

# FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
721 19<sup>th</sup> St. Suite 443  
Denver, CO 80202-2500  
TELEPHONE: 303-844-5266 / FAX: 303-844-5268

February 9, 2015

FRANK SICA,  
Complainant,

v.

JACOBS FIELD SERVICES,  
Respondent.

DISCRIMINATION PROCEEDING

Docket No. WEST 2014-615-DM  
RM MD 2014-07

Mine: Freeport-McMoRan Morenci Inc.  
Mine ID 02-00024 1PL

## ORDER DISMISSING DISCRIMINATION COMPLAINT

Before: Judge Simonton

This matter is before me pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977 (“Act”). 30 U.S.C. § 815 (c)(3). The Complainant, Frank Sica, filed a section 105(c)(3) complaint with the Commission on May 6, 2014. Compl. The Respondent filed an Answer and Motion to Dismiss with the court on November 7, 2014. Resp. Ans. The Complainant submitted a response with additional documents on December 1, 2014.<sup>1</sup> The Respondent subsequently filed a reply brief along with several additional affidavits on December 31, 2014. After carefully reviewing Mr. Sica’s complaint and subsequent filings, the Respondent’s Motion to Dismiss is **GRANTED** and this matter is **DISMISSED**.

### I. PROCEDURAL BACKGROUND

Mr. Sica worked for the Respondent from approximately February 3, 2014 to February 14, 2014 at the Morenci Mine in Greenlee County, Arizona.<sup>2</sup> Compl., 1; Resp. Ans., 2. The Respondent terminated Sica’s employment on February 15, 2014.<sup>3</sup> Compl., 1; Resp. Ans., 2. Sica filed a discrimination complaint with the Mine Safety and Health Administration (MSHA) on February 19, 2014. February 2014 MSHA Complaint, 1. On March 27, 2014 MSHA notified Complainant Sica that it had determined there was not sufficient evidence to establish that a violation of section 105(c) occurred. Compl., 2-3. Complainant subsequently filed a section 105(c)(3) complaint with the Commission on May 6, 2014. Compl., 1. He sent a copy of his Complaint by certified mail to the Respondent at an address of 4949 Essen Lane, Baton Rouge, LA 70809. Response to Deficiency Letter. On June 26, 2014, the Chief Judge ordered

<sup>1</sup> The court did not receive the Complainant’s filings until December 18, 2014 due to internal technical difficulties. December 22, 2014 Order to Disregard.

<sup>2</sup> It appears that Mr. Sica participated in workplace orientation, safety training and a medical evaluation with Jacobs Field Services from January 27, 2014 to February 3, 2014 prior to beginning work at the Metcalf Mill project at the Morenci Mine. Resp. Ans., 2-3.

<sup>3</sup> Respondent’s management escorted Sica from mine premises on February 14, 2014. February 2014 MSHA Compl., 3-4; Resp. Ans. 4. Respondent’s management made the final decision to terminate Sica’s employment on February 15, 2014. Resp. Ans. 4: Ex. I.

the Respondent to answer the complaint within 30 days and distributed this order to the Louisiana address provided by the Complainant. Order to Respondent to Answer.

On October 7, 2014 the Chief Judge assigned this docket to the undersigned judge. Order of Assignment. After noting that Jacobs Field Services MSHA Contractor ID number listed an Arizona address, the court contacted Respondent's Tucson, Arizona office. The court was informed by Jacob's Safety Manager, Dan Warter, that the Respondent had no knowledge of Sica's 105(c)(3) complaint. The court then forwarded Sica's complaint to Respondent's counsel and ordered the Respondent to submit an answer by November 7, 2014. The Respondent filed an Answer and Motion to Dismiss on November 7, 2014. Resp. Ans.

## II. 105(C)(3) COMPLAINT

Mr. Sica's May 6, 2014 Complaint states that he was "a member of a protected class as a new miner" with Jacobs Field Services. Compl., 1. Complainant alleges that Respondent's company policies state that new miners were to be treated with tolerance for the first 30 days of employment regarding mining rules and guidelines. *Id.* Sica alleged that he was fired after 9 days on the job and given no leniency whatsoever. *Id.* He also stated that he sought reinstatement and monetary compensation from February 15, 2014 to February 29, 2014. *Id.*

Complainant attached a copy of his original February 19, 2014 complaint to MSHA within his filing. This filing states as follows:

On February, 14, 2014 at approximately 1:00 am I was told by safety hand named MAUCKE? of Jacobs Field Services that I had to be tied off on a scaffold walk way.

I tried to explain to him that 2 days prior- another safety hand told both me and my working partner that we didn't have to be tied off on the 100% complete-scaffold walkway and that we only had to be tied off on the unguarded decking which was midway between the ground floor and the scaffolding walkway- where we were working each night.

After a long discussion between safety hand- MAUCKE and me, my working partner my temporary foreman- Ozzie- my general foreman- Mickey- the safety hand that told both of us days prior- that we didn't have to be tied off – the scaffold foreman- Sergio- who was responsible for tagging the scaffold

Maucke said it was up to my General Foreman to decide what to do about the situation and then Maucke left ...

February 2014 MSHA Complaint, 1.

Complainant then alleges that he was escorted to the general foreman's office where he was informed that he was being "run off." February 2014 MSHA Complaint, 2. He states that he was not given an explanation for his dismissal or any termination paperwork. *Id.* Sica states that he was escorted from the mine site in a rushed fashion. *Id.* at 3. He further alleges that safety hand Maucke never issued any correction to the other safety hand for previously providing incorrect tie-off instruction to Sica and his partner. *Id.* at 4. Sica similarly states that Maucke failed to reprimand the scaffold foreman Sergio for not properly marking the scaffold walkway as a 100% tie off area. *Id.*

In the Complainant's December 1, 2014 filing, he alleges that his temporary foreman Ozzie fired him to protect himself from disciplinary action from Respondent's management. Sica states that Ozzie had violated company policy by assigning him to work alone on the scaffold. Sica Response, 3-4. Sica states that he applied to work for other contractors at the Morenci mine but was informed that that he was banned from the site for three years. Complainant states that Respondent's personnel informed him that he had been banned from the site for calling people "peons." He later alleges that Respondent has a,

commitment to fire people on a daily basis – to use as a fear tactic- to keep people job-scared and to install fear in all its employees- most of which are Mexicans and Navaho Indians- who do not have a thorough understanding of the English language or any idea whatsoever about their legal rights- OSHA-MSHA-EEOC- NLRB...

Sica Response, 12.

Complainant disputes the Respondent's description of his interaction with scaffold foreman Tavarez but states that "I explained to Tavarez that I was already told by Safety that we didn't have to tie off!" *Id.* at 13. He also denies running away from Respondent's Safety personnel and claims that he could have slipped away if he had wanted but remained on the scaffold because "I was convinced I was in the right!" *Id.* at 14. Sica disputes that there were multiple 100% tie off signs and contends that only 1 or 2 100 % tie off signs were in place on that area of the scaffold. *Id.* at 15.

Complainant also submitted copies of statements he had previously submitted to MSHA in support of his discrimination complaint. In addition to detailing the claims listed above, Sica alleges that Respondent ordered mass layoffs and cursory terminations on a routine basis in order to instill fear in the workforce. Sica Additional Comments March 8, 2014, 4. Sica also states that vandalism occurred at the Morenci mine on a daily basis during his employment there. Sica Additional Comments March 14, 2014, 6.

Referencing the vandalism, Complainant stated that following his termination

"I must say- I understand completely now- what would drive a person to commit these acts!"

*Id.* at 7.

### III. RESPONDENT'S ANSWER AND MOTION TO DISMISS

The Respondent filed an answer and motion to dismiss on November 7, 2010. Resp. Ans. Within, the Respondent submitted a statement of facts which is summarized as follows. Resp. Ans., 2-4. The Respondent stated that Complainant completed his medical evaluation and new miner training from January 27, 2014 to February 3, 2014. Resp. Ans., 2. This new miner training included fall protection and scaffold training. *Id.*; Resp. Ans.: Ex. E. The Respondent stated that on February 14, 2014, Safety Supervisor Michael Mauck received a radio call from a scaffold foreman reporting that an employee was refusing to properly tie-off on a fifteen foot high scaffold. *Id.* at 3.: Ex. F. Mauck directed other safety team members to the area. *Id.* When those safety personnel arrived at the scaffold, Complainant ran away without tying off. Resp. Ans., 3: Ex. G. Eventually, the safety team was able to corner Sica and waited for Mauck to arrive. *Id.* According to Respondent's employees, Complainant directed abusive and insubordinate language towards the scaffold crew while waiting for Mauck. *Id.*

Once he arrived, Mauck questioned Complainant on why he was not tied off. Resp. Ans., 3. Sica responded that he was previously told that tie off was not necessary in that area and that he did not have to listen to the scaffold foreman because they were "peons." *Id.* at 3-4. Mauck pointed out to Complainant that there were multiple 100% tie off signs on the scaffold. *Id.* at 3. Other Respondent supervisors then arrived on the scene who escorted Sica away from the scaffold. *Id.* at 4. On February 15, 2014, Respondent's management then decided to terminate Complainant for his failure to tie off, running without fall protection, and insubordinate behavior. *Id.* The Respondent provided signed statements, work training logs, and termination records to support their statement of facts. Resp. Ans.: Ex. A-N.

The Respondent moved at the end of their answer to dismiss this matter pursuant to Federal Rule of Civil Procedure 12(b)(6). Resp. Ans., 7. The Respondent asserts that as Sica has not alleged or described any protected activity, "it is beyond doubt that Complainant can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 7-8; *Perry v. Phelps Dodge Morenci, Inc.*, 18 FMSHRC 1918, 1920 (Nov. 1996).

### IV. ANALYSIS

#### A. Commission Standard for Motions to Dismiss Section 105(c) Actions

The Commission's procedural rules do not provide formal guidance on a motion to dismiss for failure to state a claim. However, Commission judges addressing similar motions have been guided by Federal Rules of Civil Procedure 12(b)(6) and 12(c) and treated those filings as motions for summary decision. *See e.g., Mona Kerlock v. ASARCO, 2014 WL 4387693*, (ALJ Miller)(Aug. 2014); *Sec'y of Labor o/b/o Chaparro v. Comunidad Agricola Bianci, Inc.*, 32 FMSHRC 1517 (Oct. 2010) (ALJ Barbour). I have likewise addressed the Respondent's motion to dismiss as I would a motion for summary decision under Commission Procedural Rule 67, which requires the moving party to show:

- 1) That there is no genuine issue as to any material fact, and
- 2) That the moving party is entitled to summary decision as a matter of law.

29 CFR § 2700.67.

Additionally, it is well established that a “motion to dismiss for failure to state a claim (for section 105(c) proceedings) is viewed with disfavor and is rarely granted.” *Phelps Dodge*, 18 FMSHRC 1920. Furthermore, the pleadings of pro se complainants are held “to less stringent standards than pleadings drafted by attorneys.” *Id.* Indeed, it is clear that 105(c) complainants are not required to submit extensive offers of proof or demonstrate a likelihood of ultimate success at the pleading stage. *Mona Kerlock v. Asarco, LLC*, 36 FMSHRC 2404, 2405 (ALJ Miller)(August 2014); *Secretary of Labor obo Jennifer Morreale v. Veris Gold*, \_ slip opinion (ALJ Simonton)(November 2014).

Instead, Commission Rule § 2700.42 only requires a Complainant to submit a “short and plain statement of the facts, setting forth the alleged discharge, discrimination or interference, and a statement of the relief requested.” 29 CFR § 2700.42. The Commission has also long held that in order to establish a prima facie case under Section 105(c)(1), a complaining miner must show that,

- 1) He engaged in protected activity; and,
- 2) That the adverse action he complains of was motivated at least partially by that activity.

*Sec’y of Labor o/b/o Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786 (Oct. 1980); *Sec’y of Labor o/b/o Robinette v United Castle Coal Co.*, 3 FMSHRC 803, 817 (Apr. 1981)).

As stated earlier, it is not necessary for a Complainant to establish a prima facie case of discrimination through extensive offers of proof at the pleading stage. *Mona Kerlock v. Asarco, LLC*, 36 FMSHRC 2405 *Secretary of Labor obo Jennifer Morreale v. Veris Gold*, \_ slip opinion. However, an ALJ has granted a motion to dismiss for failure to state a claim when a pro se complainant failed to allege or describe any protected activity. *Jason Sheperd v. Black Hills Bentonite*, 25 FMSHRC 129,133 (ALJ Manning)(March 2003) (holding that suffering a workplace injury during the normal work activities did not constitute a protected activity).

#### **B. The Complainant Has Not Submitted a Supportable Claim of Protected Activity**

After reviewing all of the parties’ submissions, I find that there are no material disputes of fact in this matter as the parties have submitted filings indicating that:

1. Complainant worked for Respondent from approximately Feb 3, 2014 to February 14, 2014. Compl., 1; Resp. Ans. 3.
2. Complainant had received employee safety training and orientation, including fall protection training during his workplace orientation with Respondent. Sica Response, 11; Sica Feb. 21, 2014 MSHA Statement; Resp. Ans.: Ex. E.

3. Complainant was not tied off on a scaffold on the morning of February 14, 2014. February 2014 MSHA Compl., 1; Resp. Ans. 3.
4. Respondent directed Complainant to leave the mine site on February 14, 2014. February 2014 MSHA Compl., 2-4; Resp. Ans. 4.
5. Complainant had not filed any safety complaints with Respondent, the Morenci Mine, or MSHA prior to his termination on February 15, 2014. Compl.; February 2014 MSHA Compl.; Resp. Ans., 1.
6. Respondent officially terminated Complainant's employment on February 15, 2014. Resp. Ans: Ex. I.

Furthermore, after evaluating all submissions in the light most favorable to the Complainant, I find that he has not described any actions that could be construed as protected activity. Instead, Complainant initially contended that as a newly hired employee, he was a member of a protected class. Compl., 1. However, newly hired miners do not receive any special treatment under the Act, as section 105(c)(1) only protects those miners or applicants who have exercised their statutory rights under the Mine Act. 30 USC 815(c)1. Indeed,

(The) Commission does not sit as a super grievance board to judge the industrial merits, fairness, reasonableness, or wisdom of an operator's employment policies except insofar as those policies may conflict with rights granted under section 105(c) of the Mine Act.

*Delisio v. Mathies Coal Co.*, 12 FMSHRC 2535, 2544 (December 1990).

The only specific work activity described by Mr. Sica within his complaint and subsequent filing is his decision not to tie off while on a scaffold platform. February 2014 MSHA Complaint, 1. This court cannot conceive of a set of circumstances in which a refusal to use an available safety measure would constitute protected activity.

At the end of his original complaint to MSHA, Complainant also contends that Respondent's management failed to reprimand other employees for allegedly incorrect tie-off instruction and failure to post tie-off signs. *Id.* at 4. However, Sica does not allege that he raised any safety concerns regarding the conduct of these other employees to the Respondent or MSHA prior to his reprimand for not tying off. Furthermore, Complainant's own filings indicate that after being confronted by Respondent's safety team, he continued to insist he did not have to tie off on that scaffold level. February 2014 MSHA Compl., 1. Thus, even when accepted as true, Complainant's allegations regarding other employee's conduct would not indicate that Mr. Sica himself undertook any protected activity.

Similarly, Complainant's claim that his foreman improperly instructed him to work on the scaffold by himself, even if accepted as true, does not stand as protected activity.<sup>4</sup>

---

<sup>4</sup> While not relied upon in my ultimate ruling, Complainant's own filing indicates that he was not in fact working by himself at the time of the incident as he clearly states that he was working only 12 feet above the group of eight scaffold builders and a foreman who initially asked him to tie off. Sica Statement February, 21, 2014, 8. He also emphasizes the fact that there was not a problem communicating with this group of workers. *Id.*

Complainant did not submit any complaints to the Respondent or MSHA regarding this assignment. More critically, Mr. Sica himself has repeatedly confirmed that the confrontation that occurred on the scaffold revolved exclusively around his continued insistence that he did not have to tie off on that scaffold level. February 2014 MSHA Complaint, 1; Sica Response, 13-14.

Therefore, although this case involves the enforcement of Respondent's safety plan, Complainant has not claimed that he attempted to exercise any statutory rights under the Mine Act. In fact, he has repeatedly stated that he chose not to tie off while working on a scaffold and that this action led to his confrontation with the Respondent's safety team. February 2014 Complaint, 1-2; Feb 3, 2014 Statement 7-11; Sica Response, 13-16. By filing a discrimination claim on that basis, Complainant appears to contend that section 105(c) provides miners the right not to comply with Mine Act regulations and industry safety standards. The Commission could not validly uphold such a claim as it would contradict the very purpose of encouraging individual miners to report and correct safety concerns. 30 USC 815 (c)(1).

Put simply, section 105(c)(1) does not shield workers who refuse to use available safety measures from resulting disciplinary action. For these reasons, I find that the Complainant has not submitted a supportable claim of protected activity. Accordingly, the Respondent is entitled to summary judgment as a matter of law and the Motion to Dismiss is **GRANTED**.

### **C. The Complainant's Filings Do Not Meet the Less Stringent Pro Se Pleading Standard**

As stated above, the pleadings of pro se complainants are held "to less stringent standards than pleadings drafted by attorneys." *Phelps Dodge*, 18 FMSHRC 1920. With this standard in mind, the court provided the Complainant every opportunity to support his claim. The court issued a prehearing order to both parties that stated in plain terms the standards by which the Complainant's 105(c)(3) claim would be evaluated. October 15, 2014 Prehearing Order. At the Complainant's request, all case files, correspondence, and subsequent filings were e-mailed directly to him. After the Respondent filed a Motion to Dismiss, the court's clerk sent Complainant an e-mail outlining summary judgment standards and procedures. The court reviewed Mr. Sica's complaint and filings only to determine whether or not the Complainant has alleged facts that could be interpreted to describe any "discrimination or interference" as required by Commission Rule 30 CFR § 2700.42.

When viewing the record in the light most favorable to the Complainant, as is required by the summary judgment standard, I find no circumstances whereby a violation of section 105(c) 1 of the Mine Act could be established absent an allegation of protected activity. Since Complainant's filings cannot be considered to describe any protected activity, discrimination or interference, the Commission is not an appropriate venue for Complainant to contest his termination.

**V. ORDER**

For the reasons stated above, this matter is **DISMISSED**. The Complainant may appeal this decision with the Commission within 30 days of the Order. 30 USC 815(c)(3).

A handwritten signature in black ink, appearing to read 'David P. Simonton', written in a cursive style.

David P. Simonton  
Administrative Law Judge

Distribution: (U.S. First Class Mail)

Frank Sica, 1380 North U.S. HWY 95-A, Building 2, Suite 136 Fernley, NV 89408

Robert Hamilton, Key Harrington Barnes, P.C., 3710 Rawlins Street, Suite 950 Dallas, TX  
75219