4 PJI 17 | EMPLOYEE CLAIM AGAINST EMPLOYER AND UNION (VACA V SIPES)

In this case, [Plaintiff] makes two claims. The first claim is that [Plaintiff]'s employer discharged [Plaintiff] without just cause in violation of the collective-bargaining agreement governing the terms and conditions of [his/her] employment.

The second claim is that [Plaintiff]'s union breached its duty to fairly represent [Plaintiff] as one of its members by failing to investigate or otherwise process [his/her] grievance against [his/her] employer under the collective-bargaining agreement's grievance procedure.

The law prohibits an employer from discharging an employee governed by a collective-bargaining agreement unless there is just cause to dismiss the employee.

"Just cause" means a real cause or basis for dismissal – not an arbitrary whim. "Just cause" is something that a reasonable employer, acting in good faith in similar circumstances, would regard as a good reason for dismissing an employee.

For the first claim, [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

> First: [Name of employer] discharged [Plaintiff] from employment; and
>
> Second: [Name of employer] discharged [Plaintiff] without just cause.

If you find for [Plaintiff] on the first claim, you must consider the second claim: that [Union] breached its duty of fair representation – that [Union] did not fairly represent [Plaintiff] as one of its members.

To succeed on this second claim, [Plaintiff] must prove each of the following facts by a preponderance of the evidence:

> First: [Name of employer] discharged [Plaintiff] from employment, and that the discharge was without just cause;
>
> Second: [Plaintiff] was a member of a collective-bargaining unit represented by [Union];
>
> Third: [Plaintiff] filed a grievance with [Union];
>
> Fourth: [Union] breached its duty of fair representation by handling the grievance proceedings arbitrarily, discriminatorily, or in bad faith; and

Fifth: [Union]’s breach materially affected the outcome of [Plaintiff]’s grievance hearing.

A union has a legal duty to fairly represent the interests of its members in protecting their rights under a collective-bargaining agreement. But an employee does not have an absolute right to require the union to pursue a grievance against an employer. The test is basic fairness. As long as the union acts in good faith, the law allows it to exercise broad discretion to determine whether it should pursue the employee’s grievance against an employer under a collective-bargaining agreement.

For example, the union may weigh the cost of pursuing a grievance against the likelihood of success. So even if an employee’s grievance has merit, mere negligence or the union’s exercise of poor judgment does not establish a breach of its duty of fair representation.

But when a union acts arbitrarily or carelessly, or dishonestly and in bad faith, by refusing to pursue a union member’s meritorious grievance, it violates its duty to represent fairly the member who lodged the grievance.

[In the verdict form that I will explain in a moment, you will be asked to answer questions about these factual issues.]

If you find for [Plaintiff] on [his/her] first claim or on both claims, you must consider [his/her] damages. The damage award should be an amount that justly compensates [him/her] for the damages [he/she] incurred.

The measure of these damages, if any, is the amount [Plaintiff] would have earned from [his/her] employment with [name of employer] if [name of employer] had not discharged [him/her]. But you must reduce this amount by any earnings [Plaintiff] received, or reasonably could have received, from other employment. [Plaintiff] has a duty to mitigate or minimize the damages. [Defendant] is not responsible for lost earnings to the extent that [Plaintiff] could have avoided those lost earnings by using reasonable care in seeking other employment.

After you have determined an amount for damages, if you have found for [Plaintiff] and against both the employer and the union, you must then divide the damages between the employer and the union. The employer is only responsible for lost wages caused by discharging [Plaintiff] in breach of the collective-bargaining agreement. But any increase in lost wages that the union caused by failing to pursue [Plaintiff]'s grievance should be charged to the union – not to the employer.

So if you decide that [Plaintiff] would have been reimbursed for lost wages or reinstated to [his/her] job if the union had fairly represented [him/her], then you must divide those lost wages between the employer and the union. In that case, you should allot damages to the union to the extent its breach of duty to fairly represent [Plaintiff] increased the amount of wages [he/she] lost.

SPECIAL INTERROGATORIES TO THE JURY

Do you find from a preponderance of the evidence:

1. That [Defendant] discharged [Plaintiff] from employment?

   Answer Yes or No _____________

   If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.5

2. That the discharge was without "just cause"?

   Answer Yes or No _____________

   If your answer is "No," this ends your deliberations, and your foreperson should sign and date the last page of this verdict form. If your answer is "Yes," go to the next question.

3. That [Union] breached its duty of fair representation owed to [Plaintiff] as one of its members?

   Answer Yes or No _____________

4. That [Plaintiff] should be awarded damages?

   Answer Yes or No _____________

   If your answer is "Yes," in what amount? $_____________

5. That [Plaintiff]'s damages should be divided between the defendants?

Answer Yes or No _____________

If your answer is "Yes," how should they be divided?

_____________ % against [Defendant]

_____________ % against [Union]

SO SAY WE ALL.

DATE: ____________________ ____________________________
Foreperson's Signature

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Annotations and Comments

This jury instruction applies when an employee or former employee files a hybrid breach of contract - breach of duty of fair representation suit against the employer and union, such as in *Vaca v. Sipes, 386 U.S. 171 (1967)*. See also Labor Management Relations Act §301, 29 U.S.C. §185. A plaintiff may decide to sue one defendant and not the other. See generally *Diaz v. Schwerman Trucking Co., 709 F.2d 1371, 1375-76 (11th Cir. 1983)* (per curiam); see also *Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564 (1990)* ("Because most collective-bargaining agreements accord finality to grievance or arbitration procedures... an employee normally cannot bring a §301 action against an employer unless he can show that the union breached its duty of fair representation in its handling of his grievance.").

Unions have broad discretion in deciding whether to prosecute a grievance, subject only to the duty of fair representation. *Turner v. Air Transp. Dispatchers' Ass'n, 468 F.2d 297, 300 (5th Cir. 1972)*. In deciding whether to prosecute a grievance, the union may consider tactical and strategic factors such as its limited resources and consequent need to establish priorities, as well as its desire to maintain harmonious relations among the workers and between the workers and the employer. *Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997)*.

In *Air Line Pilots Association International v. O'Neill, 499 U.S. 65 (1991)*, the Court extended a union's duty of fair representation to include "all union activity, including contract negotiation."

Id. at 67. The Court further defined breach of the duty of fair representation to include union actions which are either "arbitrary, discriminatory, or in bad faith," and ruled that "a union's actions are arbitrary 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." Id. (quoting *Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953)*).

Bad faith on the part of the union "requires a showing of fraud, deceitful action or dishonest action." *Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 531 (10th Cir. 1992)* (citing *Motor Coach Emps. v. Lockridge, 403 U.S. 274, 299 (1971)*). Personal hostility is not enough to establish unfair representation if the representation was adequate and there is no evidence that the personal hostility tainted the union's actions. *Freeman v. O'Neal Steel, Inc., 609 F.2d 1123, 1127-28 (5th Cir. 1980)*; accord *VanDerVeer v. United Parcel Serv., Inc., 25 F.3d 403, 405 (6th Cir. 1994)*. Mere negligence is never sufficient to sustain a claim for breach of the duty of fair representation. *Parker v. Connors Steel Co., 855 F.2d 1510, 1521 (11th Cir. 1988)*.

A union owes the duty of fair representation to all members of its collective bargaining unit, whether or not the employee in question is a union member. *Sanderson v. Ford Motor Co., 483 F.2d 102, 109-10 (5th Cir. 1973)*.

The limitations period for bringing a hybrid breach of contract – breach of the duty of fair representation claim is six months from the date of the employer or union's final action, whichever is later. *Coppage v. U. S. Postal Serv., 281 F.3d 1200, 1204 (11th Cir. 2002)* (citing *DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 169-71 (1983)*).

Generally, damages are apportioned between the employer and union according to the damage caused by each. *Vaca v. Sipes, 386 U.S. 171, 197-98 (1967)*. However, joint and several liability may be appropriate where the employer and union actively participated in each other's breach. *Lewis v. Tuscan Dairy Farms, Inc., 25 F.3d 1138, 1145-46 (2nd Cir. 1994)* (citing *Vaca, 386 U.S. at 197 n.18*).