UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-9539
Summary Calendar

PHYLLIS ROMAGUERA, KIM BONANO, and TAMMY GREMILLON,

Plaintiffs-Appellees,

VERSUS

JON GEGENHEIMER, Et Al.,

Defendants,

JON GEGENHEIMER, Clerk of Court, 24th Judicial District Court, etc.,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana (91-CV-4469-E)

(December 2, 1993)

Before KING, HIGGINBOTHAM, and BARKSDALE, Circuit Judges.

PER CURIAM:[1]

In this civil rights action, Jon Gegenheimer, Clerk of Court for Jefferson Parish, Louisiana, appeals from being enjoined from instituting a drug-testing program in his office. We **VACATE** and **REMAND**.

---

[1] Local Rule 47.5.1 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 Pursuant to that rule, the court has determined that this opinion should not be published.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.

Gegenheimer sought to implement a drug-testing program to which all "Security Sensitive" or "Safety Sensitive" employees in his office would be subject.[2] Three of these employees sued on December 10, 1991 under 42 U.S.C. § 1983 for declaratory and injunctive relief, challenging the constitutionality of the program, and in particular the portions that allowed random testing and testing on reasonable suspicion.

That same day, the district court entered a temporary restraining order against implementation of the program; that order (the consolidation order) also consolidated trial on the merits with the preliminary injunction hearing. And, as a result of that hearing on January 10, 1992, the court in July 1992, permanently enjoined random drug-testing as it applied to most of the employees.[3] Gegenheimer moved for a new trial or to alter or amend the judgment; following a hearing in early November 1992, the motion was denied.

II.

Gegenheimer contends that the district court should not have entered a permanent injunction, because the parties (and perhaps even the district judge) did not realize that the TRO had also consolidated trial on the merits with the preliminary injunction

---

[2] Under the plan, these two categories covered 288 of the approximately 320 employees.

[3] The order excepted those employees who drove motor vehicles and who were custodians of the evidence room. It also allowed the Clerk to implement pre-employment, post-accident, reasonable suspicion, and return-to-employment testing.

hearing. Gegenheimer does not question the district court's ability to so consolidate under Fed. R. Civ. P. 65(a)(2).[4] He maintains, instead, that he was unaware that the district court had done so, and therefore did not realize that the preliminary injunction hearing also represented his only chance to argue the merits.

Ordinarily, the parties must receive "clear and unambiguous notice" of the possibility that the case will be decided on its merits pursuant to a consolidation order, "`either before the hearing commences or at a time which will still afford the parties a full opportunity to present their respective cases.'" ***University of Texas v. Camenisch***, 451 U.S. 390, 395 (1981) (citations omitted). The lack of such notice entitles the party without notice to a remand for a hearing on the merits, unless there was no prejudice to that party. *See* ***Wohlfarht v. Memorial Medical Center***, 658 F.2d 416, 418 (5th Cir. Unit A Oct. 1981).

Of course, a party is deemed to have notice of the proceedings in the case, including knowledge of the contents of the record; this includes knowledge of the contents of any orders. *E.g.*, ***Pentikis v. Texas Elec. Serv. Co.***, 470 S.W.2d 387 (Tex. Civ. App. 1971); ***Banks v. Crawford***, 330 S.W.2d 243 (Tex. Civ. App. 1959). Under this general rule, Gegenheimer would be deemed to have notice

---

[4] Fed. R. Civ. P. 65(a)(2) reads, in pertinent part:

> Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application.

of the consolidation order. And, ordinarily, this would preclude his contending that he did not know the court would issue a permanent injunction after the hearing. Nevertheless, as discussed below, because the court modified the consolidation order from the bench at the preliminary injunction hearing, we hold that Gegenheimer lacked notice of the fact that the hearing on the preliminary injunction was consolidated with trial on the merits; and that he was prejudiced as a result.

The TRO/consolidation order issued on December 10, 1991; the hearing on the consolidated proceedings was held on January 10, 1992.[5] Before the hearing, the plaintiffs asked Gegenheimer to stipulate that the hearings would be consolidated (apparently without referring to the consolidation order, which would have made such a stipulation unnecessary).

At the hearing, plaintiffs again mentioned their request for the stipulation -- again without bringing the consolidated order to the attention of the court or defendant. The following relevant colloquy occurred:

> [Plaintiff's counsel]: One of the proposed stipulated facts that we were not able to agree on was that the trial of the merits is going to be consolidated with a hearing on the preliminary injunction as authorized under Rule [65(a)(2)], and I understand that the defense is not willing to

[5] At the hearing, apparently even plaintiff's counsel was unaware that the consolidation order had been entered, although he had some idea that the hearings were to be consolidated. In the intervening month, plaintiffs, as well as defendants, consistently referred to the upcoming hearing in all documents filed as a hearing on the *preliminary injunction*, rather than a hearing and trial on the merits of the case.

> stipulate to that, and perhaps [defense counsel] wants to address that.
>
> [Defense counsel]: Your Honor, we respectfully request that the hearing be reserved to a hearing on the preliminary injunction rather than on the permanent injunction. We prepared [] on this short notice to litigate this preliminary injunction, but not the entirety of the case on the merits for final absolute judgment.
>
> THE COURT: Well, resolution of the preliminary injunction question may or may not moot the rest of it. We don't know.
>
> [Defense counsel]: Yes, Your Honor.
>
> THE COURT: So we will proceed that way then.
>
> [Defense counsel]: Thank you. So that means we're just on the preliminary injunction.
>
> THE COURT: On the preliminary injunction.

The consolidation order notwithstanding, we hold that this exchange modified that earlier order.

Because the hearing was only on the preliminary injunction, we turn next to the court's permanent injunction. Because the consolidation order was modified by the court's statements, discussed *supra*, the permanent injunction was issued without notice. Therefore, we must determine whether Gegenheimer was prejudiced by this lack of notice.

We find that Gegenheimer was prejudiced by the inability to fully present his case.[6] In response to the court's inquiry at the

---

[6] In finding that Gegenheimer was prejudiced, we rely on the evidence presented pursuant to his motion post-judgment, as discussed *infra*.

Gegenheimer also presents the affidavit of his trial counsel. It is not part of the record on appeal, because it is not part of the record developed in district court. ***Scarborough v. Kellum***, 525

hearing on his post-judgment motion, and in his memorandum in support of that motion, Gegenheimer provided examples of evidence he would have presented, had he been given the opportunity. These included: calling additional experts; taking further discovery regarding the jobs of all employees of his office; developing evidence regarding the applicability of qualified immunity; and proceeding with "the full requirements of class certification". Counsel for Gegenheimer stated, "we just plain did not, we feel, have a fair opportunity to prepare for a trial on the merits." As discussed, based on our review of the record, we agree.[7]

Concerning remand, we decline to construe the permanent injunction as a preliminary injunction, because the district court made no determination on the record that a preliminary, as opposed to a permanent, injunction would be appropriate, according to the factors enumerated in Fed. R. Civ. P. 65(d) and our caselaw. *See, e.g.*, ***Roho, Inc. v. Marquis***, 902 F.2d 356, 358 (5th Cir. 1990) (preliminary injunction proper where movant can show substantial likelihood of prevailing on merits; threat of irreparable harm which outweighs possible harmful results of injunction; and that injunction will not undermine the public interests); ***Canal Authority v. Callaway***, 489 F.2d 567, 573 (5th Cir. 1974) (same). Accordingly, we vacate the injunction appealed from, rather than

---

F.2d 931, 933 n. 4 (5th Cir. 1976) (citing ***Smith v. United States***, 343 F.2d 539, 541 (5th Cir.), *cert. denied*, 382 U.S. 861 (1965). Therefore, we **GRANT** appellees' motion to strike it.

[7] Gegenheimer contends also that the injunction was erroneous because it applied to almost all of the employees, even though no class was certified. We need not reach this issue.

attempting to construe it as a preliminary injunction. On remand, of course, plaintiffs can seek that relief.

III.

Accordingly, that portion of the judgment challenged on appeal is **VACATED** and this case is **REMANDED** for further proceedings consistent with this opinion.

VACATED and **REMANDED**