Judicial Misconduct Complaint

Judge Paul G. Cassell - District of Utah
Case Number 2:04CV00985 PGC
Lisa Burke, Michael Carper, and on behalf of all others similarly situated, v. Utah Transit Authority, John Inglish, individually, Amalgamated Transit Union Local 382 and the United States Department of Labor
Complaint filed by Lisa Burke and Michael Carper

This class action lawsuit, filed by a group of light rail workers in Salt Lake City, was assigned to Judge Paul G. Cassell. We believe that Judge Cassell demonstrated bias and obviously directed the case to a predetermined outcome. The evidence for this assertion is presented within this complaint. We believe it is quite compelling. To achieve the predetermined outcome, Judge Cassell ignored the plaintiffs' request for a jury trial and made factual determinations reserved for a jury, depriving the plaintiffs of an important constitutional right. Additionally, Judge Cassell expected plaintiffs' attorney to identify material facts in dispute when Judge Cassell refused to identify the substantive law that would be applied. In a similar vein, he expected plaintiffs to read the future and complain about an action years before it occurred to avoid a motion to dismiss.

This case involved a group of public employees of the Utah Transit Authority light rail operation called TRAX, who attempted to protect their free association rights not to have an employer-approved union imposed upon them. The TRAX employees, while not covered by the National Labor Relations Act, have equivalent rights guaranteed by the Urban Mass Transportation Act and Utah state law. Despite this, and approximately 63% of the TRAX employees indicating to the state employer, UTA, that they reject the present union, Amalgamated Transit Union Local 382, UTA imposed that union on the TRAX employees and refused to allow them to vote as members of their own "appropriate bargaining unit," a legal phrase for union. Local 382 combines both bus and light rail employees. The bus employees outnumber the light rail employees by about 8 to 1, thus guaranteeing that light rail employees will always be outvoted when their interests conflict. Judge Cassell ignored and abandoned accepted legal standards for determining appropriate bargaining units, used for decades throughout the United States, and created his own legal standard which has no basis in law. He then used this new standard to rule against the plaintiffs. This new and unspecified standard allows corrupt, bureaucratic unions and public transit companies to decide who will represent workers and denies those workers all ability to decide for themselves who will represent them.

Three hearings were held in Judge Cassell's court. The first hearing was held on January 24, 2005, and was noticed as a hearing for a requested preliminary injunction filed by the plaintiffs. They asked Judge Cassell to enjoin UTA from denying plaintiffs their First Amendment rights to post information and discuss forming a new association at work. It also addressed safety issues. The plaintiffs wanted to demonstrate that Local 382 was not addressing glaring safety deficiencies and consequently the workers and the public are endangered. Because the case involved labor issues, the plaintiffs requested an evidentiary hearing on their injunction to conform with federal law. Affidavits were filed with the court supporting the injunction and

plaintiffs also subpoenaed two hostile witnesses. After the filing of the two subpoenas, counsel for plaintiffs was contacted by the court clerk and informed that an evidentiary hearing would not be held.[1] Judge Cassell refused to allow the plaintiffs the ability to present their case and examine the First Amendment violations and serious safety deficiencies which continue to this day. (Many TRAX employees worry that the safety deficiencies are a ticking time bomb.) Judge Cassell then, incredibly, attempted to use the hearing to decide a motion to dismiss filed by the U.S. Dept. of Labor. Counsel for plaintiffs had not even received the DOL's reply brief yet. In fact, the attorney for the DOL objected to this and pointed out to Judge Cassell that it would be unfair to the plaintiffs to have a hearing on the motion to dismiss before they could read his reply brief. Judge Cassell reluctantly abandoned that plan. (*See* 05-4079 -Appellants' App. B; transcripts for January 24, 2005, hearing; pp. 305-306) It should be noted that the attorney for the DOL had also expected an evidentiary hearing would be held. (*Id*. p. 305) At this hearing, counsel for plaintiffs pointed out to Judge Cassell that there is an accepted test for determining appropriate bargaining units. (*Id*. p. 311) This 12-factor labor law test was explained to Judge Cassell in oral argument and in numerous subsequent filings. Although no other legal standard was ever introduced he ignored it and subsequently made up his own.

Approximately one half hour before the hearing, counsel for plaintiffs was given Judge Cassell's tentative decision denying the injunction on the stated grounds that they were unlikely to prevail on the merits. Judge Cassell had evaluated the merits on the "severance" doctrine and not the "accretion" doctrine. This totally changed the burden of evidence in the case and required that plaintiffs demonstrate that a combined bus and rail unit was not an appropriate bargaining unit, instead of correctly requiring that UTA demonstrate that the TRAX unit could not be an appropriate bargaining unit. The next day Judge Cassell issued his final decision that was virtually identical to his tentative decision but with a cursory albeit incorrect analysis of accretion. (*See* 05-4079 -Appellants' App. B; pp. 181-190)

The second hearing, to address the DOL's motion to dismiss, was held on March 9, 2005. Public transit districts must protect the collective bargaining rights of employees to be eligible for federal funding. Plaintiffs requested that they have access to DOL records to determine what agreement (known as "protective arrangements") UTA had reached with the DOL regarding certification. Judge Cassell relentlessly prevented the plaintiffs from gaining access to those records. There is currently no state agency in Utah that evaluates collective bargaining rights or does unit clarification for state employees. Counsel for plaintiffs asserted that they had exhausted all administrative remedies before filing the lawsuit. Although Judge Cassell was required to accept this assertion as the truth until discovery had taken place, he immediately challenged it

[1] A remarkably similar case filed very recently involving an employer who interfered with employees' First Amendment rights to conduct organizing activities at work was handled much differently. The very ethical judge in that case granted a temporary restraining order enjoining the company from denying the employees their rights. He then scheduled a hearing to decide whether to make it permanent. *Skywest Pilots ALPA Organizing Committee v. Skywest Airlines, Inc.* Calif. Northern Dist. 3:07-CV-02688.

and disputed that the plaintiffs had sought relief from the state agency. A letter was produced from the Utah Labor Commission confirming that it does not handle collective bargaining disputes. (*See* 05-4079 -Appellants' App. B; transcripts for March 9, 2005, hearing; pp. 338-339). Judge Cassell again denied the plaintiffs any avenue to challenge the existing labor arrangements with the DOL, which continued to argue that it is a state matter and the DOL is required to do nothing. Plaintiffs maintained that because neither the state of Utah nor the DOL addresses these labor disputes, leaving the workers with no recourse but to go to court, the protective arrangements are deficient. (*See* 05-4079 -Appellants' App. B; transcripts for March 9, 2005, hearing; pp. 317-350) Judge Cassell relied almost exclusively on Utah Code Annotated 17-A-31 which requires that UTA "bargain exclusively with any labor organization representing a majority of its employees in an appropriate bargaining unit..." There is no definition within the statute to define "appropriate bargaining unit." Although the statute was enacted to make UTA eligible for federal funds Judge Cassell discarded all established federal labor law, created his own new standard which was never identified to plaintiffs and ruled that Local 382 is an appropriate bargaining unit. Shortly after the hearing UTA and Local 382 filed motions for summary judgment.

In an earlier filing plaintiffs had asked Judge Cassell to review the severance vs. accretion issue, and provided him with new persuasive authority that this was an accretion case. Knowing that an evidentiary hearing would probably be denied, the filing requested a different injunction which asked for new and minimal relief that could be proven without an evidentiary hearing. Judge Cassell treated this as a request for reconsideration rather than as a request for a different injunction. In an unsigned minute entry he denied the request for the new injunction without explanation or a hearing. (*See* 05-4222 -Appellants' App. A; p. 108.) Plaintiffs then filed a motion requesting that a signed order be issued but Judge Cassell refused. (*See* 05-4222 -Appellants' App. A; pp. 114-116.). An appeal was filed with the Tenth Circuit and the next day Judge Cassell dismissed the DOL. He imposed the impossible and nonsensical requirement that in order to state a claim, plaintiffs had to assert that they had objected to protective arrangements created by the DOL in 2001, although the labor dispute arose in 2004; essentially requiring that plaintiffs needed to be able to see into the future. (*See* 05-4222 -Appellants' App. A; pp. 119-120.) Plaintiffs maintain that his refusal to sign his own order was an attempt to prevent the appeal to the Tenth Circuit. They further maintain that the DOL dismissal was purely retaliatory.

On April 19, 2005 plaintiffs filed a Rule 56(f) motion. It had become very clear that Judge Cassell intended to create as many procedural obstacles as possible to close down the case. He had steadfastly denied plaintiffs all due process and discovery. The Rule 56(f) motion identified two important issues that plaintiffs wanted discovery on. The first was the actual number of union members in Local 382. It was widely known among UTA employees that the membership in Local 382 was below fifty percent. Since the Utah statute that Judge Cassell had relied almost exclusively on required UTA to negotiate with a union having "majority" status, then if the membership was below fifty percent company-wide Local 382 was not a legitimate union and the argument that Local 382 was an appropriate bargaining unit was invalid. Since Utah is a right to work state, union membership is voluntary and determining membership is easy. The dues come

out of the employees' paychecks and the exact number of members is known to both UTA and Local 382. Judge Cassell claimed that this was of no importance and once again denied discovery. (*See* 05-4222 -Appellants' App. B; pp. 211; *also*, transcripts for May 20, 2005 hearing; pp. 307-310.) The second issue identified by plaintiffs that they wanted discovery on had to do with the termination, some years earlier, of a UTA bus driver by the previous general manager of UTA. This former employee then ran for, and was elected, president of Local 382. Shortly after that, the present general manager reinstated this former employee, who was by now union president. His position, seniority and benefits were also restored. A series of labor contracts, very favorable to UTA, followed. This was never disputed by UTA. Once again, Judge Cassell refused to allow discovery. (*See* 05-4222 -Appellants' App. B; pp. 211; *also*, transcripts for May 20, 2005 hearing; pp. 321-323.)

By the third and final hearing on May 20, 2005, Judge Cassell had, in the view of the plaintiffs, ceased pretending to be impartial. [2] Since federal labor law overwhelmingly supported the plaintiffs, Judge Cassell used every tactic he could to shut the case down procedurally. The hearing was supposed to examine the summary judgment issues. Judge Cassell issued another tentative order at the beginning of the hearing granting summary judgment to UTA and Local 382. He once again refused to use the established 12-factor test used to determine appropriate bargaining units, ignored established labor law, dismissed the safety issues as unimportant and denied all discovery. He even claimed that there were no disputes of material fact. In one of the most surreal moments in the hearing, Judge Cassell actually asked the attorneys for UTA and Local 382 to give him additional grounds to rule against the plaintiffs, who were present at the hearing. He wanted a "belt and suspenders" so he would be able "to announce that the case would be dismissed for two independent reasons." [3] (*See* 05-4222 -Appellants' App. B; transcripts for May 20, 2005 hearing; p. 385) He then asked counsel for Local 382 to provide him with a memorandum outlining the contractual remedies that plaintiffs had allegedly failed to exhaust. Counsel for plaintiffs had just spent a considerable portion of oral argument explaining that there were no contractual remedies to exhaust. (Plaintiffs had made it very clear that they did not recognize Local 382 as their union and had no intention of filing grievances asking that union to resolve the matter.)

Nearly three months passed and no order was issued by Judge Cassell. Counsel for plaintiffs began to suspect that he would simply not issue an order for as long as possible, thus preventing plaintiffs from filing an appeal. It was clear that Judge Cassell had no intention of ruling in favor of plaintiffs despite the strength of their case. During that time new information regarding Local 382 had come to light and the DOL had re-certified new protective arrangements even though the

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[2] Judge Cassell advised the plaintiffs to go to state court where they might get things sorted out "lickety-split." *Oh, please*. (*See* 05-4222 -Appellants' App. B; transcripts for March 9, 2005 hearing; p. 286)

[3] The transcripts read, "felt suspenders," however, Judge Cassell actually said "belt and suspenders." The context will confirm this.

case had not yet been decided. An amended complaint, which is allowed, was prepared reflecting the changed circumstances that strengthened plaintiffs' case. Counsel for plaintiffs, Dan Moquin, explained to Lisa Burke, one of the named plaintiffs, that he believed that Judge Cassell would immediately grant summary judgment to UTA and Local 382 when the amended complaint was filed, closing the case and leaving plaintiffs free to appeal to the Tenth Circuit. Judge Cassell had the duty to consider the amended complaint and address it. However, Mr. Moquin stated that if Judge Cassell was biased, due to his Federalist Society connections, he would immediately grant summary judgment and pretend he had not seen the new filing. The amended complaint was purposely filed at 11:48 p.m. on Sunday, August 14, 2005. It was docketed on Monday, August 15 at 9:18 a.m. and Judge Cassell issued an order granting UTA and Local 382 summary judgment that afternoon at 2:13 p.m., less than five hours later, just as Mr. Moquin had predicted he would. The order (*See* 05-4222 -Appellants' App. B; pp. 200-212) was essentially the same tentative order issued at the beginning of the May 20 hearing. It did not address the amended complaint, the exhaustion of contractual remedies brief ordered by Judge Cassell nor did it address the issue of dismissal of Local 382, an issue Mr. Moquin had raised both in oral argument and a supplemental filing and essential for a proper dismissal of the case. (*See* 05-4222 -Appellants' App. A; p. 165, fn. 1; *also* 05-4222 -Appellants' App. B; transcripts for May 20, 2005 hearing; p. 323) These omissions suggest that the order was hastily issued as soon as Judge Cassell saw the amended complaint. While there is a remote possibility that Judge Cassell issued his order without having seen the amended complaint, Judge Cassell had seven days to *sua sponte* change his order to reflect the amended complaint but did not do so.

An appeal to the Tenth Circuit Court was filed on August 22, 2005. It was accepted by that court despite the numerous procedural problems deliberately created, in the view of the plaintiffs, by Judge Cassell.

Judge Cassell has violated fundamental fairness, due process and Federal Rules of Civil Procedure in a shockingly brazen manner. Apparently, Justice is not blind in Judge Cassell's courtroom; Justice has an agenda. Plaintiffs considered filing a Rule 60 motion asking Judge Cassell to reopen the case and address the amended complaint but are certain that he would use it as an avenue to exact retribution from plaintiffs. Plaintiff Lisa Burke is, quite frankly, frightened of Judge Cassell.

It is impossible to know whether ambition or ideology was the primary motivation of Judge Cassell. As a prominent member of the ultra-right Federalist Society (as is the opposing counsel representing UTA) he is opposed to labor rights, safety standards and federal government actions taken under the commerce clause of the United States Constitution. However, he should be ideologically opposed to forcing a despised union on workers that do not want it. He is known to use issues to his advantage. Recently he has spoken out objecting to federal sentencing guidelines in criminal cases. He is clearly more concerned with the rights and liberties of convicted felons sentenced to harsh federal terms than he is with the rights and liberties of law abiding, working class people who merely want to be represented by an honest union.

Signed: SIGNATURES ON FILE

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Lisa Burke

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Michael Carper