FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION
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September 14, 2010

GERMAN ALAVEREZ,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	Docket No. VA 2010-266-DM
	:	NE MD 2010-02
v.	:	
	:	
LOUDOUN QUARRIES/DIV of	:	
CHANTILLY CRUSHED STONE and	:	Loudoun Quarries Mine ID 44-00071
CHANTILLY CRUSHED STONE,	:	Chantilly Crushed Stone Mine ID 44-00024
Respondents	:	

ORDER OF DISMISSAL

Before: Judge William Moran

This case is before the Court upon a discrimination complaint filed with the Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, as amended, 30 U.S.C. § 815(c)(3) (the Mine Act). Mr. German Alvarez, the Complainant, filed his complaint on March 9, 2010, alleging that he was terminated from Loudon Quarries-Div/ Chantilly Crushed Stone and Loudon Qrs-Div / Chantilly Crushed Stone ("Operators" or "Respondents") on April 27, 2009 "in retaliation for reporting a broken seat in a dump truck to an inspector from the Mine Safety and Health Administration." Complaint at 1. The Complainant requested the following relief: "[r]einstatement to his former position; back pay since [Complainant's] date of termination;
[i]nterest on all back pay awarded; . . .costs related to the prosecution of [the] claim; . . . attorney's fees; . . . [and] [a]ny other relief deemed appropriate by the Commission."

A hearing in this case commenced on July 29, 2010. The Complainant presented as the first and, as matters turned out, the only witness in the proceeding. After a time, in the course of his testimony about his employment at Respondent's mine, the Court inquired of Mr. Alvarez:

Judge Moran: "do you want to go back to work for these people, sir? Is that your hope?"

The witness [Mr. Alvarez]: "No."

Counsel for the Complainant then stated, accurately, that the Complaint set forth, as noted above, that documents and statements indicated that a return to work was part of the relief sought by Mr. Alvarez. Tr. 65.

Perplexed by the Complainant's response in the negative, the Court posed the following question to his counsel, "[I]f [the Court] were to find that [Mr. Alvarez] was discriminated against, but he doesn't want to go back to work, wouldn't the damages end as of the time he determines - - he's not entitled to damages after he says I don't want to work for them any more." Tr.65.

Complainant's Counsel responded, "Agreed." Tr. 65.

Shortly thereafter in the proceedings, the Court returned to the issue of the relief Mr. Alvarez was seeking, asking:

"Mr. Alvarez, you don't want to go back to work for these people, right?"

Mr. Alvarez responded: "I don't want to go back and work for them." Tr. 67.

The Court then asked of Mr. Alvarez: "Okay, when you were fired on April 28 of last year [2009], was there a point in time after the day you're fired when you said I don't want to go back to work for them any more in your own mind? Do you understand my question?"

Mr. Alvarez responded, "Yes, I do." Tr. 68.

The Court continued, "Okay, was there a point when you said I don't want to go back to work for them again?"

Mr. Alvarez: "I say that in my mind. I heard from them they don't want to see me any more, so - - you know, why I think about going back to work in there. They told me they don't want to see me in there. I don't want to step in this quarry." Tr. 68.

The Court inquired further, trying to ascertain the Complainant's position.

"Okay, I'm not trying to put words in your mouth, but I'm trying to understand this. On April 28th you're fired, right?"

Mr. Alvarez: "Yes." Tr. 68.

The Court: "You're gone. You're not working there. The next day, did you still hope to go back to work for them or did you not want to work for them any more after that?"

Mr. Alvarez: "No, I went to look somewhere else. No." Tr. 68.

The Court inquired further still, asking the Complainant: "If they had said to you that day come back to work, would you say yes, fine; or would you say no, I don't want to work for you [any] more."

Mr. Alvarez responded, "No, I don't want to work with them. No." Tr. 68-69.

Understandably, Complainant's Counsel was surprised by his client's testimony. Counsel explained that in his conversations with the Complainant, Mr. Alvarez *had* expressed that he was seeking to return to work at the Respondents' business.

Because the Complainant's command of English was less than average, as it is not his native language, the Court inquired yet again to be sure of the Complainant's stance.

The Court: "Do you understand, Mr.Alvarez, you've told me that as of the day - - let's be more reasonable - - say the day after you're fired, my understanding is that you never wanted to go back to work for these people after that, even if they had offered you a job back?"

Mr. Alvarez: " No, I don't want to go back to work with them, no." Tr. 70.

The Court then inquired of Complainant's Counsel if Counsel agreed that, even if Mr. Alvarez were to prevail in his discrimination claim, his damages would be zero. Counsel agreed with that assessment by the Court, stating, "Right." Tr. 70.

Counsel for Respondents then moved for dismissal, to which Mr. Alvarez's Counsel responded that he "couldn't expect [the] Court to award Mr. Alvarez a remedy that he is not seeking. . . . If he's not seeking his job back, . . . I have no good response to that. . . . I can't deny what [Mr. Alvarez] just told your Honor in open court. . . . It [had been Counsel's] understanding going forward that there was, in fact, relief sought, which was return to his job and damages up until that date." Tr. 71. Complainant's Counsel also agreed with the Court's characterization that, based on his testimony at the hearing, Mr. Alvarez understood the questions relating to his employment with the Respondents and that he was unequivocal that he did not want to return to work for them, at least as of the day following his firing. Tr. 71.

The Court then afforded the Complainant a final opportunity to speak on this issue upon advising that it had no choice but to dismiss the case. Mr. Alvarez stated: "He know that I told the Inspector investigator in my testimony that I don't want to come back to work with them. He know that. It's in the tape and in the testimony." Tr. 72. The Court then explained to the Complainant that, based upon his testimony, it had no choice but to dismiss the matter and it asked whether he understood that meant he would lose his case. Mr. Alvarez responded, "Yes." Tr. 72. The Court then summed up, again, the situation before it:

"The evidence here, based . . . [on Mr. Alvarez's testimony] is that you don't want to go

back to work for this company ever, and that you did not want to go back to work once you were fired on April 28, 2009. Is that correct, still?" Mr. Alvarez responded, "Yes."[1] Tr. 72-73.

The Court then announced that the proceeding was dismissed, advising that a formal Order would follow.

Findings of Fact

As set forth above, the Complainant, German Alvarez, did file a complaint of discrimination on March 9, 2010, alleging that he was terminated from Loudon Quarries-Div/ Chantilly Crushed Stone and Loudon Qrs-Div / Chantilly Crushed Stone ("Operators" or "Respondents") on April 27, 2009 "in retaliation for reporting a broken seat in a dump truck to an inspector from the Mine Safety and Health Administration." Complaint at 1. At that time the Complainant requested the following relief: "[r]einstatement to his former position; back pay since [Complainant's] date of termination; [i]nterest on all back pay awarded; . . .costs related to the prosecution of [the] claim; . . . attorney's fees; . . . [and] [a]ny other relief deemed appropriate by the Commission.

At the hearing, the Complainant, testifying as the first, (and in light of his testimony, the only witness at the proceeding), stated that from the date of his discharge he would not have returned to the Respondents' employment at any time thereafter. The effect of Complainant's position is to preclude any damages, making his claim moot.

Discussion

Given the foregoing, the Court has no choice but to dismiss this action. In *Sonney v. Alamo Cement Co.*, 29 FMSHRC 310 (April 2007) ("*Alamo*"), Judge Feldman was faced with the same situation, issuing a dismissal, as the Complainant there was "not seeking any tangible relief such as lost pay or reinstatement." The judge noted that, in a section 105(c)(3) action, after one has an opportunity for a hearing, an order is then issued, "based upon findings of fact, dismissing or sustaining the complainant's charges and, if the charges are sustained, granting such relief as it deems appropriate, including, but not limited to, an order requiring **the rehiring or reinstatement of the miner to his former position with back pay and interest or such remedy as may be appropriate."** 30 U.S.C. § 815(c)(3). (emphasis added).

Judge Feldman noted that a case is moot when "it is impossible for the court to grant any effectual relief whatever to a prevailing party." * 313, citing *In re Kurtzman*, 194 F.3d 54, 58 (2nd Cir. 1999). The judge went on to observe that the Commission has spoken to the subjects of

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[1]At that point Mr. Alvarez's Counsel did inquire of his client, "[W]hy did you file the complaint with the Mine Safety Act? Why did you file a legal matter and proceedings here? What were you seeking?" Mr. Alvarez responded, "I'm not going to answer that question." Tr. 73.

declaratory relief and mootness in *Mid-Continent Resources*, *Inc.*, where it stated:

> The presence of a controversy must be measured at the time the court acts. It is not enough that there may have been a controversy when the action was commenced if subsequent events have put an end to the controversy or the opposing party disclaims the assertion of the countervailing rights. A case is moot when the issues presented no longer are "live" or the parties no longer have a legally cognizable interest in the outcome.

Alamo at *314, citing *Mid-Continent Resources*, *Inc*., 12 FMSHRC 949, 955 (May 1990).

In the present matter, as in *Alamo*, the Complainant is not seeking reinstatement and recovery of monetary damages resulting from the alleged discrimination is not available, as Mr. Alvarez was explicit and clear that he would not have returned to work with the Respondents once he had been discharged.

ORDER

Based on the foregoing, the Court finds that the Complainant's allegations of discrimination, as set forth in his Complaint, have been superceded by his testimony at the hearing that, upon being discharged by the Respondents on April 27, 2009, he would not have returned to the employment of the Respondents, even if offered reinstatement, from that date to the present. Given the Complainant's stance, that no damages are sought by him, the case has become moot. Accordingly, the Complaint of Discrimination is hereby **DISMISSED**.

William B. Moran
Administrative Law Judge

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