

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

**PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC**

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PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

I. INTRODUCTION

Appellant Daniel S. O'Shea received notice on December 18, 2006 that the Fourth Circuit Court of Appeals, case number 06-1460 had reached a disposition in an unpublished opinion stating:

We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court. O'Shea v. Local Union No. 639, No. 8:05-cv-00937-JFM (D. Md. Aug. 4, 2006).

Under the Federal Rules of Appellate Procedure, O'Shea petitions for rehearing and rehearing en banc. The purpose for this petition is to direct the Court's attention that one or more of the following situations exist with respect to each of the questions O'Shea presented to the Fourth Circuit Court of Appeals:

1. Material facts and law were overlooked in the decision;
2. The opinion is in conflict with decisions of the United States Supreme Court and other court of appeals and this conflict is not addressed in the opinion, and;
3. The proceeding involves one or more questions of exceptional importance.

O'Shea presented five questions to the Fourth Circuit Court of Appeals. The panel that issued the unpublished disposition deferred to the lower court and offered no explanation except to "affirm for the reasons stated by the district court."

Thus, the lower court's decision becomes the controlling opinion of the Fourth Circuit's unpublished disposition O'Shea must reference in the foregoing Statement. (Attached Fourth Circuit Court of Appeals Unpublished Disposition in Case 04-1460 citing O'Shea v. Local Union No. 639, No. 8:05-cv-00937-JFM, Fourth Circuit Court of Appeals Judgment in Case 04-1460 citing 8:05-cv-00937-JFM, Memorandum in the U.S. District Court for the District of Maryland Civil No. JFM-05-937, Order in the U.S. District Court for the District of Maryland Civil No. JFM-05-937.)

STATEMENT

O'Shea's questions presented were either not addressed in the panel's disposition, and or presented a conflict with law, another Court of Appeals or Supreme Court opinion, and or involves a question of exceptional importance.

I. O'Shea's First Question 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").

A. The First Part Of O'Shea's Question Related To His Claim That The Union Breached Its Administrative Duty Of Fair Representation In Handling His Discharge Grievance.

The Fourth Circuit panel in the unpublished disposition deferred to the lower court without explanation and the lower court ignored a critical material fact.

For over three years, O'Shea requested from United Parcel Service, Inc. ("UPS"), Teamsters Local Union 639 ("the Union"), the National Labor Relations Board ("NLRB" or "the Board") and in the lower court the policy UPS and the Union relied upon alleging that O'Shea's fifteen year use of a tape recorder violated company policy.

It was not until the Union's summary judgment motion was filed that UPS and the Union admitted that in July, 2003, one month before O'Shea's panel hearing, UPS stated to the Union "a company policy was not needed."

However, a month later, in August of 2003 at O'Shea's panel hearing, UPS stated to the panel committee and the arbitrator that O'Shea did violate a company policy by using a tape recorder.

O'Shea alleges it was unreasonable and in complete bad faith that the Union did not object and withheld UPS' disclosure from the panel, the arbitrator and O'Shea of UPS' admission one month prior that a policy was not needed while UPS was representing to the panel that O'Shea violated company policy. (Reference O'Shea's Informal Brief at pp. 6-8 and Informal Reply Brief at pp. 1-5).

This is a material fact that was overlooked and was not addressed in the deferred disposition and in the lower court's

opinion. The lower court does not address the material fact of the union's non-disclosure to the panel committee or arbitrator. A jury could infer by the Union's actions that withholding a critical admission of non-existent company policy was indeed, in bad faith.

B. The Second Part Of O'Shea's Question Related To O'Shea's Claim That The Union Breached Their Duty Of Fair Representation By Ignoring It's Obligation To Bargain Terms And Conditions Of Employment.

The National Labor Relations Act ("NLRA" or "The Act") provides:

"The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8 [section 158 of this title]) affecting commerce.

This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise."

Under the Act, the NLRB has broad authority to determine what are to be considered unfair labor practices. O'Shea cited multiple National Labor Relations cases that its applicable precedent is that policies regarding work rules and work penalties are terms and conditions of employment that a company and union by mandate are obligated to bargain and cannot "yield" and that such policies cannot be unilaterally imposed. (Reference O'Shea's Informal Brief at p. v and Informal Reply Brief at p. v).

O'Shea also cited *Vaca v. Sipes*, 386 U.S. 177-178 (1967)(that failure to bargain is both an unfair labor practice and a breach of a union's duty of fair representation.)

The Union and UPS admitted on the record that no policy existed for what O'Shea was terminated for - violating company policy by using a tape recorder and recording employment related and employment misconduct related conversations.

In O'Shea's cross-motion for summary judgment, O'Shea established that there was no material fact in dispute - that UPS and the Union admitted there was no policy and with that admission and O'Shea put forth applicable law and precedent of a company and union's obligation to bargain.

The failure by the appellees was an unlawful act and a breach of the union's duty of fair representation in its obligation to bargain terms and conditions of employment.

The material fact that UPS and the Union did not bargain the terms and conditions of employment O'Shea was terminated for was not addressed in the Fourth Circuit's disposition or lower court Memorandum.

Further, the lower court relies on UPS' assertion that "an implicit provision of any employer's personnel policies is that its employees not violate the law" even though O'Shea disputed such a policy existed as no supporting evidence was ever introduced and the lower court rested its decision on an

unsubstantiated allegation. The Fourth Circuit's disposition did not address this material fact in dispute.

The Fourth Circuit's disposition and lower court's Memorandum conflicts with the NLRB's applicable precedent, applicable court precedent and law set forth, established and defined by the National Labor Relations Act ("the Act"). (Reference O'Shea's Informal Brief at pp. 11-16 and Informal Reply Brief at pp. 5-16.)

The decision conflicts with Supreme Court precedent and with the U.S. Court Of Appeals for the District of Columbia circuit, *Brewers and Maltsters Local 6 v. NLRB*, No. 04-1278 (D.C. Cir. July 5, 2005) and this conflict is not addressed in the unpublished disposition or in the lower court.

II. O'Shea's Second Question Presented.

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

UPS asserted:

"The arbitration panel, however, correctly did not accept the Union's argument in light of Maryland criminal statute."

O'Shea put forth applicable Supreme Court precedent, citing multiple cases:

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.

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 America v. Warrior & Gulf Navigation Co.*, 80 S. Ct. 1347, 363 U.S. 574, ¶ 32 and 581-583. (U.S. 06/20/1960).

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).

The Fourth Circuit's disposition and the lower court's decision not only conflicts with Supreme Court opinion, it raises a serious question of importance - can a company invoke statutory law and interpret that law, absent policy, and terminate employees without bargaining. And further, require that employee to confront a panel and arbitrator that interprets statutory law instead of what the parties agreed to, interpretations of a collective bargaining agreement.¹ (Reference O'Shea's Informal Brief pp. 18-20 and Informal Reply Brief pp. 19-20.)

¹ It is undisputed that O'Shea was never charged or convicted of violating the Maryland Wiretap Act. It is also undisputed that O'Shea was denied an attorney at the panel hearing in defense of criminal charges, denied due process rights of a jury of his peers and denied fundamental discovery rights critical to the preparation of his defense in the face of alleged criminal misconduct based upon interpretations of a state's criminal statute.

The lower court opined in agreement with UPS' quote of statutory law at and during O'Shea's panel hearing in front of the arbitrator:

"It is a violation of Maryland law for someone to tape conversations he has with another person without the other person's consent, see Md. Code Ann. §10-402(c)(3)."

However, UPS' quote to the panel and arbitrator, and the lower court's quote in its decision of the Maryland statute is incorrect, quoted only in-part and the interpretation of it ignores the Supreme Court's precedent that there is no right to privacy where work-related or employee misconduct-related issues are involved.

The correct Maryland statute specifically reads:

(3) It is lawful under this subtitle for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception unless the communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of this State.

Under §10-401. Definitions of the Maryland wiretapping act, wire communications and electronic communications do not apply as O'Shea was fired for using a tape recorder during a meeting concerning employment conversations that involved possible employee misconduct:

(1) "Wire communication" means any aural transfer made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and

the point of reception (including the use of a connection in a switching station) furnished or operated by any person licensed to engage in providing or operating such facilities for the transmission of communications.

(11) (i) "Electronic communication" means any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic, or photooptical system.

The only possible communication within the UPS office where the meeting was being held with multiple company officials was an oral communication. Under the Maryland Statute, the definition of an oral communication is:

2(i) "Oral communication" means any conversation or words spoken to or by any person in private conversation. [Emphasis added.]

The Supreme Court has established that there is no fourth amendment right to privacy in matters that are employment related or that involve matters of employee misconduct:

Similarly, the concept of probable cause has little meaning for a routine inventory conducted by public employers for the purpose of securing state property. See *Colorado v. Bertine*, 479 U.S. 367 (1987); *Illinois v. Lafayette*, 462 U.S. 640 (1983). To ensure the efficient and proper operation of the agency, Therefore, public employers must be given wide latitude to enter employee offices for work-related, noninvestigatory reasons. We come to a similar conclusion for searches conducted pursuant to an investigation of work related employee misconduct. Even when employers conduct an investigation, they have an interest substantially different from "the normal need for law enforcement." *New Jersey v. T. L. O.*, supra, at 351 (BLACKMUN, J., concurring in judgment). Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-

related misfeasance of its employees. *O'Connor v. Ortega*, 480 U.S. 723-724 (1987)

The Fourth Circuit panel in the unpublished disposition deferred to the lower court without explanation and the lower court's decision never addressed these points of law or the material facts in dispute that O'Shea never admitted to violating law. O'Shea's only admission was that UPS and the Union were aware of his use of a tape recorder for fifteen years, O'Shea had submitted four letters of notification to UPS of his use of a tape recorder prior to his termination and was never disciplined until after his workers compensation claim.

The right to privacy issue is not addressed in the unpublished disposition or in the lower court with respect to the court's citation or interpretation of Maryland's wiretapping law or in respect to Supreme Court precedent.

Moreover, the Fourth Circuit's disposition does not address that the lower federal court has no jurisdiction to interpret a state's criminal statutory law.

III. O'Shea's Third Question Presented.

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

With the Fourth Circuit deferring without explanation to the lower court, the Fourth Circuit panel did not address material facts or law with respect to question 3.

O'Shea put forth evidence that after filing a workers compensation claim, he filed twenty-five letters and grievances concerning harassment and retaliation by UPS that subsequently ended with his termination.

O'Shea claims that UPS' actions were in retaliation for filing a workers compensation claim. O'Shea put forth evidence that other similarly situated employees "did the same thing he did" yet were not harassed or discharged. UPS claims the termination was a result of violating statutory law, thus, a material fact in dispute exists. (Reference O'Shea's Informal Brief pp. 24-25 and Informal Reply Brief p. 23.)

O'Shea cited two Supreme Court decisions addressing this question.

Lingle v. Norge Division Of Magic Chef, Inc., 486 U.S. 399 (1988)(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.)

Alexander v. Gardner-Denver Co., 415 U.S. 35 (1974) (statutory rights conferred on individuals "can form no part of the collective-bargaining process", the Court found that the contractual right to just cause employment and statutory right "have legally independent origins and are equally available to the aggrieved employee."

The Fourth Circuit panel in the unpublished disposition deferred to the lower court without explanation and the lower court's dismissal of O'Shea's claim did not address the points

of law, the material fact in dispute or the conflict with Supreme Court opinion and precedent.

The exceptional importance of such a disposition is that it denies any employee under a collective bargaining agreement from legally claiming statutory rights that he will not be retaliated against for filing a workers compensation claim in the state of Maryland or in the jurisdiction of the Fourth Circuit.

Just as important, the Fourth Circuit's opinion holding that a union employee, under an existing collective bargaining agreement cannot invoke a state statute to seek redress for a claim of retaliation but can be discharged on an interpretation of a state statute is wholly inconsistent and conflicting which does raise a question of serious importance.

IV. O'Shea's Fifth Question Presented.

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.

O'Shea also cited *Major League Players Assoc. v. Garvey*. Garvey, as a member of a Union filed a section 301 action that the arbitrator exceeded his authority and was not required to and did not claim the Union failed to represent to pursue his claim through the Ninth Circuit Court of Appeals and to the Supreme Court. (Reference O'Shea's Informal Brief pp. 28-29.)

The Fourth Circuit panel in the unpublished disposition deferred to the lower court and the lower court's decision never addressed this conflict with the Supreme Court in Garvey and dismissed this claim, without explanation.

CONCLUSION

For all of the aforementioned reasons and reasons as stated in appellant's Motion To Stay The Issuance Of The Mandate, O'Shea respectfully requests rehearing and rehearing en banc. Respectfully submitted this 27th day of December, 2006.

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Pro Se