**13.1 Employee Claim Against Union And/or Employer—Labor Management**

**Relations Act (LMRA) § 301 (29 U.S.C. § 185)**

            In order to prevail, the plaintiff must prove each of the following by a preponderance of the evidence:

1.         that the plaintiff was discharged from employment by [*name of employer*];

2.         that such discharge was without “just cause”;

3. that the plaintiff filed a grievance with [*name of union*]; and

4.         that [*name of union*] breached its duty to fairly represent the plaintiff’s interests under the collective bargaining agreement by handling the grievance proceedings arbitrarily, discriminatorily, or in bad faith.

            The plaintiff must prove all four of the elements listed above whether [he] [she] is suing the union, the employer, or both.  In this case, the plaintiff is suing [[the union] [the employer] [both the union and the employer]].

            If you find that the plaintiff has proved all four of the elements listed above, your verdict should be for the plaintiff.  If, on the other hand, the plaintiff has failed to prove any of these elements, your verdict should be for the defendant.

            Under the law, an employer may not discharge an employee governed by a collective bargaining agreement, such as the one involved in this case, unless “just cause” exists for the employee’s dismissal.  The term “just cause” means a real cause or basis for dismissal as distinguished from an arbitrary whim or caprice; that is, some cause or ground that a reasonable employer, acting in good faith in similar circumstances, would regard as a good and sufficient basis for terminating the services of an employee.

            A union has a duty under the law to represent fairly the interests of its members in protecting their rights under a collective bargaining agreement.  However, an individual employee does not have an absolute right to require the employee’s union to pursue a grievance against the employer.  A union has considerable discretion in controlling the grievance and arbitration procedure.  The question is not whether the employee is satisfied with the union representation or whether that representation was perfect.

            Breach of the duty of fair representation occurs only when a union acting in bad faith or in an arbitrary or discriminatory manner fails to process a meritorious grievance.  So long as the union acts in good faith, it may exercise its discretion in determining whether to pursue or process an employee’s grievance against the employer.  Even if an employee’s grievance has merit, the union’s mere negligence or its exercise of poor judgment does not constitute a breach of its duty of fair representation.

**Comment**

            This jury instruction applies when an employee or former employee files a suit against either the union or employer.  It also applies in a hybrid suit against both the employer and union.  A plaintiff may decide to sue one defendant and not the other but must prove the same case whether the suit is against one defendant or both.   *Starla Rollins v. Cmty. Hosp. of San Bernadino*, 839 F.3d 1181, 1185 (9th Cir. 2016) (explaining that plaintiff could pursue claim against union after employer had settled, but must still show that employer breached collective bargaining agreement).

To support a breach of the duty of fair representation claim, the plaintiff must prove that the employer’s action violated the terms of the collective bargaining agreement and that the union breached its duty to act honestly and in good faith and to avoid arbitrary conduct.   *Bliesner v. Commc’n Workers of America*, 464 F.3d 910, 913–14 (9th Cir. 2006) (affirming summary judgment of hybrid suit based on failure to show employer’s breach of collective bargaining agreement without deciding whether union breached duty of fair representation).

As a general rule, before bringing suit, a plaintiff “must first exhaust the grievance procedures established by the [collective bargaining agreement].” *Sidhu v. Flecto Co., Inc.*, 279 F.3d 896, 898–99 (9th Cir. 2002). However, a plaintiff need not do so if the employer repudiates those procedures. *Id*. (waiving exhaustion when union attempted to use grievance procedures on plaintiff’s behalf and employer repeatedly refused). An alternative “exception to the general requirement of exhaustion exists, however, where the employee demonstrates that ‘the union . . . [has acted] in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation.’” *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 986 (9th Cir. 2007) (quoting *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 164 (1983)) (affirming summary judgment for defendant on § 301 claim when plaintiff “failed to exhaust his contractual remedies, and no breach of the duty of fair representation [wa]s alleged in the complaint”). “The determination whether to require exhaustion is left to the sound discretion of the trial court.” *Scoggins v. Boeing Co.*, 742 F.2d 1225, 1229 (9th Cir. 1984).

 The union’s duty of fair representation extends to members of a collective-bargaining unit represented by the union, provided that the union is the exclusive representative in the collective bargaining process for the unit of employees. *Simo v. Union of Needletrades, Indus. & Textile Emps., Southwest Dist. Council*, 322 F.3d 602, 614 (9th Cir. 2003) (holding that no duty of fair representation attached because union was not acting as exclusive bargaining representative nor pursuant to collective bargaining agreement). The duty of fair representation arises when a union is representing the workers in question pursuant to either the “authority granted by statute or a collective bargaining agreement,” and it applies “both to the negotiation and to the administration of collective bargaining agreements.” *United Bhd. of Carpenters & Joiners of America v. Metal Trades Dept., AFL-CIO*, 770 F.3d 846, 848–49 (9th Cir. 2014).

            A union is not liable for merely negligent conduct.  *See Slevira v. Western Sugar Co.*, 200 F.3d 1218, 1221 (9th Cir. 2000).  A breach of the duty of fair representation occurs when “the union conduct at issue is a discriminatory or bad faith exercise of judgment, or is an arbitrary (meaning wholly irrational, inexplicable, or unintentional) action that substantially injured an employee.” *Beck v. United Food & Com. Workers Union, Loc.* 99, 506 F.3d 874, 880 (9th Cir. 2007). “Whether a union acted arbitrarily, discriminatorily or in bad faith requires a separate analysis, because each of these requirements represents a distinct and separate obligation.” *Simo*, 322 F.3d at 617 (quoting *Thompson v. Aluminum Co. of Am.*, 276 F.3d 651, 657 (4th Cir. 2002)).

            A union’s actions or omissions are arbitrary if they are “unintentional, irrational, or wholly inexplicable, such as an irrational failure to perform a ministerial or procedural act.” *Beck*, 506 F.3d at 880­–81 (union’s failure to file timely grievance after agreeing to do so was arbitrary). For example, “[a] union acts ‘arbitrarily’ when it simply ignores a meritorious grievance or handles it in a perfunctory manner” and fails to “conduct a ‘minimal investigation’ of a grievance that is brought to its attention.” *Starla Rollins*, 839 F.3d at 1186 (quoting *Peterson v. Kennedy*, 771 F.2d 1244, 1253–54 (9th Cir. 1985)). By contrast, if “a union’s conduct constitutes an exercise of judgment,” it is “entitled to deference” unless its decision is “wholly irrational.” *Beck*, 506 F.3d at 879–80. This is a deferential standard that “gives the union room to make discretionary decisions and choices, even if those judgments are ultimately wrong.” *Id.* (quoting *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45–46 (1998)); *see also Demetris v. Transp. Workers Union of America, AFL-CIO*, 862 F.3d 799, 805 (9th Cir. 2017) (explaining that “our threshold inquiry in assessing any duty of fair representation claim must be to determine whether the alleged conduct involved judgment or whether such conduct was merely ministerial or procedural in nature”).

            If a union’s exercise of judgment is not wholly irrational and thus not arbitrary, “a union can still breach the duty of fair representation if it exercised its judgment in bad faith or in a discriminatory manner.” *Beck*, 506 F.3d at 880. To establish that a union acted in “bad faith,” a plaintiff must provide “substantial evidence of fraud, deceitful action, or dishonest conduct,” *Beck*, 506 F.3d at 880 (quoting *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 299 (1971)), or evidence that the union was motivated by personal animus toward the plaintiff.  *See Conkle v. Jeong*, 73 F.3d 909, 916 (9th Cir. 1995) (including personal animus as basis for finding of bad faith); *see also United Bhd. of Carpenters & Joiners of America*, 770 F.3d at 852 (observing that union’s failure to follow internal policies is “strong evidence of bad faith”).

To establish that a union impermissibly discriminated against its members, “the aggrieved members must set forth ‘substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives.’” *Demetris*, 862 F.3d at 806 (quoting *Lockridge*, 403 U.S. at 301). The duty to not discriminate extends beyond “race or other constitutionally protected categories.” *Simo*, 322 F.3d at 61-19. For example, “a union may not ‘discriminate on the basis of union membership.’” *Id*. (quoting *Bernard v. Air Line Pilots Ass’n, Int’l*, 873 F.2d 213, 216 (9th Cir. 1989)); *see also Demetris*, 862 F.3d at 806 (explaining that “unions cannot discriminate against their members based on political animus or even political expediency”). However, there is “no requirement that the unions treat their members identically as long as their actions are related to legitimate union objectives.” *Demetris*, 862 F.3d at 806 (quoting *Vaughn v. Air Line Pilots Ass’n, Int’l*, 604 F.3d 703, 712 (2d Cir. 2010)).

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