

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE LAW JUDGE
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May 21, 2025

SECRETARY OF LABOR, U.S.
DEPARTMENT OF LABOR
on behalf of GUILLERMO ORTIZ,
Complainant,

v.

KILAUEA CRUSHERS,
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2023-0281-DM
MSHA No. RM-MD-2023-06

Mine: Estrella North Mine

DECISION AND ORDER

Appearances: Afroz Baig and Rose C. Meltzer, U.S. Department of Labor, Office of the Solicitor, 90 7th Street, Suite 3-700, San Francisco CA 94103

Charles P. Keller and Tyler V. Thomas, Snell & Wilmer, 1 East Washington Street, Suite 2700, Phoenix AZ 85004

Before: Judge Simonton

I. INTRODUCTION

This case is before me upon a complaint of discrimination filed by the Secretary of Labor on behalf of Guillermo Ortiz against Kilauea Crushers pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 815(c)(2). The parties presented testimony and documentary evidence at a hearing held on December 10-12, 2024, in Phoenix, Arizona. Retired MSHA Special Investigator Daniel Scherer, Complainant Guillermo Ortiz, and former Kilauea employee Joseph Blake testified for the Secretary. Kilauea foreman Randolph “Randy” Anthes, current employee Antonio Johnson-Lewis, former Kilauea employees Brian Waldon, Jose Herrera, and Cody Tucker, assistant plant foreman Ryan McPhall, general manager Jim Nichols and owner Bill Nichols testified for the Respondent. After fully considering the testimony and evidence presented at hearing and the parties’ post-hearing briefs, I **DISMISS** this discrimination complaint.

II. STIPULATIONS OF FACT

At hearing, the parties agreed to the following stipulations:

1. Jurisdiction of this action is conferred upon the Federal Mine Safety and Health Review Commission pursuant to § 113 of the Act, 30 U.S.C. § 823.
2. The Administrative Law Judge has jurisdiction of this matter.
3. Guillermo Ortiz was a “Miner” as defined in the Mine Safety Act (the “Act”).
4. Kilauea Crushers, Inc., is an “Operator” as defined in the Act.
5. At all relevant times, Respondent’s Estrella North Plant was a crushed granite mine, the products of which enter commerce or the operations or products of which affect commerce, within the meaning of § 3(b) and § 4 of the Act, 30 U.S.C. §§ 802(b) and 803.
6. Ortiz was employed by Kilauea Crushers, Inc. (“Kilauea”) from August 29, 2018, to January 31, 2023.
7. Ortiz was working at the Estrella North mine (“Estrella”) on January 20, 2023.
8. Ortiz was working at the Estrella North mine (“Estrella”) on January 25, 2023.
9. For the majority of Mr. Ortiz’s employment with Respondent, he worked at the Estrella North Plant mine.
10. Mr. Ortiz was not in a management position with Respondent.
11. Respondent terminated Mr. Ortiz on January 31, 2023.
12. At the time of his termination, Ortiz’s rate of pay was \$27.00 per hour.
13. Ortiz began working at Martin Marietta Materials (“MMM”) on March 6, 2023.
14. Bill Nichols is the President of Kilauea and one of its owners.
15. Marcilline J. Nichols is the Vice President of Kilauea Crushers, Inc. and one of its owners.
16. Jim Nichols is a Manager at Kilauea.
17. Randy Anthes is a Foreman at Kilauea. At all relevant times, he was the Plant Foreman at Kilauea’s Estrella mine.

Tr. 8.

III. ANALYSIS AND FINDINGS

Guillermo Ortiz began working at Kilauea as a haul truck driver in 2018. Tr. I-75, I-77. At the time of his termination, he was working as a plant operator, a position he had held since 2022. Tr. I-78-79. Throughout his tenure, he worked at several different plants around the mine, including the VSI and sand plants. Tr. I-81. He was supervised by mine foreman Randy Anthes. Tr. I-79.

As an operator, part of Ortiz's responsibilities included conducting a daily pre-shift inspection to examine the equipment for wear and tear and to ensure the plant was in good working condition. Tr. I-86-87, 159; Ex. A. Miners were required to fill out and initial an inspection sheet containing a checklist of items such as checking for guards. Tr. I-160, 162; Ex. A. In addition to the inspection sheet, Ortiz kept a personal notebook detailing his daily work at each facility. Tr. I-100; Ex. S-16. The pre-shift inspection took 30 to 45 minutes to complete and was conducted while the plant was locked out and tagged out. Tr. I-203, I-299-300.

Operators were also responsible for cleaning out spillage from underneath the plant's conveyor belts. Tr. I-162. This task can be accomplished using either a skid-steer or a shovel and is safe to perform while the plant is running as long as it is properly guarded. Tr. I-162-163, I-187, III-22. While Ortiz believed that a skid-steer made cleaning underneath an unguarded machine safe because the person cleaning would be farther away, other employees attested a skid-steer is not a safety device and should not be used around unguarded machinery. Tr. I-95, II-183, III-24-25. Although he did not need permission to use the skid-steer, Ortiz would ask Anthes over the radio about its availability. Tr. I-231. These requests were frequently denied, although other miners had access to the skid-steer when they needed it. Tr. I-205, II 67-69.

In his testimony, Ortiz said he did not feel comfortable raising concerns to management, because he suffered bullying and harassment for bringing up safety issues. Tr. I-146, I-143, I-287. He did not think that management cared about miner safety as miners were instructed to keep plants running while issues went uncorrected. Tr. I-146. Other miners also had been bullied and harassed for similar activities, including another miner, Jose Herrera. Tr. I-297. Former Kilauea employee Joseph Blake agreed that the work environment was hostile, safety complaints were not taken seriously, and employees were mocked for raising issues. Tr. II-32-33, II-40-41. Ortiz also alleged that Anthes acted unprofessionally over the radio, making sexual, racial, and other derogatory comments. Tr. I-144, I-146, I-149-150. This behavior was never reported to upper management. Tr. I-287. Blake again corroborated Ortiz's account regarding radio usage and Anthes's negative comments. Tr. II-52-54, II-57.

Anthes and other employees did not agree with this characterization of the radio usage and work culture at Kilauea. Anthes testified that he did not make the types of derogatory comments alleged by Ortiz and had never heard anything like that over the radio. Tr. II-166. Other employees, including general manager Jim Nichols, similarly had not heard any type of negative language over the radio or witnessed any harassment or bullying. Tr. II-258-259, II-292-293, II-322-323, III-33. Herrera specifically testified he was not bullied or harassed while at Kilauea and said that any comments made over the radio were just joking around. Tr. III-33-34.

A. January 20, 2023, Safety Complaint

Ortiz was assigned to the VSI-1 plant as the plant operator on January 20, 2023, assisted by another miner who was working as the load operator. Tr. I-85-86. During the pre-shift inspection while the machine was locked out and tagged out, he found that the plant was missing two guards and there was spillage underneath the conveyor belt. Tr. I-86-88. There was no record of missing guards in the daily inspection sheet, completed by Ortiz, or in Ortiz's personal notebook. Ex. C, Ex. 16.

When Ortiz asked for a skid-steer over the radio, Anthes informed him he would need to use a shovel because it was unavailable. Tr. I-87-89. In response, Ortiz reported that he would keep the machine locked and tagged out, which Anthes said was unnecessary and cleaning could occur while the machine was running. Tr. I-91, I-215, I-234-235. Ortiz alleged he then notified Anthes that the plant did not have guards. Tr. I-92. Ortiz said that Anthes sounded angry. Tr. I-92. The plant was kept locked out while Ortiz and his coworker cleaned, which took approximately 45 minutes to an hour. Tr. I-92. The missing guards were not repaired. Tr. I-218-219.

Randy Anthes disputed Ortiz's account of these events, stating that Ortiz did not ask him to use a skid-steer or otherwise communicate to him that the plant was missing guards. Tr. II-154-156. If Anthes had known the area was missing guards, he would not have allowed cleaning before the guards were repaired. Tr. II-155-157. Anthes also was not aware Ortiz kept the plant locked out to clean and Ortiz did not need permission to do so. Tr. II-158-159.

B. January 25, 2023, Safety Complaint

On January 25, 2023, Ortiz worked with Jose Herrera at the VSI-2 plant. Ortiz testified that this plant, like the VSI-1 on January 20, was missing guards, which was not noted in the daily inspection sheet completed by Ortiz or in his personal notebook. Tr. I-95; Ex. B, Ex. 16. Concerned about the plant's moving parts, Ortiz testified he requested a skid-steer to clean with over the radio, which Anthes refused. Tr. I-94-95. He did not report the missing guards to Anthes at this time, because he believed Anthes was already aware. Tr. I-239-240.

As the machine ran and spillage accumulated, Ortiz notified Herrera that he wanted to lock out the plant to clean. Tr. I-95-96. Herrera told him the plant does not shut down once it starts. Tr. I-96, I-247-248. Unable to keep up with cleaning, however, Ortiz then radioed Anthes he was going to lock out the plant. Tr. I-96-97, I-246. Ortiz alleged Anthes became angry and questioned Ortiz about why he was shutting the plant down to clean when there was no reason to do so. Tr. I-97-98. Ortiz responded that he was shutting down because the plant was not guarded. Tr. I-97. Herrera then left to speak with Anthes, and when he returned, he informed Ortiz that Anthes was mad at him for shutting down. Tr. I-96-97, I-249.

Jose Herrera, testifying for the Respondent, denied that the plant was missing guards, stating that he would never start a plant in that condition and Anthes never told them to run the plant without guards. Tr. III-23-24, III-28. He checked for guards on the VSI-2 during the pre-shift inspection and found they were all in place. Tr. III-11-15, III-28. During the shift, Ortiz did

not voice any complaints to him about a missing guard or other safety concern, only communicating to Herrera that he wanted to lock out and tag out the VSI-2. Tr. III-28-29. Herrera stopped the plant to re-inspect it and confirmed that no guards were missing. Tr. III-29. As there was no safety reason to keep the plant locked out, he re-started the machine. Tr. III-30-31. He then helped Ortiz clean the spillage using shovels. Tr. III-31, 45. After this exchange, Herrera admitted he had been angry with Ortiz and spoke with Anthes in his office about what had occurred. Tr. III-32. He no longer wanted to work with Ortiz because he did not listen. Tr. III-32. He admitted he told Anthes that Ortiz was the person who shut down the plant. Tr. III-45.

Anthes described Herrera as “very upset,” informing him that he was tired of working with Ortiz, Ortiz would not help clean, and if he had to keep working with Ortiz, he would be looking for a new job. Tr. II-162-163, II-171. Safety issues were not brought up or discussed in the conversation, and Herrera did not mention that Ortiz had raised safety complaints. Tr. II-163. According to Anthes, Ortiz never raised any kind of safety concerns about the VSI plants prior to his termination. Tr. II-167. Anthes could not recall if Ortiz requested a skid-steer on January 25. Tr. II-160.

C. Ortiz’s Termination and Discrimination Complaint Investigation

Anthes reported the conversation with Herrera to Jim Nichols. Tr. II-185. He explained that Herrera had come to his office, upset because Ortiz had not helped dig, and threatened to find a new job if he had to continue working with Ortiz. Tr. II-184-185. Anthes also explained to Nichols that Ortiz refused to dig with a shovel when a skid-steer was unavailable. Tr. II-182. Anthes did not make any recommendations to keep or terminate Ortiz, and after the phone call did not have any further conversations about Ortiz. Tr. II-164-165, II-184. He was not consulted when the decision to terminate was made. Tr. II-175.

Similar to Anthes, Jim Nichols, the general manager, and Bill Nichols, the mine’s owner, both testified that they were not aware of any safety complaints raised by Ortiz. Tr. II-22, II-25, II-237, II-244-245. After learning about the dispute between Herrera and Ortiz, Jim Nichols decided to recommend termination to Bill Nichols based on Ortiz’s “body of work,” lack of proper job fit, and unsatisfactory performance. Tr. II-243-244. He did not consult with Anthes or any other member of management during the decision-making process. Tr. II-244. Bill Nichols, who made the final decision on Ortiz’s termination, affirmed that Jim Nichols’s recommendations were not related to safety complaints and were solely based on productivity and work performance. Tr. II-22-24.

Jim Nichols terminated Ortiz on January 31, 2023, explaining that it was due to poor performance, in part for refusing to use the shovel to clean. Tr. I-104, I-252. Ortiz was surprised by the termination because he thought he had good work performance, as he had never received any written discipline and only a few instances of verbal discipline. Tr. I-106. Because Nichols said that the termination was based on what management had told him, Ortiz believed Anthes played a role in the decision. Tr. I-105, I-150. During his termination, Ortiz did not discuss the events that occurred at the VSI plants on January 20 and 25, only informing Jim Nichols that he thought Anthes was retaliating against him. Tr. II-247.

After his termination, Ortiz filed this discrimination complaint. Special Investigator Daniel Scherer conducted the investigation into Ortiz's complaint. Tr. I-25-27. He found that Ortiz engaged in protected activity twice, each time he requested to use the skid-steer because he believed the job was too dangerous due to unguarded equipment. Tr. I-49-50. Ortiz suffered adverse action when he was terminated shortly after making his complaints, which indicated to the inspector there was a nexus between the two events. Tr. I-50-51. Scherer interviewed three non-management employees from Kilauea as part of his investigation, who informed the inspector that Ortiz was a good employee. Tr. I-46, I-52, I-58. Kilauea management elected to submit position statements in lieu of interviews. Tr. I-48.

Kilauea represented that Ortiz was terminated for poor performance. Tr. I-46-47. Scherer did not find any support for the employer's position. Tr. I-52. Ortiz's personnel file did not contain any record of discipline and Kilauea did not provide other documentation related to the termination, such as employment policies, rules Ortiz allegedly violated, or disciplinary policies. Tr. I-39-40; Ex. S-7. Scherer represented that he had difficulty receiving this documentation, making several requests and involving his supervisor to encourage Kilauea to produce the necessary documents so he could complete his investigation. Tr. I-35-39; Ex. S-5, S-6, S-7. While there was a later opportunity to interview Kilauea management, Scherer chose not to do so, because they were only available after he had to submit his investigative file in accordance with statutory deadlines. Tr. I-62-63.

D. Ortiz's Work History and Performance

In addition to the safety complaints raised in January 2023, Ortiz expressed that he was retaliated against when he was unable to work a Saturday overtime shift due to a vacation in December 2022. Tr. I-198. The Friday prior to his vacation, Anthes notified Ortiz it was mandatory to work the next day, leading to an argument between the two. Tr. I-80-81. Ortiz felt that Anthes was mad at him based on his tone and reaction during the conversation. Tr. I-196. The dispute was resolved when Ortiz called the front office, who told him that he did not need to work on Saturday. Tr. I-81. Ortiz believed this dispute motivated Anthes's decision to terminate him, because Ortiz had escalated the issue to the front office. Tr. I-198.

Anthes did not have an issue with Ortiz taking vacation, but rather with the fact that he did not note on the employee leave calendar that he could not work that Saturday. Tr. II-136-137. The whole crew was expected to work overtime and it was common that employees would only be alerted the day before when overtime was necessary. Tr. II-137. When Ortiz told him he couldn't work Saturday, Anthes told him to call the front office, who granted Ortiz permission to have off. Tr. II-138-139. Anthes maintains that he did not retaliate against him. Tr. II-139.

While Ortiz was on vacation, Anthes moved him from the sand plant to the VSI plants, which Ortiz felt was retaliatory. Tr. I-82, I-200. Anthes, however, said the move resulted from equipment damage discovered in Ortiz's absence. Tr. II-143-144. Brian Waldon, Ortiz's replacement at the sand plant, found that the plant's bearings had not been greased in some time. Tr. II-284-285. Cody Tucker, the maintenance technician who repaired the machinery, replaced several bearings, two shaft couplers, a belt, and the filters located inside the baghouse. Tr. III-60.

Tucker, ascribed the necessary repairs to Ortiz's lacking job performance, especially when compared to other plant operators. Tr. III-62. Repairs for the damage were costly. Ex. S, T, U. Once Ortiz was moved from the sand plant, it no longer had the same type of issues. Tr. II-153.

Prior to December, maintenance constantly repaired issues with Ortiz's machines at the sand plant, such as replacing the water pumps and compressors, because Ortiz failed to perform routine maintenance. Tr. III-56-57. When these issues were brought to Ortiz's attention, he became defensive and angry. Tr. III-59. Kilauea also identified other instances of damage attributable to Ortiz. Tr. I-353-354. While Ortiz was operating a loader, he damaged a conveyor's legs when he hit them with the loader's bucket. Tr. II-220. He also frequently failed to check the wear parts on the table inside the VSI, necessitating the replacement of the entire table. Tr. II-226-227. As the wear parts need to be inspected every four to five hours, Kilauea attests that the fault for this equipment failure rested with Ortiz. Tr. II-226.

Although Ortiz described his work performance as "excellent," the only witness who concurred with this assessment of his work performance was Blake, who could only address Ortiz's performance as a haul truck driver. Tr. II-82-83. Other employees found it lacking because he was not a team player, did not offer help to other miners, and was lazy. Tr. II-288-291. Management received complaints regarding Ortiz's failure to assist other employees or get all his work done. Tr. II-221. Two employees witnessed Ortiz leave his plant unsupervised while it was running, which is a safety hazard. Tr. II-291, II-306. Ortiz would not dig out until the spillage reached a point of panic. Tr. II-288-291. Ryan McPhall, the assistant plant foreman, had difficulty getting Ortiz to shovel, a task expected of everyone, and that Ortiz would argue when asked to do so. Tr. I-345. Jim Nichols moved Ortiz to different positions around the mine after receiving complaints about his refusal to work with others, coordinate properly, and his inability to perform maintenance in a timely manner. Tr. II-218, II-225-226, II-228-229.

Although Kilauea was unable to produce documentation demonstrating disciplinary action taken against Ortiz, Anthes testified that discipline would most often come in the form of verbal discussions. Tr. II-274. Anthes and McPhall, as members of mine management, were permitted to administer discipline through counseling or verbal warning. Tr. I-316, II-116. Prior to Ortiz's termination, Anthes had talked to Ortiz about his failure to perform maintenance and discussed issues other employees had raised, including Ortiz's tendency to watch others work. Tr. II-118-119. McPhall, who also supervised Ortiz, described similar habits and attitudes. Tr. I-308. He had also verbally disciplined Ortiz for failing to grease the bearings on one of the plants and then lying about it. Tr. I-346.

IV. DISPOSITION

Section 105(c)(1) of the Mine Act provides that a miner shall not be discharged or otherwise discriminated against because they have made a complaint regarding an alleged safety or health violation. 30 U.S.C. § 815(c)(1). It specifically states: "No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent . . . of an alleged danger or safety or health violation in a coal or other mine."

For more than forty years, the Commission has utilized the *Pasula-Robinette* framework to adjudicate claims of discrimination brought under section 105(c) of the Mine Act. *Sec'y of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2799–2800 (Oct. 1980), *rev'd on other grounds sub nom; Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981); *Sec'y of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 805, 817–18 (Apr. 1981). Under the traditional *Pasula-Robinette* framework, a miner alleging discrimination establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that (1) the complainant engaged in protected activity, and (2) the adverse action complained of was motivated in any part by the protected activity. *Jayson Turner v. Nat'l Cement Co.*, 33 FMSHRC 1059, 1064 (May 2011); *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998); *Pasula*, 2 FMSHRC at 2799; *Robinette*, 3 FMSHRC at 817–18. If a miner establishes a *prima facie* case, the operator can then rebut the case “by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity.” *Turner*, 33 FMSHRC at 1064. If the operator cannot rebut the *prima facie* case, it can nevertheless defend affirmatively by proving that although part of its motivation was unlawful, the adverse action was also motivated by the miner’s unprotected activity, *and* it would have taken the adverse action against the miner for the unprotected activity alone. *Id.*; *Pasula*, 2 FMSHRC at 2799–2800.

A miner has engaged in protected activity if they (1) have “filed or made a complaint under or *related to* this Act, including a complaint . . . of an alleged danger or safety or health violation;” (2) are “the subject of medical evaluations and potential transfer under a standard published pursuant to section 101;” (3) have “instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding;” or (4) have “exercised on behalf of himself or others . . . any statutory right afforded by this Act.” 30 U.S.C. § 815(c)(1) (emphasis added).

In *Thomas v. CalPortland Co.*, 993 F.3d 1204 (9th Cir. 2021), the Ninth Circuit abrogated the *Pasula-Robinette* framework, traditionally used to adjudicate discrimination claims brought under section 105(c) of the Mine Act. The Ninth Circuit noted that section 105(c) of the Mine Act uses the term “because of” four times—each time without any modifiers—and concluded that it thus plainly incorporates a “but-for” causation standard. *Id.* at 1210. Accordingly, “[s]ection 105(c)’s unambiguous text requires a miner asserting a discrimination claim under Section 105(c) to prove but-for causation.” *Id.* at 1211.

The “but for” causation standard, as applied to discrimination cases, has been articulated in the following manner: complainant must show that (1) he engaged in what is known as “protected activity” (i.e., “the exercise of statutory rights”); and (2) that the adverse action complained of (here the Complainant’s termination) was “because” of that protected activity. In other words, in cases ultimately subject to Ninth Circuit review the Complainant must show that his employer would not have taken the adverse action against him, “but for” the protected activity he engaged in. *Thomas v. CalPortland Co.*, 43 FMSHRC 314 (June 2021) (ALJ) (decision on remand applying but-for standard), *pet. for rev. filed Dec. 29, 2021*; *see also Sec’y of Labor on behalf of Saldivar v. Grimes Rock, Inc.*, 43 FMSHRC 299, 302–303 (June 2021).

Whether a perceived hazard is actually unsafe is not determinative of the protected status of a complaint. *Sec'y of Labor obo McGill v. U.S. Steel Mining Co.*, 23 FMSHRC 981, 986 (2001); *Consolidation Coal Co. v. Marshall*, 663 F.2d at 1215. Provided that a miner has a good faith belief that a safety hazard exists, they are protected in bringing their concern to the operator. *Robinette*, 3 FMSHRC 803; *Gilbert v. FMSHRC*, 866 F.2d 1433 (D.C. Cir. 1989). A “good faith belief simply means [an] honest belief that a hazard exists.” *Id.* While Ortiz appears to hold a misconception that it is safe to use a skid-steer to clean underneath an unguarded plant, he believed that he needed to either use a skid-steer or lock out the plant to safely clean under the VSI plants on January 20 and 25, 2023. I find that this constitutes two instances of protected activity.

“Adverse action,” as defined by the Commission, is “an action of commission or omission by the operator subjecting the affected miner to discipline or a detriment in his employment relationship” and is decided on a case-by-case basis. *Sec'y on behalf of Pendley v. Highland Mining Co.*, 34 FMSHRC 1919, 1930 (Aug. 2012); *Sec'y of Labor ex. rel. Jenkins v. Hecla-Day Mines Corp.*, 6 FMSHRC 1842, 1848 n.2 (Aug. 1984). Termination has long been considered an adverse action. *Driessen v. Nev. Goldfields, Inc.*, 20 FMSHRC 324, 32p (Apr. 1998). Therefore, Ortiz suffered an adverse action when he was terminated from his employment at Kilauea on January 31, 2023.

In evaluating whether a causal connection exists between the protected activity and the adverse action, the Commission looks to four factors: “(1) the mine operator’s knowledge of the protected activity; (2) the mine operator’s hostility or ‘animus’ toward the protected activity; (3) the timing of the adverse action in relation to the protected activity; and (4) the mine operator’s disparate treatment of the miner.” *Cumberland River Coal Co.*, 712 F.3d 311, 318 (6th Cir. 2013); *see also Sec'y of Labor on behalf of Chacon v. Phelps Dodge Corp.*, 3 FMSHRC 2508, 2510–2512 (Nov. 1981), *rev'd on other grounds*, 709 F.2d 86 (D.C. Cir. 1983).

The timing of the adverse action occurred in close temporal proximity to each instance of protected activity: Ortiz was terminated on January 31, eleven days after the protected activity occurring on January 20 and six days after the protected activity occurring on January 25. This is enough to demonstrate a causal connection between the protected activity and adverse action. I find that the Secretary established a prima facie case of discrimination.

The burden of production now shifts to the Respondent to rebut the prima facie case of discrimination by articulating a legitimate non-discriminatory reason for the Complainant’s termination. This can be achieved by either producing evidence that no protected activity occurred or that the adverse action was not motivated by the protected activity.

Kilauea argues that no protected activity occurred because Ortiz’s initial discrimination statement only references retaliation arising from the vacation dispute and not from workplace safety issues. However, this argument is unavailing because I have already found that there was protected activity, as discussed above. Alternatively, Kilauea argues that Ortiz was fired not for protected activity, but for unrelated performance issues that occurred throughout his employment. I find that Anthes only relayed information concerning a personal dispute between Herrera and Ortiz to the decisionmakers in Ortiz’s termination, Jim and Bill Nichols, who were

not aware of any safety-related complaints. The only factors Kilauea considered in the termination were related to Ortiz's work history, as evidenced by the extensive testimony related to equipment damage attributed to Ortiz, his reputation, and his work habits. Accordingly, I find that Kilauea has met the burden of production and established a sufficient rebuttal to the prima facie case of discrimination.

The Secretary alleges that Kilauea's reasoning for Ortiz's termination shifted several times throughout the litigation. Six explanations for Ortiz's termination were provided, including the neglected condition of the sand plant discovered during Ortiz's vacation, other damage to equipment occurring at unknown times, Ortiz's failure to maintain the plant and his refusal to use a shovel to prevent Herrera from quitting, Ortiz's "body of work," and, finally, other productivity concerns. The Secretary claims that there is no factual support for any of these reasons, as there are no notes contained in Ortiz's personnel file detailing any discipline or performance concerns, and Kilauea never investigated the equipment damage to determine who caused it when multiple miners work at each plant. Further, Kilauea had never previously terminated a miner because another employee refused to work with them. The Secretary argues that these "shifting justifications" demonstrate that Ortiz's termination was pretextual.

However, substantial evidence supports the Respondent's position that Ortiz was terminated for poor work performance. Jim Nichols, after receiving complaints about Ortiz's work performance, transferred Ortiz to different plants several times in an attempt to find a good fit. Multiple witnesses for the Respondent who observed Ortiz's performance as a plant operator consistently testified that Ortiz was lazy and that he did not keep up with cleaning or maintenance, damaging equipment and machinery through negligence and causing expensive repairs. Further Anthes and McPhall both testified that they talked to Ortiz about problems with his work performance prior to his termination. I credit the Respondent's witness testimony that Ortiz's work performance was unsatisfactory.

The parties also dispute whether Anthes had knowledge of Ortiz's safety complaints. On both January 20 and January 25, Ortiz claims to have informed Anthes over the radio that he had to lock out and tag out the plant because it was missing guards, which made Anthes angry. Conversely, Anthes asserts that he did not know about the missing guards and if he had known, he would not have instructed an employee to run a machine without guards. Examining the evidence, the daily inspection sheets and Ortiz's work notebook do not reflect that the plants were missing guards. Jose Herrera, who directly observed the VSI-2's condition on January 25 and specifically checked for guards twice, asserts that guards were in place and that Ortiz never communicated to him any safety complaints. Further, each of the Respondent's witnesses testified that they would not operate a plant that was missing guards, had never been ordered to run a plant with missing guards, and would repair or replace the guards before starting the plant. Other than Ortiz's unsupported assertions there are no indicia that Anthes had knowledge of Ortiz's safety complaints.

Even assuming that Anthes knew of Ortiz's protected activity and that knowledge could be imputed to the decisionmakers Bill and Jim Nichols, the evidence does not suggest that Ortiz's protected activity was even a factor in his termination. Both Herrera and Anthes testified that the conversation in Anthes's office that occurred on January 25 concerned Herrera's refusal

to continue working with Ortiz due to his work habits. The conversation in the office, and the issues Anthes subsequently brought to Jim Nichols did not concern safety or other forms of protected activity. Bill and Jim Nichols each stated they were not aware of any safety complaints and only considered productivity and work performance when deciding to terminate Ortiz. The Secretary has not met the burden of proving that but for Ortiz's protected activity, he would not have been terminated.

V. ORDER

Accordingly, it is **ORDERED** that the complaint of discrimination is hereby **DISMISSED**.

A handwritten signature in black ink, appearing to read 'David P. Simonton', with a stylized flourish at the end.

David P. Simonton
Administrative Law Judge

Distribution: (Electronic mail)

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