

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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June 17, 2022

SECRETARY OF LABOR,	:	DISCRIMINATION PROCEEDING
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
on behalf of ALVARO SALDIVAR,	:	Docket No. WEST 2021-0265-DM
Complainant,	:	MSHA Case No. WE MD 21-06
	:	
v.	:	
	:	
GRIMES ROCK INC,	:	Mine: Grimes Rock Inc
Respondent.	:	Mine ID: 04-05432

DECISION AND ORDER

Appearances: Karla Malagon and Jessica Flores, Office of the Solicitor,
U.S. Department of Labor, Los Angeles, California, for the Complainant

Mark Pachowicz, Pachowicz & Goldenring PLC, Ventura, California,
for the Respondent

Before: Judge Miller

This case is before me upon a complaint of discrimination filed by the Secretary of Labor (“Secretary”) on behalf of Alvaro Saldivar against Grimes Rock Inc. (“Respondent”) under section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (“Mine Act” or “Act”). Mr. Saldivar alleges that he was terminated for making safety complaints that are protected under the Mine Act. Both parties presented witnesses and evidence at the hearing that took place from January 25-27, 2022 and subsequently briefed the Court on issues of fact and law. For the reasons outlined below, I find that the Secretary has failed to prove a violation of section 105(c) of the Mine Act.

I. FINDINGS OF FACT

The findings of fact detailed below are based on the record as a whole and my careful observation of the witnesses during their testimony. My credibility determinations are based in part on my close observation of the witnesses’ demeanors and vocal intonations. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration or the lack thereof, and consistencies and inconsistencies in each witness’s testimony and among the testimonies of the various witnesses. Any failure to provide detail on each witness’s testimony should not be deemed a failure to have fully considered it. The fact that some evidence is not

discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433, 436 (8th Cir. 2000).

Grimes Rock operates a small sand and gravel mine located in Fillmore, California. This surface mine falls under the jurisdiction of the Mine Act, and its miners are covered by the Act's protections. *See* Jt. Stip. ¶ 1; 30 U.S.C. § 803. Alvaro Saldivar worked at Grimes Rock during two separate periods of employment. Grimes Rock first employed Saldivar as a welder in 2019. Jt. Stip. ¶ 7. Then, Grimes Rock re-hired Saldivar on October 5, 2020, and he continued working at the mine until he was terminated on January 15, 2021. Jt. Stip. ¶ 6. Saldivar's second stint of employment at Grimes Rock is the focus of the present discrimination proceeding.

Grimes Rock is owned by Russell Cochran and is managed by Ernesto Melendez, who oversees all operations at the mine. Melendez made the decision to rehire Saldivar in October 2020, motivated in part by Saldivar's high quality of work during his first term of employment. Tr. 389. Melendez testified that while there was no welder position available, he recognized the need for consistent servicing of the mine's mobile equipment, and he hired Saldivar to fill the role of "lube guy." Tr. 387.

The parties dispute certain details about Saldivar's precise title and role at Grimes Rock during the second period of his employment—Saldivar claims he was rehired as a "lube service technician and as an equipment operator" rather than a "lube guy"—but both sides largely agree as to what his duties were. Tr. 34. Grimes Rock rehired Saldivar to operate a lube truck that would carry oil and other automotive fluids around the mine and service its mobile equipment. However, at the time of Saldivar's rehiring, the lube truck had not yet been acquired, and so Saldivar was asked to help with other jobs around the mine. Tr. 36, 388. He was tasked with operating a water truck to assist with dust control, as well as operating a motor grader to help flatten and grade the roads at the mine. Tr. 36, 388. Management also asked Saldivar to service mobile equipment in the absence of the lube truck. Both sides agree that plant manager Rene Garcia and plant supervisor Aureliano Ruiz oversaw Saldivar's work, in addition to Melendez. Jt. Stip. ¶¶ 15,16.

A. Saldivar's training at Grimes Rock

Saldivar's training upon returning to Grimes Rock began with a text message. On October 5, 2020, Ernesto Melendez texted Saldivar a link to an MSHA training video. *See* Sec'y Ex. 19. Melendez testified that he sent a link to the virtual training instead of conducting an in-person training because Grimes Rock offices were closed due to the COVID-19 pandemic. Tr. 391. On October 6, Saldivar signed and dated a certificate of training indicating that he completed the video training. Resp. Ex. E. Saldivar signed a similar form confirming additional training the next day. Both forms indicate that the type of training received was "New Miner" training. Resp. Ex. E.

Saldivar began operating the Peterbilt water truck and motor grader within the first few weeks of returning to Grimes Rock. He testified that he was asked to operate these pieces of equipment before he was trained on them. Tr. 36-38. Saldivar said at hearing that he operated the equipment for one month without training, and that he requested training for this equipment in his preoperational inspection forms. Tr. 96, 100. Eventually, Grimes Rock enlisted electrician Vic Lester to train Saldivar on the water truck and motor grader. Saldivar characterized the training on the water truck as a “360 walk around” and described the training on the motor grader as “improper.” Tr. 98, 100. Vic Lester testified that water truck training involved the two men entering the cab, reviewing the controls, and then allowing Saldivar to operate the truck while Lester sat in the passenger seat. Tr. 610. Saldivar disputed this. Tr. 168. Lester also testified that he trained Saldivar on the motor grader by showing him the equipment, getting in the cab together, instructing him on how to operate the handles and levers to control the blade, and reviewing what to watch for while operating the grader. Tr. 613. Lester’s testimony was corroborated by Melendez and Garcia, who testified that they witnessed Lester and Saldivar operating the equipment together. Tr. 396, 401, 465. Ruiz testified that Saldivar told him that he had been trained by Lester. Tr. 511. No information regarding the timing of the training is contained in the record.

Within the first few weeks of returning to Grimes Rock, Saldivar was also asked to begin servicing mobile equipment at the mine. This task included replenishing the fuel, checking the fluids, greasing the pinpoints, and performing other routine service on equipment such as the excavators, bulldozers, front loaders, and a backhoe at the mine. Tr. 38-39. Saldivar claimed that Grimes Rock only provided instruction on servicing the mobile equipment *after* he complained about the lack of training on his preoperational inspection forms. Tr. 96. Jordan Van Wie from Quinn Company led a training session that Saldivar described as a “360 walk around” of the equipment and a basic demonstration on how to “check fluids.” Tr. 96, 101. Van Wie, a certified instructor of equipment maintenance, testified that he spent two or three hours showing miners the basic service techniques on four different pieces of equipment. Van Wie did not say if the training was before or after Saldivar made a complaint. Tr. 676, 679-80.

On occasion, Saldivar would have to move mobile equipment to the location where the grease and fluids were kept in order to service the equipment. According to Saldivar, he was directly ordered to move the equipment in this manner. Tr. 40. Saldivar testified that he was not trained on how to operate the heavy equipment, such as the backhoe. Tr. 40. He claimed that he directly requested training on the backhoe from Melendez and Garcia, but that the only training he received was a “360 walk around” of the equipment. Tr. 95-96. Melendez testified that neither he nor anyone else at the mine trained Saldivar regarding operation of the backhoe because Saldivar “was not an operator, there was no need for him to be on a backhoe.” Tr. 405. According to Melendez, Grimes Rock equipment operators parked the mobile equipment on flat surfaces and “[t]here is no need to move any of the equipment” to service it, beyond maybe moving it “four feet.” Tr. 434-35.

B. Saldivar's first disciplinary action

Three weeks after resuming work at Grimes Rock, Saldivar received his first disciplinary writeup. On October 27, Rene Garcia issued Saldivar a disciplinary form because the "water truck again for the third time was found with no coolant and very low on engine oil." Sec'y Ex. 2. Saldivar testified that, on that date, he had likely not yet received the Quinn Company training on equipment maintenance, and that the training he did receive lacked adequate instruction on how to service the water truck. Tr. 106.

C. The water truck tires, incident, and disciplinary action

Saldivar noticed issues with the tires of the Peterbilt water truck early in his second stretch of employment at Grimes Rock. He testified that some tires were "bald," "cracked," and had "wires exposed." Tr. 43. Saldivar claimed that he verbally reported these issues to Melendez and Garcia and that he also informed management of the issues on his preoperational inspection sheets. Tr. 43-45. Melendez denied being told about balding tires. Tr. 412. Melendez testified that when a miner reports worn tires on a preoperational inspection form, Melendez will inspect the tires and make a "business decision" about whether they need to be replaced. Tr. 429.

On the evening of December 10, 2020, Saldivar was involved in an incident while driving the Peterbilt water truck. Saldivar operated the water truck that evening for dust-control purposes. He sprayed the roadside as he traveled downhill on the main mine road connecting the plant on top of the hill and the scales below. Saldivar turned the truck around at the bottom of the hill and returned uphill toward the plant. Saldivar testified that, as he drove up the steep grade, the truck's tires lost traction and the truck started sliding back downhill. Tr. 49. Saldivar sensed that he had lost control of the vehicle, and he tried to steer the truck into a nearby row of cinderblocks to stop the truck's slide. He succeeded, and the truck collided with the cinderblocks. The collision caused damage to a tire and a rim on the water truck. *See* Sec'y Ex. 6. Saldivar immediately radioed the night manager of the plant, Aureliano Ruiz, and informed him of the incident. Tr. 54-55. Ruiz told Saldivar to try to drive the truck up the hill in first gear and park it at the plant so that Ruiz could inspect the damage. Tr. 54-55, 247. Saldivar was able to get the truck to the plant safely in first gear. Tr. 247.

The next morning, Saldivar informed Melendez about the incident via text message. *See* Sec'y Ex. 5. He detailed how he lost control of the truck and damaged a rim and a tire. Melendez responded by saying, "You need to be careful we will write you up on it." Sec'y Ex. 5. When Saldivar arrived at work the next morning, Rene Garcia issued him a discipline form for damaging company property. *See* Sec'y Ex. 3. Melendez testified that he "investigated" the water truck incident before authorizing the discipline form, but he and Saldivar agreed in their testimony that Melendez did not contact or interview Saldivar before the discipline was issued, apart from the single text message. Tr. 71, 358-59. Later that day, Melendez hired Pinky's Tire Service to replace the tire and rim on the water truck. Both Melendez and the tire technician testified that no tires had been replaced between October and December 10, that only a single tire was replaced on December 11, and that the remaining tires were in passable condition. Tr. 425-26, 597.

D. Subsequent disciplinary actions

After receiving the writeup about the water truck incident on December 11, Saldivar received his third disciplinary action the very next day. On December 12, Aureliano Ruiz issued Saldivar a writeup for arriving to work four hours late. *See* Sec’y Ex. 7. Ruiz issued this form on Rene Garcia’s behalf, after Garcia told Ruiz that Saldivar failed to show up on time. Tr. 502. Ruiz testified that Saldivar gave no excuse for his tardiness except that “he ran late, that’s it.” Tr. 505. To Saldivar, the timing of this discipline form was suspicious because he had been tardy in the past without receiving any admonishment. Tr. 79. Saldivar admitted that he was late to work about once a week but claimed that he had obtained permission for these instances. Tr. 176-77. He also testified that he was late without permission “[m]aybe a couple of times.” Tr. 178. Melendez testified that Saldivar’s attendance record “wasn’t good.” Tr. 429. Oscar Nava, a former coworker of Saldivar at Grimes Rock, said that “everybody is late to work” at the mine. Tr. 316.

On January 13, 2021, Saldivar noticed that the transmission fill tube on a dozer was missing its cap, and he reported the missing cap to Garcia and Melendez. Tr. 83; Sec’y Ex. 8. Saldivar was ultimately written up for the missing cap. Sec’y Ex. 8. According to Saldivar, he received the writeup in retaliation for reporting the unsafe condition. Tr. 84-85. Yet Rene Garcia, who issued the writeup, said both at hearing and on the disciplinary form that Saldivar admitted to having left the fill tube uncapped after being confronted by the dozer operator. Tr. 472; Sec’y Ex. 8. The dozer operator confirmed this at hearing. Tr. 659. Saldivar denied having made any such admission. Tr. 84.

Saldivar’s fifth and final writeup came the next day. Saldivar testified that he was assigned to grade the roads on January 14, and he was using the backhoe to collect the material needed as “base” in order to perform the grading. Tr. 86. When he was operating the backhoe, one of the tires was flat and appeared to separate from the rim. Tr. 85; Sec’y Ex. 10. Garcia issued Saldivar a writeup for the damage incurred to company property when Saldivar was “not paying attention” and “drove the tire off the wheel” of the backhoe. Sec’y Ex. 9. Garcia testified that he issued the disciplinary form because Saldivar was not supposed to be operating the backhoe and could not account for the damage to the tire. Tr. 469.

E. Saldivar’s termination

On January 15, 2021, Melendez radioed Saldivar to meet him at the scale house, where he informed Saldivar that he was fired. Tr. 173. Melendez gave Saldivar his final check and had him sign a termination letter. The letter indicated that Saldivar’s employment was terminated due to “damaged company property and performance issues.” Sec’y Ex. 15. Melendez testified at hearing that the factors he considered in terminating Saldivar included “his attitude, attendance, damaging the company property, not [being] willing to listen to anybody, [and] thinking he can do what he pleases at the mine.” Tr. 432-33. Several employees of Grimes Rock testified that Saldivar’s attitude was an issue at the mine. Tr. 407-19, 660-61, 669.

II. ANALYSIS

Section 105(c)(1) of the Mine Act prohibits a mine operator from discharging a miner, discriminating against him, or interfering with the exercise of his statutory rights “because . . . he has filed or made a complaint under or related to this chapter, including a complaint notifying the operator . . . of an alleged danger or safety or health violation” or “because of the exercise of such miner . . . of any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1). Congress intended for the protections of section 105(c) “to be construed expansively to ensure that miners will not be inhibited in any way in exercising any rights afforded” by the Mine Act. S. Rep. 95-181, at 36, *reprinted in* Senate Subcomm. on Labor, Comm. on Human Res., Legis. History of the Federal Mine Safety and Health Act of 1977, at 624 (1978).

A. The standard for discrimination

For decades, the Commission and its courts adjudicated claims of discrimination brought under section 105(c) of the Mine Act using the *Pasula-Robinette* framework. *Sec’y on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (Apr. 1981); *Sec’y on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799-2800 (Oct. 1980). This framework was recently abrogated by the United States Court of Appeals for the Ninth Circuit. Specifically, the Ninth Circuit found flaw in the causation aspect of the *Pasula-Robinette* standard. Now, discrimination claimants within the Ninth Circuit must prove that unlawful discrimination was a “but-for” cause of the alleged adverse action. *Thomas v. CalPortland Co.*, 993 F.3d 1204, 1210 (9th Cir. 2021). The Ninth Circuit did not announce how this new standard would interact with the rest of the Commission’s precedent regarding discrimination claims, and the Commission itself has not yet had the opportunity to opine on this matter. This Court must apply a test of discrimination that embeds a but-for causation standard and that also hews to the Commission’s robust body of discrimination case law. Accordingly, this Court will adopt the test for discrimination as applied in the matter of first impression that appeared before the courts of the Commission. *See Thomas v. CalPortland Co.*, 43 FMSHRC 531, 538-40 (Dec. 2021) (ALJ).¹

The test for discrimination under section 105(c) of the Mine Act is therefore whether the complainant has proven, by a preponderance of the evidence, an adverse action that would not have been taken but for his engagement in protected activity.

¹ At the time of publication, only one court has had the opportunity to apply the new Ninth Circuit “but-for” standard after a hearing in a discrimination case. *See Thomas*, 43 FMSHRC at 538-40. That decision engaged in a detailed discussion of how to apply the Ninth Circuit’s standard while preserving Commission precedent and honoring the intent of the legislators who drafted the Mine Act, who sought to encourage miners’ free engagement in protected activity. Furthermore, the decision clarified how burden-shifting and the prima facie case are consistent with the Ninth Circuit’s holding in *Thomas*. The test and the accompanying discussion are adopted here.

In the absence of direct evidence of discrimination, a complainant may assert a prima facie case of discrimination under the Mine Act by showing that he engaged in protected activity and that the adverse action complained of was motivated in any part by that activity. This lower standard is not the ultimate standard of discrimination, but rather an evidentiary device that allows a miner to state a claim of discrimination using indirect evidence of discrimination, such as the operator's knowledge of the protected activity, its hostility towards the protected activity, the coincidence in time between the protected activity and the adverse action, and disparate treatment of the complainant. *Sec'y of Labor on behalf of Johnny Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510 (Nov. 1981). If the miner successfully states his prima facie case, he has established a rebuttable presumption of discrimination under the Mine Act.

The mine operator then has an opportunity to rebut the miner's prima facie case by producing evidence showing that no protected activity occurred or that the adverse action was not motivated by the protected activity. This is merely a burden of production, not of persuasion. An operator's failure to produce any legitimate evidence in rebuttal to the prima facie case would result in a judgment in favor of the complainant. However, when an operator produces such evidence, the presumption of discrimination is nullified, and the judge must weigh the conflicting evidence according to the substantive "but-for" standard. During this final phase, the complainant must have an opportunity to show that the operator's explanation in rebuttal is pretextual. Throughout this entire process, the burden of persuasion never shifts to the mine operator.

B. Saldivar's claim of discrimination

Under this newly articulated test, Alvaro Saldivar must prove that he suffered an adverse action and that the adverse action would not have been taken but for his protected activity. As an initial offering, Saldivar must first establish a prima facie case of discrimination.

1. Saldivar's prima facie case

A prima facie case of discrimination requires a showing (i) that the complainant engaged in protected activity, (ii) that he suffered an adverse action, and (iii) that there is a motivational nexus between the protected activity and the adverse action. *See Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799. The burden on the complainant is not onerous. He must only produce "evidence sufficient to support a conclusion" that he was discriminated against. *Driessen*, 20 FMSHRC at 328. A miner has proven his prima facie case when he has "present[ed] evidence from which the trier of fact could infer retaliation." *Turner v. National Cement Company of California*, 33 FMSHRC 1059, 1065 (May 2011).

i. Protected activity

Alvaro Saldivar engaged in at least two instances of protected activity. First, Saldivar engaged in protected activity when he lodged safety complaints about the condition of the tires on the water truck. Saldivar testified that he had issues with the water truck's tires from the moment he was rehired. In his opinion, the tires were "bald" and "cracked" with "wires exposed." Tr. 41-45. He testified that he alerted management of the poor tire condition both verbally and on his

preoperational inspection sheets. I find Saldivar's testimony on this issue to be credible. Melendez denied that Saldivar made such complaints, but he did acknowledge his policy of allowing some wear and tear on the tires as part of his "business decision" regarding whether they need to be replaced. Tr. 429. Also, I find it suspicious that the mine failed to produce the preoperational inspection sheets when asked by the Secretary. Since they were not produced as requested, I credit the testimony of Saldivar that he did list his complaints on those sheets. Safety complaints like the ones made by Saldivar are quintessential protected activities under section 105(c)(1) of the Mine Act, which expressly protects a miner who makes a "complaint notifying the operator . . . of an alleged danger or safety or health violation." 30 U.S.C. § 815(c)(1).

Second, Saldivar's complaints to management about inadequate task training also constitute protected activity under the Mine Act. Saldivar believed that he needed additional training on several pieces of equipment, and he testified that he made both verbal and written reports of poor training to Grimes Rock management. Again, I find Saldivar's testimony on this point to be credible. While mine management generally denied that Saldivar made such reports, Melendez did admit at hearing that Saldivar had told him that he "need[ed] more practice" on the motor grader. Tr. 400. Proper task training is paramount under the Mine Act, *see* 30 U.S.C. § 825(a)(4), and inadequate training constitutes a major health and safety risk. *Id.* at § 814 (declaring that an untrained miner is a "hazard to himself and others."). Making a report of inadequate training is therefore equivalent to making a report about unsafe working conditions, and it is protected activity under section 105(c) of the Act. *Cf. Thomas*, 43 FMSHRC at 542. Accordingly, Saldivar has established his engagement in at least two protected activities.

ii. Adverse action

The Commission has defined "adverse action" to mean "an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship." *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012). Here, the parties agree that Saldivar was terminated by Grimes Rock on January 15, 2021. Jt. Stip. ¶ 11. There is therefore no dispute that Saldivar suffered an adverse action as defined by the Commission.

iii. Motivational nexus

The next relevant inquiry is whether a motivational nexus exists between Saldivar's complaints and his firing. Because "[d]irect evidence of motivation is rarely encountered," the Complainant may initially show this motivational nexus with the four circumstantial indicia of discrimination described by the Commission in its case law: the operator's knowledge of the protected activity, the operator's hostility, timing, and disparate treatment. *Chacon*, 3 FMSHRC at 2510. The complainant need not establish all four indicators of discrimination, but rather each factor proven by the miner contributes cumulatively to his case of discriminatory motive.

In this case, two factors are most persuasive: knowledge and timing. An operator's knowledge of protected activity "is probably the single most important aspect of a circumstantial case." *Chacon*, 3 FMSHRC at 2510. Management at Grimes Rock knew about Saldivar's safety complaints. Saldivar testified that he repeatedly made complaints about the water truck tires and

about his inadequate training to Melendez and Garcia, both verbally and in writing. Additionally, Melendez acknowledged at hearing that Saldivar had asked for additional practice on the motor grader before he would feel comfortable operating it. Tr. 400.

Timing is another factor that weighs in favor of Saldivar. Coincidence in timing between the protected activity and the alleged adverse action can point toward discriminatory motive. The Commission has noted that it “applies no hard and fast criteria in determining coincidence in time” and that “[s]urrounding factors and circumstances may influence the effect to be given.” *Hicks v. Cobra Mining Inc.*, 13 FMSHRC 523, 531 (Apr. 1991). Saldivar testified that he began making safety complaints within the first few weeks of returning to work at Grimes Rock on October 5, 2020. Tr. 96. By October 21, Saldivar had received the first in a series of disciplinary actions. Sec’y Ex. 2. These actions escalated until Saldivar was terminated on January 15, 2021. Therefore, at most three months elapsed between the first instances of protected activity and the adverse action, and disciplinary actions were progressively being issued during those three months. Under Commission case law, this temporal proximity can be an indication of discriminatory motive. *See Pero v. Cyprus Plateau Mining Corp.*, 22 FMSHRC 1361, 1365 (Dec. 2000) (finding that timing weighed in favor of complainant when four months elapsed between protected activity and adverse action).

Knowledge and timing are the two strongest factors supporting Saldivar’s claim of discriminatory motive, and these two factors alone can support a prima facie case. *See Pero*, 22 FMSHRC at 1365. But the Secretary has also offered some evidence regarding the final two factors, hostility and disparate treatment. Saldivar testified at hearing that Melendez and Garcia acted “malicious” toward him “every time [he] would complain about something.” Tr. 211. He viewed the progressive disciplinary actions as evidence of management’s mounting hostility for him in response to his complaints. Tr. 211. Furthermore, the Secretary argues that mine owner Russell Cochran displayed animus toward Saldivar when he called Saldivar’s subsequent employer, Brett Jones. According to MSHA Special Investigator Troy VanWey, Jones told VanWey about how Cochran warned him to “be cautious” because “if [Saldivar] was willing to file [a discrimination] complaint against [Cochran], he could also file it against Mr. Jones as well.” Tr. 543. Cochran denied ever having such a conversation. Tr. 587. Finally, the Secretary also alleges that Saldivar was treated differently than other miners once he lodged his complaints. A fellow miner, Oscar Nava, recounted times when he was late or when he damaged company property, but he told the Court that he was never fired for this conduct. Tr. 319-21. According to the Secretary, no other Grimes Rock employee had been terminated for performance issues in the two years prior to Saldivar’s firing, except for an accountant. *See Sec’y Br.* at 16 (citing tr. 379).

The Secretary has introduced enough circumstantial evidence to support a conclusion or inference of retaliation. *See Turner*, 33 FMSHRC at 1065; *Driessen*, 20 FMSHRC at 328. Accordingly, a successful prima facie case of discrimination has been shown.

2. *Grimes Rock’s rebuttal*

Grimes Rock now has an opportunity to rebut Saldivar’s prima facie case by producing evidence indicating either (i) that no protected activity occurred or (ii) that the adverse action was

not motivated by the protected activity. The company has offered arguments and evidence addressing both issues.

i. Grimes Rock's argument that no protected activity occurred

The first argument advanced as part of the operator's rebuttal is that Saldivar never engaged in protected activity. Grimes Rock contends that Saldivar did not complain about the water truck tires, nor about his inadequate training at the mine.

First, Grimes Rock denies that Saldivar reported the poor condition of the tires on the Peterbilt water truck. In its brief, Grimes Rock first points out the absence of documentary evidence (notes, text message, preoperational inspection forms) showing that Saldivar ever made such a report. While Saldivar testified that he had reported the unsafe tires, mine management directly denied this claim at hearing. Tr. 411. Grimes Rock failed to point out at hearing that the Secretary repeatedly asked for such documentation, including preoperational reports, and the mine failed to provide it. Grimes Rock has also introduced pictures and testimony indicating that at least some of the tires that Saldivar complained about were in relatively good condition. See Resp. Ex. J; tr. 425-26, 597. This evidence does not nullify Saldivar's prima facie case, because a miner only needs a reasonable, good-faith belief about the existence a safety issue to support his protected activity. See *Kelly Diede v. Summit Inc.*, 13 FMSHRC 1155, 1162 (July 1991) (ALJ) ("The fact that there may have been no objective underlying safety problem would not invalidate a miner's good faith reasonable safety complaint.").

Second, Grimes Rock denies that Saldivar ever complained about inadequate training. Again, it argues that the Secretary has failed to introduce any evidence of the complaints beyond Saldivar's own testimony. But once again, Grimes Rock failed to produce the documents when asked by the Secretary. Furthermore, Grimes Rock argues that inconsistencies in Saldivar's testimony about his level of training diminishes his credibility on this point. Resp. Br. at 3. Finally, the company questions whether the underlying safety issue (the lack of training) was legitimate, detailing the variety of training that Saldivar went through while employed at Grimes Rock. The evidence points to the fact that, while Saldivar received new miner training and perhaps other training, he did not receive adequate task training. Grimes Rock produced no evidence of task training records for Saldivar.

ii. Grimes Rock's argument that the adverse action was not motivated by the protected activity

Grimes Rock also argues that its termination of Saldivar was unrelated to his safety complaints. Instead, the operator asserts that it fired Saldivar due to his poor work performance, poor attendance, poor attitude, and the damage he caused to company property.

First, Grimes Rock claims that Saldivar's poor work performance was one reason for his termination. The company points to Saldivar's disciplinary actions as evidence of his unacceptable performance. Management issued the first writeup after Saldivar drove the water truck with low coolant and engine oil, risking damage to company equipment. The second writeup was issued in the wake of the water truck incident. Grimes Rock argues that Saldivar

caused the incident by overwatering the road and driving up the slick road in second gear. *See* Resp. Br. at 15-16. Rene Garcia issued two additional writeups: one for leaving the transmission fill tube of the dozer uncapped, and one for not paying attention while using the backhoe and causing damage to the tire. To Grimes Rock, these disciplinary forms stand as documentation of Saldivar's careless performance on the job.

The alleged performance issues extend beyond those documented on discipline forms. Rene Garcia testified that, on several other occasions, Saldivar failed to properly service the mine's mobile equipment. Tr. 475. These instances included failures to replenish hydraulic fluids and to clean the air filters. Tr. 475. This testimony was supported by equipment operator Mauricio Garcia, who testified that the fluid levels on his dozer were "either way too low or they were way over the [proper] amount" after Saldivar had performed the lube service. Tr. 669.

Second, Grimes Rock points to Saldivar's poor attendance as a factor in the decision to terminate him. Saldivar admitted at hearing that he had been tardy on multiple occasions, and he was written up for being four hours late to work on December 12, 2020. Tr. 175; Sec'y Ex. 7. When asked about Saldivar's overall attendance, Melendez said that "[i]t wasn't good." Tr. 429. Saldivar missed days at work due to meetings with his probation officer, often with Melendez's permission. Tr. 176-77. According to mine management, these frequent meetings had become quite disruptive to Saldivar's work schedule. Melendez recounted telling Saldivar to have his probation officer contact Melendez so that he could relay that Saldivar would "end up losing his job due to attendance" if the meetings continued with the same frequency. Tr. 430. Melendez also said at hearing that Saldivar's timecard revealed further attendance issues that went beyond the excused absences with his probation officer. Tr. 430.

Third, the operator cites Saldivar's poor attitude as a reason for his firing. Melendez testified that Saldivar butted heads with other employees. Tr. 409-14. According to Melendez, Saldivar did not take criticism well and would act more knowledgeable than his coworkers. Tr. 409-14. Rene Garcia testified that other employees began to ask him whether anyone else could service their equipment because "they did not want to deal with Mr. Saldivar." Tr. 474. Mauricio Garcia told the Court that he stopped asking Saldivar to correct his mistakes because Saldivar got so "bothered" if confronted about his errors. Tr. 669. When counseled by management, Saldivar "would get upset" and ignore the directives given to him. Tr. 410, 474. While the write-ups and the tardiness alone do not support a basis for terminating Saldivar, the testimony of a number of witnesses regarding Saldivar's attitude and inability to get along with other miners is persuasive.

Finally, Grimes Rock claims that it terminated Saldivar in part due to the damage he caused to company property. The company asserts that Saldivar's carelessness resulted in tire and rim damage on the water truck and the backhoe. Other documented performance issues, like leaving the transmission fluid uncapped and failing to replenish fluids on mobile equipment, could have caused further damage, according to Grimes Rock. Melendez testified that he "hired [Saldivar] to make sure that we kept our equipment safe and good, and he was actually costing me more money [with] every [piece of] equipment he would touch." Tr. 432.

In sum, Grimes Rock has presented evidence rebutting the existence of the discriminatory motive behind the adverse action. The Respondent's burden in making its rebuttal is merely one of production. Grimes Rock has introduced legitimate evidence that, if taken as true, would permit a factfinder to conclude that it did not discriminate against Saldivar. Accordingly, Grimes Rock has satisfied its burden of production and successfully rebutted the presumption of discrimination.

3. Disposition

Saldivar established a prima facie case, and Grimes Rock offered evidence in rebuttal. The rebuttable presumption of discrimination has dissipated. Now, the only inquiry remaining in this case is whether the Secretary has shown by a preponderance of the evidence that Saldivar's engagement in protected activity was a but-for cause of his termination.

In his brief, the Secretary argues that certain aspects of Grimes Rock's asserted rationales for terminating Saldivar are illegitimate and pretextual. The opportunity to prove pretext is an important part of the complainant's final burden in employment-discrimination cases. The complainant "must . . . have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII")).² Indeed, "a plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prod., Inc.*, 530 U.S. 133, 148 (2000) (under Title VII).

The Commission has explained that "pretext may be found . . . where the asserted justification is weak, implausible, or out of line with the operator's normal business practices." *Sec'y on behalf of Price v. Jim Walter Res., Inc.*, 12 FMSHRC 1521, 1534 (Aug. 1990) (internal citations omitted). In previous cases, the Commission has outlined the types of evidence that may show pretext: a complainant may demonstrate "either (1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate his discharge, or (3) that they were insufficient to motivate discharge." *Turner*, 33 FMSHRC at 1073 (emphasis omitted).

Here, the Secretary offers three showings of pretext. First, he points to inconsistencies among Melendez's statements about his reasons for terminating Saldivar. In the termination letter, Melendez told Saldivar that he was being fired for "damage [to] company property and performance issues," but he did not mention attendance or attitude issues as a motivating factor. Sec'y Ex. 15. Then, in a later letter to MSHA, Melendez said "[t]he reason I terminated Alvaro was for damaging company property." Sec'y Ex. 14. These inconsistencies allegedly shed doubt upon at least two of the operator's stated rationales for firing Saldivar. Second, the Secretary

² The Commission often looks to other federal anti-retaliation legislation like Title VII when addressing questions involving the anti-retaliation provision of the Mine Act. See, e.g., *William Metz v. Carmeuse Lime, Inc.*, 34 FMSHRC 1820, 1830 (Aug. 2012); *Turner* 33 FMSHRC at 1065-66.

argues that Melendez's readiness to hire Saldivar after his first period of employment and, subsequently, to provide a positive reference for Saldivar shows management's satisfaction with Saldivar's work performance. Third, the Secretary asserts that the evidence of disparate treatment, discussed *supra*, demonstrates that two nondiscriminatory rationales are pretextual.

None of the proffered theories of pretext are compelling. The inconsistencies in Melendez's statements are minor, and they do not necessarily show that Melendez was dishonest. Perhaps Melendez should have been more thorough in his statements but failing to do so does not stand as evidence of discrimination. Similarly, pretext is not found in Melendez rehiring Saldivar. Melendez testified that Saldivar is a skilled welder. Rehiring him based on that performance, or even offering a positive reference based on his welding³, is not inconsistent with firing him for poor performance in a different role. Finally, the alleged disparate treatment does not prove pretext. The Secretary notes that another Grimes Rock employee, Oscar Nava, also had attendance issues.

Grimes Rock did not fire Nava for those attendance issues—but Melendez did demote him. Further, Nava was not a “similarly situated” employee when compared to Saldivar. Nava worked at Grimes Rock for five years and had been promoted multiple times during that tenure. Saldivar, in contrast, worked for Grimes Rock for just three months and remained at an entry-level position. Both parties failed to provide evidence in the record to demonstrate how Grimes Rock routinely hires or fires employees, and on what basis. Without such evidence it is difficult to conclude that Saldivar was treated differently than others. All of the Secretary's evidence regarding disparate treatment is unpersuasive because it fails to identify, with any specificity, true comparators that were treated differently than Saldivar.⁴

The Secretary's limited showing of pretext, particularly evidence regarding disparate treatment, cannot support a finding of discrimination on behalf of Saldivar. The Secretary's case rests almost exclusively upon Saldivar's testimony. While I find Saldivar to be a credible witness, the record is simply devoid of other testimonial or physical evidence substantiating Saldivar's claims. I also find Melendez's testimony to be credible. The two men rarely deviated in their recitation of the facts, but instead disagree on how to interpret those facts. The weight of the evidence in this case tilts in favor of the interpretation advanced by Melendez and Grimes Rock.

The mine operator has established a reasonable nondiscriminatory rationale for firing Saldivar. His performance issues are well documented in the discipline forms, as well as in testimony from his coworkers and supervisors. Grimes Rock has introduced photographs and other documentation showing the property damage incurred by Saldivar, and the company has also elicited testimony from several mine employees attesting to Saldivar's bad attitude at work. As for attendance, Saldivar admitted to a certain amount of tardiness, and his supervisors all testified

³ The evidence supporting the notion that Melendez gave Saldivar a positive reference is weak.

⁴ This includes the Secretary's argument regarding the paucity of other miners who were terminated for performance issues. *See* Sec'y Br. at 16. Melendez testified that he did fire an accountant for poor work performance, *see* tr. 379, and the Secretary—who bears the burden of proof in this case—failed to identify any similarly situated employees whose performance issues did not lead to discipline.

to additional attendance issues. Given the testimony in the record, I find the attendance issue to be pretextual, thrown into the mix to support the allegation that Saldivar was terminated due to his performance. However, the other bases raised by Grimes Rock may have played a part in the firing. The record supports a conclusion that Saldivar was fired for legitimate reasons.

By comparison, the Secretary's case is limited. In many instances, the Secretary's claim of discrimination relies upon uncorroborated witness testimony instead of tangible documentary evidence.⁵ For example, there is little, if any, evidence beyond Saldivar's own testimony that demonstrates Grimes Rock's hostility toward his protected activity.

I accept the Secretary's view that Grimes Rock, through its owner, tried to influence Saldivar's subsequent employer by relating that Saldivar had filed a discrimination complaint against Grimes Rock and by warning that he may do the same thing to the new employer. However, that is not enough to establish animus. The Secretary also characterizes as hostile the issuance of the five disciplinary writeups, but those disciplinary actions are more likely attributable to Saldivar's poor performance at work. The Respondent has offered documentation and testimony supporting the allegations put forth in those discipline forms. In contrast, the Secretary offers very little evidence demonstrating that those writeups are marked by hostility or pretext.

Finally, the Secretary argues that "Grimes [Rock] should not be able to violate the Mine Act by failing to provide the required training and then blame Mr. Saldivar" when his inadequate training led to accidents or property damage. Sec'y Br. at 16. The Secretary's point is well taken. The fault for equipment damage should not be laid upon an untrained miner, and the Secretary alleges that Grimes Rock consistently neglected to provide its miners with the task training mandated by law. Based on my review of the record, the Secretary is likely correct. Unfortunately for the Secretary, that is not enough to negate the evidence supporting the operator's reasons for termination. Ultimately, the Secretary has failed to adequately refute the mine's legitimate nondiscriminatory rationale for firing Saldivar.

This case is a close call. I recognize that the Complainant is at a disadvantage because "it is the employer who is in the best position to prove what [it] would have done," *Pasula*, 2 FMSHRC at 2800, but the Secretary must still satisfy his burden to show by a preponderance of the evidence that discrimination was a but-for cause of Saldivar's termination. The evidence offered by the Secretary in this case does not satisfy that burden. I find that Saldivar was

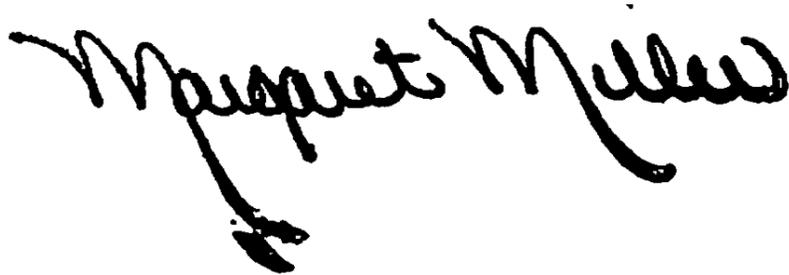
⁵ The Secretary argues that it lacks documentary evidence in part because Grimes Rock withheld preoperational inspection sheets documenting Saldivar's complaints. In his brief, the Secretary asserts that "[a]s a sanction for [Grimes Rock's] spoliation of highly relevant evidence, the Court should infer that the missing reports reflected Mr. Saldivar's protected activity of complaining about safety issues." Sec'y Br. at 21. However, I credited Saldivar's testimony in that regard, so there is no need to grant that inference. I accepted it in part due to the operator's continued resistance to cooperate in the case and to provide relevant documents to the Secretary as requested. The mine operator's behavior throughout the case, toward the Court and toward the Secretary's counsel is clearly animus, but not necessarily against Saldivar.

terminated for both protected activity and poor performance; however, the protected activity was not a but-for cause of his firing.

In conclusion, I find that the Secretary has demonstrated a prima facie case of discrimination but has failed to adequately establish that the proffered reasons for terminating Saldivar were pretext. The Secretary did not show by a preponderance of the evidence that Saldivar's protected activity was a but-for cause of his termination. Instead, the weight of the evidence suggests that Grimes Rock would have terminated Saldivar for legitimate reasons even in the absence of his complaints. Therefore, I find that the Secretary has not met the required burden of proof pursuant to section 105(c) of the Mine Act. Because the Secretary has not met his burden in this case, I need not reach the question of remedy.

III. ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination brought by the Secretary of Labor on behalf of Alvaro Saldivar is hereby **DISMISSED**. The outstanding motions filed by the Respondent in this case are summarily **DENIED**. The Order of Temporary Economic Reinstatement in the related case is terminated.

A handwritten signature in black ink, reading "Margaret Miller". The signature is written in a cursive style with a large, sweeping initial "M".

Margaret A. Miller
Administrative Law Judge

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