[Cite as *Gordon v. Gen. Motors Corp., UAW Local 1112*, 2012-Ohio-863.]

IN THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

TRUMBULL COUNTY, OHIO

DENNIS GORDON,	:	**O P I N I O N**
Plaintiff-Appellant,	:	**CASE NO. 2010-T-0121**
- vs -	:	
GENERAL MOTORS CORPORATION,	:	
Defendant,	:	
UAW LOCAL 1112,	:	
Defendant-Appellee.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2009 CV 3134.

Judgment: Affirmed.

Rhys Brendan Cartwright-Jones, 42 North Phelps Street, Youngstown, OH 44503-1130 (For Plaintiff-Appellant).

Dennis Haines and *Charles W. Oldfield*, 16 Wick Avenue, Suite 400, P.O. Box 849, Youngstown, OH 44501-0849 (For Defendant-Appellee).

THOMAS R. WRIGHT, J.

{¶1} This is an accelerated-calendar appeal, taken from a final judgment of the Trumbull County Court of Common Pleas. Appellant, Dennis Gordon, challenges the merits of the trial court's decision which granted summary judgment in favor of appellee, United Auto Workers Local 1112 ("UAW"). Appellant submits that the trial court erred in

finding that his claims of racial discrimination and negligent/fraudulent misrepresentation were time-barred under the federal statute of limitations.

{¶2} Appellant was a team leader at the General Motors ("GM") assembly plant in Lordstown, Ohio and a member of the bargaining unit represented by appellee-UAW. At some point in 2006, he decided to participate in the "Special Attrition Plan," i.e. an early-out retirement plan, under which he agreed he would never be able to return to work for GM. The Special Attrition Plan was the result of collective bargaining between GM and the UAW.

{¶3} According to appellant, sometime after his retirement under the plan, he learned that several people who had also accepted the same Special Attrition Plan had returned to work at GM. Appellant is an African American. He asserts that the persons who returned to work are Caucasian, and that his subsequent request to return to work at GM was denied due to racial discrimination. Appellant further asserts that the UAW members and GM jointly decided which individuals would be allowed to return to work.

{¶4} Appellant filed his initial complaint in the underlying action on November 23, 2009, alleging racial employment discrimination against both GM and the UAW. He also stated a claim entitled "negligent and fraudulent misrepresentation" solely against the UAW. The UAW moved to dismiss the initial complaint, which appellant opposed. Thereafter, appellant moved for, and was granted, leave to file an amended complaint.

{¶5} Appellant filed his amended complaint on May 25, 2010. His first claim alleged violations of the Ohio employment discrimination statutes, R.C. 4112.02(A) and R.C. 4112.99, against GM. When GM subsequently filed a notice of bankruptcy, the first claim was dismissed. The second claim alleged violations of R.C. 4112.02(A) and R.C. 4112.99 as well, but was directed at the UAW. The third claim of the amended

complaint was titled "Negligent Misrepresentation or Fraudulent Misrepresentation," and alleged that the "UAW had a duty to reveal to Gordon whether continued employment was possible," that the UAW breached that duty, and that the UAW's various actions had been "arbitrary, discriminatory, or in bad faith."

{¶6} The UAW filed its motion to dismiss the amended complaint on June 25, 2010, essentially contending that appellant had failed to institute the action in a timely manner under 29 U.S.C. 160(b). By the agreement of the parties, the motion to dismiss was treated as a motion for summary judgment under Civ.R. 56(C). After appellant submitted a response, the trial court issued its final decision in favor of the UAW as to both remaining claims.

{¶7} At the outset of its legal discussion, the trial court concluded that each of appellant's two claims stated alleged violations of the UAW's duty of fair representation. Upon considering prior precedent of this court, the trial court also concluded that, even though a state court has concurrent jurisdiction to review and dispose of claims of unfair representation, the substance of such claims is governed solely by federal law. In light of this, the trial court ultimately held that the six-month statute of limitations under 29 U.S.C. 160(b) was applicable to both claims, and that appellant had filed the underlying action too late to satisfy the "timeliness" requirement.

{¶8} In seeking reversal of the foregoing decision, appellant has assigned the following as error:

{¶9} "The Trial Court [erred] in granting the defense's motion for summary judgment."

{¶10} In maintaining that the UAW was not entitled to prevail on the remaining two claims in his complaint, appellant contests the trial court's application of the federal

statute of limitations in determining whether his action was brought in a timely manner. Specifically, appellant argues that the timeliness of his claims should have been judged under the governing Ohio statute of limitations because the trial court erred in concluding that federal law was pre-emptive as to the subject matter of his claims. Regarding this point, appellant contends that the trial court's "pre-emption" analysis conflicted with prior case law of this court.

{¶11} As was noted previously, appellant's two claims against the UAW sounded in racial employment discrimination under R.C. Chapter 4112 and negligent/fraudulent misrepresentation. In essence, both claims were based upon the factual assertion that the UAW did not treat him fairly in deciding whether he could return to work despite the fact that he had taken an early retirement. In reviewing similar assertions in the context of a "state" claim for relief under R.C. Chapter 4112, this court held that the governing statute of limitations is six years. *See, e.g., Hargrette v. RMI Titanium Co.*, 11th Dist. No. 2009-T-0058, 2010-Ohio-406, at ¶28, in which we applied a six-year limitation to a state claim for racial employment discrimination. On the other hand, in considering this type of assertion under a "federal" claim for relief, the United States Supreme Court has expressly concluded that the six-month statute of limitations under 29 U.S.C.106(b) is controlling. *DelCostello v. Intl. Brotherhood of Teamsters*, 462 U.S. 151 (1983).

{¶12} As part of his appellate brief, appellant readily admits that if the six-month federal limitation is applicable in this instance, both of his claims against the UAW would be time-barred. Accordingly, the critical issue in this appeal is whether appellant's two claims were predicated upon Ohio law or federal law. Since the argument in appellant's brief focuses primarily upon his claim of negligent/fraudulent misrepresentation, it will be analyzed first.

{¶13} As the grounds for his "misrepresentation" claim, appellant alleged that, by failing to provide him with proper information regarding whether he was still eligible for continuing employment with GM, the UAW's actions "were arbitrary, discriminatory, or in bad faith." As a general proposition, when the conduct of a union toward a member of its collective bargaining unit can be characterized as arbitrary, discriminatory, or in bad faith, the union has breached its duty of fair representation. *Singer v. UAW Local Union 1112*, 11th Dist. No. 2001-T-0028, 2002 Ohio App. LEXIS 2058, *11-12 (Apr. 30, 2002). *See also Vaca v. Sipes*, 386 U.S. 171, 177 (1967). Given the precise nature of the language appellant employed to describe his second claim against the UAW in this case, it logically follows that his "negligent/fraudulent misrepresentation" claim actually stated a cause of action for a breach of a union's duty of fair representation. Again, as part of his brief before this court, appellant has conceded this point.

{¶14} Notwithstanding his admission concerning the actual nature of his "unfair representation" claim, appellant still maintains that the federal statute of limitations was not applicable to this specific claim because it was brought under state law. In support of his position, appellant relies heavily upon this court's prior decision in *Singer*, *supra*. *Singer* involved an action by a union member against the union and a fellow worker. In regard to the union, the *Singer* plaintiff brought claims for, inter alia, race discrimination, sex discrimination, and negligence. As to the negligence claim, the *Singer* court treated it as a claim for a violation of the duty of fair representation. *Id*., 2002 Ohio App. LEXIS 2058, *10-12. Furthermore, the court expressly rejected the union's contention that an "unfair representation" claim was totally pre-empted by federal law. *Id*. at *11.

{¶15} As the basis for its holding on the "pre-emption" question, the *Singer* court cited the following passage from the United States Supreme Court's earlier opinion in *Vaca*, *supra*:

{¶16} "'(a) primary justification for the pre-emption doctrine – the need to avoid conflicting rules of substantive law in the labor relations area and the desirability of leaving the development of such rules to the administrative agency created by Congress for that purpose – is not applicable to cases involving alleged breaches of the union's duty of fair representation.'" *Singer*, 2002 Ohio App. LEXIS 2058, at *11, quoting *Vaca*, 386 U.S. at 180-181.

{¶17} Given its reliance upon the *Vaca* quote to support its holding on the issue of pre-emption, it is evident that the *Singer* court interpreted *Vaca* to stand for the basic proposition that a state claim of unfair representation was not barred under the National Labor Relations Act, the federal statutory law governing labor unions and the collective bargaining process. However, in again reviewing the *Vaca* opinion for purposes of this appeal, this court concludes that the *Singer* court misinterpreted *Vaca*. As to this point, this court would emphasize that the *Vaca* court never addressed the issue of whether a state claim of unfair representation was feasible in light of the nature of the federal statutory scheme. Instead, the sole question before the *Vaca* court was whether the National Labor Relations Board had exclusive jurisdiction to hear and settle claims of unfair representation. That is, the United States Supreme Court only held that such claims were cognizable in courts of law. *Vaca*, 386 U.S. at 186.

{¶18} Furthermore, even though the issue of federal pre-emption over state laws was not expressly addressed, the *Vaca* court still gave a clear indication that a claim of

unfair representation could only be predicated on federal law. In describing the nature of such a claim, the *Vaca* court stated:

{¶19} "It is now well established that, as the exclusive bargaining representative of the employees in [the plaintiff-employee's] bargaining unit, the Union had a statutory duty fairly to represent all of those employees, both in its collective bargaining with [the employer], * * * and in its enforcement of the resulting collective bargaining agreement, * * *. The statutory duty of fair representation was developed over 20 years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act, * * * and was soon extended to unions certified under the N.L.R.A., * * *. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. * * * It is obvious that [the plaintiff-employee's] complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action." (Citations omitted.) *Id*. at 177.

{¶20} In the years since the issuance of the *Vaca* opinion, the Sixth Circuit Court of Appeals has stated on a number of occasions that claims of unfair representation are not permissible under state law; i.e., federal law is totally pre-emptive as to this type of claim. *See, e.g., Welch v. General Motors Corp*., 922 F.2d 287 (6th Cir.1990). Based upon this, it has been expressly held that a state statute of limitations is not applicable to any claim of unfair representation. In *Greenwood v. Delphi Automotive Systems Inc.,* 257 F.Supp.2d 1047 (S.D.Ohio 2003), the union member alleged that the union violated its duty of fair representation by not conducting a proper investigation into his assertions

of sexual harassment. In concluding that the "unfair representation" claim had not been brought in a timely manner, the district court stated:

{¶21} "Plaintiff's argument that his breach of the duty of fair representation claim is governed by Ohio Rev. Code §2305.09 is unsupportable. 'The duty of fair representation relates to an area of labor law which has been so fully occupied by Congress so as to foreclose state regulation.' *Maynard v. Revere Copper Prods., Inc.*, 773 F.2d 733, 735 (6th Cir. 1985). Thus, whether stated in terms of federal or state law, a claim for breach of the duty of fair representation is governed by federal law. *Moore v. International Broth. of Elec. Workers*, 2002 WL 31056022 (6th Cir.2002) (quoting *Maynard*, 773 F.2d at 735) ('When a federal claim of a breach of the duty of fair representation is barred by the six-month statute of limitations, "it would be anomalous to hold that the same claim survived the defense of limitations because it was stated in terms of state law."')." (Footnote omitted.) *Id*. at 1069.

{¶22} Under the foregoing precedent, a state court is considered a proper forum for litigating a claim of unfair representation against a union. *Maynard*, 773 F.2d at 735. But, "[r]egardless of the forum in which the claim is presented, the case is controlled by federal law." *Id*. Accordingly, consistent with the *Vaca* opinion and the ensuing federal case law, this court concludes that our previous holding in *Singer* as to the existence of a state claim of unfair representation was legally incorrect. To the extent that the *Singer* opinion stated that a claim of unfair representation is not pre-empted by federal law, it is hereby overruled.

{¶23} Given our conclusion that a claim of unfair representation can only be maintained under federal law, it follows that the six-month statute of limitations under 29 U.S.C. 160(b) was applicable to appellant's second claim against the UAW in the

underlying case. *DelCostello*, 462 U.S. at 172. As part of the evidentiary materials accompanying its motion for summary judgment, the UAW attached a copy of an "unfair labor practices" charge which appellant filed with the National Labor Relations Board on September 29, 2008. A review of the charge readily shows that it was based upon the same operative facts as appellant's subsequent claim of unfair representation. In light of these facts, the latest date appellant could assert that the statute of limitations could have begun to run would be September 29, 2008. Thus, since appellant did not initiate the underlying case until November 23, 2009, his claim of unfair representation against the UAW was untimely under the governing statute of limitations.

{¶24} In relation to his separate claim of racial employment discrimination under R.C. Chapter 4112, appellant again contends that the six-month statute of limitations did not apply because federal law is not controlling over this "state" claim. In support of this part of his argument, appellant cites this court's prior analysis in *Hargrette*, 2010-Ohio-406. In *Hargrette*, we reviewed a grant of summary judgment in a somewhat similar context of a racial employment discrimination case against the employer. In its final judgment, the trial court found that some of the plaintiff's claims were barred by the six year statute of limitations provided under R.C. 2305.07 and R.C. 4112.99. *Id*. at ¶ 7. Additionally, the trial court concluded that federal law preempted some of the plaintiff's other claims because the claims involved the interpretation of the underlying collective bargaining agreement. *Id.*

{¶25} In affirming the "summary judgment" determination in *Hargrette*, this court noted that even a "state law" claim can be pre-empted by federal law in some instances. *Id*. at ¶21. In deciding when such pre-emption has occurred, a court must engage in a two-part test. First, the court must examine whether proof of the state claim will turn

upon the interpretation of the collective bargaining agreement. Second, it must ascertain whether the plaintiff's alleged right was created by the collective bargaining agreement or by state law. Under this test, there will be no federal pre-emption if the plaintiff's right is both based upon state law and does not require contract interpretation. *Id.* at ¶22, citing *Dalton v. Jefferson Smurfit Corp.*, 979 F.Supp. 1187, 1199 (S.D.Ohio 1997), quoting *DeCoe v. Gen. Motors Corp*., 32 F.3d 212, 216 (6th Cir.1994).

{¶26} Appellant reasons that, since the *Hargrette* court found that the six-year statute of limitations of R.C. 2305.07 applied to the plaintiff's R.C. Chapter 4112 claims and not the six month statute of limitations imposed by federal law, his separate racial discrimination claim cannot be preempted by federal law. However, this argument does not account for the express holding in *Hargrette* where the court found that the governing federal law can still pre-empt a claim based on state law when the interpretation of a collective bargaining agreement is required to resolve it. *See Id.* at ¶31, ¶39.

{¶27} In this case, the Special Attrition Plan which appellant invoked in taking his early retirement was an agreement directly resulting from the collective bargaining process between GM and the UAW. The fact that the Special Attrition Plan was a labor contract, distinct from the collective bargaining agreement between the UAW and GM, does not change the preemptive effect of the federal labor laws. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 217-218 (1985) (Using the term "labor contract" as opposed to "collective bargaining agreement" in considering the preemptive effect of Section 301 of the National Labor Relations Act).

{¶28} Given that appellant's claim of racial discrimination was predicated entirely upon the application of the Special Attrition Plan, it would have been necessary to

construe the plan in order to decide if a violation of R.C. Chapter 4112 had occurred. That is, the trial court would have been required to decide whether the Special Attrition Plan specifically denied appellant a right to return to work at GM and whether allowing some employees to return to work violated the collectively bargained Special Attrition Plan. Thus, since the merits of appellant's "discrimination" claim could not be properly determined without some form of interpretation of the Special Attrition Plan, the claim was still pre-empted by federal law despite the fact that it was originally based upon state law.

{¶29} As an aside, this court would also note that there is some federal authority for the proposition that, as between a union member and the union, any claim of racial discrimination is subsumed within the claim of unfair representation. *See Welch*, 922 F.2d at 294. The logic behind this proposition is that the union's statutory duty of fair representation necessarily encompasses the obligation not to discriminate against the union member. However, in light of our conclusion that federal law already applies due to the need to interpret the Special Attrition Plan, it is unnecessary in this case to decide if the *Welch* logic should be extended to a state racial discrimination claim under R.C. Chapter 4112.

{¶30} Given that appellant's claim of racial discrimination was also pre-empted by federal law, it too was subject to the six-month statute of limitations under 29 U.S.C. 160(b). Therefore, consistent with our foregoing analysis, this claim was likewise barred on the basis that it was not brought in a timely manner.

{¶31} To prevail on summary judgment, the moving party must demonstrate that: (1) there are no genuine issues of material fact remaining to be litigated; (2) it is entitled to final judgment as a matter of law; and (3) the nature of the evidentiary

materials is such that, even when those materials are construed in a way that is most favorable to the non-moving party, a reasonable person could only reach a conclusion adverse to the non-moving party. *Hargrette*, 2010-Ohio-406, at ¶11, quoting *Mootispaw v. Eckstein*, 76 Ohio St.3d 383, 385 (1996). The UAW was able to satisfy each of the three prongs of the standard for summary judgment as to appellant's two remaining claims for relief. That is, the undisputed facts established that appellant failed to bring his claims of unfair representation and racial employment discrimination in a timely manner under the applicable federal statute of limitations.

{¶32} Accordingly, because the trial court's decision granting summary judgment in favor of the UAW was warranted, appellant's sole assignment lacks merit. It is the order and judgment of this court that the judgment of the trial court is affirmed.

DIANE V. GRENDELL, J.,

MARY JANE TRAPP, J.,

concur.