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LOCAL 9800 (UMWA) V. SOL (MSHA)
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Federal Mine Safety and Health Review Commission
Office of Administrative Law Judges

LOCAL 9800, UNITED MINE WORKERS OF AMERICA,
COMPLAINANT

v.

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA),

OR

THOMAS DUPREE,
RESPONDENTS

Complaint of Discharge, Discrimination or Interference

Docket No. KENT 80-216-D

Riverview Mine

ORDER DENYING RESPONDENT'S MOTIONS TO DISMISS
AND FOR SUMMARY DECISION;
ORDER GRANTING LEAVE TO AMEND SERVICE

Appearances: J. Davitt McAteer, Esq., Center for Law and Social Policy; Washington, D.C., for Complainant
Thomas P. Piliero, Esq., Office of the Solicitor, U.S. Department of Labor, Arlington, Virginia, for Respondent, Secretary of Labor

Before: Chief Administrative Law Judge Broderick

STATEMENT OF THE CASE

This case presents the novel issue whether the Mine Safety and Health Administration (MSHA) is subject to section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 815(c). That portion of the Act protects miners and their representatives from reprisals for engaging in certain safety-related activities. Complainant alleges that an employee of MSHA threatened it with a lawsuit in retaliation for notifiying MSHA of irregularities in certain mine inspections. Respondent, MSHA, has moved to dismiss the complaint and has moved for summary decision. Both motions will be denied.

The action is styled Local 9800, UMWA v. MSHA or Thomas Dupree. Although Dupree is a named respondent, he has not, as far as Commission records show, been served with a copy of the complaint or any

of the pleadings filed herein. On June 16, 1980, Complainant filed a motion to perfect service on Dupree. Respondent did not reply to the motion. The motion will be granted.

STATUTORY PROVISION

Section 105(c)(1) of the Act provides as follows:

> (c)(1) No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any such proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

THE MOTION TO DISMISS

Respondent challenges the complaint on three grounds. First, Respondent asserts that MSHA is not a "person" subject to the provisions of section 105(c). It also states that the conduct alleged is under the jurisdiction of the Labor Department Inspector General rather than the Commission. Finally, it contends that Dupree's conduct cannot be imputed to MSHA since Dupree was not acting in his capacity as an MSHA employee when he made the alleged phone call. Respondent reformulated this last contention as a motion for summary decision on June 27, 1980, and supported it with an affidavit from Dupree. Accordingly, it will be discussed separately.

Respondent's first two contentions will be taken as components of Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure. 29 C.F.R. 2700.1(b). Thus, the question is whether

Complainant has stated a cause of action. For the purposes of the motion, the well-pleaded material allegations of the complaint are taken as admitted. 2A Moore, Federal Practice, %5712.08. A complaint should not be dismissed unless it appears to a certainty that the complainant is not entitled to relief under any state of facts which could be proved in support of the claim. Id. I assume, therefore, that the following pleaded facts are true:

1. In August 1979, Complainant discovered reports of mine inspections by MSHA inspectors that were falsified: The reports recited a general inspection of the Riverview Mine on July 24, 25, and 26, 1979. In fact, the inspectors had not been at the mine on July 25 and 26 and were there only 30 to 40 minutes on July 24.

2. Members of Complainant's safety committee discussed the irregularities with William Craft, Director of MSHA District 10, in late 1979. Craft admitted the discrepancies, stated that steps would be taken to correct the situation and Complainant would be kept informed.

3. On December 2, 1979, not having been informed of steps taken by Craft, Complainant's President, Houston Elmore, wrote to the MSHA Administrator of Coal Mine Health and Safety, requesting an investigation.

4. On or about January 31, 1980, Thomas Gaston, President of UMWA District 23, received a telephone call from Thomas Dupree, an official of the MSHA District 10 Office.

5. The telephone call concerned Elmore's letter of December 2, 1979. Dupree accused Elmore of derisive comments with regard to MSHA inspectors and with libel. He told Gaston that legal counsel had advised him that Elmore or Local 9800 could be held liable for the contents of the letter.

A. IS MSHA A "PERSON"?

Were MSHA not the respondent in this case, the facts pleaded would clearly state a cause of action under section 105(c). A threat to sue a representative of miners because that representative has made a complaint related to the Act, such as complaint that the provisions of section 103 are not being observed, constitutes, in the circumstances of this case, unlawful interference with the representative's right to make that complaint.

In deciding whether MSHA is subject to liability under the general wording of the statute, the key factor is legislative intent. Cf. Monell v. Department of Social Services, 436 U.S. 658 (1978). Section 105(c)(1) declares that "no person shall discharge or in any

other manner discriminate * * * or otherwise interfere with the exercise of the statutory rights of any miner * * *." The word "person" is defined in section 3(f) as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." There is nothing in the Act or in the legislative history to indicate that Congress considered the question whether MSHA or any other public agency could be a "person" involved in discriminatory conduct under section 105(c). The task, then, is "not to determine what the legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." Cardozo, The Nature of the Judicial Process, 15 (1921).

The Senate Committee Report on the wording of section 105(c) states that "ÕiÊt should be emphasized that the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved." S. Rep. No. 95-181, 95th Cong., 2d Sess., p. 36 (1977), reprinted in LEGISLATIVE HISTORY OF THE FEDERAL MINE SAFETY AND HEALTH ACT, p. 624. The same report directs that section 105(c) is "to be construed expansively" in order "to assure that miners will not be inhibited in any way in exercising any rights afforded by the legislation." Id

A survey of the law in other fields provides some guidance. It was long the general rule that "the United States, when not expressly named in or made subject of a legislative enactment, and not included therein by necessary implication, is not bound by the terms thereof * * *." 77 Am. Jur. 2d, United States, 6. See also, United States v. Wittek, 337 U.S. 346 (1949); F.P.C. v. Tuscarora Indian Nation, 362 U.S. 99, 120 (1960). But this rule may be ascribed, in large part, to the doctrine of sovereign immunity, which has recently been sharply curtailed by Congress. See 5 U.S.C. 702. Despite the general rule, an exception was held to obtain where the statute was "intended to prevent injury and wrong." Nardone v. United States, 302 U.S. 379, 384 (1937). That case involved section 605 of the Communications Act of 1934, which declared that no "person," not being authorized, shall intercept communications and divulge them to another. The directive was applied against Federal agents to suppress the introduction of illegally obtained evidence at a criminal trial. See also United States v. Brown, 555 F.2d 407 (5th Cir. 1977); Letter Carriers v. U.S. Postal Service, 333 F. Supp. 566 (D.D.C. 1971); Wycoff's Estate v. C.I.R., 506 F.2d 1144 (10th Cir. 1974), cert. den. sub nom. Zion's First National Bank v. C.I.R., 421 U.S. 1000.

In cases such as this, courts also examine the entire scheme of regulation to see if an effective alternate remedy is available. Pfizer, Inc. v. India, 434 U.S. 308 (1978); United States v. Cooper, 312 U.S. 600, 604-605 (1941); Georgia v. Evans, 316 U.S. 388 (1971); cf., Bivens v. Six Narcotics Agents, 403 U.S. 388 (1971); Davis v.

Passman, 442 U.S. 228 (1979). Here, Complainant may pursue other avenues of relief for the failure to inspect properly and for injuries traceable to this neglect. E.g., Raymer v. United States, 482 F. Supp. 432 (W.D. Ky. 1979). But the act of discrimination alleged is, by its inchoate nature, uniquely within the domain of this Commission. Dupree's remarks were probably not sufficiently pronounced or defined to trigger general tort or criminal liability. They are precisely the sort of threats, from one in a position to carry them out (or so it may have seemed to the union's district president) that section 105(c) is designed to discourage. Complainant may logically claim that the remarks had a chilling effect on its willingness to report dangers to miners' safety and health.

The conduct of elections under the National Labor Relations Act supplies a fitting analogy. The NLRB's goal is to assure that elections for collective bargaining representatives are held under "laboratory conditions." General Shoe Corp., 77 N.L.R.B. 127 (1948). Although only employers and unions may be charged with unfair labor practices, it has long been the Board's position that conduct which can result in setting aside an election need not constitute an unfair labor practice. Id. A coercive atmosphere created by townspeople is enough to set aside an election. Utica-Herbrand Tool Division of Kelsey-Hayes Co., 145 N.L.R.B. 1717 (1964). More to the point, if an agent of the Board gives the appearance of partiality, the election will be set aside. NLRB v. Fresh'nd Aire Co., 226 F.2d 737 (7th Cir. 1955).

The Federal Mine Safety and Health Act seeks to ensure that all persons involved in operating a mine are safety-conscious and safety-oriented in every task they perform. Just as the NLRB aims to promote an atmosphere conducive to free choice, so the Commission and MSHA aim to promote an atmosphere conducive to safety and good health. Such an atmosphere must be receptive to complaints concerning dangerous conditions. Complainant has alleged facts which, if true, could be shown to pose a risk that such conditions might go unreported.

Because the purpose of the statutory provision is to protect miners from discrimination from any source, and, following an "expansive construction," I hold that MSHA is a person under section 105(c) prohibited from discriminating against any miner.

B. THE INSPECTOR GENERAL ACT

Respondent also contends that the Inspector General has jurisdiction over the discriminatory conduct alleged. I have above concluded that the Commission has jurisdiction to entertain this complaint. If respondent can be taken to have requested deferral

of Commission jurisdiction until internal procedures in the Department of Labor have been exhausted, the request is rejected.

While resolution of an entire controversy in one proceeding promotes judicial economy and conserves the resources of litigants, this is an inappropriate case in which to inaugurate a deferral policy. Internal procedures at MSHA are directed primarily at vindication of the Government's managerial interest in honesty and efficiency. The Commission exists specifically to safeguard mine safety and health. Moreover, even assuming that the Inspector General entertains Complainant's charges, Complainant would not be a party to any proceedings with a right to participate in the course of litigation, as it is here. It is worthwhile to note, finally, that in cases dealing with discriminatory interference which employee rights, the policy of administrative deferral is in decided retreat. E.g., Newport News Shipbuilding v. Marshall, 8 OSHC (BNA) 1393 (E.D. Va. 1980); Suburban Motor Freight, 103 L.R.R.M. 113 (1980); Banyard v. NLRB, 505 F.2d 342 (D.C. Cir. 1974).

THE MOTION FOR SUMMARY DECISION

Subsequent to its motion to dismiss, Respondent filed a motion for summary decision pursuant to 29 C.F.R. 2700.64 suported by an affidavit from George Thomas Dupree. In the affidavit, Dupree states as follows: He is a Federal coal mine inspector in MSHA's District 10 Office and is President of Local 3340, AFGE. In the latter capacity, he represents MSHA inspectors in the District 10 Office. In January 1980, he became aware of Mr. Elmore's letter of December 2, 1979, to MSHA's Administrator. The letter contained unfounded serious charges of criminal acts on the part of members of the AFGE local. Because of this, Dupree telephoned Thomas Gaston of District 23, UMWA, to determine whether Elmore's charges were supported by the UMWA membership. Dupree stated that he intended to seek legal counsel as President of AFGE Local 3340 to determine whether Elmore could be liable for the defamatory statements in the letter. The telephone call was made from MSHA District 10 headquarters, but was made in Dupree's capacity as President of Local 3340, AFGE.

Complainant filed a statement in opposition to the motion for summary decision and attached an affidavit from Tommy Gaston. Gaston's affidavit states that on or about January 31, 1980, he received a call from Mr. Tom Dupree, an MSHA employee, who asked Gaston if he was aware of the letter written by Elmore seeking an investigation of the District 10 Office. Dupree stated that he felt that Elmore was accusing all the inspectors of District 10 of falsifying reports. Dupree further stated that the contents of the letter were libelous and that he was advised by an attorney that Elmore (Erratum 9/26/80) could be held liable for them.

Under Commission Rules, a motion for summary decision shall be granted only if the entire record shows that there is no genuine issue as to any material fact. 29 C.F.R. 2700.64(b).

I conclude that, despite the affidavits, issues of fact concerning the scope of Dupree's authority, actual or apparent, remain unresolved. These issues can best be decided after considering the testimony of the people involved.

CONCLUSION

In sum, I find that Complainant has stated a claim upon which relief may be granted under section 105(c). Therefore, the motion to dismiss must be denied. Since the record herein does not show that there is no genuine issue as to any material fact, the motion for summary decision must be denied. Complainant's motion for leave to amend service will be granted.

ORDER

Respondent's motion to dismiss is DENIED; Respondent's motion for summary decision is DENIED; Complainant's motion for leave to amend service so as to serve Thomas Dupree is GRANTED.

James A. Broderick
Chief Administrative Law Judge