IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF MESQUITE,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT FOR THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE,

Respondents,

and

DOUGLAS SMAELLIE,

Real Party in Interest.

_____/

Docket No. 75743
District Ct. Case No. A-17-759770-C

REAL PARTY IN INTEREST'S SUPPLEMENTAL ANSWERING BRIEF

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DISCLOSURE STATEMENT PURSUANT TO NRAP 26.1

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Daniel Marks, Esq. and Adam Levine, Esq. of the Law Office of Daniel Marks. There are no parent corporations.

Attorneys for Real Party in Interest Douglas Smaellie.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

REAL PARTY IN INTEREST'S SUPPLEMENTAL ANSWERING BRIEF

In its Order filed February 26, 2019 this Court requested supplemental briefing on 3 issues asserted by *amici curiae*:

(1) Nevada law provides an administrative process to adjudicate a claim of breach of the duty of fair representation, and NRS 288.110(4) requires the claim be brought before the administrative board (the Employee-Management Relations Board) within six (6) months after it arises. If that claim is not raised within the six (6) month limitations period, then it, and by necessity any hybrid action relying on that claim, is untimely.

(2) The Employee-Management Relations Board has exclusive original jurisdiction over a claim of breach of the duty of fair representation, and this court has specifically rejected the exception recognized in *Vaca v. Sipes*, 386 U.S. 171, 190 (1967), allowing a private-sector employee to bring a hybrid action in court in the first instance. See *Rosequist v. Int. Ass'n of Firefighters Local 1908*, 118 Nev. 444, 49 P.3d 651 (2002), modified by *City of Henderson v. Kilgore*, 122 Nev. 331, 336 n.10, 131 P.3d 11, 15 n.10 (2006), and *Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 573 n.22, 170 P.3d 989, 995 n.22 (2007).

(3) To the extent that this court previously suggested in *Clark County v. Tansey*, Docket No. 68951 (Order of Affirmance, March 1, 2017), that a claim of breach of the duty of fair representation could be adjudicated in district court as part of a hybrid action, that decision was wrong and relied on inapplicable federal private-sector labor law.

Real party in interest Douglas Smaellie believes that these arguments are more efficiently addressed in reverse order as laid out in the court's Order of February 26, 2019.

I. THIS COURT'S UNPUBLISHED DECISION IN *CLARK COUNTY V. MARK TANSEY* WAS CORRECTLY DECIDED AND THE PRIVATE SECTOR APPROACH UPON WHICH IT WAS BASED HAS BEEN ADOPTED BY OTHER STATES.

In *Clark County v. Mark Tansey*, Docket No. 68951 a three (3) Justice panel of this Court affirmed a judgment of the district court for breach of a collective bargaining agreement in favor Mark Tansey against his former employer Clark County. Tansey had been terminated as a code enforcement officer based upon a false accusation that he had a firearm in a County vehicle. While he sought to grieve his termination through his union, the union breached its duty of fair representation by failing to advance his meritorious grievance to arbitration.

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Tansey had originally filed both the breach of contract action and the breach of duty of fair representation action before the State of Nevada Local Government Employee Management Relations Board ("EMRB"). The EMRB dismissed the claim against Clark County holding it lacked jurisdiction over a breach of contract claim. Tansey filed a petition for judicial review of this dismissal with the district court which affirmed the decision of the EMRB and further concluded that the breach of contract action could proceed before the court.[1]

In that breach of contract action before the district court Tansey proceeded under two (2) separate but recognized approaches: the approach from the private sector under the Labor Management Relations Act which requires a showing that the union breached its duty of fair representation in order to excuse compliance with contractual remedies such as arbitration, or alternatively the approach from *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983) which holds that the employee does not have to prove an actual breach of the duty of fair representation, and only need demonstrate that he/she attempted to exhaust the contractual remedies before resorting to judicial enforcement. The district court determined that it did not need to decide which approach the Nevada Supreme Court would likely utilize holding that under the facts of the case Tansey would prevail under either standard.

[1] Undersigned counsel represented Mark Tansey.

On appeal this Court affirmed the judgment of the district court and adopted for the purpose of that unpublished disposition the federal approach from *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967) and *DelCostello v. International Brother Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983). (Order of Affirmance March 1, 2017). Clark County filed a Petition for Rehearing pursuant to NRAP 40(a)(2) raising the same arguments as raised by *amici* in the Douglas Smaellie case – that there is no basis under Nevada law to judicially enforce a collective bargaining agreement and that the sole remedy is to pursue a claim against the union in front of the EMRB. (See Petition for Rehearing filed March 20, 2017).[2] Following denial of rehearing Clark County filed a Petition for En Banc Reconsideration which was likewise denied. (See Order filed September 21, 2017).

Contrary to the suggestion by *amici curiae* in this case, *Tansey* was correctly decided and the judicial enforcement of collective-bargaining agreements is not based upon inapplicable private sector law. As set forth by the authorities cited on pages 9 and 10 of Douglas Smaellie's Answering Brief filed on July 5, 2018, state courts have always had jurisdiction, irrespective of adoption of §301 of the Labor Management Relations Act, to enforce collective bargaining

[2] It should come as no surprise that the arguments raised by the amicus brief in this case were the same as raised by Clark County in its Petition for Rehearing as both briefs were prepared by Clark County Deputy District Attorney Scott Davis, Esq.

agreements under the state law of contracts. See *Charles Dowd Box Co., Inc. v. Courtney*, 368 U.S. 502, 82 S.Ct. 519 (1962); *Smith v. Evening News*, 371 U.S. 195, 83 S.Ct. 267 (1962). In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 96 S. Ct. 1048 (1976) the United States Supreme Court reemphasized that there was a "strong policy favoring judicial enforcement of collective-bargaining contracts". 424 U.S. at 562, 96 S. Ct. at 1055.

However, that policy favoring judicial enforcement had to be balanced against national labor policy favoring resolution of disputes through private means such as arbitration. See §203(d) of the Labor Management Relations Act, 29 U.S.C. §173(d). Accordingly, in *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965) the Supreme Court held that an employee covered by a bargaining agreement must afford the union an opportunity to utilize the contractual procedures for settling grievances before resorting to judicial enforcement.

The exception requiring exhaustion of contractual remedies from *Vaca v. Sipes*, 386 U.S. 171, 87 S.Ct. 903 (1967) and *DelCostello v. International Brother Teamsters*, 462 U.S. 151, 103 S.Ct. 2281 (1983) arose out of the recognition by the Supreme Court that it worked what the Court has referred to alternatively as "a great injustice" or "an unacceptable injustice", where an employee is denied the opportunity to challenge a breach of contract because the union breached its duty

of fair representation by failing to advance a meritorious grievance to arbitration. *Vaca,* 386 U.S. at 185-186, 87 S. Ct. at 914; *DelCostello*, 462 U.S. at 164, 103 S. Ct. at 2290.

The arguments advanced by both *amici* and Petitioner City of Mesquite erroneously assume that there must be a finding by the EMRB of a breach of the duty of fair representation before a local government employee may pursue the exception recognized by *Vaca* and *DelCostello*. Both *amici* and the City reason that if such a charge is not pursued before the EMRB, an employee cannot thereafter pursue the matter in court. However, neither *amici* nor the City cite any authority for such argument, and the argument itself has been rejected by the United States Supreme Court.

The National Labor Relations Board ("NLRB") serves the same purpose and function for private sector employees that the EMRB does for Nevada's local government employees. An employee who believes his/her union has breached its duty of fair representation may seek redress before the NLRB because a breach of that duty is a violation of §8(b) of the NLRA as amended, 29 U.S.C. §158(b). *Breininger v. Sheet Metal Workers International Association Local Union No. 6*, 493 U.S. 67, 110 S. Ct. 424 (1989) citing *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962).

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However, the Supreme Court made clear in *Breininger* that this jurisdiction did not deprive the federal courts of jurisdiction where the *Vaca* exception is invoked. 493 U.S. at 75, 110 S. Ct. at 430 ("We decline to create an exception to the *Vaca* rule for fair representation complaints"). Rather, as explained in *DelCostello* the plaintiff "must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union" 462 U.S. at 165, 103 S. Ct. at 2291. "The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both." *Id.*

Because an employee seeking to judicially enforce a bargaining agreement need not pursue an action against the union, showing that the union breached its duty is thus part of the plaintiff's prima facie case in court. See e.g. *Johnson v. U.S. Postal Service*, 756 F.2d 1461 (9th Cir. 1985) (dismissing breach of contract action against employer at the close of the employee's case in chief based upon a failure to present sufficient evidence that the union breached its duty of fair representation).

The California Court of Appeals decision in *Anderson v. California Faculty Association,* 25 Cal. App. 4th 207, 31 Cal. Rptr. 2nd 406 (1994) is directly on point. The Court of Appeals was facing the same issue of first impression in California which this case now presents to this Court for Nevada: "whether, in a

hybrid case, the [trial court] has jurisdiction over both an employee's claim for breach of contract against an employer and his claim alleging unfair representation by the union." 25 Cal. App. 4th at 213. The Court of Appeals concluded that claims against the union for breach of its duty of fair representation must be brought before California's version of the EMRB, the Public Employment Relations Board ("PERB"). However, the employee may pursue the breach of contract action against the public employer in court "without regard to whether the union negligently or purposefully declined to carry their grievance". 25 Cal. App. 4th at 216, 218.

The Iowa Supreme Court reached the same conclusion in *O'Hara v. State of Iowa*, 642 N.W.2d 303 (Iowa 2002). In *O'Hara* the employee sued the state alleging breach of the collective bargaining agreement and further sued the union alleging breach of the duty of fair representation. The district court dismissed the claim against both the State and the union on the grounds of lack of subject matter jurisdiction. 642 N.W.2d at 307.

The Iowa Supreme Court reversed the trial court in part holding that while Iowa's Public Employment Relations Board ("PERB") had exclusive jurisdiction over the claim against the union for breach of the duty of fair representation, it held that the district court had jurisdiction to hear the breach of the bargaining agreement claim under the *Vaca v. Sipes* exception to exhaustion of contractual

remedies. The Iowa Supreme Court recognized that Iowa's Public Employee Relations Act is modeled after its federal counterpart. 642 N.W.2d at 313.[3] The court noted that while "hybrid cases" within the meaning of *Vaca* and *DelCostello* and breach of the duty of fair representation claims are related, they are not "interchangeable" based upon the language of *DelCostello* permitting the employee to choose to sue "one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both". *Id.* at 312-313.

Likewise, the State of New York reached the same conclusion in *Shaw v. State of New York*, 140 Misc.2d 16, 529 N.Y.S.2d 442 (1988). The New York Court noted that the courts have no jurisdiction for claims against the union holding "there is both federal and State authority indicating that it is not necessary to bring simultaneous actions against both the employer and the union", and "that the union is not a necessary party to a suit against the employer". As was the case in *O'Hara,* the *Shaw* court quoted the language in *DelCostello*, supra. 529 N.Y.S.2d at 445.

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[3] This court has likewise consistently recognized that the Employee Management Relations Act Chapter 288 is modeled upon its federal counterpart and should be interpreted consistently therewith. See *City of North Las Vegas v. State Local Government Employee-Management Relations Bd.*, 127 Nev. Adv. Op. 57, 261 P.3d 1071 (2011); *Weiner v. Beatty*, 121 Nev. 243, 116 P.3d 829 (2005); *Truckee Meadows Fire Protection District v. International Association of Firefighters Local 2487*, 109 Nev. 367, 374, 849 P.2d 343, 348 (1993).

Finally, it should be noted that the State of Alaska in *Casey v. City of Fairbanks*, 670 P.2d 1133 (Alaska 1983) held that an employee may pursue judicial enforcement without actually proving a breach of the duty of fair representation. The Alaska Supreme Court recognized that there is a fundamental difference between public sector and private sector employment insofar as (post-probationary) public sector employees have a property interest in their employment within the meaning of the Due Process Clause citing *inter alia* *Sweikert v. Briare*, 588 P.2d 542 (Nev.1978). The Alaska court concluded "To deny Casey a hearing on his termination except upon proof that the Union's conduct was wrongful places too great a burden upon Casey's right to due process." 670 P.2d at 1138.[4]

II. THIS COURT DID NOT REJECT THE *VACA V. SIPES* EXCEPTION IN *ROSEQUIST V. INTERNATIONAL ASSOCIATION OF FIREFIGHTERS* BECAUSE *ROSEQUIST* WAS NOT A TRUE HYBRID CASE.

Amici argue that this court has already specifically rejected the *Vaca* exception permitting judicial enforcement of a collective bargaining agreement in

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[4] *In Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487 (1985) the United States Supreme Court held that due process requires an informal pre-termination hearing followed by a more extensive post-termination evidentiary hearing. Arbitration under a collective bargaining agreement satisfies the due process requirement for the post-termination hearing. However if the union breaches its duty and fails to advance a grievance to arbitration, and the employee is denied the opportunity to obtain a review of the evidence supporting the termination through judicial enforcement, due process is effectively denied.

Rosequist v. International Association of Firefighters, Local 1908, 118 Nev. 444, 49 P.3d 651 (2002). This argument is incorrect because *Rosequist* was not in fact a hybrid case of the type addressed in *Vaca* or *DelCostello* where the union breached its duty of fair representation by failing to advance a meritorious grievance to arbitration.

Rather, in *Rosequist* the dispute between the employee and Clark County over a fire inspector's disability and benefits was the subject of a grievance filed by the union. The union did in fact advance the grievance to arbitration. While the arbitrator initially ruled in Rosequist's favor, that award was subsequently vacated by the district court. Ultimately, the matter was assigned to a new arbitrator and arbitrated a second time wherein the results were unfavorable to Rosequist. 118 Nev. at 446-447, 49 P.3d at 652-653.

Thereafter, Rosequist filed a new action in district court against both Clark County and his union alleging breach of collective bargaining agreement, breach of duty of fair representation, improper submission of grievances, breach of covenant of good faith and fair dealing, wrongful termination of his employment, and conspiracy to violate collective bargaining agreement. The district court dismissed the claims against the union for breach of its duty of fair representation because the EMRB had exclusive subject matter jurisdiction over such a claim.

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However, the court did not "dismiss" the claims against Clark County including the claim for breach of contract, on grounds of subject matter jurisdiction. Rather, the court granted summary judgment against Rosequist on those claims. While the Supreme Court's opinion in *Rosequist* does not identify the basis for the grant of summary judgment, it is almost certainly on the basis of claim and/or issue preclusion as arbitral awards are entitled to such preclusive effect. See e.g. *International Ass'n of Firefighters, Local 1285 v. City of Las Vegas*, 107 Nev. 906, 823 P.2d 877 (1991).

The *Rosequist* Court did discuss *Vaca* noting that the "holding in that case only applies when a union has the sole power to invoke the higher stages of a grievance procedure and the union wrongfully prevents the former union employee from processing those grievances." 118 Nev. at 449, 49 P.3d at 654. However, because Rosequist's union did in fact advance his case to arbitration the Court concluded that the "concerns of the Court in *Vaca* are not implicated here." *Id.* at 450.

In summary, the only issue before the *Rosequist* Court was the dismissal of the breach of the duty of fair representation claim on grounds of subject matter jurisdiction and not the district court's granting of summary judgment on the breach of contract and other claims. The *Rosequist* Court's observation that any decision of the EMRB on the fair representation claim would be subject to judicial

review has no application where an employee is prevented from obtaining arbitration in the first instance as the EMRB will not hear any breach of contract claims. Accordingly, where the union's breach of its duty of fair representation prevents any type of arbitration or post-termination hearing, nothing within the holding of *Rosequist* prevents judicial enforcement of collective-bargaining agreements, and anything in *Rosequist* implying otherwise should be expressly clarified and/or overruled.

III. THE VAST MAJORITY OF STATES WHICH HAVE CONSIDERED THIS ISSUE HAVE REJECTED ADOPTING THE SIX (6) MONTH STATUTE LIMITATIONS FROM FEDERAL LAW FOR JUDICIAL ENFORCEMENT OF COLLECTIVE BARGAINING AGREEMENTS.

As previously briefed on pages 16-19 of Smaellie's Answering Brief, and as discussed above, state courts have always had jurisdiction to enforce collective bargaining agreements under the state law contracts. Accordingly, in the absence of §301 of the Labor Management Relations Act there would be no question that the state statute of limitations would apply even to private sector disputes.

Because the LMRA excludes from coverage the states and their political subdivisions, other states have rejected the judicially created six (6) month statute from *DelCostello*. In *Griffin v. United Transportation Union*, 190 Cal. App. 3d 1359, 236 Cal. Rptr. 6 (Cal. App. 1987) the California Court Appeals expressly rejected the argument that it had authority to judicially create a six (6) month

statute of limitations for hybrid cases noting that statutes of limitation were for the legislature to provide, and that the legislature had already provided a statute of limitations for breach of contract cases. 190 Cal. App. 3d at 1364, 236 Cal. Rptr. at 9. In *Howse v. Roswell Independent School Dist.*, 144 N.M. 502, 188 P.3d 1253 (2008) the Court of Appeals of New Mexico held that the statute of limitations applicable to breach of contract actions against government entities applies to hybrid cases seeking to enforce the collective bargaining agreement.[5]

Likewise the New York Court of Appeals in *Baker v. Board of Educ. of West Irondequoit Cent. School Dist.*, N.Y.2d 314, 514 N.E.2d 1109, 520 N.Y.S.2d 538 (1987) expressly rejected application of *DelCostello* and §301 to state law cases and instead held that until the legislature acts to create a different statute of limitations, it is the six (6) year statute of limitations for causes of action which do not have a specified statute which governs. See also *Shaw v. State of New York*, supra. The State of Washington likewise follows this approach. *Killian v. Seattle Public Schools*, 189 Wash.2d 447, 403 P.3d 58 (2017).[6]

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[5] The time to bring a breach of contract action against a government entity in New Mexico is shorter than a breach of contract against a private entity. See NM Stat §37-1-23 (2013).

[6] In Nevada this would be a four (4) year statute of limitations. NRS 11.220 states "An action for relief, not hereinbefore provided for, must be commenced within four (4) years after the cause of action shall have accrued."

In *Norton v. Adair County*, 441 N.W.2d 347 (Iowa 1989) the Iowa Supreme Court rejected *DelCostello*'s six (6) month statute of limitations and adopted the five (5) year statute limitations for legal malpractice. See also *O'Hara v. State,* 642 N.W.2d 303 (Iowa 2002). Massachusetts and Pennsylvania likewise utilize their statute of limitations for legal malpractice actions. See *Graham v. Quincy Food Serv. Employees Ass'n*, 407 Mass. 601, 555 N.E.2d 543, 549 (1990); *Casner v. Am. Fed'n of State, County & Mun. Employees*, 658 A.2d 865 (Pa.Commw.Ct.1995).

The City's Supplemental Brief filed April 12, 2019 cites only cases from the State of Michigan in support of a six (6) month statute of limitations. (See Supplemental Brief at p. 6). It appears that Michigan is an outlier with regard to this issue. Likewise, in *Zelenka v. City of Chicago*, 152 Ill.App.3d 706, 504 N.E.2d 843 (1987) the Illinois Court of Appeals utilized the six (6) month statute of limitations from *DelCostello*. However, the Court of Appeals was under the mistaken belief that the action filed was a "hybrid section 301/fair representation suit alleging that the City breached their collective bargaining agreement and that the union breached its duty of fair representation." 504 N.E.2d at 846. The Illinois Court of Appeals overlooked the fact that §301 does not apply to the states or their political subdivisions, and based upon this mistake the Illinois Court of Appeals decision should be given no persuasive value.

As set forth in Smaellie's Answering Brief filed on July 5, 2018, the Nevada Legislature has adopted a six (6) year statute of limitations for breach of contract based upon written instruments, and a four (4) year statute of limitations where no other limitations period is expressly provided for. See NRS 11.190(1)(b) and NRS 11.220. This Court should reject the invitation by *amici curiae* to apply federal law from a statute, §301 of the LMRA, which by its own definition excludes employees of the states and their political subdivisions.

DATED this 7th day of May, 2019.

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CERTIFICATE OF COMPLIANCE WITH NRAP 28(e) AND NRAP 32(a)(8)

I hereby certify that I have read this Real Party in Interest's Supplemental Answering Brief and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this Real Party in Interest's Supplemental Answering Brief complies with all applicable Nevada Rules of Appellate Procedure, in particular, NRAP 28(e), which requires every assertion in the Real Party in Interest's Supplemental Answering Brief regarding any material issue which may have been overlooked to be supported by a reference to the page of the transcript or appendix where the matter overlooked is to be found.

I further certify that this Real Party in Interest's Supplemental Answering Brief is formatted in compliance with *NRAP* 32(a)(4-6) as it has one (1) inch margins and uses New Times Roman - font size 14 has 16 pages, double spaced,

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and contains 3,657 words. I understand that I may be subject to sanction in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of May, 2019.

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CERTIFICATE OF SERVICE BY ELECTRONIC MEANS

I hereby certify that I am an employee of the Law Office of Daniel Marks and that on the 7th day of May, 2019, I did serve the above and forgoing REAL PARTY IN INTEREST'S SUPPLEMENTAL ANSWERING BRIEF, by way of Notice of Electronic Filing provided by the court mandated E-Flex filing service, to the following email addresses on file for:

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