FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 2, 1998

UNITED MINE WORKERS OF AMERICA on behalf of WILLIAM KEITH BURGESS, GLENN LOGGINS, DAVID McATEER, B. RAY PATE and OTHERS	:	
v.	:	Docket Nos. SE 96-367-D SE 97-18-D
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), MICHAEL J. LAWLESS, FRANK YOUNG, TOM MEREDITH, and JUDY McCORMICK	:	

BEFORE: Jordan, Chairman; Marks, Riley, Verheggen and Beatty, Commissioners

DECISION

BY: Riley and Beatty, Commissioners[1]

[1] Commissioners Riley and Beatty are the only Commissioners in the majority on all issues presented.

In this discrimination proceeding arising under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. ' 801 et seq. (1994) (AMine Act@), Administrative Law Judge Jacqueline Bulluck determined that the Department of Labor=s Mine Safety and Health Administration (AMSHA@) and its employees are not subject to suit for alleged violations of sections 103(g)(1) and 105(c)(1) of the Mine Act, 30 U.S.C. '' 813(g)(1), 815(c)(1).[2] 19 FMSHRC 294 (Feb. 1997) (ALJ). The Commission granted the petition for discretionary review filed by the United Mine Workers of America on behalf of William Keith Burgess, Glenn Loggins, David McAteer, B. Ray Pate and others (AUMWA@), challenging the judge=s decision. For the reasons that follow, we affirm in part, reverse in part, and remand.

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[2] Section 103(g)(1) provides in part:

> Whenever a representative of the miners . . . has reasonable grounds to believe that a violation of this [Act] or a mandatory . . . standard exists, . . . such . . . representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of miners . . . , and a copy shall be provided the operator . . . no later than at the time of the inspection . . . . The name of the person giving such notice and the names of individual miners referred to therein shall not appear in such copy or notification. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists . . . . If the Secretary determines that a violation or danger does not exist, he shall notify the . . . representative . . . in writing . . . .

30 U.S.C. ' 813(g)(1). Procedures for processing complaints under section 103(g) are set forth in 30 C.F.R. Part 43. Such procedures provide in part for informal review of negative findings, such as that an inspection or the issuance of a citation is unnecessary. *See* 30 C.F.R. '' 43.6-.8.

Section 105(c)(1) provides in pertinent part:

> No person shall . . . interfere with the exercise of the statutory rights of any miner, [or] representative of miners . . . because such miner, [or] representative of miners . . . filed or made a complaint under or related to this [Act], including a complaint notifying the operator . . . of an alleged danger or safety or health violation in a coal or other mine . . . .

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

I.

Factual and Procedural Background

This case arose when the UMWA filed discrimination complaints on behalf of miners against MSHA and MSHA employees in two separate actions, Docket Nos. SE 96-367-D, and Docket No. SE 97-18-D. The Secretary of Labor moved to dismiss both complaints. 19 FMSHRC at 294-95. In her consideration of the Secretary=s motions to dismiss, the judge treated as true the following allegations set forth in the complaints. *Id.* at 295 n.3.

Docket No. SE 96-367-D

On approximately May 24, 1996, David McAteer, chairman of the safety committee of UMWA Local Union 2245, and committee members William Keith Burgess and Glenn Loggins faxed a letter to MSHA District 11 Manager Michael J. Lawless stating their concerns regarding MSHA=s alleged failure to adequately inspect Jim Walter Resources (AJWR@) #4 Mine on schedule and MSHA=s granting of extensions for various safety violations at the mine. 19 FMSHRC at 295; Compl. I at 2 & 3. On approximately May 29, McAteer and Burgess were called out of the mine to attend an Aaccident investigation team pre-inspection meeting@ at the mine site. Compl. I at 2 & 4. Present at the meeting were Atwo MSHA supervisors, including Judy McCormick, seven MSHA inspectors, the mine manager, and a number of his subordinates.@ Am. Compl. at 2 & 4. McCormick distributed a Asanitized,@ typed version of the letter faxed to Lawless, in which all names and references to individual miners had been omitted. 19 FMSHRC at 296. McCormick then proceeded to verbally chastise McAteer and Burgess for their criticisms of MSHA in such a way to make clear to Jim Walter Resources management the identity of the miners who had sent the letter. *Id.*

On August 30, 1996, the UMWA, on behalf of Burgess, Loggins, and McAteer, filed a complaint against MSHA, Lawless, McCormick, and the MSHA Assistant Manager for District 11, Frank Young, pursuant to section 105(c)(2) of the Mine Act.[3] In the complaint the UMWA alleged that MSHA officials had disclosed in violation of section 103(g) the identity of miners who sent the May 24 letter and, in so doing, had also interfered with the exercise of the complainants= rights in violation of 105(c)(1) of the Mine Act. Compl. I at 1, 3, 4.

Docket No. SE 97-18-D

In the spring and summer of 1996, UMWA representatives, including Local Union 8982 president B. Ray Pate, raised various safety and health concerns with MSHA District 11 Supervisor Tom Meredith, Lawless, and Young. 19 FMSHRC at 296. On approximately August

[3] Although the UMWA filed its complaint under section 105(c)(2), it is clear that it intended to file under section 105(c)(3). 19 FMSHRC at 295 n.1. The judge found the error to be immaterial, and that finding is not challenged on review. *Id.*

9, 1996, Lawless and Young met with UMWA representatives, including Pate, regarding the UMWA=s complaints about District 11 staff and enforcement problems at mines within District 11. *Id.*

On approximately August 19, 1996, MSHA Inspector Allen Scott advised Pate that he had been informed by Supervisor Meredith that Pate, the Local Union 8982 Safety Committee (the Asafety committee@), and all miners working at the U.S. Steel Concord Preparation Plant and associated facilities (the APlant@) could no longer telephone health and safety complaints into the MSHA office. *Id.*; Compl. II at 3 & 8. Rather, complaints were to be written and hand delivered. 19 FMSHRC at 296.

On September 19 and 25, 1996, the UMWA filed section 105(c) complaints against MSHA, including Meredith, Lawless, and Young. 19 FMSHRC at 296. The UMWA alleged, in part, in the complaints that, during an investigation of the Plant on March 28, 1996, Meredith informed mine management of the identity of the miner representative who filed a complaint, that Meredith asked mine management for employment with the company, and that Meredith and District 11 personnel had conducted negligible enforcement or investigative action. 19 FMSHRC at 296; Compl. II, Attach. A at 1-2. In addition, the UMWA described the change of policy requiring complaints to be written and hand-delivered. Compl. II, Attach. A at 2. By letters dated September 23 and October 9, 1996, MSHA denied the UMWA=s complaints. Compl. II, Attach. B.

On October 17, 1996, the UMWA, on behalf of Pate, the safety committee, and all miners working at the Plant, filed a complaint against MSHA, Meredith, Lawless, and Young pursuant to section 105(c)(2) of the Mine Act. In the complaint the UMWA alleged that Meredith=s change of policy amounted to retaliation for the information provided by Pate and other UMWA representatives on August 9, in violation of section 105(c) of the Mine Act. Compl. II at 3-4 & 9.

On October 23, 1996, the Secretary filed a motion to consolidate the proceedings (SE 96-367-D and SE 97-18-D) and to dismiss the complaints. Citing *Wagner v. Pittston Coal Group*, 12 FMSHRC 1178 (June 1990), *aff=d*, 947 F.2d 943 (table), 1991 WL 224257 (4th Cir. Nov. 5, 1991), the Secretary argued that the complaints against MSHA and the named individuals fail under principles of sovereign immunity. S. Mot. to Consolidate and Dismiss at 3-7.

The judge granted the Secretary=s motion to consolidate and dismiss. 19 FMSHRC at 295. As to the motion to dismiss, the judge first concluded that the Commission=s decision in *Wagner* required a holding that MSHA was immune from suit under principles of sovereign immunity. *Id.* at 297-98. The judge rejected the UMWA=s argument that *Wagner* was not applicable on the basis that the miners= complaints in *Wagner* were oral and not protected by section 103(g)(1) of the Mine Act, while the instant written complaints were subject to the protections of section 103(g)(1). *Id.* at 297. The judge reasoned that while section 103(g)(1) prescribes procedures by which the Secretary shall maintain the confidentiality of miners who raise safety complaints in writing, section 105(c)(1) encompasses within its protection oral as well as written complaints. *Id.* Second, the judge concluded that *Wagner* also compelled the result

that the individual employees of MSHA were immune from suit. *Id.* at 298. The judge found unavailing the UMWA=s argument that MSHA employees are liable upon application of respondeat superior principles, reasoning that such a cause of action is not recognized under the Mine Act. *Id.* The judge found that, in any event, the conduct of the MSHA employees here is indistinguishable from the conduct of the MSHA employees in *Wagner*, and that the Fourth Circuit, applying principles of respondeat superior, had concluded that those employees had not exceeded the scope of their authority so as to be subject to liability. *Id.* at 299. Accordingly, the judge dismissed the UMWA=s complaints. *Id.*

The Commission granted the petition for discretionary review subsequently filed by the UMWA and heard oral argument.

II.

Disposition

A. The Wagner Decisions

In *Wagner*, the Commission concluded that MSHA and MSHA officials are not Apersons@ subject to the provisions of section 105(c), dismissing those portions of Wagner=s complaint alleging that MSHA and MSHA officials had violated section 105(c) of the Act by adopting a policy, which they enforced against Wagner, of disclosing to coal companies the names of miners who had reported safety violations. 12 FMSHRC at 1182, 1186-87. The Commission reached its conclusion by noting that the United States, as the sovereign, is immune from suit except as it consents to be sued and that waivers of immunity must be unequivocally expressed. *Id.* at 1184 (citing *Rushton Mining Co.*, 11 FMSHRC 759, 766 (May 1989)). The Commission reasoned that the Mine Act contains no such waiver of immunity from suit for MSHA and its employees under section 105(c). *Id*. at 1184, 1185.

The dissenting Commissioners in *Wagner* disagreed with the majority=s conclusion that MSHA employees are immune from suit under the Mine Act in all circumstances. *Id.* at 1188. They noted that when an action is brought against individuals employed by MSHA, a different analysis is required. *Id.* Specifically, they reasoned that there must first be an examination to determine whether, in fact, the suit is in reality against the United States or against the individual, depending upon the nature of the relief sought. *Id.* They also stated that an MSHA official is subject to suit for specific relief if the official=s actions are outside the scope of his authority or unconstitutional. *Id.* at 1189.

Wagner appealed only that portion of the Commission=s decision holding that MSHA employees are not subject to suit. In an unpublished decision, the Fourth Circuit Court of Appeals first determined that AMSHA employees acting within the scope of their authority are agents of the sovereign, and therefore cannot be liable under section 105(c),@ reasoning that Aperson@ is defined without reference to governmental entities. 1991 WL 224257, at *2. The Court next examined whether the named MSHA employees Aacted so far outside the scope of their statutory authority as to become >persons= who may be individually liable for violating section 105(c).@ *Id.* The Court concluded that, because section 105 contains no statutory guarantee of confidentiality regarding the identity of miners who inform MSHA of safety violations, there was no basis for a conclusion that the named MSHA employee exceeded his statutory authority by disclosing the identity of a miner. *Id.*

B. Whether MSHA is Immune from Suit under the Mine Act

The UMWA argues that MSHA should be held liable for Mine Act violations to the extent that it ratifies illegal conduct by its employees. UMWA Br. at 19-21. The Secretary responds that the plain meaning of section 105(c), established canons of statutory construction, and the Mine Act=s legislative history support the judge=s conclusion that Congress did not intend to subject MSHA to discrimination charges. S. Br. at 4-21.

The Commission has recognized that it Ais a settled principle of federal law that the United States, as the >sovereign,= is immune from suit except as it consents to be sued.@ *Rushton*, 11 FMSHRC at 765 (citing *Block v. North Dakota*, 461 U.S. 273, 280 (1983); *United States v. Mitchell*, 445 U.S. 535, 583 (1980)). AWaivers of sovereign immunity >cannot be implied but must be unequivocally expressed,=@ and A[o]nly Congress may waive sovereign immunity.@ *Id.* (quoting *United States v. King*, 395 U.S. 1, 4 (1969)) (other citations omitted). The Supreme Court recently reiterated that a Awaiver of the Federal Government=s sovereign immunity must be unequivocally expressed in statutory text.@ *Lane v. Pena*, 518 U.S. 187, 192 (1996). The Supreme Court further emphasized that a Astatute=s legislative history cannot supply a waiver that does not appear clearly in any statutory text; >the unequivocal expression of elimination of sovereign immunity that we insist upon is an expression in statutory text.=@ *Id.* (quoting *United States v. Nordic Village, Inc.*, 503 U.S. 30, 37 (1992)). Therefore, the consideration of whether a waiver of sovereign immunity exists as to MSHA is limited to the text of the Mine Act.

Section 105(c)(1) provides in part that A[n]o person shall . . . interfere with the exercise of the statutory rights of any . . . representative of miners. . . because such . . . representative . . . filed or made a complaint under . . . this [Act].@ 30 U.S.C. ' 815(c)(1). The term Aperson@ is defined in section 3(f) as Aany individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.@ 30 U.S.C. ' 802(f).

We reaffirm the Commission=s holding in *Wagner*, 12 FMSHRC at 1184, that MSHA is not a Aperson@ subject to the provisions of section 105(c). As the Commission noted in *Wagner*, A>[i]n common usage, the term person does not include the sovereign, [and] statutes employing the phrase are ordinarily construed to exclude it.=@ *Id.* (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1974)). In addition, no governmental entity is specifically included within the definition of Aperson,@ although governmental entities are specifically referred to in other definitions in section 3. *Id.* For instance, section 3(a) defines ASecretary@ as Athe Secretary of Labor or his delegate,@ and section 3(n) defines AAdministration@ as Athe Mine Safety and Health Administration in the Department of Labor.@ 30 U.S.C. ' 802(a), (n).

Although the term Aother organization@ within the definition of Aperson@ may be interpreted to include MSHA, another plausible interpretation would exclude MSHA, given the lack of specific reference. The D.C. Circuit Court of Appeals has explained that an AAct of Congress is not unambiguous, and thus does not waive immunity, if it will bear any >plausible= alternative interpretation.@ *Department of Army v. FLRA*, 56 F.3d 273, 277 (D.C. Cir. 1995) (citing *Nordic Village*, 503 U.S. at 34); *see also Hubbard v. Administrator, EPA*, 982 F.2d 531, 532-33 (D.C. Cir. 1992) (stating that Congress= intent to waive sovereign immunity is Aunequivocally expressed@ if it is Aso clear and explicit as to brook no reasonable doubt@). Because the term Aperson@ is capable of plausible alternative interpretations, either including or excluding MSHA, the Mine Act does not unequivocally express a waiver of MSHA=s immunity from suit for alleged violations of section 105(c)(1).

Moreover, section 103(g)(1), upon which the UMWA also bases its complaint,[4] does not contain an express waiver of MSHA=s immunity from suit. Section 103(g)(1) does not explicitly state the basis for the issuance of a citation for breach of the responsibilities in processing safety complaints, or the parties subject to liability. Any waiver of MSHA=s immunity from suit would have to be impermissibly implied from the subsection. Accordingly, we affirm the judge=s holding that MSHA as an agency is immune from suit under sections 105(c) and 103(g)(1) of the Mine Act, and affirm the judge=s dismissal of the complaints against MSHA.

C. Whether MSHA Employees are Immune from Suit under the Mine Act

The UMWA argues that the Commission should overrule its holding in *Wagner* that MSHA employees are immune from suit under section 105(c) of the Mine Act in all circumstances. UMWA Br. at 2-3. It submits that MSHA employees should be subject to liability when their actions exceed the scope of their employment. *Id.*; UMWA Reply Br. at 15-17. The UMWA argues that, even if the Commission declines to modify *Wagner*, the present case is distinguishable because the complaints in *Wagner* were oral, unlike the written complaint at issue here, which would fall within the protection of section 103(g). UMWA Br. at 22-26. In addition, the UMWA contends that the officials= conduct here is more egregious because they were acting for personal motives, thus losing their protection under principles of respondeat superior. *Id.* at 24-26.

The Secretary responds that the judge properly dismissed the complaints against the MSHA officials. S. Br. at 11. She submits that the plain meaning of section 105(c) and the Mine Act=s legislative history support the judge=s conclusion that Congress did not intend to subject MSHA officials to discrimination charges. *Id.* at 11-21. The Secretary argues that even if the Commission decides that MSHA employees enjoy only qualified immunity, substantial evidence

[4] The UMWA alleges that, in addition to a violation of section 105(c)(1), the disclosure of identities amounted to a separate violation of section 103(g). Compl. I at 1, 3, 4.

supports the judge=s determination that the named MSHA officials were acting within the scope of their authority and were therefore immune from liability. *Id.* at 32-41. The Secretary, applying Alabama laws of respondeat superior, submits that the allegations in the complaints do not establish that the named officials were acting wholly for personal reasons, although they might have exercised poor judgment. *Id.* at 35-40.

Although the judge correctly applied Commission precedent, we conclude that it is appropriate to overrule the Commission=s *Wagner* decision as it applies to MSHA officials. Therefore, we reverse the judge=s determination that MSHA employees cannot be sued individually under the Mine Act. Our decision to overrule *Wagner* is based on the continuing development of case law, which recognizes an exception to sovereign immunity in some circumstances as it applies to federal officials.

As the dissenting Commissioners in *Wagner* recognized (12 FMSHRC at 1189), even in the absence of an explicit statutory waiver of liability against federal officials, a suit against an individual federal official for specific relief is not barred by sovereign immunity where the challenged actions of the official are beyond the official=s statutory authority, that is, ultra vires, or unconstitutional. *Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689-90, 696-97 (1948); *Dugan v. Rank*, 372 U.S. 609, 621-22 (1963). The doctrine of sovereign immunity does not apply in such cases because the conduct against which specific relief is sought is beyond the officer=s power and, therefore, is not the conduct of the sovereign.[5] *Larson*, 337 U.S. at 690. This exception has gained wide recognition, including within Fourth Circuit and the circuits to which this case could be appealed.[6] *See, e.g.*, *Wagner*, 1991 WL 224257, at *2 (considering whether MSHA employees Aacted so far outside the scope of their statutory authority@ as to become individually liable); *Swan v. Clinton*, 100 F.3d 973, 981 (D.C. Cir. 1996); *Florida Dep=t of Bus. Regulation v. Department of Interior*, 768 F.2d 1248, 1251-52 (11th Cir. 1985), *cert. denied*, 475 U.S. 1011 (1986); *Clark v. Library of Congress*, 750 F.2d 89, 103 (D.C. Cir. 1984).

[5] The UMWA=s argument that MSHA is liable to the extent that it ratifies the illegal conduct of its employees must fail. If an MSHA employee is subject to suit for a violation of the Mine Act, it is because he has exceeded the scope of his delegated powers and cannot be said to be acting on behalf of his sovereign.

[6] The Secretary acknowledges that federal employees may be divested of sovereign immunity and held to act outside of the scope of their employment for Aegregious@ conduct. S. Br. at 26-27 n.12; Oral Arg. Tr. 24.

In determining whether an officer=s actions are ultra vires and exceed the scope of his authority, it is appropriate to consider whether the officer=s conduct was based on a lack of delegated power.[7] *Dugan*, 372 U.S. at 622; *Larson*, 337 U.S. 690, 695. Official action is not invalid Aif based on an incorrect decision as to law or fact, if the officer making the decision was empowered to do so.@ *Larson*, 337 at 695; *see also Aminoil U.S.A., Inc. v. California State Water Resources Control Bd.*, 674 F.2d 1227, 1234 (9th Cir. 1982); 14 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* ' 3655, at 226 (2d ed. 1985). The Supreme Court in *Larson* explained that while an officer=s actions may establish a wrong to the plaintiff, Ait does not establish that the officer, in committing that wrong, is not exercising the powers delegated to him by the sovereign.@ *Larson*, 337 U.S. at 693. Therefore, scope of authority Aturns on whether the [official] was empowered to do what he did; i.e., whether, even if he acted erroneously, it was within the scope of his delegated power.@ *United States v. Yakima Tribal Court*, 806 F.2d 853, 860 (9th Cir. 1986) (citing *Pennhurst State Sch. and Hosp. v. Halderman*, 465 U.S. 89, 112 n.22 (1984)), *cert. denied*, 481 U.S. 1069 (1987); *see also Painter v. Shalala*, 97 F.3d 1351, 1358 (10th Cir. 1996); *New Mexico v. Regan*, 745 F.2d 1318, 1320 n.1 (10th Cir. 1984).

Finally, as the dissenting Commissioners in *Wagner* also recognized (12 FMSHRC at 1188), actions against individual federal officers may fail as actions against the sovereign if the relief requested operates against the sovereign. *Pennhurst*, 465 U.S. at 101 n.11; *Florida*, 768 F.2d at 1251. Courts make this determination by examining the issues and the effect of the judgment sought. *Florida*, 768 F.2d at 1251. An action is against the agency if the relief sought requires payment of monies from the Federal Treasury, or would restrain the government from acting, or compel it to act. *Id.*; *Larson*, 337 U.S. at 704; *Coleman v. Espy*, 986 F.2d 1184, 1189 (8th Cir. 1993).

In sum, we overrule the majority=s holding in *Wagner* that MSHA employees are not subject to suit for Mine Act violations in any circumstances. We adopt the holding of the dissenting Commissioners in that case and reiterate their summary of governing principles:

> An MSHA official is subject to individual suit, and cannot raise a sovereign immunity bar, if his actions are unconstitutional, or conflict with and exceed 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.

[7] The UMWA has made no allegations that the MSHA employees= conduct was unconstitutional.

12 FMSHRC at 1189. Moreover, in considering whether the alleged violative actions amounted to more than a mistake of law or fact, it is appropriate to consider whether the official=s conduct was motivated by retaliatory intent. *Cf. Ramon by Ramon v. Soto*, 916 F.2d 1377, 1383 n.7 (9th Cir. 1989) (quoting *Yakima*, 806 F.2d at 860 (AAt a certain point, >a violation of a statute or regulation is so inconsistent with the agent=s authority that he divests himself of sovereign immunity.=@)).

Applying these principles, we agree with the Secretary that the UMWA has sought relief that in part operates against MSHA. S. Br. at 4-5 n.1. However, because the UMWA brought suit against MSHA in addition to the named individuals, we do not dismiss the case based upon the nature of the relief sought. If relief is appropriate, it shall be fashioned so as not to operate against MSHA.

We also agree with both parties that there is an insufficient record to determine whether the named MSHA officials= actions exceeded the scope of their authority and amounted to more than a mistake of law or fact in the exercise of delegated duties. *See* Oral Arg. Tr. 8-9, 32-33 (acknowledgments by counsels to both parties that evidence is insufficient to determine whether officials= actions were motivated by retaliatory intent). Accordingly, in Docket No. SE 96-367-D, we vacate the judge=s dismissal of the complaints against McCormick, Lawless, and Young and remand for the development of a record on the allegations set forth in the complaint, as amended. The judge shall examine whether the actions of those named respondents who attended the May 29 meeting exceeded the scope of their statutory authority and amounted to more than a mistake of law or fact.[8] If the judge finds that any of the named MSHA officials are subject to suit, she shall consider whether such officials violated sections 103(g)(1) and 105(c)(1) and, if so, the judge shall order appropriate specific relief that does not operate against MSHA.

In Docket No. SE 97-18-D, we vacate the judge=s dismissal of the complaint against Meredith, Lawless, and Young and remand for the development of a record on the allegations set forth in the complaint regarding the change of policy.[9] If the judge finds that any of the named MSHA officials are subject to suit, she shall consider whether such officials violated section 105(c)(1) and, if so, the judge shall order appropriate specific relief that does not operate against MSHA.

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[8] We caution the judge against adopting the reasoning of the Fourth Circuit in *Wagner*. The court did not consider the statutory guarantee of confidentiality set forth in section 103(g)(1) of the Mine Act. *See* 1991 WL 224257, at *2.

[9] The allegations in Attachment A to the complaint do not constitute separate causes of action against Meredith, Lawless, and Young for alleged violations of section 105(c). In its complaint, the UMWA stated that AMeredith=s change in policy toward the Complainants@ was the basis for its allegation of violation of section 105(c). Compl. II at 3-4. Evidence included in Attachment A may be considered only as relevant to the change in policy.

III.

Conclusion

For the foregoing reasons, we affirm the judge=s determination that MSHA is immune from suit and the dismissal of the complaints against MSHA. We vacate the judge=s dismissal of the complaints against McCormick, Meredith, Lawless, and Young and remand for further proceedings consistent with this decision.

James C. Riley, Commissioner

Robert H. Beatty, Jr., Commissioner

Chairman Jordan and Commissioner Verheggen concurring in part and dissenting in part:

We concur in the decision of our colleagues, with the exception of their disposition regarding the complaints against Lawless and Young. We would affirm the dismissal of the complaints against Lawless and Young in Docket No. SE 96-367-D on the basis that the original and amended complaints fail to set forth any allegations of conduct by Lawless and Young that would constitute violations of sections 103(g)(1) or 105(c)(1). The violative conduct complained of occurred during the accident investigation team meeting on May 29, 1996. Compl. I at 2-3 && 4-7. While Commissioners Riley and Beatty have directed the judge to Aexamine whether the actions of those named respondents *who attended the May 29 meeting* exceeded the scope of their statutory authority and amounted to more than a mistake of law or fact,@ slip op. at 10 (emphasis added), there are no allegations that Lawless and Young were present at that meeting. In fact, the UMWA filed an amended complaint to specifically delete its reference to Lawless= presence at the meeting, which it included in its original complaint. Compl. I at 2 & 4; Am. Compl. at 2 & 4. Accordingly, we believe that the action should be dismissed against Lawless and Young based upon the UMWA=s failure to state a claim against them upon which relief can be granted. *Cf. UMWA v. Williamson Shaft Contracting Co.*, 3 FMSHRC 32, 33 (Jan. 1981).

We would also affirm the dismissal of the complaint against Lawless and Young in Docket No. SE 97-18-D because here, too, the UMWA has failed to state a claim against them upon which relief can be granted. The UMWA does not make any specific allegations concerning the manner in which Lawless and Young violated section 105(c). The UMWA alleges only that Lawless and Young met with UMWA representatives, including Pate, regarding the UMWA=s complaints about enforcement in District 11, and that the named officials violated section 105(c)(1). Compl. II at 3-4 && 7-9. Even taken as true, such allegations do not state a claim of discrimination under section 105(c), nor could such conclusory allegations of violation withstand a motion to dismiss. 2 James Wm. Moore, *Moore=s Federal Practice* ' 12.34[1][b] (Donald R. Coquillette et al. eds., 3d ed. 1998).

Mary Lu Jordan, Chairman

Theodore F. Verheggen, Commissioner

Commissioner Marks concurring in part and dissenting in part:

I concur in my colleagues= opinion, which overrules the *Wagner* decision and permits suit against MSHA officials under appropriate circumstances. In addition, I join the majority in vacating the judge=s dismissal of the complaints against the named individuals. However, I believe that, if the record reveals that MSHA, as an agency, ratified the despicable acts that are alleged to have occurred in the two complaints at issue, then MSHA should be subject to suit and held accountable under the Mine Act for discrimination. Accordingly, I dissent.

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 miner, [or] representative of miners . . . in any . . . mine subject to this [Act] because such miner, [or] representative of miners . . . 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 . . . of an alleged danger or safety or health violation . . . , or because of the exercise by such miner, [or] representative of miners . . . on behalf of himself or others of any statutory right afforded by this [Act].

30 U.S.C. ' 815(c)(1) (emphasis added).

If the conduct that is alleged to have occurred in this case had been performed by a person other than an MSHA official, there would be no dispute that a cause of action would lie under section 105(c) of the Mine Act. The two complaints allege interference with the rights and abilities of miners= representatives to make safety complaints to MSHA without fear of retaliation. The question in this case turns on whether MSHA qualifies as a person under the Mine Act. The word person is defined in section 3(f) as Aany individual, partnership, association, corporation, firm, subsidiary of a corporation, or other organization.@ 30 U.S.C. ' 802(f). The majority has concluded that MSHA does not fall into the category of Aother organization.@ I disagree.

Instead, I am persuaded by the reasoning of then Chief Administrative Law Judge Broderick in *Local 9800, UMWA v. Secretary of Labor*, 2 FMSHRC 2680, 2682-84 (Sept. 1980) (ALJ), who when faced with this question determined that AMSHA is a person under section 105(c) prohibited from discriminating against any miner.@ *Id.* at 2684. Judge Broderick relied on the legislative history of the Mine Act, which emphasizes that Athe prohibition against discrimination applies *not only to the operator but to any other person directly or indirectly involved*@ and also made it clear that section 105(c) was Ato be construed expansively.@ 2 FMSHRC at 2683 (citing S. Rep. No. 95-181, at 36 (1977), *reprinted in* Senate Subcommittee on Labor, Committee on Human Resources, 95th Cong., *Legislative History of the Federal Mine Safety and Health Act of 1977*, at 624 (1978) (emphasis added)). The judge pointed to the exception carved by the Supreme Court to express waivers of sovereign immunity when a statute

was Aintended to prevent injury and wrong.@ 2 FMSHRC at 2683 (citing *Nardone v. United States*, 302 U.S. 379, 384 (1937)). In addition, the judge found instructive Congress= curtailment of the doctrine of sovereign immunity in 5 U.S.C.' 702, which does not apply to proceedings under the Mine Act but applies to other agencies and which states that:

> An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed . . . on the ground that it is against the United States . . . .

Against this backdrop of the diminishing strength of sovereign immunity, Judge Broderick relied on the fact that the alleged acts of discrimination were uniquely within the domain of this Commission and that miners would have no alternative forum to litigate infringement of safety rights. 2 FMSHRC at 2683-84. He accordingly permitted the UMWA=s complaints to go forward against MSHA. *Id.* at 2686.

The majority, by requiring a literal waiver of sovereign immunity in the Mine Act, has frustrated Congressional intent to prohibit discrimination by any person or organization. As has been often recognized, A[s]ince the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a narrow or limited construction is to be eschewed.@ *Freeman Coal Mining Co. v. Interior Bd. of Mine Operations Appeals*, 504 F.2d 741, 744 (7th Cir. 1974). Certainly, an agency that is responsible for protecting the safety of miners should be held to the same standard of accountability as mine operators or other miners. Indeed, if the allegations in this case prove to be true, they highlight the need to limit the sovereign immunity of MSHA and to hold MSHA liable for its violations of the Mine Act.[1]

[1] My conclusion that MSHA is not immune from suit applies to both the section 105(c)(1) and section 103(g) allegations. Section 105(c)(1) expressly contains a prohibition against any person interfering with the statutory rights, such as those contained in section 103(g), of a miner or representative of miners. In addition, the portion of section 103(g)(1) at issue is directed specifically and exclusively at the Secretary and requires that the Secretary ensure that A[t]he name of the person giving such notice . . . shall not appear in such copy or notification.@ Because

Congress expressly fashioned the requirement at issue to apply to the Secretary, I am led to one inescapable conclusion **C** that Congress intended the Secretary to be liable under the Mine Act and waived sovereign immunity for MSHA=s violations of the Act.

Accordingly, I hold that a cause of action has been stated against MSHA by the UMWA and I would not dismiss MSHA from the suit.

Marc Lincoln Marks, Commissioner

Distribution

Yoora Kim, Esq.
Office of the Solicitor
U.S. Department of Labor
4015 Wilson Blvd., Suite 400
Arlington, VA 22203

Judith Rivlin, Esq.
United Mine Workers of America
900 15th Street, N.W.
Washington, D.C. 20005

Administrative Law Judge Jacqueline R. Bulluck
Federal Mine Safety & Health Review Commission
Office of Administrative Law Judges
5203 Leesburg Pike, Suite 1000
Falls Church, VA 22041