

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
601 New Jersey Avenue, N.W., Suite 9500
Washington, DC 20001

April 4, 2007

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| MICHAEL SONNEY, | : | DISCRIMINATION PROCEEDING |
| Complainant | : | |
| | : | Docket No. CENT 2007-1-DM |
| v. | : | SC MD 2006-08 |
| | : | |
| | : | |
| ALAMO CEMENT CO., LTD., | : | 1604 Plant & Quarry |
| Respondent | : | Mine ID 41-03019 |

ORDER OF DISMISSAL

Before: Judge Feldman

This case is before me based on a discrimination complaint filed with this 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). The complaint was filed by Michael Sonney against the respondent, Alamo Cement Company, LTD (Alamo). On March 9, 2007, Alamo filed a motion to dismiss Sonney’s complaint as moot because Sonney is not seeking any tangible relief such as lost pay or reinstatement. Sonney’s reply to Alamo’s motion was filed on March 26, 2007. For the reasons stated below, Alamo’s motion shall be granted and this matter shall be dismissed.

I. Statutory Provisions

This action is being brought under the Mine Act’s anti-discrimination provisions in section 105(c). A brief summary of the relevant provisions of section 105(c) follows.

Section 105(c)(1) of the Mine Act provides, in pertinent part:

No person shall discharge or in any manner discriminate against . . . any miner . . . because such miner . . . has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator’s agent . . . of an alleged danger or safety or health violation in a coal or other mine

30 U.S.C. § 815(c)(1).

Pursuant to the statutory provisions of section 105(c)(2), 30 U.S.C. § 815(c)(2), an investigation by the Secretary to determine whether a mine operator has engaged in discriminatory conduct is initiated after a miner files a complaint with the Secretary. The complaint must allege that the miner has been the victim of adverse retaliatory action

because he engaged in safety related activity. If, upon investigation, the Secretary believes the miner has been the victim of discriminatory conduct, section 105(c)(2) requires her to file a discrimination complaint on behalf of the miner with this Commission seeking appropriate relief, such as back pay and reinstatement for a terminated miner, as well as the imposition of a civil penalty in satisfaction of a mine operator's offending discriminatory conduct.

If, however, the Secretary finds that no discrimination has occurred, the miner retains the right, under section 105(c)(3) to bring a discrimination action on his own behalf against the mine operator before this Commission. Under such circumstances, section 105(c)(3) provides, in pertinent part:

The Commission shall afford an opportunity for a hearing . . . and *thereafter shall issue an order*, 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).

The Commission, in *Clifford Meek v. Essroc Corp.*, 15 FMSHRC 606 (April 1993), addressed the parameters for providing relief in a discrimination proceeding. The Commission stated:

The Commission endeavors to make miners whole and to return them to their status before illegal discrimination occurred. *See Munsey*, 2 FMSHRC at 3464; *Secretary on behalf of Bailey v. Arkansas-Carbona Co.*, 5 FMSHRC 2042, 2056 (December 1983). "Our concern and duty is to restore the discriminatees, as nearly as we can, to the enjoyment of the wages and benefits they lost as a result of their illegal terminations." *Dunmire*, 4 FMSHRC at 143. Monetary relief is awarded "to put an employee into the financial position he would have been in but for the discrimination." *Secretary on behalf of Gooslin v. Kentucky Carbon Corp.*, 4 FMSHRC 1, 2 (January 1982).

15 FMSHRC at 617.

II. Procedural History

Sonney was employed by Alamo as an Administrative Services Manager from January 2004 until his discharge on July 21, 2006. As a member of management, Sonney was in charge of safety aspects of mining and production operations. Sonney's discrimination complaint was filed with the Secretary on July 31, 2006. Sonney alleged he was the victim of a discriminatory discharge and he sought reinstatement. The Secretary advised Sonney on

September 1, 2006, that her investigation failed to disclose a violation of the provisions of section 105(c) of the Mine Act. Sonney filed this action before the Commission against Alamo in his own behalf on October 2, 2006.

The record reflects a history of acrimony between Sonney and Alamo management. During a January 26, 2007, telephone conference with Sonney and Alamo's counsel, Sonney stated that he had obtained other employment, and that he was not seeking back pay, reinstatement or reimbursement of other expenses. At that time, Sonney stated he only was seeking a determination that his discharge violated the Mine Act because it was motivated by his protected activity. During the telephone conference, I inquired about the status of Sonney's personnel record. In response, Alamo's counsel represented that Alamo would expunge all negative references in Sonney's personnel file that are in any way related to the circumstances in this case.

Since Sonney's July 31, 2006, underlying complaint did not adequately explain why he believed he was discriminated against, on January 29, 2007, Sonney was ordered to state his alleged protected activities, the adverse actions he alleges were motivated by these activities, and the relief he was seeking. 29 FMSHRC 122 (January 2007). Sonney's response to the January 29 Order was filed on February 14, 2007. With respect to the relief sought, in apparent reference to Alamo's response to his allegations of discrimination, Sonney stated he is seeking "[r]eimbursement for time and money spent to defend Alamo's false claims concerning the Complainant."

Alamo replied to Sonney's February 14 submission on February 23, 2007. Regarding the issue of relief, Alamo asserted Sonney's complaint was moot because of the absence of a genuine case or controversy.

During a February 27, 2007, telephone conference, Alamo's counsel advised that he intended to file a motion to dismiss. By Order dated February 28, 2007, filing dates were established for Alamo's motion and for Sonney's opposition.

III. Alamo's Motion

Alamo's dismissal motion was filed on March 9, 2007. In support of its motion, Alamo relies on the proposition that federal courts have recognized that a case is moot "when it is impossible for the court to grant any effectual relief whatever to a prevailing party." *In re Kurtzman*, 194 F. 3d 54, 58 (2nd Cir. 1999). By way of analogy to this action brought under the Mine Act, Alamo argues that courts have held a suit for damages under Title VII of the Civil Rights Act is moot where the court is powerless to fashion any type of effective relief for a plaintiff. *Arline v. Potter*, 404 F. Supp. 2d 521, 530 (S.D. N.Y. 2005); *Christoforou v. Ryder Truck Rental, Inc.*, 668 F. Supp. 294, 301, n.3 (S.D. N.Y. 1987) (claim for injunctive relief found moot where the plaintiff was no longer employed by the former employer and did not wish to be); *Cramer v. Va. Commonwealth Univ.*, 486 F. Supp. 187, 193 (E.D. Va. 1980); *Locke v. Bd.*

of Public Instruction for Palm Beach County, 499 F. 2d 359, 363 (5th Cir. 1974) (“[F]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them.”). Alamo avers that Title VII cases are instructive because the relief provisions of 42 U.S.C. § 2000e-5(g) are similar to the type of relief normally awarded under section 105(c) of the Mine Act. Namely, 42 U.S.C. § 2000e-5(g) provides that the court shall provide appropriate relief, including back pay and reinstatement, if it finds unlawful employment practices.

With respect to Sonney’s complaint, Alamo asserts Sonney is seeking a declaratory judgement that lacks a justiciable controversy between the parties. In this regard, Alamo points to Sonney’s representations in the January 26, 2007, telephone conference that he was only seeking a determination that Alamo had discriminated against him, and, that he was not seeking to recover any monetary damages. To further support its claim, Alamo relies on Sonney’s January 29, 2007, response to interrogatories wherein Sonney stated:

Complainant does not seek monetary compensation per a 105 (c) discrimination complaint nor any type of reinstatement allowable by the Mine Act regarding adverse action initiated by Respondent towards Complainant.

(*Alamo motion*, Ex. A at p.4)

Consequently, Alamo contends Sonney has no personal stake in a civil penalty proceeding that must be brought by the Secretary to impose administrative civil liability under the Mine Act. *Mississippi River Revival, Inc., v. City of Minneapolis*, 319 F.3d 1013, 1016 (8th Cir. 2003) (citizen plaintiffs under the Clean Water Act lack Article III standing to recover civil penalties for past violations owed the United States Treasury).

With regard to Sonney’s only identifiable claim for reimbursement “for time and money spent to defend Alamo’s false claims,” Alamo asserts that Sonney’s claim for recovery of costs incurred, in the absence of a justiciable case or controversy, cannot revive an otherwise moot cause of action. *Foster v. Carson*, 347 F.3d 742, 746 (9th Cir. 2003) (attorney fee claim not sufficient to revive an otherwise moot action); *Cramer*, 486 F.Supp. at 192, n.7 (entitlement to attorney’s fees does not avoid dismissal for mootness).

Finally, in its Motion to Dismiss, Alamo represents that it now has removed all references in Sonney’s personnel record to the disciplinary write-up that was the basis for Sonney’s June 20, 2006, discharge, and it has provided assurances that it will provide neutral employment references in response to all future requests from prospective employers.

IV. Sonney's Reply to Alamo's Motion

Sonney replied to Alamo's dismissal motion on March 26, 2007. However, Sonney failed to specify the relief he is seeking in this proceeding.

Discussion and Evaluation

As a general proposition, "[u]nder Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies." *Lewis v. Continental Bank Corp.*, 42 U.S. 472, 477 (1990). The Commission addressed the concepts of declaratory relief and mootness in *Mid-Continent Resources, Inc.*, 12 FMSHRC 949 (May 1990). The Commission, noting that Article III prohibits declaratory relief in moot cases, identified the characteristics of a case lacking justiciable controversy:

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.

12 FMSHRC at 955(citing 10A *Wright & Miller* § 2727 (pp.602-17) (footnotes omitted)).

Courts have granted declaratory relief although actions may not have ripened into a current controversy where imminent litigation will occur between the parties, or, where an allegedly moot question will recur. *Id.* (citations omitted). Although the elements of mootness are relevant in an administrative proceeding, the Article III "case or controversy" requirements do not literally apply to federal agencies like this Commission. *Id.* Rather, the propriety of granting declaratory relief is committed to the sound discretion of the Commission's administrative law judges. *Id.* at 954.

In this matter, Sonney is seeking a determination that he was discriminated against, but he is not seeking reinstatement or recovery of monetary damages directly resulting from the alleged discrimination. Courts provide relief not vindication. *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) (federal courts do not sit to bestow vindication in a vacuum). Courts cannot decide questions that do not affect the rights of litigants in the case before them. *DeFunis v. Odegaard*, 416 U.S. 312, 316 (1974). The Secretary has the sole authority to impose a civil penalty for an alleged violation of the anti-discrimination provisions in section 105(c) that can be challenged by a mine operator before this Commission.

In this case, the Secretary investigated Sonney's complaint and concluded the facts did not support a violation of section 105(c). Sonney cannot act as an *alter ego* of the Secretary and once again seek to impose civil liability on Alamo. Put another way, Sonney has no personal stake in Alamo's administrative liability and, therefore, he is not a proper party in a matter that has become solely a civil penalty action against Alamo.

In the final analysis, the factual predicate for Sonney's status as a 105(c)(3) party is lacking - - appropriate relief that can be fashioned by this Commission. Sonney has already received assurances that his personnel record has been cleansed and that Alamo will not provide negative employment recommendations. *Weiss v. Regal Collections*, 385 F.3d 337, 340 (3rd Cir. 2004) (an offer of complete relief will generally moot a plaintiff's claim and remove any personal interest in the outcome of litigation). The only remaining issue is Sonney's dissatisfaction with the Secretary's conclusion that his termination did not constitute a violation of section 105(c). Sonney's dissatisfaction with the Secretary's investigative findings does not create a justiciable case or controversy.

Declining to adjudicate this matter presents neither a likelihood of relevant future imminent litigation between the parties, nor a chance that questions relevant to the Mine Act concerning Sonney's termination will recur. Reduced to its simplest form, what Sonney seeks is a Commission adjudication of the investigative conclusions of the Secretary. However, this Commission "is not as a general matter authorized to review the Secretary's exercise of prosecutorial discretion." *Sec'y of Labor v. Twentymile Coal Co.*, 456 F.3d 151, 161 (D.C. Cir. 2006).

Sonney cannot overcome the lack of a justiciable controversy given the absence of tangible relief in this matter simply by bootstrapping his costs to pursue his moot claim. In other words, a moot claim cannot be revived by seeking the reimbursement of the cost to bring it. *Foster*, 347 F.3d at 746. Thus, Sonney's discrimination complaint shall be dismissed as moot.

In reaching the conclusion that the absence of appropriate relief disqualifies a miner from bringing a 105(c)(3) cause of action, I am cognizant of the countervailing argument that the Commission would be derelict in its duties if it avoided a finding of discrimination on the merits that may discourage future discriminatory conduct. However, it is not this Commission's role to unilaterally bring to light all acts of discrimination. In fact, the Commission frequently approves settlement agreements in discrimination cases despite the mine operator's failure to admit that discriminatory conduct occurred. Rather, the Commission's mission is adjudication, not enforcement and prosecution.

ORDER

In view of the above, **IT IS ORDERED** that Alamo Cement Company, LTD, shall provide, **in writing**, to Sonney and to me, within fourteen (14) days of the date of this Order, representations that all disciplinary references in Sonney's personnel file have been expunged, and that prospective employers will be provided with neutral recommendations that will not adversely affect Sonney's prospects for employment.

IT IS FURTHER ORDERED that, upon timely submission of the above written representations, Sonney's discrimination complaint **IS DISMISSED** with prejudice.

Jerold Feldman
Administrative Law Judge

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