

UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 94-20559
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 c/w 93 3428)

(June 30, 1995)

Before KING, JOLLY and DeMOSS, Circuit Judges.

PER CURIAM:*

BACKGROUND

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

* 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.

Houston, Texas.¹ 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; 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 an 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' discharge. Metro denied the grievance and the Union requested arbitration of the dispute, contending that Nobles' discharge was without "just

¹ The facts of this case are taken directly from Nobles v. Metropolitan Transit Authority, No. 92-2931 (5th Cir. January 11, 1994) (unpublished).

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' 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.

Nobles filed suit in federal court against Metro and the Union, asserting that Metro had violated her Fourth Amendment

rights and that the Union violated its constitution and bylaws and did not fairly represent her. Nobles also asserted that Metro had violated the collective bargaining agreement. The district court granted summary judgment in the defendants' favor, but this court vacated that order and remanded the case to the district court to consider the Fourth Amendment issue and the claims against the Union.

Nobles filed a second lawsuit on October 19, 1993, against Metro, two of its employees, the Union and the Texas Employment Commission (TEC) alleging that she was wrongly denied unemployment benefits after Metro discharged her for failing the drug test. Nobles also restated her claim that her discharge was improper. The magistrate judge dismissed TEC on March 11, 1994. The district court then consolidated this new action and the case on remand.

On June 15, 1994, the district court notified all parties of a hearing on "all pending motions" on June 27, 1994. This hearing included Metro's motion for summary judgment on Nobles' Fourth Amendment claim. At this hearing, the district court ruled from the bench that requiring bus drivers to take a drug test in the interest of public safety was not a violation of the Fourth Amendment. The district court entered final judgment ordering that Nobles take nothing from the defendants.

OPINION

Nobles argues that the district court did not give her 10 days notice before it granted summary judgment on her Fourth Amendment claim. The notice requirement of Fed. R. Civ. P. 56(c) requires

only that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." Metro served the motion for summary judgment on Nobles on March 9, 1994. Nobles responded to the motion on April 21, 1994. The district court advised Nobles of the hearing on all pending motions 12 days before it was set. Rule 56(c) was satisfied.

Nobles asserts that the district court erred in granting summary judgment in favor of Metro on her claim of a violation of the Fourth Amendment. "Review of the district court's ruling on a motion for summary judgment is plenary." King v. Chide, 974 F.2d 653, 655 (5th Cir. 1992). Summary judgment is appropriate if "viewing all the evidence in the light most favorable to the non-movant, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Amburgey v. Corhart Refractories Corp., Inc., 936 F.2d 805, 809 (5th Cir. 1991) (internal quotations and footnote omitted).

This court has recently upheld a grant of summary judgment in favor of Metro on the issue of whether its drug testing program violated the Fourth Amendment. Jackson v. Metropolitan Transit Authority, No. 94-20706 (5th Cir. April 18, 1995) (unpublished; copy attached). Like Nobles, Jackson was a Metro employee who was terminated for failing a drug test. Id., slip op. at 2-3. Citing National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) and Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989), this court stated that "[t]he Supreme Court has long allowed drug testing when the governmental interest in public

safety outweighs an employee's privacy expectations." Jackson, slip op. at 6. In the instant case, the district court found that Metro's drug testing did not violate the Fourth Amendment because of the interest in furthering "the safety of the passengers, the pedestrians and the vehicular traffic." As in Jackson, the grant of summary judgment on this issue is affirmed.

Nobles contends that the district court improperly consolidated her two suits. A consolidation of cases under Fed. R. Civ. P. 42(a) will be reversed only for an abuse of discretion. In Re Air Crash Disaster at Florida Everglades on December 29, 1972, 549 F.2d 1006, 1013 (5th Cir. 1977). "A court may order consolidation of cases despite the opposition of the parties." Id. In this instance, the two cases involve the same parties and nearly identical claims. Nobles has not shown that consolidation prejudiced her rights in any way; therefore, she has not shown that the district court abused its discretion under Rule 42(a). See id. at 1013 n.10.

Nobles asserts that the district court erred in granting summary judgment in favor of the Union² in her claim of violation the Collective Bargaining Agreement for unfair representation and improper ratification of the labor agreement and Memorandum of Understanding.

With respect to Local 260, the district court dismissed the claims for unfair representation and improper ratification because

² This includes both the Transport Workers Union of America, AFL-CIO (TWU), and its Local 260.

Local 260 was not a labor organization as defined in the Labor-Management Relations Act (LMRA), 29 U.S.C. § 152(5). In Jackson, this court concluded that Local 260 was not a labor organization as defined by the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 402(i). Jackson, slip op. at 9-10. The court held that local 260 did not fall within the LMRDA's definition of a labor organization because a labor organization was defined in terms of the employer and that Metro was excluded from the definition of an employer, 29 U.S.C. § 402(e), because it was a "political subdivision". The court in Jackson did not reach the issue of whether Local 260 was a labor organization as defined under the LMRA, but relied on the statute of limitations to dispose of the claim. Jackson, slip op. at 7-8. The definitions for employer and labor organization in both the LMRA, 29 U.S.C. §§ 152(2) and 152(5), and the LMRDA, 29 U.S.C. §§ 402(e) and 402(i), are identical. As such, the holding in Jackson, excluding Local 260 from the definition of a labor organization under the LMRDA, logically extends to the identical definitions contained in the LMRA.

With respect to the TWU, a necessary element of a breach-of-fair-representation claim is a showing that Nobles was discharged in contravention of the Collective Bargaining Agreement. DelCostello v. Teamsters, 462 U.S. 151, 163-65 (1983). At the hearing on the motion for summary judgment, the district court found that the Union had competently represented Nobles in her actions against Metro. Nobles' arguments at the hearing were that

the Union should have enforced the first arbitration order reinstating her and that the second arbitration resulting from her failure of the drug test on July 3, 1991, was improper. It is Nobles' position that, because she was not placed back on a bus prior to her drug test, she was not working under the Collective Bargaining Agreement and that the grievance procedure did not apply to her. Nobles argues that because the Union had not adequately ratified the labor agreement and the Memorandum of Understanding on drug testing, she should have been reinstated on the order of the first arbitrator without having to take the drug test that led to her ultimate discharge and the second arbitration.

In Nobles, this court stated that the Memorandum of Understanding regarding the drug screening of employees had been approved by the membership of the Union. See Nobles, slip op. at 2; see also Jackson, slip op. at 10. Nobles has not presented any evidence to create a genuine issue of material fact that she was discharged in violation of the Collective Bargaining Agreement and that the Union did not properly represent her through the grievance and arbitration proceedings. Her entire argument hinges on her misconception that it was improper to require her take a drug test before she was returned to work under the first arbitration order.

With respect to her pending motion that the first arbitration order be enforced, which has been carried with this appeal, Metro did comply with it by giving Nobles back pay and attempting to reinstate her. See Nobles, slip op. at 3-4. That motion is denied.

AFFIRMED.