IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 92-2931

Summary Calendar

GERTERINE NOBLES,

Plaintiff-Appellant,

versus

METROPOLITAN TRANSIT AUTHORITY, Et Al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-92-1618)

(January 11, 1994)

Before KING, HIGGINBOTHAM and BARKSDALE, Circuit Judges.

PER CURIAM:*

Gerterine Nobles appeals from the decisions of the district court granting summary judgment in favor of defendant Metropolitan Transit Authority and dismissing her petition for failure to state a claim as to defendants Transport Workers Union of America, AFL-CIO, and its Local 260.

---

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

I. BACKGROUND

A. *Facts*

Gerterine Nobles was hired as a bus operator in April 1982 by the Metropolitan Transit Authority ("Metro"), a public entity responsible for providing public transportation services in Houston, Texas. As such, she was within the categories of Metro employees represented by the Transport Workers Union of America, AFL-CIO, and its Local 260 (collectively referred to herein as "the Union"). In October 1989, Metro and the Union signed a Memorandum of Understanding regarding alcohol and drug screening of employees, and the two entities signed a new Memorandum of Understanding on that subject in November 1990. Both Memoranda provided for alcohol and drug treatment under certain circumstances and for random alcohol and drug testing of employees. The Memoranda were approved by Metro's board of directors and the membership of the Union.

After a extended absence from work, Nobles was tested for drug use on February 9, 1990. The test result was negative. However, she tested positive for marijuana use in a random drug test on February 26, 1990. Consistent with the terms of the Memorandum of Understanding then in effect, she was required to undergo treatment and periodic testing as a condition of retaining her position with Metro. She tested negative in a periodic test administered on March 19, 1990, but she again tested positive for marijuana use in a periodic test administered

on May 15, 1990. Nobles was discharged on June 6, 1990, because she failed the May 15 test.

The Union filed a grievance to protest Nobles's discharge. Metro denied the grievance, and the Union requested arbitration of the dispute, contending that Nobles's discharge was without "just cause" and thus violated the Union's labor agreement with Metro. The grievance proceeded to arbitration, and on June 21, 1991, the arbitrator ordered Metro to reinstate Nobles after an evidentiary hearing, finding that there was uncertainty about the validity of the drug test. Metro immediately acted to reinstate Nobles in accordance with its return-to-work policies. One of these policies was a mandatory drug test. Nobles submitted to the test, which used a urine sample provided by Nobles on July 3, 1991. The sample tested positive for the presence of marijuana at prohibited levels.

Because Nobles failed the July 3, 1991, drug test, Metro did not put her back to work; Metro did, however, comply with the arbitrator's award of back pay from June 6, 1990, through July 3, 1991. After Metro orally notified Nobles that she would not be permitted to return to work, the Union demanded that Metro put Nobles back to work despite her failure of the July 3 drug test. The Union filed a second grievance against Metro on Nobles's behalf on July 26, 1991. Metro denied the grievance, and a second arbitration hearing was held on April 15, 1992, before a different arbitrator. After a full arbitration hearing, the arbitrator rendered his decision on May 12, 1992. He concluded

that just cause existed for Metro's refusal to reinstate Nobles and denied her grievance. He also concluded that the July 3, 1991, drug test violated neither the first arbitration award nor the labor agreement.

B. *Procedural History*

On June 2, 1992, Nobles filed suit pro se against Metro and the Union in the United States District Court for the Southern District of Texas. Her complaint alleged that the defendants had violated the labor agreement and the Union's constitution, and that Metro had wrongfully discharged her and failed to comply with the first arbitration award. Jurisdiction was predicated, without explanation, on the Fourteenth Amendment. The Union filed its answer on June 22, 1992, and Metro filed its answer on June 29, 1992.

Nobles filed an "Amendment to Petition" on July 20, 1992, without obtaining leave of court to do so. This document expanded the list of claims against Metro and the Union. Nobles alleged that Metro, inter alia, violated the labor agreement, violated Nobles's Fourth Amendment rights, violated the arbitrator's award from the first arbitration, and failed to inform Nobles about the new drug testing policy. She also alleged that the Union, inter alia, violated its constitution and local by-laws and breached its duty of fair representation. Metro filed a motion to dismiss or, in the alternative, for summary judgment, as well as a motion to strike Nobles's "Amendment to Petition." In support of its motion for summary

judgment, Metro filed the affidavit of Howard W. Lewis, who was Metro's director of labor relations from 1983 to 1992. His affidavit established the facts as recited above.

The district court held a hearing on Metro's motions on October 23, 1992. The court denied the motion to strike but granted Metro's motion for summary judgment. The court accepted and granted the Union's oral motion to dismiss Nobles's suit as to the Union for failure to state a claim. Final judgment reflecting these rulings was entered on November 4, 1992. Nobles timely filed her notice of appeal.

II. STANDARD OF REVIEW

We review the granting of summary judgment de novo, applying the same criteria used by the district court in the first instance. That is, we review the evidence and inferences to be drawn therefrom in the light most favorable to the nonmoving party. Federal Deposit Ins. Corp. v. Dawson, 4 F.3d 1303, 1306 (5th Cir. 1993); Fraire v. City of Arlington, 957 F.2d 1268, 1273 (5th Cir.), cert. denied, 113 S. Ct. 462 (1992). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

We review a dismissal for failure to state a claim under the same standard used by the district court: a claim may not be

dismissed unless it appears certain that the plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. Benton v. United States, 960 F.2d 19, 21 (5th Cir. 1992).

Finally, we note that briefs and papers of pro se litigants are to be construed more permissively than those filed by counsel. Securities and Exchange Comm'n v. AMX, Int'l, Inc., 7 F.3d 71, 75 (5th Cir. 1993).

III. ANALYSIS

A. *Fourth Amendment Claim*

Nobles raised her Fourth Amendment claim, which we liberally construe as a civil rights complaint for violations of her Fourth Amendment right to privacy, against Metro for the first time in her "Amendment to Petition." Metro argues that this claim was not properly before the district court and is not properly before us because Nobles neither sought nor obtained leave of court to file the amendment. Under Federal Rule of Civil Procedure 15(a), a party may not amend a pleading after a responsive pleading has been served except "by leave of court or by written consent of the adverse party." The defendants filed and served original answers to Nobles's original complaint on June 22 and June 29, 1992. Nobles filed her amendment on July 20, 1992, without leave of court or written consent of either defendant.

The Seventh Circuit has held that filing an amendment to a complaint without seeking leave of court or the written consent

of the parties when such is required is a nullity. Friedman v. Village of Skokie, 763 F.2d 236, 239 (7th Cir. 1985); see also Straub v. Desa Indus., Inc., 88 F.R.D. 6, 8 (M.D. Pa. 1980) ("In general, if an amendment that cannot be made as of right is served without obtaining the Court's leave or the opposing party's consent, it is without legal effect and any new matter it contains will not be considered unless the amendment is re-submitted for the Court's approval."). However, some courts have recognized that it is in keeping with the liberal amendment policy of Rule 15 to allow consideration of an untimely and improperly introduced amendment if it appears that leave of court would have been granted if sought and that none of the parties would be prejudiced by allowing the change. Hoover v. Blue Cross and Blue Shield, 855 F.2d 1538, 1544 (11th Cir. 1988); Straub, 88 F.R.D. at 8-9; 6 CHARLES A. WRIGHT ET AL., Federal Practice and Procedure § 1484, at 601-02 (2d ed. 1990).

In any event, it appears that the district court in this case permitted the plaintiff's amendment, albeit after the fact. The court denied Metro's motion to strike, stating on the record, "Metro's motion to strike [Nobles's] pleadings is denied. We might as well leave them in the file. I don't think it makes any difference." The decision to grant or deny a plaintiff's motion to amend is entrusted to the sound discretion of the district court. Avatar Exploration, Inc. v. Chevron, U.S.A., Inc., 933 F.2d 314, 320 (5th Cir. 1991). The district court's refusal to strike Nobles's amended complaint was within its discretion; the

effect of that refusal was to bring Nobles's Fourth Amendment claim before the court.

Metro's motion for dismissal or, in the alternative, for summary judgment, does not address Nobles's Fourth Amendment claim. We must therefore consider whether the district court erred in entering summary judgment against Nobles on that claim.

Although a district court may grant a motion for summary judgment sua sponte, it must give proper notice to the adverse party before it does so. Judwin Properties, Inc. v. United States Fire Ins. Co., 973 F.2d 432, 436 (5th Cir. 1992) (citing FED. R. CIV. P. 56(c)). Nobles was thus entitled to receive ten days notice before the district court granted summary judgment on her Fourth Amendment claim. Id. at 436-37; NL Indus., Inc. v. GHR Energy Corp., 940 F.2d 957, 965 (5th Cir. 1991), cert. denied, 112 S. Ct. 873 (1992). Although Nobles's chances of prevailing on her Fourth Amendment claim may be poor in light of such cases as National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989), and Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), and their progeny, Nobles is entitled to an opportunity to present her case to the district court. Judwin Properties, 973 F.2d at 437. The district court committed reversible error in granting summary judgment for Metro on Nobles's Fourth Amendment civil rights claim.

B. *Metro's Amenability to Suit*

Although the district court did not explain its reasoning in a written order, the transcript of the summary judgment hearing

suggests that the court viewed this case as one arising under the federal labor laws. It appears that the judgment was based on the district court's examination of the arbitration proceedings and its belief that no cause existed to disturb the result of those proceedings. Of course, we are not bound by the reasons given by the district court in reviewing a summary judgment, and we may affirm on other appropriate grounds. Coral Petroleum, Inc. v. Banque Paribas-London, 797 F.2d 1351, 1355 n.3 (5th Cir. 1986). We turn first to Metro's argument that it is not amenable to federal jurisdiction.

Most of Nobles's claims against Metro appear to revolve around allegations that Metro breached its collective bargaining agreement with the Union. In its motion for summary judgment, Metro argued that the only possible basis for federal jurisdiction over Nobles's claims was section 301 of the Labor-Management Relations Act (LMRA), 29 U.S.C. § 185(a), which establishes federal subject-matter jurisdiction over disputes involving the labor agreement between an "employer" and a union representing employees in an industry affecting commerce. Moir v. Greater Cleveland Regional Transit Auth., 895 F.2d 266, 269 (6th Cir. 1990). "Employer" is a term of art, and the LMRA specifically excludes "political subdivisions" of states from its definition of "employer." 29 U.S.C. § 152(2); Moir, 895 F.2d at 269. Thus, if Metro is a political subdivision, it is exempt from the federal jurisdiction created by section 301 of the LMRA. Moir, 895 F.2d at 272.

Several courts have used a two-part test to determine whether an entity is a "political subdivision" within the meaning of the LMRA. These courts have held the term includes those entities that are either (1) created directly by the state, so as to constitute a department or administrative arm of the government, or (2) administered by persons responsible to public officials or to the general electorate. NLRB v. Princeton Memorial Hosp., 939 F.2d 174, 177 (4th Cir. 1991); Moir, 895 F.2d at 271. The Fourth Circuit noted in Princeton Memorial Hospital that the Supreme Court approved this test in NLRB v. Natural Gas Util. Dist., 402 U.S. 600, 604-05 (1971), but the Court also emphasized that this test did not necessarily define the boundaries of the political subdivision exemption. Princeton Memorial Hosp., 939 F.2d at 177.

Metro's summary judgment evidence demonstrates, and Nobles's response to that motion admits, that Metro is a public entity established by voter referendum pursuant to Texas law. Tex. Rev. Civ. Stat. Ann. art. 1118x, § 6 (Vernon Supp. 1994). Other courts have reached the conclusion that public transit authorities like Metro are "political subdivisions" within the meaning of the LMRA. E.g., Moir, 895 F.2d at 269-72; Crilly v. Southeastern Pa. Transp. Auth., 529 F.2d 1355, 1357 (3d Cir. 1976); Jacobs v. Ohio Valley Regional Transp. Auth., 636 F. Supp. 841, 842-43 (N.D.W. Va. 1986); Division 1287, Amalgamated Transit Union, AFL-CIO v. Kansas City Area Transp. Auth., 485 F. Supp. 856, 858-59 (W.D. Mo. 1980). At least one district court in our

circuit has already held that Metro is a political subdivision within the meaning of the LMRA. Webster v. Transit Workers Union of Am., AFL-CIO, No. H-80-1765, slip op. at 2 (S.D. Tex. Nov. 10, 1981) (unpublished opinion). We have ourselves held that Metro is a political subdivision within the meaning of the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 402(e), which also excludes states and their political subdivisions from the definition of "employer." Dabney v. Transport Workers Union Local 260, No. 92-2331, slip op. at 1 (5th Cir. May 7, 1993) (unpublished opinion).

We conclude that Metro is a political subdivision within the meaning of that term as used in the LMRA, and that federal jurisdiction over Nobles's claims for breach of Metro's labor agreement with the Union cannot be predicated on section 301 of the LMRA. The district court should have dismissed Nobles's claims based on breach of the labor agreement for lack of subject-matter jurisdiction.

C. *Dismissal for Failure to State a Claim*

The district court granted the Union's oral motion to dismiss all of Nobles's claims against the Union for failure to state a claim, presumably operating under the assumption that federal jurisdiction existed over those claims by virtue of the federal labor laws. The Union now argues in a cursory fashion that, because the district court lacked jurisdiction over Metro regarding Nobles's section 301 claims, jurisdiction was also lacking over the Union regarding Nobles's allegations that the

Union breached its duty of fair representation as to her. Concluding that there is a substantial question as to the existence of federal jurisdiction over Nobles's claims against the Union, we reverse and remand the district court's dismissal so that it may address the jurisdictional issues raised by the Union.

It appears to us that the district court must resolve two distinct issues in order to decide whether federal jurisdiction exists over Nobles's claims against the Union. First, it will be necessary to determine exactly what causes of action have been pleaded by Nobles against the Union. She clearly asserts claims that the Union violated its own constitution and by-laws and that the Union breached its duty of fair representation. Her other allegations, such as those claiming that Union officials had her arrested for being at the union office and that Union officials failed to inform her of the requirements of the Memoranda of Understanding, may fall within the two causes of action already mentioned, may allege entirely different legal causes of action, such as violations of the LMRDA, or may fail to state a claim under any existing law. After the court ascertains the legal bases for Nobles's claims against the UnionSQwhether the LMRA, the LMRDA, or some other source of a legal duty to herSQthe court should determine whether federal jurisdiction exists over each independent legal theory.

For instance, Nobles's allegation that the Union handled her second grievance and arbitration in bad faith clearly states a

claim that the Union violated the duty of fair representation. See generally Vaca v. Sipes, 386 U.S. 171, 190-91 (1967) (accepting the proposition that "a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion"). This type of fair representation claim, however, is "inextricably interdependent" with a section 301 claim against the employer. DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164-65 (1983). As a result, some courts have suggested that the failure of federal jurisdiction over the section 301 claim against the employer precludes federal jurisdiction over the fair representation claim in a "hybrid" action of this type. See generally Felice v. Sever, 985 F.2d 1221 (3d Cir.), cert. denied, 113 S. Ct. 3038 (1993); Ayres v. International Bhd. of Elec. Workers, 666 F.2d 441 (9th Cir. 1982). We, of course, express no opinion as to whether this analysis is correct. Even assuming that it is correct, Nobles's other allegations may sufficiently raise duty of fair representation claims that are not intertwined with her section 301 claim against Metro and thus may not be subject to the Felice analysis.

Some of Nobles's allegations may not raise duty of fair representation claims at all, but may instead state causes of action properly arising under section 301 of the LMRA or perhaps under the LMRDA. See generally ROBERT A. GORMAN, Basic Text on Labor Law: Unionization and Collective Bargaining 705-707 (discussing the types of union action that may implicate the duty

of fair representation). Federal jurisdiction may be lacking over such claims. See generally Moir, 895 F.2d at 269-70; Dabney, No. 92-2331, slip op. at 1. If so, dismissal for failure to state a claim, being a dismissal on the merits, would be improper.

In light of the inadequate briefing on this issue and the failure of the district court to address the jurisdictional issues, prudence dictates that we reverse the district court's merits dismissal and remand for consideration of the Union's jurisdictional arguments. We, of course, express no opinion regarding the existence vel non of federal jurisdiction over Nobles's claims against the Union.

IV.

For the foregoing reasons, the district court's judgment is REVERSED and REMANDED insofar as the appellant's Fourth Amendment civil rights cause of action is concerned. The judgment resolving appellant's claims brought against Metro pursuant to section 301 of the LMRA is VACATED and REMANDED with instructions that those claims be DISMISSED for lack of subject-matter jurisdiction. The dismissal of appellant's claims against the Union is REVERSED and REMANDED. Each party shall bear its own costs.