

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES  
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FALLS CHURCH, VIRGINIA 22041

February 11, 1997

UNITED MINE WORKERS OF AMERICA	:	DISCRIMINATION PROCEEDING
ON BEHALF OF	:	
WILLIAM KEITH BURGESS,	:	Docket No. SE 96-367-D
GLENN LOGGINS, AND	:	
DAVID MCATEER,	:	JWR No. 4 Mine
Complainants	:	
v.	:	
SECRETARY OF LABOR,	:	
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
MICHAEL J. LAWLESS,	:	
FRANK YOUNG, and	:	
JUDY MCCORMICK	:	
Respondents	:	
UNITED MINE WORKERS OF AMERICA	:	DISCRIMINATION PROCEEDING
ON BEHALF OF	:	
B. RAY PATE, the LOCAL	:	Docket No. SE 97-18-D
UNION 8982 SAFETY COMMITTEE	:	
and others,	:	BIRM CD 96-07
Complainants	:	
v.	:	U.S. Steel Mining Corp.
SECRETARY OF LABOR,	:	Concord Prep Facilities
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	
TOM MEREDITH, MICHAEL J.	:	
LAWLESS & FRANK YOUNG,	:	
Respondents	:	

ORDER OF CONSOLIDATION AND DISMISSAL

Before: Judge Bulluck

I. Motion to Consolidate

In these discrimination cases brought by the United Mine Workers of America (AUMWA@) against the Mine Safety and Health Administration (AMSHA@) and individual MSHA employees pursuant to

section 105(c) of the Federal Mine Safety and Health Act of 1977 (Athe Act@), 30 U.S.C. section 801 et seq., the Respondent has moved to consolidate and dismiss the complaints.<sup>1/</sup> Inasmuch as the complaints involve resolution of the same legal issue, and the motion to consolidate is unopposed by the Petitioner, the motion is granted. For the reasons set forth below, the motions to dismiss the complaints are, likewise, granted.

## II. Motions to Dismiss

The Secretary of Labor (ASecretary@) moved to dismiss the complaints, essentially arguing that there is no cause of action against MSHA or its employees under section 105(c) of the Act. In support of his position, the Secretary cites the Commission's decision in Wagner v. Pittston Coal Group, 12 FMSHRC 1178 (June 1990), and the decision of the Court of Appeals for the Fourth Circuit (Athe Court@) in Wagner v. Secretary of Labor, No. 91-2025, 1991 U.S. App. LEXIS 26336, at \*1 (4<sup>th</sup> Cir. Nov. 5, 1991), aff=g by unpublished decision 12 FMSHRC 1178 (June 1990).<sup>2/</sup>

In Docket No. SE 96-367-D, under the circumstances set forth below, the complainants seek to hold MSHA and MSHA employees liable for violations of sections 103(g)(in pertinent part, requiring the Secretary to delete the names of individual miners from copies of written complaints provided to operators), and 105(c)(1) of the Act (protecting miners who have engaged in protected activity from discrimination).<sup>3/</sup> On or about May 24, 1996, the chairman of Local 2245's safety committee David McAteer, along with committee members William Keith Burgess and Glenn Loggins, sent a letter to MSHA District 11 manager, Michael Lawless, complaining of safety violations at the Jim Walter Resources= #4 mine and MSHA's continual grant of extensions of scheduled mine inspections. Subsequently, at an accident

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<sup>1/</sup> Although the UMWA filed its complaint (Docket No. SE 97-18-D under section 105(c)(2), it is clear from the pleadings that it intended to sue under section 105(c)(3), which procedural error is without prejudice to the Secretary, and is therefore deemed immaterial.

<sup>2/</sup> Dennis Wagner sought to hold MSHA employees liable for disclosing to the operator that he (Wagner) had reported a safety violation to MSHA during a mine inspection.

<sup>3/</sup> Because these cases are before me pursuant to motions to dismiss, the complainants= allegations are treated as true. Goff v. Youghiogheny & Ohio Coal Co., 7 FMSHRC 1776 (November 1985).

investigation team pre-inspection meeting held at the mine site, attended by MSHA supervisors and inspectors, the mine manager and some of his subordinates, and McAteer and Burgess, a sanitized, typed version of the letter was distributed, omitting all names and references to individual miners. However, MSHA supervisor Judy McCormick verbally chastised McAteer and Burgess for their criticisms of MSHA, thereby disclosing the identity of the complainants to Jim Walter Resources management.

In Docket No. SE 97-18-D, the following circumstances gave rise to the allegation of liability of MSHA and MSHA employees for violations of section 105(c)(1) of the Act. Pursuant to various safety and health concerns raised during the spring/summer of 1996 by UMWA representatives, including Local Union 8982 president B. Ray Pate, on or about August 9, 1996, MSHA District 11 manager Michael Lawless and assistant district manager Frank Young met with UMWA representatives, including Pate, to discuss the union's complaints about MSHA District 11 staff and enforcement problems at the mines within District 11. Thereafter, on or about August 11, 1996, MSHA informed Pate that MSHA District 11 supervisor Tom Meredith would be requiring all miners at the U.S. Steel Concord Preparation Plant and associated facilities, including the local union officials and its members, to file health and safety complaints in writing by hand-delivery.

This policy discontinued MSHA's previous policy of accepting complaints made by telephone to the District 11 office. Consequently, on September 19 and 25, 1996, the UMWA filed a section 105(c) complaint against MSHA employees Meredith, Lawless and Young, charging the District 11 personnel with disclosing to mine management the identity of the complaining miner representative, seeking employment with the company, and conducting negligible enforcement action at the mine. By letters dated September 23 and October 9, 1996, MSHA rejected the UMWA's complaint.

#### Proceedings against MSHA

In Wagner, the Commission held that A. . . MSHA is not a 'person' subject to the provisions of Section 105(c)@, and dismissed the complaint that had been brought against the agency. Wagner, 12 FMSHRC at 1185. See also Nelson v. Secretary of Labor, 14 FMSHRC 337 (February 1992) (Administrative Law Judges' dismissal of the UMWA's complaint against MSHA, pursuant to the Commission's holding in Wagner).

The Commission approached the issue of MSHA's liability by analyzing the construction of the Act to determine whether the

Secretary had consented to be sued. First, in examining the words of sections 105(c) and 3(f) (defines person as any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization), the Commission found no reference to the government or any governmental entity in the term person, and relied on a principle of statutory construction that common usage of person does not include the sovereign, and statutes using the term are ordinarily construed to exclude it. Wagner, 12 FMSHRC at 1184.

In determining that there is no waiver of sovereign immunity in the Act, the Commission cited Rushton Mining Co. v. Secretary of Labor, 11 FMSHRC 759, 766 (May 1989), noting that it is well settled that the United States, as the sovereign, is immune from suit except as it consents to be sued and that waivers of its immunity must be unequivocally expressed. Wagner, 12 FMSHRC at 1184. Consequently, the Commission concluded that, the definitions set forth in the Act and the enforcement scheme of section 105(c) indicate that Congress regarded the Secretary and MSHA as separate and distinct from the population covered by the term 'person.' Id. at 1185.

The complainants argue that Wagner is not applicable to the instant proceedings, in that section 103(g)(1) of the Act does not accord protection to miners who make oral complaints as in Wagner, whereas protection is accorded to the written complaints herein at issue. This argument is unpersuasive, since the language of the Act makes no such distinction, nor would such an interpretation of section 103(g)(1) be consistent with the broad protection against discrimination provided to complainants in section 105(c). While the narrow scope of section 103(g)(1) specifically prescribes procedures by which the Secretary shall maintain the confidentiality of complainants who raise health and/or safety violations in writing, the broad language of section 105(c)(1) clearly expresses Congressional intent that the universe of protected activity be inclusive of oral and written complaints: "[n]o person shall . . . in any manner discriminate against . . . any miner . . . because such miner . . . has filed

or made a complaint . . . . (emphasis added)@ 30 U.S.C. section 815(c)(1).<sup>4/</sup>

Moreover, the issue of MSHA's sovereign immunity from 105(c) liability was not before the Court in Wagner, and the Court affirmed the Commission's decision which held, in part, that

MSHA, having not expressly waived its sovereign immunity, is not a person,@ as included in section 105(c). Accordingly, as the Commission decision remains the prevailing law, it is concluded that MSHA is not a person@ subject to liability under section 105(c) of the Act, and that portion of the complaints, herein seeking relief against MSHA for alleged violations of sections 103(g)(1) and 105(c) of the Act, is hereby dismissed.

#### Proceedings against Individual Employees of MSHA

The Commission's holding in Wagner, that MSHA employees and agents are not 'persons' subject to the provisions of section 105(c), and thus . . . cannot be sued individually under section 105(c),@ Wagner, 12 FMSHRC at 1185, was premised upon its conclusion that, had Congress intended to render MSHA employees susceptible to section 105(c) suits, it would have expressly stated so; moreover, to hold otherwise would run afoul of the enforcement scheme of section 105(c) respecting MSHA's investigatory role/authority, as well as relief awarded and sanctions imposed for violations. Id. at 1185, 1186. This holding was upheld by the Court in Wagner, which concluded that A[f]inding no indication in the statutory framework of an intent by Congress to depart from the accepted usage of the term 'person,' . . . MSHA employees acting within the scope of their authority are agents of the sovereign, and therefore cannot be liable under section 105(c).@ Wagner, at \*6.

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<sup>4/</sup> According to the pleadings, the Secretary did comply with section 103(g)(1), in that the letter that had been sent to MSHA had been sanitized to remove all names and references to individual miners before dissemination at the accident investigation team pre-inspection meeting.

The complainants' argument that the rules of *respondent superior* under Alabama state law apply to the facts herein at issue is equally unpersuasive since, as the Commission recognizes, the cause of action, if any, does not arise under the Act.<sup>5/</sup> In concluding that it finds no cause of action under section 105(c) for abuse of power by MSHA employees, the Commission notes that an employee whose action is in violation of his or her duties is not immune from civil suit and possible punitive action. It is well settled that individuals wronged by federal agents through abuse of their power may have a cause of action for damages under state law. @ Wagner, 12 FMSHRC at 1186. See also Wagner, 1991 U.S. App. LEXIS 26336, at \*7 (the Court recognized that claims of injury resulting from the wrongful acts or omissions of government employees acting within the scope of their employment are properly brought under the Federal Tort Claims Act, and analyzed according to the rules of *respondent superior* in the state wherein the alleged wrong occurred).

In an alternative analysis, subjecting section 105 provisions to Virginia rules of *respondent superior*, the Court then examined the alleged misconduct of the MSHA employee in the case before it, and characterizing that behavior as an exercise of poor judgment,@ concluded that A[i]n the absence of a statutory prohibition against such disclosure, there is no sound basis for the court to conclude that Inspector Sloce exceeded the bounds of his statutory authority by communicating Wagner's identity to Wayne Fields and Clinchfield Coal. @ Id. at \*6, \*7. The Court did not address the question of whether MSHA employees acting outside the scope of their authority are subject to suit under section 105(c), and it is unnecessary to pursue that question here, since I find nothing in the behavior of the MSHA employees in question which is materially distinguishable from the conduct in Wagner, or which would lead me to conclude that these individuals acted outside the scope of their authority. Finally, the Court made clear that it was rejecting a conclusion

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<sup>5/</sup> Respondent superior: literally meaning Alet the master answer,@ this maxim means that a master is liable in certain cases for the wrongful acts of his servant, and a principal for those of his agent. Black's Law Dictionary 1311, 1312 (6<sup>th</sup> ed. 1990).

that Congress intended for section 105 enforcement procedures to be governed by applicable state rules of *respondent superior* under the Federal Tort Claims Act, Id. at \*7, and the Court's reasoning is equally valid against the complainants' arguments in the instant complaints.

Accordingly, as held by the Commission in Wagner, and affirmed by the Court, MSHA employees cannot be sued individually under Section 105(c), and that portion of the instant complaints alleging liability of MSHA employees under 105(c) is dismissed.<sup>6/</sup>

Jacqueline R. Bulluck  
Administrative Law Judge

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<sup>6/</sup> Inasmuch as the Court's holding in Wagner is based on the sovereign immunity of MSHA and its employees, neither expressly waived by statutory construction nor legislative intent, it is unnecessary to address the remaining arguments.

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