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SOL (MSHA) & W. LAWSON V. CONSOLIDATION COAL  
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Federal Mine Safety and Health Review Commission (F.M.S.H.R.C.)  
Office of Administrative Law Judges

SECRETARY OF LABOR,  
MINE SAFETY AND HEALTH  
ADMINISTRATION (MSHA),  
ON BEHALF OF WALTER LAWSON,  
JR.,

Discrimination Complaint

Docket No. HOPE 79-157

APPLICANT

v.

CONSOLIDATION COAL COMPANY,  
RESPONDENT

Crane Creek No. 6 Mine

ORDER DISMISSING COMPLAINT

Statement of the Case

This is a discrimination complaint filed by the Secretary on behalf of Walter Lawson, Jr., pursuant to Section 105(c)(2) of the Federal Mine Safety and Health Act of 1977. A review of the pleadings reflects that Mr. Lawson was employed by the respondent as a roofbolter and that he was discharged on October 25, 1978, after being observed asleep on the job during his work duty on a midnight shift. Sleeping on the job is contrary to company policy and a dischargeable offense. Mr. Lawson filed his initial complaint with the Secretary on November 2, 1978, asserting that he was wrongfully discharged because of his health and safety activities as a member of both the Mine Safety Committee and the United Mine Workers of America. Mr. Lawson denied that he was asleep on the job and asserted that many miners including the section foreman have been observed sleeping during the midnight shift and have not been fired, suspended or even reprimanded.

Mr. Lawson's discharge was arbitrated on November 6, 1978, pursuant to the 1978 Bituminous Coal Wage Agreement, and an award made on November 20, 1978, reduced the discharge to a 90 day suspension which apparently ended on or about January 25, 1979. Thereafter, on December 28, 1978, the Secretary filed with the Commission his initial finding that Mr. Lawson's complaint was not frivolously brought and the Secretary requested an order from the Commission for Mr. Lawson's immediate temporary reinstatement pending a final order on the merits. By notice of hearing issued on January 15, 1979, Chief Judge Broderick scheduled a hearing on the Secretary's application for Mr. Lawson's temporary reinstatement for January 19, 1979. However, on January 18, 1979, the Secretary, on behalf of Mr. Lawson, withdrew his application for temporary reinstatement on the ground that respondent had given the Secretary assurance that Mr. Lawson would be reinstated to his former position on the midnight shift commencing January 24, 1979, and the hearing was apparently cancelled.

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On January 29, 1979, the Secretary filed his discrimination complaint in Mr. Lawson's behalf pursuant to Section 105(c)(2) of the Act. Respondent filed an answer, and after the completion of rather extensive discovery, the matter was scheduled for a hearing on the merits in Charleston, West Virginia, September 25, 1979.

On September 17, 1979, the Secretary filed a motion to withdraw his complaint of discrimination, and in support thereof states as follows:

1. Following the issuance of the complaint in this matter further investigation was conducted by the Mine Safety and Health Administration (MSHA).
2. MSHA's investigation disclosed that Mr. Lawson was, in fact, found sleeping in the mine on October 25, 1978 and that sleeping is a dischargeable offense. Mr. Lawson had previously asserted that he was not asleep.
3. Notwithstanding the above, during the course of the investigation, the Operator and the Secretary negotiated a settlement which the Secretary believes would have justly provided Mr. Lawson with the statutory remedies to which he claimed entitlement. Mr. Lawson refused to accept the settlement agreement.
4. The Secretary then undertook further investigation to determine whether disparate treatment existed in this case. That investigation disclosed no evidence of such disparate treatment.
5. Accordingly, the Secretary now believes that no illegal discrimination occurred as to Mr. Lawson and that withdrawal from this matter is appropriate.
6. This withdrawal is requested without prejudice to the right of Mr. Lawson to file a complaint on his own behalf pursuant to the Act.

#### Discussion

The complaint of alleged discrimination in this case was filed by the Secretary on behalf of Mr. Lawson. Thus, it is clear that the Secretary is the moving party and that he initially sought a determination and order by the Commission pursuant to Section 105(c)(2) that respondent

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unlawfully discriminated against Mr. Lawson by discharging him because of his engaging in certain mine safety and health activities protected by Section 105(c)(1). Upon further investigation the Secretary now believes that Mr. Lawson's discharge was justified and that no illegal discrimination under the Act occurred in connection with that discharge. Under the circumstances, I conclude that the motion should be granted, subject to any rights which Mr. Lawson may have to pursue this matter further on his own behalf pursuant to Section 105(c)(3) of the Act.

Order

The Secretary's motion is granted and this matter is DISMISSED without prejudice to Mr. Lawson's right to file a complaint on his own behalf within thirty (30) days of the date he was notified of the Secretary's determination that his rights under the Act were not violated. The hearing scheduled for September 25, 1979, is cancelled.

George A. Koutras  
Administrative Law Judge