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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),
ON BEHALF OF JAMES W. FURMAN,
COMPLAINANT
v.

A. FERRANTE & SONS, INC.,
RESPONDENT

Complaint of Discrimination

Docket No. YORK 81-27-DM

DECISION AND ORDER

As the result of the trial judge's review of the parties' prehearing submissions and what transpired at the prehearing/settlement conference of September 16, 1981, the trial judge exercised "his inherent authority to question whether as a matter of law" (FOOTNOTE 1) this case presented a valid cause of action. The circumstance giving rise to this query was the fact that the prehearing submissions showed the alleged report of a health hazard did not occur until after complainant's alleged voluntary quit. (FOOTNOTE 2) Since there was no genuine dispute about the excuse complainant gave for refusing to perform his assigned work tasks before he voluntarily quit his place of employment, the trial judge suggested the controlling question of law be determined on a motion for summary judgment. To this end, the parties were directed to take depositions of complainant and other material witnesses and advise the Court as to whether a summary procedure or a trial-type hearing would be necessary to resolve the matter. While the Commission views such judicial activism with alarm (FOOTNOTE 3) the parties thought that in this case it made

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a lot of sense. So much sense in fact that after they took complainant's deposition on October 8, 1981, they advised the trial judge of their desire to join in an appropriate motion to dismiss the complaint with prejudice. When the Secretary's client, the complainant, did not agree, he was advised of his right to file a complaint pro se or through his own counsel. (FOOTNOTE 4)

The trial judge agreed to consider the proposed motion provided complainant's deposition was furnished for the record. This was done and I have now carefully reviewed Mr. Furman's deposition. It clearly establishes complainant's propensity for confusing fact with fantasy, a practice which is sometimes known as confabulation. This circumstance certainly warranted a reevaluation of the merits of the complaint, because it seriously impugns Mr. Furman's credibility.

My independent evaluation of the matter leads me to conclude that the complaint was improvidently filed, as a matter of law, and that the Secretary's principal witness has, as a matter of fact, fatally flawed his ability to give a credible account of the circumstances of the alleged discrimination.

Counsel for the Secretary in this matter is to be commended for the professionalism demonstrated in recognizing early on the lack of merit in his case. (FOOTNOTE 5)

Accordingly, it is ORDERED that the motion to dismiss be, and hereby is, GRANTED and the captioned matter DISMISSED WITH PREJUDICE.

Joseph B. Kennedy
Administrative Law Judge

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~FOOTNOTE_ONE

1 Secretary v. Olga Coal Co., 2 FMSHRC 2769 (1980); 1 MSHC 2537.

~FOOTNOTE_TWO

2 There was no claim that respondent's refusal to reinstate or rehire complainant was retaliatory. See, Munsey v. Morton, 1 MSHC 1220 (D.C. Cir. 1974); Munsey v. Morton, 1 MSHC 1709 (D.C. Cir. 1978).

~FOOTNOTE_THREE

3 In Secretary v. Missouri Gravel Company, 3 FMSHRC ÄÄÄ, No. LAKE 80-83-M, decided November 4, 1981, the Commission held that "Summary decision is an extraordinary procedure" to be reserved for the "most exceptional of circumstances". And in Secretary v. Knox County Stone Company, 3 FMSHRC ÄÄÄ, DENV 75-359-M, decided November 6, 1981, the Commission deplored the trial judge's use of a "form of sua sponte summary judgment" that avoided an evidentiary hearing in a case involving a violation which the Commission characterized as "relatively minor or technical" and for which it accepted a $36.00 penalty in lieu of my assessment of $500.00. More disturbing was the Commission's effort to inhibit suggestions by its trial judges for procedural shortcuts in de minimus cases. In a discussion which it characterized as wholly "extrinsic to the matter under review" it undertook a polemic on ex parte communications that seems designed to walloff any meaningful procedural discussions between the trial judge and counsel. The tenuous nexus with the case under review was a record which clearly showed that after both

parties had submitted motions to dismiss or to approve settlement the trial judge told them he could not approve the settlement proposed, $36.00, but would proceed to treat the motions to dismiss as cross motions for summary decision for the purpose of determining the amount of the penalty warranted. Such a proposal is one of the recognized exceptions authorized by law to the general prohibition against ex parte communications that relate to the merits of a case. This was because the communication in question did not relate to the merits of any issue pending but only to the procedure best adapted to an expeditious and inexpensive disposition of the pending motions. What the Commission seemed to overlook is that the United States Court of Appeals for the Second Circuit has held it is not inappropriate for a trial judge to treat sua sponte any motion to dismiss as a motion for summary judgment where it is clear that the case does not present an issue of material fact and the parties are afforded an opportunity to present materials in opposition to the motion. Corporacion de Mercadeo Agricola v. Mellon Bank International, 608 F.2d 43, 48 (2d Cir. 1979); Flli Moretti Cerali v. Continental Grain Co., 563 F.2d 563, 563 (2d Cir. 1977).

Whether viewed as a profound misunderstanding of what occurred or more simply as a suggestio falsi, suppressio veri, it is to be hoped that Knox County does not presage a further mischievous intrusion into the authority of the trial judges to regulate the course of penalty proceedings and to provide an expeditious and inexpensive remedy.

~FOOTNOTE_FOUR

4 See, Secretary's Letter of Determination, filed October 30, 1981. When the Secretary acting on behalf of an alleged discriminatee decides the evidence will not support a finding of violation and that the case should be dismissed, it is not clear whether the complainant has a cause of action under section 105(c)(3) of the Act that survives such a dismissal.

~FOOTNOTE_FIVE

5 All too often, I have had the sad experience of watching the Secretary's counsel forge ahead with a case obviously sinking under him because he fears the reaction from his own bureauracy of admitting an error in bringing the case. Unfortunately, disapproval of procedural devices designed to surface such fatal deficiencies may encourage an "after all its only taxpayer's money we are spending" attitude on the part of less courageous counsel.