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ROBERT K. ROLAND V. MSHA
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
May 28, 1985

ROBERT K. ROLAND

v. Docket No. WEST 84-46-DM(A)

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

BEFORE: Backley, Acting Chairman; Lastowka and Nelson,
Commissioners

DECISION

BY THE COMMISSION:

This case involves a complaint of discrimination filed by a miner, Robert K. Roland, against the Secretary of Labor and the Department of Labor's Mine Safety and Health Administration ("MSHA"). The complaint alleges that the Secretary violated section 105(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 801 et seq. (1982) ("Mine Act") by withdrawing his representation of Mr. Roland in an action against Mr. Roland's former employer, Oil Shale Constructors ("OSC"). The Secretary filed a motion to dismiss the complaint against the Secretary and MSHA, asserting the failure of the complainant to state a claim upon which relief could be granted. A Commission administrative law judge denied the Secretary's motion, concluding that the Secretary and MSHA were susceptible to suit under the provisions of section 105(c) of the Mine Act, 30 U.S.C. 815(c), and that the complainant, therefore, had stated a cause of action. We granted the Secretary's petition for interlocutory review.^{1/} For the reasons that follow, we reverse the judge's decision and dismiss Mr. Roland's complaint.

On May 2, 1981, Mr. Roland suffered serious injuries to his head, shoulders, and back as a result of a ground fall at OSC's Parachute Creek Mine near Parachute, Colorado. After a period of recuperation,

1/ The Commission solicited the participation of amici curiae at the review level. The United Mine Workers of America ("UMWA") responded and filed a brief that assisted the Commission in resolving the important issues presented in this case brought by a pro se miner.

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Mr. Roland returned to light work at various OSC job sites. He was working in the Wheat Ridge Office Shop in Denver, Colorado, when he was discharged on February 9, 1982. Mr. Roland filed with MSHA a 26-page complaint of discrimination against OSC, pursuant to section 105(c)(2) of the Mine Act, 30 U.S.C. 815(c)(2). Mr. Roland alleged that, among other things, OSC had wrongfully discharged him because he had questioned the safety procedures of OSC and had been in contact with MSHA regarding his accident.

After investigating Mr. Roland's complaint, the Secretary of Labor, on June 13, 1983, filed with the Commission a complaint of discrimination on Mr. Roland's behalf against OSC. On December 15, 1983@ however, the Secretary filed a motion seeking to withdraw the discrimination complaint. The motion provided no reasons for the requested withdrawal. The motion was granted by Commission Judge John Carlson in an order issued on December 22, 1983. Secretary of Labor on behalf of Robert K. Roland v. Oil Shale Constructors, 5 FMSHRC 2221 (December 1983) (ALJ). In his order, Judge Carlson indicated that previously he had informed Mr. Roland that he had "fifteen days, if he wished them, in which to file formal objections to the Secretary's motion to withdraw. Mr. Roland indicated an understanding of what was involved and affirmatively waived his right to object." 5 FMSHRC at 2222. The judge advised Mr. Roland in the decision that he had thirty days to refile a complaint with the Commission on his own behalf pursuant to section 105(c)(3) of the Mine Act, 30 U.S.C. 815(c)(3). Id

On January 20, 1984, Mr. Roland filed a letter with the Commission expressing dissatisfaction with the Secretary's withdrawal from the case and indicating a desire to know why the complaint had been withdrawn. In the letter, Mr. Roland reasserted his claim of discrimination against OSC, as well as his request for temporary reinstatement. The Commission's Chief Administrative Law Judge treated this letter as a section 105(c)(3) complaint of discrimination against OSC and styled the matter Robert K. Roland v. Oil Shale Constructors. (The letter did not name the Secretary or MSHA as respondents.) The case was assigned to Commission Judge Gary Melick. Although Mr. Roland's letter made no mention of taking action against either the Secretary of Labor or MSHA, the next order issued by Judge Melick included the Secretary and MSHA as additional party-respondents. That order did not explain the reason for the joinder.

Shortly thereafter, on February 27, 1984, Mr. Roland and counsel for OSC filed with the Commission a Motion to Dismiss,

asserting that a written settlement agreement had been executed between Mr. Roland and OSC. The motion requested dismissal with prejudice of Mr. Roland's claim against OSC, but indicated Mr. Roland's intent to maintain any claims he might have against the United States or its agents and representatives. On March 5, 1984, the judge dismissed the case of Roland v. Oil Shale Constructors, but continued Mr. Roland's complaint against the Secretary of Labor and MSHA under a new docket number. Again, no reason was provided as to how the Secretary and MSHA became parties to this action.

In a show cause order issued on March 5, 1984, the judge directed Mr. Roland to explain his claim against the Secretary. In the ensuing months, Mr. Roland submitted to the judge a series of letters that comprised his amended complaint and provided the basis for his claim against the Secretary and MSHA. Essentially, Mr. Roland alleged that the Secretary's decision not to prosecute his discrimination complaint was not based on the merits of the case, but rather was directed by unnamed government officials to avoid setting a precedent that might prove injurious to unidentified mine operators. This, Mr. Roland alleged, was violative of his rights under section 105(c) of the Mine Act. 30 U.S.C. 815(c). Mr. Roland asserts monetary damages totalling \$79,357,650.

Subsequently, the Secretary filed a motion to dismiss this action, asserting that Mr. Roland had failed to state a claim cognizable under the Mine Act. The judge denied this motion in an unpublished decision issued on July 3, 1984. The judge held that, in the prior proceedings before Judge Carlson, Mr. Roland's waiver of his right to object to the dismissal of his discrimination complaint against OSC was not a knowing waiver. The judge stated that had Mr. Roland known of the Secretary's alleged improper motives for withdrawing from the case, he would not have acquiesced in the dismissal. Additionally, the judge determined that the Secretary of Labor is a "person" within the meaning of section 105(c)(1) of the Act, 30 U.S.C. 815(c)(1), and that Mr. Roland's complaint did in fact state a cause of action against the Secretary and MSHA.

We disagree with the judge's determination that Mr. Roland has stated a cause of action under section 105(c) of the Mine Act.^{2/} We hold that the Secretary's decision to withdraw his previously filed

2/ Section 105(c) provides:

(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

(footnote 2 continued)

discrimination complaint, based on his subsequent determination that discrimination has not occurred, does not constitute a violation of section 105(c) and is subject to limited review by this Commission.

footnote 2 continued.

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.

(2) Any miner or applicant for employment or representative of miners who believes that he has been discharged, interfered with, or otherwise discriminated against by any person in violation of this subsection may, within 60 days after such violation occurs, file a complaint with the Secretary alleging such discrimination. Upon receipt of such complaint, the Secretary shall forward a copy of the complaint to the respondent and shall cause such investigation to be made as he deems appropriate. Such investigation shall commence within 15 days of the Secretary's receipt of the complaint, and if the Secretary finds that such complaint was not frivolously brought, the Commission, on an expedited basis upon application of the Secretary, shall order the immediate reinstatement of the miner pending final order on the complaint. If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission, with service upon the alleged violator and the miner, applicant for employment, or representative of miners alleging such discrimination or interference and propose an order granting appropriate relief. The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section) and thereafter shall issue an order, based upon findings of fact, affirming, modifying, or vacating the Secretary's proposed order, or directing other appropriate relief. Such order shall become final 30 days after its issuance. The Commission shall have authority in such proceedings to require a person committing a violation of this subsection to take such affirmative action to abate the violation as the Commission deems appropriate, including, but not limited to, the rehiring or reinstatement of the miner to his former position with back pay and

interest.

(footnote 2 continued)

A fundamental purpose of section 105(c) is to encourage miners and their representatives to play an active part in the enforcement of the Mine Act by shielding them from retaliation or discrimination as a

footnote 2 end.

The complaining miner, applicant, or representative of miners may present additional evidence on his own behalf during any hearing held pursuant to this paragraph.

(3) Within 90 days of the receipt of a complaint filed under paragraph (2), the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation had occurred. If the Secretary, upon investigation, determines that the provisions of this subsection have not been violated, the complainant shall have the right, within 30 days of notice of the Secretary's determination, to file an action in his own behalf before the Commission, charging discrimination or interference in violation of paragraph (1). The Commission shall afford an opportunity for a hearing (in accordance with section 554 of title 5, United States Code, but without regard to subsection (a)(3) of such section), 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. Such order shall become final 30 days after its issuance. Whenever an order is issued sustaining the complainant's charges under this subsection, a sum equal to the aggregate amount of all costs and expenses (including attorney's fees) as determined by the Commission to have been reasonably incurred by the miner, applicant for employment or representative of miners for, or in connection with, the institution and prosecution of such proceedings shall be assessed against the person committing such violation. Proceedings under this section shall be expedited by the Secretary and the Commission. Any order issued by the Commission under this paragraph shall be subject to judicial review in accordance with section 106. Violations by any person of paragraph (1) shall be subject to the provisions of section 108 and 110(a).

30 U.S.C. 815(c).

result of their protected activities. See S. Rep. No. 181, 95th Cong., 2d Sess. 36 (1977) ("S. Rep."), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Federal Mine Safety and Health Act of 1977, at 623 (1978) ("Legis. Hist."). Section 105(c)(1) prohibits any discrimination against, discharge of, or other interference with a miner for exercising any statutory right under the Act. Section 105(c)(2) provides that a miner may file a discrimination complaint with the Secretary, and that upon receipt of a discrimination complaint, the Secretary:

shall cause such investigation to be made as he deems appropriate. ... If upon such investigation, the Secretary determines that the provisions of this subsection have been violated, he shall immediately file a complaint with the Commission.

30 U.S.C. 815(c)(2). Should the Secretary determine that no discrimination has occurred, the miner, pursuant to section 105(c)(3), 30 U.S.C. 815(c)(3), may file a discrimination complaint on his own behalf before the Commission.

Section 105(c)(2) places on the Secretary certain mandatory obligations. Upon the filing of a discrimination complaint, the Secretary must conduct an appropriate investigation and if his investigation of a miner's discrimination complaint results in a finding of discriminatory conduct on the part of the operator, he must file a discrimination complaint on the miner's behalf with the Commission. This section, however, also endows the Secretary with wide discretion. The phrases in section 105(c)(2) referring to the Secretary's handling of discrimination complaints, i.e., "causes such investigation ... as he deems appropriate" and "[i]f upon such investigation the Secretary determines ...," indicate a clear Congressional intent to grant the Secretary discretion in determining whether the facts underlying a discrimination complaint filed with him require his filing of a complaint with the Commission. Cf. *UMWA v. Secretary of Labor*, 5 FMSHRC 807 (May 1983), *aff'd mem*, 725 F.2d 126 (D.C. Cir. 1983) (miners do not have statutory authority under the Mine Act to initiate review of citations issued by the Secretary through the filing of a notice of contest); *UMWA v. Secretary of Labor*, 5 FMSHRC 1519 (September 1983) (miners have no standing to contest the Secretary's vacation of a section 104(d)(1) withdrawal order.)

This exercise of Secretarial discretion cannot constitute

discrimination under section 105(c). The specific language of section 105(c) does not provide that the Secretary's prosecutory and representation determinations are subject to its prohibitions. Such a reading of section 105(c) would place unwarranted constraints upon the discretion Congress intended the Secretary to exercise in determining the validity of miners' section 105(c) complaints, and would frustrate the enforcement scheme of the Act. Instead, section 105(c)(3) provides the miner an independent avenue of adjudication "[i]f the Secretary, upon investigation, determines that the provisions of [section 105(c)] have not been violated." The presence of section 105(c)(3) within the statutory

scheme establishes the appropriate recourse Congress intended the miner to have under the Mine Act, should the Secretary determine that a complaint should not be filed with the Commission.

In the instant case, the Secretary reversed his original administrative determination that a violation of section 105(c)(1) occurred and subsequently determined that a violation of section 105(c)(1) in fact did not occur. We have held in previous cases that in view of the unique administrative scheme established in the Mine Act, once Commission jurisdiction attaches, we will not grant automatically motions to dismiss, modify or vacate the pending action. Rather, adequate reasons supporting such a request must be present on the record. See *Youghioghney & Ohio Coal Company*, 7 FMSHRC 200, 203 (February 1985); *Kocher Coal Company*, 4 FMSHRC 2123, 2124 (December 1982); and *Climax Molybdenum Co.*, 2 FMSHRC 2748, 2750-51 (October 1980), *aff'd sub. nom. Climax Molybdenum Co. v. Secretary of Labor*, 703 F.2d 447 (10th Cir. 1983). In the present case, Commission jurisdiction attached upon the Secretary's filing of a discrimination complaint. We conclude, however, that the Secretary cannot be forced to pursue a discrimination complaint before the Commission after further review of the facts convinces him that his original finding of a violation was in error. Indeed, the Secretary has an ethical obligation at that point to seek withdrawal from the case. Accordingly, we hold that the Secretary may withdraw a discrimination case already filed with the Commission, but the Secretary must support his withdrawal request with a statement of the reason for withdrawal. This requirement strikes an appropriate balance between the need for orderly and proper disposition of cases over which the Commission exercises jurisdiction and of the Secretary's discretion in this area. While no such statement was provided in the present case prior to the judge's dismissal of the Secretary's action on behalf of Mr. Roland, in subsequent pleadings filed with the Commission counsel for the Secretary consistently has represented that withdrawal was sought based on a determination that discrimination, in fact, had not occurred. We accept these record statements as sufficient in the present case, but in the future such statements must accompany motions to withdraw discrimination complaints.

This holding does not in any way hamper realization of section 105(c)'s statutory objectives, i.e., providing an environment free from employer action taken to interfere with or retaliate for a miner's exercise of a statutory right. Our holding simply means that section 105(c)'s objectives must be realized through the specific remedies provided by Congress. Cf. *Block v. Community Nutrition Institute*, ___ U.S. ___, 81 L.Ed. 2d at 270, 275, 280 (1984);

Banzhaf v. Smith, 737 F.2d 1167, 1168-70 (D.C. Cir. 1984). In this case, Mr. Roland had the opportunity to pursue his discrimination action against OSC before the Commission. He did so, but then chose to settle his claim against the operator. He has no recourse against the Secretary or MSHA in these circumstances.

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For the foregoing reasons, we conclude that Mr. Roland's complaint against the Secretary and MSHA fails to state a cause of action under the Mine Act. Accordingly, the judge's decision is reversed and Mr. Roland's discrimination complaint is dismissed.

James A. Lastowka, Commissioner

L. Clair Nelson, Commissioner

3/ Pursuant to section 113(c) of the Mine Act, 30 U.S.C. 823(c), we have designated ourselves as a panel of three members to exercise the powers of the Commission.

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Distribution

Mr. Robert K. Roland
1640 Eppinger Blvd.
Thornton, Colorado 80229

Vicki Shteir-Dunn, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd.
Arlington, Virginia 22203

Earl R. Pfeffer, Esq.
UMWA
900 15th St., N.W.
Washington, D.C. 20005

Administrative Law Judge Gary Melick
Federal Mine Safety & Health Review Commission
5203 Leesburg Pike, 10th Floor
Falls Church, Virginia 22041