STATE OF WISCONSIN CIRCUIT COURT DANE COUNTY

HAROLD MAHNKE,

Plaintiff,

DIRECTIONS FOR JUDGMENT

vs.

STATE OF WISCONSIN EMPLOYMENT RELATIONS COMMISSION and LOUIS ALLIS COMPANY,

Defendants.

Decision No. 11017
Case No. 137-398

BEFORE HON. RICHARD W. BARDWELL, CIRCUIT JUDGE, BRANCH #1

This case comes before this court for review of the action of the Wisconsin Employment Relations Commission (WERC) dismissing plaintiff-Mahnke's complaint. Mahnke has alleged that he was unlawfully discharged by his employer, in violation of a collective bargaining agreement.

The employer has stated that Mahnke's dismissal was for excessive absences. The WERC did not consider the question, since it determined that Mahnke had failed to state a cause of action under Vaca v. Sipes, 386 U.S. 171 (1964). The issue at present is whether this determination was correct.

We find Vaca v. Sipes (supra) establishes that Mahnke may have a cause of action for unlawful dismissal even where a union has failed to pursue the grievance procedures through the final stage of arbitration. The failure of the union to demand arbitration is a defense to the employer. The plaintiff is required to show that the union's failure to act was wrongful, after the defense has been presented, rather than in the initial complaint.

In Vaca v. Sipes, Justice White, speaking for the majority, stated:

> "However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant. The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures . . . .
>
> "We think that another situation when the employee may seek judicial enforcement of his contractual rights arises if, as is true here, the union has sole power under the contract to invoke the higher stages of the grievance procedure, and if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's wrongful refusal to process the grievance. It is true that the employer in such a situation may have done nothing to prevent exhaustion of the exclusive contractual remedies to which he agreed in the collective bargaining agreement. But the employer has committed a wrongful discharge in breach of that agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit were it not for the union's breach of its statutory duty of fair representation to the employee. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice. * * * *

"For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as bargaining agent breached its duty of fair representation in its handling of the employee's grievance." 386 U.S. at 185-6.

The decision of the WERC was based on two inferences from Vaca. Because plaintiff needs to overcome the employer's defense, the WERC looked to the complaint and the hearings for allegations that the union's decision was wrongful, viz., an unfair handling of plaintiff's grievance.

While it is correct that Mahnke needs to answer this defense, we do not find that it must be pleaded as specifically as the WERC has required.

In effect, the WERC has sustained a demurrer to the complaint, and it is elementary that under such circumstances the complaint must be liberally construed to state a cause of action if one can reasonably be inferred therefrom.

Vaca v. Sipes (supra) establishes that the employer is a proper party, and that the union need not be joined.

From the portions of the hearing transcript stipulated by the parties, plaintiff has not alleged any reasons for the union's refusal to proceed other than financial reasons. The commission has determined that because the union had financial reasons, its decision could not have been "arbitrary, discriminatory or in bad faith," 186 U.S. at 190, and that plaintiff has conceded his case.

It is not necessary to reach this conclusion. First, we are dubious that "financial reasons" alone are sufficient to negate a wrongful refusal. Moreover, plaintiff's record of 20 years employment, and the agreement which provided for sick leave, do suggest circumstances which the union should also have considered. There is no indication that the union even made a determination of predicting the outcome, or of offering to let plaintiff assume the costs of arbitration, as was done in Encina v. Lama Boot Co. (W.D. Texas 1970), 316 F. Supp. 239.

The facility of asserting "financial reasons" precludes it from being by itself an adequate evaluation of union behavior.

Moreover, we think the WERC is in a much better position than Mahnke to obtain information which would permit an adequate determination of whether the union has wrongfully refused to arbitrate plaintiff's grievance. The commission should be better able to get the necessary information than the court. The union apparently has not volunteered any additional evidence to plaintiff at this point. We think the lack of supportive evidence precludes financial reasons from being a self-evident justification for refusal to act.

We therefore conclude that plaintiff has alleged a cause of action against the employer, and that the complaint should not have been dismissed.

Whether plaintiff can overcome the defense that he was properly represented should be determined before the merits of his case are reached.

We do note that one argument of Mahnke is inappropriate. The determination of ILHR that Mahnke was not discharged for misconduct was for purposes of unemployment compensation benefits. This ruling does not imply that the conduct was not sufficient to warrant a dismissal. The hearing examiner correctly indicated that the U.C. proceeding transcript might be used for impeachment purposes. Since the employer did not contest the granting of unemployment compensation, the transcript may be of minimal use to the employee. The failure of the employer to contest that proceeding does not preclude him from offering evidence in the present case, should plaintiff succeed in showing he is entitled to a decision on the merits.

We therefore direct that the order of the Wisconsin Employment Relations Commission dismissing the complaint is reversed, and the case is remanded to the WERC for further proceedings consistent with these Directions for Judgment. Counsel for the plaintiff may prepare an appropriate judgment of remand as herein directed. A copy of the proposed judgment should be presented to other participating counsel before submission to the court for signature.

Dated March 29, 1973.

BY THE COURT:

Richard W. Bardwell /s/
Circuit Judge