



United States of America
OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION
U.S. Custom House
721 19th Street, Room 407
Denver, CO 80202-2517

SECRETARY OF LABOR,

Complainant,

v.

A & A ENVIRONMENTAL, INC.

Respondent.

OSHRC Docket No. 16-1994

**AMENDED ORDER DENYING A & A ENVIRONMENTAL SERVICES, INC. MOTION
TO
DISMISS WITH PREJUDICE**

This matter is before the Court on a *Motion to Dismiss* (“Motion”) filed by the former Respondent in this case, A & A Environmental Services, Inc.. Complainant filed his response and the current Respondent, A & A Environmental, Inc. did not file a response.

On April 20, 2016, the Occupational Safety and Health Administration (“OSHA”) commenced an inspection based upon a referral received from the local police department. During the inspection, OSHA believed the employees exposed to carbon monoxide poisoning while working on a nursing home were employees of A & A Environmental Services, Inc..

OSHA issued a timely citation to A & A Environmental Services, Inc. on October 18, 2016 which contained nine serious items and four willful items with a total proposed penalty of \$243,716.00 (“First Citation”). A & A Environmental Services, Inc. timely filed a *Notice of Contest* on November 7, 2016. The case involving A & A Environmental Services, Inc. was assigned OSHRC Docket No. 16-1994. The filing of a formal Complaint in this action did not occur until February 10, 2017.

On November 2, 2016, at an informal conference held between OSHA and A & A Environmental Services, Inc., OSHA was informed that the correct employer was A & A

Environmental, Inc. - another but totally distinct asbestos removal company owned by the father of the owner of A & A Environmental Services, Inc. As a result of this finding, OSHA issued a second citation to A & A Environmental, Inc. on November 2, 2016. The citation to A & A Environmental, Inc. was identical to the citation issued to A & A Environmental Services, Inc. except for the date of issuance (“Second Citation”). A & A Environmental, Inc. timely filed a *Notice of Contest* to the Second Citation on November 7, 2016. The case involving A & A Environmental, Inc. was assigned OSHRC Docket 16-1903.

The Court held a conference with the parties on January 17, 2017. In addition to Complainant being represented at the conference, both A & A Environmental Services, Inc. and A & A Environmental, Inc. were also represented. It became apparent during the conference that A & A Environmental Services, Inc. was cited in error and upon being informed of such error Complainant served A & A Environmental, Inc. with the Second Citation. Such action, as denoted above, resulted in two cases being docketed before the Commission resulting from the same inspection. Thus, to procedurally correct the duplication and to limit this action to the proper employer Respondent, on January 17, 2017 the Court issued an Order (“January 17 Order”) in which Complainant’s request for leave to file a motion to amend the First Citation issued to A & A Environmental Services, Inc. to correctly identify the correct party as A & A Environmental, Inc. by the filing of the Complaint was GRANTED. In permitting Complainant to employ this procedure, the Court, based upon the representations of the parties, recognized that the correct employer Respondent for OSHRC Docket No. 16-1994 was A & A Environmental, Inc. and through the requested amendment to OSHRC Docket No. 16-1994, A & A Environmental Services, Inc. would be dismissed.

On February 10, 2017, Complainant filed the Complaint in OSHRC Docket 16-1994 to reflect that A & A Environmental, Inc. and not A & A Environmental Services, Inc., was the correct Respondent.¹ On the same day, Complainant withdrew, *without prejudice*, the Second Citation served upon A & A Environmental, Inc., thereby ending OSHRC Docket No. 16-1903. The Court approved the withdrawal of the Second Citation served upon A & A Environmental, Inc. and its Order has become the final Order of the Commission. Thus, through these

¹ A & A Environmental, Inc. filed its Answer on March 2, 2017. In its Answer, A & A Environmental, Inc. continued to object to Complainant’s attempt to amend the First Citation by naming it as the Respondent in this action in order for the issuance of the citations against A & A Environmental, Inc. to be considered timely under the statute of limitations. The Court makes no ruling on that issue and nothing in this Order should be construed as addressing that dispute.

procedural motions, a duplicative case has been dismissed, and in the current case, Complainant has identified A & A Environmental, Inc. as the employer Respondent for the purpose of going forward.

On March 14, 2017 A & A Environmental Services, Inc. filed the current *Motion* to dismiss *with prejudice* OSHRC Docket No. 16-1994 as to it being named the original employer Respondent. As previously stated, the action against A & A Environmental Services, Inc. was dismissed by the filing of the Complaint which identified A & A Environmental, Inc. as the proper employer Respondent in this action going forward. Thus, the sole issue is whether the dismissal of A & A Environmental, Services, Inc. is *with prejudice* or *without prejudice*.

The Court, in its January 17 Order, recognized Complainant was permitted to amend the First Citation which he did in this action by filing the Complaint. 29 C.F.R. § 2200.34(a)(3). In entering its previous Order, the Court followed F.R.C.P. Rule 15², which governs amendments to pleadings, and states that a court should “freely give leave [to amend a pleading] when justice so requires.” Fed. R. Civ. P. 15(a)(2). A judge’s decision to grant an amendment to a pleading is reviewed for an abuse of discretion. *See Reed Eng. Group, Inc.*, 21 BNA OSHC 1290 (No. 02-0620, 2005). “Motions to amend should be granted freely if the non-moving party will not be prejudiced in preparing or presenting his case.” *Structural Painting Corp.*, 7 BNA OSHC 1682 (No. 15,450, 1979). *See also Foman v. Davis*, 371 U.S. 178, 182 (1962) (holding that leave to amend shall be freely given in the absence of “undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, [or] futility of the amendment”). In that regard, the court is required to ensure that fair notice is given before granting leave to amend. *Reed*, 21 BNA OSHC 1290. Here all parties were involved in the conference with the Court. All parties were aware of the course of action that would be taken based upon the disclosures in the conference and any participant could have asked for consideration of other relief if it felt it was not adequately protected by the contemplated actions. *See United Cotton Goods, Inc.*, 10 BNA OSHC 1389 (No. 77-1894, 1982).

Commission rules are silent as to what occurs when a different entity, which is not affiliated with or a subsidiary of the originally named Respondent, is substituted in the action as the proper employer Respondent. As Respondent A & A Environmental Services, Inc. has stated

² The Federal Rules of Civil Procedure are applicable when Commission Rules are silent. 29 C.F.R. § 2200.2(b).

in its *Motion*, the Court recognized in its January 17 Order that the end result of permitting Complainant to amend the citation (through the filing of a Complaint) “would be to dismiss OSHRC Docket 16-1994 against AAES.”

Complainant argues under F.R.C.P. 41(a)(1)(A)(i) (“Rule 41(a)(1)”), by filing the Complaint which references the First Citation items, penalties and identifies A & A Environmental, Inc. as the employer Respondent, Complainant accomplished a voluntary dismissal of this action against A & A Environmental Services, Inc. since at that time no answer or Rule 56 motion was pending. Complainant also argues that voluntary dismissal of A & A Environmental Services, Inc. is *without prejudice*. See F.R.C.P. 41(a)(1)(B).

There are two avenues the Court can evaluate the argument of the parties. Under either analysis, the result is the same.

The first analysis employs the voluntary dismissal provisions of Rule 41(a)(1). Generally, a Rule 41(a)(1) dismissal results in immediate termination of the suit. *Harvey Speciality & Supply, Inc. v. Anson Flowline*, 434 F.3d 320, 324 (5th Cir. 2005) (“The plaintiff has an “absolute right” to a Rule 41(a)(1) dismissal, and “[t]he effect of [a Rule 41(a)(1)] dismissal is to put the plaintiff in a legal position as if he had never brought the first suit.”)(internal citations omitted). The procedural history indicates that the First Citation - which was assigned OSHRC Docket No. 16-1994 - was issued to A & A Environmental Services, Inc. on October 18, 2016. No Complaint was filed in OSHRC Docket No. 16-1994 until February 10, 2017. At the time the Complaint was filed, Complainant sought simultaneously the voluntary dismissal of A & A Environmental Services, Inc. as the named respondent party to the First Citation and named A & A Environmental, Inc. as the proper party respondent. Thus, by naming A & A Environmental, Inc. as the proper party respondent *before* an answer was filed Complainant could be found to have accomplished an involuntary dismissal of the action against A & A Environmental Services, Inc. In such an instance, still proceeding under Rule 41(a)(1), the parties are referred to F.R.C.P. 41(a)(1)(B) for the effect of the such dismissal. The effect of such an action as to A & A Environmental Services, Inc. would be a dismissal *without prejudice*.³

³ Under Rule 41(a)(1), the plaintiff is vested with the right by stipulation or notice to state the effect of dismissal. Absent such a declaration by the plaintiff, the rule states the effect of such dismissal is *without prejudice*. Since it is the right of the plaintiff to state what effect the dismissal should have, it would be error for the court to impose that the condition be *with prejudice* absent consent. *Bailey v. Shell Western E&P, Inc.*, 609 F.3d 710, 719 (5th Cir. 2010).

The second analysis occurs under F.R.C.P. 41(a)(2) (“Rule 41(a)(2)”) which governs dismissals by court order. This would be the applicable section to proceed under when an answer or motion for summary judgment has been filed; thereby precluding the operation of Rule 41(a)(1). The Court can interpret the procedural history of this case as preventing the operation of F.R.C.P. 41(a)(1) by A & A Environmental Services, Inc. filing its *Notice of Contest* on November 7, 2016. The *Notice of Contest* in this case essentially contained enough information in terms of denial, items and penalties contested that it functionally operates as an answer. *See* 29 C.F.R. § 2200.34(b)(2). In addition, the Court can look at the timing of the filing of the *Motion* in relation to the filing of the answer. As previously stated an answer to the Complaint was filed on March 2, 2017 by A & A Environmental, Inc. The *Motion* filed by A & A Environmental Services, Inc. seeking dismissal *with prejudice* was filed on March 14, 2017. Therefore, by the time the *Motion* was filed an answer had been filed. Thus, relief sought under Rule 41(a)(1) was foreclosed by the filing of the answer. *Bechuck v. Home Depot*, 814 F.3d 287, 293 (5th Cir. 2016)(Plaintiff may be prevented from invoking their unfettered right to dismiss actions under Rule 41(a)(1) by the simple step of filing an answer). *See also Harvey Specialty & Supply, Inc. v. Anson Flowline Equip. Inc.*, 434 F.3d 320, 324 (5th Cir. 2005 (discussing *Wilson v. City of San Jose*, 111 F.3d 688, 694 (9th Cir. 1997)); *Carter v. United States*, 547 F.2d 258, 259 (5th Cir. 1977)). Therefore, proceeding under Rule 41(a)(1) was foreclosed by the filing of the answer or the functionally equivalent of the answer – the *Notice of Contest*. Thus, the parties would have to revert to Rule 41(a)(2) which requires the dismissal be approved by the court and also states the effect of a court approved dismissal.

Rule 41(a)(2) states that except as provided by Rule 41(a)(1), an action may be dismissed at plaintiff’s request only by court order and on terms the court deems proper. The rule also states that “Unless the order states otherwise, a dismissal under paragraph (2) is *without prejudice*.” (emphasis added). As previously stated the Court held a conference with the parties on January 17, 2017. All parties to the conference had the opportunity to advance argument to protect its position. It became apparent during the conference that A & A Environmental Services, Inc. was cited in error. Thus, to procedurally correct the duplication and to limit this action to the proper employer Respondent, the Court issued its January 17 Order in which Complainant’s request for leave to file a motion to amend the First Citation issued to A & A Environmental Services, Inc. to correctly identify the correct party as A & A Environmental, Inc. by the filing of the Complaint

was GRANTED. In permitting Complainant to employ this procedure, the Court, based upon the representations of the parties, recognized that the correct employer Respondent for OSHRC Docket No. 16-1994 was A & A Environmental, Inc. and through the requested amendment to OSHRC Docket No. 16-1994, A & A Environmental Services, Inc. would be dismissed. Thus, the Court entered an Order approving the dismissal of A & A Environmental Services, Inc. in compliance with Rule 41(a)(2). The Court's January 17 Order did not specify the effect of the dismissal; therefore, under the rule such dismissal is *without prejudice*.⁴

A & A Environmental Services, Inc. will not be prejudiced for its dismissal being *without prejudice*. First, this Court retains jurisdiction to approve any future amendment to the Complaint. F.R.C.P. 15(a)(2). It is through this retention of jurisdiction that A & A Environmental Services, Inc. would be protected from any actions of Complainant to re-substitute A & A Environmental Services, Inc. as Respondent in this case when such actions could be deemed to violate the Occupational Safety and Health Act's statute of limitation⁵ or violate the voluntary waiver in this case of the "relation back" doctrine due to mistake⁶.

The *Motion* which seeks to have A & A Environmental Services, Inc. dismissed *with prejudice* in this case is DENIED. The Court finds and so Orders that the dismissal of A & A Environmental Services, Inc. in this matter is *without prejudice*.

It is further ORDERED, as other relief which is appropriate,⁷ that Complainant shall correct all internal and public records which indicate that A & A Environmental Services Inc. was cited as a result of the inspection⁸ subject to this action. By this expungement, A & A Environmental Services, Inc. will not be mistaken in future actions undertaken by OSHA as an employer previously cited and the public cannot be misled as to the record of A & A Environmental Services, Inc.. Complainant shall within thirty days of this Order provide documentation to A & A Environmental Services, Inc. of the results of any action taken as to expungement.

⁴ A & A Environmental Services, Inc. could have requested at the January 17, 2017 conference for the Court to enter in its January 17 Order the effect of the dismissal would be *with prejudice*. It failed to do so and waited until after the Complaint and Answer have been filed to seek such relief. The burden under Rule 41(a)(2) is on the party seeking a different operation of the effect of the dismissal than set forth under the rules. It would be improper for the Court on its own motion to establish the effect of the dismissal. *See infra* Fn. 3.

⁵ 29 USC § 658(b).

⁶ *See, e.g., Avcon, Inc.* 23 O.S.H.Cas. (BNA) 1440 (No. 98-0755, 2011). *See also Cornwell v. Robinson*, 23 F.3d 694 (2d Cir. 1994) and *Kilkenny v. Arco Marine, Inc.*, 800 F.2d 853 (9th Cir. 1986).

⁷ 29 USC 659(c).

⁸ OSHA Inspection No. 1141444.

SO ORDERED.

/s/ Patrick B. Augustine

Patrick B. Augustine

Judge - OSHRC

Dated: April 12, 2017
Denver, CO