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RESEARCH REPORT

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THE DUTY OF FAIR REPRESENTATION

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I. Introduction

Many commentators have noted that we live in a society that is becoming constantly more litigious. The United States has more lawyers, per capita, than any nation in the world, and the average citizen is looking more and more to those lawyers to redress perceived legal wrongs. Within the past year, for example, a child has sued his parents for not giving him a proper upbringing, and a disappointed suitor instituted an action to recover the costs of two theater tickets he had not used when his date stood him up.

The increasing propensity of individuals to resort to the courts is very evident in the area of internal union affairs. More and more frequently, disgruntled union members sue their labor organizations for breach of the so-called "duty of fair representation" ("DFR"). Even if the lawsuit is ultimately dismissed before trial, the cost to the union, in terms of attorney's fees and time expended by union officers in pretrial preparation, is very high.

Because of the drain that such litigation places on labor organizations, I am increasingly asked by union officials, "How can we prevent such lawsuits." I explain to them that there is no way to stop a member from suing if s/he is so inclined. All that an individual need do to begin a lawsuit is to prepare a fairly simple document called a complaint, and to pay a modest filing fee to the court. Even an attorney is not necessary.

While a person cannot be stopped from filing a DFR lawsuit, there are certain actions that union officials can take to reduce the likelihood of such suits, and to increase their chances of winning either after a trial, or, preferably, before trial. In order to reduce the likelihood of being sued, and to increase the chances of winning DFR suits, it is important for all union officials (including shop stewards) to first understand what the DFR is all about. Therefore, this paper will briefly trace the origins of the duty; its scope; what type of conduct it prohibits; how it is enforced; and remedies for breach of it. Finally, the paper will try to provide union officials with some hints on how to avoid DFR suits and how to enhance the chances of winning such actions if they are brought.

II. Origins of the Duty

The DFR is not explicitly provided for in any statute. Rather, it is a judicially created doctrine, first announced by the United States Supreme Court in a case decided in 1944. While that case was brought under the Railway Labor Act (RLA) and involved racial discrimination by a labor union, later cases applied the duty to unions covered by the National Labor Relations Act (NLRA) and to cases that did not involve racial discrimination. More recently, the state courts in California have begun to apply the duty to public employee unions that are controlled by state, rather than federal, law.

The DFR was created because unions that are covered by the RLA and the NLRA act as "exclusive representatives." For example, under section 9(a) of the NLRA (29 USC section 159 (a)), a union which is selected by a majority of the employees in a bargaining unit, is the exclusive representative for all employees in that unit -- including those who opposed the union. Thus, by statute, labor unions are given powers akin to a legislature.

A legislature, however, is subject to certain constitutional limitations, including the "equal-protection clause," which prevents legislative actions that unreasonably discriminate against any group of citizens. The Supreme Court recognized that, unless a similar limitation were placed upon labor unions, there would be a serious constitutional question as to whether Congress could give those organizations legislative-like powers.

To avoid that constitutional issue, the Court found that Congress intended to impose, on any union that acted as an exclusive representative, "the duty to exercise fairly the power conferred upon [it] in behalf of all those for whom [it] acts, without hostile discrimination against them." In other words, the Court found that all exclusive representatives under the RLA and NLRA had the DFR.

Recent cases decided by California courts have held that the DFR extends to unions that act as the exclusive representative because of provisions in their contracts, rather than because of a statute. In the opinion of this author, any union which has the power to act as the exclusive representative for employees in a particular bargaining unit--whether that power is derived from statute or contract--should assume that it owes the employees in that unit the DFR.

III. The Scope of the DFR

A union owes the DFR to all employees in the unit for which it is the exclusive representative. The union owes the duty with respect to all of its actions in negotiating and enforcing the collective bargaining agreement.

Most DFR cases involve claims relating to the enforcement of the contract's grievance procedure. The most common claims are that: 1) the union failed to take any steps to process the individual's grievance; or 2) although the union processed the grievance, it did so in a perfunctory manner; or 3) the union failed to take the grievance to the final step in the grievance procedure--i.e., three-party arbitration.

IV. The Standard Imposed by the DFR

The Supreme Court has held that a union breaches its DFR if it acts toward an employee in the bargaining unit in an "arbitrary, discriminatory or bad faith" manner. A union acts in an "arbitrary" manner if it acts perfunctorily and without enough regard to the merits of the matter. It acts in a "discriminatory" manner if it acts unfairly as to one person as compared to others similarly situated. And it acts in "bad faith" if it acts with improper intent, motive and purpose.

Over the years, the courts have expanded the definition of the DFR and have thereby placed a greater and greater burden on unions and their officers. The courts have ruled that action or inaction by a union which is unreasonable or arbitrary violates the DFR even though the union has acted in good faith and without hostility. One court has even gone so far as to hold that a union violates the DFR if it negligently fails to comply with the contractual time limits for filing a grievance,

and another court ruled that the DFR is breached if a union representative, due to inadequate preparation, fails to assert certain important claims during the grievance process.

It is important to note, however, that while the standard imposed by the DFR has become more stringent over the years, the DFR does not require a union to process every grievance to arbitration or, for that matter, to process every grievance even to the first step of the grievance procedure. The Supreme Court has recognized that "though. . .a union may not ignore a meritorious grievance or process it in a perfunctory fashion. . .the individual employee [does not have] an absolute right to have his grievance taken to arbitration." The union has the right to "sift out wholly frivolous grievances" and has a significant area of discretion in deciding which grievances to process and how far to process them. The union has a "wide range of reasonableness. . .subject always to complete faith and honesty of purpose in the exercise of its discretion."

In the end, the question of whether a union has met its DFR in a particular case will depend upon whether the union's actions were taken in good faith, and were reasonable in light of the particular facts involved in that case.

V. Enforcement of the DFR

An employee who believes that his/her union has breached the DFR with respect to him/her, may either file a charge with the National Labor Relations Board (NLRB) or may file a suit in either state or federal court. Generally, employees will file a lawsuit because of the possibility of recovering certain types of damages that they could not recover before the NLRB.

In order to maintain a DFR action, in court, an employee must meet certain requirements:

A. Contractual Procedures

As a general rule an employee must exhaust the grievance procedure of the contract before s/he can maintain a DFR action. Failure to exhaust the grievance procedure will ordinarily result in dismissal of the lawsuit.

In the following situations, however, exhaustion is not required.

1. If the employee's claim does not allege a breach of the collective bargaining agreement which is subject to the grievance procedure. For example, if the employee claims that the union breached its DFR by the manner in which it negotiated the collective bargaining agreement, such a claim would generally

not be subject to the grievance procedure and the employee would not have to exhaust in order to bring a lawsuit.

2. If the conduct of the employer amounts to a repudiation of the contractual grievance procedures.

3. If the union has the sole power to take the grievance to the next step and wrongfully refuses to do so.

4. If, based upon the union's past performance, or its role in the events leading up to the grievance, it would be futile for the employee to attempt to exhaust the grievance procedure. The courts will, however, examine a claim of futility very closely and will generally require the employee to demonstrate that s/he had made repeated complaints to the union that went unheeded.

Generally, if the grievance procedure has been exhausted, the employee will be bound by the arbitrator's decision. There is an exception to that rule, however. If the union breached its DFR by the manner in which it presented the case to the arbitrator, and if the union's conduct seriously undermined the "integrity of the arbitral process," the employee will not be bound by the arbitrator's award and will be able to maintain a DFR action.

B. Internal Union Procedures

Some courts have also held that, before an employee can maintain an action for breach of the DFR, s/he must exhaust his/her internal union remedies. Such a requirement exists, however, only if there are such remedies available to the employee. And even if such internal remedies exist, the employee need not exhaust them if:

1. the time to invoke arbitration is so short as to not allow the employee to appeal the union's decision not to arbitrate; or

2. the employee has attempted, without success, to exhaust internal union remedies for a reasonable period of time.

C. Statute of Limitations

The final requirement for maintaining a DFR action is that the employee files his/her suit within a certain period of time. The period of time is determined by what is known as the "statute of limitations." The time for filing the suit begins to run from the date the employee first had a claim. If s/he does not file his/her suit within the proper time, it will be dismissed.

It has not yet been definitively determined how long an employee in California has to file a DFR action. Some courts have held s/he has four years; other courts have held three years; and some courts have ruled s/he only has one year.

VI. Remedies for Breach of the DFR

A. NLRB

If an employee proves that his/her union has breached its DFR, the NLRB has the power to issue an order prohibiting the union from engaging in such conduct in the future. Violation of such an order by the union would be a contempt of court, subjecting it and its officers to fines. The NLRB can also order employees reinstated with back pay or can order arbitration. In appropriate cases, the Board can revoke the certification of a union that engages in unlawful discrimination.

B. Courts

If an employee proves in court that his/her union breached its DFR, the court can assess damages against the union for losses suffered by the employee. The court can also award punitive damages if the union's conduct was outrageous, involved threats, violence or intimidation, or showed actual malice or a wanton disregard of the employee's rights. Any damages awarded are only against the union, and not against the individual officers. The court can also issue an injunction against the union requiring it to act, or refrain from acting in a certain manner.

In DFR cases which involve a failure by the union to process an employee's grievance, or to process it in a proper manner, in order for the employee to win in court s/he must demonstrate both that the union breached its DFR and that his/her grievance was meritorious (i.e., that the employer violated the collective bargaining agreement). If the employee proves both, s/he may recover from the employer the damages that s/he suffered as a result of the employer's violation of the labor agreement. The union is liable only for the amount, if any, that the employee's losses were increased by the union's failure to process the grievance, or to process it properly. For example, the union might be liable for the employee's attorney's fees, although generally the courts have not allowed employees to recover their attorney's fees or to recover damages for alleged "mental suffering and distress."

VII. Avoiding and Defending DFR Actions

Obviously, a union's primary objective should be to avoid being sued for breach of the DFR since, as noted earlier,

even if it wins in court it will incur substantial costs in the form of attorney's fees. While there is no way to prevent members from filing suits, there are certain things that a union can do to reduce the likelihood of such suits and to win in court if such suits are filed.

Clearly, the way to avoid DFR suits, and to win them if they are filed, is for the union not to act toward any employees in the unit in an arbitrary, discriminatory or bad faith manner. What steps can the union take to achieve this goal?

A. Education

All union officials--including shop stewards--whether elected or appointed, should know that the DFR exists, and should know what standards it requires. In addition, all union officials should be very familiar with the terms of the collective bargaining agreement in order to determine whether an employee's grievance is meritorious and what steps must be taken under the contract to process the grievance. Officials must be especially aware of time limits contained in the collective bargaining agreement for filing a grievance and for taking it to the next step in the grievance procedure. Such knowledge is critical in view of recent cases holding that a union breaches the DFR if a grievance is lost because of the negligent failure by the union's officials to act in a timely fashion.

Unions should be certain that all newly elected or chosen officials receive training in the areas of processing grievances and the DFR. Such training can be conducted by other union officials; by outside organizations, such as the Center for Labor Research and Education; or by the union's attorneys.

B. Record Keeping

Since most DFR suits involve claims that the union did not act properly with respect to an employee's grievance, it is vital that good records be kept about every grievance.

1. Log

There should be a log in which is recorded the name of every employee who files a grievance; the date it is filed; and the action taken with regard to the grievance at every step.

2. Calendar

A master calendar should be kept indicating the final date on which action must be taken as to each step of the grievance procedure.

3. Weekly Calendar

At the end of each week, a calendar for the following week should be prepared and xeroxed for the responsible union officials indicating which cases must be acted upon the following week, and the date on which final action must be taken.

4. Employee File

A file should be made up for each employee who files a grievance. A copy of all documents pertaining to that grievance should be placed in the employee's file. In addition, union officials should place in the file written notes of every action they take in connection with the grievance. For example, if a telephone call is made to the employee, or to a company official, a note should be put in the file as to the date of the call, who was spoken to, and a summary of what was said. Such records are vital if a case later ends up in court.

C. Internal Appeals Procedures

As noted above, some courts have held that, before an employee can maintain an action for breach of the DFR, s/he must exhaust internal union remedies, if they are available. An internal appeal procedure can serve several important functions. First, it affords another opportunity to review the employee's grievance and determine if it is meritorious. Second, if the appeal is made to the membership or some grievance committee, and turned down, the individual has less chance of convincing a judge or jury that s/he was discriminated against because the union's officers did not like him/her. Finally, if the employee does not exhaust his/her appeal rights, s/he will be unable to maintain a DFR action.

Appeals procedures should require the employee to file a written appeal within some short period (up to 5 days perhaps) after being notified of the union's decision not to process his/her grievance any further. The notification by the union should be sent first class mail, return receipt requested, so that the union will later have proof that the notice was received by the employee. The notice should advise the employee of the union's decision and of the employee's right to appeal. The notice should clearly state the final date by which the employee may file a written appeal. It is probably preferable to supply the employee with a simple appeal form that s/he can fill out if needed. The form should indicate the address to which it must be sent. Appeals should be to some type of grievance review committee, or to the membership.

It is important to remember, however, that the employee will only be required to exhaust appeal procedures for a reasonable period of time and will not be required to exhaust

if the time to invoke arbitration is so short as to not allow the employee's appeal of the union's decision not to arbitrate. For example, if the collective bargaining agreement requires the union to ask for arbitration within 10 days of the employer's rejection of the grievance at the preceding step, and if the appeals committee or membership could not review the employee's appeal for 20 days, the employee would not be required to exhaust the appeal procedure. There are two ways to handle this problem. First, the appeals committee could meet once a week, or could meet within 24 or 48 hours after an appeal is received. Alternatively, if time limits are going to run, the union could request arbitration, but inform the employee that the request will be withdrawn unless the grievance committee or membership eventually votes that the case should be arbitrated. If a positive vote is obtained, the arbitration can proceed; if the vote is negative, the request for arbitration should be withdrawn.

D. Attorneys

The union's attorneys can play an important role with regard to the DFR before a lawsuit is filed claiming that a breach of the duty has occurred. For example, our firm often reviews grievance files for our clients and gives a written opinion as to the likelihood of success if the case goes to arbitration. Such advice saves the union money by avoiding the arbitration of cases which the attorney knows cannot be won. Moreover, if an employee later sues the union for not taking his case to arbitration, the union can defend on the ground that it relied on the advice of its attorneys and, therefore, its failure to arbitrate was not arbitrary, discriminatory or in bad faith.

VIII. Conclusion

As noted at the outset, a union cannot prevent an employee from bringing suit against it for an alleged breach of the DFR; but many such suits can be avoided. The single most important step that any union can take to avoid DFR actions is to be certain that its officials are well-trained, both as to the collective bargaining agreement they are enforcing, and as to the standards imposed upon them by the DFR.