

**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**

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

March 16, 2000

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

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

DECISION

BY: Riley, Verheggen, and Beatty, Commissioners

In this discrimination proceeding, Administrative Law Judge Avram Weisberger concluded that Reading Anthracite Company (“Reading”) did not violate section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c) (1994) (“Mine Act” or “Act”), when it discharged employee Leonard Bernardyn on November 10, 1998. 21 FMSHRC 819, 824 (July 1999) (ALJ). The Commission granted the Secretary’s petition for discretionary review challenging the judge’s determination. For the reasons that follow, we vacate the judge’s determination and remand for further analysis.

## I.

### Factual and Procedural Background

Reading owns and operates Pit 33, a coal mine in Wadesville, Pennsylvania. T. Tr. 10.<sup>1</sup> Bernardyn worked for Reading for nineteen years, including working as a haulage truck driver at the Wadesville mine for approximately four and a half to five years before his discharge. T. Tr. 10-11.

Between 7:00 and 7:10 a.m. on November 10, 1998, Bernardyn began driving his haulage truck — a 190-ton Titan truck — on his usual route between the shovel in the pit and the dump area. T. Tr. 11-12, 15-16, 83. Overall, the road has a grade of approximately 8%, and parts of it are as steep as 10.3%. T. Tr. 82, 107. When Bernardyn began driving, the weather was foggy and misty, and slippery road conditions caused Bernardyn to drive slower than usual. T. Tr. 15-18, 47-48, 114.

When Frank Derrick, the general manager of Reading, observed a Titan truck driving slowly, he called mine superintendent Stanley Wapinski to find out why. T. Tr. 83. Wapinski stopped Bernardyn and asked him why he was driving so slowly, to which Bernardyn responded the roads were getting slippery. T. Tr. 20-21. Wapinski told Bernardyn to drive faster. T. Tr. 20-21, 140-42. Approximately 20 minutes later, Derrick again noticed a Titan truck driving slowly and asked Wapinski whether it was the same truck. T. Tr. 84-85, 143-44. When Wapinski indicated that the truck was the same one and that Bernardyn was the driver, Derrick told him to tell Bernardyn to park the truck. T. Tr. 86. Wapinski approached and talked with Bernardyn at the pit and told him he was holding things up, and directed him to meet Wapinski at the dump after his current run. T. Tr. 24-25, 143-44.

After the second conversation with Wapinski, Bernardyn used the CB radio in his truck to call Thomas Dodds, the United Mine Workers of America (“UMWA”) safety committeeman. T. Tr. 29-30, 53. Dodds was driving a truck on the same shift as Bernardyn. T. Tr. 45-46. Bernardyn told Dodds he was being asked to drive at a higher speed than he believed was safe given the poor road conditions. T. Tr. 29-31, 53-54. During his 8-10 minute complaint to Dodds, Bernardyn repeatedly cursed and, referring to Wapinski, said “I’ll get the little f---r.” 21 FMSHRC at 823; T. Tr. 31-32, 54, 63, 88-91, 134-35; M. Tr. 71. Derrick overheard Bernardyn’s complaints and profanity on the CB radio and fired him after he had dumped the load in his

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<sup>1</sup> A hearing on Bernardyn’s temporary reinstatement application was held on March 16, 1999. Some witnesses testified at the temporary reinstatement hearing; others testified at the merits hearing on May 18, 1999. Citations to testimony from the temporary reinstatement hearing are referred to as “T. Tr.” Citations to testimony from the merits hearing are referred to as “M. Tr.” The judge incorporated the transcript and exhibits from the temporary reinstatement hearing into the record of the instant merits proceeding. M. Tr. 9-10.

truck, assertedly for profanity and threatening a supervisor over the CB radio. T. Tr. 87-91, 95-96, 145; M. Tr. 65-66.<sup>2</sup>

On November 12, Bernardyn filed a discrimination complaint with MSHA alleging that he was discharged unlawfully. The Secretary's application for temporary reinstatement was granted, and Bernardyn was ordered temporarily reinstated to his former position on March 22, 1999. 21 FMSHRC 339, 342 (Mar. 1999) (ALJ).

On the merits of the complaint, the judge found that Bernardyn engaged in protected activity when he drove at a speed he felt the road conditions warranted, that Reading's discharge of Bernardyn constituted adverse action, and that, based on the coincidence in time between Derrick's order to Wapinski to stop Bernardyn twice for driving too slowly, and Derrick's discharge of Bernardyn, the Secretary established a prima facie case of discrimination. 21 FMSHRC at 822. However, the judge determined that Reading would have fired Bernardyn in any event for the 8-10 minute cursing episode over the CB radio and his threatening language directed towards Wapinski. *Id.* at 823.<sup>3</sup>

## II.

### Disposition

The Secretary asserts that the judge failed to evaluate whether Bernardyn's protected activity and his profanity were inextricably intertwined such that the profanity cannot be isolated as an independent and legitimate reason for the discharge. PDR at 8-14.<sup>4</sup> The Secretary also maintains that Bernardyn's impulsive and vague statement to a safety officer does not constitute a threat against his supervisor. *Id.* at 14-17. Finally, the Secretary submits that substantial evidence does not support the judge's finding that Reading's discharge of Bernardyn did not subject him to disparate treatment. *Id.* at 17-19.

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<sup>2</sup> Within 30 minutes after Bernardyn's termination, road conditions worsened, including a layer of ice that had formed on the road. T. Tr. 103-05. After a foreman's truck slid down the haulage road, the road was shut down due to the slippery conditions. T. Tr. 56-57, 103-04.

<sup>3</sup> The judge also "dissolved" his previously issued temporary reinstatement order. 21 FMSHRC at 824. The Commission, finding that the express language of Mine Act section 105(c)(2), 30 U.S.C. § 815(c)(2), requires that a temporary reinstatement order remain in effect until the decision on the merits becomes a final Commission decision pursuant to section 113(d)(1), 30 U.S.C. § 823 (d)(1), vacated the judge's dissolution of the temporary reinstatement order. 21 FMSHRC 947, 949, 951 (Sept. 1999).

<sup>4</sup> Pursuant to Commission Procedural Rule 75(a)(1), 29 C.F.R. § 2700.75(a)(1), the Secretary designated her PDR as her brief.

Reading responds that the judge correctly found that Reading established its affirmative defense, and that Bernardyn's profanity was not inextricably linked to his protected activity. R. Br. in Resp. to PDR at 4-9.<sup>5</sup> Reading further argues that Bernardyn's statements threatened Wapinski. *Id.* at 5. Reading also claims that the judge's finding that it did not subject Bernardyn to disparate treatment is supported by substantial evidence. *Id.* at 9-11.

A complainant alleging discrimination under the Mine Act establishes a prima facie case of prohibited discrimination by presenting evidence sufficient to support a conclusion that the individual engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799 (Oct. 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981). The operator may rebut the prima facie case by showing either that no protected activity occurred or that the adverse action was in no part motivated by protected activity. *See Robinette*, 3 FMSHRC at 818 n.20. If the operator cannot rebut the prima facie case in this manner, it nevertheless may defend affirmatively by proving that it also was motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *See id.* at 817-18; *Pasula*, 2 FMSHRC at 2799-800; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642-43 (4th Cir. 1987) (applying *Pasula-Robinette* test).

Reading does not directly dispute that the Secretary proved a prima facie case of discrimination. However, the operator suggests that nothing in the record indicates that Derrick knew that Bernardyn drove slowly because of his concern regarding the road conditions. R. Br. in Resp. to PDR at 7. Insofar as this contention may be seen as calling the prima facie case into question, we address the issue. The judge found that the Secretary made out a prima facie case, but made no explicit finding regarding Derrick's knowledge. 21 FMSHRC at 822. The Commission has stated that "an operator may not escape responsibility by pleading ignorance due to the division of company personnel functions." *Metric Constructors, Inc.*, 6 FMSHRC 226, 230 n.4 (Feb. 1984), *quoted in Wiggins v. Eastern Associated Coal Corp.*, 7 FMSHRC 1766, 1771 (Nov. 1985). Here, Wapinski testified that Bernardyn, in response to Wapinski's inquiry into why he was driving slowly, informed him that the road was slippery. T. Tr. 141-42, 153-54. In any event, Derrick understood that Bernardyn's conversation on the CB was with his safety committeeman, and he admitted he heard Bernardyn say that Wapinski "was forcing him to drive faster and he didn't feel that he should." T. Tr. 88-89. To the extent Reading's argument is viewed as a challenge to the judge's finding of a prima facie case, we conclude the judge's finding is supported by substantial evidence.<sup>6</sup> Accordingly, we affirm that finding.

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<sup>5</sup> Reading designated its brief in response to the PDR as its brief.

<sup>6</sup> 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

Having found that Bernardyn established a prima facie case, the judge nevertheless found that Reading successfully asserted the affirmative defense that it would have fired Bernardyn without regard to his protected activity because he swore over the CB radio and used threatening language towards Wapinski. 21 FMSHRC at 823. As we explain further below, we find the judge's analysis of Reading's affirmative defense problematic in several respects. Furthermore, as discussed *infra*, at section II.B, we find that the judge failed to address the possibly dispositive issue of whether the conduct on which Reading purportedly based its firing of Bernardyn was provoked and therefore protected.<sup>7</sup>

#### A. Reading's Affirmative Defense

We set forth the general principles for evaluating an operator's affirmative defense within the *Pasula-Robinette* framework in *Bradley v. Belva Coal Co.*:

[T]he operator must prove that it would have disciplined the miner anyway for the unprotected activity alone. Ordinarily, an operator can attempt to demonstrate this by showing, for example, past discipline consistent with that meted out to the alleged discriminatee, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question. Our function is not to pass on the wisdom or fairness of such asserted business justifications, but rather only to determine whether they are credible and, if so, whether they would have motivated the particular operator as claimed.

4 FMSHRC 982, 993 (June 1982); see *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833 (May 1997). In *Secretary of Labor on behalf of Cooley v. Ottawa Silica Co.*, 6 FMSHRC 516, 521 (Mar. 1984), the general principles of *Bradley* were tailored specifically to situations involving the use of profanity. In *Cooley*, we looked to whether the operator had prior difficulties with the complainant's profanity, whether the operator had a policy prohibiting swearing, and the operator's treatment of other miners who had cursed or used threats. *Id.*; see also *Hicks v. Cobra Mining, Inc.*, 13 FMSHRC 523, 532-33 (Apr. 1991) (applying the factors announced in *Cooley*).

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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)).

<sup>7</sup> We view this case as presenting the issue of provocation. The Secretary's alternative argument that Bernardyn's protected activity and his swearing were inextricably intertwined does not fit the facts of this case, and we therefore decline to apply that mode of analysis in this particular context.

We conclude that the judge failed to adequately analyze the evidence relevant to the *Cooley* factors. First, we note that the record does not contain any evidence of prior difficulties Reading may have had with Bernardyn swearing. *See Cooley*, 6 FMSHRC at 521 (noting lack of evidence that the operator considered complainant to have difficulties involving profanity). Regarding Reading's disciplinary policies, we note that there was a dispute at the hearing as to which disciplinary policy was in effect at the time of Bernardyn's discharge: a 1987 policy which provided that the offending miner would be discharged after "complete exhaustion of disciplinary warnings and suspensions," or a 1998 policy providing that insubordination provided just cause warranting immediate discharge. Gov't Ex. B; R. Ex. 2. We also note that neither of the policies contained any written rule specifically prohibiting cursing. Nor did the 1998 policy define "insubordination."

The Secretary argued below that the 1987 policy was in effect at the time of Bernardyn's discharge. S. Post Hearing Br. at 8. Particularly, she pointed to one of Reading's own exhibits — an August 4, 1998 letter from a Reading attorney to a UMWA attorney which stated: "This letter confirms that the Company will implement the attached Code of Conduct *following the conclusion* of the current negotiations and ratification of the new collective bargaining agreement." *Id.* (citing R. Ex. 2 (emphasis added)). Jay Berger, a UMWA district executive board member who was involved in the 1998 collective bargaining agreement negotiations, testified that the bargaining agreement was not ratified until November 16, 1998 — a date which falls after Bernardyn's discharge — and also testified that the 1987 policy was in effect at the time of Bernardyn's discharge. M. Tr. 43, 45-46.

Reading contended below that the 1998 policy was in effect at the time of Bernardyn's discharge. R. Post Hearing Br. at 6. Berger testified that the disciplinary policy was "separate and apart from the collective bargaining agreement."<sup>8</sup> M. Tr. 56. Derrick testified that the UMWA's chief negotiator said that the disciplinary policy was not a contractual issue, and also stated that, when the UMWA negotiator signed a copy of the August 4, 1998 letter on August 11, 1998, the new disciplinary policy came into effect. M. Tr. 75-77.

The judge did not address this dispute in his decision. Determining which disciplinary policy was in effect on November 10 is a crucial factor to consider in deciding whether Bernardyn's discharge subjected him to disparate treatment and, more broadly, whether Reading established that it would have terminated Bernardyn for his unprotected activity alone. The record suggests that prior cursing incidents at Reading occurred under the 1987 policy. Gov't Ex. C. Thus, if the 1987 policy was in effect at the time of Bernardyn's discharge, the circumstances surrounding Bernardyn's discharge could be compared with prior cursing incidents in determining whether Reading subjected Bernardyn to disparate treatment. *See Schulte v. Lizza Indus., Inc.*, 6 FMSHRC 8, 17 (Jan. 1984) (finding that the operator's treatment of the complainant was consistent with its treatment of other employees disciplined under the same

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<sup>8</sup> The operator did not directly address the Secretary's argument that the implementation of the 1998 disciplinary policy was subject to ratification of the bargaining agreement.

disciplinary policy). If, however, prior to Bernardyn's discharge, insubordination had become grounds for immediate discharge pursuant to the 1998 policy, previous incidents of cursing at Reading become less easy to compare to Bernardyn's case. In sum, the judge should have determined which disciplinary policy was in effect in analyzing the disparate treatment issue.

Regarding the judge's discussion of disparate treatment, we note that the record contains several prior instances of employees being disciplined for cursing at Reading, none of which resulted in discharge. M. Tr. 27-31; Gov't Ex. C at 1-4. The other cursing incidents also involved various failures to obey work orders, including miners who left assigned work areas early, arrived for work late, argued with foremen about job assignments, ignored a supervisor giving work assignments, and refused to perform a job out of classification as ordered. Gov't Ex. C; M. Tr. 29. Thus, Reading had no established practice of disciplining workers for cursing alone and in the absence of accompanying insubordinate acts, or of treating cursing as a form of insubordination. On remand, the judge needs to analyze whether Reading established that it would have discharged Bernardyn for his cursing episode alone even though it had never before levied such a severe penalty on a cursing employee, and had no established policy of discipline for cursing. Although cursing is unprotected activity under the Mine Act, it is not sufficient for an employer to show that a miner deserved to be fired for unprotected conduct; rather, 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 2800 (emphasis in original).

While the record contains several prior instances of cursing at Reading, none of which resulted in discharge, Bernardyn's episode of cursing included what the judge characterized as a threat against Wapinski. The Secretary claims here, as she did below, that Bernardyn's words did not constitute a threat against Wapinski. S. Post Hearing Br. at 8; PDR at 14-17. The judge made contradictory findings on this question.<sup>9</sup> On the one hand, he stated that, based on the Secretary's failure to rebut Derrick's testimony regarding the specific words Bernardyn used over the CB, it was "reasonable to draw an inference that he used these words ['I'll get the little fucker'], but did not consider them to constitute a threat." 21 FMSHRC at 823 & n.9.<sup>10</sup> On the other hand, the judge held that Derrick terminated Bernardyn because he "cursed and *threatened*

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<sup>9</sup> Our dissenting colleagues conclude that "a reasonable person would not have considered Bernardyn's words to constitute a threat." Slip op. at 15. Commission precedent, however, is clear on this point: it is not within our power to reweigh the evidence in this case or to enter de novo findings of fact based on an independent evaluation of the record — which is precisely what our colleagues do. *Island Creek Coal Co.*, 15 FMSHRC 339, 347 (Mar. 1993); *see also Wellmore Coal Corp.*, No. 97-1280, 1997 WL 794132, at \*3 (4th Cir. 1997) ("[T]he ALJ has sole power to . . . resolve inconsistencies in the evidence") (citations omitted).

<sup>10</sup> We note that Bernardyn testified that when he uttered the purported threat, he was "not trying to describe anybody. I was just blowing some steam off after what I thought [I] was harassed." T. Tr. 32.

his supervisor.” *Id.* at 823 (emphasis added).

On remand, the judge must resolve this inconsistency. Clearly, he concluded that Bernardyn did not intend to threaten Wapinski. *Id.* at 823 n.9. The next question he must analyze is the impact of Bernardyn’s words, specifically, how Bernardyn’s words could constitute a threat when Wapinski, the person he allegedly threatened, did not hear Bernardyn’s supposedly threatening language, and whether Wapinski perceived any threat at all — let alone a threat of physical harm. In this connection, we note that Reading does not dispute that Bernardyn’s allegedly threatening language was directed to his safety committeeman over the CB radio, rather than to any management official. T. Tr. 88-89. The judge must also consider whether the general words Bernardyn used, which named no person in particular, constituted a threat against Wapinski.<sup>11</sup>

#### B. Provocation

Even if the judge determines that Reading has established the elements of its affirmative defense, the question remains whether that defense must nevertheless fail because Bernardyn’s conduct was provoked. Although we have recognized that cursing is opprobrious conduct unprotected by the Mine Act, *Cooley*, 6 FMSHRC at 520-21, and would find threats all the more opprobrious, in many cases decided under the National Labor Relations Act, 29 U.S.C. § 141 et seq. (1994) (“NLRA”),<sup>12</sup> courts have recognized that an employer cannot provoke an employee into an indiscretion and then rely on that indiscretion as grounds for discipline.<sup>13</sup> In *Trustees of*

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<sup>11</sup> The dissent implies that anything Bernardyn said over the company radio system is protected because he “invoked the protection of the Mine Act in a classic sense — voicing concern about safety issues to a union official.” Slip op. at 12. We believe, however, that safety is not a four letter word nor that miners are so primitive as to be unable to express themselves on important safety issues except through epithets or threats. As even our dissenting colleagues recognize, the Act does not protect a “safety complaint . . . made in . . . a reprehensible manner.” *Id.* at 13.

<sup>12</sup> In *Delisio v. Mathies Coal Co.*, we recognized that “cases decided under the NLRA — upon which much of the Mine Act’s antiretaliation provisions are modeled — provide guidance on resolution of discrimination issues under the Mine Act.” 12 FMSHRC 2535, 2542-43 (Dec. 1990).

We also note that the National Labor Relations Board case on which the dissent relies extensively, *Caterpillar, Inc.*, 322 NLRB 674 (1996), was ultimately vacated by the NLRB on March 19, 1998. Unpublished NLRB Order dated March 19, 1998. We question whether a vacated case provides any authority, even persuasive authority, in this or any other legal forum.

<sup>13</sup> Although the issue of provocation is one of first impression before the Commission, in *Moses v. Whitley Dev. Corp.*, we found that the operator failed to establish its affirmative defense

*Boston Univ. v. NLRB*, the First Circuit stated, “at least so long as the employee’s indiscretions are not major, it is immaterial that the employee’s misconduct would constitute a sufficient reason for discharge if the actual reason for discharge is the employee’s participation in [protected] activity.” 548 F.2d 391, 393 (1st Cir. 1977). That court also indicated that employees are to be given some leeway for impulsive behavior, and that “the leeway is greater when the employee’s behavior takes place in response to the employer’s wrongful provocation.” *Id.* The Fourth Circuit has recognized that “[t]he more extreme an employer’s wrongful provocation the greater would be the employee’s justified sense of indignation and the more likely its excessive expression.” *NLRB v. M & B Headwear Co.*, 349 F.2d 170, 174 (4th Cir. 1965).

Whether an employee’s indiscrete reaction upon being provoked is excusable is a question that depends on the particular facts and circumstances of each case. Interpreting the NLRA, the Seventh Circuit stated that an “employee’s right to engage in concerted activity may permit some leeway for impulsive behavior, which must be balanced against the employer’s right to maintain order and respect.” *NLRB v. Thor Power Tool Co.*, 351 F.2d 584, 587 (7th Cir. 1965).

In applying this test, some courts interpreting the anti-discrimination provision of the NLRA have found that an employee’s egregious conduct was sufficient to strip the employee of that Act’s protection, thereby justifying the employee’s discharge. For example, in *NLRB v. Louisiana Mfg. Co.*, the Eighth Circuit denied reinstatement to a complainant who was “openly abusive in his language [towards a supervisor] and obviously insubordinate in his conduct.” 374 F.2d 696, 706 (8th Cir. 1967). In *NLRB v. Soft Water Laundry, Inc.*, the Fifth Circuit denied reinstatement to an employee who cursed at a supervisor loudly and in the presence of other employees. 346 F.2d 930, 934-35 (5th Cir. 1965). And in *Timpte, Inc. v. NLRB*, the Tenth Circuit found that the termination of an employee who refused to stop using foul language and disparaging other employees after being warned not to do so was not discriminatory. 590 F.2d 871, 873-74 (10th Cir. 1979).

Other courts, however, have found layoffs, based ostensibly on vulgar employee outbursts to be improper where the employee’s conduct was provoked by unjustified employer action. For instance, in *Trustees of Boston University*, the First Circuit upheld an administrative law judge’s excusing of an employee’s misconduct because it was stimulated by the employer’s own wrongful conduct. 548 F.2d at 392-93. In *Coors Container Co. v. NLRB*, the Tenth Circuit held that the complaining employees’ unprotected behavior — cursing at employer-hired security guards who attempted to prevent the employees from engaging in protected activity — was excusable impulsive behavior which did not justify discharge. 628 F.2d 1283, 1285, 1288 (10th Cir. 1980). In *NLRB v. Steinerfilm, Inc.*, the First Circuit upheld a decision of the National Labor Relations Board (“NLRB”) excusing a complainant’s offensive and abusive language which occurred during

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in part because “much of the language and improper attitude [which the operator alleged motivated the complainant’s discharge] arose in response to [the operator’s] unlawful and provocative attempts to determine if [the complainant] had called the inspectors.” 4 FMSHRC 1475, 1482 (Aug. 1982).

a confrontation with a supervisor in reaction to the supervisor's unjustified warning of the complainant. 669 F.2d 845, 852 (1st Cir. 1982). And in *M & B Headwear*, the Fourth Circuit upheld the reinstatement of a complainant who, after her discriminatory layoff, threatened a supervisor and was rude to a vice-president, because "the unjust and discriminatory treatment of [the complainant] gave rise to the antagonistic environment in which these remarks were made." 349 F.2d at 174.<sup>14</sup>

Here, the judge failed to make any findings regarding whether Bernardyn's cursing and alleged threats were provoked by Reading's response to his protected refusal to drive at a higher speed. In this connection, we note that when Bernardyn explained to Wapinski that he was driving slowly because the poor road conditions warranted it, Wapinski responded by telling Bernardyn to "get the thing moving and get going" or "pick it up when and where you can." T. Tr. 20-21, 140-42. Had Bernardyn complied with Wapinski's instruction to drive faster, it would have put him in harm's way. But for Wapinski's reaction to Bernardyn's protected refusal to drive faster, Bernardyn would not have had any reason to make the complaint to Dodds during which he cursed and made the allegedly threatening remark.

The question thus remains for the judge to determine on remand whether Bernardyn's cursing (including the alleged threat) was provoked by Reading's response to his protected refusal to drive faster. The judge must also determine whether the particular facts and circumstances of this case, when viewed in their totality, place Bernardyn's conduct within the scope of the "leeway" the courts grant employees whose "behavior takes place in response to [an]

employer's wrongful provocation."<sup>15</sup> *Trustees of Boston Univ.*, 548 F.2d at 393. If Bernardyn's

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<sup>14</sup> The complainant in *M & B Headwear* was terminated for her organizing activities, and, when her applications for job openings at the company were rejected, she became upset and threatened to harm the supervisor who had conducted surveillance of her organizing activities. 349 F.2d at 171-74. The court held that "when a layoff is discriminatory a rehiring of the injured employee cannot be avoided by reliance on her later unpremeditated and quite understandable outburst of anger that in no way harms or inconveniences the employer." *Id.*

<sup>15</sup> The dissent first concludes that Bernardyn was provoked, stating "we are hard pressed to identify any other reason why Bernardyn would have cursed." Slip op. at 16. They then conclude that "Bernardyn's actions are excusable and fall within this leeway." *Id.* But as we pointed out above, these *factual* determinations are not ours to make, but rather must be made — as a matter of law — in the first instance by the trier of fact. *Island Creek Coal Co.*, 15 FMSHRC at 347. That this task belongs in the judge's hands is all the more apparent in this case

conduct was provoked and excusable, Reading's affirmative defense must fail.

III.

Conclusion

For the foregoing reasons, we *vacate* the judge's dismissal of Bernardyn's discrimination complaint and *remand* this matter for further analysis consistent with this decision.

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James C. Riley, Commissioner

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Theodore F. Verheggen, Commissioner

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Robert H. Beatty, Jr., Commissioner

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where he has not even reviewed the record and facts under the provocation doctrine we adopt today.

Chairman Jordan and Commissioner Marks, dissenting:

We agree with our colleagues in the majority that the judge's analysis of Bernardyn's discrimination complaint is deficient in several respects. However, because we believe that the record compels the conclusion that Reading Anthracite failed to prove its affirmative defense, we would reverse the judge's decision, and thus respectfully dissent.<sup>1</sup>

The salient factor in this case is that Bernardyn was fired for statements he made during a conversation with his safety committeeman. Because that conversation constituted protected activity (*see Phillips v. IBMA*, 500 F.2d 772, 778 (D.C. Cir. 1974)), and because Bernardyn's comments during that conversation were not so flagrant that they eviscerated the protections of the Mine Act, Reading cannot rely on them to discipline Bernardyn. Consequently, Reading's affirmative defense must fail.

By calling his safety committeeman to complain that he was being forced to drive a truck on slippery roads at an unsafe speed, Bernardyn invoked the protection of the Mine Act in a classic sense -- voicing concern about safety issues to a union official. This was first deemed protected under the Mine Act's predecessor, the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 et seq. (1976) ("Coal Act"), by the D.C. Circuit in *Phillips*. In that case the Court reversed a decision of the Interior Board of Mine Operations Appeals which had held that a miner had not engaged in protected activity by lodging a safety complaint with his foreman and mine safety committee because the Coal Act only protected complaints made to the Secretary or his authorized representative. The Court recognized that "[o]nly if the miners are given a realistically effective channel of communication re health and safety, and protection from reprisal after making complaints, can the Mine Safety Act be effectively enforced." 500 F. 2d at 778. Subsequently, when Congress was in the process of enacting the Mine Act, the Senate Report cited *Phillips* favorably, stating that the Senate Committee intended "to insure the continuing vitality of the various judicial interpretations of . . . the Coal Act which are consistent with the broad protections of the bill's provisions," and emphasizing that the Act's anti-discrimination provision should be "construed expansively 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 36 (1977), *reprinted in* Senate Subcomm. on Labor, Comm. on Human Resources, *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978).

Discharging a miner for peripheral statements made while complaining to a safety committeeman may inhibit the frequency and manner in which miners make safety complaints, resulting in a chilling effect on their ability to point out safety problems. A miner must feel free to communicate about such issues — with a management safety director, a foreman, or a union official — without undue concern about whether the complaint is couched in an acceptable format, and thus should not be fired for the manner in which he states them except in extreme

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<sup>1</sup> We agree with the majority that the judge properly found that Bernardyn had made out a prima facie case of discrimination. Slip op. at 4.

circumstances. These conversations occur within a framework that Congress wished to encourage — the protected activity of making safety complaints — and in making them, a miner enjoys the protection of the Mine Act’s shield against retaliatory actions by the operator.

That shield is not absolute, however. A miner may lose the protection of the Mine Act in circumstances where his safety complaint is made in such a reprehensible manner that he no longer deserves the Act’s protections because his actions cross a certain line. *See Caterpillar Inc.*, 322 NLRB 674 (1996).<sup>2</sup> The facts in *Caterpillar* are strikingly similar to the instant case. Caterpillar fired its employee because during a grievance meeting, in front of other workers, he said to a supervisor: “‘You’re a motherfucking liar.’ . . . ‘You know what you said.’ . . . ‘If you’re man enough to admit it once, you ought to be man enough to admit it now.’” *Id.* at 676. He also gestured at the supervisor with the forefinger of one hand and repeated “‘You motherfucker.’ . . . ‘I’ll deal with you on the outside,’” striking the supervisor with his finger in the top part of his body. *Id.* The National Labor Relations Board (“NLRB”) nevertheless ruled that his discharge violated the NLRA. *Id.* at 677.<sup>3</sup>

The NLRB acknowledged that “[t]he Act has ordinarily been interpreted to protect the employee against discipline for impulsive and perhaps insubordinate behavior that occurs during grievance meetings, for such meetings require a free and frank exchange of views and often arise from highly emotional and personal conflicts.” *Id.* (quoting *United States Postal Service v. NLRB*, 652 F.2d 409, 411 (5th Cir. 1981)). Recognizing that such protection is not without limits, the NLRB held that when “an employee is discharged for conduct occurring during a grievance meeting, the inquiry must focus on whether the employee’s language is ‘*indefensible* in the context of the grievance involved,” 322 NLRB at 677 (quoting *Crown Central Petroleum Corp. v. NLRB*, 430 F.2d 724, 731 (5th Cir. 1970)) (emphasis in original) (citation omitted); *see also NLRB v. Vought Corp.-MLRS Sys. Div.*, 788 F.2d 1378, 1384 (8th Cir. 1986) (when analyzing employer discipline of employees for protected activity where the employee used intemperate language, the standard is whether the employee’s improper conduct was so

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<sup>2</sup> While *Caterpillar* was decided under the National Labor Relations Act (“NLRA”), 29 U.S.C. § 141 et seq., we have often looked for guidance to case law interpreting similar provisions of the NLRA in resolving questions about the proper construction of Mine Act provisions. *Berwind Natural Resources Corp.*, 21 FMSHRC 1284, 1309 (Dec. 1999); *Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2542-45 (Dec. 1990). In *Delisio*, the Commission emphasized that it “has recognized . . . that . . . cases decided under the NLRA — upon which much of the Mine Act’s antiretaliation provisions are modeled — provide guidance on resolution of discrimination issues under the Mine Act.” *Id.* at 2542-43.

<sup>3</sup> The NLRB, on the joint motion of the parties, subsequently vacated its decision in *Caterpillar* in order to effectuate a settlement agreement (*see* Unpublished NLRB Order dated Mar. 19, 1998), but the NLRB has nonetheless continued to cite it. *See Central Illinois Public Serv. Co.*, 326 NLRB No. 80, 159 LRRM (BNA) 1217, 1218 n.8 (Aug. 27, 1998); *Shell Electric*, 325 NLRB No. 156, 1998 WL 280365, at \*4 (May 29, 1998).

indefensible as to forfeit the protection of the NLRA). We consider this standard to be equally pertinent when we must decide whether a miner's conduct during the course of making a protected safety complaint exceeds the protection of the Mine Act.

There is an unmistakable similarity between the lodging of employee grievances under the NLRA and the filing of safety complaints under the Mine Act. As the Board recognized in *Caterpillar*, "the filing and prosecution of employee grievances is a fundamental, day-to-day part of collective bargaining and is protected by [the NLRA]." 322 NLRB at 676-77 (citation omitted). Similarly, the reporting of safety complaints is a crucial activity protected by the Mine Act, where candor is essential and disputes may arise.

Our adoption of the approach taken by the Board in *Caterpillar* is consistent with our decision in *Secretary of Labor on behalf of Knotts v. Tanglewood Energy, Inc.*, 19 FMSHRC 833 (May 1997). In *Knotts*, a miner was discharged after engaging in a conversation with a representative of the mine landowner. The Commission found that this conversation was protected, because it included complaints about unsafe mine equipment. *Id.* at 837. The operator claimed that it would have fired him in any event because he expressed disparaging views about mine management during the conversation, including a statement he allegedly made that the mine manager "sets outside with his feet on the desk and acts like a bigshot coal operator." *Id.* at 839. The Commission found that "a significant portion of the conversation . . . concerned safety issues," (*id.*) and because these protected safety concerns were expressed in the same conversation as the unprotected statements "'[i]t is fair that . . . [the employer] bear the risk that the influence of legal and illegal motives cannot be separated.'" *Id.* at 839, 840 (quoting *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983)). Consequently, we held that the operator had failed to meet its affirmative defense.

We conclude that the undisputed facts of this case compel the finding that Bernardyn's conduct was not so indefensible as to cause him to fall outside the protective confines of the Act. In fact, Bernardyn's behavior is similar to the behavior the Board considered in *Caterpillar*, and we find it appropriate to adopt its analysis in the instant case:

[W]e find that [the employee's] statement was a spontaneous and impulsive outburst that was triggered by [the employer's] own inflammatory conduct. There is no evidence that during his 20 years with the Company, [the employee] was a violent or dangerous person. In light of the emotionally charged events that had just occurred, it is apparent to us that [the employee] simply lost his temper (or, as [the supervisor] so aptly put it, "blew up") and made the spontaneous, emotional outburst at issue here. . . .

. . . [W]e conclude that [the employee's] conduct during the grievance meeting was not of such a flagrant or serious character as

to be “indefensible in the context of the grievance involved,” thereby depriving him of the protections of the Act and rendering him unfit for further service.

322 NLRB at 677.

In determining that Bernardyn’s behavior was not indefensible, we find it noteworthy that, as the majority points out, the record contains several other examples of employees who cursed, but who were not discharged. Slip op. at 7. Unlike Bernardyn, these employees not only cursed directly at their supervisors but also displayed other conduct warranting disciplinary action. See Gov’t Ex. C. In all four reported incidents, however, the workers received only verbal or written warnings. *Id.* In one case, an employee was given a verbal warning for cursing the plant superintendent in March 1994, and a month later, when he cursed his production foreman, he was only given a written warning.<sup>4</sup> *Id.* at 2-3.

In determining that Bernardyn’s conduct was not “indefensible,” we have also considered the operator’s assertion that Bernardyn was fired for threatening Wapinski. R. Br. in Resp. to PDR at 5, 10. We believe, however, that when the entire context is considered, a reasonable person would not have considered Bernardyn’s words to constitute a threat. We are mindful that his comments were extremely general, and were not uttered directly to the alleged “victim.”<sup>5</sup> Bernardyn suggested no specific means of hurting Wapinski, but spoke only in a very vague, angry manner to a co-worker, his safety committeeman.<sup>6</sup> He did “fly off the handle,” and spoke in a coarse and disparaging manner, but his words reflected his agitation and extreme frustration with Wapinski. In sum, the record compels the conclusion that his actions here cannot be classified as “indefensible.”

In *Caterpillar*, the NLRB also reaffirmed the well-established principle, adopted by our colleagues in the majority, that an affirmative defense must fail if the complainant’s conduct was

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<sup>4</sup> The April employee warning and disciplinary report reflects that he had received the previous verbal warning in March, and that he had received three other previous warnings (for unspecified actions) since 1989. Gov’t Ex. C at 3.

<sup>5</sup> Because he used the only means of communication at hand, the company-provided CB radio in his truck, Bernardyn’s complaint to his safety committeeman did wind up being overheard by Wapinski, as well as other drivers.

<sup>6</sup> The judge’s finding that Bernardyn himself did not intend his words as a threat is also relevant. See 21 FMSHRC 819, 823 & n.9 (July 1999) (ALJ).

provoked by the employer. 322 NLRB at 678; slip op. at 8-9.<sup>7</sup> The majority remands the case for the judge to consider whether Bernardyn's cursing was provoked by his supervisor's response to his protected refusal to drive faster. Slip op. at 10.

Based on this record, we are hard pressed to identify any other reason why Bernardyn would have cursed. In describing his conversation with the safety committeeman, Bernardyn testified that he told him that management had asked him to drive faster, that he thought he should be able to use his own discretion, and that, in terms of the curse words he used, he "was just blowing some steam off after what I thought was harassed [sic]." T. Tr. 30, 32. The operator has offered no other reason for Bernardyn's cursing.

As the majority points out, under a "provocation" doctrine, a determination must also be made as to whether Bernardyn's conduct comes within the scope of the "leeway" granted by courts to employees who were wrongfully provoked. *Trustees of Boston Univ. v. NLRB*, 548 F.2d 391, 393 (1st Cir. 1977); see slip op. at 9. Our review of Bernardyn's actions (see *supra* text accompanying nn. 2-7) and of the relevant case law in the area of "provocation," leads us to the conclusion that, as a matter of law, Bernardyn's actions are excusable and fall within this leeway. Bernardyn's conduct was no more egregious than the actions at issue in *NLRB v. M & B Headwear Co.*, 349 F.2d 170 (4th Cir. 1965) (cited by the majority, slip op. at 10), as well as other cases following the principles articulated in that decision. See, e.g., *Blue Jeans Corp.*, 170 NLRB 1425, 1425 (1968) (employee's statement that she "would kill the S.O.B." who told the company about her union activities, and her actions in threatening the plant manager with scissors in hand, provoked by the employer's discriminatory treatment of her); *Vought Corp.-MLRS Sys. Div.*, 788 F.2d at 1380, 1384 (employee's direct use of abusive, profane, and threatening language toward his supervisor was unreasonably provoked by repeated company violations of his rights under the NLRA).

In deciding to remand this matter, our colleagues cite to cases in which courts have found that the employee's conduct negated the protections of the Act. These cases, however, are readily distinguishable from the matter at hand. In *NLRB v. Louisiana Manufacturing Co.*, the complainant was rude to his supervisor and cursed at him directly. 374 F.2d 696, 705 (8th Cir. 1967). Bernardyn, of course, did not speak directly to his supervisor during the conversation at issue. In *NLRB v. Soft Water Laundry, Inc.*, the court denied reinstatement to an employee who admitted using "extreme profanity" in a conversation with her supervisor. 346 F.2d 930, 934, 936 (5th Cir. 1965). The court found that the employee's language and conduct, carried out in the presence of other employees, constituted insubordination, because it was in direct defiance of superior authority, and amounted to a refusal to follow reasonable instructions. *Id.* at 934. There is no claim by the operator in the instant case that Bernardyn refused to follow orders. Moreover, in neither of these two cases relied on by the majority did the court utilize a "provocation"

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<sup>7</sup> In *Caterpillar*, the Board found that the employee's discharge was illegal because the employer had provoked the alleged insubordination by cursing at him and imposing an unlawful gag order. 322 NLRB at 678-79.

analysis. See *NLRB v. Mueller Brass Co.*, 501 F.2d 680, 686 (5th Cir. 1974) (distinguishing *Soft Water Laundry* and *Louisiana Mfg.*, because “both involved unprovoked outbursts of abusive and threatening language by the discharged employees”).

Finally, in *Timpte, Inc. v. NLRB*, 590 F.2d 871, 872 (10th Cir. 1979), the employee was not discharged when he circulated a controversial letter in the plant, but only after he refused to agree that in the future he would not circulate material with vulgar and indecent language. Again, this conduct is a far cry from Bernardyn’s.

Even under the traditional disparate treatment analysis discussed by the majority, we believe that reversal, and not remand, is warranted here. Keeping in mind that Reading must prove its affirmative defense by a preponderance of the evidence, (*Secretary of Labor on behalf of Price v. Jim Walter Resources, Inc.*, 14 FMSHRC 1549, 1556 (Sept. 1992)), our review of the record evidence on prior cursing incidents shows that Reading cannot meet its burden of showing that it would have fired Bernardyn based solely on his cursing. The majority remands the case so that the judge may consider whether Reading proved that it would have discharged Bernardyn for his cursing alone, even though Reading had never fired an employee for this behavior in the past. As we have demonstrated above, however, the record compels the conclusion that Bernardyn was the victim of disparate treatment, as other employees who cursed were not fired, and the operator’s claim that he was fired for threatening Wapinski is not supported by record evidence.<sup>8</sup>

Our colleagues decline to compare the previous cursing incidents to the one at issue here, because of the possibility that Bernardyn’s actions fell under a new 1998 disciplinary policy. Accordingly, they remand to the judge the question of which disciplinary policy was in effect at the time of Bernardyn’s termination. Slip op. at 6-7. We believe, however, that under either policy, cursing of the kind that occurred here cannot reasonably be considered an offense warranting immediate dismissal.

For purposes of this case, the only relevant difference between the two policies is that the 1998 policy permits immediate discharge for work refusal and insubordination, while the earlier policy called for progressive discipline when such conduct occurred. Under the 1998 policy, the following misconduct constitutes grounds for immediate dismissal:

- (1) Refusal to obey orders, refusal to perform work assignment after instruction, failure to carry out instructions or assignments or act of insubordination.
- (2) Stealing.

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<sup>8</sup> It is also significant that supervisors had previously used profanity toward miners. M. Tr. 17-19, 30-31; see also *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1366 (11th Cir. 1999) (emphasizing prior circuit holding that “evidence demonstrating that the decision-maker engaged in the same policy violation proffered for an employee’s termination is ‘especially compelling’ evidence of pretext”) (citation omitted).

- (3) Possession or using intoxicants or drugs in the area of work.
- (4) Carrying weapons on Company property.
- (5) Physical fighting.

R. Ex. 2, at 3. It is apparent that the behaviors described in this list involve actions so serious that they must be stopped immediately, and the perpetrator removed from the mine. It is significant, however, that in Bernardyn's case, he was permitted to continue his behavior, even though management was aware of it and could have stopped it. We find it telling that when Derrick was asked why he didn't get on the CB radio and tell Bernardyn to stop cursing, he replied: "It never dawned on me to do it. . . . [I]t never crossed my mind to pick up the CB and tell him to stop." T. Tr. 116.

Under the 1987 policy, misconduct considered a "serious offense," meriting discharge only after the exhaustion of other disciplinary remedies, included "[r]efusal to obey orders or failure to carry out instructions or assignments. (Insubordinations)." Gov't Ex. B at 2. Reading viewed the 1998 policy as simply moving this provision from the progressive discipline section in the 1987 policy to the immediate discharge section in the 1998 policy. *See* R. Ex. 2 at 1 (letter from Howard A. Rosenthal). The wording under the 1987 policy makes clear that insubordination was defined as work refusal, and that cursing would not fall under this rubric.

Consequently, we believe that remanding the disciplinary policy issue to the judge is unnecessary, because the record supports only one reasonable conclusion: even if the later policy were in effect, under the terms of its provisions, cursing was not cause for immediate dismissal. Bernardyn's termination, therefore, may properly be compared to the discipline previously received by other workers under the 1987 policy, discipline which, as we have stated, was far less severe.

Because we believe that the record in this case compels the conclusion that Reading failed to prove its affirmative defense, we would reverse the judge's finding of no discrimination. *See Donovan v. Stafford Construction Co.*, 732 F.2d 954, 961 (D.C. Cir. 1984) (although neither the Commission nor the judge had reached the issue of an affirmative defense, the D.C. Circuit recognized that "[s]ince all the evidence bearing upon the issue is contained in the record before us . . . a remand on this issue would serve no purpose. This is particularly so in light of our ultimate holding that only one conclusion would be supportable."); *Brown v. East Miss. Elec. Power Ass'n.*, 989 F.2d 858, 862 (5th Cir. 1993) (evidence permitted only one result — that the employer failed to meet its burden of proving that it would have removed employee if the illegal consideration of race had not played a role); *Secretary of Labor on behalf of Bowling v. Mountain Top Trucking Co.*, 21 FMSHRC 265, 277 (Mar. 1999), *appeal docketed*, No. 99-4278 (6th Cir. Oct. 22, 1999) (remand on constructive discharge claim was unnecessary where the record as a whole admitted to only one conclusion); *see also Walker Stone Co. v. Secretary of Labor*, 156 F.3d 1076, 1085 n.6 (10th Cir. 1998), *aff'g* 19 FMSHRC 48, 52-53 (Jan. 1997); *Secretary of Labor on behalf of Hyles v. All Am. Asphalt*, 21 FMSHRC 119, 137 (Feb. 1999).

For the foregoing reasons, we believe that a remand in this case would serve no purpose,

and we would therefore reverse the judge's decision and find in favor of Bernardyn.

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Mary Lu Jordan, Chairman

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Marc Lincoln Marks, Commissioner

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