

STATE OF WISCONSIN
BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

GREGORY SOLOMON, Jr., Complainant,

vs.

WISCONSIN CENTER DISTRICT and SEIU, LOCAL 1, Respondents.

Case 17
No. 71517
MP-4706

Decision No. 33884-A

Appearances:

Gregory Solomon, Jr., 3703 East Holmes Avenue (Lower), Cudahy, Wisconsin 53110, appearing on his own behalf.

Attorney Steven M. DeVougas, Hinshaw & Culbertson LLP, 110 East Wisconsin Avenue, Suite 2600, Milwaukee, Wisconsin 53202, appearing on behalf of the Respondent, Wisconsin Center District.

Emil P. Totonchi, Esq., Associate Counsel, Service Employees International Union, Local 1, 111 East Wacker Drive, Suite 2500, Chicago, Illinois 60601, appearing in behalf of Respondent SEIU, Local 1.

**FINDINGS OF FACT, CONCLUSIONS OF LAW
AND ORDER GRANTING RESPONDENTS' MOTIONS TO DISMISS**

On January 31, 2012, Gregory Solomon, Jr. filed a prohibited practice complaint with the Wisconsin Employment Relations Commission against his former employer, the Wisconsin Center District (the District), and his former Union, Service Employees International Union Local 1 (SEIU) contending that he had been wrongfully terminated from his employment on January 31, 2011, that his termination was, in part, a result of racial discrimination, and that SEIU Local 1 had failed to properly represent him during the termination process, again due, in part, to racial discrimination. The matter was assigned to Examiner John R. Emery and the case was set for hearing on Monday, July 9, 2012.

On July 2, 2012, the Respondents filed answers to the complaint, and on July 3, the District filed a motion to dismiss the complaint, which was joined by SEIU. The Examiner

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held the motions in abeyance pending the presentation of the Complainant's case-in-chief, whereupon the Respondents resubmitted their motions. The Examiner agreed to permit the Complainant to file a responsive brief to the Respondents' motions and a responsive brief was filed on September 10, 2012. Having considered the arguments of the parties, I am satisfied that the Respondents' motions should be granted. Accordingly, I hereby make the following Findings of Fact, Conclusions of Law and Order granting the Respondents' motions to dismiss.

FINDINGS OF FACT

1. Gregory Solomon, the Complainant herein, was, at all pertinent times, a municipal employee, employed by the Wisconsin Center District, was a member of a bargaining unit represented by Service Employees International Union, Local 1 (SEIU) and resided at 2314-A South Austin Street, Milwaukee, Wisconsin 53207.

2. The Respondent, Wisconsin Center District (WCD), is a special purpose district created under Ch. 229, Wis. Stats. to operate the Midwest Express Center, U.S. Cellular Arena and Milwaukee Theater in Milwaukee, Wisconsin and is a municipal employer under Sec. 111.70, Wis. Stats.

3. The Respondent Service Employees International Union, Local 1 (SEIU), is a labor organization under Sec. 111.70, Wis. Stats and at all pertinent times represented a bargaining unit of employees of WCD, of which the Complainant was a member. At all pertinent times a collective bargaining agreement existed between SEIU and WCD covering the period from January 1, 2009 through December 31, 2013.

4. Article 3 of the parties' collective bargaining agreement contains a grievance procedure that provides for binding arbitration of grievances in the event they cannot be resolved through negotiation.

5. Solomon was hired by WCD on July 22, 2005 and remained employed until January 31, 2011 as a Part-Time Set-up Employee, whose duties involved various tasks associated with maintaining the facilities operated by WCD and setting them up for events.

6. During the course of his employment, and prior to his termination, Solomon received discipline on four separate occasions. On January 19, 2007, Solomon received a verbal warning for attendance violations. On June 10, 2008, he received a verbal warning for taking an unauthorized break. On March 9, 2009, he received a verbal warning for leaving his assigned work area. On February 25, 2010, he received a three day suspension for using loud, profane and derogatory language in the workplace, failure to provide accurate and complete information during an investigation and threatening another employee.

7. Regarding the February 2010 incident, WCD had determined to terminate Solomon, but agreed to reduce the discipline to a suspension, accompanied by a Last Chance

Agreement at the request of the Local 1 representative, Dave Sommerscales. Solomon did not grieve any of the discipline referenced in Finding of Fact #6.

8. The Last Chance Agreement was contained in a letter issued to Solomon by Russell P. Staerkel, Director of Human Resources and Special Services, on February 25, 2010, as follows:

Dear Mr. Solomon,

This letter is to inform you of a Three Day Suspension and Last Chance letter for your failing to follow proper procedures outlined in the Local Service Employees International Union, AFL-CIO Contract, dated January 1, 2009 to December 31, 2013, as amended. To Wit: Article VII, Section 4, Page 4: To direct the employees, including assigning work...and WCD employees manual dated Feb 08, Page 15 Work Rule #1: Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, direction or instructions; Work Rule #2: Abusing, striking, or deliberately causing mental anguish...Work Rule #5: Disorderly or illegal conduct including, but limited [sic] to the use of loud profane or abusive language...and Work Rule #18: Conduct Unbecoming a WCD Employee.

On 20/21 Feb 10 you were scheduled to perform duties at the Wisconsin Center District as listed on your duty scheduled [sic] dated Feb 10. On 20/21 you were observed engaging in a loud, disruptive and disorderly behavior while performing duties in the US Cellular Arena. Reports indicate that you were using vulgar language, was extremely loud, and disruptive to the entire work crew. An investigatory hearing was conducted on 25 Feb 10, at the Midwest Airlines Center with the Director of Human Resources, Director of Event Services, the Manager of Set up and Cleaning and your union representative. During this interview you admitted to be loud, using vulgar words and being disruptive to the job site. Based on your failure to follow the WCD Work Rules and Policies and Procedures, the WCD is providing you a three-day suspension and a last chance letter. This three-day suspension encompasses the following Feb/Mar 2010 shifts; 26 Feb 10, 6AM-2PM, 27 Feb 10, 7 AM-3PM, 1 Mar 10, 8AM-6PM. You will return to duty as outlined in the March 2010 work schedule, on Mar 10 at 6AM.

You shall acknowledge receipt of this three-day suspension and last chance letter. You shall also be advised that you may not discuss this suspension with anyone other than myself, Mr. Janicek, or your union representative, Dave Sommerscales. You shall also be advised that you have agreed to this 3 day suspension and last chance letter and understand that any future violations of WCD Rules, Policies and Procedures, verbal and written orders will be cause for immediate termination.

Further, you were represented by Union Agent Dave Sommerscales.

Sincerely,

/s/

Russell P. Staerkel
Director of Human Resources and Special Services

9. Solomon acknowledged receipt and agreement to the discipline and last chance agreement in writing on February 25, 2010.

10. On January 14/15, 2011, Solomon was involved in an altercation with a fellow employee, Marshae Donaldson. An investigation was conducted in which statements were taken from the principals and several other employees who witnessed the incident.

11. Solomon was interviewed on January 26, 2011 in a meeting with Staerkel, Robert Janicek, Set up and Cleaning Manager, Jason Borders, Director of Event Services, Jeremy Ott, Director of Public Safety and Union Representative Peter Hanrahan. At that time, Solomon admitted using profane and derogatory language toward Donaldson, but claimed that Donaldson had instigated the incident and had threatened him. Solomon identified other employees he believed would substantiate his story.

12. The employees Solomon identified were interviewed and confirmed the confrontation, including the facts that Solomon had used loud and profane language toward Donaldson and had threatened him. They denied that Donaldson had used profane or threatening language toward Solomon. The witnesses also stated that Solomon continued to pursue Donaldson and agitate the situation even after he and Donaldson had been told to stay away from each other by their supervisor, Peter Kujjo. Solomon's conduct was confirmed by a review of security tapes that showed Solomon going into the break room where Donaldson was several times after Kujjo had told them to stay away from each other. Solomon and Hanrahan also viewed the security tapes and Solomon offered no explanation for his conduct.

13. On January 31, 2011, after concluding the investigation, Staerkel issued a letter of termination to Solomon, as follows:

Dear Mr. Solomon,

This letter is the Wisconsin Center District's official notification of employment termination as a Part Time Set up Employee with the Wisconsin Center District effective January 31, 2011. This termination is based on your repeated failure to comply with District Policies and Procedures. To wit:

- 25 January 2006 – Counseling session – Failure to complete duties
- 19 January 2007 – Verbal Warning for Attendance Violations

- 10 June 2008 – Verbal Warning for Leaving Your Assigned Workplace without Authorization (Taking an unauthorized break)
- 9 March 2009 – Verbal Warning for Leaving Assigned Work Area
- 8 July 2009 – Investigation for Workplace Disruption, Memo to File
- 25 February 2010 – Three day suspension and Last Chance Letter for uttering loud, profane, and derogatory language and causing workplace disruption
- 25 January 2011 – Termination for Using Loud, Profane and Derogatory Language in the Work Place, Not Providing Accurate and Complete Information during an investigation and Uttering Threats of Violence to another WCD employee.

The following WCD work rules were violated:

- Work Rule #1: Disobedience, insubordination, inattentiveness, negligence, or refusal to carry out written or verbal assignments, directions, or instructions.
- Work Rule #2: Abusing, striking, or deliberately causing mental anguish or injury to clients, visitors, employees or others.
- Work Rule #5: Disorderly or illegal conduct including, but not limited to, the use of loud, profane or abusive language...
- Work Rule #7: Failure to provide accurate and complete information when required by management.
- Work Rule #22: Conduct unbecoming of a WCD Employee.
- Work Rule #23: Failure to follow the policies set forth in this Handbook
- Wisconsin Center District Employee manual, Page 4, Violence in the Workplace.

On 14/15 Jan 11, you were identified by Set Up and Cleaning Assistant Manager Peter Kujjo as being disruptive, using foul and derogatory language and making threats to another WCD Employee. During the initial investigation you completed a statement on 15 January 2011 in which you stated that WCD Part Time Employee Marsha Donaldson was mad at you for not picking him for snow removal and that he allegedly threatened you by allegedly stating “to go outside” which upset you. On 26 January 2011 an investigatory interview

was held with you, Mr. Peter Hanrahan, Union Representative, Mr. Robert Janicek, Set Up and Cleaning Manager, Mr. Jason Borders, Director of Event Services, Mr. Jeremy Ott, Director of Public Safety, and myself concerning the incident that happened on 14/15 January 2011. During this interview a series of questions were asked to you regarding the 14/15 January 2011 incident. During these questions, it was determined, by your own admission that you did in fact, utter loud and profane language, uttering threats and knowingly providing false and misleading statements. During the interview, you stated that you only went into the break room one time during the time this incident occurred, however closed circuit camera coverage showed you entering the break room at least 10 times during a 9 minute span. You stated that the camera coverage was wrong and I permitted you and your Union Representative the chance to view the camera coverage. In fact, you observed the camera coverage with your Union Representative but did not provide any comments. You also stated that when you entered the break room the one time, you were confronted by Donaldson and Donaldson made a disparaging comment to you and threatened you and that is why you left the break room to eat your lunch in another area. I asked you to provide the names of witnesses that heard the comments and threats made to you by Donaldson. You, did in fact, provide two District employee names that you stated that would support you [sic] alleged allegation. I informed you that I would interview these individuals and that you were on suspension pending the outcome of the interviews. I did, in fact, interview the two District employees that you stated saw and heard the threats made by Donaldson. Both employees stated that Donaldson never stated the disparaging comment you alluded to and that Donaldson did not make any threats as you described. Both employees did state that you, yourself, did use derogatory and inflammatory language; did enter the break room more than once; continued to agitate the situation by confronting Donaldson even after you were told to stop by your supervisor. Further, both employees stated that they personally witnessed, at approx. 11:30 p.m., Supervisor Kujjo instruct you and Donaldson to stay away from each other and do your job to which you failed to comply as evidenced your actions [sic] and witness statements. Other statements were obtained that indicated that you, in fact, were loud, disruptive, continually attempted to instigate a confrontation with the other District employee. Based on your repeated failure to follow WCD's Policies and Procedures, the WCD has no choice but to terminate your employment effective 31 January 2011.

You must return all Wisconsin Center District owned equipment no later than 10 February 2011. You must call Robert Janicek at 414-908-6122 to make arrangements for the return of your personal belongings and the return of District equipment no later than 5 February 2011.

Further, you are not permitted on Wisconsin Center District grounds for any reason unless you are a ticketed customer or an invitee to an event occurring at

the District. At no time are you permitted in any District back of house area, which includes the Frontier Airline Center, U.S. Cellular Arena, and/or the Milwaukee Theater.

Sincerely,

/s/

Russ Staerkel

Wisconsin Center District Director of Human Resources and Special Services

Solomon received the termination letter on January 31, 2011

14. On February 1, 2011, Union Representative Hanrahan sent Solomon a letter advising him that Local 1 had determined that his discharge did not merit arbitration.

15. On June 24, 2011, Solomon filed a civil suit against WCD in the U.S. District Court for the Eastern District of Wisconsin - Solomon v. Wisconsin Center District and Russell P. Staerkel, Case No. 11-CV-16 – in which he alleged that WCD and Staerkel engaged in racial discrimination against black employees generally and him in particular, resulting in him not getting promotions to which he was entitled and also being unfairly disciplined and ultimately terminated.

16. On January 31, 2012, the Solomon filed a complaint with the Wisconsin Employment Relations Commission, alleging the following facts:

“Local Seiu does not properly represent the Union contract workers. The Black Union workers noticed how the Wisconsin Center District and Seiu showed favoritism toward the White Union workers. If an incident occurred in which a White Union worker was to be represented for the same incident, the punishment is more severe toward the Black Union workers. The Union will defend the White Union workers more than the Black Union workers. There have been several incidents that the Union defended the White Union worker and did nothing to defend the Black Union worker. For example, a White worker used profanity toward a Supervisor and nothing happened. They still kept their job because the Union defended the White Union workers but the same thing happen [sic] to the Black Union worker and the Union did nothing to represent the Black Union worker, and they were discharged. My discharge is a good example how the Union does not properly represent the Black Union workers. The Head of human resources wrote a lot of untrue statements about me and the Union did nothing to investigate. I have evidence to back up my statement. I am here for equal treatment, equal opportunity, and equal justice. My Union contract did not follow procedure which ultimately led to my dismissal.”

“Ever since Russell P. Staekel [sic] became the Head of human resources, he treated the Black Union workers different from the White Union workers. As a Union worker we all must obey company rules. It is known by the Black Union workers if you make any mistakes the punishment is more severe that the White Union worker for the same mistake. The Head of human resources will find a way to get rid of the Black worker, but he gives the White worker a second chance. Wisconsin Center District hires and promotes more full-time White workers than Black workers. It’s very seldom that a Black worker will be hired and promoted to a full-time position. The Union let the Head of human resources control every situation. I was discriminated against and wrongfully discharged by the Head of human resources and the Local Seiu Union did nothing to stop it.”

“After paying Union dues for over five years and Local Seiu Union does nothing to defend the Black Union workers. They let the Head of Human Resource [sic] control every situation and let him fabricate and produce false statements all because he does not like you. I would like to receive back pay and front pay. If Local Seiu Union would have properly done an investigation and treat everyone equal this complaint would never been file [sic].”

17. On May 15, 2012, the Court granted Summary Judgment and dismissed Solomon’s lawsuit against WCD.

18. SEIU’s conduct in representing the Complainant with respect to his conduct on January 14/15, 2011 was not arbitrary, discriminatory or in bad faith and was not influenced by the Complainant’s race.

19. SEIU’s conduct in advising the Complainant that his discharge did not merit arbitration was not arbitrary, discriminatory or in bad faith and was not influenced by the Complainant’s race.

Based on the foregoing Findings of Fact, I hereby make the following

CONCLUSIONS OF LAW

1. For the purpose of determining if Complainant states claims that can be heard by the Commission, Complainant was a “Municipal employee” within the meaning of Sec. 111.70(1)(i), Stats.

2. For the purpose of determining if Complainant states claims that can be heard by the Commission, Wisconsin Center District is a “Municipal employer” within the meaning of Sec. 111.70(1)(j), Stats.

3. For the purpose of determining if Complainant states claims that can be heard by the Commission, Service Employees International Union, Local 1, is a "Labor organization" within the meaning of Sec. 111.70(1)(h), Stats.

4. The complaint was timely filed under Sec. 111.07(14), Stats.

5. Respondent, Service Employees International Union, Local 1, did not violate its duty of fair representation to the Complainant herein in its representation of the Complainant regarding his discharge by the Wisconsin Center District, or in advising him that his discharge did not merit arbitration and, thus, did not commit a prohibited practice within the meaning of Sec. 111.70(3)(b), Stats.

6. The Commission will not exercise its jurisdiction under Sec. 111.70(3)(a)5, Stats. to adjudicate the Complainant's claims against Respondent, Wisconsin Center District.

Based upon the foregoing Findings of Fact and Conclusions of Law, I hereby enter the following

ORDER

IT IS ORDERED that the Respondents' Motions to Dismiss are granted and that complaint herein be, and hereby is, dismissed in its entirety.

Dated at Fond du Lac, Wisconsin, this 8th day of January, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner

WISCONSIN CENTER DISTRICT

MEMORANDUM ACCOMPANYING FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER
GRANTING RESPONDENTS' MOTION TO DISMISS

Prior to the hearing in this matter, the Respondents filed motions to dismiss. Commission examiners have long cited the following standard when ruling on the merits of a pre-hearing motion to dismiss:

Because the dramatic consequences of denying an evidentiary hearing, on a motion to dismiss the complaint must be liberally construed in favor of the complainant and the motion should be granted only if under no interpretation of the facts alleged would the complainant be entitled to relief. Unified School District No. 1 of Racine County, Wisconsin, Dec. No. 15915-B (Hoornstra with final authority for WERC, 12/77), at 3; Racine Unified School District. Dec. No. 27982-B (WERC, 6/94).

In this case, the Examiner determined that the pleadings at least facially stated claims which, if proven, could potentially entitle the Complainant to relief. For that reason, the motions were initially held in abeyance. At the conclusion of the presentation of the Complainant's case in chief at hearing, the Respondents resubmitted their motions.

PARTIES' POSITIONS

The Respondent, Wisconsin Center District maintains that the Complainant's discharge was for good cause and was in no way based upon racial discrimination. It further asserts that the Complainant's discrimination claims are precluded in that they were previously raised in a separate action in U.S. District Court under 28 USC §1983, which was dismissed on summary judgment. Finally, WCD asserts that the complaint is barred by the statute of limitations.

The Respondent, Service Employees International Union, asserts that the Complainant's claims are barred by the one year statute of limitations set forth in Sec. 111.70(4)(a), Wis. Stats., as well as by his failure to exhaust the grievance procedure contained in the parties' collective bargaining agreement. SEIU further asserts that the Complainant has failed to offer evidence that it did not fairly represent him with respect to his discharge.

The Complainant maintains that his discharge was not for good cause and that the evidence establishes that SEIU did not properly represent him in the investigatory process leading to his termination. Tangentially, he claims the Last Chance Agreement in effect at the time of his discharge was entered into under duress. He denies that the complaint is barred by the statute of limitations. He asserts, moreover, that WCD's decision to terminate him, and SEIU's alleged inadequate representation of him during the process, were racially motivated based on the fact that the Complainant is African-American.

DISCUSSION

Statute of Limitations

Section 111.07(14), Stats, states: "The right of any person to proceed under this section shall not extend beyond one year from the date of the specific act or unfair labor practice alleged." In this case, the Complaint was filed on January 31, 2012. The Respondents argue that the filing took place beyond a year from the date on which the alleged unfair labor practice occurred, which they assert was January 26, 2011, the date on which Solomon had his investigatory interview with WCD management and his SEIU representative, Peter Hanrahan. The Respondents contend that Solomon learned of his termination at this time and so the statute of limitations began to run at this point, despite the fact that he did not receive his written notice of termination until January 31. I disagree.

Solomon's letter of termination from Human Resources Director Russell Staerkel is dated January 31, 2011. Page 1 of the letter sets forth Solomon's disciplinary history and lists the specific work rules WCD alleged were violated in the incident that occurred on January 14/15, 2011. Page 2 contains a narrative setting forth the details of the January 14/15 incident and management's investigation thereof. The narrative states that management conducted an "investigatory interview" with Solomon and Union Representative Hanrahan on January 26. The letter does not state that Solomon was informed of his termination at that time. Rather, it states that Solomon was asked to provide the names of corroborating witnesses, which he did, and that he was told he was on administrative suspension pending interviews with the witnesses. Staerkel interviewed the witnesses and then determined to terminate Solomon. Solomon was not informed of this, however, until he received his termination notice on January 31, 2011.

The Commission has held that the one-year statute of limitations begins to run when "the Complainant has knowledge of the act alleged to violate the Statute." State of Wisconsin, Dec. No. 26676-B at 8 (WERC, 2/91) or in circumstances when the complainant did not learn of the event during the limitations period, the date upon which the Complainant "knew or reasonably should have known," Premontre High School, et al., Dec. No. 27550-B (WERC, 8/93) at 7. Further, under Wisconsin law, the day on which a cause of action accrues is not counted in computing the period of limitations. Pufahl v. Williams, 179 Wis. 2d 104, 506 N.W. 2d 747 (1993). In this case, Solomon did not learn of WCD's decision to terminate him until January 31, 2011. The filing of his Complaint on January 31, 2012, therefore, was within the statute of limitations, albeit on the last day. Accordingly, I find that Solomon's complaint was timely filed.

Merits of the Complaint

In this case, the Solomon has asserted that WCD terminated him wrongfully and that SEIU violated its duty of fair representation to him in that it acted discriminatorily in its handling of his termination based upon his race. He contends that SEIU, and WCD, treated

black employees generally, and himself specifically, unfairly in comparison to white employees. He further contends that had he been white, WCD would not have fired him and that SEIU would have worked harder to defend him.

The WERC has held that where a collective bargaining agreement exists that contains a grievance procedure and provides for binding arbitration of grievances, the Commission will not assert jurisdiction over statutory breach of contract claims because the contractual grievance procedure is presumed to be the exclusive means of resolving allegations of contract violations. Mahnke v. WERC, 66 Wis. 2d 524, 529-530, 532 (1975); Gray v. Marinette County, 200 Wis. 2d. 426, 436 (Ct. App. 1996); United States Motor Corp., Dec. No. 2067-A (WERB, 5/49); Harnischfeger Corp., Dec. No. 3899-B (WERC, 5/55); Melrose Mindoro Joint School District No. 2, Dec. No. 11627 (WERC, 2/73); City of Menasha, Dec. No. 13283-A (WERC, 2/77); Monona Grove School District, Dec. No. 22414 (WERC, 3/85). There is no dispute that the collective bargaining agreement between WCD and SEIU contains a grievance procedure providing for binding arbitration, and the record reveals that Solomon did not seek to file a grievance after his termination, either on his own or through the Union. However, the Commission will assert its violation of contract jurisdiction where the Complainant has not exhausted his contractual remedies if it can be shown that the Union failed in its duty of fair representation. Mahnke v. WERC, Supra. Further, Sec. 111.07(3), Stats., made applicable to the Municipal Employment Relations Act by Sec. 111.70(4)(a), Wis. Stats., states that “. . . the party on whom the burden of proof rests shall be required to sustain such burden by a clear and satisfactory preponderance of the evidence.” It is, therefore, the Complainant’s duty to establish a breach of the duty of fair representation by a clear and satisfactory preponderance of the evidence.

In Vaca v. Sipes, 87 S.Ct. 903, 64 LRRM 2369 (1967), the U.S. Supreme Court established standards for determining compliance with the duty of fair representation, which were subsequently adopted by the Wisconsin Supreme Court in Mahnke. In Vaca, the Court stated:

A breach of the statutory duty of fair representation occurs only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith.
Id at 2376.

In his complaint, Solomon states that the Union works harder to defend white bargaining unit members than black members and that his case is a good example. He alleges that WCD did not follow the contractual discipline process and that the Union did not object. His complaint further states that WCD produced false statements from other employees to support its action and that the Union did not properly investigate the incident or attempt to defend him during the investigation.

At hearing, Solomon admitted that he was operating under a last chance agreement that had been in effect since February 2010 for behavior similar to that for which he was ultimately

discharged. He further admitted that he would have been terminated in February 2010, but for the intervention of the Union in proposing and negotiating the agreement. Solomon stated that the WCD based its termination decision on false statements from other employees and that the Union did not investigate or challenge these statements. Solomon produced no witnesses, however, to confirm his version of the incident or challenge the information gathered by WCD.

At the investigatory interview on January 26, Solomon admitted that after the incident he and Marshae Donaldson were told by Supervisor Peter Kujjo to avoid one another. He admitted going in to the break room one time after the incident while Donaldson was in there, but denied confronting Donaldson or going into the break room multiple times while Donaldson was there, despite a security tape showing Solomon going into the break room multiple times while Donaldson was in there and appearing to argue with him. The tape was shown to Solomon and Union Representative Hanrahan during the investigatory interview. At the interview, Solomon also told Staerkel that his version of events would be corroborated by co-workers Beatrice Thomas and Jason Steinfeldt. Staerkel subsequently interviewed both Thomas and Steinfeldt, who both signed statements to the effect that Solomon provoked Donaldson throughout the shift and that they both overheard Solomon make threatening statements to Donaldson, but did not hear Donaldson threaten Solomon.

At hearing, Solomon produced no evidence of discriminatory behavior by the Union in handling either his discharge or his prior disciplines. He testified that he was unaware of the Union handling the representation of any similarly situated white employee differently, nor did he provide any evidence that the Union's handling of his representation was in any way influenced by racial considerations.

The record further reflects that Solomon had an extensive disciplinary history prior to his discharge, including verbal warnings in January 2007, June 2008 and March 2009, and the suspension and last chance agreement that occurred in February 2010. Article 16 of the collective bargaining agreement provides for progressive discipline, but also provides that management may depart from the progression in the case of serious offenses and Section 3 of Article 16 includes harassment in the definition of serious violations. Thus, it does not appear on this record that WCD departed from the contractual discipline formula in addressing Solomon's behavior, or that the Union had cause to argue that it did.

Solomon offered no evidence other than conclusory statements that the Union acted arbitrarily with respect to his termination. Under Mahnke, *supra*, where a union at the least considers the monetary value of a grievance, the impact on the grievant and the likelihood of prevailing on the merits in deciding not to arbitrate, it can be said to have not acted arbitrarily. The Union's decision regarding the lack of merit in arbitrating Solomon's termination is supported by his long disciplinary record, the fact that he was operating on a last chance agreement, the statements of numerous witnesses to the incident and Solomon's contradictory statements about his own conduct which did not comport with the videotape recorded in the workplace. While no direct evidence of consideration of the other factors was offered, in a

case involving termination those factors are obvious and it is highly unlikely that SEIU did not weigh them in the balance when evaluating Solomon's case. There is also absolutely no evidence of racial discrimination by the Union in its representation of Solomon prior to his termination. Solomon offered no evidence that the Union representative evinced any racial bias toward him in their direct dealings, nor did he offer any evidence that the Union's handling of his termination differed from that of any other similarly situated white employee, or employee of another race. The lack of any such evidence requires that the complaint against SEIU be dismissed in accordance with the Union's motion.

Because SEIU did not violate its duty of fair representation to the Complainant, under Mahnke v. WERC, I will not exercise jurisdiction to rule on his underlying contractual claims against the WCD and they are, accordingly, dismissed, as well.

Dated at Fond du Lac, Wisconsin, this 8th day of January, 2013.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

John R. Emery /s/

John R. Emery, Examiner