ST. JOHN'S UNIVERSITY
SCHOOL OF LAW

A Union's Duty in Bankruptcy Cases to Fairly Represent its Constituency

2018 Volume X No. 7

A Union's Duty in Bankruptcy Cases to Fairly Represent its Constituency

Denise Dessel, J.D. Candidate 2019

Cite as: *A Union's Duty in Bankruptcy Cases to Fairly Represent its Constituency*, 10 ST. JOHN'S BANKR. RESEARCH LIBR. NO. 7 (2018).

Introduction

Under the National Labor Relations Act ("NLRA"), a union, as the sole representative of its workers, has a duty to fairly represent them. This duty entitles a union to fairly represent all employees, "whether members of the union or not, fairly."[1] A union breaches this duty when its conduct or decisions are arbitrary, discriminatory, or committed in bad faith.[2]

The terms "arbitrary," "discriminatory," and "bad faith" have been interpreted through case law. Part I of this memorandum discusses the interpretation of arbitrary conduct; Part II addresses how courts have defined discriminatory conduct; and Part III analyzes how bad faith conduct has been interpreted in connection with a union's duty of fair representation.

I. A Union's Conduct Cannot Be Found Arbitrary if its Actions were not Wholly Irrational.

To successfully plead that a Union's conduct was "arbitrary," a plaintiff must plead conduct that demonstrates the union did not exercise its own judgment.[3] The standard for breaching that duty, is when the Union's conduct is "wholly irrational."[4] Irrational conduct has been interpreted

[1] NATIONAL LABOR RELATIONS BOARD, *Right to Fair Representation*, https://www.nlrb.gov/rights-we-protect/whats-law/employees/i-am-represented-union/right-fair-representation (last visited Feb. 24, 2018).
[2] *See* Vaca v. Sipes, 386 U.S. 171, 1090 (1967).
[3] *See* Beck v. United Food and Commercial Workers Union, 506 F.3d 874, 879 (9th Cir. 2007).
[4] *Id.*

as "when it is without a rational basis or reasonable explanation."[5] Thus, this provides the union reasonable discretion to make "decisions and choices, even if those judgments are ultimately wrong."[6] Accordingly, to show arbitrary conduct, the act must be far outside the "wide range of reasonableness."[7]

A. A Court Considers a Union's Conduct when Reviewing Conduct under the Arbitrary Prong

In determining whether a union's conduct is wholly irrational and therefore arbitrary, courts evaluate the conduct on a continuum with two distinct ends.[8] "On one end of the continuum is intentional conduct by a union exercising its judgment."[9] This type of conduct is usually not considered arbitrary, as it is not usually considered "wholly irrational."[10] On the other end are "actions or omissions that are unintentional, irrational or wholly inexplicable, such as an irrational failure to perform a ministerial or procedural act."[11] Courts usually refer to these types of ministerial or procedural acts or omissions as arbitrary.[12] These arbitrary actions can breach the duty of fair representation when such actions cause injury to a union member.[13] In deciding where in the continuum a union's action falls, a court will review the process taken by a union to render a decision and the statements made to union members.[14]

For example, it is arbitrary for a union to agree to file a grievance with a union worker, and then fail to timely do so.[15] This type of act constitutes a procedural omission that constitutes a breach of fiduciary duty. This is illustrated in *Beck v. United Food and Commercial Workers*

---

[5] *Id.* (internal citation omitted).
[6] *Beck,* 506 F.3d 874 at 879. (internal citation omitted).
[7] *Id.*
[8] *See id.*
[9] *Id*.
[10] *See id.*
[11] *Id.*
[12] *See Beck,* 506 F.3d 874 at 879.
[13] *See id.*
[14] *See* Demetris v. Local 514, Transp. Workers Union of Am., 862 F.3d 799, 806 (9th Cir. 2017).
[15] *See Beck,* 506 F.3d 874 at 879.

Union, where the plaintiff's union failed to file a timely grievance after plaintiff was issued a "Final Written Warning" from her employer after using profanity at work.[16] The union has discretion on whether or not to file a grievance, but in *Beck* the union agreed to file the grievance but failed to do so.[17] The Court emphasized the fact that the union agreed to file the grievance, expressly informed the plaintiff it was going to file, then chose not to file the grievance.[18] This constituted an "arbitrary" action.[19]

On the other end of the spectrum, however, is a union's duty to negotiate and enforce a security clause; a clause explicitly authorized by the NLRA.[20] A union's decision to negotiate a security clause has widely been accepted as "far from arbitrary."[21] For example, in *Marquez v. Screen Actors Guild,* plaintiff alleged that the union failed to fairly represent her by negotiating and enforcing a union security clause that did not contain language informing her of her right to not join the union and to pay for only the union's representational activities.[22] Plaintiff argued that the union had the duty to fully explain the security clause because that is the only part of the contract where the union's interests diverge from its members.[23] Ultimately, the court held that the union "tracked the statutory language," and thus its conduct was not "arbitrary."[24]

II. Conduct is Discriminatory if it is Intentionally Aimed to Enhance One Group Over Another

Unions cannot discriminate against its members.[25] Nor can a union make decisions solely to advance one employee over another.[26] For a union to be found to be engaging in discriminatory

[16] *See Beck,* 506 F.3d 874 at 881.
[17] *See id.*
[18] *See id.*
[19] *Id.*
[20] *See* Marquez v. Screen Actors Guild*,* 525 U.S. 33, 43-44 (1998).
[21] *Id.* at 44-45.
[22] *See id.* at 40.
[23] *See id.*
[24] *See id.* at 46.
[25] *See* Demetris v. Local 514, Transp. Workers Union of Am., 862 F.3d 799, 809. (9th Cir. 2017).

conduct, there must be "'substantial evidence of discrimination that is intentional, severe and unrelated to legitimate union objective.'"[27]

There is no requirement, however, "that unions treat their members identically as long as their actions are related to legitimate union objectives."[28] This is especially true in circumstances where the employer has filed for bankruptcy.[29] However, a union may not discriminate based on whether an employee is a union member. [30] For example, in *Bernard v. Air Line Pilots Ass'n Intern*., a union's actions were found to constitute discrimination against certain pilots who were not unionized. In *Bernard*, Jet America was an independent air carrier who was acquired by Alaska Air Group, Inc. ("Alaska").[31] Air Line Pilots Association ("ALPA"), the union for Alaska, met with Alaska to determine how to integrate the Jet America pilots with the Alaska pilots for purposes of seniority and possible reductions in force.[32] Jet America pilots brought the action stating that they were excluded from the bargaining process.[33] At the time of the bargaining process, ALPA did not officially represent the Jet America Pilots, but would be the union representative after the merger.[34] ALPA did not acknowledge the Jet America Pilots in the seniority agreement with Alaska.[35] The Ninth Circuit held that the effect of ALPA's "approach [was] to discriminate against the Jet America pilots because they were not unionized prior to the merger."[36]

---

[26] *See id.*
[27] Amalgamated Ass'n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge 403 U.S. 274, 301 (1971).
[28] Bondurant v. Air Line Pilots Ass'n, Intern., 679 F.3d 386, 393. (6th Cir. 2012).
[29] *See id.*
[30] *See* Bernard v. Air Line Pilots Ass'n Intern., 873 F.2d 213, 216-217 (9th Cir. 1989).
[31] *See id.* at 214.
[32] *See id.*
[33] *See id.*
[34] *See id.* at 215-16.
[35] *See id.* at 217.
[36] *Id.*

At the other end of the spectrum, in a restructuring agreement, it is not discriminatory to create a bright line cutoff date for eligibility into a compensation program that might negatively affect retirees.[37] This was the situation in *Bondurant v. Air Line Pilots Ass'n, Intern.* where, during an employer bankruptcy, the Ninth Circuit recognized that a union was trying to make the "best out of a bad situation" and not everyone's interests could possibly be satisfied.[38] In *Bondurant*, Northwest Airlines filed for Chapter 11 Bankruptcy.[39] "During its reorganization, Northwest extracted concessions from the union that collectively resulted in an approximate 40% wage cut for all Northwest pilots."[40] "Northwest set out terms of the Bankruptcy Restructuring Agreement for which an $888 million claim was intended to compensate."[41] The Master Executive Council, composed of pilot representatives, appointed an Eligibility Committee to issue a recommendation on how to approach the distribution.[42] The committee established a cutoff date for distributing the claim of July 31, 2006.[43] The plaintiffs, retirees who had reached the age of sixty and left Northwest before July 31, 2006, were not entitled to a share of the claim.[44] The Sixth Circuit affirmed the district court's finding that "the union was trying to make the best out of a bad situation, and it was almost inevitable that the union's drawing would hurt someone."[45] Just because the retirees did not "similarly benefit" does not mean that the union breached its duty of fair representation.[46] The retirees did not plead any facts that would lead the Sixth Circuit to believe anything differently.[47]

---

[37] *See* Bondurant v. Air Line Pilots Ass'n, Intern., 679 F.3d 386, 393. (6th Cir. 2012).
[38] *See id.*
[39] *See id.* at 390.
[40] *Id.*
[41] *Id.*
[42] *See id.* at 391.
[43] *See id.*
[44] *See id.*
[45] *Id.* (internal citation omitted).
[46] *Id.* at 394.
[47] *See Bondurant*, 679 F.3d 386, at 394.

III. Conduct is Considered Committed in Bad Faith if it can be proven there is Substantial Evidence of Fraud, Deceitful Action or Dishonesty in the Conduct.

To establish a breach of the duty to fairly represent under the "bad faith" prong, the plaintiff must show "substantial evidence of fraud, deceitful action or dishonest conduct."[48] In the *Beck* case, the Court of Appeals for the Ninth Circuit found that the union committed bad faith by not representing female and male employees similarly.[49] The court held that the union's misfiling of plaintiff's original grievance that she asked to be filed on her behalf was not "mere negligence" but treated plaintiff's claim "'so lightly as to suggest an egregious disregard of her rights."[50] The court affirmed the district court's decision that failure to file two grievances requested by plaintiff amounted to bad faith and therefore breached the duty of fair representation.[51] At the trial, plaintiff introduced evidence that a male employee who was subject to multiple disciplinary actions, including actions that were similar to plaintiff's, was not fired.[52] Another male employee had been suspended after he fought with an employee and, unlike with plaintiff, the union chose to represent him in getting his job reinstated.[53] Further, the union did not represent a female employee who was terminated for allegedly extending the expiration date on meat.[54] The district court found the mishandling of plaintiff's grievances were motivated by gender discrimination.[55] The Ninth Circuit affirmed that the union breached the duty of fair representation because it committed bad faith.[56]

---

[48] *See* Beck v. United Food and Commercial Workers Union, 506 F.3d 874, 880 (9th Cir. 2007) (internal citation omitted).
[49] *See id.* at 882 (holding that "[plaintiff's] termination was not entitled to deference because it was tainted by the union's intentional gender discrimination and bad faith conduct).
[50] *Id.* at 881 (internal citation omitted).
[51] *See id.* at 882.
[52] *See id.* at 877.
[53] *See id.*
[54] *See id.*
[55] *See Beck* 506 F.3d 874, at 878.
[56] *See id.* at 882.

"Mere negligence and erroneous judgment calls" cannot, however, by themselves, support an inference of bad faith[57]. In *Stevens v. Moore Business Forms, Inc.*, appellants were employed by Moore.[58] Moore announced that it would have to close one of its plants.[59] Moore paid its union employees severance pay equal to the amount required under the collective bargaining agreement.[60] The severance pay amount received by Moore's bargaining unit employees "was substantially less than that received by non-bargaining unit employees."[61] The union members filed a grievance with their union, claiming "discrimination on the basis of their union membership;" the union did not process the grievance.[62] Because the union did not file the grievance, appellants argued that the union breached its duty of fair representation.[63] The Ninth Circuit held that the appellants offered no evidence of bad faith but actually offered evidence stating that they were paid per their collective bargaining agreement.[64]

Conclusion

A union faces unique challenges when trying to fairly represent its constituency. A union will breach its duties to its members, where actions taken are arbitrary, discriminatory or committed in bad faith. In order to prevent such a finding, a union must take steps to document a thorough, reasoned approach to each decision it makes. Through this approach, a union should be able to successfully counter allegations of breach of its duty of fair representation.

---

[57] Stevens v. Moore Business Forms, Inc., 18 F.3d 1443, 1447-48 (9th Cir. 1994).
[58] *See id.* at 1445.
[59] *See id.*
[60] *See id.*
[61] *Id.*
[62] *Id.*
[63] *See id.*
[64] *See id.* at 1148-49.