

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 95270

CHERYL D. WAITERS

PLAINTIFF-APPELLANT

vs.

GREGORY J. LAVELLE, ET AL.

DEFENDANTS-APPELLEES

**JUDGMENT:
AFFIRMED**

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-724158

BEFORE: Sweeney, J., Stewart, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 13, 2011

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JAMES J. SWEENEY, J.:

{¶ 1} This appeal is before the Court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1.

{¶ 2} In this accelerated appeal, plaintiff-appellant Cheryl Waiters (“Waiters”), appeals the trial court’s decision that dismissed her verified complaint for injunctive and declaratory relief for lack of jurisdiction or, in the alternative, for failure to state a claim. In her complaint, Waiters sought an injunction to restrain and enjoin the Arbitrator and union from conducting further proceedings in the processing of her grievance against the city of Cleveland (the “City”). Waiters simultaneously sought a declaratory judgment from the court of common pleas concerning her alleged interest in the collective bargaining agreement and her right to present her own grievance without further union representation pursuant to the provisions of R.C. 4117.03(A)(5). For the reasons that follow, we affirm.

{¶ 3} The facts underlying this matter are detailed in previous decisions rendered by this court in ancillary proceedings among these parties and to the extent they equally pertain to this matter they are incorporated herein. See *State ex rel. Waiters v. Szabo, et al.*, Cuyahoga App. No. 94599, 2010-Ohio-5249; *Cleveland v. Intl. Bhd. of Elec. Workers Local 38*, Cuyahoga App. No. 92982, 2009-Ohio-6223. Additional facts are set forth where appropriate for resolution of this accelerated appeal.

{¶ 4} Waiters assigns two errors for our review:

{¶ 5} “Jurisdiction over the subject matter of Waiter’s [sic] civil action does not rest exclusively with the State Employment Relations Board (‘SERB’); and “Waiter’s [sic] verified complaint does not fail to state a claim upon which relief can be granted.”

{¶ 6} Two points of non-dispute include that: (1) the grievance that is the subject of Waiters’s civil action was presented on her behalf by her Union; and (2) Waiters’s only attempted to invoke the non-union representation provisions of R.C. 4117.03(A)(5) during the remedy phase of her already pending grievance.

{¶ 7} According to R.C. 4117.03(A)(5), “[p]ublic employees have the right to: * * * Present grievances and have them adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective bargaining agreement then in effect and as long as the bargaining representatives have the opportunity to be present at the adjustment.”

{¶ 8} Waiters’s reasons for invoking the provisions of R.C. 4117.03(A)(5) in the midst of arbitration are essentially premised upon her belief that the Union was mishandling the arbitration and “might not fairly and thoroughly represent her interests” at the second stage of the remedy phase. Waiters also states her suspicions that the Union had ceased to look after her interests and asserts that the “Union’s counsel expressly disclaimed

any obligation to represent Waiters or anyone other than the Union in the prosecution of her grievance.”

{¶ 9} The Union and the City jointly assert that the trial court lacked jurisdiction over Waiters’s civil action that arose under Chapter 4117 of the Ohio Revised Code and that the verified complaint failed to state a claim for relief. The City and the Union primarily rely on the authority of *Johnson v. Ohio Council Eight* (2001), 146 Ohio App.3d 348, 766 N.E.2d 189, appeal not allowed, *Johnson v. Ohio Council Eight* (2002), 94 Ohio St.3d 1454, 762 N.E.2d 371 and *Johnson v. MetroHealth*, Cuyahoga App. No. 79403, 2001-Ohio-4259.

{¶ 10} This court has addressed the timing applicable to a public employee asserting a statutory right under R.C. 4117.03(A)(5). We explicitly “interpret[ed] this right to exist *only before the employee invokes union representation.*” *Johnson*, 2001-Ohio-4259 (emphasis added). This conclusion was derived by recognizing a “distinction between a party in interest and an interested party. Clearly, [the individual employee] remained interested in the arbitration decision; however, when she asked for her union’s help, she called upon the collective power of her fellow members, and ceased to stand alone. The necessary and just price paid by [the individual employee] was subordination of her individual rights to those of her fellow union members.” Contrary to Waiters’s interpretation of *Johnson*,

this court clearly held that the employee's right under R.C. 4117.02(A)(5) exists only before he/she invokes union representation.

{¶ 11} Our interpretation that the statute requires the employee to invoke the provisions of R.C. 4117.03(A)(5) in lieu of union representation at the outset of presenting the grievance is buttressed by the fact that any perceived breach of union representation, once invoked, is addressed within the exclusive jurisdiction of SERB as an unfair labor practice under R.C. Chapter 4117. If the aggrieved employee is dissatisfied with SERB's decision on a ULP claim that the union breached a duty of fair representation, she may then appeal SERB's decision to the common pleas court pursuant to R.C. 4117.13(D).

{¶ 12} While Waiters asserts that a "constitutionally guaranteed property interest and attendant Due Process rights" emanated from her decision to invoke her statutory right, the fact remains that her complaint is based upon a statutory right created under R.C. Chapter 4117. Therefore, the rights she is asserting are directly correlated and depend on the collective bargaining rights. "[I]f a party asserts claims that arise from or depend on the collective bargaining rights created by R.C. Chapter 4117, the remedies provided in that chapter are exclusive." *Franklin Cty. Law Enforcement Assn. v. Fraternal Order of Police, Capital City Lodge No. 9* (1991), 59 Ohio St.3d 167, 572 N.E.2d 87.

{¶ 13} R.C. Chapter 4117 is the Public Employees' Collective Bargaining Act and specifically designates in R.C. 4117.11(B)(6) that a public union's failure to fairly represent a public employee in the bargaining unit as an unfair labor practice ("ULP"). In turn, R.C. 4117.12(A) provides that "[w]hoever violates section 4117.11 of the Revised Code is guilty of an unfair labor practice *remediable by the state employment relations board as specified in this section.*" (Emphasis added.)¹

{¶ 14} In *Ohio Council Eight*, this Court observed that matters dealing with a public employees' collective bargaining contract are exclusively within the jurisdiction of SERB. In that case, an employee attempted to assert breach of contract and tort claims against his public union. In upholding the lower court's dismissal for lack of jurisdiction, this court held that "if the complaint alleges conduct that constitutes an unfair labor practice specifically enumerated in 4117.11, SERB has exclusive jurisdiction." *Id.* at 191. Because Waiters's complaint arose from alleged conduct that is within the

¹R.C. Chapter 4117 became effective in 1984 and since its passage courts have held that "a common pleas court may no longer obtain jurisdiction over a case * * * merely because the plaintiff alleges that the union wrongfully refused to process a grievance." *United Elec. Radio & Machine Workers of Am. v. Delaware City School Dist. Bd. of Edn.* (June 11, 2001), Delaware App. No. 00CAH004010, fn. 2, citing, *State ex rel. Ramsdell v. Washington Local School Bd.* (1988), 52 Ohio App.3d 4, 556 N.E.2d 197, and *Shamrok v. Trumbull Cty. Commrs.* (1990), 71 Ohio App.3d 54, 593 N.E.2d 28; accord, *Ohio Council of Eight*, 146 Ohio App.3d 348, 766 N.E.2d 189.

exclusive jurisdiction of SERB, the trial court properly dismissed her complaint for lack of jurisdiction.

Judgment affirmed.

It is ordered that appellees recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

JAMES J. SWEENEY, JUDGE

MELODY J. STEWART, P.J., and
MARY J. BOYLE, J., CONCUR