

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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December 11, 2017

SECRETARY OF LABOR, MSHA on
behalf of **LOUIS SILVA, JR.**,
Complainant

v.

AGGREGATE INDUSTRIES WRC, INC.,
Respondent

DISCRIMINATION PROCEEDING

Docket No. WEST 2017-0482-DM
RM-MD-17-05

Mine: Morrison Plant
Mine ID: 05-00864

**ORDER DENYING RESPONDENT’S MOTION
FOR SANCTIONS FOR SPOILIATION OF EVIDENCE**

This matter is before me on a complaint of discrimination filed by the Secretary of Labor (“Secretary”) on behalf of Louis Silva, Jr. pursuant to section 105(c)(2) of the Federal Mine Safety and Health Act of 1977 (“Mine Act”), 30 U.S.C. § 815(c)(2), against Aggregate Industries WRC, Inc. (“Aggregate Industries”). Respondent filed a Motion for Sanctions for Spoliation of Evidence. Complainant filed an Opposition to the motion.¹ For reasons that follow, I **DENY** Respondent’s motion.

Louis Silva, Jr., was terminated from his position as a Quality Control Technician at the Morrison Plant on or about January 19, 2017. On January 25, 2017, Silva, through separate counsel representing him in a workman’s compensation proceeding, returned his company-issued cell phone to Aggregate Industries. The cell phone contained no user data. The missing user data is the subject of Respondent’s motion and this order.

Respondent argues that Complainant should be sanctioned by the court because Silva intentionally destroyed potentially relevant evidence, thereby prejudicing Respondent. Specifically, Respondent argues that Silva, following his termination, intentionally deleted the contents of his company-issued cell phone before returning the phone to Aggregate Industries on January 25. Mot. 1-3. Respondent employed a forensic investigator who was able to determine that a “factory reset” of the phone, which deleted and made unrecoverable all user data, was performed on January 24. Mot. 3. Respondent argues that, based on deposition testimony, Silva’s phone may have contained information related to his allegations in this matter and the deletion of those contents prejudices Respondent “because it is unable to dispute any allegations that may or may not have been supported by the contents of the cell phone[.]” *Id.* at 1-2. Spoliation occurred because Silva had control over the company-issued cell phone, the contents of which are relevant to his claims and Aggregate Industries’ defenses in this case, and he intentionally destroyed the information on the phone despite having a reasonably foreseeable duty to preserve it, as evidenced by his hiring of an attorney as early as January 19. Mot. 2, 4-5.

¹ Louis Silva is also represented by separate counsel in this proceeding. Complainant’s opposition was filed jointly by counsel for the Secretary of Labor and counsel for Silva.

Respondent moves this court to utilize its broad discretion to impose sanctions against Silva for the spoliation. Mot. 6-11. It suggests four forms of sanction: (1) dismissal, (2) an adverse inference that the phone contained information unfavorable to Silva's case or did not contain information corroborating his alleged protected activity, (3) an order excluding testimony regarding the contents of the phone, and (4) an order granting fees and costs incurred by Respondent in bringing the subject motion. Mot. 2, 6-11.

Complainant, in opposition, argues that Respondent's motion should be denied for multiple reasons. First, Respondent did not confer with Complainant prior to the filing of its motion and, in doing so, failed to comply with Commission Procedural Rule 10(c). Opp. 2-3. Second, Respondent's allegations lack evidentiary support. Specifically, Complainant states that the "factory reset" was not a result of intentional conduct by Silva but, rather, was conducted without Silva's knowledge by his daughter while Silva was hospitalized. Opp. 3. Further, Respondent failed to show how the contents of Silva's phone are relevant to the case. Opp. 4. Furthermore, there is no evidence that Silva engaged in any conduct in bad faith or failed to preserve evidence where a duty was reasonably foreseeable. Opp. 4. Finally, Respondent has not shown that it was prejudiced and the relief sought is disproportionate to the facts and unsupported by law. Opp. 5.

I find that sanctions are inappropriate. I agree with Complainant that Respondent's allegations lack evidentiary support. Respondent blindly alleges that Silva intentionally destroyed relevant evidence on the phone. However, Complainant disputes this and instead, citing the Declaration of Silva, avers that it was not Silva who conducted the "factory reset," but rather his teenage daughter who did so while Silva was hospitalized.² Moreover, Complainant asserts that, while Silva did ask his daughter to remove his personal photos that were stored on the phone, the "factory reset" was conducted without his knowledge. Silva's declaration directly undercuts Respondent's argument regarding any intentional deletion of that information by Silva. *See Sec'y of Labor obo Jeffrey Pappas v. CalPortland Company, et al.*, 39 FMSHRC 808 (Mar. 2017) (ALJ) (Denying a motion for sanctions and noting that the party who failed to preserve certain materials lacked intent).

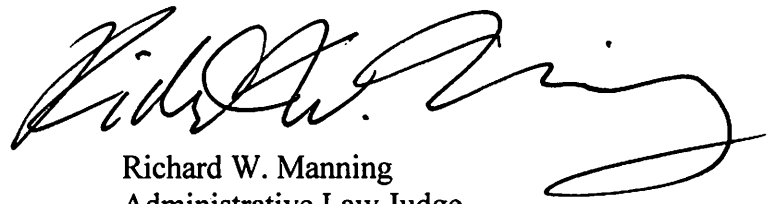
Respondent's argument that the destroyed information was relevant also lacks evidentiary support. I agree with Complainant that Respondent's assertions of relevance are based on speculation. Although the contents of the phone have been erased and it is impossible for the court to determine what was on the phone,³ Silva has declared that the "[a]ll of the safety complaints [he] made at the mine were made in person, and not through email or text messages. The same is true with respect to reporting [his] injuries to" Respondent. Opp. Ex. 1 ¶ 8. This testimony contradicts Respondent's statement that "Silva appears to allege that he made some safety complaints" using the phone." Mot. 5.

² The Secretary alleges that Respondent failed to confer prior to the filing of its motion. Had Respondent done so it may have learned of the Secretary's planned response, and the parties may have been able to resolve the issues on their own without the involvement of this court.

³ As noted by Complainant, however, Respondent may be able to obtain text messages and emails that were sent by Silva by examining the cell phones of other employees.

Finally, I agree with Complainant that Respondent “misses the mark on whether Mr. Silva had a duty to preserve evidence and whether such duty was reasonably foreseeable.” Opp. 4. Parties have a “duty to preserve evidence in [their] possession when [they] know[] that the evidence is potentially relevant to litigation before the evidence was destroyed.” *Pappas*, 39 FMSHRC at 810 (citing *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir. 2006)). At the time the phone was returned to Respondent, Silva had not filed a complaint of discrimination and had not retained counsel to represent him in anticipation of filing a complaint.⁴ Moreover, given the lack of evidentiary support regarding potential relevance of any information on the phone, I find that it is at best questionable whether there may have been some reasonable foreseeability of a duty to preserve anything on the phone.

While I do not resolve all disputes of fact in this order, the unsupported allegation of Respondent that Silva intentionally destroyed relevant information that he had a duty to preserve lacks evidentiary support and is contradicted by evidence presented by Complainant. I find that the requested sanctions are not warranted because Respondent’s allegation that there was information on the phone that was relevant to this case is speculative and there is no evidence that Silva intentionally deleted relevant data or instructed his daughter to do so. In addition, it is not at all clear that Silva had a duty to preserve data on the phone or whether such a duty was reasonably foreseeable at the time the data was deleted. Finally, Respondent failed to show that it was prejudiced by the deletion of the data. Assuming, for that sake of argument, that Silva did make safety complaints using the phone, such information would be on the phone of the management employee(s) to whom the complaints were made. Respondent’s motion is **DENIED**.



Richard W. Manning
Administrative Law Judge

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⁴ Silva had retained counsel to represent him in a separate worker’s compensation proceeding, who was not the same private attorney representing him in the current proceeding.