

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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September 8, 2005

DANIEL B. LOWE,	:	DISCRIMINATION PROCEEDING
Complainant	:	
	:	
	:	
v.	:	
	:	
	:	
SOUTHWEST DIVISION,	:	Docket No. WEST 2005-246-DM
AGGREGATE INDUSTRIES,	:	WE MD 2005-08
Respondent	:	
	:	
	:	
SECRETARY OF LABOR,	:	Mine I.D. 26-01845
MINE SAFETY AND HEALTH	:	Sloan Quarry #1001
ADMINISTRATION (MSHA),	:	
ROBERT M. FRIEND,	:	
Respondents	:	

**DECISION GRANTING MOTIONS FOR SUMMARY DECISION
ORDER OF DISMISSAL**

Before: Judge Manning

This case is before me on a complaint of discrimination brought by Daniel B. Lowe against Southwest Division, Aggregate Industries (“Aggregate Industries”) under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §815(c)(3) (the “Mine Act”). In his complaint, Mr. Lowe contends that his employment with Aggregate Industries was terminated after Robert M. Friend, MSHA’s Administrator for Metal/Nonmetal Safety and Health, complained to the president of Aggregate Industries about harassing calls Lowe was making to MSHA headquarters. Lowe contends that he was terminated because of his protected activities as a direct result of Robert Friend’s interference, intimidation, and harassment.

Although it appeared from the original complaint Lowe filed with MSHA that he wanted to include Friend in his section 105(c)(3) complaint, he only served Aggregate Industries with his complaint of discrimination in this case. At the time Lowe initiated this action, he was not represented by counsel. I permitted Lowe to serve the Secretary and Mr. Friend with his complaint of discrimination out of time subject to any objections that they might raise.

In response to Lowe’s complaint, the Secretary of Labor and Robert Friend filed an answer, a motion for summary decision, and a motion to dismiss. Aggregate Industries filed a

response to this motion and joined in that part of the motion that seeks dismissal of the complaint on the basis that Lowe did not engage in protected activity. Lowe filed an opposition to the motion for summary decision and motion to dismiss. For the reasons set forth below, the motion for summary decision is granted and this proceeding is dismissed against the Secretary, Mr. Friend, and Aggregate Industries.

I. BACKGROUND

Aggregate Industries operates the Sloan Quarry near Las Vegas, Nevada. On or about February 8, 2005, Mr. Lowe filed a discrimination complaint with the local office of the Department of Labor's Mine Safety and Health Administration ("MSHA"). On March 17, 2005, the Secretary determined that the facts disclosed during her investigation into Lowe's discrimination complaint do not constitute a violation of section 105(c) of the Mine Act.

On or about April 7, 2005, Lowe filed this proceeding on his own behalf under section 105(c)(3) of the Mine Act. The allegations contained in the complaint are set forth below along with other undisputed facts.

Mr. Lowe started working for Aggregate Industries in June 2004 as the company's regional safety manager. He states that he was responsible for investigating accidents, compliance with MSHA standards and regulations, and conducting safety training. He supervised three employees. Lowe also provided safety consultation and training services for Technos Corporation ("Technos"), a company that is not owned or otherwise affiliated with Aggregate Industries. Technos is a speciality contractor that provides fan services at mines. Its MSHA contractor number is LAH. Lowe provided these services for Technos as a contractor on his own time.

On September 22, 2004, MSHA Inspector Norman Zeeman issued Citation No. 6255580 to Technos at the 1604 Quarry and Plant located near San Antonio, Texas. This facility is owned and operated by Alamo Cement Company. The citation alleged that mobile equipment at the quarry had run over electrical power conductors (welding leads) in violation of 30 C.F.R. § 56.12005. On September 27, 2004, Lowe sent a letter to Edward Lopez, MSHA's metal/nonmetal district manager in Dallas, Texas, requesting a safety and health conference on Citation No. 6255580. The letter also stated that it was to serve as a Freedom of Information Act ("FOIA") request to obtain a copy of all of Inspector Zeeman's notes, photographs, and other documents pertaining to the citation. The letter was written on the stationery of Technos and was signed by Mr. Lowe as "Corporate Safety Manager, Technos Corporation." (Ex. 8 to Secretary's Motion). The letter stated that he was the "company representative handling this action" and asked that all documents be sent to his attention. The return address was for the offices of Technos in Schertz, Texas.

By letter dated October 21, 2004, Mr. Lopez responded to the FOIA request by stating that MSHA would not be providing any documents to Technos "under FOIA exception 7(A),

which protects from disclosure records or information compiled for law enforcement purposes whose disclosure could reasonably be expected to interfere with enforcement proceedings.” (Ex. 9 to Secretary’s Motion).

In his discrimination complaint, Lowe contends that MSHA violated FOIA in that MSHA “did not properly provide the requested information or proper documentation within 20 working days of the FOIA request.” (Lowe Complaint of Discrimination). He also contends that MSHA violated section 103(h) of the Mine Act. Lowe called Lopez on the telephone on October 26, 2004, following receipt of this letter. Lowe alleges that Lopez was “unprofessional” and “verbally abusive” during this call. Lowe received a fax from Lopez following this call. (Ex. 10 to Secretary’s Motion). Lowe alleges that the fax “attempted to cover up [Lopez’s] error related to providing the requested information under FOIA and the Act.” (Lowe Complaint of Discrimination). Both of the letters from Lopez explained the appeal process under FOIA.

Lowe states that as a result of abusive and unprofessional behavior of Lopez, he called John Correll, Deputy Assistant Secretary of Labor for Mine Safety and Health, to complain about Lopez. Lowe also faxed a letter to Correll on Technos stationery about his concerns. (Ex. 11 to Secretary’s Motion). He stated his belief that MSHA was violating FOIA by not providing him with the requested information. Lowe also stated his belief that Lopez “intentionally” started a “confrontation” with him during the phone call. *Id.* Lowe further stated that Lopez “refused to take responsibility for his actions which caused a violation of federal law” and that he “should be removed from a position of responsibility as the South Central Director of MSHA as he is incompetent.” *Id.*

On October 26, 2004, Lowe also faxed a FOIA request to David D. Lauriski, the Assistant Secretary of Labor for Mine Safety and Health, asking for all documents and information concerning the Secretary’s decision to “automatically deny the release of documents and records when requested by mine operators and contractors working on mine property as it relates to information related to inspection of mines and in particular MSHA field notes taken during inspection of mines.” (Ex. 12 to Secretary’s Motion).

On November 19, 2004, Mr. Correll sent Lowe a letter stating that MSHA’s interpretation of FOIA exemption 7(A) is “consistent with other Departmental FOIA policies and practices.” (Ex. 14 to Secretary’s Motion). The letter “encouraged” Lowe to appeal the denial. Correll also stated that his review “revealed no credible evidence of unprofessional conduct by Mr. Lopez in handling this [FOIA] matter.” *Id.* In his discrimination complaint, Lowe states that Correll’s letter is “evidence of John Correll’s poor investigation of my complaint related to Edward Lopez’s actions of October 23, 2004.”

On December 1, 2004, Mr. Lowe sent another letter to Correll. In the letter, he asserted that Lopez had been “less than honest” with Correll regarding the “time line” of his FOIA request of September 27, 2004. Lowe states that his FOIA request was received by the MSHA Dallas District Office via facsimile transmission on September 27. Lowe also states that “[w]e received

the FOIA denial response in our office on October 26 . . . via facsimile transmission . . .” (Ex. 15 to Secretary’s Motion). Lowe states in his letter to Correll that “the duration of the response from MSHA [to the FOIA request] was in fact 22 days which we all know to be unlawful under FOIA.” Lowe’s letter further states that it is “his belief that Mr. Lopez has not been honest or professional in the lawful handling of our FOIA request and in fact has been deceitful and untruthful to you as well during your inquiry to this matter.” *Id.* Finally, Lowe asked Correll to call him “to advise me as to what actions MSHA is prepared to take in this matter regarding this unlawful act.” *Id.* The letter concludes by stating that if Correll does nothing in response to his letter, he is “prepared to take this matter to the Office of the Inspector General.” *Id.*¹

In his discrimination complaint, Lowe states that on or soon after December 1, 2004, he tried to call Correll again but, because Correll was out of the office, he talked to Robert Friend. Lowe alleges that “Robert Friend was very abusive to me during the conversation and was extremely irate that I was making a complaint against Edward Lopez and that I had sent my . . . complaint letter to Elaine Chao, Secretary of Labor.” (Discrimination Complaint).

On December 3, 2004, Robert Friend faxed Lowe’s letters of October 26, 2004, and December 1, 2004, to James Addams, President of Aggregate Industries. Friend also talked to Addams about Lowe on the phone that day. Lowe believes that action by Friend was “nothing more than intimidation tactics, pure harassment, and interference at the hand of Robert Friend in an effort to do me personal harm.” (Discrimination Complaint). On December 6, 2004, Addams discussed the situation with Lowe. Addams asked Lowe to let him review any letters that he sends to MSHA on behalf of Technos before they are mailed to help Lowe get his “point(s) across to MSHA in a more professional manner.” *Id.* Lowe thanked Addams for his help.

Lowe stated that, “[d]ue to Robert Friend’s willful personal harassment and interference of my actions that I was taking in accordance with my statutory rights as a miner, I began the process of making a complaint to . . . the Mine Safety and Health Administration and in particular either John Correll or David Dye.” (Discrimination Complaint). At this point, Lowe called MSHA’s headquarters in Arlington, Virginia, several times in an attempt to talk to either Correll or Dye. Lowe states that on December 8, 2004, Friend called him “and was extremely irate and stated that he was going to have me fired from my employment with Aggregate Industries if I did not drop my complaint.” *Id.* Lowe states that he told Friend that he was going to file a complaint with the Inspector General to which Friend replied, “bring it on.” *Id.*

¹ Marvin W. Nichols, Jr., the Director of MSHA’s Office of Standards, Regulations and Variances, also sent Lowe a letter dated November 19, 2004, in response to Lowe’s FOIA request of October 26 directed to Mr. Lauriski. The letter listed several documents that fit within the FOIA request but stated that these documents have been “redacted from public disclosure under Exemption 2 which allows for protection of internal administrative markings and practices.” (Ex. 13 to Secretary’s Motion).

Lowe states that after that call with Friend on December 8, Addams asked Lowe to stop calling MSHA. Lowe states that he responded by telling Addams that he had the right to call MSHA because Robert Friend was harassing and intimidating him. *Id.* Addams told Lowe that Friend had called him and complained about Lowe's calls to MSHA headquarters.

Following these events, Lowe began preparing complaints to be filed with the Inspector General and the Federal Bureau of Investigation ("FBI"). Lowe states that he decided to try to discuss these issues with David Dye before he filed these complaints. To that end, on January 18, 2005, he sent an e-mail to Dye asking Dye to call him. The e-mail states, in part, that he has "serious complaints against several top members of your agency" that he would like to discuss. *Id.* Lowe further advised Dye in the e-mail that if he did not hear from Dye within 24 hours, he intended to meet with the FBI to file a civil rights complaint "as I have been the victim of your senior staff members under the color of law." (Ex. 17 to Secretary's Motion).

On January 19, 2005, Friend or another MSHA official forwarded Lowe's January 18th e-mail to Addams. Lowe was terminated from his employment at Aggregate Industries on January 20, 2005. Lowe stated that Addams told him that "he had to terminate my employment with Aggregate Industries because I had made a complaint against MSHA and that MSHA was the federal agency that governs most of Aggregate Industries' business and that he, as President of the Southwest Region, was afraid of MSHA retaliating against Aggregate Industries businesses." (Ex. A ¶17 to Lowe's Opposition).

The Secretary proposed a penalty of \$60.00 for the alleged violation set forth in Citation No. 6255580 and Technos contested the citation and penalty under the Commission's procedural rules at 29 C.F.R. § 2700.26. The Secretary filed a petition for assessment of penalty on January 26, 2005, but Technos failed to file an answer as required by 29 C.F.R. § 2700.29. On April 14, 2005, the Commission's chief administrative law judge issued an order requiring Technos to show cause why it did not file an answer. When Technos failed to respond to the show cause order, the chief judge entered an order of default dated May 23, 2005, Docket No. CENT 2005-92-M. (Ex. 5 to Secretary's Motion).

II. BRIEF SUMMARY OF THE PARTIES' ARGUMENTS

In her motion, the Secretary argues that Lowe failed to allege a *prima facie* case of discrimination in that his alleged activities were not protected activities under the Mine Act. All of the activities that Lowe contends were protected were taken as a representative of a mine operator, Technos Corporation, rather than on behalf of miners. She contends that advocacy on behalf of a mine operator is not protected under section 105(c) of the Mine Act. His activities had nothing to do with involving miners in the improvement of safety at the mine.

The Secretary also contends that Lowe's activities protesting the Department of Labor's interpretation of FOIA are not protected under section 105(c). Even if Lowe's original protests were protected, "when his correspondence became attenuated from Mine Act matters and turned

into complaints of missed deadlines under FOIA” they were no longer protected under the Mine Act. (Secretary’s Motion 21).

Finally, the Secretary argues that the Secretary and Friend must be dismissed from this case because neither the Secretary nor Friend may be sued under section 105(c) for actions taken during the course of his employment. “MSHA officials acting under the color of their authority are not amenable to suit under section 105(c) of the Mine Act.” *Id.* at 25 quoting *Meredith v. FMSHRC*, 177 F.3d 1042, 1056 (D.C. Cir. 1999).

Aggregate Industries, through counsel, concurs with that part of the Secretary’s motion for summary decision that seeks dismissal on the basis that Lowe did not engage in activity protected by section 105(c) of the Mine Act. It points to Lowe’s representation that, at all pertinent times, he was acting as a representative of Technos. Aggregate Industries also points to Lowe’s representation in his complaint to the Department of Labor’s Inspector General, dated January 21, 2005, that he filed the FOIA request while “conducting consultation services for Technos.” (P. 1, Attachment C to Aggregate Industries Reply). Lowe also acknowledged that the “services” he provided for Technos had “absolutely nothing to do with Aggregate Industries.” *Id.* at p. 3. As a consequence, his alleged protected activities did not arise within the scope of his employment as safety manager with Aggregate Industries.

Lowe maintains that the motions should be denied. Lowe states that, because he was a miner, he is entitled to the protections of section 105(c). He contends that he was also a representative of the miners working for Technos. Lowe states that he sought the information from the Secretary not only on behalf of Technos but also on behalf of miners who were subject to being blamed for the alleged violation. Lowe argues that he is entitled to pursue his miner’s rights under the Mine Act without being discriminated against by the Secretary and Aggregate Industries. Lowe believes that the communications sent by him to MSHA officials are protected activities and were not inappropriate.

Because the record in this case “contains no declarations or evidence . . . from Robert Friend or any other MSHA representative explaining what . . . gave them the right to contact Mr. Addams and threaten Aggregate Industries if they did not silence Mr. Lowe’s complaints,” there are “huge questions of material fact that make summary decision impossible in this case.” (Lowe Response 13). He argues that he should be allowed to complete discovery before the Secretary’s motion should be considered. Finally, Lowe argues that Friend was not acting under color of law when he made threats to get him terminated from his job with Aggregate Industries.

III. DISCUSSION

Section 105(c) of the Mine Act prohibits discrimination against miners for exercising any protected right under the Mine Act. The purpose of the protection is to encourage miners “to play an active part in the enforcement of the [Mine] Act” recognizing that, “if miners are to be encouraged to be active in matters of safety and health, they must be protected against any

possible discrimination which they might suffer as a result of their participation.” S. Rep. No. 181, 95th Cong., 1st Sess. 35 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2nd Sess., *Legislative History of the Federal Mine Safety and Health Act of 1977* at 623 (1978).

A miner alleging discrimination under the Mine Act establishes a *prima facie* case of prohibited discrimination by presenting evidence sufficient to support a conclusion that he engaged in protected activity and suffered adverse action motivated in any part by that activity. *Secretary of Labor on behalf of Pasula v. Consolidation Coal Co.*, 2 FMSHRC 2786, 2797-800 (October 1980), *rev'd on other grounds*, 663 F.2d 1211 (3d Cir. 1981); *Secretary of Labor on behalf of Robinette v. United Castle Coal Co.*, 3 FMSHRC 803, 817-18 (April 1981); *Driessen v. Nevada Goldfields, Inc.*, 20 FMSHRC 324, 328 (Apr. 1998). The mine operator may rebut the *prima facie* case by showing either that no protected activity occurred or that the adverse action was in no part motivated by the protected activity. *Pasula*, 2 FMSHRC at 2799-800. If the mine operator cannot rebut the *prima facie* case in this manner, it nevertheless may defend by proving that it was also motivated by the miner's unprotected activity and would have taken the adverse action for the unprotected activity alone. *Pasula* at 2800; *Robinette*, 3 FMSHRC at 817-18; *see also Eastern Assoc. Coal Corp. v. FMSHRC*, 813 F.2d 639, 642 (4th Cir. 1987).

The Commission's Procedural Rule at 29 C.F.R. § 2700.67(b) sets forth the grounds for granting a motion for summary decision, as follows:

A motion for summary decision shall be granted only if the entire record, including the pleadings, depositions, answers to interrogatories, admissions, and affidavits, shows:

- (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.

I find that Lowe did not raise genuine issues of material fact in his response to the Secretary's and Aggregate Industries' motions and that they are entitled to summary decision as a matter of law. The facts clearly demonstrate that Lowe did not engage in protected activities prior to his termination from employment at Aggregate Industries.

The activities that Lowe relies on center around his request for information from MSHA concerning Citation No. 6255580 issued to Technos at the Alamo Cement facility in Texas. He made this request through FOIA on September 27, 2004. In his opposition to the motions for summary decision, Lowe states that he filed the FOIA request as a step to contesting the citation. (Lowe Opposition 3). The information sought by Lowe through the FOIA request would have been available to him through discovery if he had filed a pre-penalty contest of the citation with the Commission or if he had filed discovery after the Secretary proposed a penalty. *See* 29 C.F.R. §§ 2700.20 and 2700.56 through 2700.58. Mine operators do not generally use FOIA to get information about citations issued to them by MSHA. Lowe states that he did not know that

Technos was held in default with respect to Citation No. 6255580 and states that he has asked the Commission to reopen the case. (Ex. A ¶ 21 to Lowe's Opposition).

I hold that Lowe's communications with MSHA concerning the FOIA request were not protected activities under section 105(c) of the Mine Act. I reach this conclusion based on a number of factors discussed below.

Miners have the "right to complain to the operator and to the Secretary of alleged dangers or violations." *Pasula* at 2790. "The successful enforcement of the 1977 Mine Act is . . . dependent on the voluntary efforts of miners to notify either MSHA officials or the operator of conditions or practices that require correction." *Id.* "[I]f miners are to be encouraged to be active in matters of safety and health, they must be protected against any possible discrimination which they might suffer as a result of their participation [in the enforcement of the Act]." *Donovan on behalf of Anderson v. Stafford Construction*, 732 F.2d 954, 960 (D.C. Cir. 1984) (brackets in original) (citation omitted). A miner's complaints or actions are protected even if they go beyond what is required under the Secretary's health and safety standards "if they are based on a miner's 'good faith, reasonable belief' that such precautions are needed" so long as "the precautions themselves are reasonable." *Sec'y on behalf of Zecco v. Consolidation Coal Co.*, 21 FMSHRC 985, 993 (Sept. 1999).

In this case, Lowe was not complaining about safety or health conditions at Technos' operations at the Alamo Cement Company. Instead, he believed that MSHA should not have issued the subject citation because he did not consider welding leads to be power conductors subject to section 56.12005. (Ex. 7 to Secretary's Motion). He wanted a copy of Inspector Zeeman's notes to aid him in a conference with the MSHA Dallas District Office in his attempt to get the citation vacated or modified. In taking these steps, Lowe was acting as an agent of Technos, not as a miner or a representative of miners. His actions were not designed to correct an unsafe condition or improve the safety of miners. He was seeking information from MSHA to help him negotiate a settlement for Technos with respect to Citation No. 6255580.

In his response to the motions for summary decision, Lowe states that he was seeking the information to "rebut" the citation not only on behalf of Technos but on behalf of two miners "who were subject to being blamed for the alleged violation to assist them in clearing their records of the alleged incident." (Lowe Opposition 10). He states that he was taking these actions as a miners' representative. *Id.* at 11. He filed a document dated August 16, 2005, signed by 13 miners employed by Technos designating him as their representative for mine safety and health purposes, which states that he has been their representative since August 2000. (Ex. C to Lowe's Opposition).² Lowe may well be a "miners' representative" when seeking to improve the health and safety of miners, but he was not acting as a miners' representative when he sought information to contest the citation.

² Neither Technos nor Lowe filed this miners' representative designation with MSHA under 30 C.F.R. § 40.2.

As events progressed in the autumn of 2004, the discussions and correspondence between Lowe and MSHA turned from the initial document request to Lowe's concern that Lopez was disrespectful, abusive, unprofessional, and incompetent. Much of Lowe's anger at Lopez arose because MSHA provided its response to Lowe's FOIA request in 22 days rather than 20 days. Lowe also believed that MSHA was misusing exemption 7(A) of FOIA. These disputes between MSHA and Lowe have nothing to do with improving the safety of miners working for Technos. Lowe was not complaining about alleged violations or hazardous conditions. These discussions are not protected under section 105(c) of the Mine Act.³

I have relied on the facts presented by Lowe, including his characterization of his phone calls with MSHA officials, and the undisputed correspondence in reaching my conclusion that summary decision is warranted in this case. Further discovery would not reveal facts that would mitigate against a finding that Respondents are entitled to summary decision.

I believe that it is important to note that conflicts described above could have easily been avoided. The conduct of MSHA's management was far from exemplary. MSHA denied Lowe's FOIA request, yet it knew that he was acting as a representative of Technos. I find it hard to believe that Messrs. Lopez, Correl, and Friend were not aware that Lowe would be entitled to the inspector's notes and photographs for Citation No. 6255580 if he contested the citation before the Commission. None of these MSHA officials suggested to Lowe that he contest the citation once the Secretary proposed a penalty and that he file discovery with the Office of the Solicitor asking for the inspector's notes. If such a suggestion had been made, Lowe would have had access to the information he wanted and MSHA would not have been faced with a confrontation concerning the Secretary's recent policy of denying FOIA requests for basic information from MSHA. See "Records show Sharp Increase in MSHA FOIA Denials," *Mine Safety and Health News*, Vol. 12, No. 11, p. 222, May 31, 2005. It should also be noted that, if Lowe had contested the citation within 30 days of its issuance, he could have obtained the inspector's notes through the Commission's discovery rules before a penalty was proposed by the Secretary.

I also note that Lowe presented documentary evidence to support his contention that Friend contacted Addams for the purpose of putting pressure on Lowe to stop calling MSHA officials and to stop complaining about Lopez's response to his FOIA request. (Ex. D to Lowe's

³ It also bears noting that none of the activities that Lowe contends were protected under the Mine Act were taken on behalf of miners working for Aggregate Industries or miners working at facilities operated by Aggregate Industries. In a letter dated March 7, 2005, to the MSHA special investigator who was investigating Lowe's discrimination complaint, Addams stated that he was not aware that Lowe was representing Technos in safety matters before MSHA until Friend called him on December 3, 2004. (Ex. E to Lowe's Opposition). He stated he terminated Lowe for "conflict of interest, failing to perform his job satisfactorily, failing to comply with clearly communicated policy, insubordination, and misrepresentation." *Id.* at 3. Conflict between Lowe's evidence and Addams' letter on this issue goes to the motivation for his termination by Aggregate Industries, which has no bearing on the issues presented by the motions for summary decision.

Opposition). For purposes of this decision I accepted Lowe's evidence and argument. I assume that the Department of Labor's Inspector General is looking into this matter pursuant to Lowe's formal complaint. Because I granted the Secretary's and Aggregate Industry's motions for summary decision, I did not consider the Secretary's motion to dismiss, which was based on *Meredith v. FMSHRC*.

IV. ORDER

For the reasons set forth above, the motions for summary decision filed by the Secretary of Labor and Aggregate Industries are **GRANTED** and the discrimination complaint filed by Daniel B. Lowe against Aggregate Industries, the Secretary of Labor, and Robert Friend under section 105(c)(3) of the Mine Act is **DISMISSED**.⁴

Richard W. Manning
Administrative Law Judge

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⁴ Because this case is being dismissed, Aggregate Industries' motion to compel is moot.