

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY, PENNSYLVANIA

JOE MYERS,

CIVIL DIVISION CASE NO. 19-10516

Plaintiff

TYPE OF PLEADING:

vs.

TIMOTHY F. MCCUNE, JOSEPH H.
CHIVERS, JACK W. MURTAUGH JR.,
GRAYDON BREWER, CARL V.
NANNI, JACK LEWIS, JIM
GALLAGHER, HANK LEYLAND,
GREG LOVERICK, EDWARD
TASSEY. AK STEEL.UAW. et al.,

Defendants.

**SUPPLEMENT TO DEFENDANTS
UAW LOCAL 3303'S, JAMES C.
GALLAGHER'S, HANK LEYLAND'S,
JOHN MURTAGH JR.'S, GREG
LOVERICK'S, CARL NANNI'S, AND
JACK LEWIS' BRIEF IN SUPPORT
OF PRELIMINARY OBJECTIONS
TO PLAINTIFF'S COMPLAINT**

Filed on behalf of:

Defendants UAW Local 3303, James
Gallagher, Hank Leyland, John W.
Murtagh Jr., Greg Loverick, Carl
Nanni, and Jack Lewis.

Counsel of Record for these Parties:
Adam K. Hobaugh (PA ID No. 203448)
Murtagh, Hobaugh & Cech
110 Swinderman Road
Wexford, PA 15090
Telephone: (724) 935-7555
Email: akhobaugh@mhclawfirm.com

IN THE COURT OF COMMON PLEAS OF BUTLER COUNTY,
PENNSYLVANIA

JOE MEYERS

Plaintiff.

v.

Civil Division No. 2019-10516

TIMOTHY MCCUNE, JOSEPH H.
CHIVERS, JACK W. MURTAGH JR.,
GRAYDON BREWER
CARL V. NANNI, JACK LEWIS,
JIM GALLAGHER, HANK LEYLAND,
GREG LOVERICK, EDWARD TASSEY,
AK STEEL, UAW, et al.

Defendants.

**SUPPLEMENT TO DEFENDANTS UAW LOCAL 3303'S, JAMES C. GALLAGHER'S,
HANK LEYLAND'S, JOHN MURTAGH JR.'S, GREG LOVERICK'S, CARL NANNI'S,
AND JACK LEWIS' BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS TO
PLAINTIFF'S COMPLAINT**

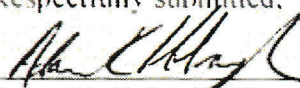
In accordance with the Court's directive at Oral Argument on Defendants' Preliminary Objections on October 22, 2019, the Defendants, UAW LOCAL 3303, JAMES C. GALLAGHER, HANK LEYLAND, JOHN MURTAGH JR., GREG LOVERICK, CARL NANNI, AND JACK LEWIS, by and through their undersigned attorney, hereby submit this SUPPLEMENT to provide the Court with the 2004 filings of Plaintiff Joe Myers against AK Steel Corporation, Butler Armco Independent Union, and the UAW, filed in the Butler County Court of Common Pleas and removed to the United States District Court for the Western District of Pennsylvania at Case No. 04-674.

Attached hereto as Exhibit 1 are the following documents:

- Notice of Removal and a copy of Plaintiff's Complaint;
- Defendant AK Steel's Motion to Dismiss;

- Defendant Butler Armco Independent Union and UAW's Motion to Dismiss;
- Plaintiff Joe Myers' Response to Defendants' Motions to Dismiss;
- Opinion and Order of Court issued by Honorable Donetta W. Ambrose on October 4, 2004;
- October 18, 2005 Third Circuit Decision on *Myers v. AK Steel Corp.*, 156 Fed. Appx. 528, (3rd Cir. 2005).

Respectfully submitted,



Adam K. Hobough, Esq.
MURTAGH, HOBAUGH, & CECIL
110 Swinderman Road
Wexford, PA 15090
724-935-755

Attorney for Defendants UAW LOCAL 3303,
JAMES C. GALLAGHER, HANK LEYLAND,
JOHN MURTAGH JR., GREG LOVERICK, CARL
NANNI, AND JACK LEWIS

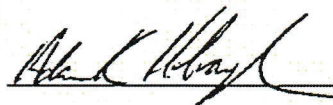
CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by:

Defendants UAW
LOCAL 3303, JAMES
C. GALLAGHER,
HANK LEYLAND,
JOHN MURTAGH JR.,
GREG LOVERICK,
CARL NANNI, AND
JACK LEWIS

Signature:



Name:

Adam K. Hobaugh

Attorney No. (if applicable)

203448

CERTIFICATE OF SERVICE

I, the undersigned certify that the foregoing DEFENDANTS UAW LOCAL 3303,
JAMES C. GALLAGHER, HANK LEYLAND, JOHN MURTAGH JR., GREG
LOVERICK, CARL NANNI, AND JACK LEWIS' BRIEF IN SUPPORT OF
PRELIMINARY OBJECTIONS TO PLAINTIFF'S COMPLAINT was served on the
following via U.S. Mail, First-Class, postage prepaid, this 31ST day of October, 2019.

Mr. Joe Myers
12137 Emerald Green Court
Jacksonville FL 32246

Mr. Angelo Papa
318 Highland Avenue
New Castle, PA 16101

Timothy F. McCune
c/o Marie Milie Jones, Esq.
Jones Passodelis, PLLC
Gulf Tower, Suite 3410
707 Grant Street
Pittsburgh, PA 15219

Joseph Chivers
c/o Dennis J. Roman, Esq.
Marshall Dennehey, Warner, Coleman, & Goggin, P.C.
Union Trust Building
501 Grant Street, Suite 700
Pittsburgh, PA 15219

Graydon Brewer
318 Highland Avenue
New Castle, PA 16101

AK Steel Corporation and
Edward Tassej
c/o Nicholas J. Koch, Esq.
Frost Brown Todd, LLC
Union Trust Building
501 Grant Street, Suite 800
Pittsburgh, PA 15219

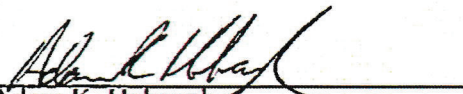
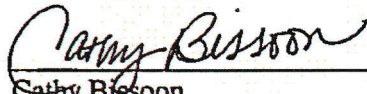

Adam K. Hobaugh
Attorney for UAW Local 3303. James C.
Gallagher. Hank Leyland. John Murtagh Jr.,
Greg Loverick. Carl Nanni. and Jack Lewis

EXHIBIT 1

4. Section 301 confers federal jurisdiction over all such claims.

5. Because Plaintiff alleges a federal question, this action is one over which this Honorable Court has original jurisdiction under the provisions of 28 U.S.C. § 1331; as such, removal is proper under 28 U.S.C. § 1441.

WHEREFORE, Defendant AK Steel Corporation gives notice that the above-captioned action now pending in the Court of Common Pleas of Butler County Pennsylvania is removed therefrom to this Honorable Court.



Cathy Bissoon
Pa. ID No. 70371
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219-1886
412-288-3268

Counsel for Defendant,
AK Steel Corporation

Date: May 3, 2004

EXHIBIT A

4. Defendant Butler Armco Independent Union breached its contractual obligation to Plaintiff by negligently representing Plaintiff, failing to represent Plaintiff's best interest in his grievance arbitration with AK Steel Corporation and omitting affirmative defenses of Plaintiff in the grievance arbitration with AK Steel Corporation.

5. Defendant company's fraudulent activity in having an unwritten operating procedure which violated its own written procedures was the direct and proximate cause of Plaintiff's termination.

FACTUAL HISTORY

6. Plaintiff entered into a contract with the Defendant, AK Steel in April of 1984 as part of the collective bargaining unit after having been a probationary employee.

7. Plaintiff was a laborer at that time. (1984) The Plaintiff became a member of the Union Local Butler-Armco Independent Union on or about July of 1984.

8. Plaintiff was first hired in the reserve pool starting out at approximately \$12.00 per hour in the mill.

9. Plaintiff was then laid off for nine months.

10. Plaintiff put a bid in for a crane position with a starting wage of approximately \$14.00-15.00 per hour and was put on as a trainee.

11. Plaintiff signed a bid into the Hot Mill crane section and for the next nine years was under the supervision of Mr. Dick Fowler.

12. Plaintiff then entered into a different job Hot Mill production in 1993.

13. Plaintiff then bid into the Labor Department because of daylight hours for a one year period in 1996.

14. At all times Plaintiff was an employee of the Defendant AK Steel/Armco and part of

the collective bargaining unit.

15. Plaintiff next entered into the truck section (including heavy equipment operation 1997-2001). By the second month at that latest position Plaintiff was driving trucks in and out of the plant because he received a CDL license, as required by Armco Steel/AK Steel, he passed the Penn Dot Test, and obeyed the vehicle code, etc. as required by his contract and other rules, regulations, policies, and reasonable standards of care.

16. Specifically the authority that requires the Plaintiff to obey and follow weight and load securing rules can be found in the following sources:

- A. The Collective Bargaining Contract.
- B. SHSP0035 -28 (Safety and Health Standard Procedure) page 4 of 10. Item 2.9. This document governed the Plaintiff's conduct from the time he worked with Defendant until discharge.
- C. Safety and Security handbook provided by the Defendant AK Steel Company.
- D. Pennsylvania Vehicle Code.
- E. ARMCO safety and security handbook which also later required the Plaintiff to apply and at all times obey the Pennsylvania vehicle code.
- F. OSHA occupational Safety and Health Administrator.
- G. CDL License requirements.
- H. A duty of care a reasonable person would follow.

17. In 1998 Plaintiff, was involved in an accident (hauling a gear) caused by the fact that the load was not properly secured during an in-plant haul, in violation of the above required standards.

18. Plaintiff was given a breath test and urine test, and passed both.

19. Although the accident was partially his fault for not securing the load as required by above regulations, policies, and reasonable standards of care, after being disciplined, he had a good relationship for the next 2 years with the Defendant Company who disciplined him (for not securing the load.)

20. It must be noted that despite the fact that Defendant company disciplined the Plaintiff for not securing the load they were inconsistent with such discipline. Plaintiff's misconduct occurred because Defendant Company did not require or permit securing of the coils on trucks as required by the above regulations, policies, reasonable standards of care and their own written policies which will later be the basis of the suit.

21. During the year 2000, Plaintiff had numerous contacts with OSHA official Jim Cannell, questioning the operation of defective and dis-repaired heavy equipment like cranes used on state and local highways and overloaded and unsecured tractor-trailers like the unsecured coils in the trucks in question.

22. In June of 2000, there was another incident in which it was alleged that Plaintiff failed to comply with general safety orders involving coning and derailling while working on a railroad track. Nine other employees were involved, but only Plaintiff was given a 3-day suspension. When Plaintiff questioned his boss Ed Tasse, Tasse stated he was told by his supervisor, Tom Ayres, to mind his own business. It is believed that the Plaintiff was being singled out because of his well known opposition to the required safety breaches of the Defendant company.

23. Plaintiff asked the Union to file a grievance on the "discrimination" i.e. being singled out for discipline because he was the only person to receive discipline. The Union did file a grievance on that discipline and the suspension itself, but not on the discrimination.

24. Meanwhile the Plaintiff continued in the Truck/Heavy Equipment Section, operating mainly heavy equipment, not tractor-trailers for the next 6 months.

25. An investigation meeting was held on the grievance in which Robert Newcombe, Supervision of Industrial Relations; Jack Lewis, Union Vice President; Greg Loverick, Union Representative; Don Monteleone, Union Representative; and Plaintiff were in attendance. This meeting ended with the Plaintiff being persuaded to abandon the discrimination issue which was never addressed on the merits. Plaintiff questioned why he was singled out and was told they could not rule on that aspect but could rule only on the discipline itself. Plaintiff made no attempt to argue the discipline itself-because, admittedly, he had erred in the incident. Plaintiff was only questioning why the other workers didn't receive the same discipline.

26. In December 2000, Plaintiff was assigned on an overtime position to operate a tractor-trailer coil truck in question. Plaintiff hauled according to the legal load limits, as set out in the sources previously mentioned hauling 3 coils per load. In a disciplinary meeting on December 15, 2000, Tassej reprimanded Plaintiff for taking too many trips and hauling too few coils. Plaintiff could only make fewer trips if the truck was overloaded. Tassej ordered Plaintiff to haul 6 coils at a time instead of 3 at a time that would have been the legal load limit of 73,280 lbs. During the meeting Plaintiff questioned Tassej, asking that if he doesn't haul overloaded will it result in his termination? Tassej replied no, but that Plaintiff should do as instructed.

27. Plaintiff protested to all concerned being required to haul overloaded and unsecured at all times in violation of the law.

28. Plaintiff's lawyer at that time Attorney Dennis Moskal, at Plaintiff's direction sent a protest letter on March 1, 2001 requesting indemnification in the overloaded and unsecured truck issue. In addition on March 21, 2001 Plaintiff sent certified letters to the AK Steel CEO

and all AK Steel high officials regarding operation of defective mobile cranes and the use of overloaded and unsecured tractor-trailers. Plaintiff was attempting to alert those in power of the safety hazard that existed by operating in such a manner.

29. March 22, 2001 a reminder was sent to departmental employees, (given just 1 day prior to Plaintiff being ordered out of the plant) which stated: "#1 Do not overload trucks=haul within legal load limits, #2 Secure all loads on all vehicles." These reminders are in accordance with all other official company materials. This is in direct conflict with the supervisor's (Ed Tasse) verbal orders to overload trucks and not chain the loads."

It is obvious that the Defendant company uses these writings as a C Y A gesture for cosmetic purposes to give the appearance that they are a model company in compliance with the law while intending to break the law through its agents like Mr. Tasse in order to increase production and profit.

30. Next, March 23, 2001 Plaintiff was hauling coils and was attempting to chain and secure such coils. Plaintiff was then told by Ed Tasse, agent of the Defendant Company, to get the truck on the road immediately and that they'd "been over this before" in reference to Plaintiff's prior protest. Plaintiff offered to put chains on and secure the truck himself, and plant security was called. Plaintiff was directed to get into the truck and drive the unsecured truck in violation of the law. Plaintiff, refusing to violate the law and regulations which would compromise the safety of himself and fellow workers, refused to drive the truck in that condition. Upon such refusal, Plaintiff was escorted out of the plant.

31. Defendants then had an investigation meeting, on this last issue.

32. Company reviewed the investigation and Plaintiff within a week received a letter suspending him from his work and livelihood.

33. Next, Plaintiff had a meeting with 2 members of management (Mike Seyler, Ed Tassey and at least 3 or 4 Union representatives).

34. Finally, on April 10, 2001 Plaintiff received a letter stating that he was terminated.

35. On April 9, 2001, Plaintiff left a voice mail message with Brenda Harmon, Vice-President of Human Resources at the AK Steel Corporate Office, in order to file a complaint with her. She returned the call and left a message, instructing Plaintiff to contact Rick Winter in the Human Resources office at the Butler plant, regarding Plaintiff's discharge and harassment by Company.

36. On April 12, 2001, Plaintiff contacted Rick Winter to file a complaint with Human Resources. On April 19, Winter returned the call and told Plaintiff that he had no issue with AK Steel.

37. Plaintiff retained Joseph H. Chivers to represent him sometime in April 2001.

38. On June 1, 2001, the Union while under a duty to diligently represent Plaintiff and his best interests, supplied in the Grievance Record the clause of insubordination in the Safety and Security Handbook which supported AK Steel's position. The Union, however, did not supply the clauses on Page 68 and 71, which clearly were the Plaintiff's best defense and which clearly establish that Plaintiff was not insubordinate in the operation of the tractor-trailers and mobile cranes but instead was attempting to act in compliance with official company policy and the applicable law. Page 68 of such handbook details the operation of tractor-trailers according to federal, state, and local law. Page 71 of such handbook states that mobile cranes must have deficiencies corrected prior to usage.

39. Around October 1, 2001, AK Steel's legal counsel, Mr. John P. O'Connor, called Plaintiff's then-attorney Joe Chivers and requested a demand letter from Plaintiff, and stated that

reinstatement of Plaintiff was absolutely out of the question. O'Connor made this statement prior to the Arbitration ruling.

40. On October 4, 2001, Plaintiff sent a demand letter, at Chivers' request, requesting a lump sum compensation for all facets of his injury, among others.

41. On October 19, 2001 Chivers sent a demand letter to AK Steel on Plaintiff's behalf, for a grossly reduced settlement - to which Plaintiff never agreed. In this act, Chivers misrepresented Plaintiff in violation of their contract. Chivers then consented to sending a revised demand letter to AK, with Plaintiff's original demands.

42. Plaintiff next filed a grievance seeking to keep his job and had a hearing on August 20, 2001.

43. On September 18, 2001, Plaintiff had a personal phone conversation with Bonnie Hill, a member of the AK Steel Board of Directors, informing her that AK Steel management verbally required the Plaintiff to violate written company policy. Her comment to Plaintiff was that she did not want to be involved.

44. On November 29, 2001, the arbitrator upheld the decision not to give Plaintiff his job back.

45. The Union refused to file an appeal on behalf of plaintiff as they were required to do so, claiming that they (the union), do not appeal individual cases.

46. Plaintiff believes an exception should have been made because of the working conditions issue in this case implicated in this matter.

COUNT I - BREACH OF CONTRACT
BY DEFENDANT COMPANY

47. Plaintiff hereby incorporates by reference all prior paragraphs as though fully referenced herein.

48. The obligation of the Defendant Company to the Plaintiff employee is stated in Article 9 Discharges and Disciplinary Suspensions Section A "The company agrees that no employee shall be discharged or disciplined without just cause and due consideration." The Defendant discharged Plaintiff not for just cause and due consideration as required by contract but instead for not violating the law and company procedures in an attempt of Defendant Company to quiet his whistle blowing activity which would lessen Defendant Company profits and results in sanctions to company.

49. The Defendant lost his job and for the next period of years despite best efforts to obtain employment has only been able to earn \$22,034.00 in 2001 (including three months working with Defendant company), \$9,834.00 in 2002 and \$10,343.00 in 2003 doing odd jobs and living off of savings and investment.

50. If the Plaintiff had not been damaged by the Defendant company breach of contract, he would have earned \$95,472.00 in 2001, \$98,336.00 in 2002, and \$101,286.00 in 2003. Additionally, Plaintiff received health care, dental, eye, orthodontic insurance with 100% coverage with Defendant company which he has lost because of Defendant's breach of contract. Defendant has also lost his pension plan with the company and retirement package and his expectation of future earning if the contract had been fulfilled.

51. As a direct and proximate cause of Defendant's breach of contract the Plaintiff has suffered substantial loss.

WHEREFORE the Plaintiff respectfully requests this Honorable Court grant him judgment in the excess of \$100,000.00 with interest at legal rate.

COUNT II

BREACH OF CONTRACT DEFENDANT UNION

52. Plaintiff hereby incorporates by reference all prior paragraphs as though fully referred herein.

53. Defendant Union undertook a contractual obligation to the Plaintiff employee to represent his best interests at all times and keep an adverse posture to Defendant Company in litigation with said company. Defendant Union also had an obligation to appeal at Plaintiff's employee's request any arbitrator decisions with a judgement adverse to Plaintiff employee.

54. Defendant Union breached their duty to Plaintiff by failing to provide the arbitrator the official company policy and state regulations which clearly spelled out that Plaintiff was merely attempting to comply with the law and official company rules. Additionally, Defendant Union breached their duty to Plaintiff by refusing to file an appeal to the arbitrators decision as requested by Plaintiff.

55. As a direct & proximate cause of the breach the Defendants Union has suffered loss of his employment and income and benefits as stated in Count I.

WHEREFORE the Plaintiff respectfully requests this Honorable Court grant him judgment in excess of \$50,000.00 with interest.

COUNT III

FRAUD OF DEFENDANT COMPANY AND IT'S AGENTS

56. Plaintiff hereby incorporates by reference all paragraphs as though fully referred herein.

57. Defendant company's official rules, regulations and other sources of information as outlined in this complaint require equipment to be in a certain high level of maintenance and repair, require drivers to secure loads in their trucks and limit the weight in which can be carried in every truck to promote the health, safety and welfare of drivers, factory workers and the

public at large. Additionally, their requirements are in place to be in compliance with Pennsylvania State Law. These regulations are also in place to improve Defendant Companies image to the general public.

58. Agents of Defendant Company required, as a course of dealings and standard operation on threat of job termination, Plaintiff to operate in a manner inconsistent with the Defendant companies own policy and regulations in an effort to increase profits. Agents of Defendant company knew such unwritten operation procedure was in violation of company policy and state law.

59. As a direct and proximate cause of the fraudulent activity and criminal violation of Defendant company Plaintiff was terminated from his job for attempting to expose such fraud has suffered the losses stated in Count I.

WHEREFORE the Plaintiff respectfully requests this Honorable Court grant him judgment in excess of \$50,000.00 with interest.

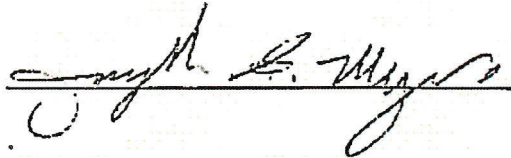
Respectfully submitted,



Angelo A. Papa, Esquire

VERIFICATION

I verify that the statements made in the foregoing documents are true and correct. I understand that false statements herein are made subject to the penalties of 18 Pa.C.S. §4904 relating to unsworn falsification to authorities.

A handwritten signature in cursive script, appearing to read "Joseph E. Meyer", is written over a horizontal line.

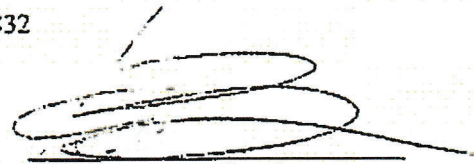
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 23rd day of April, 2004, true and correct copies of the foregoing were served on the following individual by U.S. Certified Mail, postage prepaid:

Butler Armco Independent Union, U.A.W.
P.O. Box 2128
Butler, PA 16003

AK Steel Corporation
703 Curtis Street
Middletown, OH 45043-0001

AK Steel Corporation
Butler Works
P.O. Box 832
Butler, PA 16003-0832

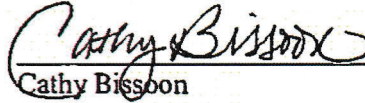


Angelo A. Papa, Esquire

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing
Notice of Removal was served on counsel of record this 3rd day of May, 2004, by United States
first-class mail, postage prepaid, addressed as follows:

Angelo A. Papa, Esq.
Signature Hill
318 Highland Avenue
New Castle, PA 16101


Cathy Bisson

FILED

NOV 17 1957

CLERK
U.S. DISTRICT COURT

37

CIVIL COVER SHEET

The JS-44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

JOSEPH MYERS

DEFENDANTS

AK STEEL CORPORATION and BUTLER ARMCO
INDEPENDENT UNION, U.A.W.

(b) COUNTY OF RESIDENCE OF FIRST LISTED PLAINTIFF Butler, PA
(EXCEPT IN U.S. PLAINTIFF CASES)

COUNTY OF RESIDENCE OF FIRST LISTED DEFENDANT Butler, OH
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) ATTORNEYS (FIRM NAME, ADDRESS, AND TELEPHONE NUMBER)

Angelo A. Papa, Esq.
Signature Hill
318 Highland Avenue
New Castle, PA 16101 (724) 654-8111

ATTORNEYS (IF KNOWN) **04 0674**
Cathy Bissoon, Esq.
Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219 (412) 288-3268

II. BASIS OF JURISDICTION (PLACE AN "X" IN ONE BOX ONLY)

- 1 U.S. Government Plaintiff
- 3 Federal Question (U.S. Government Not a Party)
- 2 U.S. Government Defendant
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (PLACE AN "X" IN ONE BOX FOR PLAINTIFF AND ONE BOX FOR DEFENDANT)

- | | | | |
|---|---------------------------------------|---|---------------------------------------|
| Citizen of This State | <input checked="" type="checkbox"/> 1 | Incorporated or Principal Place of Business in This State | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business in Another State | <input checked="" type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (PLACE AN "X" IN ONE BOX ONLY)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 180 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury PERSONAL INJURY — Med. Malpractice <input type="checkbox"/> 362 Personal Injury — Med. Malpractice <input type="checkbox"/> 365 Personal Injury — Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 680 Other LABOR <input checked="" type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 OWB/DRWW (405(g)) <input type="checkbox"/> 864 SSD Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 670 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 671 IRS — Third Party 28 USC 762B	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commercial/CC Rules/etc. <input type="checkbox"/> 480 Deposition <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 881 Agricultural Acts <input type="checkbox"/> 882 Economic Stabilization Act <input type="checkbox"/> 883 Environmental Matters <input type="checkbox"/> 884 Energy Allocation Act <input type="checkbox"/> 885 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes <input type="checkbox"/> 990 Other Statutory Actions
REAL PROPERTY	CIVIL RIGHTS	PRISONER PETITIONS		
<input type="checkbox"/> 210 Land Condemnation <input type="checkbox"/> 220 Foreclosure <input type="checkbox"/> 230 Rent Lease & Ejectment <input type="checkbox"/> 240 Rents to Land <input type="checkbox"/> 245 Tort Product Liability <input type="checkbox"/> 290 All Other Real Property	<input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 448 Other Civil Rights	<input type="checkbox"/> 510 Motions to Vacate Sentences HABEAS CORPUS: <input type="checkbox"/> 530 General <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 580 Civil Rights <input type="checkbox"/> 585 Prison Condition		

V. ORIGIN (PLACE AN "X" IN ONE BOX ONLY)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

(CITE THE U.S. CIVIL STATUTE UNDER WHICH YOU ARE FILING AND WRITE BRIEF STATEMENT OF CAUSE. DO NOT CITE JURISDICTIONAL STATUTES UNLESS DIVERSITY)

Alleged violations of the LMRA, 29 U.S.C. Section 185.

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23

DEMAND \$ _____

CHECK YES only if demanded in complaint
JURY DEMAND: YES NO

VIII. RELATED CASE(S) IF ANY

JUDGE _____

DOCKET NUMBER _____

DATE _____ SIGNATURE OF ATTORNEY OF RECORD _____

5-3-04

Cathy Bissoon

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THIS CASE DESIGNATION SHEET MUST BE COMPLETED

PART A

This case belongs on the (_____ Erie _____ Johnstown X Pittsburgh) calendar.

1. **ERIE CALENDAR** - If cause of action arose in the counties of Crawford, Elk, Erie, Forest, McKean, Venango or Warren, OR any plaintiff or defendant resides in one of said counties.
2. **JOHNSTOWN CALENDAR** - If cause of action arose in the counties of Bedford, Blair, Cambria, Clearfield or Somerset, OR any plaintiff or defendant resides in one of said counties.
3. Complete if on **ERIE CALENDAR**: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.
4. Complete if on **JOHNSTOWN CALENDAR**: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.

PART B (You are to check ONE of the following)

1. _____ This case is related to Number _____, Judge _____.
2. X This case is not related to a pending or terminated case.

DEFINITIONS OF RELATED CASES:

CIVIL: Civil cases are deemed related when a case filed relates to property included in another suit, or involves the same issues of fact or it grows out of the same transactions as another suit, or involves the validity or infringement of a patent involved in another suit.

EMINENT DOMAIN: Cases in contiguous closely located groups and in common ownership groups which will lead themselves to consolidation for trial shall be deemed related.

HABEAS CORPUS & CIVIL RIGHTS: All habeas corpus petitions filed by the same individual shall be deemed related. All pro se Civil Rights actions by the same individual shall be deemed related.

PART C

1. **CIVIL CATEGORY** (Place x in only applicable category).

1. () Antitrust and Securities Act Cases
2. (X) Labor-Management Relations
3. () Habeas Corpus
4. () Civil Rights
5. () Patent, Copyright, and Trademark
6. () Eminent Domain
7. () All other federal question cases
8. () All personal and property damage tort cases, including maritime, FELA, Jones Act, Motor vehicle, products liability, assault, defamation, malicious prosecution, and false arrest.
9. () Insurance indemnity, contract, and other diversity cases.
10. () Government Collection Cases (shall include HEW Student Loans (Education), VA Overpayment, Overpayment of Social Security, Enlistment Overpayment (Army, Navy, etc.), HUD Loans, GAO Loans (Misc. Types), Mortgage Foreclosures, S.B.A. Loans, Civil Penalties and Coal Mine Penalty and Reclamation Fees.)

I certify that to the best of my knowledge the entries on this Case Designation Sheet are true and correct.

Date: 5-3-04



 ATTORNEY AT LAW

NOTE: ALL SECTIONS OF BOTH SIDES MUST BE COMPLETED BEFORE CASE CAN BE PROCESSED.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

THIS CASE DESIGNATION SHEET MUST BE COMPLETED

PART A

This case belongs on the (_____ Erie _____ Johnstown X Pittsburgh) calendar.

1. **ERIE CALENDAR** - If cause of action arose in the counties of Crawford, Elk, Erie, Forest, McKean, Venango or Warren, OR any plaintiff or defendant resides in one of said counties.
2. **JOHNSTOWN CALENDAR** - If cause of action arose in the counties of Bedford, Blair, Cambria, Clearfield or Somerset, OR any plaintiff or defendant resides in one of said counties.
3. Complete if on **ERIE CALENDAR**: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.
4. Complete if on **JOHNSTOWN CALENDAR**: I certify that the cause of action arose in _____ County and that the _____ resides in _____ County.

PART B (You are to check ONE of the following)

1. This case is related to Number _____, Judge _____.
2. This case is not related to a pending or terminated case.

DEFINITIONS OF RELATED CASES:

CIVIL: Civil cases are deemed related when a case filed relates to property included in another suit, or involves the same issues of fact or it grows out of the same transactions as another suit, or involves the validity or infringement of a patent involved in another suit.

EMINENT DOMAIN: Cases in contiguous closely located groups and in common ownership groups which will lend themselves to consolidation for trial shall be deemed related.

HABEAS CORPUS & CIVIL RIGHTS: All habeas corpus petitions filed by the same individual shall be deemed related. All pro se Civil Rights actions by the same individual shall be deemed related.

PART C

1. **CIVIL CATEGORY** (Place x in only applicable category).

1. () Antitrust and Securities Act Cases
2. (X) Labor-Management Relations
3. () Habeas Corpus
4. () Civil Rights
5. () Patent, Copyright, and Trademark
6. () Eminent Domain
7. () All other federal question cases
8. () All personal and property damage tort cases, including maritime, FELA, Jones Act, Motor vehicle, products liability, assault, defamation, malicious prosecution, and false arrest.
9. () Insurance indemnity, contract, and other diversity cases.
10. () Government Collection Cases (shall include HEW Student Loans (Education), VA Overpayment, Overpayment of Social Security, Enlistment Overpayment (Army, Navy, etc.), HUD Loans, GAO Loans (Misc. Types), Mortgage Foreclosures, S.B.A. Loans, Civil Penalties and Coal Mine Penalty and Reclamation Fees.)

I certify that to the best of my knowledge the entries on this Case Designation Sheet are true and correct.

Date: 5-3-04

Cathy Burton
ATTORNEY AT LAW

NOTE: ALL SECTIONS OF BOTH SIDES MUST BE COMPLETED BEFORE CASE CAN BE PROCESSED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH MYERS,

Plaintiff,

v.

AK STEEL CORPORATION and
BUTLER ARMCO INDEPENDENT
UNION, U.A.W.,

Defendants.

Civil Action No. 04-0674


Chief Judge Donetta W. Ambrose

2

DEFENDANT AK STEEL'S MOTION TO DISMISS

AND NOW comes Defendant AK Steel Corporation ("AK Steel"), by its counsel Reed Smith LLP, and moves this Court to dismiss Plaintiff's Complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). As set forth fully in AK Steel's supporting brief, Plaintiff can prove no set of facts in support of his Complaint that would entitle him to relief. Plaintiff's Complaint should, therefore, be dismissed as a matter of law.

Because dismissal of Plaintiff's Complaint is proper, AK Steel respectfully requests that the Court grant this motion and dismiss Plaintiff's Complaint with prejudice.


Cathy Bissoon
Pa. I.D. No. 70371
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219
(412) 288-3268

Counsel for Defendant,
AK Steel Corporation

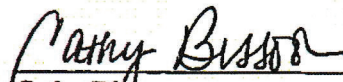
Dated: May 10, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of Defendant AK Steel's Motion to Dismiss was served upon counsel of record for Plaintiff and Defendant Butler Armco Independent Union by United States first class mail, postage prepaid, this 10th day of May, 2004, addressed as follows:

Angelo A. Papa, Esq.
Signature Hill
318 Highland Avenue
New Castle, PA 16101

Marianne Oliver, Esq.
Gilardi, Cooper & Lomupo, P.A.
808 Grant Building
Pittsburgh, PA 15219


Cathy Bissoon

F

'04 MAY 10 P4:10

CLERK
U.S. DISTRICT COURT

ReedSmith

Cathy Bissoon
Direct Phone: 412.288.3268
Email: cbissoon@reedsmith.com

Reed Smith LLP
435 Sixth Avenue
Pittsburgh, PA 15219-1886
412.288.3131
Fax 412.288.3063

May 10, 2004

VIA HAND DELIVERY

Robert V. Barth, Jr., Clerk
United States District Court for the
Western District of Pennsylvania
Eighth Floor, Room 829
U.S. Post Office and Courthouse
Pittsburgh, PA 15219

Re: Joseph Myers v. AK Steel Corporation, et al.
Civil Action No. 04-0674 (W.D. Pa.)

Dear Mr. Barth:

Enclosed for filing in the above-referenced matter please find Defendant AK Steel's Motion to Dismiss and Brief in Support thereof.

Very truly yours,

REED SMITH LLP



Cathy Bissoon

CB:csf

Enclosures

cc: Angelo A. Papa, Esq. (w/encs.)
Marianne Oliver, Esq. (w/encs.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

(3) w

JOSEPH MYERS,

Plaintiff,

v.

AK STEEL CORPORATION and
BUTLER ARMCO INDEPENDENT
UNION, U.A.W.,

Defendants.

Civil Action No. 04-0674

Chief Judge Donetta W. Ambrose

BRIEF IN SUPPORT OF DEFENDANT AK STEEL'S MOTION TO DISMISS

I. INTRODUCTION

Plaintiff, Joseph Myers ("Plaintiff"), who admittedly was represented by Defendant Butler Armco Independent Union, U.A.W. ("Defendant Union") at all relevant times, has brought suit alleging so-called state law breach of contract claims against both Defendant AK Steel Corporation ("AK Steel") and Defendant Union (Counts 1 and 2), and a state law claim of fraud against AK Steel (Count 3). The facts alleged by Plaintiff plainly demonstrate that his state law breach of contact claim against AK Steel (Count 1) is preempted by federal labor law and is time-barred. Additionally, Plaintiff's state law claim of fraud likewise is time-barred under Pennsylvania's two-year statute of limitations for such claims.

Accepting Plaintiff's averments of fact as true and viewing all inferences in the light most favorable to the Plaintiff, Plaintiff cannot possibly state a claim upon which relief can be granted and his Complaint must, therefore, be dismissed pursuant to Federal Rule of Civil

Procedure 12(b)(6). *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir. 1985). AK Steel offers this brief in support of its position.

II. STATEMENT OF FACTS

At all relevant times during his employment, Plaintiff was represented by Defendant Union and was subject to the terms of a collective bargaining agreement. (Complaint, ¶¶ 1, 53). Plaintiff's employment was terminated effective April 10, 2001. (Complaint, ¶ 34).¹ Plaintiff's termination stemmed from Plaintiff's refusal to follow his supervisor's directive on March 23, 2001. (Complaint, ¶¶ 30-34). On November 29, 2001, an arbitrator upheld AK Steel's decision to terminate Plaintiff's employment. (Complaint, ¶ 44).² This lawsuit was filed on April 22, 2004.

III. ARGUMENT

A. Plaintiff Cannot, As A Matter Of Law, Prevail On His State Law Breach Of Contract Claim Against AK Steel.

Plaintiff cannot prevail on his state law breach of contract claim against AK Steel (Count 1) because this claim is preempted by Section 301 of the LMRA and time-barred under that statute.

¹ Contrary to Plaintiff's allegation, Plaintiff actually received a letter on April 5, 2001, indicating that he would be terminated effective April 10, 2001. Whether this communication occurred on April 5, 2001, or on April 10, 2001 (as Plaintiff contends), is of no consequence to the instant motion.

² The arbitrator's decision actually was dated November 30, 2001. This discrepancy in the facts, however, is of no consequence to the arguments that follow.

1. Plaintiff's Purported State Law Claim Of Breach Of Contract Is Preempted.

Section 301 of the LMRA provides as follows:

Suits for violation of contracts between an employer and a labor organization representing employees . . . may be brought in any district court of the United States having jurisdiction of the parties . . .

29 U.S.C. § 185(a).

The United States Supreme Court has made clear, however, that Section 301 reaches beyond merely conferring jurisdiction upon the federal courts to hear disputes arising out of a collective bargaining agreement. *Textile Workers Union v. Lincoln Mills of Alabama*, 353 U.S. 448, 450-51 (1957). Section 301 has broad preemptive effect and precludes and preempts consideration of collective bargaining disputes outside of the Section 301 framework. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210 (1985). Section 301 represents a Congressional mandate for the courts to create a uniform body of federal common law governing disputes related to labor contracts so that such disputes can be decided “according to the precepts of federal labor policy.” *Local 174, Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 103 (1962). This body of federal common law is “uniformly to prevail over inconsistent local rules.” *Id.* at 104.

Moreover, “§ 301 is not to be given a narrow reading.” *Smith v. Evening News Ass'n.*, 371 U.S. 195, 199 (1962). As the Supreme Court has declared, “[i]f the policies that animate § 301 are to be given their proper range . . . the pre-emptive effect of § 301 must extend beyond suits alleging contract violations,” to encompass also state actions that implicate the application and interpretation of collective bargaining agreements. *Allis-Chalmers*, 471 U.S. at 210.

In *Allis-Chalmers*, the Supreme Court set forth the analysis for determining whether state-law claims are preempted by Section 301:

We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law.

471 U.S. at 220 (citation omitted) (emphasis added). In *Allis-Chalmers*, the Supreme Court concluded that the plaintiff's state law cause of action for the alleged bad faith handling of a claim under a disability plan, which was created pursuant to a collective bargaining agreement, was preempted by Section 301. The Supreme Court found that the plaintiff's state law cause of action was "inextricably intertwined with consideration of the terms of the labor contract." 471 U.S. at 213. Thus, it is clear that Section 301 preemption applies even to cases in which the claims at issue only *indirectly* require an analysis of a collective bargaining agreement.

Count 1 of Plaintiff's Complaint alleges that AK Steel breached the terms of its collective bargaining agreement with Defendant Union when it allegedly "discharged Plaintiff not for just cause and due consideration as required by contract." (Complaint, ¶ 48). When a so-called "independent contract claim is founded directly on a right created by the Collective Bargaining Agreement[, t]he preemptive effect of Section 301 is implicated." *Leonardis v. Burns Int'l. Sec. Services, Inc.*, 808 F. Supp. 1165, 1176 (D.N.J. 1992). Plainly, Plaintiff's claim is *directly* based upon the collective bargaining agreement between AK Steel and Defendant Union. It is axiomatic, therefore, that Plaintiff's so-called breach of contract claim, which cannot be resolved without reference to, or an examination of, the terms of the collective bargaining agreement between AK Steel and Defendant Union, is preempted by Section 301 of the LMRA. *Allis-Chalmers*, 471 U.S. at 210. See also *Angst v. Mack Trucks, Inc.*, 969 F.2d 1530 (3d Cir. 1992) (employees' state law breach of contract claim regarding employer's "buyout plan"

whereby departing employees would receive lump sum payments preempted by Section 301); *Young v. Anthony's Fish Grottos, Inc.*, 830 F.2d 993 (9th Cir. 1987) (employee's state law breach of contract claim based upon alleged promise that she would be discharged only for just cause and state law tort claims for fraud, negligent misrepresentation, and intentional and negligent infliction of mental distress preempted by Section 301).

2. Once Properly Cast As A Claim Under Section 301, Plaintiff's State Law Breach Of Contract Claim Is Time-Barred As A Matter Of Well-Settled Federal Law.

When a cause of action brought under state law is preempted by Section 301, the court must apply the statute of limitations that would have applied had the plaintiff originally brought the action under Section 301. *See Kern v. United Steelworkers of America*, 669 F. Supp. 701, 705 (M.D. Pa. 1987). In this case, Plaintiff alleges both that AK Steel breached the collective bargaining agreement by terminating his employment and that the Union breached its duty of fair representation (Counts 1 and 2).³ The law is clear that a hybrid suit -- one in which a claim is brought against an employer under Section 301 and against the union for a breach of the duty of fair representation -- must be brought within the six month statute of limitations established by Section 10(b) of the LMRA, 29 U.S.C. § 160(b). *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169 (1983); *Whittle v. Local 641, International Brotherhood of Teamsters*, 56 F.3d 487, 489 (3d Cir. 1995); *Service Employees Int'l. Union Local No. 36, AFL-CIO v. City Cleaning Co., Inc.*, 982 F.2d 89 (3d Cir. 1992); *Downey v. United Food and Commercial Workers Union Local 1262*, 946 F. Supp. 1141, 1152 (D.N.J. 1996).

³ Although Plaintiff similarly styles his cause of action against Defendant Union as a breach of contract claim, it is clear from the face of Plaintiff's Complaint that Plaintiff's claim actually is a claim that Defendant Union breached of its duty of fair representation.

For limitation of actions, a claim accrues when it is sufficiently ripe that one can maintain suit on it. *Downey*, at 1152-1153 citing, *inter alia*, *Clayton v. International Union, United Auto., Aerospace, and Agric. Implement Workers of America*, 451 U.S. 679, 689-93 (1981); *Miklavic v. U.S. Air, Inc.*, 21 F.3d 551, 556 (3d Cir. 1994). Although Plaintiff contends that his discharge was the triggering event for his breach of contract claim against AK Steel, courts have long required that an employee seeking a remedy for an alleged breach of the collective agreement between his union and his employer attempt to exhaust any exclusive grievance and arbitration procedures established by that agreement before he may maintain suit against his union or employer under Section 301 of the LMRA. *Clayton*, 451 U.S. at 681, (citing, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652-653 (1965) (holding “[a]s a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress.”)). Thus, the relevant date for the purposes of determining the timeliness of the instant Section 301 action is the date on which Plaintiff exhausted the contractual arbitration process -- November 30, 2001.

From the face of the Complaint, it is obvious that this lawsuit was filed almost two and a half years after the arbitrator's ruling upholding Plaintiff's discharge. There can be absolutely no question that Plaintiff's Section 301 claim is time-barred under the six-month statute of limitations applicable in this case. Plaintiff's so-called breach of contract claim must, therefore, be dismissed as time-barred.

B. Plaintiff's State Law Claim Of Fraud Is Time-Barred.

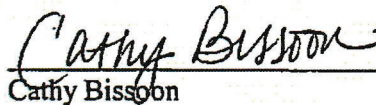
Under Pennsylvania law, a plaintiff is required to commence a claim of fraud within two years of the accrual of the claim. 42 Pa.C.S.A. § 5524(7). *See also Bhatla v. Resort Development Corp.*, 720 F. Supp. 501, 512 (W.D. Pa. 1989) (Smith, J).

In the instant case, Plaintiff appears to allege that AK Steel allegedly engaged in fraud when it directed Plaintiff on March 23, 2001, to perform an act, which he alleges was inconsistent with AK Steel's policies and state law. (Complaint, ¶¶ 57-58). Plaintiff filed this action more than 3 years after the alleged fraud in this matter. Simply put, there can be no question that Plaintiff's fraud claim is time-barred.

IV. CONCLUSION

For all of the above reasons, this Court should dismiss all claims against AK Steel in Plaintiff's Complaint, with prejudice.

Respectfully submitted,



Cathy Bisson
Pa. ID No. 70371
REED SMITH LLP
435 Sixth Avenue
Pittsburgh, PA 15219-1886
412-288-3268

Counsel for Defendant,
AK Steel Corporation

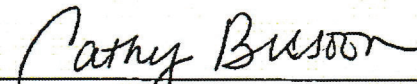
Date: May 10, 2004

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief in Support of Defendant AK Steel's Motion to Dismiss was served on counsel of record this 10th day of May, 2004, by United States first-class mail, postage prepaid, addressed as follows:

Angelo A. Papa, Esq.
Signature Hill
318 Highland Avenue
New Castle, PA 16101

Marianne Oliver, Esq.
Gilardi, Cooper & Lomupo, P.A.
808 Grant Building
Pittsburgh, PA 15219



Cathy Bissoon

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing Brief in Support of Defendant AK Steel's Motion to Dismiss was served on counsel of record for Plaintiff and Defendant Butler Armco Independent Union this 10th day of May, 2004, by United States first-class mail, postage prepaid, addressed as follows:

Angelo A. Papa, Esq.
Signature Hill
318 Highland Avenue
New Castle, PA 16101

Marianne Oliver, Esq.
Gilardi, Cooper & Lomupo, P.A.
808 Grant Building
Pittsburgh, PA 15219


Cathy Bisson

FBI

'04 MAY 10 P4:10

U.S. 11

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

8

1534

JOSEPH MYERS,

Plaintiff

v.

C.A. No. 04-0674

AK STEEL CORPORATION AND
BUTLER ARMCO INDEPENDENT UNION,
UAW,

Defendants

**MOTION TO DISMISS
FILED ON BEHALF OF DEFENDANT BUTLER ARMCO
INDEPENDENT UNION, UAW**

NOW COMES Defendant Butler Armco Independent Union, UAW (hereinafter, defendant Union) by and through its attorneys, Gilardi, Cooper & Lomupo and Marianne Oliver, to file the within Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) and (6) to dismiss Count II, supported by a Brief in Support of the Defendant Union's Motion to Dismiss, on the following grounds:

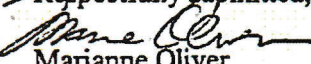
Plaintiff Joseph Myers worked for the Defendant AK Steel Corporation (hereinafter, "defendant company") from 1984 until his termination in April, 2001 (Complaint, paragraphs 1, 34). Defendant was a member of the defendant Union during the time of his employment with the employer (Complaint, paragraphs 7, 14). Following the plaintiff's termination, he filed a grievance with the defendant Union protesting his termination (Complaint, paragraph 42). An arbitration hearing was held concerning the termination grievance on August 20, 2001 (Complaint, paragraph 42). On November 29, 2001, the arbitrator refused to reinstate the plaintiff to employment (Complaint,

paragraph 44). The defendant union then refused to appeal the decision of the arbitrator (Complaint, paragraph 45).

Plaintiff then filed a complaint in state court against both the defendant company and defendant union. The defendant employer filed a Notice of Removal and the defendant union thereafter filed a Joinder in Notice of Removal. In Count II of his complaint, the plaintiff contends that the defendant union failed to fairly represent him by (i) refusing to appeal the arbitrator's ruling (complaint, paragraph 53) and by (ii) failing to properly represent him in the grievance arbitration concerning his discharge (complaint, paragraph 54).

Even assuming all of the allegations of Count II are true, the allegations of Count II must be dismissed because it is well settled that claims that a union has breached its duty of fair representation must be filed within six months of the breach. Plaintiff's claims, filed more than two-and-a-half years following the arbitrator's adverse ruling, fall well outside the six month statute of limitations.

WHEREFORE, in light of the above and the Defendant Union's Brief in Support of its Motion to Dismiss, it is respectfully submitted that Count II of the Complaint be dismissed.

Respectfully submitted,

Marianne Oliver
Counsel for the Defendant Union
P.A. I.D. No. 46463

Gilardi Cooper & Lomupo
223 Fourth Avenue, 10th Floor
Pittsburgh PA 15222
412-391-9770

Dated: May 24, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH MYERS,

Plaintiff

v.

C.A. No. 04-0674

AK STEEL CORPORATION AND
BUTLER ARMCO INDEPENDENT UNION,
UAW,

Defendants

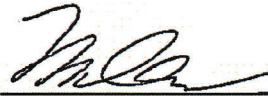
ORDER

AND NOW, this ____ day of _____, 2004, it is hereby ordered adjudged
and decreed that Count II of the Complaint is dismissed.

J.

CERTIFICATE OF SERVICE

I, Marianne Oliver, do hereby certify that I have served a copy of the foregoing Defendant Union's Motion to Dismiss and Brief In Support Thereof upon counsel for the Plaintiff, Angelo A. Papa, Esquire and counsel for Defendant AK Steel Corporation , Cathy Bissoon, Esquire by first class mail, postage prepaid, this 24th day of May, 2004.



Marianne Oliver
Counsel for Defendant Butler Armco
Independent Union, UAW

Dated May 24, 2004

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

1534

JOSEPH MYERS,

Plaintiff

v.

C.A. No. 04-0674

AK STEEL CORPORATION AND
BUTLER ARMCO INDEPENDENT
UNION, UAW,

Defendants

9

**BRIEF IN SUPPORT OF MOTION TO DISMISS
FILED ON BEHALF OF DEFENDANT BUTLER
ARMCO INDEPENDENT UNION, UAW**

NOW COMES Defendant Butler Armco Independent Union, UAW (hereinafter, "defendant union") by and through its attorneys, Gilardi, Cooper & Lomupo and Marianne Oliver, to file this Brief in Support of its Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(1) and (6), seeking to dismiss Count II on the following grounds:

Introduction

Plaintiff Joseph Myers worked for the Defendant AK Steel Corporation (hereinafter, "defendant company") from 1984 until his termination from employment in April, 2001 (Complaint, paragraphs 1, 34). Defendant was a member of the defendant Union during the time of his employment with the employer (Complaint, paragraphs 7, 14). Following the plaintiff's termination, he filed a grievance with the defendant Union protesting his discharge (Complaint, paragraph 42). An arbitration hearing was held on August 20, 2001 (Complaint, paragraph 42). On November 29, 2001, the arbitrator

refused to reinstate the plaintiff to employment (Complaint, paragraph 44). The defendant union refused to appeal the decision of the arbitrator (Complaint, paragraph 45).

Plaintiff then filed a complaint in state court against both the defendant company and defendant union. The defendant employer filed a Notice of Removal and the defendant union thereafter filed a Joinder in Notice of Removal. In Count II of his complaint, the plaintiff contends that the defendant union engaged in a breach of contract by its failure to fairly represent him in (i) refusing to appeal the arbitrator's ruling (complaint, paragraph 53) and (ii) failing to properly represent him in the grievance arbitration concerning his discharge (complaint, paragraph 54).

**PLAINTIFF'S STATE COURT COMPLAINT WAS PROPERLY
REMOVED BECAUSE PLAINTIFF HAS ALLEGED THAT
THE DEFENDANTS BREACHED THE LABOR CONTRACT
AND THAT THE DEFENDANT UNION HAS FAILED TO FAIRLY
REPRESENT HIM; AS SUCH, HIS CLAIMS ARE CLEARLY
PREEMPTED BY FEDERAL LAW**

It is well settled that federal law prevails in the substantive interpretation of collective bargaining agreements. *Teamsters Local 174 v. Lucas Flour*, 369 U.S. 95 (1962). Lawsuits cast as state law claims, whether in tort or contract, that require the interpretation or application of a collective bargaining agreement, are preempted by Section 301 of the National Labor Relations Act, 29 U.S.C. §185.¹ *Allis-Chalmers Corp v. Lueck*, 471 U.S. 202 (1985).

¹ Section 301 of the National Labor Relations Act, 29 U.S.C. §185, provides that suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

In Count I, Plaintiff's claims that the defendant employer improperly discharged him in violation of the labor agreement covering his employment, which requires that "no employee shall be discharged or disciplined without just cause and due consideration." (Complaint, paragraph 48). In Count II, plaintiff contends that the defendant union "undertook a contractual obligation to the plaintiff employee to represent his best interests in litigation with the company" (Complaint, paragraph 53). Plaintiff also contends in Count II that the defendant union breached its duty to the plaintiff by failing to provide the arbitrator with certain documents and by failing to further appeal the arbitration award, which was adverse to plaintiff (Complaint, paragraph 54). Plaintiff's claims against the defendant union, although pled as a breach of contract action, clearly require application of the collective bargaining agreement, and thus, are preempted.

Allis-Chalmers, supra.

It has long been established that an individual employee may bring suit against his employer for breach of a labor agreement. *Smith v. Evening News Ass'n.*, 371 U.S. 195 (1962). Ordinarily, however, an employee is required to attempt to exhaust any grievance remedies as set forth in the labor agreement, and be bound by the final and binding provisions of the labor agreement. *Teamsters v. DelCostello*, 462 U.S. 151, at 163-164 [case citations omitted]. As recognized in *DelCostello*, the rule that an employee must exhaust his grievance remedies and is bound by them works an injustice when the union representing the employee acts in an arbitrary manner. *Id.* at 164. In such an instance, the employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance proceedings. *Id.* As instructed by the *DelCostello* court, such a suit comprises two causes of action: the suit against the

employer rests on §301 since the employee is alleging a breach of the collective bargaining agreement; the suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act. *Id.* To prevail against either the company or the union, employee must not only show that [his] discharge was contrary to the contract but must also carry the burden of demonstrating a breach of the duty by the Union. *Id.* at 165. Such a suit is known as a hybrid §301/fair representation claim. *Id.*

**PLAINTIFF'S CLAIMS, PROPERLY CAST AS §301 CLAIMS,
MUST FAIL BECAUSE PLAINTIFF HAS FAILED TO FILE
HIS SUIT WITHIN THE SIX MONTH STATUTE OF LIMITATIONS
FOR HYBRID ACTIONS**

In *DelCostello, supra*, with facts remarkably similar to the facts at bar, Philip DelCostello refused to drive a tractor-trailer, contending that it was unsafe, and was thereafter discharged. 462 U.S. at 155. Following his discharge, the Union unsuccessfully represented him in a grievance hearing. *Id.* DelCostello brought suit, contending that the employer breached the labor agreement, and that the union failed to properly represent him. *Id.* at 156. The *DelCostello* Court concluded the National Labor Relations Act's six month period for filing unfair labor practice charges was the most appropriate and closely analogous statute of limitations. *Id.* at 155.

In the instant case, the arbitrator's award was rendered on November 29, 2001 (Complaint, paragraph 44). The plaintiff filed his hybrid lawsuit over two years later on April 22, 2004. Plaintiff's complaint is clearly time barred, and must be dismissed. *DelCostello, supra.*

WHEREFORE, in light of the above, it is respectfully submitted that Count II of the Complaint against the Defendant Union be dismissed.

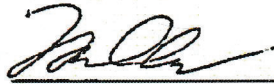
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'MO', is written over the typed name.

Marianne Oliver
Counsel for the Defendant Union
P.A. I.D. No. 46463
223 Fourth Avenue, 10th Floor
Pittsburgh PA 15222

CERTIFICATE OF SERVICE

I, Marianne Oliver, do hereby certify that I have served a copy of the foregoing Defendant Union's Motion to Dismiss and Brief In Support Thereof upon counsel for the Plaintiff, Angelo A. Papa, Esquire and counsel for Defendant AK Steel Corporation , Cathy Bissoon, Esquire by first class mail, postage prepaid, this 24th day of May, 2004.



Marianne Oliver
Counsel for Defendant Butler Armco
Independent Union, UAW

Dated May 24, 2004

FILED

'04 MAY 2 10 23 AM

U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JOSEPH MYERS,

Plaintiff,

VS.

AK STEEL CORPORATION and
BUTLER ARMCO INDEPENDENT
UNION, U.A.W.,

Defendants.

NO. 04-0674 CA

1134
14

**PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANT BUTLER ARMCO
INDEPENDENT UNION, UAW'S AND DEFENDANT
AK STEEL CORPORATION'S MOTION TO DISMISS**

NOW COMES, Plaintiff, Joseph Myers by and through his attorney, Angelo Papa, Esquire and files this Brief in Opposition to Defendant Butler Armco Independent Union UAW's (hereafter referred to as Defendant Union) Motion to Dismiss Pursuant to FR CVP 12 (b)(1) and (6) to Dismiss Count II of Plaintiff's Complaint.

FACTUAL BACKGROUND

Plaintiff, Joseph Myers, became employed by AK Steel Corporation (hereinafter referred to as Defendant-Employer) in April 1984. In July 1984, he became a member of the Defendant-Union. In 1997, Plaintiff became employed in the truck division of the plant. In June 2000, Defendant-Employer, through its agents, became involved in a course of conduct to defraud and deceive state and federal law enforcement officials relating to the safe and secure operation of heavy equipment. On several occasions, Plaintiff was orally directed to operate a motor vehicle with loads which exceeded legal weight requirements.

Specifically, on December 15, 2000, Plaintiff was reprimanded for making too many

trips to meet legal requirements. On March 22, 2001, he was removed from the plant for refusing to drive an unsecured truck.

On April 10, 2001 Plaintiff was terminated. On August 20, 2001, an arbitration hearing was upheld. On November 29, 2001, the arbitrator upheld the termination. Defendant-Union refused to file an appeal. On April 23, 2004, Plaintiff filed a Complaint in the United States District for the Western District of Pennsylvania. On May 24, 2004 Defendant-Union filed his Motion to Dismiss. Plaintiff's Brief in Opposition follows.

The six month statute of Limitations established in Section 10(b) of the National Labor Relations Act, 29 USC 160(b) is inapplicable in this case.

A. Delcostello v. International Brotherhood of Teamsters, et al. 462 US 151 (1983) is inconsistent with United Parcel Service Inc. v. Mitchell. 451 U.S. 56 (1981).

It is well established that Delcostello, Supra, is a leading case in this area of the law. However, in their dissenting opinions to the majority in that case, Justices Stevens and O'Connor felt that the Court erroneously applied the 10(b) statute of limitations. They both reasoned that the holding in Mitchell was the precedent the (Court should follow).

In Delcostello the United States Supreme Court held that the six month limitation in §10(b) of the National Labor Act, 29 USC §160(b) is the applicable statute of limitations governing a suit by an employer against an employer and a union. Section 10 (b) provides in pertinent part as follows:

That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the fixing of charge with the Board and the service of a copy thereof upon the person against whom such charge is made. . . .

Under Delcostello, this litigation represents two interdependent causes of action, known as a

hybrid §301/ duty of fair representation claim. In this litigation, to prevail Plaintiff must show that the discharge was contrary to the contract and that the union breached its duty of fair representation.

Pursuant to Delcostello analysis the federal statute of limitations should be applied., Defendant-Union argues that this puts Plaintiff out of court on Count II of his Complaint. However, Justice Stevens challenged the application of that statute in cases of this nature. The hybrid nature of the claim does not require the Court to diverge from the “settled practice, rounded in Rules Decision Act, of borrowing analogous state statutes in cases such as this.” Delcostello, 462 US at 174.

Stevens points out that the majority’s decision in Delcostello is inconsistent with Mitchell, Supra. In Mitchell, the Supreme Court held that an employee’s claim against an employer was governed by the state statute of limitations for the vacation of an arbitral award. As for the union, the statute of limitations should be the state time limit on legal malpractice cases.

Stevens reasoned that the Court was required by the United States Congress to “borrow” from the state. Specifically, when federal law is silent on the limitation period, federal courts must borrow analogous state statutes. Justice Stevens quoted from Vaca v. Sipes, 386 U.S. 171 (1967):

We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon union . . . unlimited discretion to deprive injured employees of all remedies for breach of contract.

Justice Stevens and O’Connor raise a valid point which must be addressed here.

Moreover, subsequent opinions have noted, “considerations set forth in Delcostello have led to

divergent outcomes, even for those which explicitly regulate trade claims.” United Paperworkers Local 340 v. Specialty PRBD, 999 F2d 51, 53 (2ND as 1993).

B. Defendants have engaged in activities which are contrary to the principles of Equity, therefore they are estopped from asserting the statute of limitations as a defense to Plaintiff's action.

Section 10 (b)'s time limitation for filing a complaint is subject to the equitable doctrines which apply to prevent unjust and unconscionable results. NLRB v. BAKERSFIELD CALIFORNIAN, 128 f 3D 1339 (9TH Cir. 197). The statutes of limitations is subject to waiver, estoppel and equitable tolling. Zipes v. Transworld Airlines, Inc., 455 U>S. 385(1982).

Fraud is an equitable tolling doctrine read into every Federal Statute of limitations. Holmberg v. Armbecht, 327 U.S. 392 397 (1946), Davis v. Grusemeyer, 999 F2d 617, 624 (3rd Cir. 1993), Forbes v. Eagleson, 19 F. Supp. 2d 352 (F.D. Pa. 1998). The doctrine of fraud is based on estoppel principles and when applicable it prevents Defendant from asserting the statute of limitations as a defense. Resolution Trust Corp. v. Farmer, 865 F. Supp. 1143(E.D. AA. 1994).

The circumstances of this case are so thoroughly tainted with fraud, bad faith, and dirty hands that Equity requires that the statute of limitations must be tolled and Plaintiff given an opportunity to proceed on the merits. Fraud goes to the crux of this controversy. Through the oral directions of its agents, AK Steel engaged in a continuing effort to defraud state and federal law enforcement officials regarding the safe and leal operation of heavy equipment.

Plaintiff's employment history is relatively uneventful from 1984 through 1997. In 1997, Plaintiff entered employment at the truck division of the AK Steel Plant. As part of his job, he was required to secure a commercial driver's license; to pass a Penn Dot test; and to operate

heavy equipment. Plaintiff complied with all the requirements.

There were no work-related problems until June, 2000. In 2000, Defendant-employer engaged in a course of conduct to defraud law enforcement officials. From time to time the company distributed written safety directives, but on a daily basis, Ed Tasse and Tom Ayres, supervisors with the company, ordered employees to meet unrealistic time constraints and to operate dangerously overloaded and unsafe heavy equipment. Employees were coerced into illegal and unsafe activities.

Plaintiff was a vocal opponent to these dangerous activities. His steadfast opposition to the company's "oral safety policies" became a source of conflict. On December 15, 2000, Plaintiff was reprimanded for making too many trips to maintain safe, legal weight limits. As time went on the employment relationship continued to deteriorate. On March 22, 2001, Plaintiff was removed from the plant for refusing to drive an unsecured truck and refusing to violate the law as his employer requested.

Plaintiff went to his union for help. Defendant-Union had a fiduciary duty to Plaintiff to act in good faith and represent his interests. However, the union had a history of ineffective and incompetent representation. In 2000, Defendant-Employer singled out Plaintiff with a 3 day suspension. The suspension was discriminatory since Plaintiff was the only employee out of nine who was suspended. Defendant-Union omitted the discrimination claim when it filed the grievance.

Contrary to its fiduciary duty to act in good faith, Defendant-Union provided support for Defendant-Employer's position at the insubordination hearing of August 20, 2001. Instead of establishing that Plaintiff was actually acting pursuant to specific safety provisions in the Safety and Security Handbook, Defendant-Union pointed out the clauses relating to insubordination.

Defendant-Union compounded Plaintiff's employment problems. In effect, it was an obstacle to his representation. The Union failed to zealously represent Plaintiff. The Union failed to recognize and argue his best defense. The Union failed to appeal the arbitration decision. The Union failed to advise him of the six month statute of limitations.

Without the assistance of his union, he foundered around trying to find competent legal representation with little success. Plaintiff entrusted his cause of action to numerous attorneys prior to present counsel who held his file, were supposedly working for him, but actually did nothing to advance his claim. Prior counsel held his file; failed to communicate to Plaintiff and jeopardized his legal remedies, eventually returning Plaintiff's file to him after weeks and even months of delay without any progress or knowledge by Plaintiff of the applicable statute. Present counsel finally informed Plaintiff of his rights and the tolling statute of limitations.

This is an unconscionable, unjust circumstance which requires Equitable Relief. Justice requires that Defendants be estopped from asserting the statute of limitations set forth in §10(b) as a defense. Plaintiff deserves his day in court and an opportunity to be heard.

C. The six month statute of limitations places an undue burden on Plaintiff

The six month statute of limitations places an extremely heavy burden on a newly discharged employee. It is an unduly short period of time for an unemployed Plaintiff to obtain competent counsel and file the action.

This is a particular hardship here since Plaintiff made every effort to protect the public and his fellow workers. He became known as the employee who refused to "go along to get along." Instead of receiving accolades he was fired. Instead of receiving the support of his peers, he was abandoned. He was stigmatized and cut loose. Now, the judicial system is adding insult to injury by barring his claim.

Additionally, in other industries so called "whistle blowers" like Plaintiff, Joseph Myers

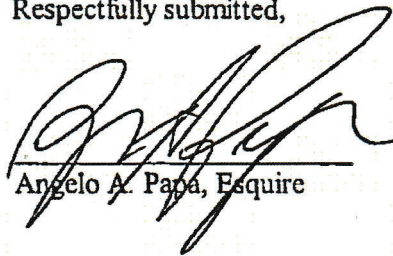
are receiving extra protection for the valuable public service they provide. The Pennsylvania house on June 24, 2003 by unanimous vote approved a Bill that provides broad protection for health care practitioners who report unsafe conditions in hospitals including prohibiting retaliation against those public servants who stand up against the illegal, unsafe public hazards companies can create in the name of profit.

An individual like Joseph Myers who was dismissed because he stood up for the law and public safety and stood against corporate greed should certainly be given an opportunity to present his case on the merits.

Conclusion

Based upon the foregoing law, Plaintiff respectfully requests this Court to deny Defendant-Union's Motion to Dismiss Count II of the Complaint and to deny AK Steel Corporation's Motion to Dismiss.

Respectfully submitted,



Angelo A. Papa, Esquire

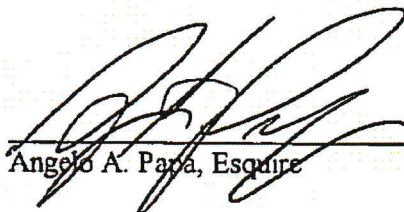
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of June, 2004, true and correct copies of the foregoing Response and Brief were served on the following individual by U.S.

Mail, postage prepaid:

Marianne Oliver, Esquire
Gilardi, Cooper & Lomupo
The Benedum Trees Building
223 Fourth Avenue 10th Floor
Pittsburgh, Pa., 15222
412-391-9770

Cathy Bissoon
REED SMITH
435 Sixth Avenue
Pittsburgh, PA 15219-1886
412-288-2368


Angelo A. Papa, Esquire

FILED

2004 JUN 29 AM 11:20

CLERK
U S DISTRICT COURT

M

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

134

JOSEPH MYERS,

Plaintiff,

VS.

NO. 04-0674 CA

AK STEEL CORPORATION and
BUTLER ARMCO INDEPENDENT
UNION, U.A.W.,

Defendants.

15

**PLAINTIFF'S RESPONSE IN OPPOSITION
TO DEFENDANT BUTLER ARMCO INDEPENDENT UNION, UAW'S AND
DEFENDANT AK STEEL CORPORATION'S MOTION TO DISMISS**

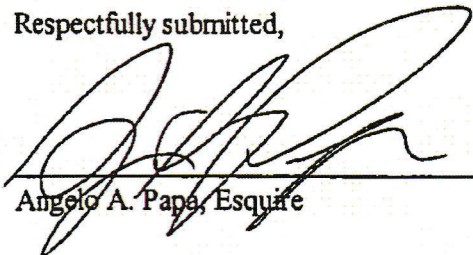
Now comes, Plaintiff, Joseph Myers, by and through his attorney, Angelo A. Papa, Esquire and files this Response in Opposition to Defendant Butler Armco Independent Union UAW's (hereafter referred to as Defendant - Union) Motion to Dismiss Pursuant to FRCVP 12 (b) (1) and (6) to dismiss Count II of Plaintiff's Complaint and in Support hereof states the following:

1. Plaintiff, Joseph Myers became employed by AK Steel Corporation (hereafter referred to as Defendant-Employer) in April 1984.
2. Plaintiff became a member of Defendant - Union in July 1984.
3. On March 23, 2001, despite oral orders by Defendant - Employer's agents to violate safety laws enacted by the Commonwealth of Pennsylvania, Plaintiff refused to drive an unsecured, unsafe truck.
4. On March 23, 2001, Plaintiff was removed from Defendant - Employer's plant.
5. On April 10, 2001, Plaintiff was terminated.

6. Plaintiff filed a grievance with Defendant - Union challenging the termination for insubordination.
7. On August 20, 2001, an arbitration hearing was held on the matter.
8. On November 29, 2001, the arbitrator upheld the termination.
9. Defendant - Union refused to file an appeal.
10. Plaintiff filed a Complaint in the United States District Court for the Western District of Pennsylvania on April 23, 2004.
11. On May 24, 2004, Defendant - Union filed this Motion to dismiss asserting that the six month statute of limitations set forth in § 10 (b) of the National Labor Relations Act, 29 USC § 160 (b) barred the lawsuit.
12. The Motion to Dismiss must be denied because the § 10 (b) statute of limitations is inapplicable.
13. The State Statute of Limitations applicable to legal malpractice is applicable.
14. Defendants actions were contrary to equity and are estopped from asserting the six month statute of limitations as a defense.
15. The six month statute of limitations is unduly burdensome and punitive.

WHEREFORE, Plaintiff respectfully requests that this Honorable Court deny this Motion to Dismiss Plaintiff's Complaint.

Respectfully submitted,



Angelo A. Papa, Esquire

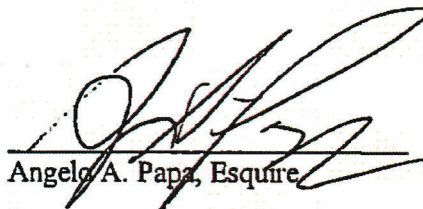
CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of June, 2004, true and correct copies of the foregoing Response and Brief were served on the following individual by U.S.

Mail, postage prepaid:

Marianne Oliver, Esquire
Gilardi, Cooper & Lomupo
The Benedum Trees Building
223 Fourth Avenue 10th Floor
Pittsburgh, Pa., 15222
412-391-9770

Cathy Bissoon
REED SMITH
435 Sixth Avenue
Pittsburgh, PA 15219-1886
412-288-2368


Angelo A. Papa, Esquire

FILED

2004 JUN 29 AM 11:19

CLERK
U S DISTRICT COURT

M

Signature HillSM

...a world of opportunity



www.signaturehill.com

LEGAL

Signature Hill

318 Highland Avenue - New Castle, PA 16101 - 724-654-8111 - Fax 724-654-6766 - E-mail: ceo@signaturehill.com

Angelo A. Papa, Esquire
Jay B. Kranich
Malcom Pollard, Esquire

*Admitted Federal Court
*Admitted Federal Court
*Admitted Ohio Court
*Admitted Federal Court
*Certified Public Accountant

June 28, 2004

Clerk, U.S. District Court
Western District of Pennsylvania
819 U.S. Post Office and Courthouse
700 Grant Street
Pittsburgh, PA 15219

RE: **No. 04-0674 C.A.**
Myers vs AK Steel Corporation and Butler Armco Independent Union,
U.A.W.,
Response and Brief in Opposition to Motion to Dismiss

Dear Clerk of Courts:

Please kindly file of record the enclosed documents in the above referenced matter.
Enclosed is a stamped envelope to return the copy.

Thank you for your cooperation. Any questions please call (724) 654-8111.

Very truly yours,

Angelo A. Papa, Esquire

AAP/rhm

Enclosures

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

1/3/0

JOSEPH MYERS,

Plaintiff,

-vs-

AK STEEL CORPORATION and BUTLER ARMCO
INDEPENDENT UNION, U.A.W.,

Defendants.

CASE CLOSED

Civil Action No. 04-674

AMBROSE, Chief District Judge.

OPINION
and
ORDER OF COURT

SYNOPSIS

In this civil action, Plaintiff, a former employee of Defendant AK Steel Corporation ("AK Steel"), alleges that his employer engaged in several unsafe and illegal trucking practices. On April 10, 2001, after notifying AK Steel of those practices, and refusing to participate in same, Plaintiff was fired. Plaintiff avers that Defendant Butler Armco Independent Union, U.A.W. ("Union") failed to adequately represent him with respect to his discharge, particularly in refusing to appeal an arbitrator's November 29, 2001 decision to uphold his discharge. Therefore, Plaintiff asserts claims for breach of contract against both Defendants, and a claim for fraud against AK Steel. He filed his Complaint on April 22, 2004, in the Court of Common Pleas of Butler County; Defendants thereafter removed the matter to this Court.

Between them, Defendants have moved pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss all three Counts of Plaintiff's Complaint. AK Steel has moved to dismiss Count I of Plaintiff's Complaint, as preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a), and time-barred by Section 10(b) of the LMRA, 29 U.S.C. § 160(b). The Union has moved to dismiss Count II, which claims breach of the duty of fair representation, also on grounds of Section 10(b). Finally, AK Steel has moved to dismiss Count III, which alleges common law fraud, as time-barred by Pennsylvania's two-year statute of limitations for such claims.

OPINION

A. Rule 12(b)(6) Standard

In deciding a motion to dismiss, all factual allegations, and all reasonable inferences therefrom, must be accepted as true and viewed in a light most favorable to the plaintiff. Colburn v. Upper Darby Twp., 838 F. 2d 663, 666 (3d Cir. 1988). I will dismiss a complaint only if it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Conley v. Gibson, 355 U.S. 41, 45, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957). Under Rule 12(b)(6), the defendant bears the burden of showing that no claim has been stated. Kehr Packages v. Fidelcor, Inc., 926 F.2d 1406, 1409 (3d Cir. 1991).

B. LMRA Standards

Plaintiff does not dispute that Counts I and II of his Complaint should be considered in light of the LMRA. Indeed, he expressly characterizes his claims against AK Steel and the Union as a hybrid Section 301/duty of fair representation claim.

Such a hybrid claim is subject to the limitations period set forth in Section 10(b) of the LMRA. Del Costello v. International Bhd. of Teamsters, 462 U.S. 151, 169, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983). That Section provides that “no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made....” 29 U.S.C.S. § 160 (b). Plaintiff relies primarily on the assertion that the dissenters in Del Costello are more persuasive, and urges that I follow their lead and find Section 10(b) inapplicable.¹ My evaluation of the Justices’ competing opinions, however, is of no matter here. I am bound by the majority’s decision, and find that Section 10(b) applies. Moreover, it is clear that Plaintiff’s claim, which was filed years after the events described in the Complaint, was brought outside of the six month period.

Nevertheless, Plaintiff asserts that due to their fraud, Defendants should be estopped from asserting the statute of limitations, or that the limitations period should be tolled. Such equitable principles, however, usually apply when the defendant’s fraudulent or improper conduct affects the plaintiff’s ability to timely file suit. See, e.g., Resolution Trust Corp. v. Farmer, 865 F. Supp. 1143, 1153 (E.D. Pa. 1994). Here, Plaintiff avers that Defendant defrauded law enforcement officials, rather than Plaintiff; he does not aver or suggest that the allegedly illegal conduct, or any inequitable conduct, affected his knowledge or his ability to file suit. Indeed,

¹Moreover, I note that this matter does not involve—nor does Plaintiff argue as such—activity of the type excepted from Section 10(b) in Reed v. United Transportation Union, 488 U.S. 319, 102 L. Ed. 2d 665, 109 S. Ct. 621 (1989), and Brenner v. Local 514, United Bhd. of Carpenters & Joiners, 927 F.2d 1283 (3d Cir. 1991).

Plaintiff's alleged knowledge of the fraud, in 2000 and 2001, instigated the events that are the subject of his suit against AK Steel. Contrary to Plaintiff's suggestion, the justness of his cause alone cannot remedy its untimeliness. Plaintiff has not pointed to any legal authority that would apply equitable tolling in the present situation.

As regards his claim against the Union, I reach the same conclusion. Plaintiff, in his Brief, argues that the Union failed to apprise him of the six-month limitations period; so did "numerous attorneys" prior to present counsel. Even accepting these unsworn averments as true, this series of alleged failures, while unfortunate, are not grounds for lifting the time bar under the present facts. Cf., e.g., Edwards v. International Union, United Plant Guard Workers, 46 F.3d 1047, 1055 (10th Cir. 1995). Again, Plaintiff has pointed to no applicable authority that would require tolling the time limits imposed on his claim against the Union.

Finally, AK Steel argues that Plaintiff's state law fraud claim is barred by the two-year limitations period applicable to such claims. Plaintiff does not oppose this contention. In any event, it is evident that Plaintiff's fraud claim arose, at the latest, when he was allegedly terminated on March 23, 2001 after attempting to expose Defendant's fraudulent activity.

CONCLUSION

Certainly, I do not condone retaliation against those who complain of illegal activity in the workplace. Nevertheless, I am without authority to disregard the time limits imposed on persons seeking redress under circumstances such as those

presented here. Because of those time limits, Plaintiff can prove no set of facts which would entitle him to relief, and I must find that he has failed to state a claim according to applicable standards. Therefore, I will dismiss his Complaint in its entirety.

DATE FILED: **OCTOBER 4, 2004**

PLAINTIFF'S COUNSEL: **ANGELO A PAPA ESQ**
 318 HIGHLAND AVE
 NEW CASTLE PA 16101

DEFENDANT'S COUNSEL: **REED SMITH SHAW & MCCLAY**
(AK STEEL CORP) **ATTN CATHY BISSOON ESQ**
 435 SIXTH AVE
 PITTSBURGH PA 15219

DEFENDANT'S COUNSEL: **GILARDI COOPER & LOMPO PA**
(BUTLER ARMCO IND) **ATTN MARIANNE OLIVER ESQ**
 808 GRANT BLDG
 PITTSBURGH PA 15219



Positive

As of: October 30, 2019 12:33 PM Z

Myers v. AK Steel Corp.

United States Court of Appeals for the Third Circuit

October 18, 2005, Submitted Under Third Circuit LAR 34.1(a) ; December 8, 2005, Filed

No. 04-4258

Reporter

156 Fed Appx. 528 *, 2005 U.S. App. LEXIS 27032 **

JOSEPH MYERS, Appellant v. AK STEEL CORPORATION; BUTLER ARMCO INDEPENDENT UNION, U.A.W.

Notice: [**1] RULES OF THE THIRD CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

Prior History: On Appeal from the United States District Court for the Western District of Pennsylvania. (D.C. Civil No. 04-cv-00674). District Judge: The Honorable Donetta W. Ambrose.

Core Terms

statute of limitations, preempted, collective bargaining agreement, arbitration, breach of contract claim, file suit, time-barred, terminated, fraud claim, six-month, infliction of emotional distress, motion to dismiss, preemptive effect, time barred, half year, state law, defendants', Equitable, mandated, exhaust, Trucks, tolled

Case Summary

Procedural Posture

Appellant former employee sought review of a decision of the United States District Court for the Western District of Pennsylvania, which dismissed the employee's complaint against appellees, his former employer and his union, for failure to state a claim. The employee alleged that the employer retaliated against him for refusing to follow unsafe trucking practices and that the union failed to adequately represent him.

Overview

The district court had dismissed the employee's breach of contract claims because they were preempted under §

301 of the Labor Management Relations Act (LMRA), 29 U.S.C.S. § 185(a), and were therefore time-barred under § 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C.S. § 160(b). The court affirmed. Although the employee attempted to portray his action as an independent contract claim, it could not be considered without reference to a collective bargaining agreement with the union. Therefore, the preemptive effect of § 301 of the LMRA was implicated. That meant that the six-month limitations period in § 10(b) of the NLRA applied. The employee's claims against the union also had to be brought within the six-month limitations period as they were part of a hybrid suit. As the employee had exhausted his administrative remedies on his claims more than two years before he filed suit, the suit was untimely.

Outcome

The district court's order was affirmed.

LexisNexis® Headnotes

Labor & Employment Law > Collective Bargaining & Labor Relations > Federal Preemption

HN1 [] **Collective Bargaining & Labor Relations, Federal Preemption**

Section 301 of the Labor Management Relations Act (LMRA), 29 U.S.C.S. § 185(a), has broad preemptive effect and precludes state consideration and regulation of collective bargaining disputes. However, § 301 of the LMRA does not limit federal court jurisdiction exclusively to disputes arising out of collective bargaining agreements. Section 301 of the LMRA also encompasses state claims that require the application and interpretation of collective bargaining agreements.

Governments > Legislation > Statute of
Limitations > Time Limitations

Labor & Employment Law > ... > Unfair Labor
Practices > Union Violations > Breach of Duty of
Fair Representation

Labor & Employment Law > Collective Bargaining &
Labor Relations > Judicial Review

HN2 Statute of Limitations, Time Limitations

A hybrid suit including claims that require the application and interpretation of collective bargaining agreements and claims that a union failed to adequately represent a union member must be brought within the six-month statute of limitations mandated by § 10(b) of the National Labor Relations Act, [29 U.S.C.S. § 160\(b\)](#).

Labor & Employment Law > Collective Bargaining &
Labor Relations > Enforcement of Bargaining
Agreements > Exhaustion of Remedies

HN3 Enforcement of Bargaining Agreements, Exhaustion of Remedies

An employee alleging breach of the collective bargaining agreement between his or her employer and the union must exhaust contractually-mandated grievance and arbitration procedures before he or she is permitted to file suit under § 301 of the Labor Management Relations Act (LMRA), [29 U.S.C.S. § 185\(a\)](#).

Governments > Legislation > Statute of
Limitations > Equitable Estoppel

Governments > Legislation > Statute of
Limitations > Tolling

HN4 Statute of Limitations, Equitable Estoppel

Equitable tolling principles apply only when fraudulent conduct inhibits a plaintiff's ability to bring a timely suit.

Counsel: For JOSEPH MYERS, Appellant: Angelo
Papa, New Castle, PA.

For AK STEEL CORP, Appellee: Cathy Bissoon, Reed

Smith, Pittsburgh, PA.

For BUTLER ARMCO INDEPENDENT UNION, U.A.W.,
Appellee: Marianne Oliver, Gilardi, Cooper & Lomupo,
Pittsburgh, PA.

Judges: Before: SMITH, STAPLETON, and NYGAARD,
Circuit Judges.

Opinion by: NYGAARD

Opinion

[*529] OPINION OF THE COURT

NYGAARD, Circuit Judge.

Appellant Joseph Myers, an employee of the AK Steel Corporation and a member of the Butler Armco Independent Union, U.A.W., was terminated in 2001 for insubordination. He filed suit against both AK Steel and the Union alleging that he was retaliated against for refusing to follow his employer's allegedly unsafe and illegal trucking practices and that the Union failed to adequately represent him with respect to his termination. The District Court dismissed his **[**2]** complaint for failure to state a claim for which relief can be granted pursuant to [Fed. R. Civ. Pro. 12\(b\)\(6\)](#). We will affirm.

I.

Myers was terminated from his employment at AK Steel for failure to follow his supervisor's orders. An arbitrator upheld Myers' termination. Myers subsequently brought state law breach of contract claims against both AK Steel and the Union and a state law fraud claim against AK Steel. At all times relevant to this appeal, Myers was represented by appellee Butler Armco Independent Union, U.A.W. This case was removed to the U.S. District Court pursuant to the Labor Management **[*530]** Relations Act (LMRA). See [29 U.S.C. § 185\(a\)](#); [29 U.S.C. § 160\(b\)](#).

AK Steel moved to dismiss all claims against it pursuant to [Fed. R. Civ. Pro. 12\(b\)\(6\)](#) because Myers' claims were preempted by [§ 301 of the LMRA](#) and hence, time-barred under [§ 10\(b\)](#) of the National Labor Relations Act (NLRA). The Union moved to have all claims against it dismissed.

The District Court granted the motions to dismiss on all counts. It held that Myers' breach of contract [**3] claims were preempted by § 301 and therefore, time-barred under § 10(b). The District Court also found Myers' fraud claims to be time-barred under Pennsylvania's statute of limitations for fraud claims.

Myers raises the following issues on appeal: (1) whether the District Court erred in granting defendants' motions to dismiss; (2) whether the District Court erred in applying the § 10(b) statute of limitations to Myers' claims; (3) whether the District Court erred in failing to estop defendants' from asserting the statute of limitations defense; and (4) whether the District Court erred when it applied the § 10(b) statute of limitations because it placed an undue burden on Myers.

We need only discuss the applicability of the § 10(b) statute of limitations to Myers' claims because they are preempted by § 301 of the LMRA, and consequently, time-barred under the six-month statute of limitations established in § 10(b) of the NLRA.

II.

Although Myers attempts to portray this as an independent contract claim, it cannot be considered without reference to the collective bargaining agreement. Therefore, the preemptive effect of § 301 is implicated. HN1 [↑] Section 301 has broad preemptive [**4] effect and precludes state consideration and regulation of collective bargaining disputes. Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 210, 105 S. Ct. 1904, 85 L. Ed. 2d 206 (1985). However, § 301 does not limit federal court jurisdiction exclusively to disputes arising out of collective bargaining agreements. Textile Workers Union v. Lincoln Mills of Alabama, 353 U.S. 448, 450-51, 1 L. Ed. 2d 972, 77 S. Ct. 912 (1957). Section 301 also encompasses state claims that require the application and interpretation of collective bargaining agreements. Allis-Chalmers Corp., 471 U.S. at 210; see also, Angst v. Mack Trucks, Inc., 969 F.2d 1530 (3d Cir. 1992) (employees' breach of contract claim regarding a "buy out plan" through which departing employees would receive benefits in a lump sum payment was preempted by § 301); Young v. Anthony's Fish Grottos, Inc., 830 F.2d 993 (9th Cir. 1987) (employee's breach of contract claim and state law tort claims for fraud, negligent misrepresentation, intentional infliction of emotional distress and negligent infliction of emotional distress were all preempted by § 301).

Myers also alleges that [**5] his Union failed to represent him adequately in his discharge process and failed to advise him of the limited time in which he had to file suit. HN2 [↑] A hybrid suit such as this must be brought within the six-month statute of limitations mandated by § 10(b) of the NLRA. DelCastello v. Int'l Brotherhood of Teamsters, 462 U.S. 151, 169, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983).

HN3 [↑] An employee alleging breach of the collective bargaining agreement between his or her employer and the union must exhaust contractually-mandated grievance and arbitration procedures before he or she is permitted to file suit under § 301. See e.g., Clayton v. Int'l Union, 451 U.S. 679, 681, 101 S. Ct. 2088, 68 L. Ed. 2d 538 (1981); Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53, 85 S. Ct. 614, 13 [**531] L. Ed. 2d 580 (1965). Hence, the date on which the statute began to run was November 30, 2001, the day on which Myers exhausted the arbitration process mandated under the collective bargaining agreement. Because he did not file suit in the District Court until nearly two and half years after the arbitrators' ruling, his claims are time barred under § 10(b).

Finally, Myers argues that the statute should be equitably [**6] tolled because he was defrauded by AK Steel. However, the fraud he claims concerned AK Steel's alleged disregard for the law of freight transport. Even assuming this was fraud, it did not prevent him from filing his claim within the statute of limitations. HN4 [↑] Equitable tolling principles apply only when fraudulent conduct inhibits the plaintiff's ability to bring a timely suit. See Resolution Trust Corp. v. Farmer, 865 F. Supp. 1143, 1153 (E.D. Pa. 1994).

IV.

Myers' claims are preempted by § 301 of the LMRA. Therefore, he was required to file suit within the six-month statute of limitations period of § 10(b). Because he filed his claims nearly two and a half years after the conclusion of the arbitration proceedings, Myers' claims are time barred. The order of the District Court will be affirmed.