UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 94-20706
Summary Calendar

JEROME W. JACKSON, JR.

Plaintiff-Appellant,

VERSUS

METROPOLITAN TRANSIT AUTHORITY,
TRANSPORT WORKERS UNION OF AMERICA LOCAL 260 AFL-CIO, and
HOUSTON MEDICAL TESTING SERVICES,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Texas
(CA-H-93-1633)

(April 18, 1995)

Before GARWOOD, HIGGINBOTHAM and DAVIS, Circuit Judges.

PER CURIAM:[1]

This case revolves around the Metropolitan Transit Authority's ("Metro"'s) termination of Jerome Jackson, Jr., after he failed a drug test for the second time. Jackson filed suit against Metro, the Transport Worker's Union of America Local 260 AFL-CIO, and

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[1] 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 Pursuant to that Rule, the Court has determined that this opinion should not be published.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 Medical Testing Services ("HMTS"). The district court granted summary judgment in favor of all defendants. We affirm.

I.

Metro is a public entity that provides transportation services within the Houston area. In January 1985, Metro hired Jerome Jackson as a bus operator. As a bus operator, Jackson was employed within the bargaining unit represented by the Transport Workers Union of America, AFL-CIO ("TWU") and its Local 260 (collectively, the "Union"). Pursuant to various labor agreements with the Union, Metro promulgated policy statements regarding drug and alcohol use and testing. Metro contends that it had authority to do so pursuant to the labor agreement with the Union and its inherent power as an employer.[2]

In October 1989, Metro and the Union executed a "Memorandum of Understanding" ("MOU") regarding drug and alcohol testing. A new MOU was executed on November 8, 1990. At the same time, the 1990-92 Labor Agreement was negotiated. Both were part of a document entitled "Settlement Agreement," Paragraph 14 of which specifically adopted the November 1990 MOU. The Settlement Agreement was presented to the membership of Local 260 by local Union officials at a membership meeting held on or about November 21, 1990.

Jackson first tested positive for marijuana during a "return to work" test in December 1990. This result was confirmed by gas chromatograph/mass spectrometry ("GCMS") analysis and was reviewed

[2]The relevant sections of the Labor Agreement are quoted in the magistrate's Amended Memorandum and Recommendation (the "magistrate's report").

by Dr. James M. Vanderploeg, Metro's medical review officer. Jackson was referred to a three-week drug treatment center at Metro's expense, pursuant to Metro's policy and the MOU. In January 1991, Jackson signed a "Letter of Commitment for Rehabilitation Services," stating that "[i]t is understood that the Metropolitan Transit Authority will conduct unannounced specific testing for a period of twelve months, and if I fail any of these periodic drug screens, I will be discharged."

After returning to work, Jackson submitted to a number of random drug tests and again tested positive for marijuana in July 1991. This result was also confirmed by GCMS analysis and reviewed by Dr. Vanderploeg. As a result, Metro terminated Jackson on August 5, 1991.

The disciplinary action report which effectuated Jackson's discharge was signed by Jackson, his Union steward, Mr. Shepherd, and Metro supervisor, Mr. Lapayude. Neither Jackson nor the Union filed a grievance protesting Jackson's termination within the ten-day time period provided by the Labor Agreement. Jackson testified that he asked Union representatives to file a grievance and that they repeatedly advised him that they would "look into it."

Thirteen months after Jackson's discharge, Local 260 was placed in administrative trusteeship by TWU. In November 1992, plaintiff discussed the status of his grievance request with a representative appointed by TWU for Local 260. The representative reviewed Jackson's records and discovered that a grievance hearing was never requested. In February 1993, approximately eighteen

months after Jackson's discharge, the representative requested a grievance hearing. Metro denied the request as untimely.

Jackson then filed this suit pro se against Metro, the Union and HMTS.[3] The case was referred to a magistrate pursuant to 28 U.S.C. § 636(b)(1). Each defendant filed a motion to dismiss or, in the alternative, for summary judgment. The magistrate filed a thorough report and recommended that summary judgment be granted in favor of the defendants. The district court adopted the magistrate's findings and recommendations, dismissing with prejudice all of Jackson's claims against the defendants. Jackson now appeals. We, of course, review the district court's grant of summary judgment de novo. **Unida v. Levi Strauss & Co.**, 986 F.2d 970, 975 (5th Cir. 1993).

II.

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[3] Jackson asserted the following claims:

(1) against Metro:

(a) breach of the 1990-92 Labor Agreement,
(b) violation of his Fourth Amendment right to privacy,
(c) invasion of privacy/false light;

(2) against the Union:

(a) violation of the collective bargaining agreement, unfair representation, and
(b) improper ratification of the 1990-92 Labor Agreement and MOU.

(3) against HMTS:

(a) negligence, and
(b) misrepresentation.

A.

The district court dismissed Jackson's breach of contract claim against Metro on the basis that it lacked subject matter jurisdiction. Jackson's breach of contract action is based upon Metro's alleged violation of the 1990-92 Labor Agreement in promulgating and enforcing the MOU. Section 30l(a) of the Labor-Management Relations Act, 28 U.S.C. § 185, provides a federal remedy for breach of a collective bargaining agreement.[4] Although § 30l authorizes private action against employers, it defines the term "employer" to exclude "any State or political subdivision thereof." **Id.** § 152. Because Metro is a political subdivision, the district court properly dismissed this claim for lack of subject matter jurisdiction. **See Nobles v. Metropolitan Transit Auth.**, No. 92-2931, slip op. at 11 (5th Cir. Jan. 11, 1994) (unpublished opinion) (holding that Metro is a political subdivision under § 301).

B.

Jackson next complains that Metro violated his fourth amendment rights by forcing him to be drug tested without probable cause.[5] The Supreme Court has long allowed drug testing when the

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[4] Section 30l provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, are between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the party.

[5] The Fourth Amendment provides that "[t]he right of the people to be secure in their persons . . . against unreasonable

governmental interest in public safety outweighs an employee's privacy expectations. **See National Treasury Employees Union v. Von Raab**, 489 U.S. 656, 677 (1989); **Skinner v. Railway Labor Executives' Ass'n,** 489 U.S. 602, 633 (1989). Following **Skinner** and **Von Raab**, cases have routinely upheld drug and alcohol testing for public employees if reasonable. **See, e.g., Tanks v. Greater Cleveland Regional Transit Auth.**, 930 F.2d 475, 479-80 (6th Cir. 1991) (post-accident bus driver testing); **National Treasury Employees Union v. Yeutter**, 918 F.2d 968, 971-72 (D.C. Cir. 1990) (random urinalysis of motor vehicle operators); **Bluestein v. Skinner**, 908 F.2d 451, 456-57 (9th Cir. 1990) (random testing of flight crew members), **cert. denied**, 111 S.Ct. 954 (1991).

The magistrate judge carefully balanced the interests and determined that Metro's testing was reasonable. For the reasons set forth in the magistrate's report, we conclude that the district court properly granted summary judgment on this issue.

C.

In the proceddings below, Jackson also asserted a claim against Metro for false light invasion of privacy. Previously, it was unclear whether Texas recognized a claim of false light invasion of privacy. **See Diamond Shamrock Refining & Marketing Co. v. Mendez**, 844 S.W.2d 198, 200-01 (Tex. 1992). The district court held that, notwithstanding this uncertainty, Jackson's claim failed on the merits. However, the Texas Supreme Court recently rejected

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searches and seizures, shall not be violated." U.S. Const. amdt. IV.

the tort of false light invasion of privacy. **Cain v. Hearst Corp.**, 878 S.W.2d 577, 579 (Tex. 1994). Thus, summary judgment was proper on this claim as well.

III.

A.

As to the Union, Jackson argues first that the Union violated Art. XXV of the International Constitution, section 5, by failing to file a timely grievance on his behalf. The district court determined that this was at bottom a claim that the Union violated its duty of fair representation. It held that it lacked subject matter jurisdiction over these claims, and, in the alternative, that the claims were time barred.

Unfair representation claims in this context are "hybrid" § 301/fair representation claims, in that they are "inextricably interdependent" with the employee's § 301 claim against the employer. **DelCostello v. International Brotherhood of Teamsters**, 462 U.S. 151, 164-65 (1965). This court noted in **Nobles** that some courts have suggested that the failure of federal jurisdiction over a § 30l claim against the employer precludes federal jurisdiction over "hybrid" claims against the Union. **Nobles**, slip op. at 12-13 (citing **Felice v. Sever**, 985 F.2d 1221, 1227 (3d Cir. 1993)). The **Nobles** court expressed no opinion as to this issue. **Id.** at 13.

The district court held that it lacked subject matter jurisdiction, relying on **Williams v. Metropolitan Transit Auth.**, No. 91-3725, slip op. at 8 (S.D. Tex. Jan 12, 1994) ("[B]ecause this Court finds that Metro is not an 'employer,' it follows that

the Union representing plaintiff is not a 'labor organization' within the meaning of 29 U.S.C. § 152(5) of the Act, because the definition of a labor organization, which is subject to the Act's coverage, is tied to the definition of employer.").

We need not decide this issue because Jackson's claims against the union are time barred. In **DelCostello**, the Supreme Court held that the six-months statute of limitations in § 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), applies to "hybrid" claims. 462 U.S. at 169-72. Jackson failed the second drug test on July 17, 1991. He was discharged on August 5, 1991. This lawsuit was not filed until May 18, 1993, nearly two years after Jackson was discharged. "The limitations period . . . begins to run when the claimant[] discover[s], in the exercise of reasonable diligence, should discover, the acts that form the basis of [his] duty of fair representation claim." **Wood v. Houston Belt & Terminal Rwy.**, 958 F.2d 95, 97 (5th Cir. 1992).

Jackson argues that he did not file suit until May 18, 1993 because Union representatives repeatedly told him that they would look into the matter. He contends that he did not realize that the Union was not going to file a timely grievance on his behalf until February 13, 1993, when Labor Relations refused to hear the grievance because it was untimely. For the reasons set forth in the magistrate's report, we agree that Jackson should have, in the exercise of reasonable diligence, discovered the Union's failure to act on his behalf more than six months before he filed this suit. **See Metz v. Tootsie Roll Indus., Inc.,** 715 F.2d 299, 304-06 (7th

Cir. 1983) (rejecting argument similar to Jackson's), **cert. denied**, 464 U.S. 1070 (1984).

B.

Jackson argues next that the Union violated Local 260 Bylaws Article XIX, Contract Negotiations, Paragraph B, which states: "No agreement shall become effective until it is ratified by the Local Membership with a secret walk-in ballot." Jackson alleges that the MOU was not ratified as required by the Bylaws and the International Constitution. Jackson also asserts that the 1990-92 Labor Agreement was illegal and that the members were not told about it.

Jackson's arguments essentially assert a claim under the Labor Management Reporting and Disclosure Act ("LMRDA"), 29 U.S.C. § 401, et seq. Section 411(a)(1), entitled the Bill of Rights of Members of Labor Organizations, protects each member's right to vote and otherwise to participate equally in Union affairs. **See Christopher v. Safeway Stores, Inc.,** 644 F.2d 467, 469 (5th Cir.-Unit A 1981). Jackson contends that the Union violated these protected rights when it wrongly denied him the right to participate, including the right to vote on the Labor Agreement and the MOU.

The district court held that it lacked subject matter jurisdiction over these claims, at least as they applied to Local 260, because Local 260 is not a "labor organization" under the LMRDA. The LMRDA defines a "labor organization" as:

> [any organization] in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor

> disputes, wages, rates of pay, hours or other terms and conditions of employment.

29 U.S.C. § 402(i). The LMRDA also excludes "political subdivisions" from the definition of employer. **Id.** § 402(e). Because the only employer that Local 260 deals with is Metro, a political subdivision under the LMRDA, **Dabney v. Transport Workers Union Local 260**, No. 92-2331, slip op. at 1 (5th Cir. May 7, 1993) (unpublished opinion), Local 260 is not a "labor organization" under the LMRDA. **Martinez v. American Fed'n of Gov't Employees,** 980 F.2d 1039, 1042 (5th Cir.), **cert. denied,** 113 S. Ct. 2996 (1993). Thus, the district court properly dismissed Jackson's LMRDA claims against Local 260.

This analysis does not apply to Jackson's claims against TWU for improper ratification of the 1990-92 Labor Agreement and improper ratification of the MOU because TWU deals with other employers, some of which are not public entities. However, the district court found that Jackson had presented no competent summary judgment evidence supporting his claim that neither agreement was approved by a vote of the membership of Local 260. In contrast, the Union presented competent summary judgment evidence that both the Agreement and the MOU were part of the Settlement Agreement approved by Metro's Board of Directors and the membership of Local 260. Because Jackson failed to raise an issue of material fact as to this claim, the district court properly granted summary judgment.

IV.

A.

As to HMTS, Jackson argues first that HMTS used negligent procedures to collect Jackson's urine specimen.[6] Under Texas law, negligence "consists of three essential elements--a legal duty owed by one person to another, a breach of that duty, and damages proximately resulting from the breach." **El Chico Corp. v. Poole**, 732 S.W.2d 306, 311 (Tex. 1987). A drug testing laboratory owes a duty to testees to use reasonable care in conducting its tests. **See Willis v. Roche Biomedical Laboratories, Inc.**, 21 F.3d 1368, 1372-73 (5th Cir. 1994) (interpreting Texas law). For the reasons articulated in the magistrate's report, we agree that a service that collects and labels a urine sample for drug testing owes a duty of reasonable care to the testee.

Jackson contends that HMTS breached this duty because the chain of custody of the specimen container was broken. The district court found that Jackson presented no competent summary judgment evidence to controvert HMTS' expert affidavit by Janet Jordan, R.N., stating that collection procedures "were rigorously followed." Jordan's affidavit also established that the chain of custody was not broken and that no foreign substance was placed in the container. For the reasons articulated in full in the magistrate's report, we conclude that summary judgment was proper.

B.

[6] Metro contracted with American Medical Laboratories, Inc. ("AML") to handle the drug testing of its employees. AML retained HMTS to serve as Metro's agent for collection of specimens for drug testing.

Jackson argues next that HMTS misrepresented to him that the custody and control form was valid under federal laws and that the test was conducted pursuant to federal laws or federal authority. The district court granted summary judgment on the basis that Jackson failed to allege facts that could prove the elements of fraud. "The elements of actionable fraud are: (l) that a material representation was made; (2) that it was false; (3) that, when the speaker made it, he knew it was false or made it recklessly without any knowledge of its truth and as a positive assertion; (4) that the speaker made it with the intention that it should be acted upon by the party; (5) that the party acted in reliance upon it; and (6) that the party thereby suffered injury." **Blue Bell, Inc. v. Peat, Marwick, Mitchell & Co.**, 715 S.W.2d 408, 415 (Tex. App.--Dallas 1986, writ ref'd n.r.e.).

The district court found that Jackson had presented no evidence that a material misrepresentation was made except for conclusory assertions that they were. It further found that Jackson presented no proof that he acted in reliance upon such representation, if made. For the reasons set forth in the magistrate's report, summary judgment was proper on the misrepresentation claim.

V.

Finally, Jackson makes several arguments that the district court did not comply with 28 U.S.C. § 636(b)(1) in referring the case to the magistrate court. These arguments lack merit. A district court may designate a magistrate to hear and determine any

pretrial matter, with certain exceptions, and to submit to the district court proposed findings of fact and recommendations concerning any such motion. If a party objects to the magistrate's recommendation, "[a] judge of the court shall make a de novo determination of those portions of the report . . . to which objection is made." **Id.** The district judge "may also receive further evidence or recommit the matter to the magistrate with instructions, but is not required to do so." **United States v. Raddatz**, 447 U.S. 667, 674 (1980).

The magistrate considered all motions to dismiss and motions for summary judgment and submitted his proposed findings and recommendations to the district court. The district court conducted a de novo review, stating: "The court, after reviewing the Magistrate Judge's Amended Memorandum and Recommendation and objections thereto, is of the opinion that said memorandum and recommendation should be adopted by this Court." Because Jackson has presented no evidence that the procedures were not followed, his arguments fail. **See Koetting v. Thompson**, 995 F.2d 37 (5th Cir. 1993).[7]

VI.

For the foregoing reasons, we affirm the district court's grant of summary judgment in favor of Metro, the Union and HMTS.

AFFIRMED.

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[7] Jackson asserts several additional arguments for the first time on appeal. These arguments cannot be considered as grounds for reversal.