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THE DICHOTOMY BETWEEN INDEPENDENT AND CUMULATIVE REASONS FOR AN ADVERSE ACTION: A NEW DEFENSE FOR EMPLOYERS TO CLAIMS OF WORKPLACE DISCRIMINATION

DHRUBA MUKHERJEE¹

PART I: INTRODUCTION

Fifteen years ago, in *Reeves v. Sanderson Plumbing Products Inc.*, the United States Supreme Court addressed the evidentiary burden borne by plaintiffs who seek to use indirect evidence to prove intentional discrimination.² The Court clarified that if a plaintiff establishes a *prima facie* case of discrimination and discredits all of an employer's non-discriminatory reasons for the adverse action, the trier of fact is permitted to find pretext, *i.e.*, that the employer's business justification is a pretext for wrongful discrimination).³ However, the Court failed to clarify whether a fact-finder may find pretext when only some of the employer's non-discriminatory reasons are discredited. As of today, the Supreme Court has yet to determine whether a plaintiff can demonstrate pretext by only discrediting some, not all, of the employer's proffered non-discriminatory reasons. Therefore, in such a situation, a fact-finder must look to the case-law developed by the United States Courts of Appeals. This paper will explore how the Sixth Circuit has attempted to address this issue, particularly in the context of the Mine Act.

In *Sims v. Cleland*, the Sixth Circuit held that when an employer offers multiple "alternative and independent" reasons for an adverse action, the falsity of

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² *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-149 (2000).

³ *Id.*

one such reason may not impeach the credibility of any other reason.⁴ However, the court failed to indicate how to distinguish reasons that are “alternative and independent” from reasons that are not. Equally important, the court failed to clarify whether, if the employer’s reasons are not independent, the falsity of one reason will necessarily impeach the credibility of the remaining reasons.⁵ In 2010, the Sixth Circuit clarified these unresolved issues in *Pendley v. Federal Mine Safety and Health Review Commission*,⁶ a case decided under the Federal Mine Safety and Health Act of 1977 (“the Mine Act”).⁷

The Mine Act prohibits an employer, known as a mine operator, from retaliating against a miner because the miner engaged in protected activity.⁸ Under the Mine Act, a miner can establish a *prima facie* case of discrimination by proving that his protected activity was a motivating factor in the adverse action. However, the mine operator can avoid all liability by proving an affirmative defense, *i.e.*, that even in the absence of protected activity, the miner would have suffered the same adverse action for his unprotected misconduct.⁹ The Federal Mine Safety and Health Review Commission (“the Commission”) is an independent adjudicative agency which interprets the Mine Act.¹⁰

In *Pendley v. Federal Mine Safety and Health Review Commission* (“FMSHRC”), the Sixth Circuit found that the three non-discriminatory reasons offered by the mine operator were not alternative and independent but cumulative.

⁴ *Sims v. Cleland*, 813 F.2d 790, 793 (6th Cir. 1987).

⁵ *Id.*

⁶ *Pendley v. Fed. Mine Safety and Health Review Comm’n*, 601 F.3d 417, 425-426 (6th Cir. 2010).

⁷ 30 U.S.C. § 801 *et seq.* (2012).

⁸ *See id.* § 815(c)(1).

⁹ *See Sec’y of Labor ex rel. Pasula v. Consolidation Coal Co.*, 2 F.M.S.H.R.C. 2786, 2799-2800 (1980), *rev’d on other grounds sub nom. Consolidation Coal Co. v. Marshall*, 663 F.2d 1211 (3d Cir. 1981).

¹⁰ Citations to Commission decisions will follow the Commission’s citation manual. Such citations will cite to specific volumes of the Commission’s bluebook, abbreviated as F.M.S.H.R.C., in lieu of a federal reporter, and will include the year of the Commission decision.

The court then held that if all reasons are cumulative, they must all be credible.¹¹ In other words, where the operator articulates two or more cumulative reasons, the falsity of one will impeach the credibility of the remaining reasons. Cumulative reasons thus have the exact opposite effect from alternative and independent reasons.

The Sixth Circuit's distinction between independent and cumulative reasons provides a set of incentives for employers. By strategically framing their non-discriminatory reasons as independent or cumulative, employers can utilize a loophole to secure an advantage in the affirmative defense analysis. However, it may be possible to close this loophole by eliminating an employer's ability to dictate whether its non-discriminatory reasons are treated as independent or cumulative.

Part I will summarize the purpose of the Mine Act, and will discuss the main Commission decisions regarding retaliation under the Mine Act. Part II will discuss the Sixth Circuit's decisions regarding independent and cumulative reasons for an adverse action. Part III will discuss how employers may be able to utilize a loophole in the dichotomy between independent and cumulative reasons. Further, Part III will propose a means by which the Commission may resolve this loophole.

Broadly speaking, the paper looks at the development, and consequences, of the Sixth Circuit's distinction between independent and cumulative reasons for an adverse action. In the future, the Sixth Circuit may apply the dichotomy of independent and cumulative reasons to other federal non-discrimination statutes. Part IV will briefly consider whether the principles outlined in this paper are broadly applicable in other contexts. In this regard, perhaps the paper could serve as a guide to federal courts which seek to implement a similar distinction in the context of other statutes.

PART I: THE MINE ACT

I.A. Background and Purpose

Congress passed the Federal Mine Safety and Health Act of 1977 ("the Mine Act")¹² to consolidate the federal regulations regarding mining into a single

¹¹ *Pendley*, 601 F.3d at 425-426.

¹² 30 U.S.C. § 801.

statutory scheme.¹³ The Mine Act seeks to ensure the safety and health of miners by preventing mine accidents that result in injuries or fatalities.¹⁴ The Act directs the Secretary of Labor “to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation’s coal or other miners” and requires that mine operators and miners comply with such standards.¹⁵

Under the Mine Act, the Mine Safety and Health Administration (“MSHA”), an agency in the Department of Labor, promulgates and enforces mine health and safety standards. MSHA employs numerous inspectors who periodically inspect mines. If an inspector determines that an operator has violated any of MSHA’s mandatory standards, he will issue a citation to the operator. The citation will describe the violation of the relevant standard and will require the operator to “abate” (fix) the violation. In certain situations, the inspector may also issue an order requiring that miners be removed from a hazardous area until the hazard has been removed. After the inspector issues a citation or order, MSHA will generally propose a penalty (fine) to the operator as a result of the violation.¹⁶

The Federal Mine Safety and Health Review Commission, an independent adjudicative agency, adjudicates disputes between MSHA and mine operators regarding the validity of citations, orders, and penalties. The Commission is comprised of an Office of Administrative Law Judges, which decides cases at the trial level (without a jury), and a Review Commission, which provides appellate review of judges’ decisions.¹⁷ The Review Commission is comprised of five Commissioners appointed by the President. Final Review Commission decisions

¹³ The Mine Act was amended by the Mine Improvement and New Emergency Response Act of 2006 (“MINER Act”), Pub. L. 109-236. Any reference to the Mine Act will refer to the amended version of the Act.

¹⁴ Mine Safety and Health Admin., *History of Mine Safety and Health Legislation*, MSHA.GOV, <http://www.msha.gov/MSHAINFO/MSHAINF2.HTM> (last visited Dec. 19, 2013).

¹⁵ 30 U.S.C. §§ 801(g)(1)-(2).

¹⁶ Fed. Mine Safety and Health Review Comm’n, *Guide to Commission Proceedings*, FMSHRC.GOV, <http://www.fmshrc.gov/guides/guide-commission-proceedings> (last visited Dec. 20, 2013).

¹⁷ *Id.* (providing further that Review Commission decisions form precedent for the administrative law judges of the Commission; however, a decision by a Commission judge is merely persuasive, and not binding on the other judges).

are appealed to the United States Courts of Appeals.¹⁸ As the Commission adjudicates disputes under the Mine Act, it is not bound by federal court decisions which address issues under other federal statutes. However, decisions by the United States Courts of Appeals interpreting other statutes, such as Title VII, may have persuasive value.

In addition to MSHA inspectors, the Mine Act also relies on miners to report violations of mandatory safety standards that create unsafe working conditions. The miners may report such violations either to their supervisors or to MSHA. As the Commission has stated:

MSHA inspectors cannot be everywhere at once, nor can they be expected to be so familiar with every mine that they will become aware of every condition or practice in need of correction. The successful enforcement of the 1977 Mine Act is therefore particularly dependent upon the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction.¹⁹

However, operators may often attempt to discourage miners from making safety complaints by disciplining miners who complain about unsafe working conditions. If operators were allowed to freely retaliate against miners who made safety complaints, miners would be very reluctant to complain about safety hazards. Congress recognized and addressed this issue in the Mine Act by enacting section 105(c), commonly known as the anti-retaliation provision of the Mine Act.

Section 105(c) is comprised of three sub-sections. Section 105(c)(1) prohibits an operator from retaliating against a miner because the miner engaged in an activity protected under the Mine Act, such as making a complaint about unsafe working conditions.²⁰ Section 105(c)(2) permits a miner to file a complaint with

¹⁸ *Id.*

¹⁹ Sec’y of Labor ex rel. Pasula v. Consolidation Coal Co., 2 F.M.S.H.R.C. 2786, 2790 (1980), *rev’d on other grounds sub nom.* Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981).

²⁰ 30 U.S.C. § 815(c)(1) (1977) (stating in relevant part that “no person shall discharge or in any manner discriminate against or cause to be discharged or cause

MSHA alleging retaliation.²¹ If, after an investigation, MSHA determines that the operator engaged in discrimination, an attorney from the Department of Labor will represent the miner at the subsequent hearing before an administrative law judge of the Commission. However, under section 105(c)(3), even if MSHA determines that the operator did not violate section 105(c)(1), the miner can independently pursue a claim of discriminatory retaliation before the Commission.²² In a 105(c)(3) action, the miner is represented by private counsel, or represents himself *pro se*.

I.B. Retaliation under the Mine Act

In 1980, the Review Commission set forth the framework for analyzing claims of retaliation under the Mine Act. In *Pasula v. Consolidation Coal*, the Review Commission considered whether to adopt the “in any part” test or the “but for” test to determine whether an operator engaged in unlawful discrimination.²³ Under the former test, a plaintiff can establish prohibited discrimination by showing that his protected activity was a motivating factor for the adverse action. Under the latter test, a plaintiff can establish prohibited discrimination only by showing that he would not have suffered the adverse action but for his protected activity.

There are advantages and disadvantages to using each test. The “in any part” test is easier for employees to satisfy, but may protect employees who would have been fired in any event for their unprotected misconduct. The “but for” test returns the employee to the position he would have occupied if he had not engaged in protected activity, but is a much harder test which may deter other employees

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 operator or the operator’s agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine”).

²¹ *Id.* § 815(c)(2).

²² *Id.* § 815(c)(3).

²³ *Pasula*, 2 F.M.S.H.R.C. at 2797-2800.

from filing claims of discrimination.²⁴ In *Pasula*, the Review Commission adopted elements from both tests.

The Review Commission stated that a miner can establish a *prima facie* case of retaliation under the Mine Act by demonstrating by a preponderance of the evidence that: (1) he engaged in activity protected under the Mine Act and that (2) the adverse action²⁵ was motivated in any part by his protected activity. The miner bears the burden of production and persuasion in proving his *prima facie* case.²⁶ However, the Review Commission also stated that an operator may affirmatively defend by proving by a preponderance of the evidence that (1) the adverse action was motivated by both the miner's protected and unprotected activities and that (2) the operator would have taken the adverse action for the miner's unprotected misconduct alone. In essence, the employer must prove that the protected activity was not the "but for" cause of the adverse action.²⁷ The operator bears the burden

²⁴ *Id.* at 2797-98.

²⁵ This paper will focus on adverse actions that take the form of disciplinary actions, issued to an employee for specific instances of misconduct. When an employer issues a disciplinary action, the employee is given a letter of discipline, which lists non-discriminatory reasons for the adverse action.

²⁶ *Pasula*, 2 F.M.S.H.R.C. at 2799; *see also* Sec'y of Labor ex rel. Chacon v. Phelps Dodge Corp., 3 F.M.S.H.R.C. 2508, 2510-11 (1981), *rev'd on other grounds sub nom.* Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983) (noting that the Commission has permitted miners to establish a *prima facie* case through the use of indirect evidence; indirect evidence of a causal connection between the protected activity and the adverse action may include: (1) coincidence in time between the protected activity and the adverse action, (2) the operator's knowledge of the protected activity, (3) the operator's hostility or animus towards the protected activity, and (4) disparate treatment of the plaintiff).

²⁷ *See* Sec'y of Labor ex rel. Robinette v. United Castle Coal Co., 3 F.M.S.H.R.C. 803, 818 n.20 (1981) (providing that under the Mine Act, an operator may also attempt to rebut a *prima facie* case, by showing either that the miner did not engage in protected activity or that the adverse action was not motivated by the miner's protected activity; whether the operator rebuts the *prima facie* case or establishes an affirmative defense, the effect under the Mine Act is the same – the operator avoids all liability for the adverse action; thus, given that an affirmative defense is easier to prove but has the same effect as a rebuttal, it is reasonable to

of production and persuasion in proving an affirmative defense.²⁸ If the operator establishes an affirmative defense, there is no violation of section 105(c), and the operator avoids all liability for the adverse action.²⁹

The Review Commission integrated the “in any part” test into the miner’s *prima facie* case to prevent “the imposition upon the complainant of what may be an impossible burden to shoulder.”³⁰ The Review Commission integrated the “but for” test into the operator’s affirmative defense to ensure that a miner is returned to the same position he would have occupied if he had not engaged in protected activity, instead of being placed in a more favorable position.³¹ The Review Commission has recognized that an operator must show that “he did in fact consider the employee deserving of discipline for engaging in the unprotected activity alone and that [the operator] would have disciplined [the employee] in any event.”³²

The Review Commission has explained that an affirmative defense should not be “examined superficially or be approved automatically once offered.”³³ In reviewing affirmative defenses, an administrative law judge must “determine whether [the reasons proffered by the operator] are credible and, if so, whether they would have motivated the particular operator as claimed.”³⁴ In regards to showing that an affirmative defense is pre-textual, the Review Commission has held that “pretext may be found . . . where the asserted [business] justification is

infer that most claims of retaliation under the Mine Act hinge on the operator’s affirmative defense).

²⁸ *Pasula*, 2 F.M.S.H.R.C. at 2799-2800.

²⁹ *See generally* Robinette, 3 F.M.S.H.R.C. at 818 n.20 (stating in relevant part that “if a complainant who has established a *prima facie* case cannot refute an operator’s meritorious affirmative defense, the operator prevails”); *see also* Chacon, 3 F.M.S.H.R.C. at 2517-18 (noting even though the plaintiff established a *prima facie* case, the complaint was dismissed because the operator established an affirmative defense).

³⁰ *Pasula*, 2 F.M.S.H.R.C. at 2800.

³¹ *Id.*

³² *Id.*

³³ Haro v. Magma Copper Co., 4 F.M.S.H.R.C. 1935, 1938 (1982).

³⁴ Bradley v. Belva Coal Co., 4 F.M.S.H.R.C. 982, 993 (1982).

weak, implausible, or out of line with the operator's normal business practices."³⁵ However, the Review Commission has also held that in evaluating whether an affirmative defense is pre-textual, "our judges should not substitute for the operator's business judgment our views on good business practice."³⁶

Taking cues from a Sixth Circuit decision interpreting other federal non-discrimination statutes, the Review Commission further analyzed the issue of pretext in *Turner v. National Cement*.³⁷ In *Turner*, the Review Commission listed two ways in which a miner can show that the operator's affirmative defense is not credible but rather a pretext for prohibited discrimination. First, a miner can establish that the operator's proffered reason(s) for the adverse action have no basis in fact, *i.e.*, that they are factually false. Second, a miner can show that the proffered reason(s) did not actually motivate the adverse action.³⁸ In this regard, the miner admits the factual basis underlying the operator's proffered reason(s), and that such conduct could motivate dismissal, but attacks the credibility of the proffered reason(s) indirectly by showing circumstances which tend to prove that an illegal motivation was more likely than the legitimate business reason(s) proffered by the operator.³⁹

³⁵ Sec'y of Labor ex rel. Price v. Jim Walter Res., Inc. 12 F.M.S.H.R.C. 1521, 1534 (1990).

³⁶ Sec'y of Labor ex rel. Chacon v. Phelps Dodge Corp., 3 F.M.S.H.R.C. 2508, 2516 (1981), *rev'd on other grounds sub nom.* Donovan v. Phelps Dodge Corp., 709 F.2d 86 (D.C. Cir. 1983).

³⁷ *Turner v. Nat'l Cement Co.*, 33 F.M.S.H.R.C. 1059, 1073 (2011) (citing *Madden v. Chattanooga City Wide Serv. Dep't*, 549 F.3d 666, 675 (6th Cir. 2008)).

³⁸ *Id.*

³⁹ *Turner*, 33 F.M.S.H.R.C. at 1073-1077 (noting a third approach for demonstrating pretext; a miner can demonstrate pretext by showing that the employer's proffered non-discriminatory reason(s) were insufficient to motivate the adverse action, *i.e.*, other employees did not suffer the same adverse action even though they engaged in conduct substantially similar to that which formed the basis of the adverse action at issue. The Review Commission implicitly suggested that all circumstantial evidence of discrimination should be analyzed under the second approach, indirectly limiting the third approach to direct evidence of disparate treatment).

The most recognized federal non-discrimination statute is Title VII of the Civil Rights Act of 1964.⁴⁰ Therefore, it is instructive to compare the burden-shifting framework of the Mine Act's anti-retaliation provision to the burden-shifting frameworks of Title VII's anti-retaliation and status-based discrimination provisions. In this paper, status-based discrimination will refer to discrimination based on a protected status such as the employee's race, color, religion, sex, or national origin.

In contrast to the Mine Act, a plaintiff who claims retaliation under Title VII⁴¹ must establish that his protected activity was a "but for" cause of the adverse action.⁴² In this regard, he bears the burden of persuasion to establish that he would not have suffered the adverse action in the absence of his protected activity. As previously discussed, under the Mine Act the employer bears the burden of persuasion regarding but for causation. In this regard, after the plaintiff establishes a *prima facie* case, the employer must prove, as part of its affirmative defense, that the protected activity was not the "but for" cause of the adverse action.

In contrast to the Mine Act, a plaintiff can prove "status-based discrimination" under Title VII under a lessened causation standard. A plaintiff can prove such discrimination by simply establishing that his protected status was a motivating factor in the adverse action.⁴³ After the plaintiff makes such a showing, he is entitled to declaratory relief and attorney's fees, regardless of the employer's affirmative defense. While the employer can defend by showing that the plaintiff would have suffered the adverse action in any event for his unprotected activities, a credible affirmative defense only precludes liability for compensatory damages and reinstatement.⁴⁴ When a plaintiff claims status-based

⁴⁰ 42 U.S.C. § 2000e *et seq.* (2012).

⁴¹ 42 U.S.C. § 2000e-3(a) (2012).

⁴² *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (2013).

⁴³ 42 U.S.C. § 2000e-2(m) ("An unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.")

⁴⁴ *Id.* § 2000e-5(g)(2)(b) ("On a claim in which an individual proves a violation under [42 U.S.C. § 2000e-2(m)] and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court – (i) may grant declaratory relief, injunctive relief and, (ii)

discrimination, the affirmative defense is part of the remedy stage of litigation. This stage is only reached after the plaintiff has already proven a violation, *i.e.*, that his protected status was a motivating factor in the adverse action. Therefore, since the plaintiff has already proven discrimination, a successful affirmative defense does not preclude liability for attorney's fees. In contrast, when a plaintiff claims retaliation under the Mine Act, the affirmative defense is part of the violation or liability stage of litigation. In this regard, the plaintiff must discredit an employer's affirmative defense to prove discrimination. Therefore, a successful defense precludes all liability.

It is easier for a plaintiff to establish prohibited status-based discrimination under Title VII than prohibited retaliation under the Mine Act. A plaintiff can establish status-based discrimination by simply showing that his protected status was a motivating factor in the adverse action. In contrast, a plaintiff can only establish retaliation under the Mine Act by showing that his protected activity was a motivating factor in the adverse action AND that the employer's affirmative defense is not credible.

PART II: THE SIXTH CIRCUIT

In *Pendley v. FMSHRC*, the Sixth Circuit clarified how the Commission must review claims of retaliation under the Mine Act. The court considered whether a plaintiff can show that an operator's justification, comprised of multiple non-discriminatory reasons for an adverse action, is pre-textual when only some of the reasons are found to be false. The court concluded that if the reasons are alternative and independent, the plaintiff can show pretext only by demonstrating that all the reasons are not credible. Conversely, if the reasons are cumulative, the plaintiff can show pretext by simply demonstrating that one of the reasons is not credible. In this regard, the Sixth Circuit built on principles it had earlier laid down in *Sims v. Cleland*.

II.A. Sims v. Cleland

attorney's fees and costs demonstrated to be directly attributable only to the pursuit of a claim under [42 U.S.C. § 2000e-2(m)]; and (iii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment, described in subparagraph (A).”)

In *Sims v. Cleland*, the Sixth Circuit adjudicated claims of sex and age-based discrimination under Title VII and the Age Discrimination in Employment Act of 1967⁴⁵ respectively.⁴⁶ During the bench trial in the district court, the plaintiff claimed she suffered discrimination when she was passed over for promotion in favor of a younger male co-worker. The employer claimed 1) that the plaintiff was not qualified for the promotion and 2) that the employer believed in good faith that the other individual was more qualified due to his attitude and work habits. The district court, while finding the former reason to be false, held that there was no discrimination since the latter reason was the true reason for the adverse action. The issue before the Sixth Circuit was whether, if an employer proffers multiple non-discriminatory reasons for an adverse action, the falsity of one reason mandates a finding of pretext.⁴⁷

The Sixth Circuit recognized that if an employer only offers a single non-discriminatory reason, which is proven false, the fact-finder is only left with circumstantial inferences that the employer was motivated by discriminatory animus. In such a situation, the court held that the plaintiff must prevail. However, the court added that “it is not merely the falsity or incorrectness of the articulated reason that gives rise to the conclusion of pretext; rather, it is the resulting absence of legitimate explanation for the suspect employment decision that warrants the finding of discrimination.”⁴⁸ This principle implies that when an employer proffers multiple non-discriminatory reasons for an adverse action, as long as one of the reasons is credible, there is a legitimate explanation for the discipline. Therefore, in such a scenario, the court should not find discrimination.

However, the Sixth Circuit further stated, “where two or more alternative and independent legitimate, nondiscriminatory reasons are articulated by the defendant employer, the falsity or incorrectness of one may not impeach the credibility of the remaining articulated reason(s).”⁴⁹ In this regard, the court limited the principle that one reason may not impeach the credibility of another to

⁴⁵ 29 U.S.C. § 623 (2012).

⁴⁶ *Sims v. Cleland*, 813 F.2d 790, 791 (6th Cir. 1987).

⁴⁷ *Id.* at 791-793.

⁴⁸ *Id.* at 793.

⁴⁹ *Id.*

“alternative and independent” reasons.⁵⁰ However, the court failed to clarify how to distinguish between reasons that are alternative and independent and reasons that are not. The court also failed to clarify whether, if an employer’s justification is comprised of multiple non-alternative and independent reasons, the falsity or incorrectness of one will necessarily impeach the credibility of the remaining reasons.⁵¹

The Sixth Circuit implicitly assumed, without further explanation, that the two reasons proffered by the employer in the case at bar were alternative and independent. Therefore, the court held that the falsity of the former reason did not impeach the credibility of the latter reason. Accordingly, the Sixth Circuit affirmed the district court’s finding that the employer’s business justification was not pre-textual.

II.B. Pendley v. FMSHRC

In 2010, the Sixth Circuit decided *Pendley v. FMSHRC*, which involved a claim of retaliation under the Mine Act. In that case, the plaintiff miner was terminated for three non-discriminatory reasons: 1) harassment of office staff, 2) interference with safety check of a hoist potentially endangering the safety of those conducting the test, and 3) assaulting another employee.⁵² The initial trial was conducted before an administrative law judge of the Commission. The judge’s

⁵⁰ Since the issue was whether the falsity of one alternative and independent reason mandates a finding of pretext, the Sixth Circuit could have merely held that the falsity of one independent reason does not necessarily impeach the credibility of other reasons. Instead, the court held that the falsity of one alternative and independent reason may not impeach the credibility of other reasons, resulting in a bright line rule. *See Sims*, 813 F.2d at 793.

⁵¹ In *Sims*, the Sixth Circuit analyzed an employer’s business justification in the context of rebuttals under the *McDonnell-Douglas* framework. However, the distinction between reasons that are alternative and independent and reasons that are not is equally applicable to the affirmative defense analysis. *See Sims*, 813 F.2d at 793.

⁵² *Pendley v. Fed. Mine Safety and Health Review Comm’n*, 601 F.3d 417, 425-426 (6th Cir. 2010).

decision was appealed to the Commissioners of the Review Commission, and the Review Commission's subsequent decision was appealed to the Sixth Circuit.⁵³

After the trial, the administrative law judge dismissed the miner's complaint since he found that the operator had rebutted the miner's *prima facie* case of discrimination.⁵⁴ While the judge only found two of the three reasons proffered by the employer to be credible, he found these two reasons to be sufficient to have motivated the miner's termination. Specifically, the judge stated that:

I do not find [the second reason, interference with safety check of a hoist] crucial to the validity of the disciplinary action. It was enough, in my view, that [the miner] was involved in the oral altercation with the office employees [(the first reason),] and the physical altercation with [another employee] [(the third reason)].⁵⁵

The Review Commission affirmed the judge's decision, holding that "the judge's role in examining the reasons for [the miner's] discharge under the Mine Act does not require that [the judge] adopt every reason given by the operator in order to sustain the discipline."⁵⁶ However, the Sixth Circuit disagreed, and in its decision, further clarified the dichotomy between alternative and independent and cumulative reasons for an adverse action.

On review, the Sixth Circuit distinguished alternative and independent reasons from "cumulative reasons" for an adverse action. The court acknowledged the *Sims* principle that "where two or more alternative and independent legitimate, nondiscriminatory reasons are articulated by the defendant employer, the falsity or incorrectness of one may not impeach the credibility of the remaining articulated

⁵³ *Id.*

⁵⁴ Sec'y of Labor ex rel. Pendley v. Highland Mining Co., 34 F.M.S.H.R.C. 1919, 1922 (2012) (the Review Commission on remand from the Sixth Circuit discussing the judge's decision).

⁵⁵ Sec'y of Labor ex rel. Pendley v. Highland Mining Co., 30 F.M.S.H.R.C. 459, 495 n.43 (2008) (the original decision by the administrative law judge).

⁵⁶ *Pendley*, 601 F.3d at 425-426 (citing Sec'y of Labor ex rel. Pendley v. Highland Mining Co., 31 F.M.S.H.R.C. 61, 79 (2009) (the original decision by the Review Commission appealed to the Sixth Circuit)).

reason(s).”⁵⁷ However, the court further stated that the reasons at bar “have not been shown to be alternative and independent reasons, but are, according to the decision-maker’s testimony, cumulative reasons for termination.”⁵⁸

The Sixth Circuit held that when the non-discriminatory reasons for an adverse action are “cumulative,” each of the reasons must be credible.⁵⁹ In other words, when all reasons are cumulative, the falsity or incorrectness of one will impeach the credibility of the remaining reasons.⁶⁰ When all reasons are impeached, the fact-finder will be left without any legitimate explanation for the adverse action. And once there is an absence of any legitimate explanation, a finding of discrimination is warranted. The court further recognized that to distinguish reasons that are cumulative from reasons that are independent, the viewpoint of the decision-maker is of paramount importance.

The Sixth Circuit found that if a decision-maker issues the disciplinary action “based” on all of the enumerated reasons, the reasons are cumulative.⁶¹ In this regard, the decision-maker views the combined reasons as justifying the adverse action. Conversely, if the decision-maker views the reasons as being independent bases for the disciplinary action, the reasons are alternative and independent. According to the court, the decision-maker’s viewpoint can be discerned from the structure of the letter of disciplinary action given to the employee, and from the decision-maker’s testimony at trial.

As indicated above, the Sixth Circuit found that the non-discriminatory reasons proffered by the employer in the case at bar were cumulative. Therefore, all three reasons needed to be credible. However, the administrative law judge did not examine the credibility of the second reason for the adverse action (interference with safety check of a hoist). Therefore, the Sixth Circuit remanded the case requiring the Commission to examine the credibility of the second reason

⁵⁷ *Id.* at 426 n.4 (citing *Cooley v. Carmike Cinemas*, 25 F.3d 1325, 1329 (6th Cir. 1994) (quoting *Sims v. Cleland*, 813 F.2d 790, 793 (6th Cir. 1987))).

⁵⁸ *Id.*

⁵⁹ *Id.* at 425-26.

⁶⁰ *Id.* at 431 n.4 (noting the distinction between alternative and independent and cumulative reasons applies to the employer’s business justification, regardless of whether the business justification is part of the employer’s rebuttal or affirmative defense).

⁶¹ *Id.* at 425-29.

before sustaining the disciplinary action and dismissing the complaint. On remand, the Review Commission remanded the case to the administrative law judge to determine the credibility of the second reason “in light of . . . the Court of Appeals finding that in fact the three reasons given were cumulative rather than independent.”⁶²

As discussed above, the influence of *Sims v. Cleland* is apparent in the Sixth Circuit’s decision. Less apparent is the influence of prior Commission case-law. In *Pendley v. FMSHRC*, the Sixth Circuit claimed that the Review Commission departed from its own precedent in holding that an adverse action can be sustained even if some of the operator’s reasons are not credible. More precisely, the Sixth Circuit claimed that under prior decisions by the Review Commission, “the [Review] Commission may not disbelieve part of an operator’s justification [the second reason] but nonetheless hold that in the [Review] Commission’s own view[,] [another] part of the asserted justification [the first and third reasons] was enough to support the adverse action.”⁶³ In this regard, the Sixth Circuit implied that Review Commission precedent dictated that all reasons for an adverse action must be credible. However, it is highly ambiguous as to whether the Review Commission’s prior case-law suggested that all reasons for an adverse action must be found credible in order for the judge to sustain the disciplinary action.

The Sixth Circuit primarily relied on two decisions by the Review Commission, Sec’y of Labor *ex rel. Chacon v. Phelps Dodge Corp.* and Sec’y of Labor *ex rel. McGill v. U.S. Steel*.⁶⁴ In *Chacon*, the Review Commission merely held that an administrative law judge had improperly rejected an operator’s affirmative defense by applying a subjective standard of fairness as to what

⁶² On remand, the Review Commission claimed that the Sixth Circuit remanded the matter so that the Commission may examine the credibility of the second reason for the termination. *See* Sec’y of Labor *ex rel. Pendley v. Highland Mining Co., 34 F.M.S.H.R.C. 1919, 1926 (2012)*. It is unclear, however, whether this interpretation of the Sixth Circuit’s decision was accurate. The Sixth Circuit believed that the administrative law judge discredited the second reason, which would preclude the need for the Commission to determine the credibility of that reason. *See Pendley*, 601 F.3d at 426.

⁶³ *Pendley*, 601 F.3d at 426.

⁶⁴ *Id.* at 425.

constituted an appropriate business practice.⁶⁵ In *McGill*, the Review Commission simply held that an administrative law judge may not substitute a different affirmative defense for the one relied upon by the operator.⁶⁶ There was no indication, in either case, that an administrative law judge must find all reasons proffered by the operator to be credible in order to sustain the disciplinary action. In addition, neither case distinguished between alternative and independent and cumulative reasons for an adverse action.

Therefore, the Sixth Circuit arguably imposed its own principles to a claim of retaliation under the Mine Act. First, the Sixth Circuit's implicit presumption, that under prior Review Commission case-law all non-discriminatory reasons must be credible, is flawed. This claim relies on the debatable assumption that *Chacon* and *McGill* held that all of the operator's reasons must be found credible before an adverse action may be sustained. Second, even if the first claim were supported by the case-law, the Sixth Circuit's distinction between alternative and independent and cumulative reasons for an adverse action is unsupported by any decision by the Review Commission. In this regard, the Sixth Circuit's own interpretation of Review Commission precedent contradicts the distinction between independent and cumulative reasons. If prior Commission precedent holds that all reasons must be credible in all circumstances, then it fails to distinguish between cumulative and independent reasons.

Regardless, the Sixth Circuit may, in the near future, apply such principles to other federal non-discrimination statutes.⁶⁷ In *Sims v. Cleland*, the Sixth Circuit

⁶⁵ Sec'y of Labor ex rel. *Chacon v. Phelps Dodge Corp.*, 3 F.M.S.H.R.C. 2508, 2516-17 (1981), *rev'd on other grounds sub nom. Donovan v. Phelps Dodge Corp.*, 709 F.2d 86 (D.C. Cir. 1983).

⁶⁶ Sec'y of Labor ex rel. *McGill v. U.S. Steel Mining Co.*, 23 F.M.S.H.R.C. 981, 987-89 (2001) (explaining that while the employer argued that the adverse action was motivated by the employee's insubordination and profanity, the administrative law judge instead found that the adverse action was motivated by the employee's threat to file a grievance and other labor-contract related issues.)

⁶⁷ The Sixth Circuit's decision in *Pendley* may not apply in the same manner to all federal non-discrimination statutes. Under the Mine Act, Review Commission case-law strongly suggests that the falsity of an employer's proffered business justification mandates a finding of discrimination. In this regard, *McGill* holds that the fact-finder is bound to the affirmative defense proffered by the employer. In contrast, under other federal non-discrimination statutes, the falsity of an

mentioned alternative and independent reasons in the context of status-based discrimination under Title VII. An affirmative defense to a claim of status-based discrimination may similarly consist of multiple non-discriminatory reasons for an adverse action. Thus, the Sixth Circuit may apply, and perhaps even further develop, the dichotomy between alternative and independent and cumulative reasons in the context of status-based discrimination under Title VII.

PART III: MANIPULATING THE DICHOTOMY

III.A. The Loophole

In light of the dichotomy between independent and cumulative reasons, the Commission should use a two-tiered framework to determine whether an operator's affirmative defense is pre-textual. At the first tier, the Commission should assess the credibility of each non-discriminatory reason proffered by the operator. At the second tier, the Commission should assess the substantiality of the affirmative defense, *i.e.*, whether the operator's non-discriminatory reasons are substantial enough to motivate the adverse action in the absence of protected activity. The new two-tiered framework will require a slight reformulation of the Commission's prior framework set forth in *Turner*.⁶⁸

The first approach in *Turner* permits a miner to demonstrate pretext by showing that the operator's non-discriminatory reasons are factually false.⁶⁹ In the new framework, at the first tier, the fact-finder should continue to assess the factual accuracy of each reason. In addition, the presiding administrative law judge should determine whether each non-discriminatory reason reflects a violation of a

employer's business justification may permit, rather than mandate, a finding of discrimination. In this regard, under other federal non-discrimination statutes, a fact-finder may substitute a different justification for the one proffered by the employer. *See generally* *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 147-149 (2000). While *Reeves* was decided a year before *McGill*, the Review Commission chose not to incorporate the *Reeves* principle into the burden shifting framework of the Mine Act.

⁶⁸ *Turner v. Nat'l Cement Co.*, 33 F.M.S.H.R.C. 1059, 1073-77 (2011).

⁶⁹ *Id.* at 1073.

consistently enforced company policy.⁷⁰ This will allow the judge to determine whether each non-discriminatory reason is factually accurate and a credible basis for any discipline. If the operator's affirmative defense clears the first tier, the judge should determine whether, under the second tier, the affirmative defense is substantial enough to motivate the discipline at issue.

The second approach in *Turner* permits a miner to demonstrate pretext by showing that the operator's non-discriminatory reasons were not substantial enough to motivate the adverse action.⁷¹ The miner must rely on circumstantial evidence that in the absence of protected activity, the miner would not have suffered the adverse action. In practical terms, a fact-finder can determine the substantiality of the operator's non-discriminatory reasons by assessing several factors. The presiding administrative law judge must assess: 1) whether the miner's past work record, including his past disciplinary record, was satisfactory; 2) whether the miner had received any prior warnings for the misconduct at issue; 3) whether the operator introduced any evidence of prior consistent discipline; and 4) any other relevant circumstantial evidence.⁷² Other relevant circumstantial evidence include evidence by the operator that the miner's misconduct damaged its reputation and evidence by the miner that the operator failed to consistently espouse the same non-discriminatory reasons as a basis for the adverse action.

At the first tier, the fact-finder assesses the credibility of each non-discriminatory reason proffered by the operator. At this tier, independent reasons provide an advantage to employers. If the reasons are independent, the falsity of one reason may not impeach the credibility of other reasons. Therefore, a plaintiff must discredit each of the individual reasons to show pretext. Conversely, an employer need only demonstrate that one of its reasons is credible to avoid a

⁷⁰ In *Turner*, the Review Commission considered whether the miner violated a consistently enforced company policy under the second approach, which relates to substantiality. However, as indicated above, the miner's violation of a formal or informal company policy should be considered when assessing the credibility of each reason for an adverse action. *Turner*, 33 F.M.S.H.R.C. at 1076-77.

⁷¹ *Turner*, 33 F.M.S.H.R.C. at 1073-1077.

⁷² *Id.*; see also *Bradley v. Belva Coal Co.*, 4 F.M.S.H.R.C. 982, 993 (1982) (providing the operator can demonstrate the substantiality of an affirmative defense "by showing, for example, past discipline consistent with that meted out to the alleged discriminate, the miner's unsatisfactory past work record, prior warnings to the miner, or personnel rules or practices forbidding the conduct in question").

finding of pretext. However, if the reasons are cumulative, the falsity of one reason impeaches the credibility of the remaining reasons. Therefore, a plaintiff can demonstrate pretext by simply discrediting one of the reasons. Conversely, an employer must demonstrate that all of its reasons are credible.

At the second tier, the fact-finder assesses the substantiality of the operator's affirmative defense. At this tier, cumulative reasons provide an advantage to employers. Cumulative reasons are treated as a group when analyzing an affirmative defense since all such reasons, in combination, were the basis for, or motivated, the adverse action. Therefore, if the reasons are cumulative, a plaintiff must show pretext by demonstrating that the combined reasons are not substantial enough to support the adverse action. Conversely, the employer can avoid a finding of pretext by simply demonstrating that the reasons, when combined, are substantial enough to motivate the adverse action. However, if the reasons are independent, the plaintiff can demonstrate pretext by simply showing that each reason is not "independently sufficient" to motivate the adverse action.⁷³ Conversely, the employer must demonstrate that one of its reasons is substantial enough, by itself, to motivate the adverse action.

Therefore, depending on the scenario, an employer has an incentive to frame its non-discriminatory reasons as either independent or cumulative.⁷⁴ When one of the proffered non-discriminatory reasons is false, or otherwise suspect, an employer has an incentive to frame the reasons as independent. In this regard, one false independent reason may not impeach the credibility of another reason. When each proffered reason is insufficient by itself to motivate the adverse action, an employer has an incentive to frame the reasons as cumulative. In this regard, the fact-finder assesses whether the cumulative reasons, when combined, are substantial enough to motivate the adverse action.

Furthermore, an employer will be able to retroactively characterize its reasons as independent or cumulative to secure a strategic advantage, regardless of the decision-maker's initial viewpoint. For example, a decision-maker may not initially view any of the proffered non-discriminatory reasons as being

⁷³ *Pendley v. Fed. Mine Safety and Health Review Comm'n*, 601 F.3d 417, 425 (6th Cir. 2010).

⁷⁴ If an employer proffers a single non-discriminatory reason for the adverse action, the employer will not gain any advantage by characterizing the reason as independent or cumulative. The single reason must be credible and substantial enough by itself to motivate the adverse action.

independently sufficient for the adverse action. In other words, the decision-maker may view the multiple reasons as being cumulative bases for the adverse action. However, one of the reasons is clearly false or otherwise suspect. Therefore, at trial, the employer would have a strong incentive to retroactively frame the reasons as independent regardless of the decision-maker's initial viewpoint.

As discussed previously, the decision-maker's initial viewpoint dictates whether the proffered non-discriminatory reasons are independent or cumulative. In the above example, the plaintiff's ability to show that the non-discriminatory reasons are cumulative, rather than independent, hinges on the decision-maker's statements at the time of discipline, the structure of the letter of discipline, and the decision-maker's testimony at trial.⁷⁵ Normally, however, the decision-maker's generic statements when he issued the adverse action and the generic structure of letters of discipline⁷⁶ will not indicate whether he viewed the reasons as independent or cumulative. Moreover, it is reasonable to assume that the decision-maker's testimony at trial will support the employer's retroactive characterization of its non-discriminatory reasons. Therefore, barring a contradiction in the decision-maker's testimony at trial, the presiding administrative law judge will be forced to accept the employer's retroactive characterization.

The employer certainly has strong incentives to strategically frame its non-discriminatory reasons as independent or cumulative, depending on the circumstances. However, these incentives come with corresponding disincentives. As discussed, the first tier assesses the credibility of each reason while the second tier assesses the substantiality of the overall affirmative defense. Independent reasons provide employers an advantage at the first tier, but a disadvantage at the second. Conversely, cumulative reasons provide employers a disadvantage at the first tier, but an advantage at the second. As long as an employer is trading an advantage at one tier for a disadvantage at another, the employer's ability to manipulate the framework will be limited.

A loophole arises whenever it is likely that the fact-finder will not find pretext at one of the two tiers, regardless of how the non-discriminatory reasons are characterized. In such a scenario, the employer can strategically characterize

⁷⁵ See *Pendley*, 601 F.3d at 425-426.

⁷⁶ In this regard, it is reasonable to infer that the letter of discipline will follow a boiler plate format, simply listing the non-discriminatory reasons in bullet points without indicating whether any of the reasons are independent bases for the adverse action.

its non-discriminatory reasons to secure an advantage at one tier without suffering a corresponding disadvantage at the other.

For example, an employer may offer two non-discriminatory reasons, the first of which is clearly credible and sufficient by itself to motivate the adverse action. However, the second reason is of questionable credibility. Since one of the reasons is substantial enough by itself to motivate the adverse action, a plaintiff will be unable to demonstrate pretext at the second tier regardless of how the reasons are framed. In this scenario, by framing both reasons as independent, the employer can also avoid a finding of pretext at the first tier. In other words, the employer can ensure that even if the second reason is discredited, the credibility of the first reason will not be impeached.

Therefore, an employer may manipulate the dichotomy between independent and cumulative reasons when establishing an affirmative defense to a claim of retaliation under the Mine Act. If the reasons are alternative and independent, the employer must show that a single reason is credible and sufficient by itself to motivate the adverse action. If the reasons are cumulative, the employer must show that all reasons are credible, and when combined, are sufficient to motivate the adverse action. In certain scenarios, employers may be able to utilize a loophole in the dichotomy between independent and cumulative reasons to establish their affirmative defense. And as compared to other federal non-discrimination statutes, if an employer establishes an affirmative defense under the Mine Act, it has not engaged in any discrimination and avoids all liability for the adverse action.

Prior to the Sixth Circuit's decision in *Pendley v. FMSHRC*, the Commission lacked bright line rules regarding the credibility of an employer's multiple non-discriminatory reasons for an adverse action. The Review Commission had not distinguished between independent or cumulative reasons, or suggested that all reasons should be treated as independent (only one reason need be credible) or cumulative (all reasons must be credible).⁷⁷ In the absence of bright line rules, it is reasonable to infer that administrative law judges who found only some of an operator's non-discriminatory reasons to be credible formulated their own various rules. Following the Sixth Circuit decision, however, two bright line

⁷⁷ Instead, the Review Commission had merely held that an adverse action may be sustained even if not all of the operator's non-discriminatory reasons are adopted by the judge. *Pendley*, 601 F.3d at 426 (citing Sec'y of Labor ex rel. *Pendley v. Highland Mining Co.*, 31 F.M.S.H.R.C. 61, 79 (2009)).

rules replace this variation – an independent reason will not impeach the credibility of other reasons, while a cumulative reason will impeach the credibility of the entire affirmative defense.

III.B. Resolution of the Loophole

As discussed, mine operators may manipulate the dichotomy between independent and cumulative reasons for an adverse action. An operator may strategically frame its non-discriminatory reasons as independent, even though the decision-maker initially viewed them as cumulative. Alternatively, an operator may strategically frame its reasons as cumulative, even though the decision-maker initially viewed them as independent. As explained above, Commission judges will be forced to accept the operator's characterization of its proffered non-discriminatory reasons.

Thus, the operator will be able to dictate whether its non-discriminatory reasons are treated as independent or cumulative. In this regard, an operator may retroactively frame its reasons as independent, regardless of the decision-maker's viewpoint, to preclude one false reason from impeaching the entire affirmative defense. By strategically framing its non-discriminatory reasons as independent, the operator can reduce its burden to establish an affirmative defense. However, when a party strategically exploits a loophole to reduce its burden of proof, there is a resulting imbalance in the burden-shifting framework of the Mine Act.

To rectify this imbalance, the Commission must incorporate the "intertwined" exception, a principle briefly mentioned by the Sixth Circuit in the context of other federal non-discrimination statutes.⁷⁸ The principle of "intertwined reasons" will prevent an operator from unilaterally dictating whether the enumerated non-discriminatory reasons are treated as independent or cumulative. Instead, if the fact-finder determines that the operator's proffered non-discriminatory reasons are intertwined, the reasons will be treated as cumulative even if the operator frames them as independent.⁷⁹ In other words, if the reasons

⁷⁸ See generally *Smith v. Chrysler Corp.*, 155 F.3d 799, 809 (6th Cir. 1998).

⁷⁹ *Id.*

are intertwined, the falsity of one “independent” reason will impeach the credibility of the remaining reasons for the adverse action.⁸⁰

In *Smith v. Chrysler*, a case decided under the Americans with Disabilities Act,⁸¹ the Sixth Circuit set forth the principle of “intertwined” reasons.⁸² The court recognized that if an employer proffers multiple “independent” reasons for an adverse action, the general rule is that an employee must demonstrate that each reason is false.⁸³ However, the court also recognized an exception to the general rule, holding that “there may be cases in which the multiple [independent reasons] . . . are so intertwined . . . that the plaintiff could withstand summary judgment.”⁸⁴ In this regard, the court implied that when the non-discriminatory reasons are “intertwined,” the falsity of an independent reason will impeach the credibility of the entire affirmative defense.⁸⁵

A fact-finder who determines that an operator’s multiple non-discriminatory reasons are “intertwined” may treat the reasons as cumulative. Instead of subjectively determining whether the decision-maker initially viewed the reasons as independent, an administrative law judge of the Commission merely has to determine if the non-discriminatory reasons are intertwined based on objective indicia. If the judge determines that the reasons are intertwined, the falsity of one “independent” reason will impeach the credibility of the entire affirmative defense.⁸⁶ This will allow the plaintiff miner to demonstrate pretext at the first tier.

⁸⁰ The opposite issue, *i.e.*, when an employer wrongly frames its non-discriminatory reasons as cumulative, when the decision-maker initially viewed the reasons as independent, is beyond the scope of this paper.

⁸¹ 42 U.S.C.A. § 12101 *et seq.* (2012).

⁸² *Smith*, 155 F.3d at 809.

⁸³ *Id.* (citing *Kariotis v. Navistar Int'l Transp. Corp.*, 131 F.3d 672, 676 (7th Cir. 1997)).

⁸⁴ *Id.* (citing *Russell v. Acme-Evans Co.*, 51 F.3d 64, 70 (7th Cir.1995)).

⁸⁵ *Id.* (noting the court concluded that since the reasons at issue were not intertwined, the falsity of one reason did not impeach the credibility of other reasons. While not explicitly stated, the court implied that “intertwined” reasons would have the opposite effect, *i.e.*, the falsity of one reason would impeach all other reasons for the adverse action).

⁸⁶ A separate issue is whether intertwined reasons are treated as cumulative for the purpose of the second tier, the substantiality analysis. In other words, if the non-

When an operator proffers multiple non-discriminatory reasons for an adverse action, each reason generally reflects and cites a specific instance of misconduct by the plaintiff miner.⁸⁷ Such misconduct could range from absenteeism to property damage to unsafe conduct to insubordination. The operator will investigate each instance of misconduct before issuing a disciplinary action to the miner. In the context of the Mine Act, the term “intertwined reasons” should refer to “intertwined investigations” of each type of misconduct. Investigations of misconduct may be intertwined when the decision-maker learned of each type of misconduct, cited as a reason for the adverse action, from the same source.

First, the presiding administrative law judge must determine how the decision-maker learned of each type of misconduct. The decision-maker may have first-hand knowledge of the misconduct, or may learn about it from company documents, *i.e.*, attendance records, pre-shift examination checklists, disciplinary records, etc. If the decision-maker learned of each instance of misconduct from the same source, it is likely that the non-discriminatory reasons are intertwined. For example, if a miner is disciplined for tardiness and unexcused leave, and the decision-maker learned of both types of misconduct from the miner’s attendance record, the administrative law judge may find that the two reasons are intertwined.

Often however, the decision-maker will learn of each non-discriminatory reason from other individuals. If the decision-maker is an upper-level management official, he may learn of the misconduct through supervisors or other miners.⁸⁸ If the same supervisor reports each type of misconduct, it is likely that all non-discriminatory reasons are intertwined. However, the administrative law judge should also assess the supervisor’s source of knowledge regarding each type of misconduct listed on the disciplinary action.

A supervisor could have first-hand knowledge of the plaintiff’s misconduct, or learn of his misconduct from a company document or from another employee.

discriminatory reasons are found to be intertwined, does the fact-finder assess whether each individual reason, or whether the combined reasons, are substantial enough to motivate the adverse action? This issue is beyond the scope of this paper, and will not be addressed further.

⁸⁷ As discussed above, this paper focuses on a specific type of adverse action – disciplinary actions which result from a plaintiff’s misconduct.

⁸⁸ If the decision-maker is also the plaintiff’s immediate supervisor, then the fact-finder need only assess the decision-maker’s source of knowledge.

If a single supervisor reported the non-discriminatory reasons to the decision-maker, but the supervisor learned of each type of misconduct from a separate source, it is unclear if the multiple non-discriminatory reasons are intertwined. In such a scenario, the fact-finder must use his own discretion to determine if the reasons are intertwined.

In the future, the Review Commission may specify additional indicia of “intertwined” reasons. For the present, administrative law judges of the Commission should assess the decision-maker’s source of knowledge when determining whether an operator’s multiple non-discriminatory reasons are intertwined.

PART IV: POTENTIAL BROAD APPLICABILITY

The preceding pages have considered whether, under the Mine Act, a plaintiff can demonstrate that an employer’s affirmative defense is pretextual by only discrediting some of the enumerated non-discriminatory reasons. The issue has broad relevance to other federal non-discrimination statutes that permit employers to avoid some or all liability by establishing an affirmative defense.

Hoping to address this issue, the Sixth Circuit has created two bright line rules regarding the impact of independent or cumulative reasons on the credibility of an affirmative defense. The court’s distinction between independent and cumulative reasons was developed in *Sims v. Cleland* and *Pendley v. FMSHRC*. *Sims* was decided under Title VII, while *Pendley* was decided under the Mine Act. In *Pendley*, the Sixth Circuit drew on principles laid down in *Sims* to promulgate rules regarding independent and cumulative reasons. Furthermore, there was no indication that these rules would only apply to the Mine Act. Given the continuing influence of *Sims*, the Sixth Circuit’s rules may be broadly applicable to other federal non-discrimination statutes.

Under the Mine Act, an employer may manipulate the dichotomy between independent and cumulative reasons for an adverse action. The employer has an incentive, depending on the scenario, to retroactively frame its non-discriminatory reasons as independent or cumulative. By strategically characterizing its reasons, an employer may be able to secure an advantage at the first tier, or the second tier, of the affirmative defense stage. These two tiers assess the credibility of each non-discriminatory reason and the substantiality of the overall affirmative defense respectively. The two tiers are derived from a Sixth Circuit decision adjudicating a case under another federal non-discrimination statute. Therefore, the two tiers may perhaps be used to evaluate affirmative defenses under other federal statutes.

The Commission may be able to prevent employers from manipulating the dichotomy between independent and cumulative reasons. In this regard, the Review Commission must incorporate the principle of “intertwined reasons” as an exception to the general Sixth Circuit rule regarding independent reasons. The principle of “intertwined reasons” has its genesis in a Sixth Circuit decision, rendered under another federal statute, the Americans with Disabilities Act. Therefore, the concept of intertwined reasons may apply to other federal statutes.

Based on prior decisions by the Sixth Circuit, it is reasonable to speculate that the principles behind independent and cumulative reasons may apply to other federal non-discrimination statutes. In this regard, it is possible that employers, when defending claims of discrimination under such statutes, may be able to utilize a similar loophole. Furthermore, it is conceivable that other federal courts could utilize the “intertwined” exception to resolve such a loophole.

PART V: CONCLUSION

In the preceding pages, this paper has sought to address a core issue regarding an employer’s defense to a claim of workplace discrimination. The issue can be phrased as a simple question – can a plaintiff discredit an employer’s affirmative defense by simply discrediting some, not all, of the non-discriminatory reasons proffered by the employer as a justification for the adverse action? Given the United States Supreme Court’s silence on this subject, we must look to the United States Courts of Appeals for an answer.

The Sixth Circuit has attempted to provide an answer, but in so doing, has introduced a distinction between “alternative and independent” and “cumulative” reasons for an adverse action. There are incentives for an employer, depending on the factual circumstances in each case, to frame its non-discriminatory reasons as either independent or cumulative, and thus manipulate the dichotomy for his own advantage. It is thus clear that the framework of independent and cumulative reasons adds a degree of complexity to courts’ analysis of claims of employment discrimination. In this regard, the paper may serve as a guide to courts, which seek to navigate the dichotomy of independent and cumulative reasons for an adverse action.