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FRANCIS A. MARIN v. ASARCO
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges
The FEDERAL BUILDING
ROOM 280, 1244 SPEER BOULEVARD
DENVER, CO 80204

FRANCIS A. MARIN,
COMPLAINANT

v.

ASARCO, INCORPORATED,
RESPONDENT

DISCRIMINATION PROCEEDING

Docket No. WEST 91-161-DM

WE MW 90-14

Ray Unit

ORDER OF DISMISSAL

Before: Judge Morris

This case is a discrimination complaint arising under Section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801, et seq.

On June 3, 1991, Complainant moved to withdraw her complaint pursuant to Commission Rule 11, 29 C.F.R. 2700.11.

In support of her motion, Complainant states that, while appearing pro se, she filed a complaint with FMSHRC. The gravamen of her complaint was that she had been terminated by Respondent because of her seniority, sex, and national origin. At that time, she also filed charges with the Equal Employment Opportunity Commission (EEOC) and the State of Arizona Civil Rights Division (ACRD) intending to pursue her remedies under State and Federal anti-discrimination laws.

Complainant further states her deposition was scheduled for May 29, 1991. On that date, she appeared and the motion was made to withdraw her complaint.

Complainant now believes that her complaint arising out of sexual harassment can be properly addressed under the State and Federal anti-discrimination laws. Accordingly, she desires to withdraw her complaint now pending herein.

Respondent opposes Complainant's motion and moves to impose sanctions and seeks an order dismissing the complaint herein with prejudice.

In support of its motion, Respondent states that on May 14, 1990, Complainant, appearing pro se, filed a discrimination report, which was followed by a discrimination complaint filed on May 30, 1990.

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Complainant later withdrew her complaint for lack of a protected activity.

On September 4, 1990, Complainant filed an additional discrimination complaint stating she believed that her termination was for refusal to perform work which she deemed to be unsafe.

After conducting an investigation, MSHA concluded the facts disclosed during the investigation did not constitute a violation of Section 105(c) of the Mine Act.

On January 7, 1991, Complainant requested a hearing under the Mine Act.

On January 7, 1991, Chief Administrative Law Judge Paul Merlin ordered Complainant to forward her complaint to Respondent.

The complaint, when filed, was 10 days overdue.

On March 13, 1991, Respondent filed a motion to dismiss for failure to timely file her complaint.

On April 26, 1991, Mary Judge Ryan notified FMSHRC that she had been retained to represent Complainant.

Respondent's motion to dismiss was denied by the Presiding Judge on May 14, 1991.

Respondent's Counsel asserts he first became aware that Complainant was represented by Mary Judge Ryan through a distribution notation contained in a notice dated May 14, 1991.

A deposition was scheduled in Tucson, Arizona, for May 29, 1991. Counsel for both parties appeared but, on the instruction of her counsel, Complainant refused to be deposed on the grounds that Complainant would be moving to withdraw the Complaint before FMSHRC.

On May 31, 1991, Complainant formally moved to withdraw her complaint herein.

Respondent asserts Complainant's counsel has abused the discovery process and filed frivolous claims and documents which have amounted to harassment and needless increase in the cost of litigation.

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Finally, Respondent asserts Complainant and Complainant's Counsel are in violation of Rules 11 and 37(b)(2) of the Federal Rules of Civil Procedure and merit sanctions, pursuant to Commission Rules 80(a) and 1(b), 29 C.F.R. 2700.80(a), 1(b).

Accordingly, Respondent seeks an order dismissing the complaint with prejudice and granting sanctions, including costs and attorneys' fees.

DISCUSSION

The Commission has previously ruled that it lacks jurisdiction to impose sanctions. Rushton Mining Company, 11 FMSHRC 759 (1989). See also Beaver Creek Coal Company, 10 FMSHRC 758 (1988) (Morris, J) and Rushton Mining Company, 9 FMSHRC 392 (1987) (Broderick, J).

Based on the rationale of the above cases, I enter the following:

ORDER

1. Respondent's motion to impose sanctions is DENIED.
2. Complainant's motion to dismiss this case is GRANTED and the case is DISMISSED WITHOUT PREJUDICE.

John J. Morris
Administrative Law Judge