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DENNIS WAGNER V. PITTSTON COAL GROUP & SOL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
June 6, 1990

DENNIS WAGNER

v. Docket No. VA 88-21-D

PITTSTON COAL GROUP
CLINCHFIELD COAL COMPANY
JACK CRAWFORD
MONROE WEST
WAYNE FIELDS

and

ANN McLAUGHLIN
SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
GERALD SLOCE AND KENNETH HOWARD

Before: Ford, Chairman; Backley, Doyle, Lastowka and Nelson, Commissioners

DECISION

By: Ford, Chairman: Doyle and Nelson, Commissioners

In this discrimination proceeding, arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. $ 801 et seq. (1988)("Mine Act" or "Act"), the Secretary of Labor seeks interlocutory review of that portion of an order by Commission Administrative Law Judge James A. Broderick, holding that the Department of Labor's Mine Safety and Health Administration ("MSHA") and its employees are "persons" subject to the discrimination prohibitions of section 105(c)(1) of the Mine Act, 30 U.S.C. $ 815(c)(1). 1/ The judge certified his ruling to the

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1/ Section 105(c)(1) of the Mine Act provides:

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

Commission, and the Secretary's position for interlocutory review was granted. For the reasons that follow, we reverse the judge insofar as he held that MSHA and its employees are "persons" subject to section 105(c) of the Mine Act, and we dismiss those portions of Wagner's complaint pertaining to the individual governmental respondents.

I.

At all times relevant to this case, Dennis Lee Wagner was employed as a miner at the McClure No. 1 Mine, an underground coal mine, located near McClure, Virginia, and operated by Clinchfield Coal Company ("Clinchfield"), a subsidiary of the Pittston Coal Group ("Pittston"). Wagner was also a United Mine Workers of America ("UMWA") safety committeeman at the mine.

On June 26, 1987, Wagner was suspended with intent to discharge by Clinchfield, but shortly thereafter was reinstated with back pay, as the result of an arbitration proceeding conducted pursuant to the wage agreement between Clinchfield and the UMWA.

On July 17, 1987, Wagner filed a discrimination complaint with MSHA, alleging that Clinchfield, Pittston and their employees, Monroe West, Jack Crawford, and Wayne Fields, as well as the Secretary of Labor and MSHA and its agents, Inspector Gerald Sloce and District Manager Kenneth Howard, had all unlawfully discriminated against him in violation of section 105(c) of the Mine Act.

Wagner alleged that the respondents had collectively conspired to obstruct effective operation and enforcement of the Mine Act and had discriminated against him because he had engaged in protected activities

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> 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].

30 U.S.C. $ 815(c)(1).

as a representative of miners. Alternatively, Wagner alleged that the respondents had individually discriminated against him because he had reported unsafe conditions and safety violations to MSHA officials and because of other actions associated with his status as a representative of miners.

Upon completion of MSHA's investigation of Wagner's complaint, the Secretary filed an action on Wagner's behalf against Clinchfield pursuant to section 105(c)(2) of the Act (Docket No. VA 88-19-D). 2/ The complaint named only Clinchfield as a respondent and alleged that

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2/ Section 105(c)(2) of the Mine Act provides in part:

> 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 ... 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....

30 U.S.C. $ 815(c)(2).

Clinchfield illegally discriminated against Wagner with intent to discharge because he had reported a safety violation to Inspector Sloce during an inspection of the mine. Because Wagner had been reinstated prior to the filing of the complaint and paid back wages as the result of the arbitration award, the Secretary sought only interest on his back pay, reimbursement to Wagner of attorney's fees incurred as a result of the discrimination, an order directing Clinchfield to comply with section 105(c) in the future, and the assessment of a civil penalty for the operator's violation of section 105(c). Subsequently, Judge Broderick approved a settlement of the Secretary's section 105(c)(2) complaint on Wagner's behalf. Pursuant to the parties' settlement agreement, the judge awarded interest on lost wages, noted Clinchfield's promise of future compliance with section 105(c), and assessed a civil penalty of $700 against Clinchfield. 10 FMSHRC 1542 (November 1988)(ALJ).

Approximately one month after the Secretary's complaint was filed. Wagner, as an individual and member of a class, filed the subject discrimination complaint pursuant to section 105(c)(3) of the Act. 3/

3/ Section 105(c)(3) of the Mine Act provides in part:

> Within 90 days of the receipt of a complaint filed under [section 105(c)(2)], the Secretary shall notify, in writing, the miner, applicant for employment, or representative of miners of his determination whether a violation has 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 [section 105(c)(1)]. The Commission shall afford an opportunity for a hearing ... 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

The multi-count complaint reiterates many of the allegations in Wagner's complaint to MSHA and alleges that MSHA and its agents illegally disclosed to operators the identities of miners making safety complaints and, in particular, disclosed Wagner's identity to Clinchfield and Pittston; that Clinchfield and Pittston illegally required miners to report to management all safety violations prior to reporting them to MSHA and suspended Wagner for failing to conform to that policy; that MSHA and its agents, in collusion with the operators, obstructed the enforcement of mine safety laws; and that MSHA and its agents conspired with Clinchfield and/or Pittston and their agents to interfere with miners' rights to file safety complaints.

Wagner's complaint seeks to have the Commission order MSHA and its agents to cease and desist from violating miners' rights to anonymity, from harassing and retaliating against miners, including Wagner, and from refusing to re-establish a special unit investigating discrimination complaints. Wagner further seeks to have the Commission order Clinchfield and/or Pittston and their agents to cease and desist from retaliation and harassment against Wagner and others for reporting safety violations and from the policy of requiring miners to first report safety violations to management. Finally, Wagner's complaint seeks an order requiring all of the respondents to cease their alleged conspiracy to render mine safety laws ineffectual and to impede the independence of investigators and inspectors. Wagner also seeks interest, punitive damages, costs, attorney's fees, and the assessment of a civil penalty against the respondents.

Clinchfield, Pittston and their named employees moved for dismissal of Wagner:s complaint on the grounds that it was barred by the Secretary's complaint on Wagner's behalf, which was settled in Docket No. VA 88-19-D. The Secretary also moved to dismiss Wagner's complaint, arguing that section 105(c)'s prohibition against "persons" committing acts of discrimination does not encompass federal agencies or officials and that MSHA and its officers and agents are immune from suit under section 105(c); that section 105(c) does not contemplate class action suits, or that if it does, the purported class has not been properly alleged; that parts of the complaint are untimely; and that Wagner has no right to challenge in a section 105(c) proceeding the manner in which the Secretary chooses to investigate discrimination complaints.

In an unpublished interlocutory order, the administrative law judge concluded that the complaint did not state a cause of action against the Secretary of Labor individually; that it must be dismissed with regard to those acts of discrimination that had also been charged in the Secretary's complaint; that it did not meet the prerequisites for a class action; that

those portions of the complaint charging all of the respondents with conspiring to undermine enforcement of the Act and to discriminate against Wagner were too vague to support a claim; and that portions of the complaint were untimely. ALJ Order 2-4 (May 24, 1988)("Order").

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violation....

30 U.S.C. $ 815(c)(3).

The judge also stated:

> The Secretary argues that neither MSHA nor any of its officers or agents can be considered a "person" under section 105(c) of the Act because of the doctrine of sovereign immunity. I have previously ruled that MSHA is a person under 105(c) in the case of Local 9800 v. Secretary of Labor or Thomas Dupree, 2 FMSHRC 2680 (September 1980)[(ALJ)]. I adhere to that ruling in this case.... I conclude that Congress intended that the prohibition against discrimination applies to all persons, including government officials.

Order 3.

Accordingly, all of the allegations in the complaint were dismissed except for the allegation that the federal respondents had adopted a policy, which they enforced against Wagner, of disclosing to coal companies the names of miners who had reported safety violations and the allegation that the operators had adopted a policy requiring miners to report safety violations to management before communicating them to MSHA. Order 4.

II.

The Secretary asserts that "the judge erred in ruling that MSHA may be sued and that employees of MSHA may be sued individually and/or in their official capacity as 'persons' under section 105(c) of the Mine Act." PIR 1. For the reasons set forth below, we agree.

In Local 9800, on which the judge relied, the complainant union alleged that an employee of MSHA had unlawfully discriminated against it when he threatened the union local and its president with legal action as a result of their complaints about alleged irregularities in certain mine inspections. MSHA moved to dismiss the union's complaint asserting, among other things, that MSHA was not a "person" subject to the provisions of section 105(c). The judge found nothing in the Mine Act or in its legislative history to indicate that Congress directly considered whether MSHA or any other public agency could be a "person" involved in discriminatory conduct under section 105(c) of the Act. Therefore, the judge stated that he was required "to guess" what Congress would have intended if it had considered the question. 2 FMSHRC at 2683. The judge noted the statement in the Senate Committee Report that "the prohibition against discrimination applies not only to the operator but to any other person directly or indirectly involved" and also noted the same committee's admonition 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 legislation." S. Rep. No. 95-181, 95th Cong., 1st Sess. 36 (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 624 ("Legis. Hist."); 2 FMSHRC at 2683. The judge reasoned that the "general rule" that the United States is not

bound by legislation when it is not expressly named in or made subject of the legislation may be curtailed when the statute is "intended to prevent injury and wrong." 2 FMSHRC at 2683 (quoting Nardone v. United States, 302 U.S. 379, 384 (1937). The judge further reasoned that, in such cases, the entire scheme of regulation must be examined to determine if an effective alternate remedy is available. 2 FMSHRC at 2683. The judge concluded that the alleged act of discrimination was "by its inchoate nature, uniquely within the domain of this Commission" and held that "MSHA is a person under section 105(c)" and, as such, is "prohibited from discriminating against any miner." 2 FMSHRC at 2684.

On review, the Secretary takes issue with this rationale and its application to the present case, arguing that a waiver of the doctrine of sovereign immunity must be unequivocally expressed, and that when, as in the Mine Act, the definition of "person" does not expressly extend to a governmental agency and its employees, Congress did not mean for the agency and its officers and agents to be liable under the Act. See Sec. Br. at 8-11. Further, the Secretary notes that holding MSHA liable under section 105(c) would result in the anomalous situation of MSHA investigating and prosecuting cases in which it and its agents are also defendants. Id. at 12.

Wagner responds that granting sovereign immunity to MSHA inspectors and other agency employees is inconsistent with the spirit and intent of the Mine Act and general legal principles of sovereign immunity. Wagner urges the adoption of a case-by-case approach in analyzing the conduct of MSHA employees and determining whether immunity is justified. Wagner contends that where, as here, the conduct of an MSHA employee does not further a clearly expressed governmental policy, immunity does not apply. Wagner Br. 6, 9-11.

Our analysis of these issues begins as it must, with the words of the Mine Act. Section 105(c)(1) states, [n]o 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...." Although the term "person" is not defined in section 105(c), section 3(f) of the Act defines "person" as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." Absent from the definition of "person" is any reference to the government or any governmental entity. 30 U.S.C. $ 802(f). "[I]n common usage, the term 'person' does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it." Wilson v. Omaha Indian Tribe, 442 U.S. 653, 667 (1974) (quoting United States v. Cooper Corp., 312 U.S. 600, 604 (1941)). See also United States v. United Mine Workers of America, 330 U.S. 258,

275 (1947). As the Commission has previously observed, 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. See Rushton Mining Co., 11 FMSHRC 759, 766 (May 1989). The Mine Act contains no such waiver of MSHA's immunity from suit under section 105(c).

Further, other terms in the Mine Act specifically denote governmental entities. Section 3(a) defines "Secretary" as "the

Secretary of Labor or his delegate." 30 U.S.C. $ 802(a). Section 3(n) defines "Administration" as "the Mine Safety and Health Administration in the Department of Labor." 30 U.S.C. $ 802(n). Where Congress has specifically defined the term "person" so as to avoid including the government and its agencies within that definition, and has expressly included them in other definitions, it is clear that Congress has purposefully legislated into the Act a distinction between a "person" and the government, here specifically MSHA, and that neither may be subsumed into the other. 4/ Had Congress intended to include MSHA as a potential defendant under section 105(c), it would have done so explicitly.

For the foregoing reasons, we hold that MSHA is not a "person" subject to the provisions of section 105(c).

III.

We also conclude that MSHA's employees and agents are not "persons" subject to the provisions of section 105(c), and thus that MSHA Inspector Sloce and MSHA District Manager Howard cannot be sued individually under section 105(c).

We have noted 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." While MSHA possesses its own legal identity, it is composed of individuals who hold and staff MSHA's offices and positions. In view of MSHA's role in effectuating section 105(c), we are convinced that, had Congress intended that MSHA's employees be susceptible to section 105(c) suits, it would have expressly stated as much.

The Mine Act, unlike some other acts, does not specifically include employees of the government as "persons" for purpose of liability under the Act. Compare Omnibus Crime Control Act of 1968, 30 U.S.C. $$ 2510, 2520 (1982); Marine Protection Research and Sanctuaries Act of 1972, 30 U.S.C. $$ 1415(g), 1402(e) (1982); Federal Pollution Control Act, 30 U.S.C. $ 1365(a) (1982). Further, as we have noted, the structure of section 105(c) requires the Secretary (actually MSHA in practice) to investigate all initial discrimination complaints. Under the judge's interpretation of section 105(c), MSHA would be required to investigate its own employee if a discrimination complaint were filed against him and, upon finding evidence of discrimination, prosecute him on behalf of the complainant. In effect, the Secretary would be required to prosecute herself, a result not contemplated in the enforcement scheme of section 105(c).

4/ For example, in providing for the judicial review of Commission orders, section 106(a)(1) of the Act states "[a]ny person adversely affected or aggrieved by an order of the Commission ... may obtain ... review,"30 U.S.C. $ 816(a)(1), and section 106(b) states, "[t]he Secretary may also obtain review...." 30 U.S.C. $ 816(b).

Further, the type of relief that Congress envisioned discriminatees be awarded is not of the type MSHA employees may readily provide. Section 105(c)(2) gives the Commission the authority to require a person violating section 105(c) "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." 30 U.S.C. $ 815(c)(2). Rehiring and reinstatement with back pay and interest are typically within the control of the operator. While Congress envisioned that the Commission might also issue cease and desist orders where appropriate, it emphasized that those orders "include requirements for the posting of notices by the operator." Legis. Hist. at 625.

In addition, section 105(c)(3) states that "[v]iolations by any person of ... [section 105(c)(1)] shall be subject to the provisions of sections 108 and 110(a)." 30 U.S.C. $$ 818 and 820(a). Since the injunctive provisions of section 108 and the civil penalty provisions of section 110(a) apply specifically to the "operator" or "his agent," it does not appear that Congress intended employees of MSHA to be subject to the sanctions applicable to "persons" who violate section 105(c).

Thus, we agree with the Secretary that section 105(c) was not structured by Congress to accord complainants the right to proceed against MSHA's employees.

Although we find no cause of action for abuse of power by an employee of MSHA under section 105(c), it must be noted 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. See Wheeldin v. Wheeler, 373 U.S. 647, 652 (1963). 5/ Moreover, the Secretary clearly has the authority through her Office of Inspector General to investigate, punish and to remove from office any of her employees found to have engaged in conduct violative of the Mine Act or in other misconduct.

V.

Accordingly, we reverse the judge's holding that MSHA and its employees are subject to suit under the provisions of section 105(c), and we dismiss those portions of Wagner's complaint pertaining to the

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5/ We note that Wagner brought a civil action in Virginia against MSHA Inspector Sloce, among others, alleging common law claims under state law. Wagner v. Pittston Coal Group, et al., Law No. 6499, Dickinson County,

Virginia Circuit Court (filed June 21, 1988), removed by order of July 13, 1988, to U.S. District Court for the Western District of Virginia, Civil Action No. 88-0195-A. Sec. Br. 6 n. 5. While Wagner did not expressly allege violations of his constitutional rights, we note that damages are available when Fourth and Fifth Amendment rights have been violated. See Bivens v. Six Narcotics Agents, 403 U.S. 388 (1971); Davis v. Parsman, 442 U.S. 228 (1979).

federal respondents. We remand this matter to the judge for further proceedings consistent with this opinion.

L. Clair Nelson, Commissioner

Commissioners Backley and Lastowka, concurring in part and dissenting in part:

We agree with the majority that complainant Dennis Wagner is barred by the principle of sovereign immunity from bringing a discrimination action against the Mine Safety and Health Administration ("MSHA") pursuant to section 105(c) of the Federal Mine Safety and Health Act of 1977 ("Mine Act"). We base our agreement on the Mine Act's failure to include any reference to the government or any governmental entity in its definition of "person" and the principle of sovereign immunity.

We dissent, however, from that part of the majority decision that holds that Wagner is similarly barred in all circumstances from bringing a discrimination action against individuals employed by MSHA. As discussed below, a different analysis is required, and a different conclusion results, in determining the potential liability under section 105(c) of individuals employed by MSHA as opposed to the governmental agency itself.

Sovereign Immunity

At the outset, we acknowledge that "determining the extent to which a federal officer may be protected by sovereign immunity for acts done in his or her official capacity is an extraordinarily difficult problem" requiring careful analysis and a delicate balancing of conflicting interests. 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure $ 3655 at 218 (2nd ed., 1985)("Wright & Miller"). Wagner alleges in Count 25 of his complaint that two MSHA officials, Inspector Gerald Sloce and District Manager Kenneth Howard, adopted a policy of informing coal companies, including Wagner's employer, the Pittston Coal Group, of the names of miners who report safety violations to MSHA, that pursuant to this policy Pittston was informed that Wagner had made a safety complaint to MSHA, and that as a direct consequence of the actions by the MSHA officials Wagner was harassed and discharged by Pittston. Because the complaint alleges official misconduct on the part of Sloce and Howard, an inquiry into the principle of sovereign immunity is required.

When federal officials are sued in their official capacity, the facts of the case and the relief sought by the plaintiff must be analyzed to determine if the suit in reality is against the individual or against the United States. Wright & Miller $ 3655 at 217. If the suit is not against the federal government, then sovereign immunity does not apply. Id. "The general rule is that a suit is against the sovereign if 'the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration,' or if the effect of the judgment would be 'to restrain the Government from acting, or to compel it to act.'"

Pennhurst State School v. Halderman, 465 U.S. 89, 101 n.11 (1984)(quoting Dugan v. Rank, 372 U.S. 609, 620 (1963)(citations omitted)); U.S. v. Yakima Tribal Court, 806 F.2d 853, 858 (9th Cir. 1986).

A suit brought against a federal officials for specific relief is not a suit against the United States if the official acted outside the scope of his authority and his actions are therefore ultra vires. "If an employee of the United States acts completely outside his governmental authority, he has no immunity. Yakima Tribunal Ct., 806 F.2d at 859; Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682, 689 (1949). For example, suits charging federal officials with unconstitutional conduct are not barred by sovereign immunity because in such suits, "the conduct against which specific relief is sought is beyond the officer's powers and is, therefore, not the conduct of the sovereign." Larson, 337 U.S. at 690, 696-97, 702.

Where a claim against a federal official is based on an official's violation of federal statutes or regulations, as opposed to an unconstitutional act, a somewhat different analysis applies. Yakima, 806 F.2d at 859. In such instances, if the official has simply committed a mistake of fact or law in the discharge of his duties, his actions do not necessarily exceed the scope of his authority. The Supreme Court has expressly rejected the argument that a government official "given the power to make decisions is only given the power to make correct decisions." Larson, 337 U.S. at 695. In Larson the Court held that official action is not invalid because it was based on an incorrect decision as to law or fact, "if the officer making the decision was empowered to do so." Id. "Official action is still action of the sovereign, even if wrong, if it 'do[es] not conflict with the terms of [the officer's] valid statutory authority..." Yakima, 806 F.2d at 860 (quoting Larson at 695).

Thus, when a federal official is charged with violating a federal statute or regulation, the applicability of sovereign immunity "turns on whether the [official] was empowered to do what he did, i.e., whether even if he acted erroneously, it was action within the scope of his authority." Pennhurst, 465 U.S. at 112 n. 22. Stated similarly, an ultra vires claim "rests on the official's lack of delegated power." Yakima, 806 F.2d at 860. An important consideration in making this determination is whether the official's power is limited by statute and whether he has exceeded such limitation. Larson, 337 U.S. at 689-90; Martinez v. Marshall, 573 F.2d 555, 560 (9th Cir. 1977). At some point, a violation of a statute or regulation becomes so inconsistent with the agent's authority that his actions are divested of the cloak of sovereign immunity. Yakima, 806 F.2d at 860.

Thus, as specifically applied to persons employed by MSHA, the principle of sovereign immunity can be summarized as follows. An MSHA official is subject to individual suit, and cannot raise a sovereign immunity bar, if his actions are unconstitutional, or conflict with and exceeds the scope of his statutory or regulatory authority and amount to

more than a mistake of law or fact in the exercise of delegated duties, and if the relief sought against the individual is not a claim against the United States Treasury, does not interfere with a government program or does not restrain the Government from acting or compel it to act.

Therefore, the Secretary's argument that the principle of sovereign immunity in all circumstances requires the discrimination claims brought

against persons employed by MSHA be dismissed must be rejected. A bald claim of sovereign immunity cannot preclude Wagner from an opportunity to establish that Inspector Sloce's and District Manager Howard's authority is limited by the Mine Act, that one or both of them exceeded such limitation and acted in a manner violative of section 105(c), and that the relief sought is against Sloce and Howard as individuals rather than against the government. If such a showing is made, the principle of sovereign immunity does not apply.

Structure of Section 105(c)

The majority would also dismiss Wagner's complaint on the basis that section 105(c) is not structured to allow the Secretary to investigate an alleged act of discrimination committed by one of her agents. Given the express language of section 105(c), this protest is unpersuasive. The Mine Act in no way precludes the Secretary from filing a section 105(c) discrimination complaint against an individual employed by MSHA where such person acted in a manner exceeding the scope of his statutory authority and in violation of section 105(c).

Section 105(c)(1) of the Mine Act expressly provides that "no person shall ... in any manner discriminate against ... or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner...." 30 U.S.C. 815(c)(1)(emphasis added). The term "person" is defined in section 3(f) as "any individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization." 30 U.S.C. 802(f)(emphasis added). Thus, by its express terms, the Mine Act prohibits any individual from discriminating against miners in violation of section 105(c), and this broad prohibition includes, rather than exempts, individuals employed by the Secretary.

Unless exceptional circumstances dictate otherwise, judicial inquiry into the meaning of a statute is complete once a court finds that the terms of the statute are unambiguous. Burlington Northern R. Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987). As the Supreme Court has stated:

> [T]he starting point for interpreting a statute is the language of the statute itself. Absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980); see also Chevron USA, Inc., v. Natural Resources Defense Counsel, Inc., 467 U.S. 837, 842 (1984). Section 3(f) of the Mine Act defines person" to include "any individual." The Mine Act does not include a

second special definition of "person" applicable only to section 105(c) or an express exclusion in section 105(c) limiting its reach. Thus, in the absence of a clearly expressed legislative intention to the contrary, section 105(c)'s use of the word "person" and section 3(f)'s definition of "person" to include "individuals" must be interpreted in accordance with the plain meaning of those words.

Furthermore, the legislative history of the Mine Act clearly provides that section 105(c) is to be broadly interpreted:

> It is the Committee's intention to protect miners against not only the common forms of discrimination, such as discharge, suspension, demotion, reduction in benefits, vacation, bonuses and rates of pay, or changes in pay and hours of work, but also against the more subtle forms of interference, such as promises of benefit or threats of reprisal. It 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., 1st Sess., at 36 (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 624 (1978)(emphasis added). Thus, the legislative history is consistent with the express language of the statute and fortifies the conclusion that Congress intended to subject to the anti-discrimination provisions of section 105(c) of the Mine Act "any person" who interferes with a miner's protected rights.

Contrary to the majority's conclusion, the overall structure of section 105(c) does not otherwise preclude giving effect to the plain wording of the statute. There is no restriction on the Secretary preventing her from investigating allegations that one of her employees exceeded the scope of his or her authority and acted in violation of the Mine Act by interfering with a miner's protected rights. To the contrary, it is not unusual for a federal agency to investigate complaints of misconduct or illegal conduct by its own employees. Thus, the fact that an MSHA investigator would be called on to examine the alleged illegal conduct of an MSHA employee is not a basis for defeating a miner's right to engage in protected activity without suffering harassment or retaliation. Even if the Secretary believed that in a particular set of circumstances it would be better, for logistical reasons, if MSHA did not conduct the investigation into the activities of one of its own employees, she could assign another official of the Department of Labor or another of her investigatory agencies, e.g., the Inspector General, to assume this function. Certainly, a miner's statutory right to engage in safety related activities free from the threat of retribution cannot be sacrificed simply because the Department of Labor finds itself in an awkward position.

In sum, nothing in the Mine Act precludes the Secretary from filing a complaint against an individual employed by MSHA who, after investigation,

is determined to have committed an act of discrimination prohibited under section 105(c). Further, because no absurd or unworkable result flows from interpreting section 105(c) in accordance with its express terms, no ambiguity should be created where none exists so as to preclude giving effect to the statute's express provisions.

We also disagree with the majority's suggestion that the fact that the remedies that a discriminatee might seek against a government employee who has acted illegally would not be the "typical" remedies sought in discrimination cases i.e., backpay and reinstatement, has some bearing on the outcome of the liability issue presented. First, the fact that the relief that could be awarded is not "typical" should not be surprising in view of the fact that the issue raised in this case is one of first impression. Second, section 105(c)(2) authorizes the Commission to direct the discriminator "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." 30 U.S.C. $ 815(c)(2)(emphasis added). Thus, the Mine Act expressly contemplates that the relief granted to any discriminatee will be tailored to fit the particular circumstances of the case. In a case such as the present, if illegal discrimination were ultimately established, appropriate forms of relief could include an award of damages, the issuance of cease and desist orders and the imposition of civil penalties.

Conclusion

For the above reasons, we agree with the majority that the administrative law judge must be reversed insofar as he held that MSHA itself is subject to the provisions of section 105(c). We dissent, however, from their conclusion that in no circumstances can a section 105(c) complaint be brought against an individual employed by MSHA who is alleged to have acted in a manner exceeding the scope of his statutory authority and in violation of section 105(c). We express no opinion as to whether the allegations in the complaint before us satisfy the criteria applicable to the determination of whether Wagner's suit is barred by sovereign immunity. We would remand to the judge for further analysis of this issue.

Accordingly, we concur in part and dissent in part.

James A. Lastowka, Commissioner

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