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EMPLOYMENT DISCRIMINATION UNDER THE FEDERAL MINE SAFETY AND HEALTH ACT

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I. INTRODUCTION

The energy crisis foreseen by experts for decades became a reality for America in the 1970's, when sudden cutbacks in the supply of imported oil produced higher prices and occasional panic buying. Americans were surprised to learn that their energy supplies are finite and that they depend on the good will of other nations for resources vital to the industrial way of life. Coal and nuclear energy are being explored as alternatives to oil, but the nation remains dependent on foreign sources for other important minerals. It must compete with other industrialized nations for the mineral riches of the third world and the vast supply of resources which may lie below the oceans.

For these reasons, increased emphasis is being placed on the need to further explore and develop our domestic mineral resources. This will result in opening new mines and further exploiting existing mines. Unfortunately, it also will result in an increased risk of fatalities and serious injuries to those who work in this dangerous occupation. Half a million persons are employed in mining and each miner's chances of being killed on the job have been estimated to be eight times greater than those of a laborer in manufacturing.¹

The first federal legislation dealing with safety in the nation's

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coal mines was enacted in 1910. The safety of metal and non-metal miners was first addressed by Congress in 1966. In 1969, Congress passed the Federal Coal Mine Health and Safety Act (Coal Act), the first mine safety law with strong enforcement provisions and the first to protect the rights of miners who complain of safety violations. Like its predecessors, the Coal Act was prompted by a mine disaster. It did not end the disasters, however. In 1972, ninety-one miners perished in a fire in a silver mine in Idaho; in 1976, twenty-six lost their lives in methane explosions in a coal mine in Kentucky. Following extensive hearings in 1975 and 1976, Congress decided to unify mine safety and health legislation under one statute, the Federal Mine Safety and Health Act of 1977 (Mine Act). Now the same law covers the extraction and processing of virtually all solid minerals.

Congress was not under the illusion that passing a law eliminated safety and health problems in the mining industry. Mining remains a dangerous occupation. Federal Inspectors employed

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6 S. REP. No. 181, 95th Cong., 1st Sess. 4 (1977) [hereinafter cited as S. REP.].
7 Id.
9 Roof falls, for example, are an ever-present hazard in underground mining. During 1980, 55 miners were seriously injured or killed by roof falls. 5 Mine Regulation & Productivity Rept. No. 11, at 7 (1981). A recent survey revealed the incidence of injuries in mining to be the second highest in all industries. 2
by the Department of Labor's Mine Safety and Health Administration (MSHA) are required to inspect every underground mine at least four times and every surface mine at least twice each year. If violations of MSHA's mandatory safety and health regulations are found, the inspector must issue citations and may even summarily order certain section to the mine to be closed or certain equipment to be removed. A civil penalty of up to $10,000 may be imposed for each violation. Citations, orders, and the proposed penalties based upon them, may be contested before an independent agency, the Federal Mine Safety and Health Review Commission (Commission).

The Mine Act imposed on MSHA and the Commission another important responsibility in protecting miners' safety and health. Congress was convinced that, for the Mine Act to be effective, the miners themselves must play a role in the enforcement process. The Mine Act thus grants a number of rights to miners, chief among them the right to obtain an inspection on request, and provides that retaliation against a miner for exercising those rights is itself a violation of the Mine Act. Miners who believe they have been retaliated against many complain to MSHA and may obtain a hearing and appropriate relief, if warranted, from the Commission. This protection against discrimination, embodied


Hereinafter cited as MSHA or the Secretary.


The Secretary of Labor is directed in Section 101 of the Mine Act, supra note 8, at § 811 to develop, promulgate, and revise mandatory health and safety standards for coal or other mines. These standards are collected in 30 C.F.R. §§ 11.1-100.7 (1981).


Hereinafter called the Commission. 30 U.S.C. § 815(d) (Supp. IV 1980). The Commission is established in § 113 of the Mine Act, supra note 8, at § 823. Citations and orders are generally contestable even before MSHA has proposed a civil penalty. Energy Fuels Corp. v. Secretary of Labor, 1 FMSHRC 299, 1 MSHC (BNA) 2013 (1979).


in section 105(c) of the Mine Act, 19 is the subject of this article.

Section 110(b) of the 1969 Coal Act

The Federal Coal Mine Health and Safety Act of 1969 was prompted by the same sort of event which triggered earlier enactments, a mine disaster. On November 20, 1968, seventy-eight miners perished when methane gas leaking from a coal seam touched off an explosion in an underground coal mine in Farmington, West Virginia. Public attention was again focused on the industry's abysmal safety record, and also on the serious and widespread health problem only recently acknowledged to be associated with coal mining—coal miner's pneumoconiosis, or black lung.

The Coal Act extended the Interior Department's (Interior) jurisdiction to virtually all coal mines. It gave Interior a number of new enforcement tools as well. Federal Inspectors were permitted to enter mine property without a warrant.19 They were empowered to issue "orders of withdrawal" immediately closing down a mine until certain conditions were corrected.20 Inspectors were also authorized to halt production in any area of a mine which contained an excessive level of respirable dust.21 And, for the first time, the Coal Act enabled Interior to promulgate mandatory health and safety regulations for coal mines.22

The Coal Act was based on the belief that the miners themselves were a key link in the enforcement process.23 Thus, miners' representatives were given the right to obtain immediate inspection of hazardous conditions and the right to accompany the Federal Inspector during the "walkaround" portion of the inspection.24 The Coal Act also entitled them to participate as parties in administrative proceedings.25

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24 Coal Act, supra note 4, Pub. L. No. 91-173, §§ 103(g), 103(h), 83 Stat 742, 750 (1969).
Section 110(b) was not part of the bill reported out of the Senate Labor Committee. Senator Kennedy introduced it as a floor amendment during the legislative debates. As enacted, the relevant portion provides:

No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

In his remarks, the Senator compared this provision with provisions in the National Labor Relations Act and the Fair Labor Standards Act designed to protect employees who notify federal officials of possible violations from reprisals by their employers. It was not clear, however, whether section 110(b) was enacted solely to safeguard the channels of communication between employees and the government or additionally was intended to create rights in miners independent of the enforcement process.

The Interior Board of Mine Operations Appeals took the view that section 110(b) was designed solely to guard the government's enforcement process. Thus, it held that miners were protected from retaliation only when they complained directly to Interior's Mining Enforcement and Safety Administration (MESA). Complaints to foremen or supervisors were unprotected as was self-help based on those complaints. Two miners, however, challenged this view and the result of their challenge was a new, expansive interpretation of section 110(b).

The Evolution of Section 110(b)

On April 15, 1971, Glen Munsey and two co-workers were
assigned to a crew installing roof supports in an underground mine. While they were working, a five-ton rock fell on a nearby machine. The roof was then inspected by a foreman who pronounced it safe. A short time later, one of the miners noticed debris trickling from the roof, a sign that another fall might be imminent. Munsey and his co-workers refused to continue working in the area, and they were subsequently discharged because of this refusal.

The administrative law judge (ALJ)\textsuperscript{31} decided that the miners had been discharged unlawfully. He placed special importance on the fact that these miners were known by management to have registered safety complaints with federal officials in the past. The intent to penalize them for this activity was, he said, in itself a violation of section 110(b).

[It is immaterial whether a discharged miner has in fact complained to the government, for the focus of section 110(b)(1)(A) is upon the intent of the employer. Thus, if the purpose is to discriminate against a miner in the belief—mistaken or otherwise—that the miner has notified the Bureau [of Mines] of an alleged violation or danger or has probably done so, a violation is established regardless whether the miner in fact complained to the Bureau.\textsuperscript{32}]

In addition to holding that a miner’s safety complaint to a supervisor was protected under section 110(b), the administrative law judge also held that the subsequent refusal to work was protected. This right, he said, was necessarily derived from section 103(g) of the Coal Act, which gave miners the right to secure an inspection. The ALJ reasoned that the purpose of section 103(g) would be thwarted if miners presenting a good faith safety complaint could be required to work under a condition which they feel is an imminent danger, pending the time required for their representative to get the Federal Inspector to come to the scene. Some accommodation is indicated, whether it be temporary reassignment of duties or an arrangement between the miner’s representative and the operator. Discharge is obviously not an answer.\textsuperscript{33}

\textsuperscript{31} Administrative law judges were called Hearing Examiners when the decision was issued.


\textsuperscript{33} Id. at 41-42.
Four months later, the same ALJ decided another major case under section 110(b). It involved a miner named Franklin Phillips who was operating a shuttle car at Kentucky Carbon's Mine No. 1 in Phelps, Kentucky. His job was to receive coal from a mechanized loader and transport it to a belt conveyor. Each time coal was loaded, it stirred up a cloud of coal dust which made it difficult for Phillips to breathe and caused him to cough. The loader had water sprays which were supposed to control the dust, but the sprays were often clogged and required frequent cleaning. Phillips reported the problems to his foreman as he had many times before. When the dust became too thick for him, Phillips and the loader operator stopped work to clean the sprays. The foreman expressed exasperation at the delay, and Phillips told him that he had had enough of the coal dust and would not work in it. The foreman told him he was fired.

The ALJ found a violation of section 110(b). As in Munsey, he found that Phillips was known to have made frequent safety and health complaints. He stressed again the connection between section 103(g) and section 110(b). The most significant point about the decision, however, is the fact that the condition confronting Phillips did not threaten death or immediate bodily harm, as did the condition confronting Munsey. Nevertheless, the ALJ upheld his right to refuse to work and ordered the company to provide Phillips with back pay.

The Interior Board reversed the ALJ in both cases. Reading the statute literally, it concluded that complaints to supervisory personnel could not be equated with complaints to the Secretary of the Interior or his authorized representative, and were not protected under the Coal Act.

On appeal, the Court of Appeals for the District of Columbia


35 Coal dust can present a fire hazard when an ignition source is present, but Phillips' basic complaint was difficulty in breathing. However, the court of appeals which affirmed the ALJ stated that "excessive dust plus defective wiring is an explosive safety hazard; we cannot assume that Phillips' complaint went only to a long term health hazard." Phillips v. Interior Bd. of Mine Operation Appeals, 500 F.2d 772, 780 n.29 (D.C. Cir. 1974), cert. denied, 420 U.S. 938 (1975). See infra note 84.

reversed the Board in both cases. The court's decision in each case was grounded upon two considerations. First, the court emphasized the ALJ's finding that each mine had established procedures for reporting safety and health violations in its collective bargaining agreement, and that these procedures, providing for temporary reassignment to alternative work, had not been followed. The court felt that the collective bargaining agreements complemented section 110(b) and had the effect of extending it into the workplace: notifying one's foreman was logically the first step in a process leading ultimately to notifying MESA.

The more far-reaching aspect of the court's decision was its "penumbral analysis." Phillips, said the court, "brought himself within the penumbra of the Safety Act by notifying his foreman of defective equipment creating dangerous working conditions." The court went beyond the ALJ's reliance on section 103(g) to the "overall remedial purpose of the statute." A broad construction of section 110(b) was required because Congress, in Senator Kennedy's words, "want[ed] to encourage the reporting of suspected violations of health and safety regulations."

The court's extension of section 110(b) to cover reports to supervisory personnel was ratified by Congress when it replaced the Coal Act with the 1977 Mine Act. Section 105(c) now protects miners when they make a "complaint notifying the operator or the operator's agent, or the representative of miners . . . of an alleged danger or safety or health violation . . . ." Congress did not, however, codify the ultimate holding in Munsey and Phillips that miners have the right to refuse to work under conditions they think are hazardous or unhealthful. The Commission, however, has endorsed this holding and has further refined it.

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28 507 F.2d at 1208 n.32; 500 F.2d at 779-80.
29 500 F.2d at 774. This analysis may have been based on the Supreme Court decision in Griswold v. Connecticut, 381 U.S. 479 (1965), in which Justice Douglas fashioned a constitutional right to privacy from the "penumbra" of the Bill of Rights.
30 500 F.2d at 779.
31 Id. at 782 (quoting Senator Kennedy, 115 Cong. Rec. 27,948 (1969)).
33 See infra notes 63-101 and accompanying text.
SECTION 105(c) OF THE 1977 MINE ACT

Section 105(c)(1)

While the Senate Committee on Labor and Public Welfare was considering proposals to strengthen the Coal Act and the Metal Act, two methane explosions took the lives of twenty-three miners and three Federal Inspectors at the Scotia Coal Mine in Eastern Kentucky in March, 1976. In the words of the Committee, these and other tragedies "signal[ed] a pressing need for legislative improvements in our mine safety and health programs." The Congressional response was the Federal Mine Safety and Health Act of 1977. It covers not only the coal mines but virtually all activities involved in the extraction of solid minerals from the earth. The Act streamlined the penalty process, gave the government additional enforcement tools, and significantly liberalized the anti-discrimination provisions.

Under section 110(b) of the Coal Act, a complaining miner had to prosecute his own case. Under the Mine Act, a miner who alleges discrimination must file his complaint with the Secretary of Labor within sixty days of the adverse action. If upon investigation, the Secretary determines that a violation occurred, he will file a complaint on the miner's behalf with the Commission. If the Secretary decides not to file a complaint with the Commission, the miner may proceed on his own by filing a complaint with the Commission within thirty days after the date he is notified of the Secretary's decision. Should the Commission find a violation, it may grant appropriate relief, including reinstatement, back pay, and attorneys' fees. In addition, a civil penalty may be imposed on the violator.

What is Protected Activity?

Section 105(c) protects miners, representatives of miners, and

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" Section 105(c)(1) of the 1977 Mine Act reads:

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, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the
applicants for employment from adverse action because of protected activity. The action is adverse if the offending person "discharge[s] or in any manner discriminate[s] against or cause[s] to be discharged or cause discrimination against . . . ." Proof of the adverse action is commonly the easiest burden for a complainant to satisfy, since it is the adverse action which prompts the filing of the complaint. 48

Section 105(c)(1) embraces three types of protected activity. 49

A "miner" is "any individual working in a coal or other mine." 30 U.S.C. § 802(g) (Supp. IV. 1980). The term includes a foreman or a supervisor. Eagle v. Southern Ohio Coal Co., 2 FMSHRC 3728, 3729 2 MSHC (BNA) 1182 (1980). One may claim the protections of § 11(c) of OSHA even if he is a former employee or an employee of some other than the discriminator. 29 C.F.R. § 1977.5 (1981). "Representatives of Miners" are required by MSHA to register their status. 30 C.F.R. §§ 40.1-.4 (1981). However, the failure to file under these regulations may have little or no effect on their statutory rights. Consolidation Coal Co. v. Secretary of Labor, 3 FMSHRC 617, 2 MSHC (BNA) 11185 (1981). Hereinafter, "miner" refers to the class of persons protected by § 105(c).

The sentence continues, "or otherwise interfere with the exercise of the statutory rights of any miner . . . ." This is redundant since the fourth basis for discrimination under § 105(c)(1) is "because of the exercise . . . of any statutory rights afforded by this Act." 30 U.S.C. § 815(c)(1) (Supp. IV 1980).

However, in Local 9800, UMWA v. Dupree, 3 FMSHRC 958, 2 MSHC (BNA) 1077 (1981), it was held that a Federal Mine Inspector's phone call to the Union's District President to express displeasure over a letter the union had written to MSHA headquarters criticizing MSHA inspectors did not constitute adverse action under the statute.

There is also one protected status "because such miner . . . is the subject of medical evaluation and potential transfer under a standard published pursuant to section 101. . . ." 30 U.S.C. § 815(c)(1) (Supp. IV 1980). Section 101(a)(7) provides that miners who may suffer material impairment of health or functional capacity by reason of a covered hazard must be reassigned to other work at the same rate of pay. 30 U.S.C. § 811(a)(7) (Supp. IV 1980). This protection is intended particularly for potential victims of black lung disease, and dovetails with § 428 of the Mine Act, supra note 8, at § 938, administered by the Department of Labor, which protects miners who have black lung from discharge or discrimination. This
To succeed, a complainant must show a connection between an adverse action and one of these protected activities. The first is filing or making a complaint under or related to the Mine Act. This is the broadest portion of section 105(c). It codified the Phillips holding by providing that "a complaint notifying the operator or the operator's agent, or the representative of the miners" is protected when he complains of an "alleged" danger; the condition need not be actually dangerous or actually a violation of a safety or health regulation. It is likely that the miner's belief in a dangerous condition must be bona fide, however. Whether it must be reasonable as well is a question left unsettled at this writing. If the miner not only complains, but acts on his belief by refusing to work, the belief must be a reasonable one under the circumstances. The right to refuse to work will be discussed more fully below.

Discrimination for instituting a proceeding under the Mine Act or testifying in such a proceeding is the second type of proscribed activity. The purpose of this provision, like the similar provision in section 110(b) of the Coal Act, is to safeguard the integrity of MSHA's investigative processes. (The Interior Board in Phillips and Munsey felt this way the only purpose of section 110(b)). The protection is designed, like a similar provision in the National Labor Relations Act, "to prevent ... [MSHA's] channels of information from being dried up by employer intimidation of prospective complainants and witnesses." Whether a miner claiming discrimination under this portion of section 105(c) must have acted in good faith is unsettled.

basis for discrimination has produced no major cases under § 105(c) and will not be developed in this article.


52 E.g., Secretary of Labor ex rel. Noland v. Luck Quarries, Inc., 2 FMSHRC 954, 1 MSHC (BNA) 2426 (1980).


54 The D.C. Circuit has ruled that even bad faith complaints to the Secretary of Interior were protected under § 110(b) of the Coal Act. Munsey v. FMSHRC, 595 F.2d 735, 742-43 (D.C. Cir. 1978). In support, the court cited NLRB precedent. However, it is questionable whether the Labor Act protects bad faith charges of unfair labor practices. Socony Mobil Oil Co. v. NLRB, 337 F.2d 682, 684 (2d
The third type of protected activity is similar to the first. It prohibits discrimination "because of the exercise . . . of any statutory right afforded by this Act." The most important statutory rights are the rights to request an inspection, the right to accompany an inspector as he inspects the mine and the right to be paid at one's usual rate while doing so. Miners also have the right to be compensated when they are withdrawn from a mine pursuant to a government order and to retain their rates of pay when, for health reasons, they are transferred to other areas of the mine. They are entitled to participate in proceedings before the Secretary of Labor and the Commission. The operator of a mine must keep them informed on their exposure to harmful materials and must provide adequate training for their jobs. It should be borne in mind that a miner is protected when he exercises these rights "on behalf of others" as well as on his own behalf.

The Right To Refuse to Work

By far the most controversial right afforded miners is the right to refuse to work. The right is nowhere mentioned in section 105(c), but the legislative history strongly supports the ultimate holding in Munsey and Phillips: "This section is intended to give miners,


E.g., Magma Copper Co. v. Secretary of Labor, 1 FMSHRC 1948, 1 MSHC (BNA) 2227 (1979), aff'd, 645 F.2d 694 (9th Cir. 1981), cert. denied, 102 S. Ct. 475 (1981). The use of the word "statutory" is noteworthy, since it conceivably could be interpreted to exclude judicially created rights, such as the right to refuse to work under hazardous conditions. Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. § 660(c) (1976), which corresponds to § 105(c), does not so modify the work "rights."


30 U.S.C. § 811 (Supp. IV 1980). See also 30 C.F.R. §§ 90.1, et seq. (1981). According to a recent decision, a miner retains only the pay rate he had prior to transfer; he does not receive pay increases granted to those in his pre-transfer job after his transfer. Matala v. Consolidation Coal Co., 647 F.2d 427 (4th Cir. 1981).


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EMPLOYMENT DISCRIMINATION

their representatives and applicants, the right to refuse to work in conditions they believe to be unsafe or unhealthful and to refuse to comply if their employers order them to violate a safety and health standard promulgated under the law.

The Commission has adopted and further sharpened the contours of the judicially developed right to refuse to work. In Secretary of Labor ex rel. Pasula v. Consolidation Coal Co., the Commission found that a miner had been wrongfully discharged when he refused to operate a continuous mining machine. He complained that it was excessively noisy and gave him a headache, an earache, and made him nervous. The grievance procedure in the mine's collective bargaining agreement was followed, and Pasula's union representative agreed with the company that the machine was not too loud to operate. A Federal Mine Inspector also tested the machine but found no noise violation. Nevertheless, the Commission held that the company's decision to fire him for refusing to work violated section 105(c).

The Commission had no difficulty in deciding that "miners have some right to refuse to work under the 1977 Mine Act." The difficult issue is to determine which refusals to work fall within the ambit of "protected activity." In Pasula, the Commission concluded that the evidence established that the miner's "good faith belief was reasonable, and was directed to a hazard that we consider sufficiently severe . . . ." Thus, the factors to be considered in analyzing a refusal to work are the miner's state of

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S. REP., supra note 6, at 36, reprinted in 1977 U.S. CODE CONG. & AD NEWS at 3436. One may wonder how representatives of miners and applicants for employment can avail themselves of this right. Perhaps the section authorizes the former to call a strike and the latter to some form of relief if they refuse a job offer for fear of its dangerous nature.

A right to refuse to work was developed by rulemaking under the Occupational Safety and Health Act. 29 C.F.R. §§ 1977.1 (1981).


Id. at 2787, 2 MSHC (BNA) at 1002.

Id. at 2788, 2 MSHC (BNA) at 1002. The agreement provided that no employee would be required to work under conditions he had reasonable grounds to believe could cause death or serious physical harm. If the existence of such a condition was disputed, the employee had the right to request an evaluation by a union committeeman. If the committeeman disagreed with the employee, the employee was obligated to return to work.

Id.

Id. at 2790, 2 MSHC (BNA) at 1004.

Id. at 2793, 2 MSHC (BNA) at 1006.
mind and in the severity of the condition which troubles him.\textsuperscript{71} The court of appeals, in a 2-1 decision, reversed the Commission because it found, contrary to the Commission's finding, that Pasula was discharged not for refusing to work, but because he prevented anyone else from operating his machine.\textsuperscript{72} The court did not repudiate the test laid down by the Commission in Pasula.

The Commission supplied some of the standards to be followed in determining whether a refusal to work is protected in Secretary of Labor \textit{ex rel.} Robinette \textit{v.} United Castle Coal Co.\textsuperscript{73} It held that the good faith required of a miner who refuses to work "simply means an honest belief that a hazard exists."\textsuperscript{74} The miner's honest perception must also be "a reasonable one under the circumstances."\textsuperscript{75} The National Labor Relations Act (Labor Act) and the Occupational Safety and Health Act (OSHA) provide similar protections for employees who refuse to work under dangerous conditions. But section 502 of the Labor Act requires that "ascertainable, objective evidence" support a refusal to work,\textsuperscript{76} while OSHA requires that a "reasonable person" would have shared the employee's belief.\textsuperscript{77} The Commission emphasized that "reasonable minds can differ" and so long as a miner can justify his belief with "detail, inherent logic and overall credibility" he will satisfy the standard.\textsuperscript{78}

The Commission twice declined in these cases to explain how

\textsuperscript{71} For a miner to claim the protection of \textsection 105(c), he must, at the time he refuses to work, expressly ground his refusal on an unsafe condition. Secretary of Labor \textit{ex rel.} Duncan \textit{v.} T.K. Jesup, Inc., 3 FMSHRC 1880, 2 MSHC (BNA) 456 (1981); Boone \textit{v.} Rebel Coal Co., 3 FMSHRC 1707, 2 MSHG (BNA) 408 (1981); Adkins \textit{v.} Deskins Branch Coal Co., 2 FMSHRC 2803, 2 MSHC (BNA) 1023 (1980).


\textsuperscript{73} 3 FMSHRC 803, 2 MSHC (BNA) 1213 (1981).

\textsuperscript{74} \textit{Id.} at 810, 2 MSHC (BNA) at 1219.

\textsuperscript{75} \textit{Id.} at 812, 2 MSHC (BNA) at 1220.

\textsuperscript{76} Gateway Coal Co. \textit{v.} UMWA, 414 U.S. 368, 387 (1974) (quoting Gateway Coal Co. \textit{v.} UMWA, 466 F.2d 1187, 1162 (3d Cir. 1972) (Rosenn, J., dissenting)). Section 502 prevents a refusal to work under such conditions from being deemed a strike. Sections 7 and 8(a)(1) of the Labor Act provide a more lenient standard, requiring only that a refusal to work be undertaken in concert with other workers and in good faith. NLRB \textit{v.} Modern Carpet Indus., Inc., 611 F.2d 811 (10th Cir. 1979). Two commonly cited examples of the right involving abnormally cold and abnormally hot working conditions, respectively, are NLRB \textit{v.} Washington Aluminum, 370 U.S. 9 (1962) and NLRB \textit{v.} Knight-Morley Corp., 251 F.2d 753 (6th Cir. 1957), \textit{cert. denied}, 357 U.S. 927 (1958).


\textsuperscript{78} 3 FMSHRC at 812, 2 MSHC (BNA) at 1220. Since the Commission did not embrace an objective standard of reasonableness, it is unclear how subjective
severe the safety or health hazard must be to justify a refusal to work.\textsuperscript{79} Pasula's discomfort was considered "sufficiently severe, whether or not the right to refuse to work is limited to hazards of some severity."\textsuperscript{80} In Robinette, the company argued that the hazard facing the miner did not threaten death or serious bodily harm. "This case," said the Commission, "does not require definitive answer as to whether any criteria like these should be adopted."\textsuperscript{81} The dissenting opinion in the court of appeals decision in Pasula criticized the Commission for its failure to "articulate some standard as to the severity of the hazard which triggers the right."\textsuperscript{82}

Proof of an "abnormally dangerous condition for work" is required under section 502 of the Labor Act.\textsuperscript{83} An employee claiming the right to refuse to work under OSHA must believe "that there is a real danger of death or serious injury and that there is insufficient time, due to the urgency of the situation, to eliminate the danger through resort to regular statutory enforcement channels."\textsuperscript{84} Indeed, this "urgency factor" was and remains the

the miner's perception can be and still remain reasonable. Certain industries in which employees assemble or work with high technology equipment have been afflicted with complaints of "funny smells", headaches, and nausea in recent years. Experts attribute these reactions to fear of unfamiliar and complex devices. 11 OSHR (BNA) 6 (1981). Nevertheless, the fear, and the reactions, are very real to the employees involved. Would the Mine Act sanction a refusal to work under these circumstances?

\textsuperscript{79} The legislative history indicates that no hazard need accompany the refusal to work. According to the drafters, "the refusal to comply with orders which are violative of the Act or any standard" is protected activity. S. Rep., supra note 6, at 35, reprinted in 1977 U.S. Code & Cong. Ad. News at 3435. What if a miner refuses to work in an area he considers unclean or disorderly? 30 C.F.R. § 57.20-3 (1981). Would this be reasonable? Is it protected activity? A recent case held that refusal to work where the employer failed to provide clean and readily accessible toilet facilities is protected. Edwards v. Aaron Mining, Inc., 3 FMSHRC 2630 (1981).

\textsuperscript{80} 2 FMSHRC at 2793, 2 MSHC (BNA) at 1006.

\textsuperscript{81} 3 FMSHRC at 816, 2 MSHC (BNA) at 1223.

\textsuperscript{82} 663 F.2d at 1226 (Solvetir, J., dissenting).

\textsuperscript{83} Gateway Coal Co. v. UMWA, 414 U.S. 368, 387 (1974) (quoting Gateway Coal Co. v. UMWA, 446 F.2d 1157, 1162 (3d Cir. 1972) (Rosenn, J., dissenting).

\textsuperscript{84} 29 C.F.R. § 1977.12(b)(2) (1981). This is very similar to the definition of "imminent danger" under the Mine Act. An imminent danger is a condition which can reasonably be expected to cause death or serious bodily harm before it can be corrected. 30 U.S.C. § 802(j) (Supp. IV 1980). A federal inspector who discovers an imminent danger may order the immediate closure of the mine. 30 U.S.C. § 817 (Supp. IV 1980). Under OSHA, the inspector must first secure an injunction in federal district court. 29 U.S.C. § 662 (1976). In sustaining the regulations providing a right to refuse to work under OSHA, the Supreme Court placed par-
primary justification for the right to refuse to work. As the Commission stressed in *Pasula*, "the right . . . [to notify MSHA of safety or health problems] would be hollow indeed . . . if before the regular statutory enforcement mechanisms could at least be brought to bear, the condition complained of caused the very injury that the Act was intended to prevent." Therefore, it seems safe to say that there must be a risk of an immediate injury.

Day No reasonable other alternative" and the condition must be "highly dangerous." Whirlpool Corp. v. Marshall, 445 U.S. 1, 12, 19 (1980). Clearly, the Commission in *Pasula* was willing to accept a lower quantum of risk to support a refusal to work. The next level of risk below an imminent danger is the statutory scheme is a "significant and substantial" violation. 30 U.S.C. § 814(d) (Supp. IV 1980). Asked to clarify this term, the Commission responded that a violation is significant and substantial if "there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Secretary of Labor v. Cement Div., Nat'l Gypsum Corp., 3 FMSHRC 822, 825, 2 MSHC (BNA) 1201, 1203 (1981).

Phillips v. Interior Bd. of Mining Operations Appeals, 500 F.2d 772 (D.C. Cir. 1974) is commonly thought to repudiate the notion that the right to refuse to work in a mine is conditioned on the existence of an imminent danger. However, the court thought Phillips was confronted with "a chronic, long-term threat to his health or safety," i.e., black lung disease. *Id.* at 780. The evidence relied upon by the court for this conclusion was not discussed.

This language strongly suggests that the right of a miner to refuse to work is extinguished once the condition complained of has been inspected by MSHA. If this is so, then the right to refuse to work can be more simply and objectively applied than it is now. The succeeding footnote elaborates on this point.

The approaches taken under the Mine Act, the Labor Act, and OSHA leave both employers and employees uncertain of each other’s rights in a dispute concerning hazardous working conditions. Only after the fact, when a group of lawyers have passed on the reasonableness of his conduct, can an employee be sure he engaged in protected activity. Moreover, whether the employee's conduct was reasonable often turns on complex technical issues which are difficult for most attorneys to grasp.

There is an alternative that restores the bond between the right to refuse to work and the right to obtain a federal inspection from which the former was derived. We suggest that an employee should have the right to refuse to work if: (1) he honestly believes that the job to which he is assigned endangers his safety or health; (2) he agrees to remain on the premises available for alternate work, with the understanding that he will not be paid if he does not work; and, (3) he agrees to call for a federal inspection. Unlike the present standards, this set of rules can be applied with certainty as soon as the dispute arises. Under our test, an employer would bear the burden of disproving good faith belief, and an employee, if he wished to be paid for not working, would have to prove a discriminatory intent on the employer's part to deny alternative work. The employee's right to refuse to work ends when: (1) he accepts alternate work; (2) federal officials notify him that they will not conduct an inspection; (3) a federal
The Commission also declined to decide whether a miner claiming the right to refuse to work must first seek management's assistance in correcting the condition. Under the corresponding provision of OSHA, an employee must give his employer this opportunity. 87 In Robinette, the Commission concluded that, whether or not it was required, Robinette had satisfied this standard by making repeated requests for assistance and waiting ten-fifteen minutes for help. 88 A recent Commission decision adds a requirement that a miner who refuses to perform his work must ordinarily attempt to make his health or safety complaint known to his employer prior to or reasonable soon after his work refusal. 89

The Commission did, however, decide that a miner can do more than passively refuse to work and still retain the protections of the Mine Act. There was evidence that after ceasing work, Robinette shut down a belt conveyor and the machine which fed coal into it. "As with reasonable belief," declared the Commission, "a miner need only demonstrate that his affirmative action was a reasonable approach under the circumstances to eliminating or protecting against the perceived hazard." 90 In view of the court of appeals decision in Pasula, this Commission holding would seem to be on shaky ground.

A troublesome aspect of the right to refuse to work is that it may conflict with the national policy favoring resolution of industrial disputes through collective bargaining. The long-established "presumption of arbitrability" applies to safety disputes as well as other disputes over working conditions. 91 One of the central tenets of the arbitration process is "work now, grieve later." 92 In firing Pasula, for example, the company was

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88 3 FMSHRC at 816, 2 MSHC (BNA) at 1223.
89 Secretary of Labor ex rel. Dumire and Estle v. Northern Coal Co., 4 FMAHRC 126, 2 MSHC (BNA) 1585 (1982). The requirement that the alleged hazard be communicated to management is limited to instances where such communication is "reasonably possible." Id. at 133, 2 MSHC (BNA) at 1590.
90 FMSHRC at 816, 2 MSHC (BNA) at 1220.
92 F. ELKOURI & E. ELKOURI, HOW ARBITRATION WORKS, 154, 671 (3d ed. 1973). There is an exception to this principle for safety disputes but only where the...
acting wholly within its contractual rights. The discharge, in fact, was upheld in arbitration.\textsuperscript{3}

The Commission avoided this issue in \textit{Pasula} by holding that the contractual and statutory rights to refuse to work were independent of each other.\textsuperscript{4} But it may not always be possible to treat them as independent. For example, an entire shift may refuse to work because the miners object to riding in rail cars which they believe are not safe. A grievance is filed but the miners will not return to work. The mine is covered by a collective bargaining agreement with a no-strike clause. The company sues the union under section 301 of the Labor-Management Relations Act seeking damages and injunction.\textsuperscript{5} The union then files a complaint with MSHA alleging a violation of section 105(c). Should the district court grant this injunction? Assuming the miners return to work after an adverse decision from the arbitrator, should the district court award damages to the company? And how should the Commission respond to the claim of discrimination?

These difficult issues are bound to arise in the future. A case similar to the above hypothetical, in fact, has already been decided. In \textit{Segedi ex rel. Ezarik v. Bethlehem Mines Corp.}, an entire shift refused to work for nearly an hour while the mine elevator's doors were malfunctioning. The ALJ found that the company's refusal to pay the miners for the time consumed in a lawful work stoppage under the Mine Act was a violation of section 105(c).\textsuperscript{7} If the strike had persisted, it might have compelled the ALJ to face squarely some of the issues set out above.

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employee can produce objective evidence of a serious and unusual safety or health hazard.

\textsuperscript{3} 2 FMSHRC at 2788, 2 MSHC (BNA) at 1003.

\textsuperscript{4} \textit{Id}. at 2795, 2 MSHC (BNA) at 1007.


\textsuperscript{6} 3 FMSHRC 764, 2 MSHC (BNA) 1336 (1981).

\textsuperscript{7} \textit{Id}. at 788. The \textit{Whirlpool} Court, which upheld the right to refuse to work under OSHA, stressed that the Secretary of Labor's regulations did not require employers to pay workers who exercise their right to refuse to work. On remand, however, the district court held that the employees must be compensated for time spent not working since they were not given an opportunity to perform safe alternate work. \textit{Marshall v. Whirlpool Corp.}, 9 OSHC (BNA) 1038 (1980). Of course, it does not always follow that an employee must be paid while exercising a statutory right. The Labor Act guarantees the right to strike, but employees who exercise that right not only do not have to be paid but may be permanently replaced. \textit{NLRB v. Mackay Radio & Telegraph Co.}, 304 U.S. 333 (1938).
We raise these questions only to provoke thought on the matter; we do not pretend to have the answers. Supreme Court precedent suggests that two statutes should be reconciled if possible. If legislative history provides no basis for reconciliation, then a policy decision must be made as to which statute ought to prevail. Whether the Court in Gateway Coal Co. v. UMWA rejected Justice Douglas's view that Congress preempted the field of mine safety and health when it legislated on the subject is uncertain. It seems to us that accommodations between the Mine Act and the Labor Act will have to be fashioned on a case by case basis.

Who Can Be Liable?

Section 105(c) is sweeping in its reach. Its prohibitions extend not only to employers but to "[a]ny person." "Person" is defined in section 3(f) as "any individual, partnership, association, corporation, firm, subsidiary of a corporation or other organization." The word "person" as used in the anti-discrimination provision of OSHA has been interpreted by the Secretary of Labor to include "such entities as organizations representing employees for collective bargaining purposes, employment agencies, or any other person in a position to discriminate."

The focus of the prohibition on persons in a position to discriminate was adopted in Local 9800, UMWA v. Secretary of Labor. MSHA's motion to dismiss the complaint of discrimination filed against it was denied, and MSHA was held to be a person subject to the provisions of section 105(c). It was reasoned that the aim of fostering a working environment receptive to safety complaints is similar to the aim under the Labor Act of ensuring

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100 Id. at 394 (Douglas, J., dissenting).
101 Perhaps it will be unnecessary to further refine these issues. The Third Circuit's decision in Pasula emphasized that the right to refuse work is a right personal to a miner faced with an unsafe condition. "There is no right in the Act to shut down an entire shift's work." 663 F.2d at 1219. However, it may be argued that if an entire shift is exposed to a serious danger, the entire shift may claim the right to refuse to work.
104 2 FMSHRC 2680, 2 MSHC (BNA) 1077 (1980).
"laboratory conditions" for union representation elections.\(^{105}\) The source of a threat to this environment was thus thought irrelevant.

Liability may even extend to one never charged with discrimination. In Munsey v. Smitty Baker Coal Co.,\(^ {106}\) the Commission decided that a successor employer could be ordered to reinstate and reimburse a miner wrongfully fired by its predecessor. The Commission relied on Golden State Bottling Co. v. NLRB,\(^ {107}\) in which the Supreme Court held that the Board's power to direct "such affirmative action . . . as will effectuate the policies of this act"\(^ {108}\) sanctioned a remedial order against a successor employer. The Commission's power to "grant such relief as it deems appropriate"\(^ {109}\) is indistinguishable.

The exercise of this power, naturally, must be subject to rational standards. The following factors were held by the Commission to govern resolution of the successorship issue:

1) \([W]\)hether the successor company had notice of the charge,
2) the ability of the predecessor to provide relief,
3) whether there has been a substantial continuity of business operations,
4) whether the new employer uses the same plant,
5) whether he uses the same or substantially the same work force,
6) whether he uses the same or substantially the same supervisory personnel,
7) whether the same jobs exist under substantially the same working conditions,
8) whether he uses the same machinery, equipment and methods of production and
9) whether he produces the same product.\(^ {110}\)

Procedure

Hearing and pre-hearing procedure is governed by the Commission's Rules of Procedure.\(^ {111}\) No particular form of Complaint is required, as long as it contains a short and plain statement of

\(^{105}\) 2 FMSHRC at 2684, 2 MSHC (BNA) at 1078.
\(^{106}\) 2 FMSHRC 3463, 2 MSHC (BNA) 1052 (1980); appeal docketed, No. 82-1079 (D.C. Cir. Oct. 16, 1981).
\(^{110}\) 2 FMSHRC at 3465, 2 MSHC (BNA) at 1054 (quoting from EEOC v. Mac-Millan Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974)).
\(^{111}\) 29 C.F.R. §§ 2700.1, et seq. (1981). Any procedural question not governed by the Mine Act or the Commission's rules is governed by the Administrative Procedure Act or the Federal Rules of Civil Procedure. 29 C.F.R. § 2700.1(b) (1981). The Mine Act expressly delegates to the Commission only the power to prescribe
the facts and a statement of the relief requested. The person charged with discrimination (the respondent) must answer the Complaint within thirty days. The Answer need only identify the case and briefly explain the respondent's position. If either a complainant or a respondent fails to comply with the rules, an order to show cause will issue before the entry of a dismissal or a default. Anyone may be permitted to represent a party before the Commission, but the representative will be held to "the standards of ethical conduct required of practitioners in the courts of the United States."

By an anomalous requirement, discovery must be initiated within twenty days after a complaint is filed, although the Answer need not be filed until thirty days after filing the Complaint. The time for discovery may be extended for good cause, however. Discovery should be completed sixty days after a Complaint is filed.

rules governing review of ALJ decisions. 30 U.S.C. § 823(d)(2) (Supp. IV 1980). However, Congress must have intended that the power vested in the Secretary of Interior to issue regulations governing adjudications, in § 508 of the Coal Act, carrying over to the Commission. 30 U.S.C § 961(a) (Supp. IV 1980). Congress also declared in § 105(d) of the Mine Act that the “rules of procedure prescribed by the Commission shall provide affected miners or representatives of affected miners an opportunity to participate as parties to hearings under this section.” 30 U.S.C. § 815(d) (Supp. IV 1980). This naturally implies that the Commission is empowered to prescribe rules of procedure for hearings.

If the Secretary of Labor decides there has been a violation of § 105(c), he must “immediately file” a complaint with the Commission. If the miner is proceeding on his own, he must “file” a complaint within 30 days of “notice” of the Secretary’s determination that there has been no violation. Filing is effective upon receipt by the Commission, or upon mailing by certified or registered mail. 29 C.F.R. § 2700.5(d) (1981). The meaning of “notify” is far from clear. Under Title VII of the Civil Rights Act, a person is notified of EEOC’s determination on his complaint when he receives the notification. Reeves v. American Optical Co., 408 F. Supp. 297, 301 (W.D.N.Y. 1976). However, the Commission has held that MSHA is notified of a mine operator’s intent to contest a proposed civil penalty when the operator mails the notice of contest. Secretary of Labor v. J.P. Burroughs & Son, Inc., 3 FMSHRC 854, 2 MSHC (BNA) 1275 (1981). The rule seems to be that “notify” should be construed to preserve a party's procedural rights.

29 C.F.R. § 2700.42 (1981). 29 C.F.R. § 2700.63(a). Id. at § 2700.3, 2700.80(a). Id. at § 2700.55. Id.
The Commission's most controversial rule of procedure concerns withholding the identity of miner witnesses and informants. Rule 59 provides:

A Judge shall not, until 2 days before a hearing, disclose or order a person to disclose to an operator or his agent the name of a miner who is expected by the Judge to testify or whom a party expects to summon or call as a witness. A Judge shall not, except in extraordinary circumstances, disclose or order a person to disclose to an operator or his agent the name of an informant who is a miner.119

By its terms, the rule limits only the power of the ALJ; it does not prevent parties from voluntarily disclosing the names of witnesses or informants. The rule may be invoked by applying for a protective order.

The rule's first sentence absolutely bars disclosure of the names of miner witnesses. It is patterned on the NLRB's rule barring disclosure of the statements of witnesses or informants prior to a hearing,120 which, in turn, is modeled on the Jencks Act.121 In permitting disclosure two days prior to a hearing, it is less restrictive than the Jencks Act, which permits the government to retain pre-trial statements until the witness who made the statement is called on direct examination.122

The rule's second sentence is based on the qualified privilege which the Secretary of Labor claims in proceedings under the Fair Labor Standards Act and OSHA.123 Names and statements of informants will not be disclosed unless the requesting party can demonstrate a substantial need for them.124

Both parts of the rule were invoked and upheld in an

119 Id. at § 2700.59.
120 29 C.F.R. § 102.118(a) (1981).
122 Id.
123 E.g., Brennan v. Engineered Products, Inc., 506 F.2d 299 (8th Cir. 1974); Quality Stamping Products, 7 OSHC (BNA) 1285 (1979).
124 506 F.2d at 303, 7 OSHC (BNA) at 1287 n.5. The privilege is grounded on Fed. R. Civ. P. 26(b)(3). The word "informant" is commonly understood to refer to a person who provides information to the government. Thus, it is doubtful that anyone except the Secretary of Labor could claim a privilege of nondisclosure under this part of Commission Rule 59.
unreported civil penalty ruling, *MSHA v. Domtar Industries, Inc.* It was also held that the rule protects statements of miner witnesses and informants, as well as their names.

In resolving a procedural question not governed by the Commission's rules, the Mine Act or the Administrative Procedure Act, the Commission will be guided by the Federal Rules of Civil Procedure. The motion to dismiss is a common example. The Federal Rules may also be sources for additional forms of action, such as declaratory judgments and class actions, though neither device has been used in the discrimination area.

Hearing sites must be selected with due regard for the convenience and necessity of the parties and their witnesses. At the hearing, any evidence that is relevant and not unduly repetitious or cumulative is admissible.

Direct evidence of discrimination is usually difficult to produce. Many cases present the mixed motive problem: the complainant may have been subjected to discrimination, or treated differently than others, but unprotected activity as well as protected activity may have motivated the adverse action of which he complains. To deal with this problem, the Commission has allocated the burdens of proof in a discrimination case as follows:

We hold that the complainant has established a prima facie case of a violation of section 105(c)(1) if a preponderance of the evidence proves (1) that he engaged in a protected activity, and (2) that the adverse action was motivated in any part by the protected activity. On these issues, the complainant must bear

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127 Other possibilities are consolidation/severance, interpleader, impleader, and substitution of parties.
130 This should be distinguished from the "pretext" case in which the employer advances a legitimate business reason for his action which proves to be a sham upon examination, since the employer did not rely upon it at all. Wright Line, 251 N.L.R.B. 150 (1980), enforced sub nom. NLRB v. Wright Line, 662 F.2d 899 (1st Cir. 1981), cert. denied, 102 S. Ct. 1612 (1982). See also Truesdale, Recent Trends at the NLRB and in the Courts, 32 Labor L.J. 131 (1981).
the ultimate burden of persuasion. The employer may affirmatively defend, however, by proving by a preponderance of all the evidence that, although part of his motive was unlawful, (1) he was also motivated by the miner's unprotected activities, and (2) that he would have taken adverse action against the miner in any event for the unprotected activities alone.\textsuperscript{131}

These tests are based on the Supreme Court decision in \textit{Mt. Healthy City Board of Education v. Doyle},\textsuperscript{132} which involved an employee who alleged he had been fired for engaging in activities protected by the First Amendment. Similar tests are followed under the National Labor Relations Act\textsuperscript{133} and Title VII of the Civil Rights Act.\textsuperscript{134} In \textit{Robinette}, the Commission made it plain that the ultimate burden of proving a violation of section 105(c) never shifts from the complainant.\textsuperscript{135}

\textsuperscript{131} Pasula, 2 FMSHRC 2786, 2799-2800 (1980), rev'd sub nom. Consolidation Coal Co. v. Marshall, 633 F.2d 1211 (3d Cir. 1981). \textit{See also} Marshall v. Commonwealth Aquarium, 469 F. Supp. 690 (D. Mass.), aff'd, 611 F.2d 1 (1st Cir. 1979). In \textit{Robinette}, the Commission held that a mine operator meets its \textit{Pasula} burden even if protected activity was the leading or primary ground for adverse action, as long as other instances of unprotected activity were sufficient grounds. 3 FMSHRC at 819. This suggests that § 105(c) is not necessarily violated when protected activity is the "straw that breaks the camel's back" and leads to discipline or discharge.

\textsuperscript{132} NLRB v. Eastern Smelting & Refining Corp., 598 F.2d 666 (1st Cir. 1979); NLRB v. General Warehouse Corp., 643 F.2d 965 (3d Cir. 1981).

\textsuperscript{133} McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

\textsuperscript{134} 3 FMSHRC at 818, 2 MSHC (BNA) at 1224. \textit{See also} Brazell v. Island Creek Coal Co., 3 FMSHRC 1773 (1981). The intermediate burden placed on the employer, however, seems more onerous than that placed on a defendant under Title VII of the Civil Rights Act, who needs only to produce evidence that the adverse action was motivated by a legitimate, nondiscriminatory reason. The defendant need not prove that it was actually motivated by the preferred reasons. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981). Under the Mine Act, the employer does have to make this showing. Moreover, "[i]t is not sufficient for the employer to show that the miner deserved to have been fired... 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." \textit{Pasula}, 2 FMSHRC at 2800, 2 MSHC (BNA) at 1010. Proof of the absence of disparate treatment may be one of the few methods an employer can use to meet this burden. This contrasts sharply with Title VII cases, where proof of disparate treatment is typically the foundation of plaintiff's prima facie case. However, a recent decision indicates that the Commission may be drifting away from the \textit{Pasula} formula toward the more lenient \textit{Burdine} test. In Secretary of Labor \textit{ex rel.} Chacon v. Phelps Dodge Corp., 3 FMSHRC 2608, 2 MSHC (BNA) 1505 (1981) \textit{appeal filed}, No. 81-2300 (D.C. Cir. Dec. 11, 1981), the Commission reversed an ALJ's finding of discrimination because the ALJ delved too
Whether to grant review of an ALJ's decision is a matter of Commission discretion. A final order of the Commission is reviewable in the courts of appeals. The findings of the Commission on questions of fact shall be conclusive if supported by substantial evidence. If no petition for review is filed within forty days of an ALJ's order or within thirty days of the Commission's order, the findings of fact and order in the case "shall be conclusive with respect to any petition for enforcement which is filed by the Secretary."

Defenses

Once a miner establishes a prima facie case, the respondent may defend by claiming that the adverse action would have been imposed for unprotected activities alone. Unprotected activity is a general term covering the kinds of misconduct familiar to personnel managers: absenteeism, tardiness, loafing, fighting, horseplay, insubordination, incompetence, dishonesty, theft, intoxication, and so on. A mine operator that establishes, publishes, and enforces work rules in a uniform manner is more likely to deeply into the mine operator's business justification for suspending a miner. "Once it appears that a proffered business justification is not plainly incredible or implausible, a finding of pretext is inappropriate. We and our judges should not substitute for the operator's business judgment our views on 'good' business practice or on whether a particular adverse action was 'just' or 'wise.'" Id. at 2516, 2 MSHC (BNA) at 1511. Since the employer's motive in imposing the discipline is the basic issue, as a dissenting opinion pointed out, Id. at 2519, 2 MSHC (BNA) at 1512, it is difficult, when the issue of disparate treatment is raised, to justify avoiding or "limiting" an inquiry into the alleged business justification for the discipline.

This is the most common defense. The respondent may also defend by proving it was unaware of the miner's protected activities, Secretary of Labor ex rel. Bishop v. Mountain Top Fuel, Inc., 2 FMSHRC 1126, 1 MSHC (BNA) 2470 (1980), or that he voluntarily quit and was not discharged, Mullins v. Eastover Mining Co., 2 FMSHRC 2715, 2 MSHC (BNA) 1079 (1980), or that he was laid off pursuant to contractually mandated procedures, McCracken v. Valley Camp Coal Co., 2 FMSHRC 928, 1 MSHC (BNA) 2503 (1980), or that the mine operator thoroughly investigated the miner's complaint and took reasonable corrective action. Secretary of Labor ex rel. Bennett v. Kaiser Alum. & Chem. Corp., 3 FMSHRC 1539, 2 MSHC (BNA) 1424 (1981).
be successful in rebutting a prima facie case of discrimination than one without explicit and consistent personnel practices.

The above defenses are of course particularly applicable to mine operators, the usual respondents in section 105(c) cases. In cases where other organizations, such as unions, employment agencies or outside individuals are respondents, the defenses will be analogous. Special problems are sure to arise in such cases, however. For example, it has been held that potentially coercive remarks under section 105(c) uttered by a public employee to a union official must be weighed against the public employee's free speech rights.141

The impact of the doctrine of fair representation on mine safety discrimination cases is uncertain.142 Assume, for example, that a union representing a miner refuses to process his grievance concerning a safety issue to arbitration. The miner may claim that the union interfered with his right to make a safety complaint. The union may have believed the complaint to be meritorious but may have decided to withdraw it in exchange for the employer's satisfaction of a grievance concerning the wage provisions of the collective bargaining agreement. So long as the union made "an honest effort to serve the interest of all [unit] members, without hostility to any [and] subject always to complete good faith,"143 there is no violation of the duty of fair representation. But is this an affirmative defense to a section 105(c) claim, particularly if the union has successfully defended a suit by the miner alleging a breach of that duty? Only more experience under the Mine Act will supply the answer.

This hypothetical raises an important issue: should a decision in another forum affect one's section 105(c) claim or defense? Res judicata and collateral estoppel have been interposed frequently by respondents relying upon a decision adverse to the miner in arbitration or state administrative proceedings. To date, the Commission has declined to apply these doctrines, but has cautiously endorsed a limited form of deference to prior decision involving the same parties.

141 Local 9800, UMWA v. Secretary of Labor, 3 FMSHRC 958, 2 MSHC (BNA) 1077 (1981).
State agencies commonly deal with issues which may affect a section 105(c) claim. A state unemployment compensation board may have to decide whether a miner was discharged for "cause" to determine his eligibility for benefits. Similarly, a state agency which administers a statute nearly identical to section 105(c), such as the West Virginia Coal Mine Safety Board of Appeals, may have to determine whether unprotected activity was the motivating factor in a miner's discharge. Must the Commission defer to decisions handed down in such cases?

We think not. As a preliminary matter, it may be doubtful whether res judicata and collateral estoppel can apply. The rationale behind these doctrines is that a litigant who has once had an opportunity to advance every argument in his support may be justly barred from doing so again. Administrative agencies are unlike courts of general jurisdiction, however. A complainant before the West Virginia Coal Mine Safety Board of Appeals, to return to the example cited above, has no opportunity to have his section 105(c) claim litigated expressly. Without that opportunity, we believe that the Commission should not defer to the Board's decision. Moreover, unlike courts of general jurisdiction, the Commission is a specialized body charged by Congress with overseeing a particular piece of legislation. The NLRB, in an analogous situation, has always reserved to itself the power to differ with the views of an arbitrator or a state agency.

In the final analysis, the issue is one of legislative intent. It is clear that Congress intended "to accord parallel or overlapping remedies against discrimination" under the Mine Act. Although states may supplement federal efforts, to the extent that the Commission disagrees with a determination made under state law, the Commission's view must prevail.

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14 F. JAMES & C. HAZARD, CIVIL PROCEDURE § 11.7 (2d ed. 1977).
14 Alexander, 415 U.S. at 47.
15 Congress' pre-emptive intent is clear. Senator Williams, one of the Act's principal sponsors, stated during the legislative debates that "[f]ew subject areas
However, the decision of a state tribunal should be entitled to some weight as a matter of evidence. In connection with the decision of labor arbitrators, the Commission in *Pasula* rejected both the idea that arbitral findings should be controlling and the more limited form of post-arbitral deference endorsed by the NLRB.\(^\text{151}\) Instead the Commission held that an arbitrator’s decision may be admitted as evidence, and that its weight will depend on, *inter alia*, the congruence of the statutory and contractual rights, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of the particular arbitrator.\(^\text{152}\)

The difficulty with this view is that it does not address the basic problem created by a multiplicity of proceedings. While the doctrines of res judicata and collateral estoppel may be inapplicable to Commission proceedings, the policies underlying them should figure in all litigation: the need to have matters finally determined and the need to conserve the resources of the parties and the adjudicatory system. A creative complainant might sue in three, four or five different fora on essentially the same complaint. Barring a major legislative initiative, such as the creation of an Article III Labor Court,\(^\text{153}\) this situation is likely to persist.

\(^\text{151}\) The Board will not relitigate unfair labor practice issues already decided by an arbitrator if the proceedings before the arbitrator appear to have been fair and regular, all parties agreed to be bound and the decision of the arbitrator is not clearly repugnant to the purposes and policies of the Labor Act. Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955). The Board shows an increasing reluctance to defer to arbitral decisions in which the unfair labor practice issues were not specifically raised or addressed. Suburban Motor Freight, Inc., 247 N.L.R.B. 2 (1980). Deference to arbitral decisions has been approved by the courts, most recently in NLRB v. Max Factor & Co., 105 LRRM 2765 (9th Cir. 1980). See also Associated Press v. N.L.R.B., 492 F.2d 662 (D.C. Cir. 1974).

\(^\text{152}\) See Miller, An Administrative Appraisal Of The NLRB 132 et seq. (1977).

\(^\text{153}\) *Id.* at 1034.
The Commission, however, should continue to explore the feasibility of administrative deference.\textsuperscript{154}

If a miner accepts an arbitral award, the effect on his section 105(c) case is unsettled. Acceptance of such an award while proceeding as a private party under section 105(c)(3) may be a defense to complaint. However, when the Secretary of Labor sues in his behalf under section 105(c)(2), a public right is also being vindicated, and precedent strongly suggests that the miner's acceptance of the award will not bar the action.\textsuperscript{155}

\textit{Remedies}

If the Commission rules in favor of a complainant, it may grant "such relief as it deems appropriate, including, but not limited to, an order requiring the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate."\textsuperscript{156} This provision is modeled on the NLRB's power to remedy discrimination, which has been copied in other employment-related statutes as well.\textsuperscript{157} The typical order will direct a mine operator to reinstate the miner, reimburse him for lost wages and benefits, post the decision and expunge any reference to the adverse action from the miner's personnel file.\textsuperscript{158}

An ALJ's decision in a discrimination case is not reviewable by the Commission until an award is made.\textsuperscript{159} There is a presump-

\textsuperscript{154} One approach would be to encourage the use of sworn, transcribed testimony from other proceedings. This would not necessarily abrogate the usefulness of live testimony but should make it easier to determine just what issues of fact are genuinely in dispute. Rule 32(a)(3) of the FED. R. CIV. P. expresses an analogous policy. It recognizes that "exceptional circumstances" may warrant substituting depositions for the testimony of witnesses in open court. For further discussion, see Note, \textit{Res Judicata in Successive Employment Discrimination Suits}, 1980 U. ILL. L. FORUM 1049.

\textsuperscript{155} Marshall v. N.L. Indus., Inc., 618 F.2d 1220 (7th Cir. 1980); EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975).

\textsuperscript{156} 30 U.S.C. § 815(c)(3) (Supp. IV 1980). In addition to securing enforcement of orders and decisions in the courts of appeals, the Secretary is authorized to seek injunctions in district courts to aid compliance with such orders and decisions. 30 U.S.C. § 818 (Supp. IV 1980).

\textsuperscript{157} Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975) (concerning remedies under Title VII of the 1964 Civil Rights Act. 42 U.S.C. §§ 2000(E) \textit{et seq}.

\textsuperscript{158} See Howard v. Martin-Marietta, 3 FMSHRC 1599, 2 MSHC (BNA) 1445 (1981).

\textsuperscript{159} Council of the S. Mountains, Inc. v. Martin County Coal Corp., 2 FMSHRC 3216, 2 MSHC (BNA) 1058 (1980).
tion under analogous statutes favoring back pay, which should reflect total earnings, including overtime, premium pay, automatic raises and fringe benefits. The Commission has included vacation pay as part of "backpay." If medical expenses would have been covered by employer-provided insurance, the respondent may be ordered to reimburse the complainant for such expenses.

Back pay equals the pay the complainant would have earned minus interim earnings. The employer is responsible for withholding the amounts required by state or federal laws and for paying any additional contributions which those laws may require. Public assistance and unemployment benefits received while off work will not be deducted, since these payments may be recoverable by the state. Interest will be ordered paid on the back pay award at the rate used by the Internal Revenue Service for underpayments and overpayments of tax.

Laches may bar all or part of a back pay claim. Amounts which could have been earned with reasonable diligence, as well

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162 Secretary of Labor ex rel. Dunmire v. N. Coal Co., 4 FMSHRC 126, 2 MSHC (BNA) 1585 (1982). This decision also affirmed an ALJ's back award which included "incidental personal hearing expenses" incurred by the complaining miners. Id. at 1596-97 (the miners did not have legal expenses since they were represented by the Solicitor of Labor).
164 Back pay proceedings can be complex and time-consuming. So far, Commission cases have only begun to explore its many facets. The NLRB has highly refined back pay procedures developed over the past 40 years. See 3 NLRB CASEHANDLING MANUAL §§ 10530.1, et seq. (1977).
166 Howard v. Martin-Marietta Corp., 3 FMSHRC 1599, 2 MSHC (BNA) 1445 (1981); Florida Steel Corp., 231 NLRB 117 (1977). The current rate, effective as this article was written, was 12% per annum. Rev. Rul. 79-366, 1979-2 C.B. 402.
167 Cf. Lynn v. Western Gillette, Inc., 564 F.2d 1282 (9th Cir. 1977).
as actual interim earnings, will be deducted.\textsuperscript{168} Periods of unavailability, for example, during an illness, may also reduce the award.\textsuperscript{169}

In cases arising under Title VII of the Civil Rights Act, courts have occasionally awarded "front pay" when the violation was found particularly egregious.\textsuperscript{170} This compensates the complainant for loss of future earnings until promoted. Whether this remedy is available under section 105(c) has not been determined at this time.

A troublesome issue is whether special or compensatory damages may be awarded. The legislative history declares that "recompense for any special damages" should be granted.\textsuperscript{171} Yet it is generally held that compensatory damages cannot be recovered under statutes of this kind since the remedial provisions are equitable in nature.\textsuperscript{172} Damages for emotional distress, loss of value, pain and suffering and the like are legal in nature and the respondent may claim it is entitled to a jury trial on these issues. The Supreme Court has held, however, that if Congress commits the enforcement of a public right to an administrative agency, a jury trial may properly be denied even if one would be required were the case tried to a court.\textsuperscript{173}

In one respect, the remedial portions of section 105(c) differ

\textsuperscript{168} Cf. Bing v. Roadway Express, Inc., 485 F.2d 441 (5th Cir. 1973); NLRB v. Robert Haws Co., 403 F.2d 979, 981 (6th Cir. 1968).

\textsuperscript{169} Cf. Ostapowicz v. Johnson Bronze Co., 541 F.2d 394, 401 (3d Cir.), cert. denied in 429 U.S. 1041 (1976). Back pay will also be cut off as of the date an employee would have been laid off or terminated. Cf. NLRB v. Columbia Tribune Publishing Co., 495 F.2d 1384, 1393 (8th Cir. 1974).

\textsuperscript{170} White v. Carolina Paperboard Corp., 564 F.2d 1073, 1091 (4th Cir. 1977). See also East Texas Steel Castings Co., 116 NLRB 1336 (1956).


\textsuperscript{173} Atlas Roofing v. OSHRC, 430 U.S. 442, 455 (1977). Special damages consisting of lost equity in a truck were awarded in Luck Quarries, 2 FMSHRC 954, 1 MSHC (BNA) 2426 (1980).
markedly from other statutes. A violator may be assessed a civil penalty. Congress, however, seems to have given little thought to how such a penalty is to be assessed. The Secretary of Labor typically adds a claim for civil penalties to his prayer for relief in a section 105(c) complaint. Not surprisingly, miners who bring their own cases to the Commission tend to be unaware that civil penalties may be imposed. The problem is that civil penalties under the Mine Act are intended for violations of mandatory safety and health standards and the regulations governing their imposition do not fit in a discrimination case.

MSHA regulations allow a mine operator the opportunity to secure informal review of penalty assessments before the Commission becomes involved. After a citation is issued by an inspector, it is reviewed by an assessor who assigns what he believes is an appropriate penalty. The operator, upon receiving the results of this review, may request a conference with MSHA administrative personnel and changes in the penalty can be negotiated. After the conference process, MSHA sends the operator a proposed assessment. Within thirty days, the operator must either pay the assessment or request a formal hearing with the Commission.

Can a Commission ALJ impose a civil penalty after finding a violation of section 105(c)(1) without allowing the operator a chance to avail itself of these procedures? The answer is probably no.

174 "Violations by any person of paragraph (1) shall be subject to the provisions of sections 108 [818] and 110(a) [820(a)]." 30 U.S.C. § 815(c)(3) (Supp IV 1980). Section 108 provides for injunctions to enforce orders or decisions issued under the Mine Act. 30 U.S.C. § 818 (Supp. IV 1980). Section 110(a) directs the Secretary of Labor to assess a penalty for each violation of a mandatory safety or health standard. 30 U.S.C. § 820(a) (Supp. IV 1980). From this, it might be argued that only MSHA, not the Commission, may assess a penalty for a violation of § 105(c)(1). However, § 110(i) is broad enough to incorporate § 110(a). It declares that "[t]he Commission shall have authority to assess all civil penalties provided in this chapter [Act]." 30 U.S.C. § 820(i) (Supp. IV 1980). Although civil penalties are expressly authorized only for violations of § 105(c)(1), a penalty has been imposed for the failure to obey an order of temporary reinstatement issued pursuant to § 105(c)(2). Secretary of Labor ex rel. Bishop v. Mountain Top Fuel, Inc., 2 FMSHRC 1126, 1 MSHC (BNA) 2470 (1980).

175 See 30 C.F.R. §§ 100.1, et seq. (1981). The procedures described in these regulations are available only to mine operators. Section 105(c) extends to any "person." 30 U.S.C. 815(c)(1) (Supp. IV 1980). Whether this is an indication that only operators can be assessed a civil penalty for violations of § 105(c)(1) is unsettled at this writing.

The regulations described above specifically include alleged violations of section 105(c) within their scope. Commission intervention is probably inevitable, since the operator would fear prejudice to its defense in the discrimination case if it paid the proposed assessment in the civil penalty case. But the procedures would not necessarily be a hollow exercise. They might encourage settlement and, as in civil penalty cases generally, MSHA's views on the application of the statutory criteria may be helpful to the Commission.

Still, the statutory criteria for penalty assessments are ill-suited to discrimination cases. The size of the business and the operator's ability to pay, of course, should be considered. But in evaluating the history of previous violations, should the ALJ consider only violations of section 105(c) or violations of any statutory or regulatory provision under the Mine Act? How can the ALJ evaluate the operator's negligence when, as it universally the case under section 105(c), the operator intended to take the adverse action complained of? How is the "gravity" of the violation to be measured since the damage done is essentially non-physical?

We think an operator is at least entitled to the civil penalty procedures if it wants them. Of course, they may be waived but the waiver should be apparent on the record. We also believe that in fixing an appropriate penalty for a violation of section 105(c)(1), the statutory criteria should be abandoned in favor of a set of mitigating factors which can be developed on a case by case basis. The ALJ might consider, for example, whether the miner was granted temporary reinstatement, whether the operator's position was sustained in arbitration, whether the discriminatory conduct was endorsed by company management, and whether the miner specifically claimed the protection of the Mine Act when he engaged in the protected activity.

Section 105(c)(2)

A complaint of discrimination may be brought before the Commission by the Secretary of Labor (MSHA) or by the complaining

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They are: "[T]he operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation." 30 U.S.C. §§ 815(b)(1)(B), 820(d) (Supp. IV 1980).
miner. In all cases, the Secretary investigates the complaint and, if he finds a violation, files an action before the Commission on the miner's behalf. If the Secretary decides there is no violation, he notifies the miner who may then file a complaint with the Commission under section 105(c)(3).

A miner who believes he is the victim of discrimination "may, within sixty days after such violation occurs, file a complaint with the Secretary. . . ."[17a] The word "may" is significant, for it has been held that the filing periods are not jurisdictional.[18] Like statutes of limitation, they may be waived for equitable reasons.[179]

The complaint may be filed at any MSHA office.[160] Once it is filed, MSHA sends a copy to the respondent and commences an investigation. The Secretary must begin the investigation within fifteen days and conclude it within ninety days, but, despite the use of the mandatory "shall" in this passage of the statute, the drafters declared that "these time frames are not intended to be jurisdictional. The failure to meet any of them should not result in the dismissal of the discrimination proceedings; the complainant should not be prejudiced because of the failure of the government to meet its time obligations."[181] Controversy over the Secretary's timetable may be mooted by Commission Rule 40 which entitles the miner to file a complaint on his own behalf ninety days after he complained to the Secretary, whether or not the Secretary has made a determination on the complaint.[182]

The Secretary must "immediately" file a complaint with the Commission if he decides that a violation of section 105(c)(1) has occurred. The miner may present additional evidence on his own

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[179] Id.
EMPLOYMENT DISCRIMINATION

behalf if he so desires. Further, Commission rules allow intervention by other interested parties upon timely application. The Secretary, however, is in control of the action at all times and may compromise it or withdraw it as he sees fit. Whether the Secretary's conduct binds the complainant is unsettled. This is the rule followed in similar cases, but the drafter of the Mine Act, according to the Senate Committee report, "intend[ed] to afford a complainant the right to institute an action on his own behalf before the Commission if the Secretary, in the exercise of his discretion, settles a case brought under [section 105(c)(2)] on terms unsatisfactory to the complainant." Commission rules do not provide for this contingency. If an action were brought by a miner after the Secretary had filed a settlement on his behalf, a host of difficult issues would emerge concerning the effect of the settlement and the respondent's reliance thereon.

The Secretary, if he prevails, may secure the same relief as any prevailing party, described earlier. Complainants proceeding on their own may receive attorneys' fees in addition to other relief. The Mine Act does not provide for an award of attorneys' fees

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184 Id. at 2700.4(c).
185 See 7 A.M. JUR. 2D, Attorney General. § 18 (1980). It has been held that an employee's desire to withdraw his unfair labor practice charge is not binding on the General Counsel of the NLRB, nor is a union's waiver of back pay for its members. Nabors v. NLRB, 323 F.2d 686 (5th Cir. 1963). Analogously, the right of employee representatives to elect party status in proceeding under OSHA does not mean that they can continue to prosecute a citation after the Secretary of Labor has withdrawn from the case. IMC Chemical Group, Inc. v. OSHRC, 1980 (CCH) ¶ 24,990. See also UAW v. OSHRC, 557 F.2d 607 (7th Cir. 1977). However, the Commission has indicated that it will recognize greater autonomy in cases nominally controlled by the Secretary of Labor. In Secretary of Labor ex rel. Koerner v. Arch Mineral Coal Co., 1 FMSHRC 471, 1 MSHC (BNA) 1761 (1979), the Commission insisted on the miner's written consent to a settlement agreement before approving the Secretary's motion to dissolve an order of temporary reinstatement.

186 S. REP., supra note 6, at 37, reprinted in 1977 U.S. CODE CONG. & AD NEWS at 3437.
187 In Secretary of Labor ex rel. Gooslin v. Kentucky Carbon Corp., 3 FMSHRC 640 (1981), the Secretary sought to withdraw from the case after he had filed a complaint with the Commission, based on a conflict of interest. The ALJ denied the request to withdraw, stating that "Section 105(c)(2) clearly mandates MSHA to prosecute a discharge case where it determines that section 105(c)(1) of the Act has been violated." Id. at 652. Part of the ALJ's concern was that there is no statutory or regulatory provision implementing the language of the drafters cited in the text. He feared that the miner would be left in "limbo."
to a prevailing respondent. However, the Equal Access to Justice Act of 1980\textsuperscript{188} may be a vehicle for such reimbursement. Under certain conditions, a party prevailing against the government will receive costs, expenses, and attorneys' fees "unless the adjudicating officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust."\textsuperscript{189} This Act makes important amendments to the Administrative Procedure Act and became effective in October of 1981. Its potential impact on Commission proceedings is difficult to assess at this writing.

It often happens that a complainant will file a complaint under more than one act. Nothing in section 105(c)(2) suggests that the Secretary of Labor may defer to other federal agencies while they investigate or prosecute the same complaint. The Secretary did, however, develop such a policy of deference to the NLRB under OSHA. This practice was invalidated in \textit{Newport News Shipbuilding and Drydock Co. v. OSHA}.

\textsuperscript{190} The court's holding is equally applicable in the Mine Act. Once the Secretary finds a violation, the court said, the plain language of the statute compels him to bring an action on the employee's behalf.\textsuperscript{191}

No policy of administrative deference has been announced by MSHA, but there are in effect certain memoranda of understanding.\textsuperscript{192} The agreement with the Employment Standards Administration (ESA) provides that ESA will defer to MSHA on complaints within the jurisdiction if both.\textsuperscript{193} The NLRB has agreed to grant similar deference to MSHA.\textsuperscript{194} Thus, it is unlikely that MSHA will be criticized for improperly deferring to other federal agencies.\textsuperscript{195}

\begin{itemize}
  \item \textsuperscript{189} 5 U.S.C. § 504(a)(1) (Supp. IV 1980).
  \item \textsuperscript{190} 8 OSHC (BNA) 1393, 1980 OSHD (CCH) ¶ 24,510 (E.D. Va. 1980).
  \item \textsuperscript{191} See 29 U.S.C. § 661(c)(2) (1976). In fact, § 105(c)(2) adds the word 'immediately' to specify when the Secretary must file a complaint with the Commission. 30 U.S.C. § 815(c)(2) (Supp. IV 1980).
  \item \textsuperscript{192} MSHA and OSHA have published a memorandum of understanding, 44 Fed. Reg. 22,827 (1979), but it does not deal specifically with discrimination complaints. Rather, it describes the business operations that fall within the jurisdiction of either agency.
  \item \textsuperscript{193} 44 Fed. Reg. 247 (1979).
  \item \textsuperscript{194} 45 Fed. Reg. 6189 (1980).
  \item \textsuperscript{195} The issue of deference to arbitral or state-sponsored tribunals is discuss-
EMPLOYMENT DISCRIMINATION

Temporary Reinstatement

Another controversial portion of section 105(c) is the provision in section 105(c)(2) for temporary reinstatement: "[I]f the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint."196

This measure, as well as the authorization of civil penalties for violations of section 105(c), have long been urged by proponents of labor law revision, who argue that too many employees are willing to waive reinstatement rights in exchange for immediate back pay.197 Temporary reinstatement offsets this advantage to employers, promotes speedier resolution of discrimination complaints and encourages employees not to abandon their rights.198 The drafter of section 105(c) "[felt] that this temporary reinstatement is an essential protection for complaining miners who may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint."199

An order of temporary reinstatement is obtained on an ex parte application by the Secretary of Labor.200 The application must be accompanied by a copy of the miner's complaint, a statement from the Secretary stating his finding that the complaint is not frivolous and an affidavit setting forth the reasons therefor.201 If
the Secretary's finding appears to be supported by the accompanying documents, the order is issued and is effective upon receipt or actual notice.\footnote{222} As of this writing, an application for temporary reinstatement filed by the Secretary has never been denied.

The mine operator may request a hearing on the order and may insist that the hearing take place within five days after the request is filed.\footnote{223} The conduct of the hearing is entrusted to an ALJ and the sole issue is whether the miner's complaint was frivolously brought. After the hearing, the judge may dissolve, modify or continue the order.\footnote{224}

Implementing the temporary reinstatement provisions of the statute has caused problems for the Secretary and the Commission. The statute is silent on the question whether a hearing is required and, if it is, before whom it must be held.

The interim procedural rules\footnote{225} of the Commission which were in effect during the first year of its operation, did not provide for a hearing on a temporary reinstatement order. The order could be challenged only at a hearing on the merits of the complaint. The constitutionality of the procedure was challenged by two mine operators in the same federal district court in actions seeking

\footnote{222} The Commission's rule states that the order of temporary reinstatement is effective upon receipt or actual notice. In practice, however, the Chief ALJ issues the order and § 113(d)(1) of the Act states that an ALJ's decision "shall become the final decision of the commission 40 days after its issuance, unless within such period the Commission has directed that such decision be reviewed." 30 U.S.C. § 823(d)(1) (Supp. IV 1980). Can an ALJ's order be "effective" if it is not final? The Supreme Court has stated that "administrative orders are not reviewable unless and until they impose an obligation, deny a right, or fix some legal relationship as a consummation of the administrative process." Chicago & S. Air Lines, Inc., v. Waterman Steamship Corp., 333 U.S. 103, 112-13 (1948) (emphasis added). See also Abbott Laboratories v. Gardner, 387 U.S. 136 (1967). The difficult issue of effectiveness cannot be resolved in this article. Perhaps the Commission itself, rather than an ALJ, should issue the order of temporary reinstatement.

\footnote{223} See supra note 200.

\footnote{224} The rule does not expressly provide for an appeal to the Commission, but § 113(d)(2)(A) of the Act provides for discretionary review of a decision of an ALJ. Review of temporary reinstatement orders has been granted on at least two occasions. Secretary of Labor ex rel. Bobby Gooslin v. Kentucky Carbon Corp., 3 FMSHRC 1707, 2 MSHC (BNA) 1385 (1981); Secretary of Labor ex rel. Karnstein v. Allis Chalmers Corp., Docket No. LAKE 80-242-DM (1980).

preliminary injunctions. In the space of three weeks, one judge denied and another granted the relief sought.\footnote{206}

Both decisions expressed reservations about the procedure followed in temporary reinstatement proceedings and the Commission, after extensive public hearings, issued its new rules of procedure including Rule 44.\footnote{207} This rule provided for a hearing on an order of temporary reinstatement limited to the issue whether the Secretary's finding that the miner's complaint was not frivolous, was itself arbitrarily or capriciously made.\footnote{208}

The procedure was again challenged in Zeigler Coal Co. v. Marshall\footnote{209} where a federal district court refused to enjoin an order of temporary reinstatement issued by the Commission. The court held that the statutory provisions for temporary reinstatement did not contravene due process guarantees. Later, however, the Commission itself in Secretary of Labor ex rel Gooslin v. Kentucky Carbon Corp.\footnote{210} vacated an order of temporary reinstatement on the ground that the scope of the hearing was so narrow that it denied the mine operator a meaningful opportunity to be heard. Thereafter the Commission amended Rule 44, eliminating the arbitrary or capricious standard, and permitting an operator to test the sufficiency of a miner's complaint (i.e., whether it was frivolous) before an ALJ.\footnote{211}

Nevertheless, the procedure afforded still presents constitutional problems. That Congress has the power to provide for temporary reinstatement pending a decision on the merits is no longer in doubt.\footnote{212} "Congress has broad latitude to readjust the economic burdens of the private sector in furtherance of a public purpose. Only if Congress legislates to achieve its purpose in an arbitrary or irrational way is due process violated."\footnote{213} Temporary reinsta-

\begin{itemize}
\item \footnote{208} \textit{Id.} at 38,231.
\item \footnote{209} 502 F. Supp. 1326 (S.D. III. 1980).
\item \footnote{210} 3 FMSHRC 1707, 2 MSHC (BNA) 1385 (1981).
\item \footnote{211} \textit{See supra} note 200.
\end{itemize}
ment of a miner claiming discriminatory discharge is a rational way for Congress to attempt to counteract the effects to job discrimination.

The Congressional power to readjust the economic burdens of the private sector is subject to the mandate of the Fifth Amendment that liberty or property not be taken without due process of law. It could be argued that a temporary reinstatement order deprives a mine owner of liberty and property. In one sense property is not taken, however, because the operator receives a day's work for each day's wages he is ordered to pay. It is clear that temporary reinstatement deprives the employer of liberty: the liberty to manage its business and to hire and fire. This interest is by no means insubstantial. The operator may honestly believe that the discharged miner is inefficient or insubordinate, and he may be in fact. Reinstatement may cause disruption or resentment from other employees. If the reinstated employee is a supervisor, his misconduct or neglect could undermine an entire shift.

It is clear that due process must be observed, and the question is, what process is due? The bedrock constitutional requirements are adequate notice and an opportunity to be heard. Since the Administrative Procedure Act applies to temporary rein-

212 Nachman Corp. v. Pension Benefits Guaranty Corp., 592 F.2d 947, 958 (7th Cir. 1979), aff'd, 446 U.S. 359 (1980); see also Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 18 (1976).


214 The Secretary of Labor ordinarily agrees to "economic reinstatement," in which the miner is paid though he does not actually return to work, when the operator contends that returning him to the job would jeopardize production or tranquility in the workplace. S. Ohio Coal Co., 464 F. Supp. at 452.

215 Property interests are derived from laws, regulations or practices creating an entitlement to a certain interest. Liberty interests are those freedoms to which a person is thought entitled in a free society. Liberty includes "the right of the individual to contract, to engage in any of the common occupations of life... and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." Meyer v. Nebraska, 262 U.S. 390, 399 (1923). It should be noted, however, that the common law doctrine of employment at will is being eroded by judge - made exceptions based on public policy. See Note, Protecting at Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816 (1980).

EMPLOYMENT DISCRIMINATION

statement proceedings, these requirements are statutorily mandated as well. But the requirements are more than a matter of form. The hearing must be timely provided and may not be unduly restricted in scope.

The new Commission rule broadening the scope of a temporary reinstatement hearing makes it consistent with practice under the Federal Rules of Civil Procedure. The issue at the hearing is whether the miner's complaint was frivolously brought. This could be said to be equivalent to the issue of "probable cause" in federal civil practice.

Despite the new Commission rule, the question whether a hearing is timely afforded an operator remains a problem. Under the present rule the hearing will in almost all cases follow the issuance of the order.

Whether a hearing must precede a deprivation of liberty or property is not entirely clear from recent Supreme Court pronouncements. In one case the Court said that when the government proposes to take a person's liberty or property, a post-deprivation hearing is permissible only in "rare and extraordinary situations." Other cases, however, show a greater tolerance for a post-deprivation hearing so long as a specific factual showing must be made before a neutral magistrate as soon as practicable.


219 See FED. R. CIV. P. 65.

220 In an early draft of the Mine Act, the House Committee stated that "probable cause for the miner's complaint" would trigger the Secretary's obligation to investigate the charges. H. REP., supra note 1, at 24, LEG. HIST., supra note 1, at 380. Both standards have been looked to in proceedings to enjoin alleged violations of the Labor Act: "In determining whether reasonable cause exists to believe that unfair labor practices have been committed, the district court need only decide that the Board's theories of law and fact are not insubstantial or frivolous." Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1189 (5th Cir. 1975).


We believe the above cases establish that there must be a demonstrable need for immediate action in order to sustain an *ex parte* deprivation of liberty or property. This policy is followed in the Federal Rules of Civil Procedure and in other federal statutes in the labor field. The NLRB can obtain an injunction restraining allegedly unfair labor practices without prior notice and a hearing only in extraordinary circumstances. And it may not order an employer to bargain with a labor union without first providing a hearing to resolve disputed issues of fact. In the Mine Act itself an inspector may summarily close an entire mine only in situations of "imminent danger." Challenges to the procedure followed in temporary reinstatement proceedings are likely to continue. In our opinion, the new Commission rule is inadequate. If a post-deprivation hearing is to be the norm, the Secretary should be required to state on his application not only his finding that the complaint is not frivolous, but also facts from which it may be inferred that serious harm to the policies underlying the Mine Act are likely to occur in the time it would take to hold a hearing and render a decision on whether an order of temporary reinstatement should issue.

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224 29 U.S.C. § 160(j) (1976). Section 10(j) of the Labor Act requires the NLRB to issue a complaint before requesting an injunction. *Id.* In contrast, § 105(c)(2) of the Mine Act requires only a finding that the miner's complaint is not frivolous before a temporary reinstatement order is issued. 30 U.S.C. § 815(c)(2) (Supp. IV 1980). In extraordinary circumstances, a § 10(j) injunction may be obtained on an *ex parte* basis, but only on a showing of immediate and irreparable harm to the policies of the Act and only on condition that it last no more than 10 days. *Fed. R. Civ. P. 65(b).* See generally, Levine v. C. & W Mining Co., 610 F.2d 432 (6th Cir. 1979); Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185 (5th Cir. 1975).
226 30 U.S.C. § 817 (Supp. IV 1980). An "imminent danger" is a condition which could reasonably be expected to cause death or serious physical harm before the mine operator can correct it. 30 U.S.C. § 802(j) (Supp. IV 1980).
227 The legislative history supports this interpretation of the underlying basis for temporary reinstatement. Miners "may not be in the financial position to suffer even a short period of unemployment or reduced income pending the resolution of the discrimination complaint." *S. Rep., supra* note 6, at 36-37, *reprinted in 1977 U.S. Code Cong. & Ad. News* at 3436-37. Congress was "also aware that mining often takes place in remote sections of the country, and in places where work in the mines offers the only real employment opportunity." *Id.* at 35, *reprinted in 1977 U.S. Code Cong. & Ad. News* at 3435.
Section 105(c)(3)

If, upon investigation, the Secretary of Labor decides that discrimination did not occur, the miner may file a complaint on his own behalf with the Commission. The complaint should be filed within thirty days of the date the miner is notified of the Secretary's determination. This deadline is not jurisdictional and may be waived for equitable reasons. The Secretary ordinarily makes his determination within ninety days of receipt of the complaint, but if that period expires and no determination has been made, the miner may nevertheless file his complaint with the Commission.

In practice, the Commission will accept a letter from the miner stating his disagreement with the Secretary's determination in satisfaction of the filing deadline. The Commission then writes to the miner requesting copies of his original complaint to MSHA and the Secretary's determination letter. It also requests proof that the complaint was delivered to the respondent, which may consist of a return receipt for certified mail. Once the respondent files an Answer, the case is assigned to an ALJ for further proceedings. The hearing is de novo and no weight is assigned to the Secretary's determination.

The remedies available to a successful complainant have been previously described. If the complainant has sued on his own behalf, he may, in addition to these remedies, recover costs, expenses, and attorneys' fees if he prevails.

Johnson v. Georgia Highway Express sets forth the twelve criteria commonly used to compute an award of attorneys' fees. It has been held, however, that a delay of eight months in filing a complaint warranted dismissal of an action under § 105(c)(3). Monahan v. Exxon Minerals Co., 3 FMSHRC 1844 (1981).

29 C.F.R. § 2700.40(b) (1981). If an order of temporary reinstatement has been issued, the Secretary must notify the Commission of the decision adverse to the miner and the order will be dissolved. 29 C.F.R. § 2700.44(b) (1981).

The miner may use his original complaint to MSHA as his complaint to the Commission or he may draft a new one. It is important that he inform the respondent that he does not agree with MSHA's determination and is taking his case to the Commission.

29 C.F.R. § 2700.7(b) (1981).


See supra text accompanying notes 156-77.

448 F.2d 714 (5th Cir. 1974).

These criteria were extensively reviewed in Council of the Southern Mountains v. Martin County Coal Corp., 3 FMSHRC 526, 2 MSHC (BNA) 1058 (1981).
fields indicate that a law firm handling a case on a pro bono basis may recover attorneys' fees. Similarly, attorneys' fees may not be reduced because the firm is a legal clinic funded by government contributions. The time spent processing an appeal is also reimbursable, as is the time spent litigating the issue of attorneys' fees.

CONCLUSION

The purpose of this article has been to survey the major facets of section 105(c) of the Mine Act. From the standpoint of the practitioner in the field, the law is still in its infancy; major issues, such as the right to refuse to work and temporary reinstatement, still await definitive resolution. We believe that as mining becomes increasingly important to the national economy, familiarity with the Mine Act will be essential to many members of the legal profession.

Anti-discrimination provisions are not unique to the Mine Act, but the development of the law consciously involving the employees in the enforcement of safety regulation and protecting that involvement is unique. Nearly a century of legislative experience has convinced Congress that, because of the inherent risk to life and limb, the participation of each miner in the enforcement of safety and health laws is the only way to ensure effective and consistent safety and health practices through the industry. The declaration that "the first priority and concern of all in the coal or other mining industry must be the health and safety of its most precious resource—the miner" is more than pious rhetoric. The nation cannot afford to return to the era when the product—whether coal or gold—was more valued than the laborers who produced it.

227 Mary and Crystal v. Ramsden, 635 F.2d 590 (7th Cir. 1980); Reynolds v. Coomey 567 F.2d 1166, 1167 (1st Cir. 1978).
228 Mims v. Wilson, 514 F.2d 106, 111 (5th Cir. 1975).
Congress reasoned that "if miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation." It may be that the industry pays a price for this policy. It is also true that vindictive or irresponsible miners might abuse it. But the need for safety and health in the mines far outweighs these difficulties and, in the long run, we think it is self-evident that a clean and safe mine is a more efficient and productive mine.

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