STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PETER DUNCAN, Complainant,

v.

OPEIU LOCAL 35, and OZAUKEE COUNTY, Respondents.

Case 89
No. 70304
MP-4630

Decision No. 33295-C

Appearances:

Richard Saks, Hawks Quindel, S.C., Attorneys at Law, 700 West Michigan, Suite 500, P.O. Box 442, Milwaukee, WI 53201-0442, appearing on behalf of OPEIU Local 35.

Ronald Stadler, Gonzalez Saggio & Harlan LLP, 111 East Wisconsin Ave., Suite 1000, Milwaukee, WI 53202-4806, appearing on behalf of Ozaukee County.

Peter Duncan, Complainant, N28W6360 Alyce St., #223, Cedarburg, WI 53012, appearing on his own behalf.

ORDER GRANTING UNION'S AND COMPLAINANT'S REQUEST TO DISMISS WITH PREJUDICE ALL CLAIMS BY COMPLAINANT AGAINST UNION

On May 3, 2011, the undersigned Examiner issued an Order denying Ozaukee County's motion to dismiss the above-captioned matter. *See* Ozaukee County, Dec. No. 33295-A (Carlson, 5/11). As noted in that Order,

> [t]he Complaint alleges that 1) Ozaukee County violated a collective bargaining agreement by terminating his employment and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(a)5 and 1, Stats., and 2) the Office and Professional Employees International Union (OPEIU) Local 35 breached its duty of fair representation by failing to arbitrate his termination grievance and thereby committed prohibited practices within the meaning of Secs. 111.70(3)(b)1 and 4, Stats.

On May 19, 2011, the County filed a petition with the Wisconsin Employment Relations Commission seeking interlocutory review of the May 3rd Order. On June 27, 2011, the Commission affirmed the Examiner's Order denying the motion to dismiss.

Following the Commission's decision, the Complainant and the Union negotiated and entered into a settlement agreement, the terms of which included the dismissal with prejudice of the Union from this proceeding. Complainant's then counsel, Felicia Miller-Watson, sent a copy of the settlement agreement *via* email to the undersigned but not to the County on April 2, 2012. On April 4, 2012, Attorney Miller-Watson sent an email to the undersigned and to counsel for the County and the Union, stating in relevant part:

> The Complainant in this matter requests that OPEIU Local 35 be formally dismissed from this complaint, with prejudice, due to a settlement agreement that [the Examiner has] already received regarding such. The details of the settlement agreement should not be disclosed to any other party. The Complainant realizes that the settlement agreement does not obviate the Complainant from its' [sic] burden of proving that the Union violated its duty of fair representation to Mr. Duncan at a hearing.
>
> Furthermore, please know that Miller-Watson Law Office, LLC through Attorney Felicia Miller-Watson no longer represents Mr. Duncan in the aforementioned matter. Mr. Duncan will be finding new representation shortly. After the Dismissal [sic] of OPEIU from this matter, all future communication should be made directly with Mr. Duncan . . . until new counsel makes an appearance.

This email prompted additional correspondence that included the County's express objection to the dismissal of the Union from the case and the Union's and Complainant's refusal to provide the County with a copy of the settlement agreement. In addition, the Complainant sent emails regarding his efforts to secure new counsel in the wake of Attorney Miller-Watson's withdrawal from the case.

On May 3, 2012, the undersigned sent an email to the Complainant and to counsel for both the County and the Union. The email stated *inter alia*:

> At this point, I am inclined to rule on Mr. Duncan's motion to dismiss the Union. My hope is that such a ruling will facilitate resolution of other issues that have been raised. However, I do not wish to make any such ruling without affording Attorney Stadler an opportunity to provide any additional comment he wishes to make in support of his opposition to the motion. If Attorney Stadler wishes, his comments may include *inter alia* why he deems it imperative to see the settlement agreement before agreeing to dismiss the Union, given that 1) Mr. Duncan and the Union concede that Mr. Duncan still must prevail on his DFR claim as a threshold requirement; 2) Attorney Saks' representation that "the settlement agreement is 100% silent on any issue related to the union's culpability or any factual matter relevant to whether the union violated its duty to fairly represent Mr. Duncan" (Email from Attorney Saks sent May 2, 2012) and 3) the Union has expressly

> acknowledged that the employer "is free with or without the presence of the union to present evidence, subpoena witnesses, and argue that there has been no showing of either a DFR violation or a CBA violation." (Email from Attorney Saks, sent April 4, 2012.)

. . . . .

On May 9, 2009, the County submitted *via* email a memorandum in opposition to the dismissal of the Union, to which the Union emailed a response on the same date supporting the Complainant's request and opposing the County's objections. Additional facts are set forth below where appropriate.

Having considered the parties' submissions and arguments, the Examiner makes the following

ORDER

The Complainant's and Union's motion for a dismissal with prejudice of any and all claims asserted by the Complainant against the Union relating to the Union's duty of fair representation is granted.

Dated at Madison, Wisconsin, this 26th day of June, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/

John C. Carlson, Jr., Examiner

OZAUKEE COUNTY (Peter Duncan)

MEMORANDUM ACCOMPANYING ORDER

The Complainant "requests that OPEIU Local 35 be formally dismissed from this complaint, with prejudice, due to a settlement agreement . . . ." I interpret this statement more precisely as a request by the Complainant, pursuant to his settlement agreement with the Union, to dismiss with prejudice any and all claims that he has asserted against the Union relating to the Union's duty of fair representation. The effect of a dismissal with prejudice of all claims asserted against the Union, of course, would be to dismiss the Union from this lawsuit.[1]

The County objects to the requested dismissal for four primary reasons: 1) the legal authority cited by the Union is not dispositive here; 2) if the Complainant proves that the County violated the collective bargaining agreement, the Union will be a necessary party to the County's future demand for an apportionment of backpay between the County and the Union, notwithstanding prior Commission decisions; 3) fundamental fairness and due process preclude settlement and dismissal of the Union; and 4) neither the County nor the Complainant's possible successor counsel has seen or evaluated the fairness of the settlement agreement. As discussed below, these arguments are unavailing.

I. CONTRARY LEGAL AUTHORITY

The parties disagree over the import of Leflore v. Milwaukee County Transport Services, Inc., Dec. 28531-B (Mawhinney, 1/97), *aff'd by operation of law* - C (WERC, 2/97). The Union argues that it "has the right to settle Mr. Duncan's claims against the union," that this right "does not obviate Mr. Duncan's obligation to prove that the union violated its duty to fairly represent Mr. Duncan", and that "[t]his was the exact posture in Leflore v. Milwaukee County Transport

[1] Although I read the Complaint to allege a single DFR claim against the Union, I use the more comprehensive language, "any and all claims . . . asserted against the Union relating to the Union's duty of fair representation", to obviate any possible ambiguity regarding the nature and number of claims asserted against the Union and to reflect the Complainant's and Union's express intent to dismiss the Union from the lawsuit. In addition, I note that Sec. ERC 12.02(4)(b), Wis. Adm. Code (not cited by either party), provides:

> *Withdrawal*. Any complaint may be withdrawn at any time prior to the issuance of a final order based on it, by motion granted by the commission or examiner. A motion to withdraw shall be granted unless withdrawal would result in an injustice to any party. The commission shall not refund fees based on a withdrawal of a complaint.

I question whether this rule applies here, because I interpret the Complainant's and Union's motion as a request not to withdraw the Complaint but rather to dismiss with prejudice all claims against the Union relating to the Union's duty of fair representation, and thus to dismiss the Union from the action, as a result of a settlement. Regardless, resolving the question of whether this rule applies is unnecessary, because my analysis herein represents, and can be interpreted, as my reasoning in support of my conclusion that granting the Complainant's and Union's motion will not "result in an injustice to any party" within the meaning of Sec. ERC 12.02(4)(b), Wis. Adm. Code.

Services, Inc., Dec. 28531-B".[2] The County responds to this argument as follows:

> The County is aware of *Leflore v. Milwaukee County Transport Services, Inc*, Dec. 28531-B (WERC, 1997) where a union was voluntarily dismissed by the DFR complainant and the examiner held that the complainant was still required to prove the union's violation of its duty. It appears that the employer in *Leflore* never objected to the union's dismissal or raised an argument that it was fundamentally unfair to allow the union to be voluntarily dismissed. Thus, although the facts of that case note that the union's dismissal occurred, it does not hold that a union may be voluntarily dismissed from a DFR case. Milwaukee County's waiver of that issue is not precedent for whether such a dismissal is proper.[3]

When inferring Milwaukee County's ostensible waiver of any objection to the dismissal of the Union in Leflore, the County presumably focused on the following Examiner's observation: "Even though the Complainant seeks no remedy against the Union *and has in fact dismissed it from this action*, the Complainant still has to show why it would have been futile for her to use the grievance procedure and why she should be allowed to bring a claim for a breach of contract." Leflore v. Milwaukee County Transport Services, Inc., Dec. 28531-B (Mawhinney, 1/97), *aff'd by operation of law* - C (WERC, 2/97) (emphasis added).

The County, however, errs in its conclusion that Leflore does not address whether a union can settle a DFR claim and then stipulate with a Complainant to a voluntary dismissal. In an earlier portion of the same decision that the County evidently missed or disregarded, the Examiner notes:

> Before the hearing in the matter started on May 16, 1996, the Complainant notified the Examiner that she had reached a settlement with the Union the previous evening, and that she decided to dismiss her case against the Union, and that she wished to proceed with her case against the Company. *The Company objected to proceeding to a hearing without the Union as a Respondent, and the parties submitted briefs . . . on the issue of whether or not the Union is a necessary party in a complaint against an employer for breach of contract under the Wisconsin Employment Peace Act*. On August 8, 1996, the Examiner denied the Motion to Dismiss and the Motion for Summary Judgment. *The Examiner found that the Complainant could proceed against the Company without the Union joined as a Respondent*.

---

[2] Email from Attorney Saks to undersigned and to Attorneys Stadler and Miller-Watson, dated April 2, 2012.

[3] County's memorandum in opposition to the dismissal of the Union, submitted *via* email on May 9, 2009 (emphasis in original).

Id. (emphasis added). Consistent with this summary, the August 8, 1996 decision referenced in the above-quoted passage concluded,

> *nothing prevents the Complainant from dismissing the Union as a Respondent*. The Complainant seeks no remedy against the Union anymore, just against the Company. The Complainant may seek to prove that the Union breached its duty of fair representation to her without joining the Union as a Respondent. *There is nothing that would prevent the Complainant from going forward solely against the Company as long as she first proves that the Union breached its duty of fair representation. The Complainant is not obligated to re-join the Union as a correspondent in order to proceed*, but she is obligated to prove that the Union breached its duty of fair representation before she can proceed to her claim that the Company breached the labor contract. She may do this through calling witnesses and introducing documents, including Union witnesses and documents, and using subpoena powers provided by Sec. 111.07(1)(b)1, Stats., if necessary. Similarly, the Company can respond with such witnesses and documents and also use such subpoena powers.

Leflore v. Milwaukee County Transport Services, Inc., Dec. 28531-A (Mawhinney, 8/96) (emphasis added). Thus, contrary to the County's argument, Leflore did squarely address in an analogous context the questions presented here, namely, whether the Union is a necessary party in a hybrid DFR / breach-of-contract case, and whether the employer can object to, and prevent, the dismissal of the Union from such a suit, following a settlement between the Complainant and the Union of the DFR claim. Leflore answered both questions in the negative. *Accord* Klema v. Wingra Redi-Mix, Dec. 31056-F (Michelstetter, 11/05) ("The WERC has no policy requiring that a Union be named as a party in complaints under Section 111.06(1)(f), Stats, even though a complaining party is alleging that a union violated its duty of fair representation.)

That Leflore arose under the Wisconsin Employment Peace Act (WEPA), while this case arises under the Municipal Employment Relations Act (MERA), is not a distinction with meaning. Like the instant matter, Leflore involved allegedly prohibited practices by a Union for violating its duty of fair representation and by an employer for violating a collective bargaining agreement. In Leflore, the alleged breach of contract claim was brought under Sec. 111.06(1)(f), Stats., (WEPA), while the analogous claim here is based on an alleged violation of Sec. 111.70(3)(a)5, Stats. (MERA). The differing sources of statutory authority, however, are immaterial; in Gray v. Marinette County, 200 Wis. 2d 426, 546 N.W.2d 553 (Ct. App. 1996), "a case involving a union that was the collective bargaining representative of municipal employees . . . covered by the Municipal Employment Relations Act, the Wisconsin Court of Appeals adopted and applied the burdens and standards set forth by the Wisconsin Supreme Court in Mahnke, *supra* (a case involving a private sector employee advancing a Sec. 111.06(1)(f) breach of contract claim under the Wisconsin Employment Peace Act) for determining whether a union has breached its duty of fair representation." Florence County Wisconsin and Labor Association of Wisconsin, Inc. Dec. No. 32435-F (WERC, 4/11).

The United States Supreme Court's interpretation of analogous federal law further supports the Union's right to settle a DFR claim and be dismissed from this case. As the Commission has observed, "although the [National Labor Relations Act (NLRA)] differs from MERA in some important respects and the Commission is not bound to follow or even consider NLRA precedent, the Commission may find guidance there in appropriate situations." Western Racine Special Education Association, Professional Unit v. Racine County Dec. No. 31377-C (WERC, 6/06). One such appropriate situation is a hybrid DFR / breach of contract action arising under the NLRA and Sec. 301 of the Labor Management Relations Act (LMRA), respectively. Discussing such a claim in DelCostello v. International Broth. of Teamsters, 462 U.S. 151, 103 S.Ct. 2281 (1983) the United States Supreme Court observed:

> Such a suit, as a formal matter, 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. "Yet the two claims are inextricably interdependent. 'To prevail against either the company or the Union, ... [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating a breach of duty by the Union.' " *Mitchell,* 451 U.S., at 66-67, 101 S.Ct., at 1565-1566 (Stewart, J., concurring in the judgment), quoting *Hines,* 424 U.S., at 570-571, 96 S.Ct., at 1059. *The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.*

DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 164-165, 103 S.Ct. 2281, 2290 - 2291 (1983) (emphasis added) (footnotes omitted). Although LeFlore (decided by an Examiner, not the Commission) and DelCostello (interpreting the NLRA) are not binding precedent, I am inclined to follow these decisions, absent a persuasive reason not to do so. As shown below, none of the remaining reasons proposed by the County convinces me to disregard these cases and blockade the Union's and Complainant's desired port of settlement and dismissal.

II. COUNTY'S FUTURE DEMAND FOR APPORTIONMENT OF BACKPAY

Notwithstanding LeFlore and DelCostello, the County argues that if the Union proves both the DFR and breach-of-contract claims, the Union will be a necessary party, because the County will demand an apportionment of backpay between the County and the Union. While acknowledging a conflicting Commission decision, Milwaukee Public Schools and Service Employees International Union Local 150 Dec. No. 31602-G (WERC, 8/08), *rev'd on other grounds*, Service Employees Intern. Union Local No. 150 v. Wisconsin Employment Relations Com'n, 2010 WI App 126, 329 Wis. 2d 447, 791 N.W.2d 662, the County argues that the "holding [in Dec. No. 31602-G] was limited to the facts of that particular case and there were substantial supporting arguments that MPS failed to raised [sic] before the Commission."

I disagree with the County's argument for various reasons. First, I am not persuaded that the holding in Milwaukee Public Schools was limited to its particular facts. On a petition for rehearing, the Commission reaffirmed a previous Order that 1) had ruled that the Union had violated its duty of fair representation and 2) had required the Union to pay the Complainant's attorney fees and expenses during the second phase of the bifurcated proceedings (the breach-of-contract claim against Respondent Milwaukee Public Schools for discharge without just cause). *See* Dec. No. 31602-C. Moreover, the Commission noted in its rehearing decision that it had "granted MPS's petition for rehearing 'for the sole purpose of allowing the Commission to determine whether it committed an error of fact and/or law by failing to require [in its . . . decision in the DFR phase of the case] that Local 150 contribute to Bishop's back pay.'" Milwaukee Public Schools and Service Employees International Union Local 150 Dec. No. 31602-G (WERC, 8/08). Thus, the apportionment issue was squarely before the Commission, which concluded that it had not erred by refusing to apportion backpay. Basing this conclusion on an extensive review of relevant decisions, the Commission "[thought] it likely" that those decisions "[supplied] more than 'dicta' for the instant situation". Id. I interpret this statement to mean that in the Commission's view, the earlier decisions compelled the conclusion that the remedy of backpay in a DFR / breach of contract action could not be apportioned between the employer and the union.

Nevertheless, the Commission added that even if the relevant language from the earlier cases were dicta that should be limited to the circumstances of those cases, the facts in Milwaukee Public Schools would not require the Commission to alter the longstanding remedy for a breach of the duty of fair representation: *i.e.* requiring the union to pay the employee's attorney fees and costs in prosecuting the case against the employer, but not backpay. The same conclusion applies with equal force in this factually analogous case; both cases involve the discharge of an employee allegedly in violation of a collective bargaining agreement, and an alleged breach of a Union's duty of fair representation. The County, however, fails to explain how the facts in this case are materially distinguishable from those of Milwaukee Public Schools, so as to warrant an apportionment of backpay.

Lastly, the County does not identify the supposedly "substantial supporting arguments that MPS failed to raised [sic] before the Commission." As an Examiner, I cannot conclude that backpay (if it were awarded) should be apportioned between the County and the Union based on hypothetical or inchoate arguments, where the Commission has rejected that position in previous decisions and the County has offered no persuasive basis to distinguish the decision. Moreover, even if I was not obligated to follow Milwaukee Public Schools, I would do so, based on its sound reasoning and consistency with past decisions.

III. DUE PROCESS AND FUNDAMENTAL FAIRNESS

Citing no legal authority, the County argues that due process and fundamental fairness preclude dismissal of the Union. The issue of whether the Union has violated its duty of fair representation, according to the County, substantially impacts the County, because in the absence

of the Union, the County cannot adequately defend the DFR claim. The County does not know who the key decision makers are, how the internal operations of the Union are conducted, and how to prepare for a fact-finding hearing without access to relevant facts. Moreover, the County maintains that it is fundamentally unfair to permit the Union to violate its duty of fair representation by not processing a grievance and then to revive the employee's stale claim by settling with the Union. Dismissing the Union under these circumstances, according to the County, would encourage unions to violate rather than fulfill their duty of fair representation. As discussed below, these arguments are unavailing for several reasons.

First, the County's reliance on notions of due process and fundamental fairness presupposes that it has standing to object to the Complainant's and Union's settlement and request for dismissal of the Union; however, based on persuasive federal authority, I disagree. Even if the Commission's approval of the settlement were required, the County, as a non-settling defendant, would not have standing to object to the settlement and dismissal here, unless it could show plain legal prejudice. *See* Agretti v. ANR Freight System, Inc., 982 F.2d 242 (7th Cir. 1992). Agretti was a class-action in which a non-settling defendant employer objected to a court-approved settlement between a defendant union and a plaintiff class of dissatisfied union members. The plaintiff class alleged that the employer had breached a collective bargaining agreement and that the union had breached its duty of fair representation. The Seventh Circuit Court of Appeals observed:

> The general rule, of course, is that a non-settling party does not have standing to object to a settlement between other parties. Particularly, "non-settling defendants in a multiple defendant litigation context have no standing to object to the fairness or adequacy of the settlement by other defendants." 2 Herbert B. Newberg, Newberg on Class Actions § 11.54 (2d ed. 1985).

Id. at 246. *See also* Waller v. Financial Corp. of America, 828 F.2d 579, 582 (9th Cir. 1987) (noting that "a non-settling defendant, in general, lacks standing to object to a partial settlement" and citing cases.) However, an exception to this general rule is the doctrine of "plain legal prejudice" or "formal legal prejudice":

> This doctrine, adopted by [the Seventh Circuit Court of Appeals] in *Quad/Graphics* and other courts, requires a defendant to prove plain legal prejudice in order to have standing to challenge a partial settlement to which it is not a party. *Quad/Graphics,* 724 F.2d at 1233; *see In re School Asbestos Litig.,* 921 F.2d at 1333; *Alumax Mill Prods., Inc. v. Congress Fin. Corp. of Am.,* 912 F.2d 996, 1002 (8th Cir.1990); *Waller v. Financial Corp.,* 828 F.2d 579, 582-83 (9th Cir.1987); *New Mexico ex rel. Energy and Mineral Dep't v. United States Dep't of Interior,* 820 F.2d 441, 445 (D.C.Cir.1987); *Bass v. Phoenix Seadrill/78, Ltd.,* 749 F.2d 1154, 1165 (5th Cir.1985); *see also* 2 Herbert B. Newberg, Newberg on Class Actions § 11.54 (Supp.1992) ("Nonsettling defendants also have standing to object if they can show some *formal* legal prejudice").

Agretti, 982 F.2d at 246-247. Moreover, "whether a party will suffer plain legal prejudice from a settlement involves an evaluation of the settlement's effect on that party's *legal rights*." Id. at 247 (emphasis added). The Court provides examples of situations that do and do not constitute plain legal prejudice:

> Plain legal prejudice has been found to include any interference with a party's contract rights or a party's ability to seek contribution or indemnification. *Quad/Graphics*, 724 F.2d at 1232. A party also suffers plain legal prejudice if the settlement strips the party of a legal claim or cause of action, such as a cross-claim or the right to present relevant evidence at trial. *Alumax*, 912 F.2d at 1002 (dismissing cross-claims with prejudice); *Dunn v. Sears, Roebuck & Co.*, 639 F.2d 1171, 1173-74 (5th Cir.1981) (making potential witnesses unavailable to remaining defendants).
>
> On the other hand, courts have repeatedly held that a settlement which does not prevent the later assertion of a non-settling party's claims, although it may force a second lawsuit against the dismissed parties, does not cause plain legal prejudice to the non-settling party. *In re Sch. Asbestos Litig.*, 921 F.2d at 1333; New *Mexico ex rel. Energy & Minerals Dep't*, 820 F.2d at 445; *Quad/Graphics*, 724 F.2d at 1233; *Morgan v. Walter*, 758 F.Supp. 597, 600 (D.Idaho 1991); *New York Hotel & Motel Trades Council*, 747 F.Supp. at 1078; *see* 2 Newberg, *supra*, § 11.54 (Supp.1992). *Mere allegations of injury in fact or tactical disadvantage as a result of a settlement simply do not rise to the level of plain legal prejudice*. *Quad/Graphics*, 724 F.2d at 1233-34.

Agretti, 982 F.2d at 247 (emphasis added).

Applying these principles, the Agretti Court concluded that the non-settling employer's (ANR's) rights were not legally prejudiced by a settlement between the union and plaintiff class, and thus ANR did not have standing to object to the settlement. The provisions at issue declared a ratification vote and the implementation of a profit sharing plan to be null and void, ended all claims brought by the plaintiffs against the union, and waived any monetary relief. In reaching its decision, the Court noted that notwithstanding these provisions, the non-settling employer still retained its rights under the contract, could enforce those rights through legal action, and could assert any counterclaims it wished against the union. Agretti, 982 F.2d at 247-248. The Court further observed:

> Nor do we know of any cases finding standing for a non-settling party because a settlement is allegedly illegal or against public policy. This is because the plain legal prejudice [doctrine] is an exception to the general rule that only a party to a settlement may object to a proposed settlement. Furthermore, *ANR has failed to show or cite any authority for its proposition that its due process rights have been violated by the settlement and that they have standing because of this*.

Agretti, 982 F.2d at 248 (emphasis added).

Applying Agretti to the facts of this case leads me to conclude that the settlement herein does not legally prejudice the County and that the County therefore does not have standing to object to it. Both Agretti and this case involve a hybrid DFR / breach-of-contract claim. Here, as in Agretti, the settlement has interfered with neither the employer's contractual rights nor its ability to seek contribution or indemnification. The County retains its right to defend, if necessary, its position that terminating the Complainant's employment did not violate the collective bargaining agreement. Moreover, even if the County's possible future demand for an apportionment of backpay were interpreted as a claim or cross-claim for contribution, under Milwaukee Public Schools, such a claim would not be actionable. The County is not legally prejudiced by the deprivation of a claim that is not legally cognizable under MERA. Nor is the County legally prejudiced by the absence of other remedies traditionally awarded for a *complainant's* successful DFR claim, such as requiring a union to post remedial notices.

In addition, the County has not been deprived of its right to present evidence at hearing. While the County protests that it is not in the same position as the Union to identify the Union's "key decision makers"4 or to understand "how the internal operations of the Union are conducted", any such disadvantage falls under the rubric of "[m]ere allegations of injury in fact or tactical disadvantage as a result of a settlement [that] simply do not rise to the level of plain legal prejudice." Agretti, 982 F.2d at 247, *citing* Quad/Graphics, 724 F.2d at 1233-34. The County retains the right to subpoena witnesses and to present evidence regarding the DFR claim. And even assuming that the County is at a disadvantage compared to the Union in defending the DFR claim, such a disadvantage does not constitute legal prejudice, where, in the absence of the Union's alleged violation of the duty of fair representation, the County would be in the position of defending a timely filed breach-of-contract grievance, and where it will be relieved of that burden if the Complainant does not prove his DFR claim. Notably, moreover, the Court in Agretti rejected the arguments that the employer's due process rights were somehow violated by the settlement of the DFR claim, and that the violation of those rights conferred standing on the employer to object to the settlement. Agretti, 982 F.2d at 248.

Finally, the County's fundamental fairness arguments are essentially moot, because it does not have standing to make them; however, even if considered, they do not have substantive merit. Dismissing the Union under these circumstances, in my view, would not encourage unions to violate their duty of fair representation. Such violations expose unions to potential payment of complainants' legal fees and costs in prosecuting breach-of-contract claims against employers, unless a settling complainant is willing to partially or completely waive such a remedy. Moreover, the stigma attached to a violation of the duty of fair representation should not be underestimated, especially given that "[i]t is exceedingly difficult for an individual bargaining unit member to establish a breach of the duty . . ." Milwaukee Public Schools and Service Employees International Union Local 150 Dec. No. 31602-C (WERC, 1/07).

[4] The County is nevertheless not completely disadvantaged in this regard. The Complaint sets forth various allegations regarding the Union's steward's mishandling of the grievance.

IV. NON-DISCLOSURE OF SETTLEMENT AGREEMENT

Given the County's lack of standing to object to the settlement agreement, it follows that it lacks standing to object to the non-disclosure of that agreement to the County and to the Complainant's possible successor counsel. Nevertheless, even if I were to consider the merits of the County's arguments, I am not persuaded that the Union must, as the County urges, disclose its settlement agreement. The County cites no legal authority supporting its position that the settlement agreement here must be so disclosed; to the contrary, the Court of Appeals has recognized that stipulations to maintain confidentiality are "common with employment contracts and settlement agreements". Markwardt v. Zurich American Ins. Co., 2006 WI App 200, ¶ 24, n. 10, 296 Wis. 2d 512, 535, 724 N.W.2d 669, 680. Moreover, although the Union provided the Commission with a copy of the settlement agreement, I question whether it had to do so; the County does not cite, nor am I aware of, any legal authority requiring the Commission to review and approve the terms of a settlement before it can become a valid and legally binding agreement.[5] Thus, mere notice of the settlement to the Commission would have sufficed to support the Complainant's and Union's request for a voluntary dismissal. In addition, as the Complainant's counsel expressly acknowledged, "[t]he Complainant realizes that the settlement agreement does not obviate the Complainant from its' [sic] burden of proving that the Union violated its duty of fair representation to Mr. Duncan at a hearing." Under these circumstances, I do not believe that disclosure of the settlement agreement is necessary, nor does non-disclosure somehow preclude me from granting the Complainant's requested order of dismissal.

The County also argues that dismissal of the Union would be unfair to the *Complainant* without first allowing the Complainant's possible successor counsel to review the settlement agreement on his behalf. Although the Complainant's former counsel negotiated the settlement agreement, the County counters that she demonstrated "very little understanding of WERC proceedings or the substantive issues involved in this case" and questions whether the settlement agreement's terms afford the Complainant remedies traditionally awarded to complainants for a union's breach of the duty of fair representation. Even if I were to disregard the questionable magnanimity and transparent self-interest of this argument, I would find it unconvincing. The County effectively invites me to evaluate the fairness of the terms of the settlement agreement without any factual record relevant to the DFR claim, to evaluate in this factual vacuum whether the Complainant's former attorney provided ineffective counsel in settling the DFR claim, and to determine whether the successor counsel should be given the opportunity to review and somehow invalidate the already signed settlement agreement. Needless to say, I decline the invitation.[6]

---

[5] By way of contrast, for example, Wis. Stat. § 807.10(2) requires court approval of settlements involving minors. Moreover, in the class-action context, Fed. R. Civ. P. 23(e) provides that "[t]he claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised *only with the court's approval*." (Emphasis added.)

[6] Additionally, I note that while Wisconsin recognizes claims for legal malpractice, *see* Cook v. Continental Cas. Co., 180 Wis. 2d 237, 246, 509 N.W.2d 100, 103 (Ct. App. 1993) (citations omitted) (describing elements of such claims), the Commission does not have subject matter jurisdiction over them. *See* State (Dept. of Administration) v.

In sum, based on the foregoing analysis, the Complainant's and Union's motion for a dismissal with prejudice of any and all claims asserted by the Complainant against the Union relating to the Union's duty of fair representation is granted, and the Union is thus dismissed from this matter.

Dated at Madison, Wisconsin, this 26th day of June, 2012.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John C. Carlson, Jr. /s/
John C. Carlson, Jr., Examiner

Department of Industry, Labor and Human Relations, 77 Wis. 2d 126, 136, 252 N.W.2d 353, 357 (1977), *citing* Racine Fire & Police Comm. v. Stanfield, 70 Wis.2d 395, 399, 234 N.W.2d 307 (1975); Wisconsin Environmental Decade, Inc. v. Public Service Commission, 69 Wis. 2d 1, 16, 230 N.W.2d 243 (1975) ("It is the general rule that an administrative agency has only those powers which are expressly conferred or which are fairly implied from the four corners of the statute under which it operates.") The Commission declines to stick its institutional nose in a subject matter over which it has no authority.