UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4135

STEVE SYMONDS,

Plaintiff-Appellant,

versus

DAY & ZIMMERMAN, INC.,

Defendant-Appellee.

Appeal from the United States District Court
for the Eastern District of Texas
(91-CV-62)

(December 15, 1992)

Before DAVIS and JONES, Circuit Judges and PARKER,[1] District Judge.[2]

EDITH H. JONES, Circuit Judge:

From the district court's grant of adverse summary judgment in his wrongful termination case, Symonds appeals. We affirm.

Appellant Symonds was employed by Day & Zimmerman (D&Z), a private corporation operating a munitions plant at a federal

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[1] Chief Judge of the Eastern District of Texas, sitting by designation.

[2] 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 Pursuant to that Rule, the court has determined that this opinion should not be published.

enclave. His employment with the corporation was covered by a collective bargaining agreement with ("CBA") the International Chemical & Atomic Workers Union. Article 8 of the CBA was entitled "Employee Discipline" and contained a just cause clause, an employee drug policy, and a provision permitting D&Z to furnish employees with rules of conduct.

On May 8, 1989, Symonds was fired. D&Z refused his request to leave the plant until he underwent a drug test. He refused. Absent the test, Symonds was told, he would have to sign a written resignation of employment before he would be allowed to leave the plant. Symonds signed the resignation and was escorted under guard to the plant gate.

He then filed suit in state court. Symonds asserted in his petition that, although his time had run out for pressing a grievance under the CBA, he had an independent contract with D&Z based on the employee rules of conduct His causes of action included common law breach of contract, the tort of bad faith and negligence. D&Z removed to federal court, alleging federal jurisdiction because the claims arose on a federal enclave and under § 301 of the Labor Management Relations Act. The district court declined to remand and entered summary judgment for the defendant. Symonds challenges the federal court's jurisdiction and its summary judgment ruling.

JURISDICTION

We have jurisdiction over the instant case as the incidents that gave rise to it occurred on a federal enclave.

Appellant's contrary argument misunderstands the constitutional status of federal enclaves as well as the reservation to the state of the power to effect service of process on such properties. In its deed of cession, Texas reserved the "concurrent jurisdiction with the United States of America over every portion of land so ceded, so far, that all process, civil and criminal, issuing under the authority of the State of Texas or any other of the courts and judicial officers thereof, may be executed by the proper officers of the State of Texas . . . . (emphasis added).

Appellant has confused the state's procedural right to serve process on military installations with the substantive power of the federal sovereign to govern on the enclave. The reservation of a state's right to serve process has no bearing on the exclusive federal sovereignty over the enclave. Mater v. Holley, 200 F.2d 123, 125 (5th Cir. 1952); Lord v. Local 208, 646 F.2d 1057, 1060 n.6 (5th Cir. 1981); U.S. v. State of Texas, 695 F.2d 136, 141 (5th Cir. 1983); Vincent v. General Dynamics Corp., 427 F.Supp. 786, 795 (N.D.Tex. 1977). Therefore, removal jurisdiction exists on the ground that the alleged cause of action arose on federal land.

DISCUSSION

We also affirm the district court's summary judgment on the issue of § 301 preemption. Since this is a threshhold issue, it is unnecessary to discuss Symonds's other claims. Symonds sought to avoid § 301 preemption by asserting that an independent contract of employment existed which was not governed by the CBA. He additionally asserted common law causes of action for bad faith

and negligence. However, to judge the bad faith or negligence of the firing, a duty must be established between appellant and appellee. Appellant asserts that this duty was formed by the rules of conduct prescribed by D&Z.[3]

The question thus presented is whether Symonds can assert a cause of action based on an independent contract made between him and the employer when the general employment relationship was covered by a CBA. The answer to this question is clear: he cannot. In J.I. Case Co. v. National Labor Relations Board, 321 U.S. 332, 64 S. Ct. 556, 88 L.Ed. 762 (1944), the Supreme Court was asked whether a co-extensive independent contract could exist with an employee whose employment relationship was governed by a CBA. The Court stated:

> Individual contracts, no matter what the circumstances that justify their execution or what their terms, may not be availed of to defeat or delay the procedures prescribed by the National Labor Relations Act looking to collective bargaining, nor to exclude the contracting employee from a duly ascertained bargaining unit; nor may they be used to forestall bargaining or to limit or condition the terms of the collective agreement . . . Whenever private contracts conflict with its function, they must obviously yield or the Act to be reduced to a futility.

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[3] An independent claim, i.e. one not based on the CBA or independent contracts such as the rules of conduct, would fare no better. See Gray v. Local 714, International Union of Operating Engineers, 778 F.2d 1087, 1090 n.2 (1985) (noting contract claims fall in the core of the preemption doctrine); Chube v. Exxon Chemical Americas, 760 F.Supp. 557, 560 (M.D. L.A. 1991) (finding § 301 preemption of intentional infliction of emotional duress in the context of improper labor practices); Strachan v. Union Oil Company, 768 F.2d 703, 705 (5th Cir. 1985) (similar facts to the instant case preempted).

321 U.S. at 337, 364 S. Ct. at 580.[4]

The issue of the independent effect of policy manuals was directly answered in Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468 (9th Cir. 1984) (Wisdom, J.). There, a worker asserted that his written policy manual constituted an independent contract between him and his employer. The court held the claim "clearly preempted." Olguin, 740 F.2d at 1474. Its rationale was that

> [t]he bargaining agreement provides that the Company has the right to discharge or discipline employees for just cause. . . . The alleged personnel manual could have binding effects only if they were authorized by and incorporated by reference in the collective bargaining agreement. By omitting any reference to the collective bargaining agreement Olguin attempts to avoid federal jurisdiction but his suit is effectively a suit to enforce the collective bargaining agreement and § 301 provides Olguin's only remedies.

Id. (citations omitted).

Following Olguin, the Ninth Circuit held in Stallcop v. Kaiser Foundation Hospitals, 820 F.2d 1044, 1048 (9th Cir. 1987),

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[4] The holding in J. I. Case was recently limited by the Supreme Court's holding in Caterpillar, Inc. v. Williams, 482 U.S. 386, 107 S. Ct. 2425, 96 L.Ed. 318 (1987). In Caterpillar, the Court stated that "J. I. Case does not stand for the proposition that all individual employment contracts are subsumed into or eliminated by the Collective Bargaining Agreement." 482 U.S. at 396, 107 S. Ct. at 2431. The Court found that a contract to employ workers in another plant in the event of the present plant's closure was independent of the provisions of the Collective Bargaining Agreement under which they worked. Id. See also White v. National Steel, 938 F.2d 474, 482 (7th Cir. 1991) (promise to re-employ independent). Cases subsequent to Caterpillar have, however, found that employee handbooks and policy manuals are covered by the wide scope of J. I. Case. See infra.

that an alleged oral employment agreement which was coextensive with the Collective Bargaining Agreement was preempted. The court stated

> Stallcop contends that the wrongful termination alleged does not involve the interpretation of the collective bargaining agreement. . . . she apparently contends that she was wrongfully discharged in violation of the oral agreement . . . However "any independent agreement of employment could be effective only as part of the collective bargaining agreement." Id. at 1048 (citing Olguin and other similar cases).

See also, Bale v. General Telephone Company of California, 795 F.2d 775, 779 (9th Cir. 1986. Although this court has never examined the specific issue of policy manuals and employee handbooks in the context of a § 301 action, we have acknowledged the broad scope of such preemption:

> It is well established that § 301 must be broadly construed to encompass any agreement, written or unwritten, formal or informal, which functions preserve harmonious relations between labor and management. Smith v. Kerrville Bus Co., 709 F.2d 914, 920 (5th Cir. 1983).

This court is not only persuaded but compelled by the above reasoning. In attempting to be covered both by a Collective Bargaining Agreement and an independent contract based on a policy manual, appellant Symond "is essentially asking for a second bite at the apple." Shivers v. Saginaw Transit System, 719 F.Supp. 599, 602 (E.D.Mich. 1989) (discussing the effect of policy manuals on the preemptive effect of a CBA). We will not allow such a bite to be taken here. Consequently, employees policy manuals issued pursuant to a CBA are subsumed by the CBA to the extent they would

"defeat or delay the procedures prescribed by the NLRA" and therefore are preempted by § 301. It is on that basis that we **AFFIRM** the summary judgment of the district court.