UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 06-1460

DANIEL S. O'SHEA,

Plaintiff-Appellant

v.

TEAMSTERS LOCAL UNION 639 and UNITED PARCEL SERVICE, INC.,

Defendants-Appellees

Appeal from a Judgment of the
United States District Court
for the District of Maryland

INFORMAL BRIEF FOR APPELLANT DANIEL S. O'SHEA

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May 11, 2006

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JURISDICTION

The district court had jurisdiction under 28 U.S.C. §1331 (Federal Question) and venue was proper in the court pursuant to 28 U.S.C. §1391(b)(2). Judgment was entered, disposing of all issues in the case, on March 23, 2006. (DEN 67). O'Shea appealed on April 12, 2006. (DEN 69). This court has jurisdiction under 28 USC §1291.

QUESTIONS PRESENTED

I. Did Teamsters Local Union 639 ("Union") breach its duty of fair representation in the administration (grievance procedure) and negotiation (mandatory obligation to bargain terms and conditions of employment) of the collective bargaining agreement. ("CBA").

II. Did the committee panel and arbitrator exceed their authority and ignore a key provision of the CBA.

III. Did the court improperly dismiss O'Shea's Maryland common law claim against UPS.

IV. Did the court abuse its discretion in denying retransfer, recusal and meaningful discovery.

V. Did the court err in dismissing O'Shea's claim that the panel committee and arbitrator both exceeded and ignored critical provisions of the applicable CBA because the court did not find the Union in breach of their duty of fair representation, a question of first impression.

STATEMENT OF THE CASE

On May 13, 2003, appellant Daniel S. O'Shea, as a member of Local Union 639 ("Union") was terminated after twenty-four years of employment with United Parcel Service, Inc. ("UPS") for "failure to follow UPS methods, procedures and policies and the dishonest use of a tape recorder." (DEN 56, SUMF ¶ 6). On August 20, 2003 the Atlantic Area Parcel Grievance Committee ("AAPGC" or "Panel") upheld O'Shea's discharge. (DEN 56, SUMF ¶ 10). On Feb. 11, 2004 O'Shea timely filed a complaint in the U.S. District Court for the District of Columbia alleging breach of the collective bargaining agreement by UPS and breach of the Union's duty of fair representation ("DFR"). (DEN 1). On April 6, 2005 the action was transferred to the U.S. District Court for the District of Maryland. (DEN 10). On March 23, 2006 the district court denied O'Shea's "Rule 56(f) motion and for meaningful discovery", denied O'Shea's motion for summary judgment, granted defendants' motions for summary judgment and entered judgment in favor of defendants. (DEN 67). O'Shea filed a timely notice of appeal on April 12, 2006. (DEN 69).

STATEMENT OF FACTS

O'Shea began working for UPS on January 20, 1979 as a part-time package pre-loader/sorter and holding that position until 1981 when he was promoted to a full-time package delivery driver. O'Shea worked at the Company's facility in Laurel,

Maryland. (DEN 56, SUMF ¶ 1). O'Shea was also a member of International Brotherhood of Teamsters Local Union 639. (DEN 56, SUMF ¶ 2).

On Jan. 22, 2002 O'Shea sustained a work-related injury and filed a workers compensation injury claim. (DEN 70, O'Shea Affidavit ¶ 13; DEN 70 Exh. 1). On June 18, 2002 the Workers Compensation Commission found O'Shea "sustained an accidental injury arising out of and in the course of employment on January 22, 2002 and ordered UPS and its insurer, Liberty Mutual to pay compensation and medical expenses. (DEN 70, Exh. 3). Immediately after the Workers Compensation Commission's decision on June 18, 2002 and until O'Shea's discharge on May 13, 2003, twenty-five letters and grievances were filed by O'Shea. (DEN 64, Exh. 7). O'Shea encountered similar retaliation between 1988 and 1992 after filing a workers compensation claim that led to a federal lawsuit against UPS and the Union in 1989. (DEN 25, Pg. 6.; DEN 56, Exh. B ¶ 3; DEN 56 Exh. 14.)

Recognizing the same retaliatory actions, O'Shea notified UPS of his fifteen year use of a tape recorder and on four occasions that he was using a tape recorder on the job to note delays, management instructions and suppress verbal harassment and abuse. (DEN 52, Exh. 1 Pg.'s 26-27; DEN 64, Exh. 9 at 6; DEN 64, Exh. 10 at 7; DEN 64, Exh. 11 at 5; DEN 64, Exh. 12 at 4.) O'Shea believed he was adhering to the law (DEN 60, Pg. 5.) and

through fifteen years of use and four notifications to UPS was never disciplined, charged or convicted of using a tape recorder. (DEN 56, Exh. B ¶ 10; DEN 27, pg. 4, lines 3-5).

On May 13, 2003, O'Shea was terminated for failure to "follow UPS methods, procedures and policies and the dishonest use of a tape recorder." (DEN 56, SUMF ¶ 6.) O'Shea requested his Union representative to conduct an investigation pursuant to the CBA by interviewing a number of witnesses and requesting exculpatory documents such as the policies O'Shea was to have violated but had never seen or shown in his twenty-four year career and statements by other similarly situated employees who were not disciplined for the same actions O'Shea was discharged for. (DEN 56, Exh. B ¶ 13; DEN 56, Exh. 3; DEN 25, Exh. 8; DEN 56, Exh. B ¶ 20; DEN 56, Exh. 11; DEN 56, Exh. 13; DEN 64, Exh. 14; DEN 64, Exh. 15).

One request was the company policy against the employee use of a tape recorder O'Shea was terminated for. (DEN 1 ¶ 27). In July, 2003 UPS stated to the Union that a company policy against the use of a tape recorder was not needed. (DEN 56, SUMF ¶ 7; DEN 56, SUMF ¶ 8). However, one month later, on August 19, 2003 at O'Shea's panel hearing discharge case, UPS represented to the arbitrator that O'Shea violated "company policy and practice" and cited UPS manager John Morris' affidavit stating it was against company policy to tape someone's conversation. (DEN 60,

Exh. 1, line 14; DEN 60, Exh. 1, line 23; DEN 56, Exh. B ¶ 10; DEN 56, Exh. 4).

On August 20, 2003, less than twelve hours after O'Shea's panel hearing, UPS' insurance carrier, Liberty Mutual faxed to O'Shea's workers compensation attorney notice that since O'Shea "does not work at UPS anymore" they requested to settle his permanent injury claim. (DEN 70, Exh. 5). However, UPS wrote O'Shea fifteen days later stating they were just "informed" of the panel decision. (DEN, Exh. 7). UPS' letter informed O'Shea that the arbitration panel issued a determination upholding O'Shea's termination. (DEN 52, Exh. E).

The panel decision awarded O'Shea full back pay, acknowledging he should have remained on the job. In so ruling, the arbitration panel determined O'Shea did not commit a cardinal infraction. (DEN 19, pg. 7, at FN 6; DEN 56, SUMF ¶¶ 11-14). O'Shea filed National Labor Relations ("NLRB") charges against the Union that he withdrew, choosing to pursue his claims in Federal Court. (DEN 56, Exh. B ¶ 19; DEN 56, Exh. 5). O'Shea filed NLRB charges against UPS. (DEN 25, Exh. 20). O'Shea filed a Freedom Of Information Act ("FOIA") lawsuit against the NLRB in ignoring O'Shea's request for his case file against UPS. The NLRB eventually admitted in that case that "no company policies or procedures exist" in the NLRB's file. (DEN 56, pg. 11; DEN 56, Exh. B ¶ 19). O'Shea filed this action in the U.S. District

Court for the District of Columbia. (DEN 1). The action was moved to Maryland. (DEN 10).

PROCEEDINGS BELOW

The district court dismissed O'Shea's cross-motion for summary judgment claim of breach of the Union's duty of fair representation, granted the Union summary judgment against O'Shea and for that reason granted UPS summary judgment dismissing O'Shea's claim of breach of the CBA and claim of violation of Maryland common law. (DEN 67). The district court reasoned that the Union had a "wide range of reasonableness", that the "record in the arbitration proceeding already establishes all material facts necessary to decide the pending summary judgment motions" and that "there was no evidence that the union committed any errors at all in representing plaintiff." (DEN 66). O'Shea timely appealed. (DEN 69).

ARGUMENTS

I. The District Court Erred In Dismissing O'Shea's Claim That The Union Breached Its Duty Of Fair Representation In The *Administration* Of The Contract In Handling O'Shea's Discharge Grievance And In Its Mandatory Obligation To *Bargain* Terms And Conditions Of Employment.

A. The Granting Of Summary Judgment To The Union Dismissing O'Shea's DFR Claims Should Be Reversed With Respect To The Union's Administrative Handling Of O'Shea's Discharge Grievance.

1. A Question of Policy.

The cornerstone of this action concerns a wrongful discharge dispute with respect to a company policy ("policy") never

presented on the record. UPS asserts that O'Shea violated a policy against the recording of conversations at UPS and/or employees who violate law. Throughout the record there is no policy presented, quoted, cited, shown it was bargained, or when and how it was implemented. Despite O'Shea's written request for an investigation to the Union for the policy, the Union refused to acquire one. No policy or evidence of one was presented at the local hearing, at the AAPGC panel committee hearing, the NLRB's investigation and in any motions filed by UPS and the Union that the district court could refer to. Former Local Union 639 President John Catlett disputes UPS' assertion a company policy exists:

> "I requested that UPS produce to the Union a copy of the Company's policy...Mr. Aaron claimed that UPS did not need to maintain a specific policy prohibiting the recording of conversations without consent, because Maryland had promulgated a statute which made such conduct a violation of state law. Accordingly, I did not receive a copy of any such policy in response to my request." (DEN 52, Exh. 2 ¶ 6).

At O'Shea's local discharge hearing (DEN 56, Exh. 10):

> Frank Gribbon to John Catlett: *Ever see policy on tape recorder?* John Catlett to Frank Gribbon: *No.*

John Catlett also stated at O'Shea's panel hearing:

> "And I do not remember a thing about where (inaudible) recording. I would certainly remember that. I was in the ah August 9th meeting in 2002, and I don't remember, I don't remember anything being said about, *you can't tape-record conversations anymore.* And I was in the January 22nd meeting too. I am not sure. *That never occurred in my*

presence-the Grievant being instructed-don't tape-record." (DEN 60, Exh. 1 at pg. 62). [Emphasis added.]

O'Shea also presented three affidavits of UPS employees who have never seen or was ever informed of a policy against using a tape recorder or recording conversations at UPS and saw other UPS employees using tape recorders and/or used a tape recorder themselves. (DEN 64, Exh.'s 14-15; DEN 56, Exh. 13).

One month after O'Shea's discharge for recording conversations in 2003, Robert Moorhead observed:

> "I have direct knowledge of rank-and-file UPS employees conducting electronic recording of conversations with management personnel while engaged in work activities, with the full knowledge of management (either concurrent with the recording or afterwards), resulting in no disciplinary action against the employee...On September 10, 2003...I specifically informed Mr. Rosentrator that employees were recording incidents of abuse in the workplace. He told me that he already knew of this, both from speaking with employees that morning, and in prior conversations with UPS management. He took no action against those involved." (DEN 56, Exh. 13).

2. A Question Of Relevant Witnesses.

The Union testified that at the hearing, "testimony was presented by all relevant witnesses." (DEN 52, pg. 5 ¶ 2). O'Shea showed that the relevant employees, similarly situated that the Union asserted were called to testify indeed were not called. A current officer of the defendant Union, business agent Ron Joseph informed O'Shea by email of occurrences when handing out O'Shea's campaign material (DEN 56, Exh. 12) to UPS employees and members of the Union after his discharge, stating:

> "I was talking to some delivery drivers about your case and unlike Mike, they are very disturbed that a 24 year man can be discharged *for things they do all the time . .* They said *they couldn't believe a 24 year man could be discharged for things they do.* Ron" (DEN 56, Exh. 11).

O'Shea showed evidence that the Union called only shop steward Donald Smith who was not even in O'Shea's center and had no personal knowledge of many of the events. The Union shunned all witnesses who were relevant witnesses. (DEN 64, pg. 6).

3. A Question of Unprocessed Grievances.

On March 5, 2003 O'Shea filed a grievance concerning the ongoing harassment. The Union gave O'Shea no reason for not processing it and UPS labor manager Mark Aaron admitted this grievance was untimely filed by the Union. (DEN 60, Exh. 1 pg. 60; DEN 64, Exh. A ¶ 13). Between May 13 and June 18 of 2003 O'Shea filed four more grievances that went unprocessed without explanation. (DEN 64, Exh. 5; DEN 64, Exh. A ¶ 15; DEN 64, Exh. 6; DEN 64, Exh. A ¶ 22).

In sum, with respect to O'Shea's claim that the Union breached its administrative duty in fairly representing O'Shea, to obtain summary judgment, the Union must properly file evidence supporting the motion. *Celotex Corp.*, 477 U.S. at 322-24. With respect to company policy, the district court did not consider that the Union produced no evidence that there was a policy and the Union even disputed that UPS had a policy. The district court merely relied in its memorandum on UPS' allegations in the

pleadings that it has an implicit provision of "any employer's personnel policies is that its employees not violate the law". This is unsupported by any evidence in the record, written or unwritten and the district court erred in determining that no material fact in dispute exists on this critical issue.

The district court acknowledged O'Shea's dissident status in its memorandum yet erred when it determined the Union provided wholly satisfactory representation even though O'Shea presented evidence that the Union did not call relevant witnesses and the Union did not process a number of O'Shea's grievances. The Griffin standard is clear:

> A union may refuse to process a grievance or handle the grievance in a particular manner for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority. *Griffin v. International U.*, United Automobile, 469 F.2d 183 (4th Cir. 1972.)

The union's discretion for a "wide range of reasonableness" does not exist in evaluating grievances as it does in contract negotiation. (DEN 56, pg. 4). *Thomas v. United Parcel Service, Inc.* clarified the two Supreme Court standards between *Vaca v. Sipes* and *Ford Motor Co.*:

> The application of the Vaca standard in the context of grievance procedures does not provide for union discretion within 'a wide range of reasonableness' - in contrast to the collective bargaining standard of [Ford Motor Co.] Schultz, 696 F.2d at 515. *Thomas v. United Parcel Service, Inc.*, 890 F.2d at ¶'s 43 and 44, (7th Cir. 1989).

Summary Judgment is appropriate only:

> When the court, viewing the record as a whole and in the light most favorable to the nonmoving party, finds no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-24, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).

B. The Dismissal Of O'Shea's Cross-Motion For Summary Judgment Should Be Reversed And Be Granted With Respect To The Failure Of The Union's DFR Claim As The Union Had An Obligation To Bargain Policies And Disciplinary Structures Whether New Or Altered.

O'Shea claims the Union breached its duty of fair representation in its mandatory obligation to bargain terms and conditions of employment. In the absence of a policy against tape recording or policy against violations of statutory law throughout the record and that other similarly situated employees used tape recorders and were not subject to discipline is evidence that not only was the policy new, but the application of it was discriminatory and unlawful under the National Labor Relations Act ("NLRA" or "The Act").

O'Shea has made a prima facie showing that genuine issues of material facts in dispute *do not exist* and the Union did breach its duty of fair representation and that UPS unlawfully discharged O'Shea by unilaterally instituting a new company policy. UPS and the Union unlawfully under the Act did not bargain or negotiate the new policy or the disciplinary structural change which are mandatory terms and conditions of employment of which the Union "cannot yield".

The NLRA requires covered labor organizations, section 8(b)(3), 29 U.S.C. § 158(b)(3), and employers, section 8(a)(5), 29 U.S.C. § 158(a)(5) to bargain collectively about "wages, hours, and other terms and conditions of employment." Section 8(d), 29 U.S.C. § 158(d).

The Union had a duty of fair representation as O'Shea's exclusive bargaining agent to negotiate and bargain over terms and conditions of employment that are mandatory subjects. A Supreme Court opinion noted that Congress, in amending the Act in 1947, refused to enact draft legislation which:

> Contained a specific listing of the issues subject to mandatory bargaining...make a conscious decision to continue its delegation to the Board of the primary responsibility of marking out the scope of the statutory language and of the statutory duty to bargain. *Ford Motor Co. v. NLRB*, 441 U.S. 488, 99 S. Ct. 1848-1849, 60 L. Ed. 2d 420 (1979).

The NLRB sets forth the standard:

> Employee work rules and particularly those that can lead to disciplinary actions constitute mandatory subjects of bargaining." It is immaterial "whether the rule change is good, bad, or indifferent. Whether the rule change was intended to accomplish a worthwhile result is not relevant. *Randolph Children's Home*, 309 NLRB 341, 343 at fn. 3 (1992).

Vaca v. Sipes was clear:

> Although N. L. R. A. § 8(b) was enacted in 1947, the NLRB did not until *Miranda Fuel* interpret a breach of a union's duty of fair representation as an unfair labor practice. In *Miranda Fuel,* the Board's majority held that N.L.R.A. §7 gives employees "the right to be free from unfair or irrelevant or invidious treatment by their exclusive bargaining agent in matters affecting their employment,"

> and "that Section 8(b)(1)(A) of the Act accordingly prohibits labor organizations, when acting in a statutory representative capacity, from taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair." 140 N.L.R.B., at 185. The Board also held that an employer who "participates" in such arbitrary union conduct violates § 8(a)(1), and that the employer and the union may violate §§ 8(a)(3) and 8(b)(2), respectively, "when, for arbitrary or irrelevant reasons or upon the basis of an unfair classification, the *union attempts to cause or does cause an employer to derogate the employment status of an employee." Vaca v. Sipes*, 386 U.S. 177-178 (1967) [Emphasis added.]

The NLRB's precedent is that the disciplinary penalty is what transforms the work rule from "expressions of opinion" into terms and conditions subject to mandatory bargaining:

> For purposes of determining if bargaining is mandatory, work rules should not be severed from their ensuing penalties, and an employer must bargain over the substance of the rules as well as the penalty, where the Board held that rules and their penalties should not be artificially severed because the attachment of penalties is what transforms the rules from expressions of opinion into terms and conditions of employment. *Peerless Publications*, 283 NLRB 334-35 (1987)

Both the Courts and NLRB have set well established precedent that unilateral implementation of disciplinary schedules constituted a material, substantial and significant change in a company's disciplinary rules and practices and is unlawful:

> Imposition of a system of specific disciplinary penalties constitutes a mandatory subject of bargaining...*This formalized ladder of discipline represents a marked change from the Respondent's past practice*...Respondent's unilateral implementation of disciplinary procedures as an enforcement mechanism for its unilaterally implemented drug and alcohol policy is as unlawful as the implementation of the policy itself. *Star Tribune*, 295 NLRB No. 543 at 563 (1989) citing *Peerless Publications*,

283 NLRB 334 (1987); *Tenneco Chemicals*, 249 NLRD 1176 (1980).

It is well established that an employer's disciplinary system constitutes "a term of employment that is a mandatory subject of bargaining." *Migali Industries*, 285 NLRB 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining); *Toledo Blade Co.*, 343 NLRB 51 (2004) citing *Electri-Flex Co.*, 228 NLRB 847 (1977) (written warning system of discipline held to be mandatory subject of bargaining), enfd. as modified 570 F.2d 1327 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978). Well established precedent of mandatory subjects of bargaining with respect to work rules and discipline can be cited throughout NLRB decisions - *Scepter Ingot Castings*, 331 NLRB 1509, 1516 (2000), enfd. 280 F.3d 1053 (D.C. Cir. 2002); *Murphy Diesel Co.*, 484 F. 2d 303; *Womac Industries*, 238 NLRB 243 (1978); *Ciba-Geigy Pharmaceutical*, supra; *NLRB v. Miller Brewing Co.*, supra, 408 F.2d at 15.

The Union's duty of fair representation applies to negotiation as well as administration:

> ...we have repeatedly noted that the Vaca v. Sipes standard applies to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." *Communications Workers v. Beck*,487 U.S. 735, 743 (1988) (internal citation omitted); see also *Electrical Workers v. Foust*, 442 U.S. 42, 47 (1979); *Vaca v. Sipes*, 386 U.S., at 177.

The Union had a duty to protect the terms and conditions of O'Shea's employment with respect to mandatory subjects:

> The bargaining representative's duty not to draw "irrelevant and invidious" distinctions among those it represents does not come to an abrupt end, as the respondents seem to contend, with the making of an agreement between union and employer. Collective bargaining is a continuing process. Among other things, it involves day-to-day adjustments in the contract and other working rules, resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating a collective agreement. *Conley et al. v. Gibson et al.*, 78 S. Ct. 99, 355 U.S. 46 (U.S. 11/18/1957)

The Union, in its duty of fair representation in bargaining terms and conditions of employment cannot yield:

> Read together, these provisions establish the obligation of the employer and the representative of its employees to bargain with each other in good faith with respect to 'wages, hours, and other terms and conditions of employment...' *The duty is limited to those subjects, and within that area neither party is legally obligated to yield. Air Line Pilots Association v. Joseph E. O'Neill et al.*, 111 S. Ct. 1127, 499 U.S. ¶ 38 (U.S. 03/19/1991) [Emphasis added.]

The district court erred in dismissing O'Shea's cross-motion for summary judgment. O'Shea put forth on the record evidence that no policy or tethered disciplinary structure was negotiated. Once a party has properly filed evidence supporting the motion for summary judgment, the nonmoving party may not rest upon mere allegations in the pleadings, but must instead

set forth specific facts illustrating genuine issues for trial. *Celotex Corp.*, 477 U.S. at 322-24:

> The plain language of Rule 56(c) mandates the entry of summary judgment...against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322.

It is undisputed that in all violations O'Shea was charged with committing, it was determined he did not commit a "cardinal infraction". (DEN 56, SUMF ¶¶ 12-14). UPS admitted "It is customary to issue warning letters to people that fail to follow instructions." (DEN 60, Exh. 1, pg. 89 line 12). The CBA requires a warning notice be given to an employee first absent a cardinal infraction. (DEN 64, Exh. 2, Art. 50 ¶ 1). With O'Shea, the disciplinary structure unilaterally changed without negotiation or bargaining when UPS summarily discharged him.

C. A Question Of Fair Representation At The Panel Hearing.

Defendants UPS and Union allege O'Shea's position was that the Union fairly represented him. The district court rests partially on its decision in its memorandum by excluding a key portion of the record. The court stated:

> At the conclusion of the arbitration hearing, the chairman of the panel asked plaintiff if he had been properly represented by his business agent and Local 639. In response, plaintiff stated 'they made a good presentation.'

The full record of O'Shea's response *when asked if he had been properly represented*:

> "They made a good presentation, but due to the fact that there are Labor Charges that the Union filed against UPS, that I had to file against UPS, that I filed against the Union, and what I said under oath today, *I can't say that I have.*" (DEN 60, Exh. 1, pg. 20-22). [Emphasis added.]

The district court in its memorandum errs by stating "plaintiff withdrew that [NLRB] charge *prior* to the arbitration panel rendering its decision." O'Shea's NLRB charge against the Union was filed four days prior to his panel hearing and O'Shea withdrew the charge *one month after the panel hearing* to pursue his claims in federal court. (DEN 56, Exh. B ¶ 19; DEN 56, Exh. 5). Further, on July 27, 2003, three weeks prior to O'Shea's discharge hearing O'Shea wrote to the Union questioning its representation. (DEN 56, Exh. 6, pg. 3-4).

Further, any question of what O'Shea believed at the end of the panel hearing becomes moot since the Union withheld critical information in representing O'Shea. In July, 2003 Catlett requested from labor manager Mark Aaron company policy and Aaron replied the company did not need one. (DEN 52, Exh. 2 ¶ 6)

At O'Shea's panel hearing on August 19, 2003, the Union never objected when UPS represented to the panel, arbitrator or O'Shea that a company policy *did exist* and O'Shea violated it. (DEN 60, Exh. 1, pg. 19 lines 14-16). The Union withheld UPS' admission one month earlier. The district court did not consider the evidence and all inferences reasonably drawn therefrom in the light most favorable to O'Shea, the nonmoving party. *Strother v.*

Lexington County Recreation Comm'n, 332 S.C. 54, 61, 504 S.E.2d 117, 121 (1998). Summary judgment for the Union should not have been granted.

II. The District Court Erred In Dismissing O'Shea's Claim That The Panel Committee And Arbitrator Exceeded Its Authority By Failing To Draw Its Essence From The CBA And Ignored A Key Provision Of The CBA.

A. The Panel And Arbitrator Exceeded Their Authority And The Essence Of Their Decision Was Not Drawn From The CBA. Vacating O'Shea's Discharge Is Just.

UPS nor the Union presented a company policy either at O'Shea's panel hearing or in the district court record. Instead, the panel committee and arbitrator looked beyond the CBA to legislative law and relied on by the district court in its memorandum, "Plaintiff's employment was terminated because he secretly taped conversations he has with another person without the other person's consent, see Md. Code Ann. § 10-402(c)(3)."

The parties do not dispute that both UPS and the Union's basis for O'Shea's discharge for using a tape recording arose from *enacted law*. Former UPS labor manager Mark Aaron's testimony at the panel hearing included reading the Maryland Wiretap and Electronic Surveillance Act 10-402 into the record, (DEN 60, Exh. 1, page 17; DEN 64, Exh. 16), and case preparation:

> "Matt did the legal research for me, and we went down and we talked about it and so forth with regards to wire-tapping and Maryland statutes." (DEN 60, Exh. 1, page 53).

Teamsters Union Officer Ron Candler's testimony included:

> MR. CANDLER: That is middle district. Would you agree that the *laws of tape recording vary from state to state?*
> MR. AARON: Correct. I know that Virginia is different than Maryland, yes.
> MR. CANDLER: *I am only familiar with North and South Carolina,* but I know that. *My question was we can always review each state as to what can be recorded, and what cannot?* MR. AARON: *Correct.* [Emphasis added.]
> (DEN 60, Exh. 1, pg. 80).

The district court in its memorandum opines "an implicit provision of any employer's personnel policies is that its employees not violate the law" and UPS argues that "common sense dictates that an employer does not need a written policy prohibiting conduct that already has been criminalized by the state legislature." (DEN 62, pg. 7). These positions are contrary to controlling authority and the district court ignored precedent set by the courts and the NLRB.

The NLRB has long held that the implementation of a policy is a mandatory subject of bargaining, even if it is illegal conduct. *Johnson-Batemann Co.*, 295 NLRB 180, 182-84 (1989):

> This is true despite the fact that the underlying employee conduct is not only unprotected, *but most often illegal*. . since the rule certainly impacts employees' terms and conditions of employment. *WGE Federal Credit Union*, 25-CA-29101, JD(ATL)-27-05, page 7, Lawrence W. Cullen, 8/10/05.
>
> As the General Counsel observed in his brief, "While there may be a public policy against criminal drug use, there is no clear public policy against employment of drug users. *Bath Iron Works Corp.*, 302 NLRB No. 143 at 914 (1991)

UPS asserts that the arbitrator simply did not accept the Union's argument in light of the statute and in light of

O'Shea's refusal to cease recording. (DEN 62, pg. 7 at fn 4). UPS' presentation to the panel was Maryland statute and the panel committee and arbitrator took it upon themselves to engage in judicial fact-finding to decide that O'Shea committed a criminal act. It is not for a panel committee or arbitrator to assert themselves as a public tribunal. The courts have paved well-established law with respect to a panel committee's and arbitrator's role:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He is rather part of a system of self-government created by and confined to the parties. *United Steelworkers America V. Warrior & Gulf Navigation Co.*, 80 S. Ct. 1347, 363 U.S. 574 ¶ 32 (U.S. 06/20/1960) See *Shulman, Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016.
>
> The special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation. Among these is the fact that the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581-583 (1960).
>
> The resolution of statutory or constitutional issues is a primary responsibility of courts. Moreover, the factfinding process in arbitration usually is not equivalent to judicial factfinding. See *Bernhardt v. Polygraphic Co.*, 350 U.S. 198, 203 (1956); *Wilko v. Swan*, 346 U.S., at 435-437; *McDonald v. City West Branch*, 104 S. Ct. 1799, 466 U.S. ¶ 30 (U.S. 04/18/1984)

B. The Panel And Arbitrator Ignored A Key Provision Of The CBA And Vacating O'Shea's Discharge Decision Is Just.

An arbitration decision arises from the terms of a CBA and judicial review is narrowly limited. Courts do afford great deference to arbitral awards. Accordingly, a court must affirm an arbitral award "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority . . . ." *United States Postal Svc. v. American Postal Workers Union*, 204 F.3d ¶ 27 (4th Cir. 2000) and if the arbitrator has not exceeded his authority, a court may not vacate the resulting award just because the court is convinced that he "committed serious error." Id.

> As long as the arbitrator's decision 'draws its essence from the collective bargaining agreement' and the arbitrator is not fashioning 'his own brand of industrial justice,' the award cannot be set aside. *Misco*, 484 U.S. at 38).

In O'Shea's discharge hearing, the panel and arbitrator's decision found O'Shea had not committed any cardinal infraction (DEN 56, SUMF ¶ 12) but ignored the CBA's provision that to discharge O'Shea he must have received a warning notice in the preceding nine month period. O'Shea had no current warning notice. (DEN 60, Exh. 1, pg. 23, line 12). Yet defendant UPS violated the CBA and discharged O'Shea when a warning notice was required before discharge. The arbitrator ignored the critical provision of the CBA requiring a warning notice and stated "discharge is appropriate". (DEN 64, Exh. 1). The arbitrator's

authority with respect to O'Shea's discharge was limited by the parties CBA:

> ARTICLE 49 - GRIEVANCE PROCEDURE, Section 5
> The arbitrator shall have the authority to apply the provisions of this Agreement, and to render a decision on any grievance coming before him, but *shall not have the authority to amend or modify this Agreement or establish new terms and conditions under this Agreement.*
> [Emphasis added.] (DEN 64, Exh. 2).

The National Master Agreement in Article 7 and Article 50 set out categorical and mandatory rules. The CBA provision with respect to cardinal infractions:

> ARTICLE 7. LOCAL AND AREA GRIEVANCE MACHINERY
> Except in cases involving cardinal infractions under the applicable Supplement, Rider or Addendum, an employee to be discharged or suspended shall be allowed to remain on the job, without loss of pay unless and until the discharge or suspension is sustained under the grievance procedure. Notwithstanding the foregoing, any superior provisions in Supplements, Riders or Addenda shall prevail. (DEN 64, Exh. 17).

The parties CBA sets forth the requirements of a warning notice prior to discharge in non-cardinal infractions:

> ARTICLE 50 - DISCHARGE OR SUSPENSION
> The Employer shall not discharge nor suspend any employee without just cause *but in respect to discharge or suspension shall give at least one warning notice of a complaint against such employee to the employee, in writing...* (DEN 64, Exh. 2).

Read together, these provisions unambiguously prohibit UPS from discharging an employee for a reason that is not a cardinal infraction unless the employee has received a warning notice *and* until the discharge has been sustained in arbitration. The

arbitrator exceeded his authority by ignoring the plain language of the CBA, by deciding that discharge is appropriate based on his own opinions and judgment, and by ignoring O'Shea's right to have been given at least one warning notice of complaint. The arbitrator's award should be vacated because it does not "draw its essence" from the CBA.

In a similar case, *Hawaii Teamsters v. UPS* (except in that arbitrator's decision found the employee had committed a cardinal infraction, while *O'Shea in this action did not*) stated:

> When read together...can arguably be construed as *prohibiting UPS from discharging an employee for a reason that is not one of the seven cardinal infractions unless the employee has received a warning notice and until the discharge has been sustained in arbitration*...To be sure, an arbitrator's award is not bulletproof. In Garvey, we summarized the rare circumstances where we may upset an arbitrator's award: The general rule [of refusal to review the merits of an arbitral award], the [Supreme] Court noted, is inapplicable when an arbitrator "dispense[s] his own brand of industrial justice." [Enterprise Wheel,] 363 U.S. at 597. In those instances — instances in which, by definition, an arbitrator's award draws no legitimacy from the collective bargaining agreement — a court has no choice but to refuse enforcement of the award . . The only plausible reading of the CBA is that, in an arbitration challenging a summary discharge, the arbitrator is limited to deciding the factual questions whether the employee (1) committed an enumerated cardinal infraction; and (2) received a warning in the preceding nine month period. If these predicate facts do not exist, an arbitrator may not uphold a discharge based on principles of "reasonableness" or "just cause." The arbitrator in this case exceeded the limited factfinding role that the parties bargained for and set forth in detail in the CBA. Therefore, "the arbitrator's award represents an invalid exercise of the power the parties have entrusted to him." Stead, 886 F.2d

at 1206 n. 6. *Hawaii Teamsters v. UPS*, 241 F.3d (9th Cir. 1182-1183, 1185-1186.

When a panel and arbitrator ignores relevant CBA provisions, the award must be vacated. *United States Postal Svc. v. American Postal Workers Union*, 204 F.3d 523, 528 (4th Cir. 2000)(vacating arbitral award in which the arbitrator relied on one provision of the agreement, but ignored another provision which limited his authority).

III. The District Court Erred In Dismissing O'Shea's Claim Of Retaliation By UPS For Filing A Workers Compensation Injury In Violation Of Maryland Common Law.

A. Dismissal Of O'Shea's Claim Of Retaliation In Violation Of Maryland Common Law Should Be Reversed And Remanded To Maryland State Court.

O'Shea filed a work-related injury claim (DEN 70, Exh. 1), filed twenty-five letters and grievances in response to UPS' actions (DEN 25, Exh. 6) in the eleven months between the Maryland Workers Compensation award (DEN 70, Exh. 3) and O'Shea's termination, and Liberty Mutual faxed a settlement offer within twelve hours of the panel committee/arbitrator's decision (DEN 70, Exh. 5) despite UPS' assertion they "just" received notice of the decision fourteen days later. (DEN 70, Exh. 7). O'Shea's evidentiary showing of the absence of any policy, that the panel committee and arbitrator's decision did not draw its essence from the CBA but from enacted law and that similarly situated employees "did the same thing all the time"

and were not discharged presents a genuine material fact in dispute that could lead a jury to infer that O'Shea's discharge was indeed retaliation for the workers compensation injury claim. O'Shea's claim that his discharge was retaliatory and violated Maryland common law does not require the interpretation of a collective bargaining agreement as the state tort remedy is not pre-empted by Section 301 of the Labor Management Relations Act. As the Supreme Court expressed in Lingle v. Norge:

> [T]o show retaliatory discharge, the plaintiff must set forth sufficient facts from which it can be inferred that (1) he was discharged or threatened with discharge and (2) the employer's motive in discharging or threatening to discharge him was to deter him from exercising his rights under the Act or to interfere with his exercise of those rights."...Each of these purely factual questions pertains to the conduct of the employee and the conduct and motivation of the employer. Neither of the elements requires a court to interpret any term of a collective-bargaining agreement. To defend against a retaliatory discharge claim, an employer must show that it had a nonretaliatory reason for the discharge...this purely factual inquiry likewise does not turn on the meaning of any provision of a collective-bargaining agreement. Thus, the state-law remedy in this case is "independent" of the collective-bargaining agreement in the sense of "independent" that matters for 301 pre-emption purposes: resolution of the state-law claim does not require construing the collective-bargaining agreement. *Lingle V. Norge Division Of Magic Chef, Inc.*, 486 U.S. 399 (1988)

The district court erred in dismissing O'Shea's state-tort retaliatory claim and should have remanded it to the state court.

IV. The District Court Abused Its Discretion In Denying Recusal, Retransfer And Meaningful Discovery.

In UPS' motion to dismiss, they accused O'Shea of committing a crime and in so doing O'Shea filed a complaint with the Maryland Attorney Grievance Commission. The Commission stated "even though the arbitrators did not mention the Maryland wiretapping act but obviously referred to the wiretapping." (DEN 41, Exh. 6). The Attorney Grievance Commission members are appointed by the Court of Maryland Appeals, entertains actions in Maryland Rule 16 and the Attorney Grievance Commission is inexorably intertwined with the Maryland judicial system and Maryland rules. As this was occurring, this case extended for six-hundred days after O'Shea filed his complaint without any scheduling order, conference hearing or discovery period, approaching two years since the case was filed. O'Shea requested a retransfer of his action to the U.S. District Court for the District of Columbia for an impartial venue. (DEN 41). Before O'Shea could reply to UPS' response, the district court requested the Union to advise the court why it would not be appropriate for the Union to file a motion for summary judgment. (DEN 49, Exh. 5).

O'Shea was placed in a position to respond to a summary judgment without meaningful discovery, even though the *defendants themselves engaged in limited discovery when UPS aided the Union by submitting a sixteen paragraph affidavit by former UPS labor manager Mark Aaron for the Union's summary judgment motion* (DEN 52, Exh. 1) while denying O'Shea the same

discoverable opportunity. The district court granted summary judgment to the defendants without giving O'Shea meaningful discovery.

O'Shea filed this action on February 14, 2004, over seven-hundred and sixty (760) days until the district court's final order and there was no scheduling order entered and subsequently no meaningful discovery allowed. Under Maryland local rule, discovery cannot begin until a scheduling order has been entered. (DEN 56, pg. 2, Pl. Rule 56f motion). Summary judgment is appropriate as the Supreme Court noted only after discovery:

> In our view, the plain language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); *Temkin v. Frederick County Comm'rs*, 945 F.2d 716, 719 (4th Cir. 1991).
>
> Summary judgment must be refused where the nonmoving party has not had the opportunity to discover information that is essential to his opposition. *Anderson*, 477 U.S. at 250 n.5.

O'Shea was not accorded the right to be heard and unfairly disadvantaged by facing a motion for summary judgment without meaningful discovery in the two-year history of O'Shea's action and in such circumstances, a question of impartiality could be raised:

> The question is...simply whether another, not knowing whether or not the Judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances. *Aiken County v. BSP Div. of Envirotech Corp.*, 866 F.2d 661, 679 (4th Cir. 1989).

Respectfully, the district court abused its discretion in denying recusal, (DEN 47 and 49), retransfer (DEN 41 and 45) and meaningful discovery. (DEN 56 and 64). As the district court noted in its memorandum, "a plaintiff has a very heavy burden to meet in order to prevail on a breach of duty of fair representation claim." In light of the district court's own statement, even more so the reason O'Shea should not have been denied the clear mandate of discovery in Rule 56.

V. Did The Court Err In Dismissing O'Shea's Claim That The Panel Committee And Arbitrator Both Exceeded And Ignored Critical Provisions Of The Applicable CBA Because The Court Did Not Find The Union In Breach Of Their Duty Of Fair Representation, A Question Of First Impression.

The court's memorandum stated that:

> a plaintiff may proceed with a §301 claim against his employer only if he has first prevailed on his fair representation claim against the union. Therefore, my granting summary judgment to Local 639 on the fair representation claim entitles UPS to summary judgment on plaintiff's §301 claim as well.

In so ruling, the court cited three cases where the only question before those courts was the Union's duty of fair representation. *Breininger v. Sheet Metal Workers Int'l Assoc. Local Union No. 6*, *Ash v. United Parcel Service, Inc.* and an unpublished opinion in *Thomas v. Siemens VDO Automotive Corp.* Those courts were not presented with the issue that the panel committee or arbitrator exceeded or ignored provisions of the CBA.

The court's ruling establishes precedent and the question becomes *must a plaintiff in a §301 hybrid action prevail on a fair representation claim first in order to proceed with a claim that the panel committee and arbitrator's decision did not arise from the essence of the CBA.*

Major League Players Assoc. v. Garvey and *Hawaii Teamsters and Allied Workers Union Local 996 v. United Parcel Service, Inc.* are the only two cases remotely associated with this question. Garvey was a §301 action against his Union while Hawaii Teamsters was a §301 action against the company. Neither case presented a breach of fair representation claim nor was either plaintiff required to prevail on such a claim to pursue claims that the arbitrator exceeded his authority. O'Shea argues that a breach of DFR claim and an arbitrator exceeding his authority are not tethered to each other and the court incorrectly dismissed O'Shea's claim with respect to the panel committee's and arbitrator's decision.

Standard of Review

Summary judgment rulings from a district court are reviewed de novo, viewing the facts and inferences drawn therefrom in the light most favorable to the non-moving party. *Seabulk Offshore, Ltd. v. Am. Home Assurance Co.*, 377 F.3d 408, 418 (4th Cir. 2004).

CONCLUSION

1. Summary judgment granted to the Union should be vacated and O'Shea's case transferred to the original court in the District of Columbia for discovery on O'Shea's claim that the Union breached its DFR in its administrative handling of O'Shea's discharge grievance;

2. Summary judgment denied to O'Shea should be reversed and granted on O'Shea's claim that the Union breached its DFR in its obligation to bargain terms and conditions of employment;

3. Summary judgment granted to UPS should be vacated and remanded with judgment entered that UPS unlawfully discharged O'Shea for unilaterally implementing new policy and disciplinary procedures that must be bargained and negotiated and transferred to the original court in the District of Columbia for discovery on O'Shea's breach of contract claims;

4. Summary judgment granted to UPS should be vacated and remanded to Maryland state court on O'Shea's common law claim;

5. The arbitrator's decision should be vacated in discharging O'Shea for exceeding his authority within, and ignoring a key provision of, the CBA;

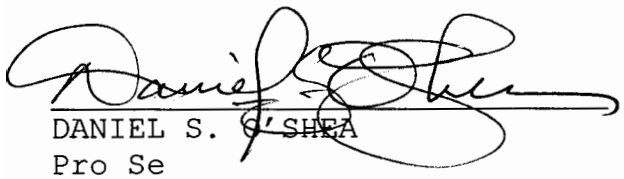
6. Award O'Shea such other and further relief as may be deemed just and equitable, including reinstatement;

7. To order the recovery of pay, health & welfare benefits, retirement benefits and any compensatory and punitive damages;

8. The court to take such action as is necessary to ensure that the effects of the unlawful actions are eliminated;

9. To order the recovery of reasonable attorney fees, legal expenses and other costs of this action.

Respectfully submitted this 11th day of May, 2006.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11th day of May, 2006, a copy of the foregoing Informal Brief was sent via U.S. Express Mail addressed to:

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