UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-40565
Summary Calendar

DONNA K. TANNER,

Plaintiff-Appellant,

versus

MARVIN T. RUNYON, JR.,
U.S. Postmaster General, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
For the Western District of Louisiana
(5:93-CV-5)

(February 8, 1995)

Before POLITZ, Chief Judge, HIGGINBOTHAM and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:[*]

Donna Tanner appeals the dismissal of her suit against her former employer, the United States Postal Service, and her union, the American Postal Workers Union. Finding no reversible error, we affirm.

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 Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

A postal service clerk in Shreveport, Louisiana, Tanner was assigned new hours and duties, prompting a more senior clerk to complain of preferential treatment. After the union invoked the contractual grievance procedure, the matter was settled and the post was rebid. Tanner was an unsuccessful bidder. At her request the union challenged the abolition of her job through Step 2 of the grievance process but declined to proceed any further. Tanner was reassigned to a different shift. Unable to arrange for child care, she was excused from work for several weeks. When she failed to report thereafter she was notified that her approved leave was ended and she faced termination unless she promptly contacted her supervisor. Instead of doing so, Tanner wrote the Postmaster and asked for an indefinite unpaid leave of absence. She was discharged.

The union grieved Tanner's discharge all the way through arbitration, ultimately winning reinstatement. The abitrator, however, declined to award back pay because, *inter alia*, Tanner had requested an indefinite leave, making it impossible to determine the appropriate quantum. Tanner opted not to return to work but filed the instant suit claiming a breach of contract by the postal service and a breach of the duty of fair representation by the union. The district court dismissed the union because of Tanner's failure to make timely service of process and granted summary judgment in favor of the postal service. Tanner timely appealed.

Analysis

When a collective bargaining agreement establishes a mandatory grievance procedure and grants the union the exclusive right to pursue employee claims, as here, an individual employee may challenge the results of the grievance procedure judicially only if the union breaches its duty of fair representation.[1] "A breach of the . . . duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[2] Reviewing *de novo* the summary judgment evidence and, in the interests of justice, the material presented in conjunction with Tanner's Motion for New Trial, we find no basis for reversal. Tanner's criticisms of the union's performance are either conclusionary or trivial; for example, her contentions that the union should have "dug a little deeper" and done "a little more homework" are frivolous in light of the fact that it won all the relief to which she was entitled.[3]

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[1]**McNair v. U.S. Postal Service**, 768 F.2d 730 (5th Cir. 1985) (39 U.S.C. § 1208(b) is an analogue of section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a), and its application is governed by law construing section 301(a)); **Bacashihua v. U.S. Postal Service**, 859 F.2d 402 (6th Cir. 1988) (same). Tanner erroneously invoked the Federal Arbitration Act, 9 U.S.C. § 10(a)(3), as well. See **Bacashihua** (Arbitration Act does not apply to labor contracts where workers are engaged in interstate commerce); **Acuff v. United Papermakers and Paperworkers**, 404 F.2d 169 (5th Cir. 1968) (employee lacks standing to bring suit under 9 U.S.C. § 10 because only the union and the employer were parties to the arbitration), cert. denied, 394 U.S. 987 (1969).

[2]**Vaca v. Sipes**, 386 U.S. 171, 190 (1967).

[3]See **Smith v. Babcock & Wilcox Co.**, 726 F.2d 1562, 1565 (11th Cir. 1984) (finding "no precedent for a claim of unfair representation where the grievance procedure ended, as it has here, in the favor of the employee.").

The union attorney may have erred in believing that her surreptitious tape recording of her boss was illegal under Louisiana law but Tanner presents no evidence that this mistake, if it be a mistake, was other than in good faith. A mistake is not a breach of the duty of fair representation.[4]

The gravamen of Tanner's complaint is her dissatisfaction with the union's handling of the abolition of her job. The time for a judicial challenge raising that issue has long expired.[5] Tanner questions the district court's refusal to consider certain prior events, contending that they evidence a proscribed "course of conduct." We disagree. Whatever the quality of the union's prior representation, the record reflects no taint to its representation of Tanner with respect to her discharge.

The judgment of the district court is AFFIRMED in all respects.

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[4]**Landry v. The Cooper/T. Smith Stevedoring Co., Inc.**, 880 F.2d 846 (5th Cir. 1989).

[5]There is a six-month limitations period for filing duty of fair representation suits. **DelCostello v. International Brotherhood of Teamsters**, 462 U.S. 151 (1983). Tanner's grievance of the abolition of her job was denied at Step 2 on October 1, 1991. The union had 15 days after receipt to appeal the decision to Step 3 but did not do so. Tanner filed suit in January 1993.