries leading to the face, where active mining of coal occurred. (Vol. I: Tr. 26.) Each entry was numbered one through seven. (*Id.*) The left-hand continuous miner operated in entries one through four, and the right-hand continuous miner operated in entries four through seven. (Vol. I: Tr. 49.) Three shuttle cars loaded coal extracted by the two miners. The left shuttle car carried loads from the left continuous miner, the right shuttle car carried loads from the right continuous miner, and the center shuttle car received coal from both the right and left continuous miners. (Vol. I: Tr. 215–17.) The center shuttle car would inform one continuous miner that it could start operating when the other miner was done cutting coal. (Vol. I: Tr. 217-18.)

Williamson worked for CAM for approximately 21 months before the events that led to his termination. Williamson was originally employed as a utility man, or "floater," constructing and maintaining ventilation controls in Section 2 of No. 28 mine. (Vol. I: Tr. 21.) Prior to April 2009, Williamson had made two safety-related complaints to CAM management. First, Williamson had told Frank Smith, the mine superintendent, that supervisors were smoking on the surface in areas where smoking was prohibited. (Vol. 1: Tr. 47, 105.) The issue of not smoking on CAM property was subsequently discussed in a safety meeting. (Vol. 1: Tr. 105.) Second, Williamson complained that no one answered phone calls from miners needing to be transported out of the mine after their shift ended. (Vol. 1: Tr. 47.) Williamson made this complaint to the mine manager, the superintendent and foremen from Sections 1 and 2. (Vol. 1: Tr. 106.) Williamson testified that he never encountered this problem again but that he did not think anything was done about his complaint. (Vol. 1: Tr. 106–07.)

### A. The April Safety Complaint

In mid-April 2009, Williamson was transferred to Section 1 and began to work under McArthur Swiney, who was the foreman of Section 1. (Vol. I: Tr. 33.) On April 20 or 21, 2009, Williamson observed the left-side and right-side shuttle cars exiting from two different entries at the same time. (Vol. I: Tr. 36.) Both cars were loaded with coal. (*Id.*) Williamson also testified that he heard the power box make a "surge," which he believed occurred when the second miner started running while the first miner was still being operated. (*Id.*) Williamson believed that both continuous miners were being operated simultaneously. (Vol. I: Tr. 35.) Williamson was concerned about dust and gases created by the right miner traveling into the intake airway of the left miner (Vol. I: Tr. 38–39), and, according to Williamson, he informed Swiney that he thought both miners were running simultaneously (Vol. I: Tr. 35). According to Williamson, Swiney did not give Williamson a verbal response but simply stared at him. (*Id.*) Swiney denies that Williamson ever complained to him about ventilation or the simultaneous operation of two continuous miners in Section 1. (Vol. II: Tr. 119.)

The parties presented contradictory evidence regarding whether both continuous miners were actually being operated simultaneously. Phillip Gray, a mine foreman and electrician who started at CAM after Williamson was terminated, testified that both continuous miners sometimes operated at the same time in Section 1. He stated that he could tell both miners were being operated simultaneously because of the dust that accumulated in the mine. (Vol. I: Tr. 187–88.) William Gillespie, a former shuttle car driver at CAM, testified that he would leave one continous miner that was cutting coal and drive to the other continuous miner, which was also cutting coal. (Vol. I: Tr. 218–19.) The drive between the two continuous miners took roughly two and one half minutes. (Vol. I: Tr. 236–37.) However, Anthony Moore, a continuous miner operator on the section, testified that he did not know of any time that both miners were running simultaneously. (Vol. I: Tr. 255.) Perry Norman, the operator of the other continuous miner in April of 2009, told MSHA officials that the two miners never operated simultaneously. (Vol. II: Tr. 214–15; Resp't Ex. 11.) Alex Blankenship, the left-side shuttle car operator for Section 1, testified he never saw evidence that both miners were cutting coal at the same time. (Vol. II: Tr. 231.) Additionally, Benny Hopkins, CAM's Chief Electrician, and Jerry Taylor, the electrician for Section 1, both testified that the power supply in Section 1 was insufficient to allow both miners to operate at the same time. (Vol. I: Tr. 268; Vol. II: Tr. 241.) Specifically, they testified that if both miners were to operate simultaneously, the power box would heat up, create a strong smell, and potentially explode. (Vol. I: Tr. 268; Vol. II: Tr. 241.) Quentin Dean Blair, coal mine inspector and electrical specialist for the Department of Labor, MSHA, testified that if a power box is overloaded, it will overheat and eventually damage itself. (Vol. II: Tr. 275.)

After Williamson made his alleged complaint on April 20 or 21, he testified that Swiney displayed a "Jekyll/Hyde reverse on the attitude" towards him. (Vol. I: Tr. 161.) Williamson believes Swiney began criticizing him more and acted in a more hateful way towards him. (Vol. I: Tr. 42–43.) According to Williamson, Swiney began referring to Williamson exclusively as "asshole." (Vol. I: Tr. 50; 222.) Nevertheless, evidence at the hearing demonstrates that Swiney acted similarly towards other miners. Specifically, Anthony Moore, a continuous miner operator

who worked with Swiney and Williamson, believed Swiney was a tough foreman and a "tough man to work for." (Vol. I: Tr. 256.)

On April 22, not long after transferring to Swiney's section, Williamson was taken out of the mine because he thought he was experiencing a heart attack. (Vol. I: Tr. 41.) Williamson sought medical treatment for chest pains and was advised by his doctor to take some days off from work. (Vol. I: Tr. 45.) Williamson returned from medical leave on April 27, and he was transferred from working as a floater to operating the right-side shuttle car. (Vol. I: Tr. 48.) While Williamson was working as a shuttle car driver, Swiney assigned him various tasks that required physical labor, such as shoveling ribs, shoveling the tail piece area, and building brattices. (Vol. I: Tr. 52.) Williamson admits that these additional jobs he was asked to do were included in his job description as shuttle car driver. (Vol. I: Tr. 130.) Yet Williamson does not believe other shuttle car drivers were made to perform these tasks in the manner and to the extent he was required to perform them. (Vol. I: Tr. 50–54.) Nevertheless, other shuttle car drivers were asked to do the tasks Williamson was asked to complete. (Vol. I: Tr. 232; Vol. II: Tr. 202, 219, 228.) Indeed, these other employees also built brattices, hung curtains, and shoveled coal while working as shuttle car drivers. (Vol. I: Tr. 232; Vol. II: Tr. 219.)

B. The May 13 Incident

Williamson worked as a shuttle car driver under Swiney without event until May 13, 2009. On that day, Williamson was using the shuttle car to load coal from the right-side continuous miner, which was operating in the No. 4 entry. (Vol. I: Tr. 59.) Williamson testified that he had loaded the shuttle car and was making a right turn into the No. 5 entry when the shuttle car hit a dip in the mine floor. (Vol. I: Tr. 59.) According to Williamson, the car slid through the intersection and severed a water line, causing water to stream into the air. (Vol. I: Tr. 66; Gov't Ex. 4.) The car also pinched the cable providing power to the continuous miner. (Vol. I: Tr. 66.) Swiney testified that the car had already turned into the No. 5 entry and had crossed two intersections when it ran into the rib and severed the water and power lines. (Vol. II: Tr. 135–37; Gov't Ex. 4.)[3] Both Swiney and Williamson agree that Swiney approached the shuttle car and told Williamson he would have avoided contact with the water line and cable if he had raised the car's boom. (Vol. I: Tr. 73; Vol. II: Tr. 112.) According to Williamson, Swiney shoved his finger in Williamson's face and swore at him. (Vol. I: Tr. 73.) Swiney states he did

[3] The testimony regarding the placement of the shuttle car during the events of May 13 is less than clear. Both Swiney and Williamson illustrated the movements of the shuttle car on a mine map, entered into evidence as Government Exhibit 4. Swiney was told to illustrate the events of May 13 on the map without being given any instruction as to which way the map was oriented. (Vol. II: Tr. 135.) Further, the differences between Swiney's illustrations and Williamson's illustrations are slight. Considering that the events the parties testified about occurred over one year before the hearing, the fact that Swiney believed the shuttle car ran into the rib two intersections away from the spot where Williamson believed the shuttle car ran into the rib does not discredit either witness's testimony. Considering these facts, I do not give the hand-drawn illustrations made on Government Exhibit 4 much weight.

not put his finger in Williamson's face, but was standing at the front of the shuttle car. (Vol. II: Tr. 111.) Swiney also denies swearing at Williamson. (Vol. II: Tr. 121.) Williamson maintains that he exited the shuttle car and that Swiney retreated. (Vol. I: Tr. 76.) According to Swiney, Williamson jumped out of the shuttle car and pushed Swiney six or seven feet into the rib. (Vol. II: Tr. 134.) Both agree that Williamson loudly told Swiney that he had been "dogging" Williamson for two weeks, and then swore at Swiney. (Vol. I: Tr. 73.) More specifically, Williamson told Swiney "that he [Swiney] was going to quit his goddamn dogging on me. That he'd been dogging me for two fucking weeks and I was tired of it and it's going to stop now." (Resp't Ex. 8 at 75.)

After the confrontation between Swiney and Williamson, Swiney called the shift foreman, Danny Conn. (Vol. I: Tr. 78–79.) Swiney and Williamson traveled to meet Conn in a mantrip, a vehicle used to transport people within the mine. (Vol. I: Tr. 81.) Swiney told Conn he wanted Williamson off of his section. (Vol. I: Tr. 85; Vol. II: Tr. 152.) Swiney then told Conn that Williamson had pushed him against a rib. (Vol. I: Tr. 85.) Williamson responded that Swiney was "a G.D. Liar." (Vol. I: Tr. 85.) According to Conn, Williamson said, "Mac, I never pushed you." (Vol. II: Tr. 178). Conn then escorted Williamson out of the mine. (Vol. I: Tr. 85.) Williamson asked Conn if he was being terminated, and Conn told him to return to the mine the next day to speak to Smith, the mine superintendent. (Vol. I: Tr. 86.) Conn called Smith that night to inform him of the incident. (Vol. II: Tr. 188.)

Sometime after the incident, Swiney dictated a note to Perry Norman, a continuous miner operator on Section 1. (Vol. II: Tr. 8.) This note described Swiney's allegations against Williamson, specifically that Williamson had "jumped out of his car and started pushing me around." (Resp't Ex. 3 at 3.) On the morning of May 14, after Swiney completed his shift at 4:30 a.m., Swiney gave Smith his dictated note describing the incident with Williamson. (Vol. II: Tr. 8.) Swiney told Smith that Williamson had cut the cable, got out of the shuttle car, and pushed Swiney. (Vol. II: Tr. 9.) Swiney and Smith completed a disciplinary report. (Vol. II: Tr. 16.) Smith wrote, "Lige cut miner cable and water line. Mac talked to him. He got off shuttle car and pushed Mac against rib" on the disciplinary report, based upon what Swiney had told him. (Vol. II: Tr. 17.) In the disciplinary report, Smith recommended that Williamson be suspended. (Vol. II: Tr. 18.) Smith faxed the report to Lantha Potter, Jack Holbrook's secretary. (Vol. II: Tr. 17.) Later in the morning of May 14, Smith met with Holbrook, Manager of the Mines, to discuss the disciplinary report he had sent to Holbrook. (Vol. II: Tr. 20.)

Williamson returned to the No. 28 mine around 12:00 noon on May 14 to speak with Smith about the incident. (Vol. I: Tr. 87.) Williamson wanted to take Smith underground to show him where the incident occurred and explain that he could not have pushed Swiney; but they did not go down into the mine. (Vol. I: Tr. 88.) Smith told Williamson he was suspended for three days "with intent to fire." (Vol. I: Tr. 88–89.) Smith also told Williamson not to worry and to speak to Holbrook and William May, Head Human Resources Officer, on Tuesday, May 19. (Vol. I: Tr. 89.) According to Smith, sometime during this discussion, Williamson told him he would call MSHA over "some issues" he had with the mine. (Vol. II: Tr. 23.) Williamson

says he left the meeting under the impression that he would not be fired. (Vol. I: Tr. 90.) Later, around 2:30 p.m., Smith spoke with Conn about what had happened the night before. (Vol. II: Tr. 188.)

At 4:07 p.m. on May 14, David Zatezalo, President of CAM Mining, and May received an e-mail from Holbrook's secretary, Lantha Potter, stating, "Attached is disciplinary report for Lige Williamson, Utility Man at Mine #28. We are asking to terminate for Insubordination. Please advise." (Vol. II: Tr. 260–61; Resp't Ex. 3.) The employee disciplinary report and the note Swiney had dictated to Norman were attached to the e-mail. (Vol. II: Tr. 252.) May called Zatezalo to discuss the e-mail. (Vol. II: Tr. 252–53.) May recommended to Zatezalo that Williamson be terminated. (Vol. II: Tr. 253.) Holbrook signed the termination notice on May 15, 2009. The termination notice cited "insubordination" as the basis for discharge. (Resp't Ex. 5.) Williamson's termination was processed on the company payroll effective at 3:24 p.m. on May 15. (Resp't Ex. 7.)

On the evening of May 15, Williamson called Smith at his home. (Vol. I: Tr. 91.) A co-worker had informed Williamson about a rumor circulating at the mine that Williamson had called MSHA in retaliation, and Williamson called Smith to assure him he had not called MSHA. (*Id.*) According to Williamson, he told Smith, "If I've got something to say to the man I've got the balls to look him in the eyes and say it." (Vol. I: Tr. 149–50.) Smith believes that Williamson told him, "He [Smith] didn't have the balls to fire him." (Vol. I: Tr. 283.) Smith told him that Williamson would meet with May and Holbrook on Tuesday. (Vol. I: Tr. 91.)

Williamson received the termination notice via certified mail on May 16, 2009. (Resp't Ex. 6.) He filed a complaint under section 105(c) of the Mine Act on May 29, 2009.

## III. Principles of Law

### A. *Pasula-Robinette* Test

Section 105(c)(1) of the Mine Act prohibits mine operators from discriminating against miners for reporting safety complaints to management.[4] In *Sec'y of Labor ex rel. Pasula v.*

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[4] No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this 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 or has testified or is about to testify in any such proceeding, or because of the exercise by such miner . . . of any statutory right afforded by this chapter.

30 U.S.C. § 815(c)(1).

*Consolidation Coal Co.*, the Commission set forth the elements necessary to prove a miner's prima facie discrimination claim:

> [T]he complainant . . . establishe[s] a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear the ultimate burden of persuasion.

2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

If the operator's rebuttal fails and the miner meets his or her burden of persuasion, then the miner will prevail unless the operator can affirmatively defend its claim:

> The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's protected activities, and (2) that he *would* have taken adverse action against the miner in any event for the unprotected activities alone. On these issues, the employer must bear the ultimate burden of persuasion. . . . The employer must show that he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that he *would* have disciplined him in any event.

*Pasula*, 2 FMSHRC at 2799–800.

Shortly after *Pasula*, the Commission further explained:

> The "ultimate burden of persuasion" on the question of discrimination rests with the complainant and never "shifts." As we indicated in *Pasula*, above, there are intermediate burdens which do shift. The complainant bears the burden of producing evidence and the burden of persuasion in establishing a prima facie case. The operator may attempt to rebut a prima facie case by showing either that the complainant did not engage in protected activity or that the adverse action was in no part motivated by protected activity. If the operator cannot rebut, he may still affirmatively defend in the manner indicated in the quotation from *Pasula* above. The twin burdens of producing evidence and of persuasion then shift to him with regard to those elements of affirmative defense.

*Sec'y of Labor ex rel. Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 818 n.20 (Apr. 1981).

The Commission's formulation of the *Pasula-Robinette* test was guided by the Supreme Court's decision in *Mt. Healthy City School District Board of Education v. Doyle*, 429 U.S. 274 (1977). *Pasula*, 2 FMSHRC at 2798–99. *Mt. Healthy* set forth the test for determining whether a government agency improperly took adverse action against an employee for exercising his First Amendment rights. 429 U.S. at 287. The Court concluded:

> [T]he burden was properly placed upon respondent to show that his conduct was constitutionally protected, and that his conduct was a "substantial factor" or to put it in other words, that it was a "motivating factor" in the Board's decision not to rehire him. Respondent having carried that burden, however, the District Court should have gone on to determine whether the Board had shown by a preponderance of the evidence that it would have reached the same decision as to respondent's reemployment even in the absence of the protected conduct.

In applying *Mt. Healthy*, the Commission reasoned that "[a]lthough *Mt. Healthy* dealt with constitutionally protected rights, and not with statutory rights granted by Congress, we find that *Mt. Healthy* is nevertheless instructive, particularly with respect to the need for flexibility in the allocation of burdens of persuasion, and is consistent with the 1977 Mine Act." *Pasula*, 2 FMSHRC at 2799.

*Pasula*, as well as *Robinette*, recognized that the National Labor Relations Board's ("NLRB") *Wright Line* test for evaluating whether an employer has unlawfully discharged a worker for protected union activity is "substantially the same as the one announced in *Pasula*." *Pasula*, 2 FMSHRC at 2800 n.15 (citation omitted). *See Robinette*, 3 FMSHRC at 818 n.20 (comparing the *Wright Line* test to the Commission's discrimination test). The Sixth Circuit, the circuit in which this current case arises, approved the *Pasula-Robinette* framework for establishing a discrimination claim based on the Supreme Court's approval of the *Wright Line* test. *Boich v. FMSHRC*, 719 F.2d 194, 196 (6th Cir. 1983) (discussing *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983)).

B. Miner's Prima Facie Case

To establish a prima facie case of discrimination, the miner must "*present*[] *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." *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998) (emphasis added) (citing *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817–18). The miner bears the burden of establishing his or her prima facie claim, and the operator may rebut it. *Driessen*, 20 FMSHRC at 328 (citing *Robinette*, 3 FMSHRC at 818 n.20).

As for the second component of the miner's prima facie case, a court should consider (1) knowledge of protected activity; (2) hostility or animus toward protected activity; (3) coincidence in time between protected activity and adverse action; and (4) disparate treatment

to determine whether the miner has proven a causal connection between protected activities and the adverse action. *Sec'y of Labor ex rel. Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

C. Miner's Burden of Persuasion

The application of *Pasula-Robinette*, which employs *Mt. Healthy*'s burden-shifting mechanism, differs from the analysis of a Title VII employment discrimination claim. In a *Mt. Healthy*-style case, once the complainant has met his or her burden to show "sufficient evidence from which the fact finder reasonably can infer that the [complainant]'s conduct was *a* 'substantial' or 'motivating' factor behind [his or] her dismissal," the defendant has the burden of showing that the complainant's dismissal "would have occurred in any event for nondiscriminatory reasons." *Acevedo-Diaz v. Aponte*, 1 F.3d 62, 67 (1st Cir. 1993). *See Pendley v. FMSHRC*, 601 F.3d 417, 423–24 (6th Cir. 2010) (restating the *Pasula-Robinette* test); *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777–78 (6th Cir. 2002) (restating the *Wright Line* test).

In contrast, under Title VII, an employer need only respond to the complainant's prima facie case by "*articulat[ing]* a legitimate, nondiscriminatory reason for its actions, a burden which is fully satisfied if the employer submits enough evidence to raise a genuine issue of material fact." This evidence need not persuade the fact finder. *Acevedo-Diaz*, 1 F.3d at 67 (citing *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981)). Therefore, a Title VII case differs from those using the standard enunciated in *Mt. Healthy* because in a Title VII case, the burden of persuasion never falls on an employer. *Acevedo-Diaz*, 1 F.3d at 67.

The Commission's recent decision in *Turner v. National Cement Co.* discusses the level of proof necessary to support a miner's prima facie discrimination claim. 33 FMSHRC __, slip op. at 7–8 (May 2011). In its analysis, *Turner* drew nearly exclusively from Circuit Court decisions on Title VII claims. *Id.* *Turner* did not address *Pasula*'s holding that "the *complainant . . . establishe[s] a prima facie case* of a violation of section 105(c)(1) *if a preponderance of the evidence proves* (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity." *Pasula*, 2 FMSHRC at 2799 (emphasis added). *See Turner*, 33 FMSHRC __, slip op. at 7–8 (discussing the complainant's burden in proving a prima facie discrimination case). In remaining silent on this point, *Turner* does not overturn the well-settled principles set forth in *Pasula*, *Robinette*, and their progeny. *See Michigan v. Thomas*, 805 F.2d 176, 184 (6th Cir. 1986) ("An administrative agency may reexamine its prior decisions and may depart from its precedents provided the departure is explicitly and rationally justified.") (citations omitted).

D. Operator's Business Justification for Adverse Action

The contours of the Commission's jurisprudence for analyzing an operator's business justification may be summarized as follows:

[T]he inquiry is limited to whether the reasons are plausible, whether they actually

> motivated the operator's actions, and whether they would have led the operator to act even if the miner had not engaged in protected activity. The Commission may not impose its own business judgment as to an operator's actions. Further, . . . the Commission may not substitute its own justification for disciplining the miner over that offered by the operator.

*Pendley*, 601 F.3d at 425 (citations omitted).

## IV. Further Findings of Fact, Legal Analysis, and Conclusions of Law

CAM does not dispute that Williamson's termination constitutes adverse action.[5] Therefore, the issues to be decided are (1) whether Williamson engaged in protected activity, and (2) whether the adverse action was motivated, at least in part, by Williamson's protected activity, or whether CAM would have taken the adverse action due to Williamson's unprotected activity alone.

### A. Protected Activity

The Secretary contends that Williamson engaged in two forms of protected activity. First, the Secretary argues that Williamson's complaint to Swiney regarding the mine's ventilation and simultaneous operation of both right-hand and left-hand continuous miners was a safety complaint protected by the Act. Second, the Secretary argues that Williamson engaged in protected activity when he told Smith he was going to call MSHA.[6]

#### 1. Ventilation Complaint

Williamson testified that, on April 20 or 21, 2009, he told Swiney that he (Williamson) could not properly ventilate the section because two continuous miners were simultaneously running, which is a safety hazard. (Vol. I: Tr. 35.) Williamson arrived at his conclusion that two continuous miners were running simultaneously upon seeing two shuttle cars loaded with coal (*Id.*) At the hearing before me, Williamson testified for the first time that he also heard the

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[5] The Secretary also contends that Williamson was harassed by Swiney after making a safety complaint and that this harassment constitutes adverse action. CAM disputes that Williamson was harassed and that any harassment constitutes adverse action. Whether Williamson was harassed by Swiney is examined in Part IV.B.2.a, *infra*.

[6] In her original complaint, the Secretary did not include the claim that Williamson's conversation with Smith, in which Williamson told Smith he was going to speak to MSHA, was protected activity. This claim was raised for the first time in the Secretary's post-hearing brief. (Sec'y Br. 17.) Indeed, in making this point, the Secretary relies not on Williamson's testimony but on Smith's. (*Id.*) Williamson did not mention this statement during his recollection of his conversation with Smith. (Vol. I: Tr. 87–90.)

power box in the mine emit a whining noise, which led him to believe two continuous miners were being operated at the same time. (Vol. II: Tr. 103–04.) Williamson also testified that Swiney's response to the complaint was to give Williamson a look "like he was stupid." (Vol. I: Tr. 35; Vol. II: Tr. 119.) Despite this lack of response, Williamson never told anyone else that he was concerned about ventilation or that he believed two continuous miners were being operated at the same time. (Vol. I: Tr. 119.) Williamson was, and continues to be, unsure of the date on which he made the alleged safety complaint. In the original statement he filed with MSHA, Williamson claimed he made the complaint two weeks before he was terminated. (Gov't Ex. 3.) Williamson later testified that he made the safety complaint to Swiney on April 20 or 21, roughly ten days earlier than he initially claimed.

Williamson's testimony sets forth evidence that he reported to his supervisor, Swiney, the hazardous, simultaneous operation of two continuous miners, which is a protected activity. Though Williamson's relative uncertainty about the date of this incident at the time most proximate to its occurrence undercuts the veracity of his testimony, this relatively trivial mistake does not fatally undermine his testimony in light of the relative consistency of his testimony during the temporary reinstatement hearing and the hearing before me.[7] This evidence is adequate to support the first element of Williamson's prima facie case.

Nevertheless, Swiney testified consistently at both the temporary reinstatement hearing and the discrimination hearing that Williamson never raised an issue involving two miners running at the same time and that Williamson failed to make any safety complaint to him. (Vol. II: Tr. 119.) Swiney is retired from CAM Mining and has no personal interest in the outcome of this matter. Most importantly, I observed that Swiney, as an older gentlemen with a long career in mining, demonstrated significant difficulty hearing counsel's questions even in the relatively close quarters and quiet environment of my courtroom. *See, e.g.*, (Vol. II: Tr. 104–05, 108, 115) (direct examination); (Vol. II: Tr. 129, 131, 134, 150–52) (cross-examination). Considering these facts, as well as Swiney's candid demeanor at the hearing, I give great weight to Swiney's testimony that he did not hear Williamson's safety complaint.

Therefore, I find Swiney credibly testified that he did not hear Williamson make a ventilation complaint on or around April 20 or 21, 2009, or, at the very most, he did not understand Williamson's statement to be a safety complaint regarding the simultaneous operation of two continuous miners. This finding is consistent with Williamson's testimony that Swiney did not give Williamson a verbal response. This evidence rebuts Williamson's prima facie case by negating the necessary predicate to the conclusion that Williamson engaged in protected

[7] CAM argues that Williamson's testimony should not be credited because he changed his story during his discrimination hearing. CAM contends that Williamson first testified that he *saw* the two miners operating simultaneously, but he then testified that seeing two miners at the same time was impossible. (Resp't Br. 6). I do not find this argument persuasive. Williamson was clear on both direct examination and cross-examination in his belief that both miners were operating simultaneously because he saw two shuttle cars loaded with coal and heard a "roar" from the power box.

activity—namely that Swiney actually heard and understood Williamson.

Considering the evidence presented by CAM and my witness credibility determinations from the hearing, I determine that Williamson did not make a protected safety complaint to Swiney.[8] I do not make this finding lightly—but it is one compelled by the unique circumstances of this case.

My conclusion on this issue naturally begs the philosophical question: If a tree falls in a forest and no one is around to hear it, does it make a sound? Here, the philosophical question translates into the following: Can Williamson's ventilation complaint exist without it being heard by Swiney? Even if no one heard the tree fall in the forest, a subsequent stroll through the woods could reveal the cracked stump and broken branches of surrounding vegetation, telltale signs of the tree's demise, thus increasing the probability that a sound occurred like those similar to other tree falls. Likewise, evidence of the traditional factors underlying a determination that the protected activity led to an adverse action—such as hostility or disparate treatment toward the complainant—could, in fact, bolster the weight of a complainant's evidence that he or she engaged in protected activity and thus support the inferences necessary to prevail. In this case, however, my conclusion that no protected activity has occurred is further buttressed by my findings on the second element of Williamson's prima facie case, as set forth in Part IV.B., *infra*.

2. Williamson's Claim He Would Call MSHA

Smith recalled that, during the course of his conversation with Williamson on May 14, Williamson said he "had some issues that he was going to talk to MSHA about." (Vol. I: Tr. 282.) Smith responded that an MSHA inspector was present at the mine that very day. (*Id.*) The next day, Williamson phoned Smith at home to inform him that he had not called MSHA.[9] (Vol. I: Tr. 91.) In communicating to Smith that he may call MSHA, Williamson engaged in protected activity.

CAM argues that Williamson's claim that he would call MSHA does not constitute protected activity because Williamson did not raise specific safety complaints. However, Williamson's statement that he intended to speak to MSHA about "some issues" is tantamount to stating he was going to make a safety complaint, an activity protected under section 105(c) of the Mine Act. Moreover, Commission case law establishes that a safety complaint does not need to be specific in order to be protected under section 105(c). *See Knotts v. Tanglewood Energy Co.*,

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[8] I need not decide whether the mine was actually operating two continuous miners simultaneously. The issue before me is whether Williamson engaged in protected activity—i.e., whether Williamson told Swiney that he believed two continuous miners were being operated.

[9] Williamson claims he called Smith at home because he was informed of a rumor that he had called MSHA in retaliation for being terminated. (Vol. I: Tr. 91.) Both Smith and Williamson agree that Smith had been informed, either by Williamson himself or a co-worker, that Williamson intended to call MSHA.

19 FMSHRC 833, 837 (May 1997). I therefore determine that Williamson engaged in protected activity when he told Smith he was going to speak to MSHA.

B. Causal Connection

1. Knowledge of Protected Activities

Because Williamson made a protected statement to Smith, Smith had knowledge of Williamson's protected activity.[10] However, Smith did not have the authority to terminate Williamson (Vol. I: Tr. 281); instead, that authority belonged to Zatezalo, President of CAM.[11] (Vol. II: Tr. 252.)

The Commission has established that "if a supervisor has knowledge of an employee's protected activities, harbors animus towards that activity, and influences or participates in a decision that adversely affects the employee, the courts have imputed knowledge and animus to the employer notwithstanding the actual decision-maker's ignorance of the protected activities." *Sec'y of Labor ex rel. Garcia v. Colorado Lava, Inc.*, 24 FMSHRC 350, 358 (Apr. 2002) (Jordan, C., concurring). *See also Shager v. Upjohn Co.*, 913 F.2d 398, 405 (7th Cir. 1990) (stating the decision to terminate an employee could be tainted by a manager's discriminatory animus, even though manager did not have authority to terminate the employee); *Garcia*, 24 FMSHRC at 356 n.6 (holding that it would be appropriate to consider imputing knowledge to an employer notwithstanding the actual decision-maker's ignorance of the protected activities); *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984) ("An operator may not escape responsibility by pleading ignorance due to the division of company personnel functions.")

Smith had influence on and participated in the decision to terminate Williamson. Swiney initiated the action that ended in Williamson's firing by submitting a handwritten note describing the May 13 incident in the mine. (Vol. II: Tr. 207.) Based upon Swiney's note, Smith and Swiney completed a disciplinary report, which Smith then sent to Holbrook. (Vol. II: Tr. 16–17.) Holbrook then recommended to May and Zatezalo that Williamson be terminated. (Vol. II: Tr. 260; Resp't Ex. 3.) The disciplinary report completed by Smith and Swiney, as well as Swiney's written note, were given to May and Zatezalo with Holbrook's recommendation. (Vol. II: Tr. 252.) Zatezalo did not conduct any independent investigation; the decision to fire Williamson was based solely on representations and recommendations made by Swiney and Smith. (Vol. II: Tr. 253, 259.) I conclude that Smith's knowledge of Williamson's protected activity may be

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[10] In contrast, as discussed in this section, the weakness of the evidence underlying the second element of Williamson's discrimination claim underscores the lack of any circumstantial evidence suggesting that Swiney even knew about Williamson's safety complaint.

[11] Assuming *arguendo* that Williamson did make a protected statement to Swiney, Swiney would have had knowledge of Williamson's protected activity but no authority to terminate Williamson.

imputed up the chain of command to Zatezalo. Therefore, I determine that CAM had knowledge of Williamson's protected activity.

2. Hostility or Animus Towards Protected Activity

a. Ventilation Complaint

The Secretary contends that Williamson was harassed by Swiney after making a safety complaint on April 20 or 21, 2009, regarding the mine's ventilation. My evaluation of this evidence further bolsters my conclusion that Williamson has not met his burden to prove a case of discrimination.

Williamson testified that about two days after he complained about ventilation to Swiney, Swiney began referring to Williamson as "asshole." (Vol. I: Tr. 134.) Williamson testified that Perry Norman, a fellow CAM employee, overheard Swiney call him asshole. (*Id.*) However, Norman did not recall Swiney referring to Williamson in that manner. (Vol. II: Tr. 205.) Additionally, William Gillespie, a former employee at CAM, also testified that Swiney referred to Williamson as "asshole," but that Swiney had always done so. (Vol. I: Tr. 222.) Anthony Moore, a miner operator at CAM, testified that he thought Swiney was "always giving Lige [Williamson] a hard time" and "had it in" for Williamson. (Vol. I: Tr. 261–62.) Yet Moore did not state when Swiney started treating Williamson in this way or whether he had always acted in this manner towards Williamson. Further, other evidence demonstrates that Swiney's behavior was not directed solely at Williamson. Moore believed Swiney was a "tough man to work for" and that he would cuss at employees other than Williamson. (Vol. I: Tr. 256, 262.) Alex Blankenship, a shuttle car operator, also testified that Swiney cussed in the mines, but did not berate his subordinates nor cuss at any particular one. (Vol. II: Tr. 231.) Finally, Gillespie testified that most miners cursed in the mine. (Vol. I: Tr. 227.) This evidence is consistent with Swiney's testimony that although he cussed underground, he did not do so at particular miners. (Vol. II: Tr. 153–56.)

Williamson also testified that within 24 hours of complaining about the ventilation, he noticed Swiney displayed "[a] Jekyll/Hyde reverse on the attitude. He was a completely different man toward me." (Vol. I: Tr. 161.) As evidence of this change in attitude, Williamson alleges that when Swiney moved Williamson from working as a utility man to driving a shuttle car, Swiney gave Williamson more and harder tasks than other shuttle car drivers.

However, Williamson's switch from working as a utility man to driving a shuttle car was, if not voluntary, with Williamson's approval. Williamson stated he spoke with Dusty Newsome about taking over Newsome's role as shuttle car driver. (Vol. I: Tr. 44–45.) Newsome credibly testified that he spoke with Williamson and they agreed to change jobs. Newsome stated, "I wanted a different job and he did, too. He said his knee bothered him and stuff a lot of time doing the walkaround, and we just – we okayed it and we switched jobs." (Vol. II: Tr. 218.) If Swiney really had it in for Williamson, then he probably would not have approved a request to

make Williamson's job at the mine easier.

Further, Williamson admitted the additional jobs he was asked to do were included in his job description as shuttle car driver. (Vol. I: Tr. 130.) Other CAM employees, namely Perry Norman, Dusty Newsome, and Alex Blankenship, testified that shuttle car drivers were asked to do the tasks Williamson was asked to complete. (Vol. I: Tr. 232; Vol. II: Tr. 202, 204, 219, 228.) Gillespie and Newsome both stated they were asked to build brattices, hang curtains, and shovel coal while working as shuttle car drivers. (Vol. I: Tr. 232; Vol. II: Tr. 219.)

Considering all of the evidence before me, I find that Williamson was treated no differently than any of the other miners. As a result, I conclude that neither Swiney nor CAM exhibited hostility or animus towards Williamson due to his alleged ventilation complaint.

b. Williamson's Claim He Would Call MSHA

As for Williamson's claim that he would call MSHA, Smith immediately responded to Williamson's request to speak to MSHA by informing Williamson that an MSHA official was available at the mine that day. (Vol. I: Tr. 282.) No evidence in the record demonstrates any hostility or animus towards Williamson after he told Smith he wanted to speak to MSHA. Smith continued to treat Williamson with respect; when Williamson phoned Smith at home after work hours, Smith took the call, spoke to Williamson, and repeated that Williamson should come back to the mine on Tuesday. (Vol. I: Tr. 283.) Indeed, Smith had not previously acted with hostility when Williamson made a prior safety complaint to him about miners smoking at the mine site. Moreover, I give great weight to Smith's testimony, as I found Smith to possess a calm bearing and credible demeanor, which was consistent with his testimony about his respectful interactions with and harboring no animus towards Williamson.

Most importantly, the evidence reflects Smith initially recommended that Williamson be suspended. (Vol. II Tr. 18.) Yet it was after Smith met with Holbrook on the morning of May 14, prior to Smith's meeting with Williamson (Vol. II: Tr. 19–20), that a change occurred in the recommended discipline, whereby Smith informed Williamson of his suspension "with intent to fire" (Vol. I: Tr. 88–89). Thus, the escalation in Williamson's discipline took place *before* Williamson mentioned his desire to talk to MSHA.

Considering these facts, I determine neither Smith nor CAM displayed hostility or animus towards Williamson after he engaged in the protected activity of telling Smith he had some issues to discuss with MSHA.

3. Coincidence in Time

Williamson's complaints were somewhat close in time to his termination. Williamson told Smith he wished to speak to MSHA the day before he was terminated. His alleged

complaint to Swiney occurred approximately three weeks before his termination. Although the Commission does not have any hard and fast criteria, it has determined that a coincidence in time exists where the adverse action occurred two or more months after the protected activity. *See Chacon*, 3 FMSHRC 2508; *Driessen,* 20 FMSHRC 324; *Gatlin v. KenAmerican Res., Inc.*, 31 FMSHRC 1050 (Oct. 2009). I therefore determine that a coincidence in time existed between Williamson's protected activity and the adverse action taken against him.

4. Disparate Treatment

The Commission has determined that "[t]ypical forms of disparate treatment are encountered where employees guilty of the same, or more serious, offenses than the alleged discriminatee escape the disciplinary fate which befalls the latter." *Chacon*, 3 FMSHRC at 2512. Here, no evidence was offered as to whether other employees accused of pushing a foreman in the mine were terminated. The evidence shows that CAM considered Swiney's allegation that Williamson shoved him against a mine rib when deciding to terminate Williamson. A handwritten note and disciplinary report, both detailing Swiney's allegation that Williamson shoved him against a rib, were attached to the e-mail recommending Williamson's termination to May and Zatezalo. (Vol. II: Tr. 252.) The stated reason for Williamson's termination was insubordination. (Resp't Ex. 5.) According to CAM's employee handbook, insubordination includes making assault, threats or abusive language to a supervisor. (Resp't Ex. 3.)

Additionally, Williamson admits he angrily swore at Swiney on May 13. (Vol. I: Tr. 73.) In the past, CAM has disciplined employees for swearing. Prior to Williamson's termination, Gillespie was suspended for three days for swearing at a foreman. (Vol. I: Tr. 223–24.) Kevin Blevins, a CAM employee, was removed from his position as foreman and suspended for three days after cursing at an employee. (Vol. II: Tr. 59.) Although Swiney was not disciplined for swearing back at Williamson, Williamson never made a complaint about Swiney's swearing. (Vol. I: Tr. 136.) Even though Williamson was terminated rather than suspended, Williamson was also accused of physically pushing his foreman. Therefore, I determine that the evidence presented does not establish that Williamson suffered disparate treatment.

5. Conclusion

Considering the above four factors, I determine that Williamson has failed to prove that any adverse action taken against him was motivated by protected activity.

C. Affirmative Defense

CAM alleges as an affirmative defense that it would have terminated Williamson for unprotected activity alone. According to CAM, Williamson would have been terminated because he swore at and allegedly pushed Swiney against a rib. Here, I credit the testimony of May, the Human Resource Manager at CAM Mining since April of 2004. (Vol. II: Tr. 251.) At 4:07 p.m.

on May 14, 2009, May received the e-mail from Holbrook recommending Williamson's termination. (Vol. II: Tr. 253.) May read the e-mail and the note Swiney had dictated, as well as the disciplinary report and the rules of conduct from CAM's employee handbook, which were attached to the e-mail. (*Id.*) May then recommended to Zatezalo that Williamson be terminated. (*Id.*) CAM's rules of conduct prohibit fighting, assault, threats and abusive language. (Resp't Ex. 3.) Based on Swiney's note and the disciplinary report, May believed Williamson had assaulted Swiney after swearing at him. (Vol. II: Tr. 259.) In May's opinion as Human Resource Manager, Williamson's statement to Swiney—"He was going to quit his goddamned dogging on me, and that he had been dogging me for two fucking weeks and I was tired of it and it was going to stop; it's going to stop now"—amounts to sufficient grounds for termination "in most cases." (Vol. II: Tr. 258.) CAM's evidence, specifically May's testimony, demonstrates a reasonable belief that Williamson swore at and pushed Swiney on May 13. The evidence also shows CAM believed the assault and abusive language that Williamson was alleged to have engaged in constituted grounds for termination.

In response, the Secretary criticizes CAM for failing to thoroughly examine whether Williamson actually pushed Swiney by investigating the site of the pushing incident for signs of its occurrence, as well as testing Swiney's clothing for rock dust where he was pushed. (Sec'y Br. 8, 17.) In light of Williamson's admission that he cursed at Swiney, as well as the paucity of evidence supporting Williamson's prima facie discrimination claim, CAM reached the reasonable conclusion that Williamson violated its policies and properly terminated him. Concluding otherwise in a case such as this where the evidence of discrimination is lacking would put this Commission Judge in the position of substituting his own justification for disciplining Complainant over that offered by CAM, which would contravene Commission precedent on this issue.

I conclude that CAM has established by a preponderance of the evidence that it would have taken this adverse action against Williamson for an unprotected activity alone.

D. Conclusion

Based on the reasons stated above, I conclude that the evidence in this case fails to establish Williamson's claim of discrimination under section 105(c)(1) of the Mine Act.[12]

[12] Docket No. KENT 2009-1428-D involving Williamson's temporary reinstatement proceeding remains open "pending final order on the [discrimination] complaint," which is 40 days from the date of this decision. 30 U.S.C. §§ 815(c)(2), 823(d)(1).

## V. ORDER

In light of the foregoing, it is hereby **ORDERED** that Complainant's discrimination claim be **DISMISSED**.

Alan G. Paez
Administrative Law Judge

Distribution:

Mary Sue Taylor, Esq., Office of the Solicitor, U.S. Department of Labor, 618 Church Street, Suite 230, Nashville, TN 37219-2440

Mark E. Heath, Esq., Spilman Thomas & Battle, PLLC, 300 Kanawha Boulevard, East, P.O. Box 273, Charleston, WV 25329

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