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JOSEPH MAYNARD V. STANDARD SIGN & SIGNAL
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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.
March 24, 1981
JOSEPH MAYNARD

v. Docket No. PIKE 77-57

STANDARD SIGN & SIGNAL COMPANY IBMA No. 77-48

DECISION

This proceeding arises under the Federal Coal Mine Health and Safety Act of 1969. 30 U.S.C. $801 et seq. (1976). The issue is whether the administrative law judge erred in dismissing a miner's application for review of discharge for failure to state a claim upon which relief can be granted.

In his application and accompanying affidavit Joseph Maynard, an assistant mine foreman, alleges that a federal mine inspector issued several notices of violation to the company on February 15, 1977. 1/ Maynard also alleges he was told by the night superintendent to correct whatever violations he could and to proceed with the production of coal because the second and third shifts would correct the other violations. Maynard states that he did as he was told, but that on February 16, 1977, the mine inspector returned and, finding violations unabated, issued orders of withdrawal. When asked by a supervisor why he had not corrected the conditions for which the orders were issued Maynard responded that he had corrected what he could and thought the third shift would correct the rest. He alleges he was then fired because he had run coal and had not corrected all of the violations. Maynard asserts the discharge violated section 110 of the 1969 Coal Act. 2/

1/ The notices cited violations of the company's roof control plan, excessive coal dust accumulations, and loose panel board covers on buggies.

2/ Section 110(b)(1) of the 1969 Coal Act provided:

No person shall discharge or in any other way discriminate against or cause to be discharged or discriminated against any miner or any authorized representative of miners by reason of the fact that such miner or representative (A) has notified the Secretary or

his authorized representative of any alleged violation or danger, (B) has filed, instituted, or caused to be filed or instituted any proceeding under this Act, or (C) has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this Act.

~614

The company moved to dismiss for failure to state a claim upon which relief could be granted. The judge granted the motion stating:

Mr. Maynard ... has not brought himself within the purview of section 110 of the Act. By his own admission, [Maynard] was discharged because of his failure to abate violations and the Act cannot be construed to protect an employee for his failure to abate violations, even if that failure is the result of instructions by a supervisor. If the allegations of the affidavit are true, [Maynard] probably has a cause of action somewhere, but it is not in this tribunal.

Following the dismissal Maynard moved for reconsideration arguing, among other things, that his application did state a cause of action. He also argued that the Secretary was required to conduct an investigation of his complaint under the 1969 Coal Act, that he had failed to do so and that it was error to dismiss his complaint prior to such an investigation. Maynard requested the judge to reopen the proceeding and to order a factual investigation by the Secretary of the Interior. 3/ The judge denied the motion. The judge stated that he was still of the opinion that Maynard's complaint did not state a cause of action and that neither the 1969 Coal Act nor the Secretary's regulations required the investigation sought by Maynard.

The decision was appealed to the Board of Mine Operations Appeals. While the matter was pending the Secretary's Deputy Associate Solicitor, Division of Mine Health and Safety, sent the Board a letter on July 25, 1977, expressing the Secretary's willingness to conduct an investigation into the facts underlying Maynard's complaint. The Board did not act upon this offer, and the matter was transferred to our jurisdiction when the Federal Mine Safety and Health Act of 1977 took effect. 30 U.S.C. $961(c)(3)(Supp. III 1979).

We concur in the judge's conclusion that the application for review fails to state a claim under the 1969 Coal Act. We agree with the judge that even when viewed in the light most favorable to Maynard, the allegations in the complaint do not come within the perimeters of the activities protected by section 110(b)(1).

We also agree that under the 1969 Coal Act the Secretary was not required to conduct a prosecutorial-type investigation of discrimination complaints. Rather, the procedure established by the Secretary--adversarial adjudication before an administrative law

judge, with administrative and judicial review--satisfied the Secretary's responsibilities under section 110(b).

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3/ Until enactment of the Federal Mine Safety and Health Act of 1977, enforcement of the 1969 Coal Act was the responsibility of the Secretary of the Interior. His enforcement functions, except those assigned to him under section 501 of the 1969 Coal Act and those expressly transferred to us, were transferred to the Secretary of Labor when the 1977 Mine Act took effect. 30 U.S.C. $961(a) (Supp. III 1979).

~615

We note, however, that the Secretary's offer to conduct an investigation of Maynard's complaint is yet extant. We are mindful that the Secretary's offer represented a change in policy with respect to the Secretary's participation in unlawful discrimination and discharge cases brought under the 1969 Coal Act, and that Maynard was denied the possible benefit of such an investigation through no fault of his own.

Accordingly, we affirm the judge's dismissal of the application for review for failure to state a claim upon which relief can be granted. 4/ We remand the case, however, to afford Maynard leave to amend his complaint within 60 days to allege, if he is so able, facts which do state a valid claim under section 110(b). In the intervening period, the Secretary may, if he chooses, undertake the factual investigation offered in the July 25, 1977 letter.

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4/ Maynard's claim that he was entitled to, but denied a "public hearing" prior to dismissal of his application is without merit. The adjudicatory hearing contemplated by section 110(b) need not, of course, proceed to an evidentiary hearing if prior pleadings and procedures establish that one party is entitled by law or undisputed facts to prevail on the merits. A "public hearing" in this context is an adjudication on the public record.

~616

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