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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

International Association of United Workers Union, et al., PLAINTIFFS v. United Mine Workers of America, et al., DEFENDANTS	DEFENDANT PACE LOCAL 8-286's REPLY TO PLAINTIFFS' OPPOSITION TO ITS MOTIONS TO QUASH SERVICE and to DISMISS THE AMENDED COMPLAINT Civil Action No. 2:04CV00901 Honorable Dee Benson

Paper, Allied-Industrial, Chemical & Energy Workers, Local 8-286 (herein Local 8-286) hereby replies to Plaintiffs' opposition to its motions to quash service of the Summons and dismiss this action.

I

REPLY TO ISSUES REGARDING QUASHING SERVICE AND TO PLAINTIFFS MOTION TO AMEND

Plaintiffs having been advised as to full name of the particular Local with which Gary Aplin is associated, they now seek to amend the complaint again and serve Local 8-286. It should not be permitted to do so for the following reasons.

This is not simply a case of misnomer, as previously stated, by reason of the lack of any allegations whatsoever against Local 8-286. It changes nothing if Plaintiffs wish to substitute "Local 8-286" for "Local +". As more fully set forth in our memorandum in support of the

Motion, the only place in the Amended Complaint making reference to "Paper, Allied-Industrial, Chemical & Energy Workers Local +" was in the caption and paragraph 29, describing it as a labor union.[1] In the body of the allegations, there is no mention of it. Rather it mentions the PACE International or another PACE local, that is separately denominated from Local 8-286.

Plaintiffs state they want to name Local 2-286 because it is a member of PACE Region 11, and because Region 11 was reported to have passed a resolution in support of the striking miners. (Plaintiffs Exhibit 1). Clearly Local 2-286, or its title holding non profit corporation is not PACE Region 11, so that reason, even if it were alleged, states nothing against Local 8-286. Simply being a member of Region 11's does not make it its agent and it is not generally liable for its acts as an affiliated labor organization.[2] The resolution itself is the purest form of lawful, protected free expression and support of solidarity for coal miners engaged in a labor dispute. It is clearly not defamatory and is not even alleged to be so in the Amended Complaint. Region 11 is not mentioned in the Amended Complaint.

Allowing Plaintiffs to amend the Amended Complaint, as Plaintiffs apparently desire, does not change the fact that it has the wrong party.[3] Serving any PACE Local who happens to

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[1] The "+" symbol, comes from the Utah Department of Commerce Website, and indicates that the web site does not have enough room to set forth the complete name for the entity and there is more to it. The certified name is not denominated with a "+". The entity which Plaintiffs happened to pull up on its search, 586731-0140, is actually Paper, Allied-Industrial, Chemical & Energy Workers Local No. 2-286 Building Inc. Counsel herein has personal knowledge of this and that it was incorporated to hold title to real property for Local 8-286 because the labor organization is an incorporated association and cannot.

[2] Defendants refer the court to the Reply Memorandum of Defendant UMWA at footnote 4 in support of this law.

[3] It would be proper for Plaintiffs to submit the form of the proposed amended complaint, in order to be able to be respond with certainty to what they intends to do.

come up on a web site, is no substitute for setting forth the name of the organization on the Summons it has actually alleged committed a wrongdoing. Accordingly, changing the name will not correct the defective process and the motion to quash should be granted. [4]

II

DEFENDANTS REPLY TO PLAINTIFFS RESPONSE RELATIVE TO THE DEFAMATION CLAIM

Plaintiffs have utterly failed to respond to Defendant's discussion and characterization of the statements in the Amended Complaint, attributed to any PACE affiliate or member, as being non defamatory, opinion that by its very nature cannot be false. Plaintiffs simply rely on their own conclusory allegations that it has met its burden of pleading that "responsible person's made defamatory statements with malice and knowledge of its falsity." (Plaintiffs' Response at page 4) Plaintiffs' silence on this issue speaks volumes about how innocuous any reported rhetoric is, and how it could not possibly be understood to be defamatory, even if this dispute was not set in a labor context, which it is. Plaintiffs cannot even argue why this is not so. Accordingly, Plaintiffs have failed to state a claim for defamation under Utah law and the standards set forth in Cox v Hatch, 761 P. 2d 556, 561 (Utah 1988) (finding statements which constitute opinions or even nettlesome falsehoods that do not damage a person's reputation, as non-defamatory), and under federal law and the heightened standards set forth in Linn v. United Plant Guard Workers of America, 383 US 53 (1966) and Dominion Branch No. 496, Nat'l. Assoc. of Letter Carriers v.

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[4] In Pounds V. Department of Interior S.C. No. 99- CV-328-B(10th Cir. 2001), in an unpublished decision, attached hereto, the court stated at footnote 2, that the general rule is to allow insufficient process that can be cured, to be cured rather than dismiss, *unless* that would be futile because the other claims could not survive dismissal.

Austin, 418 U.S. 264 (1974)(protecting opinion and the use of intemperate, even insulting statements in the context of a labor dispute).

Furthermore, Plaintiffs' defamation claim is pre-empted by federal law under Linn because Plaintiffs have failed to allege facts sufficient to constitute actual malice.

III.
DEFENDANT'S REPLY TO PLAINTIFFS' RESPONSE CONCERNING ALLEGATIONS OF A CIVIL CONSPIRACY AND OTHER STATE CLAIMS

Again, Plaintiffs seem to have nothing to say directly to Defendant's contentions with regard to the preemption of Plaintiffs' state claims, under San Diego Building Trades Council v. Garmon, 359 U.S. 236 (1959), aside from its claim for civil conspiracy which Plaintiffs state is their primary claim against PACE Local 8-286. (See Plaintiffs Response at page 5). Plaintiffs readily acknowledge if the underlying tort is not preempted, the conspiracy count is not pre-empted, citing Alongi v. Ford Motor, 386 F3d 716, 729(6th Cir 2004). This was exactly the point Local 8-286 made. It is clear the other state law counts are in tort, and are preempted by Garmon, and nothing Plaintiffs have set forth in any of its responses, to any of the parties, demonstrates why this is not so. Accordingly these state claims should be dismissed.

Nor have Plaintiffs alleged facts, to state a claim for conspiracy, to even remotely suggest there was a meeting of minds to accomplish an unlawful course of action to commit the unfair labor practices.

Dated this 22 day of April, 2005.

Arthur F. Sandack

CERTIFICATE OF SERVICE

I certify that a true and correct copy of Defendants PACE Local 8-286 Reply Memorandum was mailed, first class, postage prepaid on 4-22-05, to:

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UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARY V. POUNDS, in propria persona libera lex, federal witness private attorney general, Plaintiff-Appellant, v. DEPARTMENT OF INTERIOR; COURT OF INDIAN OFFENSES, CHILDREN DIVISION MIAMI AGENCY, Defendants-Appellees.	No. 00-7113 (D.C. No. 99-CV-328-B) (E.D. Okla.)

ORDER AND JUDGMENT(*)

Before **HENRY**, **BRISCOE**, and **MURPHY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Plaintiff-Appellant Mary V. Pounds appeals the district court's order dismissing her action brought pursuant to 42 U.S.C. §§ 1981, 1983, 1985, 1986, and various federal criminal statutes. The district court dismissed Ms. Pounds' complaint for lack of subject matter jurisdiction under Fed. R. Civ. P. 12(b)(1), for improper venue under Rule 12(b)(3), and for insufficient service of process under Rule 12(b)(5). We have jurisdiction pursuant to 28 U.S.C. § 1291, and we affirm.

Ms. Pounds brought this action alleging various violations of her constitutional rights in connection with a decision of the C.F.R. court(1) located in Miami, Oklahoma, granting custody of her three grandchildren to the Eastern Shawnee Tribe (the Tribe). Due to mental instability and substance abuse, Ms. Pounds' daughter, the children's natural mother, relinquished custody of the children to the Tribe. The Tribe placed the children in the temporary Tribe-supervised custody of Ms. Pounds pending a home study. On March 14, 1996, the Tribe revoked Ms. Pounds' custody due to her refusal to cooperate with the Tribe, adjudicated the children as in need of care, and placed legal physical custody with the Tribe. In order to prevent the Tribe from taking custody of the children, Ms. Pounds moved them to various states including Nevada and California. The C.F.R. court issued and enforced an order requiring that the children be returned to the Tribe from Nevada and placed in sheltered care in Oklahoma.

Ms. Pounds then brought a number of actions in an attempt to regain custody of the children. She filed an action in Ottawa County, Oklahoma, which was dismissed for failure to appear; her request to the C.F.R. court to modify the custody order was denied, and she did not appeal; she initiated at least two actions in the Northern District of Oklahoma which were dismissed and not appealed; another petition to the C.F.R. court to regain custody of the children was denied; and she filed an action under the Federal Tort Claims Act in federal district court in the Central District of California which was dismissed. Finally, on May 13, 1999, the C.F.R. court approved the adoption of the children by a Tribe family.

Ms. Pounds then filed this action against the Department of the Interior and the C.F.R. court, alleging that (1) the 1996 orders were illegal; (2) the orders were obtained through deceit and fraud; (3) the C.F.R. court ignored her pleadings and her *amicus curiae* briefs; (4) the C.F.R. court violated her constitutional rights under the Fourth, Fifth, Sixth, Eighth, Tenth, and Fourteenth Amendments; and (5) the C.F.R. court did not comply with The Indian Child Welfare Act, 25 U.S.C. §§ 1901-63. Defendants filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), (3), (5), and (7). The district court thoroughly addressed each of defendants' bases for dismissal, concluding that, pursuant to absolute immunity, the federal court lacked subject matter jurisdiction to entertain Ms. Pounds' claims, service on defendants was insufficient,[2] and venue in the Eastern District of Oklahoma was improper. Ms. Pounds appeals.

We are obligated to construe Ms. Pounds' pro se pleadings liberally. *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972) (per curiam). Regarding the issue of absolute immunity, we review *de novo* the district court's dismissal pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. *U.S. West, Inc. v. Tristani*, 182 F.3d 1202, 1206 (10th Cir. 1999). We also review a dismissal based on the validity of a forum selection *de novo*. *United States ex rel. B & D Mech. Contractors, Inc. v. St. Paul Mercury Ins. Co.*, 70 F.3d 1115, 1117 (10th Cir. 1995).

With these standards clearly in mind, we have conducted a thorough review of the briefs, the record, and the district court's order. We conclude that the district court's well-reasoned dismissal decision was correct. Accordingly, we AFFIRM the district court's dismissal for substantially the same reasons given in its September 26, 2000 order.

Entered for the Court

Mary Beck Briscoe

Circuit Judge

FOOTNOTES

Click footnote number to return to corresponding location in the text.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

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1. A "C.F.R. court" is a court created pursuant to Bureau of Indian Affairs regulations to preside over tribal matters in the absence of a court established by tribal government. 25 C.F.R. §§ 11.100; *see Tillett v. Lujan*, 931 F.2d 636, 638, 640 (10th Cir. 1991). The Shawnee Indian Tribe uses C.F.R. courts.

[2] The general rule is that "when a court finds that service is insufficient but curable, it generally should quash the service and give the plaintiff an opportunity to re-serve the defendant." *Pell v. Azar Nut Co.*, 711 F.2d 949, 950 n.2 (10th Cir. 1983). In this case, however, the district court determined that allowing Ms. Pounds to effect proper service of process would be futile, because her claims could not survive defendants' remaining bases for dismissal. The court also declined to address defendants' claims of res judicata and failure to join an indispensable party as unnecessary to the decision.

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