EMPLOYMENT LAW REPORT

Missing The Mark: The Typical Pursuit of Duty-of-Fair-Representation Claims Against Unions To Address Workplace Problems

By Justin D. Cummins

Introduction[1]

Given the difficulty of proving discrimination against an employer these days, and perhaps in an effort to gain leverage, plaintiff lawyers might be tempted to sue the union representing an employee who has potential workplace claims. The basic legal theory is that the union has allegedly violated its duty of fair representation ("DFR").

At first glance, a DFR claim may seem enticing to some plaintiff lawyers. A union's duty to represent all union members fairly presents the potential for conflict between the interests of individual union members and the interests of the union membership as a whole. The Supreme Court first addressed this tension and a union's duty of fair representation in a series of cases decided under the Railway Labor Act.[2] The DFR obligation was thereafter extended to unions organized under the National Labor Relations Act ("NLRA").[3]

The reality, however, is that DFR claims typically do not provide viable grounds for meaningful recourse. If attorneys believe it is difficult to prove a traditional discrimination claim, they will likely be shocked by how challenging it would be to prove a violation of a union's duty of fair representation.

Even in the unlikely instance where an employee were to prevail on a DFR claim, there is little chance that a plaintiff would be able to recover anything besides back pay.[4] Indeed, unlike Title VII and similar employment statutes, the NLRA does not provide for recovery beyond actual economic loss.

I. Employees Must Satisfy An Extremely Onerous Evidentiary Standard To Prove A DFR Claim Against A Union

According to settled Supreme Court precedent, a DFR claim exists solely when the conduct of a union is "arbitrary, discriminatory, or in bad faith."[5] Therefore, negligence, poor judgment, and even incompetence are insufficient to establish a DFR claim.[6]

In fact, the Supreme Court has held that a DFR claim failed even though the union-brokered settlement was worse than simply acquiescing to the employer's position.[7] The Supreme Court has also expressly endorsed the holding that "mere ***negligence, even in the enforcement of a collective-bargaining agreement, would not state a claim*** for breach of the duty of fair representation . . . ."[8] The Eighth Circuit has stated the governing standard perhaps even more emphatically: "Mere ***negligence, poor judgment, or ineptitude by a union is insufficient*** to establish a breach of the duty of fair representation."[9]

Under Supreme Court and Eighth Circuit precedent, then, a member could show that a union's actions were arbitrary for DFR purposes "***only if***, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is ***so far outside 'a wide range of reasonableness as to be irrational.'***"[10] Similarly, per Supreme Court precedent, a member could prove that a union's conduct was discriminatory in the DFR context only if "such actions are ***intentional, severe, and unrelated to legitimate union objectives. . . .***"[11] Lastly, to show that a union acted in bad faith for DFR purposes pursuant to Supreme Court precedent, a member must prove the existence of "***substantial evidence of fraud***, deceitful action or dishonest conduct."[12]

Further underscoring the narrow scope of DFR liability for unions, clearly established Eighth Circuit precedent confirms that unions have an affirmative duty not to pursue grievances which the union believes should not be pursued:

> A union does not act arbitrarily simply because it does not pursue a grievance that it has decided lacks merit. This is true even if a judge or jury later determines that the grievance is meritorious. Indeed, because the union's duty of fair representation is a collective duty, owed equally to all members of the bargaining unit, courts have ruled ***that the union has the affirmative duty not to press grievances which the union believes, in good faith, do not warrant such action.***[13]

II. Barking Up The Wrong Tree: Typical Discrimination Claims Against Unions

Employment lawyers less familiar with labor law may conflate the DFR duty with the employer's anti-discrimination duty. That confusion has prompted some such attorneys to sue unions for the race discrimination, sex harassment, or similar workplace problems that occur in an employer's facility.

That approach is ill advised. Under well settled Eighth Circuit precedent, the employer – not the union – has a duty to create and maintain a workplace free of discrimination and to discipline those who violate workplace policies.[14]

Accordingly, neither passivity nor

apparent acquiescence regarding workplace discrimination is sufficient to hold a union liable.[15] A union also will not be liable when its members instigate or support the discriminatory acts.[16] In that regard, the actions of a shop steward will not be imputed to the union.[17]

In short, under clearly established Eighth Circuit precedent, a union will be liable for discrimination only when the union instigates or actively supports employer discrimination or the union, as an organization, itself engages in discrimination.[18]

III. Important Procedural Issues In DFR Cases

Employment lawyers who sue unions for purported DFR violations often also sue the employer for contract violations. Such hybrid cases – which involve an alleged breach of the collective bargaining agreement by the employer and an purported DFR violation by the union – ~~are pursued under~~ Section 301[19] and present procedural pitfalls that can be traps for the unwary.

For example, when a member wants to seek redress for an alleged collective-bargaining-agreement breach by the employer and/or an purported DFR breach by the union, the member typically must exhaust his/her remedies under the grievance procedure if one is included in the collective bargaining agreement.[20] Exhaustion will not be required, however, when the conduct of the employer amounts to a repudiation of those contractual procedures or when the union wrongfully refuses to process the grievance.[21]

In the end, the courts have the discretion to decide, and they will not require exhaustion if it would be futile:

> In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee that he could ~~not hope to~~ obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim.[22]

Moreover, such hybrid claims have a six-month statute of limitations.[23] The Supreme Court reasoned that such Section 301 actions resemble unfair labor ~~practice charges under the~~ NLRA for a stand-alone DFR claim, so the six-month NLRA limitations period should be used to promote a prompt resolution of labor disputes.[24]

The Eighth Circuit takes an aggressive approach to interpreting when the six-month limitations period begins to run: when the member "should reasonably have known of the union's alleged breach."[25] In addition, the limitations period for commencing a court action will not be tolled by filing a charge with the National Labor Relations Board or with the Equal Employment Opportunity Commission.[26]

In sum, the Eighth Circuit has repeatedly applied the limitations period in favor of dismissing claims in DFR cases.[27]

JUSTIN D. CUMMINS, *a partner at Miller O'Brien Cummins, PLLP, is past Chair of the MSBA's Labor & Employment Law Section as well as a past Officer of the National Employment Lawyers Association's Eighth Circuit and Minnesota Boards. Justin has taught courses on civil rights and employment law at the University of Minnesota Law School and William Mitchell College of Law, and he spearheaded the development of the Workers' Rights Clinic at the University of Minnesota Law School.*

Conclusion

The Supreme Court and Eighth Circuit apply the stringent DFR legal standard broadly against employees. Even if an employee were to survive a motion to

continued on page 42

dismiss and/or a motion for summary judgment and to prevail at trial, the most that employee could recover would be back pay. Put simply, DFR claims do not generally provide meaningful relief to employees.

---

[1] This article is drawn from an earlier version of materials included in the manual for the Minnesota CLE entitled "Labor Law for the Employment Lawyer."
[2] See, e.g., Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944).
[3] See generally Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).
[4] See generally Int'l Broth. Of Elec. Workers v. Foust, 442 U.S. 42 (1979) (holding that punitive damages cannot be recovered in connection with DFR claims); United Paperworkers Int'l Local 274 v. Champion Int'l Corp., 81 F.3d 798 (8th Cir. 1996) (affirming the denial of attorney's fees); Smith v. Hussman Refrig. Co., 619 F.2d 1229 (8th Cir. 1980), cert. denied 449 U.S. 839 (1980) (ruling that emotional distress damages were not recoverable).
5 Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1998); see also Vaca v. Sipes, 386 U.S. 171, 190 (1967).
[6] See, e.g., Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 79 (1991).
[7] Id.
[8] Steelworkers v. Rawson, 495 U.S. 362, 372-73 (1990) (emphasis added).
[9] Jones v. United Parcel Serv., Inc., 461 F.3d 982, 994 (8th Cir. 2006) (citing Eighth Circuit precedent) (citation omitted) (emphasis added); see also Carnes v. United Parcel Serv., Inc., 51 F.3d 112, 116 (8th Cir. 1995) (citing Eighth Circuit precedent) ("Even negligence or poor judgment in exercising [discretion to pursue grievances] will not expose a union to liability. . . .").
[10] O'Neill, 499 U.S. at 67 (citing Supreme Court precedent) (emphasis added); see also Hansen v. Qwest Commc'ns, 564 F.3d 919, 924 (8th Cir. 2009) (same).
[11] Amalgamated Ass'n of Street, Elec. Ry. & Motor Coach Employees of Am. v. Lockridge, 403 U.S. 274, 301 (1971) (emphasis added).
[12] Lockridge, 403 U.S. at 299 (citing Supreme Court precedent) (emphasis added).
[13] Schmidt v. Int'l B'hood of Elec. Workers, 908 F.2d 1167, 1169 (8th Cir. 1992) (citing Supreme Court and Eighth Circuit precedent) (emphasis added); see also Cross v. United Auto Workers, Local 1762, 450 F.3d 844, 847 (8th Cir. 2006) (same).
[14] Eliserio v. United Steelworkers of Amer., Local 310, 398 F.3d 1071, 1076, rhrg and rhrg en banc denied 398 F.3d 1071(8th Cir. 2005); Thorn v. Amalgamated Transit Union, 305 F.3d 826, 833 (8th Cir. 2002); see also generally Anjelino v. New York Times Co., 200 F.3d 73 (3rd Cir. 1999) (allowing the plaintiffs to proceed with their discrimination claims against the employer but not against the union).
[15] Martin v. Local 1513, 859 F.2d 581, 584 (8th Cir. 1988); see also Carter v. Chrysler Corporation, 173 F.3d 693 (8th Cir. 1999) (allowing sexual and racial harassment claims to proceed against the employer but not against the union because the union did not cause the employer to discriminate).
[16] Eliserio, 398 F.3d at 1077.
[17] NLRB v. Local 815, International Bhd. of Teamsters, 290 F.2d 99, 104 (2nd Cir. 1961) ("Certainly a union is not responsible for every act of a shop steward, simply by virtue of the position."); Badlam v. Reynolds Metals Co., 46 F.Supp.2d 187, 201-02 (N.D.N.Y. 1999) (holding that union stewards are not agents for purposes of discrimination claims).
[18] Eliserio, 398 F.3d at 1076; Thorn, 305 F.3d at 832; see also 42 U.S.C. § 2000e-2(c); Minn. Stat. § 363A.08, Subd. 1.
[19] 29 U.S.C. § 185.
[20] Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965); Rowan v. K. W. McKee, Inc., 114 N.W.2d 692, 698 (Minn. 1962).
[21] Vaca, 386 U.S. at 184.
[22] Clayton v. Int'l Union, UAW, 451 U.S. 679, 689 (1981).
[23] DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 169-70 (1983).
[24] Id.
[25] Evans v. Northwest Airlines, Inc., 29 F.3d 438, 441 (8th Cir. 1994).
[26] Aarsvold v. Greyhound Lines, Inc., 724 F.2d 72, 73 (8th Cir. 1983) (per curiam), cert. denied 467 U.S. 1253 (1984); see also Johnson v. Artim Transp. Sys., Inc., 826 F.2d 538, 550-51 (7th Cir. 1987).
[27] Scott v. United Auto., 242 F.3d 837, 839 (8th 2001); Schuver v. MidAmerican Energy Co., 154 F.3d 795, 800 (8th Cir. 1998); Skyberg v. United Food and Commercial Workers Int'l Union, 5 F.3d 297, 301-02 (8th Cir. 1993); Cook v. Columbian Chems. Co., 997 F.2d 1239, 1240-41 (8th Cir. 1993).