No. 74024-5-I

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

ROLAND KILLIAN and DENNIS BAILEY,

Plaintiff-Petitioners

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 609,

Defendant-Respondent

RESPONDENT'S BRIEF

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INTRODUCTION

The Superior Court granted Summary Judgment on Plaintiffs' claims for breach of duty of fair representation ("DFR") and the negligent unauthorized practice of law CP 966-968, and denied Plaintiffs' motion to amend to plead a new claim under the Consumer Protection Act ("CPA"), against Defendant International Union of Operating Engineers, Local 609, ("Local 609" or "Union") CP 971-973.

The Superior Court correctly held that all claims asserted or sought to be asserted against Local 609 were claims for the breach of the duty of fair representation and were time barred by the applicable statute of limitations. CP 966-968, 971-973.

STATEMENT OF THE CASE

Local 609 represents a bargaining unit of custodial engineers and gardeners employed by Seattle Public Schools ("District" or "SPS"). for purposes of collective bargaining under the Public Employment Collective Bargaining Act ("PECBA"), Ch. 41.56 RCW, including bargaining, grievances concerning, disciplinary actions, and safety violations. CP 52-53, 55-56. Plaintiffs Roland Killian ("Killian") and Dennis Bailey ("Bailey") were gardeners employed by the District and were part of a bargaining unit, represented by Local 609. CP 69-72. Article XVIII of the collective bargaining agreement ("CBA") covering their bargaining unit

contains a four step process for grievances alleging a violation of the CBA. CP 186-190, 349-351 (45:5-53:12).

In 2011, the District investigated a complaint that Bailey had sexually harassed a co-worker, Sue Wicker. CP 74 During the investigation of that complaint, the District received complaints that Bailey and Killian had been using school district time, materials and equipment for their personal landscaping business, and that Bailey had made physical threats to Wicker. CP 76-82. The District placed Bailey and Killian on paid administrative leave while it investigated claims that they had misused SPS's property. CP 84-85.

Local 609's officer Mike McBee ("McBee") conducted his own investigation and represented Killian and Bailey during the course of the District's investigation. CP 57 (115:3-11), 359 (88:10-22). McBee submitted numerous information requests to obtain all data concerning the District's decision to place them on paid administrative leave and designed to obtain information that would assist Local 609 in representing them if the SPS imposed discipline. CP 86-93, 296 (67:6-24).

On December 18, 2012, the District concluded there was proper cause to terminate Killian's and Bailey's employment for misconduct and scheduled *Loudermill* hearings, at which McBee represented them. CP 69-72, 231 (104:9)-232 (108:10), 367 (118:27-119:2). The District

terminated Plaintiffs' employment on December 27, 2012. CP 69-72.

McBee filed grievances under the CBA on the behalf of Killian and Bailey, contending that they were fired in violation of the just cause provision of that agreement, and represented them in each step, as he advanced their grievances through the CBA grievance process, by presenting factual and contractual arguments at three step meetings with District management. CP 95-106, 233-234 (111:25-112:24), 349 (45:5-48:8), 234 (114:14-20), 235 (117:21-118:24); CP 235-236 (120:7-121:3).[1] The District denied the grievances at each step. CP 99-102.

After the District denied the grievances at step three, CP 104-107, McBee proposed mediation of the grievances, an optional step, under the CBA grievance procedure and informed the Plaintiffs of that. CP 109, 193. On June 5, 2013 McBee wrote an e-mail to Killian to notify him that SPS was willing to go to mediation, but only with the stipulation that reinstatement to his job was "off the table." CP 661. Moreover, McBee

[1] During the grievance process Local 609 representatives are continually gathering facts in order to assess whether they should advance a grievance to the next step. CP 349(45:15-46:25). If the grievance is not resolved at the first step, the Union representative weighs the facts to determine whether the Union should advance the grievance to step two. *Id*. At this step, the Union representative requests a formal grievance conference, and meets with the next highest person in the chain of command to present the Union's grievance. *Id*. If the matter is not resolved, the Union may decide to advance the grievance to step three. CP 349 (47:7-11). If the matter is still unresolved at step three, the Union can request mediation, or can engage in alternative dispute resolution. *Id*. Where mediation or alternative dispute resolution procedures do not resolve the matter, the Union then has the option of advancing the grievance to binding arbitration. *Id*.

told Killian that any District proposal at mediation "would most certainly include a clause in which you agree not to sue the District at a future date." *Id*. Because Killian had previously indicated that he had retained legal counsel, McBee wrote, "I would advise you to consult with him/her and let me know your answer [regarding mediation]." *Id.* On June 9, Killian responded to McBee's email, and indicated that he had consulted with his attorney, Ms. Chellie Hammack, and that, pursuant to her advice he agreed to go to mediation. *Id*., CP 236 (124:10-13).

On June 13, 2013, SPS and Local 609 filed a joint grievance mediation request with the Washington Public Employment Relations Commission ("PERC"), CP 111-114. The parties proceeded to a mediation conducted by a PERC mediator. CP 374-375 (145:10-149:22), 119 (125:4-17), 116-126, 132 (89:4-8). In the first mediation session on August 5, 2013, the District proposed monetary settlements in the low five figures separately to each Plaintiff, and mediation ended without settlement. CP 374-375 (148:20-149:22), 301 (92:18-20); 237-238 (125:1-129:9)

On September 9, the second day of mediation, in order to force improved offers, McBee informed the District that Local 609's Executive Board would be voting that evening on whether to authorize proceeding to

the arbitration step under the CBA[2]. CP 361 (96:27-35). The District had offered Bailey $60,000, but he said he was done and left. CP 302 (93:12-96:1), CP 303 (98:17-20). Killian received an offer of $75,000, which he also rejected. CP 238 (132:14-19). During this session, for the first time, the District presented a settlement draft that, while it did not include monetary amount, did break out the monetary settlement into wages and attorney's fees, and included a provision resolving the CBA grievance. CP 373 (144:14-23) 167-170, 194 ¶8. Because it also included a release of statutory claims, following the mediation session Plaintiffs provided the draft to Hammack, on the advice of the PERC mediator and McBee. CP 379 (165:3-7) 379-380 (167:6-169:7), 239 (135:18-136:1), 376 (154:2-155:1), 377-378 (159:23-161:9).[3]

Later that evening, McBee presented the District's monetary offers to settle the grievances to the Union's Executive Board and recommended

[2] Because of the risks associated with arbitration, a case may only be advanced to arbitration if is approved by the Union's Executive Board, subject only to later review at a membership meeting.. CP 350 (52:12-53:12). Union representatives weigh several factors before making a recommendation to the Board that they should proceed to arbitration, including, the best interest of the bargaining unit and the Union as a whole, the facts at hand, and the risks involved. CP 347 (40:18-41:5). Local 609's decision to proceed to arbitration is not taken lightly. *Id*.. In the instance of the Killian and Bailey grievances, because there would be no membership meetings over the summer in which the membership would have the opportunity to review the Executive Board's decision on arbitration, the membership voted before the summer break to allow the Board complete authority on that decision. CP 388-389 (204:23-205:18).

[3] McBee had repeatedly told Plaintiffs they needed to discuss any settlement agreement with their attorney, and explained that while the Union could decide to settle its grievances, it was up to the Plaintiffs individually to decide whether they wanted to accept the offer in exchange for releasing civil claims, and that they should consult with their attorney. CP 377-378 (159:23-161:9).

that they authorize arbitration because the mediator had predicted that the District might increase its monetary offers, and he felt that a decision to authorize arbitration of the grievances would put leverage on District to increase its offers. CP 362 (100:3-22), 378 (163:22-165:2), 381 (174:23-176:6), 382 (177:3-13). The Board voted to move the grievances to arbitration, though the Board wanted to consider rescinding that decision if the District offered the equivalent of two years salary to each Plaintiff. CP 381 (174:23-176:6), 382 (178:15-179:23) McBee informed Killian and Bailey that the Board had voted to proceed to arbitration, but that it was possible that the Union would settle its grievances if the District offered more money. CP 385 (190:13-21).

On September 17, 2013, through a phone call from the mediator to McBee, the District offered $100,000 for Killian and $75,000 for Bailey, if each would agree to release all legal claims and if the union would settle the grievances. CP 380 (169:23-170:7); *see also* CP 425-428. McBee, who was not in Seattle, emailed the Executive Board to present a motion that it had requested be made if the District increased its offers; that is, to reconsider its decision to take the grievances to arbitration if the District increased its offers. CP 429. In making the motion, McBee considered the impact of the decision on the membership as a whole, and the risks inherent in arbitration. *Id*. His email to the Board explained:

> This is the largest settlement offer I've seen from the District for one of our members. Although this does not overturn the termination this would be a significant victory for our members in addressing the terrible investigation process SSD has put in place in the last few years. Were we to proceed to arbitration it would be the Local's expense and there would be no guarantee of victory.

Id. He also informed the Board that he would be notifying the Plaintiffs of SPS' offer:

> I have calls into both [plaintiffs] but remember, the grievance belongs to the union and we decide to proceed or not. I will be recommending to both of [the Plaintiffs] that they consult with their attorney before deciding to accept or reject their individual offers. If they reject, and it's up to them, they can pursue their claims in court.

CP 429. This email reflected McBee's earlier discussion with the Board in the September 9 meeting that, if the Board approved a settlement of the grievances, the District in exchange would make the offers and the Plaintiffs would be free to consult with their attorney about accepting or rejecting the offers to settle legal claims. CP 383 (182:2-24); 508.[4] The Board voted to settle the grievances in exchange for the District extending those settlement offers and to not proceed to arbitration. CP 505-506, *Id*. 184:18-185:2, CP 383 (182:6-24), 384 (188:12-15), 385 (189:18-190:21).

On the same day, September 17, 2013, **McBee sent written copies of the offers to Killian and Bailey, informing them that the Union had agreed to settle its grievances and that it would not be proceeding to**

[4] McBee and the mediator had also explained this to the Plaintiffs. CP 383 (183:19-184:17)

arbitration. CP 383 (182:6-24), 384 (187:17-24), 387 (200:16-21). McBee also informed Killian and Bailey that they should consult with Hammack before deciding whether to accept the offers or reject them. CP 383 (184:15-17), 388 (203:4-13).

Killian and Bailey discussed the offers with Hammack that day, September 17, 2013, and later in that same day Hammack sent a letter to Local 609's attorney, stating:

> Today, after meeting with both my clients to discuss the issues, and after our discussion, McBee called my clients again extending an offer made by SPS. Further, **McBee told both of my clients that if they did not accept the offers extended the union would decline to represent them further and would not pursue an arbitration on their behalf**.

CP 135-136 (emphasis added). The Plaintiffs refused the District's final settlement offers. CP 504-505 (183:16-184:3), 239-240 (136:12-137:13), CP 204 (102:16-24).

On September 20, 2013, Local 609 entered into a settlement agreement which provided that the Union would not pursue arbitration of the CBA grievances in exchange for the District extending offers of $100,000 and $75,000 to Killian and Bailey, respectively, in return for them releasing their civil claims.[5] CP 430-431. The settlement affected the grievances only, and left Plaintiffs free to pursue their legal claims against

[5] The grievance settlement did not break down these gross sums. CP 430 (¶¶ 2.0 and 2.1)

the District should they reject those offers. CP 430-431, 508 (203:4-203:13).

On October 12, 2013, during a regularly scheduled monthly Local 609 membership meeting, all of the previous months' decisions by the Executive Board were read out, including the decision not to arbitrate Plaintiffs' grievances. CP 54, (16:6-16); CP 133 (101:3-9). Bailey was in attendance and heard the announcement. *Id*. Bailey relayed this announcement to Killian on the same day or shortly after. CP 125-126 (175:20-176:2).

Two days later, on October 14, 2013, Hammack wrote to Local 609's counsel unequivocally stating that the Plaintiffs were aware of the Union's decision not to pursue arbitration: "This Saturday during the union meeting, **it was publically announced that the union board had voted not to pursue arbitration** despite the fact that it appears the decision was made in September." CP 138-139 (emphasis added).

Plaintiffs filed lawsuits on May 29, 2014, which were later consolidated into the instant suit. Those lawsuits alleged that Local 609 had breached its duty of fair representation and had negligently engaged in the unauthorized practice of law, and alleged claims against the District, (as they were free to do, despite the Union's settlement of its grievances under the CBA). CP 387 (198:15-21), 1-12 (Killian sued the District

alleging discrimination and breach of contract), 974-985 (Bailey sued the District alleging discrimination, retaliation for complaining of discrimination, and breach of contract). CP 824-828, 933, 939-942. In August 2015, the Superior Court granted summary judgment to Local 609 on all claims CP 966-968, and denied Plaintiffs motion to amend their complaint to add a claim of violation of the Consumer Protection Act. CP 971-973.

STATEMENT OF ISSUES

1. Should this Court affirm the summary judgment in favor of Local 609 on Plaintiffs' explicit DFR claims because those claims are time barred?
2. Should this Court affirm the summary judgment in favor of Local 609 on Plaintiffs' remaining claims and the denial of the motion to amend to add a CPA claim, because those claims arise from Local 609's representation of Plaintiffs in the CBA grievance process and are therefore subsumed by their DFR claims, which are time barred and which are not supported by the evidence?
3. Should this Court affirm the summary judgment ruling in favor of Local 609 on Plaintiffs' explicit and implicit DFR claims where they have failed to plead facts that meet the highly deferential DFR standard?

4. Even if not treated as DFR claims, should this Court affirm summary judgment in favor of Local 609 where the undisputed evidence fails to establish that Local 609 engaged in the unauthorized or negligent practice of law, or a violation of the CPA?

ARGUMENT

I. THE TRIAL COURT CORRECTLY DISMISSED ALL CLAIMS AND DENIED A MOTION TO AMEND THE COMPLAINT TO ADD A CLAIM BECAUSE ALL THESE CLAIMS ARE DUTY OF FAIR REPRESENTATION CLAIMS WHICH ARE BARRED BY THE STATUTE OF LIMITATIONS.

A. Local 609 Is Entitled To Summary Judgment Because The Material Facts Are Undisputed And Those Facts Entitle Local 609 To Judgment As A Matter Of Law.

This court reviews summary judgment orders de novo and performs the same inquiry as the trial court, viewing all facts and reasonable inferences in the light most favorable to the nonmoving party. *Elcon Const., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965, 969 (2012). Summary judgment shall be rendered where the pleadings and discovery show that there is no triable issue of material fact and that the moving party is entitled to judgment as a matter of law. *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union, Local 1001*, 77 Wn. App. 33, 40, 888 P.2d 1196 (1995). This court may affirm

on any ground supported by the record. *Washburn v. City of Federal Way*, 178 Wn.2d 732, 310 P.3d 1275, 1286 n.9 (2013).

Here, there are no disputed material facts that preclude summary judgment for Local 609. The undisputed evidence establishes that all of Plaintiffs' claims arise from Local 609's actions as their representative for collective bargaining under Ch. 41.56 RCW and from the processing of grievances under a collective bargaining agreement. Plaintiffs premise their claims on the alleged negligence of Local 609 representation during the collective bargaining agreement's grievance process and the Union's decision settle its grievances in exchange for the District's offers to the Killian and Bailey, which they were free to accept or reject. Local 609 settled only the grievances under the CBA, and Plaintiffs were free to, and did, reject the offers made by the District and exercised their rights to file their legal claims against the District.

Because it is undisputed that all of the alleged conduct took place in the context of Local 609 administering its CBA and processing grievances, all Plaintiffs' claims against Local 609 are treated as DFR claims as a matter of law. And, as discussed below, there is no genuine issue of material of fact concerning the date that Plaintiffs were aware of the facts on which they base their claims, McBee's representation and the decision to not arbitrate the grievances. As Plaintiffs waited more than six

months after they knew the Union was not going to arbitrate their grievances to file their lawsuit against Local 609, their claims are barred by the applicable statute of limitations.

Even if the claims had been timely, there is no genuine issue of material fact precluding summary judgment because the undisputed facts establish that Local 609 did not act discriminatorily, arbitrarily, or in bad faith in processing the grievances. Therefore, should this Court reach the substantive merits of the claims, Local 609 is entitled to summary judgment on all claims.

Finally, even if the unauthorized negligent practice of law and the Consumer Protection Act claims are not considered DFR claims, the undisputed evidence creates no issue of material fact precluding summary judgment on the merits of those claims, and the trial court properly denied the Plaintiffs' motion to amend their complaints to assert the CPA claim.

B. Summary Judgment Is Appropriate Because Plaintiffs' Claims Were Filed After The Expiration Of The Applicable Six-Month Statute Of Limitations.

1. The Duty of Fair Representation Governs the Duties Owed By a Union to Its Members.

Washington recognized the duty of fair representation under public sector collective bargaining statutes in *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 670 P.2d 246 (1983), and applied it to grievance

processing in *Lindsey v. Metropolitan Seattle*, 49 Wn. App. 145, 148-149, 741 P.2d 575 (1987). In *Allen*, the Court noted that RCW 41.56.080, which provides that a union representing public employees in Washington is the exclusive representative of the bargaining unit employees that selected it, "parallels that contained in section 9 of the NLRA" and held that a cause of action for breach of the duty of fair representation was also implied in RCW 41.56.080. *Allen,* 100 Wn.2d at 372 (citing *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967))[6].

Courts "'accord substantial deference' to a union's decisions regarding grievance processing, because a union must balance many collective and individual interests in making these decisions. … The collective bargaining system by its very nature subordinates the interests of an individual employee to the collective interests of all the employees in the bargaining unit." *Lindsey*, 49 Wn. App. at 149, 741 P.2d at, 577-78 (1987) (*citing Peterson v. Kennedy,* 771 F.2d 1244, 1253 (9th Cir.1985); *Johnson v. U.S. Postal Service*, 756 F.2d 1461, 1466 (9th Cir. 1985); *Dutrisac v. Caterpillar Tractor Co.*, 749 F.2d 1270, 1273 (9th Cir.1983); *Vaca,* 386 U.S. at 182, 87 S.Ct. at 912.). Therefore the standard of care owed by unions toward their members is encapsulated in the duty of fair

[6] The duty of fair representation was recognized under the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151-169, "as a judicial response to the broad power granted to unions as the exclusive representatives of their members" under Section 9 of that Act. *Allen*, 100 Wn.2d at, 367, 670 P.2d at 249.

representation. That duty is breached only "when a union's conduct is discriminatory, arbitrary, or in bad faith." *Lindsey*, 49 Wn. App at, 148, 741 P.2d at 577 (citing *Allen*, at 375, 670 P.2d 246.). Therefore, a duty of fair representation protects union members from arbitrary and discriminatory conduct and, at the same time, takes into account broad discretion a union must have in representing the bargaining unit. *Allen*, 100 Wn.2d at 375.

2. All Of Plaintiffs' Claims Are DFR Claims Because The Implied Duty Of Fair Representation Encompasses All Issues Concerning Union Representation Of Bargaining Unit Members.

Plaintiffs' claims for "negligent and unauthorized practice of law," and the CPA claim they sought to bring are actually, in this context, duty of fair representation claims and must be treated as such. In *United Steelworkers of America v. Rawson*, 495 U.S. 362, 374, 110 S.Ct. 1904, 109 L.Ed. 2d 362 (1990), the Supreme Court held that the only duty to its members implied in the union's representational status for purpose of collective bargaining is the duty of fair representation. Thus, courts have repeatedly held that claims relating to a union's conduct during the course of representation, including conduct related to legal claims, should be adjudicated only as duty of fair representation claims, whether that claim arises under state or federal collective bargaining statutes.

Other public sector collective bargaining statutes have been similarly interpreted to limit a union's scope of liability to the scope of its duty of fair representations. *See e.g.*, *Weiner v. Beatty*, 121 Nev. 243, 249-50, 116 P.3d 829, 832 (2005) (the duty of fair representation under Nevada's public sector collective bargaining act "governs the relationship between union members and union representatives" and therefore the plaintiff's legal malpractice "claim directly implicates the union's duty of fair representation"); *Brown v. Maine State Employees Ass'n*, 690 A.2d 956, 960 (1997) ("Brown's labeling of his claim as one for attorney malpractice does not alter" its character as a DFR claim); *Best v. Rome*, 858 F. Supp. 271, 275 (D. Mass. 1994) *aff'd*, 47 F.3d 1156 (1st Cir. 1995); *Hussey v. Operating Engineers Local Union No. 3*, 35 Cal. App. 4th 1213, 1219-20, 42 Cal. Rptr. 2d 389, 392-93 (1995) (claim denominated as negligence action was DFR claim, subject to DFR standards because "union does not owe a duty of due care to its members"). *Cf.*, *Weiner v. Beatty*, 121 Nev. 243, 249-50, 116 P.3d 829, 833 (2005) (Union agents should not be held to a negligence standard of care, when the union for whom they work is liable only if its representation is 'arbitrary, discriminatory, or in bad faith.'"); *Lucien v. Conlee*, No. 081066, 2009 WL 1082367, at *2-3 (Mass. Super. Mar. 27, 2009) (same); *Callahan v. New Mexico Fed'n of Teachers-TVI*, 2006-NMSC-010, 139 N.M. 201,

206-07, 131 P.3d 51, 56-57 *same).[7]

In the key case, *Peterson v. Kennedy*, the Ninth Circuit held that malpractice claims against unions' attorneys were subsumed as a duty of fair representation claim against the union. 771 F.2d 1244, 1255 (9th Cir. 1985), *cert. denied* 475 U.S. 1122 (1986) ("[plaintiff's] malpractice claim against the union's attorney was subsumed in and precluded by the breach of the duty [of fair representation] claim").[8] The Ninth Circuit cited sound reasons for its decision:

> Negligence is the essence of a malpractice action. However, negligence is insufficient to support a breach of the duty of fair representation suit against a union; a union's conduct must be arbitrary, discriminatory or in bad faith. Holding that union attorneys are subject to malpractice suits by individual grievants for actions undertaken as the union's representative would give rise to an anomalous result: certain agents or employees of the union would be held to a far higher standard of care than the

[7] For similar holdings under the NLRA and the Railway Labor Act, s*ee also*, *Johnson v. Graphic Communications*, 930 F2d 1178 (7th Cir. 1991) (malpractice allegations that union officers gave inaccurate legal advice where those officers "held themselves out to be experts in representation, collective bargaining . . ." treated as DFR.); *Bautista v. Pan Am World Airlines*, 828 F2d 546, 549 (9th Cir. 1987) (allegation that union provided inaccurate legal information to strikers after expiration of contract at 837 (11th Cir. 1984) (allegation that union's misrepresentation that striking employees' jobs were secure was treated as a DFR); *United Steel Workers of America v. Craig*, 571 So.2d 1101 (Ala. 1990) (malpractice allegation that Union failed to "adequately represent the plaintiffs in a litigated discrimination suit" after plaintiffs' discharge treated as DFR).

[8] While there are no *published* decisions from the Washington Courts of Appeals addressing the question of whether a claim for legal malpractice or negligent practice of law are subsumed in the duty of fair representation, authority from the Ninth Circuit Court of Appeals and Western District of Washington addressing the PECBA is persuasive. *Murphy v. City of Kirkland*, 149 Wn. App. 1064 (2009)("In construing the PECBA, Washington courts may look to judicial interpretations of similar federal labor laws. *Navlet v. Port of Seattle*, 164 Wn.2d 818, 828–829, 194 P.3d 221, 227 (2008). The PECBA is "substantially similar" to the National Labor Relations Act (NLRA), 29 U.S.C. §§ 151–169 (1976), *State ex rel. Wash. Fed'n of State Employees v. Board of Trustees*, 93 Wash.2d 60, 67–68, 605 P.2d 1252 (1980); *Allen*, 100 Wn.2d at 372.

union itself.

771 F.2d 1258 (citations omitted). Liability outside the scope of the duty of fair representation does not exist where the attorneys involved "were acting on behalf of the union in carrying out the union's obligation to represent its members in the collective bargaining process." *Id.* at 1261. The Ninth Circuit allowed that liability outside the duty of fair representation could arise only if:

> services provided are wholly unrelated to the collective bargaining process; e.g. drafting a will, handling a divorce or litigating a personal injury suit.

771 F.2d at 1258.

Moreover, if unions were to be held to the standards of a lawyer in matters related to its representation of employees, their ability to protect members and, indeed, help people like Killian and Bailey, would be chilled if not altogether extinguished. As the Eight Circuit recognized, "a union representative is not a lawyer and cannot be expected to function as one." *Curtis v. United Transportation Union*, 700 F.2d 457, 458 (8th Cir. 1983). The U.S. District Court for the District of Massachusetts has further explained why imposing a single duty and standard of liability on unions and their agents promotes the interest of allowing the Union latitude to act in the best interests of its members:

> This court concludes that a rule imposing personal liability on

> union agents for conduct undertaken on behalf of the union would interfere with the legislative goal of permitting unions wide latitude to act for the collective good of all employees. Such a rule would subject union agents to liability under a negligence standard for conduct for which the union itself would not be liable under the duty of fair representation. *Peterson,* 771 F.2d at 1259. **As a consequence, union agents' decisions might well be affected by a fear of incurring personal liability, and this fear would, in turn, restrict the union's ability** to act on behalf of its members.

Best v. Rome, 858 F. Supp. 271, 275 (D. Mass. 1994) *aff'd,* 47 F.3d 1156 (1st Cir. 1995) (emphasis added). *See also, Weiner v. Beatty*, 121 Nev. at 249-50, 116 P.3d at 833.

Further, to treat some claims arising out of a union's representation as DFR claims but others as something else would create a patchwork of statutes of limitations, under which some causes of action could be pursued long after the six-month statute for DFR claims had lapsed. This consideration was reflected in Division 3 of this Court holding that under RCW 41.56, the application of the six-month limitation period applicable to DFR claims filed with PERC, also applied to DFR claims filed directly in superior court. *Imperato v. Wenatchee Valley College,* 160 Wn. App. 353, 247 P.3d 816 (2011) (six month limitation period for court claims operates to "prevent piecemeal litigation [and] impose a greater degree of certainty and fairness to the process.") *See also, Peterson,* 771 F.2d at 1259 (Explaining that this would "destroy the rationality and symmetry

the Supreme Court has finally brought to the law with respect to the time for the filing of suits in cases involving claims by union members that their grievances were mishandled.")

Plaintiffs' claims are DFR claims, and treating them as such ensures the uniform handling of similar claims and promotes stable bargaining relationships – interests which would be thwarted by placing a different limitation period on claims based on the same facts and relationship but designated as different legal claims. The six-month limitation on claims against the Union alleging it violated its duty of fair representation would be undercut by permitting a claim for the unauthorized practice of law based on entirely the same set of facts to be brought.

Because the Union's activities that the Plaintiffs' complain of here, are not "wholly unrelated to" the grievance process, the standard developed to address unions' unique representative status is the standard that applies to all the claims asserted, or sought to be asserted, here. *Id*. at 1261.[9] Limiting the scope of Local 609's liability in accordance with the

[9] *See also. Rawson*, 495 U.S. at 374 (observing that the **only** implied duty in a union's relations with its members was the duty of fair representation and that "[i]f an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees.")

deferential DFR standard appropriately recognizes that the union must act in the interests of the bargaining unit as a whole, and thus a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents." *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 368, 670 P.2d 246 (1983) (*quoting Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S.Ct. 681, 686, 97 L.Ed. 1048 (1953); 49 Wn. App. at 149, 741 P.2d at 577-78 (1987).

All of Plaintiffs' claims are based on Local 609's actions while representing Plaintiffs throughout the grievance process.[10] Because the actions of McBee and the Executive Board were taken "in carrying out the union's obligation to represent its members in the collective bargaining process," all claims pled against the Union must be treated as DFR claims. Plaintiffs' claims for negligent and unauthorized practice of law and the related CPA claim are actually duty of fair representation claims and must be treated as such. *Peterson*, 771 F.2d at 1261. All of Plaintiffs' claims, are based on McBee's and Local 609's Executive Board's actions in representing Plaintiffs through the CBA's grievance process. The genesis of Plaintiffs' relationship with McBee was the Union's status as their collective bargaining agent, and their relationship evolved in the context of a collective bargaining agreement. The undisputed evidence shows that

[10] CP 974-985, Plaintiff Bailey Complaint, ¶¶ 3.3, 3.4, CP 1-12, Plaintiff Killian Complaint, ¶¶ 3.3, 3.4.

all of McBee's actions were an extension of his role in representing the grievants in enforcing their rights under a labor agreement. Indeed, the specific acts which Plaintiffs claim constitute negligence took place *during* the mediation process provided for by the CBA. It simply cannot be said that Plaintiffs' claims are independent of the CBA. Because McBee's actions were taken "in carrying out the union's obligation to represent its members in the collective bargaining process," all claims pled against the Union must be treated as DFR claims. *Peterson.* 771 F.2d at 1261.

3. Plaintiffs' DFR Claims Are Time Barred Because They Were Filed After the Expiration of the Applicable Six Months Statute of Limitations.

a. The applicable limitations period is six months.

Plaintiffs' DFR claims, as well as their unauthorized and negligent practice of law and CPA claims as described above are subsumed in their DFR claims and are time barred by the six-month statute of limitations applicable to such actions. *Imperato v. Wenatchee Valley Coll.*, 160 Wn. App. 353, 364, 247 P.3d 816, 821 (2011). Although this Division of the Court of Appeals has not addressed in a published opinion the question of the appropriate statute of limitations for a DFR suit filed in court, rather than with PERC, the reasoning of Division 3 in *Imperato* rejecting the applicability of limitations periods set forth in RCW 4.16.130 and

applying RCW 41.56.160, is persuasive and should be adopted here.[11]

In *Imperato*, the Court held that the application of the six-month limitation period applicable to claims filed with PERC under RCW 41.56.160 provides consistency and predictability to both employees and employers and will "prevent piecemeal litigation [and] impose a greater degree of certainty and fairness to the process." 160 Wn. App. at 364, 247 P.3d at, 821.[12] Moreover, application of a different statute of limitations for DFR claims filed in superior court as compared to those filed with PERC would frustrate PERC's role of promptly adjudicating and resolving labor disputes. *Id*.

Additionally, the *Imperato* Court agreed with the Michigan Court of Appeals, that applying the relatively short limitation period that applied to administrative DFR actions "was based on sound policy rationale [in

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[11] The Plaintiffs' assertion that the limitations period set forth in RCW 4.16.130 applies is simply wrong. Theirs' is not an action not otherwise provided for. As the Court in *Imperato o*bserved, in *Wash. State Council of County & City Employees v. Hahn*, 151 Wn.2d 163, 167, 86 P.3d 774 (2004), "the Washington Supreme Court concluded that unfair labor practice claims under chapter 41.56 RCW include those filed with PERC and those filed in superior court." *Imperato*, 160 Wash. App. at 363, 247 P.3d at 820.

[12] RCW 41.56.160(1) sets forth a six-month statute of limitations for unfair labor practice claims filed with PERC:

> (The commission is empowered and directed to prevent any unfair labor practice and to issue appropriate remedial orders: PROVIDED, **That a complaint shall not be processed for any unfair labor practice occurring more than six months before the filing of the complaint with the commission**. This power shall not be affected or impaired by any means of adjustment, mediation or conciliation in labor disputes that have been or may hereafter be established by law.

(emphasis added)

that] the fact that the parties had contracted to resolve claims among themselves required that their final decisions should become final quickly [and] …should be an efficient high-volume apparatus, not a lengthy process of litigation." *Imperato*, 160 Wn. App. at 363-64, 247 P.3d at 821 (citing *Meadows v. City of Detroit,* 164 Mich.App. 418, 434, 418 N.W.2d 100 (1987)). The *Meadows* Court cited *DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 171, 103 S. Ct. 2281, 2294, 76 L. Ed. 2d 476 (1983) as persuasive authority for this proposition.

In *Delcostello,* the U.S. Supreme Court has recognized a labor policy interest in bringing quick resolution to claims involving parties to and interpretation of the meaning of a collective bargaining agreement so that peace and harmony may be quickly restored. In adopting a six-month statute of limitations for "hybrid" claims like the one here involving a DFR claim against a union and a breach of contract claim against the employer, the Supreme Court emphasized "the need for uniformity among procedures followed for similar claims" and the "national interests in stable bargaining relationships."

This reasoning applies in full force to the situation here. Plaintiffs' claims all pertain to the union's alleged mishandling of the grievances. The above-described policy of ensuring uniform handling of similar claims and promoting stable bargaining relationships would be thwarted

by placing a six-month cap on claims against the Union alleging it violated its duty of fair representation, but permitting a claim for the unauthorized practice of law based on entirely the same set of facts to be brought up to three years after the events in question.

b. The Plaintiffs' claims are barred because they filed suit more than 8 months after they knew of the facts on which they premise their claims.

Plaintiffs' claims are time barred as their Complaints were not filed until May 29, 2014, more than two months after the limitations period ran. CP 1-12, 974-985. The six-month limitations period begins to run when the employees knew or reasonably should have known of the facts underlying their claims. *Harris v. Alumax Mill Prod., Inc*., 897 F.2d 400, 403-404 (9th Cir. 1990) (employee knew or should have known of alleged breach no later than the date on which a union representative informed the employee it would not pursue a grievance on his behalf).[13]

Despite Plaintiffs' arguments that they were never told, or never told in writing about the status of their grievances, it is undisputed that Plaintiffs and their counsel knew about the Union's decision not to

[13] As discussed above, Washington courts analyzing cases under the PECBA may look to federal decisions interpreting the NLRA to the extent those laws are "substantially similar." The PECBA is "substantially similar" to the NLRA, 29 U.S.C. §§ 151–169 (1976), *State ex rel. Wash. Fed'n of State Employees v. Board of Trustees,* 93 Wn.2d 60, 67–68, 605 P.2d 1252 (1980), and both acts provide a six-month limitation period for claims based upon "any unfair labor practice." 29 U.S.C. § 160(b); RCW 41.56.160(1).

arbitrate their grievances on September 17, 2013. CP 135-136. Both Bailey and Killian had been told as of that date that the Union had agreed to settle its grievance with the District, and that it would not proceed to arbitration. *See* CP 66 (200:16-21), 120-124. In her letter to Local 609's attorney, dated September 17, 2013, Plaintiffs' counsel stated:

> Today, after meeting with both my clients to discuss the issues, and after our discussion, McBee called my clients again extending an offer made by SPS. Further, McBee told both of my clients that if they did not accept the offers extended the union would decline to represent them further and **would not pursue an arbitration on their behalf**.

CP 135 (emphasis added). Therefore, September 17, 2013, started the six-month clock for the statute of limitations, and to timely file the case, Plaintiffs needed to file their complaint on or before March 17, 2014, which they did not do.

Perhaps in an attempt to escape the consequences of delayed action, Plaintiffs contradict their lawyer's letter by asserting that they first learned about the Union's decision not arbitrate their grievances when Bailey attended the general membership meeting on October 12, 2013 and heard the announcement to the members about the September 17, 2013 decision to settle their grievances and decline arbitration. CP 133 (101:3-9), 125-126 (175:20-176:2). *See also*, CP 54 (16:6-16). While this contradicts the written record establishing their knowledge on September

17, 2013, based on McBee's communications to them on that day, that contradiction is not material. Even if this were true, Plaintiffs' claims against the Union are still time barred, as six months from October 12, 2013, when they again received notice through formal announcement at the Union's membership meeting, is April 12, 2014.[14] Plaintiffs filed on May 29, 2014, more than six months after that membership meeting. [15]

II. REGARDLESS OF THE SIX MONTH LIMITATIONS PERIOD, THIS COURT ALSO SHOULD AFFIRM BECAUSE PLAINTIFFS' DUTY OF FAIR REPRESENTATION CLAIMS ARE GOVERNED BY A HIGHLY DEFERENTIAL STANDARD THAT REQUIRES PLAINTIFFS TO PROVE THE UNION ACTED ARBITRARILY, DISCRIMINATORILY, OR IN BAD FAITH – A STANDARD THEY DID NOT MEET.

In *Muir v. Council 2, Washington State Council of County & City Employees*,), this Court observed that unions are afforded broad discretion in refusing to take grievances to arbitration under a CBA. 154 Wn. App. 528, 534, 225 P. 3d 1024 (2009) (Reversing a summary judgment against a union for refusing to arbitrate a grievance on grounds that the trial court,

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[14] Two days later, on October 14, 2013, Hammack wrote to Local 609's counsel unequivocally stating that the Plaintiffs were aware of the Union's decision not to pursue arbitration: "This Saturday during the union meeting, **it was publically announced that the union board had voted not to pursue arbitration** despite the fact that it appears the decision was made in September." CP 138-139 (emphasis added).

[15] Plaintiffs' attempts to rely on their confusion and that of their counsel (Appellants' Brief 19-22) to avoid the consequences of their untimely lawsuit are unavailing. Plaintiffs' counsel mentioned her clients' knowledge and her knowledge when she wrote on October 14, 2013: "This Saturday during the union meeting, it was publically announced that the union board had voted not to pursue arbitration despite the fact that it appears the decision was made in September." CP 138-139. The limitations period counting six months from October 14, 2013 is May 14, 2014, two weeks before the instant action was filed.

"ignored the broad discretion of the union in this area and failed to focus on whether the union's decision had a rational basis."). *See also, Schmidtke v. Tacoma Sch. Dist. No. 10*, 69 Wn.App. 174, 181, 848 P.2d 203 (1993).

Therefore, to establish that the Union breached its duty of fair representation, Plaintiffs must show that Local 609's conduct toward Plaintiffs was "arbitrary, discriminatory or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Lindsey v. Municipality of Metro. Seattle*, 49 Wn. App. 145, 148, 741 P.2d 575, 577 (1987) (looking to United States Supreme Court and Ninth Circuit cases for guidance on what constitutes discriminatory, arbitrary, or bad faith conduct in the context of grievance processing). This standard is restrictive and thus courts construe it narrowly in order to preserve the union's discretion to decide how best to balance the collective and individual interests that they represent. *Peters v. Burlington Northern Railroad Company*, 931 F.2d 534, 538 (9th Cir. 1991); *Peterson*, 771 F.2d at 1254.[16]

A union's decision whether to pursue a grievance based on its

[16] To determine whether a Union has breached the DFR, the court first considers whether the conduct "in question involved the Union's judgment, or whether it was 'procedural or ministerial.'" *Moore v. Bechtel Power Corp.*, 840 F.2d 634, 636 (9th Cir. 1988). If the Union did not fail in a ministerial duty, but rather simply exercised its judgment, Plaintiffs can prevail only if they establish that the Union acted discriminatorily or in bad faith. *Marino v. Writers Guild of America*, 992 F.2d 1480, 1486 (9th Cir. 1993), *cert. denied*, 570 U.S. 978 (1993).

merits, or lack thereof, is an exercise of the union's judgment to which courts afford great deference because the union must balance the individual interests against the collective interests of all employees in a bargaining unit. *Schmidtke*, 69 Wn.App. at 181, 848 P.2d 203. In accordance with this broad discretion, courts do not scrutinize the quality of a union's decisions. *Muir v. Council 2 Wash. State Council of County & City Emp., Local 1849*, 154 Wn.App. 528, 533, 225 P.3d 1024 (2009). A union's conduct constitutes an exercise of judgment entitled to deference even when the union's "judgments are ultimately wrong." *Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 45–46, 119 S.Ct. 292, 142 L.Ed.2d 242 (1998); *Doron v. E. Washington Univ.*, 184 Wn. App. 1058 (2014).

Standing alone, disagreement with employees over the merits of their cases is not evidence of bad faith, even when the employees' grievances are meritorious. *Moore*, 840 F.2d at 637. To establish that the exercise of judgment was in bad faith, Plaintiffs must show, which they cannot do on this record, "substantial evidence of fraud, deceitful action or dishonest conduct." *Id.* Plaintiffs must "point to specific facts that support a jury finding of 'improper motive.'" *Adamiec v. Gas Workers Union Local 18007*, 18 F. Supp. 2d 855, 871 (N.D. Ill. 1998). Finally, even if Plaintiffs could prove that the Union's conduct was arbitrary,

discriminatory, or in bad faith, to prevail Plaintiffs must further show that this conduct "prejudiced a strong interest of the employee." *Galindo v. Stoody Company*, 793 F.2d 1502, 1514 (9th Cir. 1986).

Here, Plaintiffs allege Local 609 acted in bad faith when it refused to advance the grievances to arbitration; failed to properly notify them of the decision not to pursue arbitration; and attempted to negotiate their non-union civil claims. In reality, all these claims arose from the union's representation of the Plaintiffs and involve decisions where the union exercised its judgment. Plaintiffs must therefore establish that Local 609 engaged in fraud, deceitful action, or dishonest conduct in evaluating and declining to pursue arbitration, and in settling its grievances. However, Plaintiffs have no evidence to contradict the fact that (1) the Union fully investigated their terminations; (2) the Union evaluated Plaintiffs' grievances on the merits; (3) the Union made a reasoned decision not to move their grievances to the next step of the grievance resolution process; (4) the Union made a reasoned decision to settle its grievance in exchange for the offers made to Plaintiffs; and (5) the Union took these actions and made these decisions in a wholly non-discriminatory manner and in good faith.

Local 609 representative McBee promptly and thoroughly investigated Plaintiffs' suspensions, and subsequent terminations. McBee

represented both grievants during District's investigation, and submitted numerous information requests to secure information relating to decision to place Plaintiffs on paid administrative leave and relating to their termination from employment. CP 57, 85, 92-93, 97. Moreover, McBee also advanced the grievances through the grievance process and represented Plaintiffs during the mediation sessions. CP 99-102, 104-107, 109, 118-119, 132. In determining not to pursue arbitration of the grievances, Local 609 balanced the likelihood of success of the grievances, the risks involved in the arbitration process, and the potential benefits to the Union membership as a whole. CP 382, 384-385, 429. The Union decided not to proceed to arbitration because it concluded that the risks and costs associated with the arbitrating the grievances outweighed any potential benefits to the Plaintiffs and the Union's membership. CP 377 (157:6-157:9)

The Union determined that the offer of $175,000 to the Plaintiffs in exchange for withdrawing the Union's grievances would protect the collective interests of the bargaining unit by penalizing the District for its inadequate investigations and encouraging it to change the way it conducted investigations into employee misconduct. CP 382-384 (177:3-13; 182:9-18). Plaintiffs have presented no evidence that the Union's decision was fraudulent, deceitful, or in bad faith.

Further, there are no facts that would substantiate Plaintiffs' claims that Local 609 failed to properly notify Plaintiffs of the status of the grievances. The undisputed facts are that Plaintiffs were provided information concerning each step of the grievance process. CP 385, 661. Plaintiffs were in attendance at the mediation of their grievances where they were told of the District's offer to settle the grievances. CP 118-119, 131-132. During the second day of mediation, Plaintiffs were presented with the District's offer to settle the grievances and which also embodied an offer to settle the Plaintiffs' non-union civil claims, and they were advised to consult their counsel about the release of civil claims. CP (162:15-25), 238-239, 378. Plaintiffs declined these settlement offers with the advice of their counsel, and with the knowledge that the Union had decided to withdraw the grievances and forego arbitration. CP 58-60, 63-64.[17]

Finally, it is undisputed that Local 609 did not attempt to settle or resolve the resolution of Plaintiffs' civil claims. On August 5, Plaintiffs and Local 609's McBee attended a PERC conducted mediation session with the District. CP 116, 119, 132. During the course of the mediation, Bailey inquired as to whether any proposed settlement would include

[17] On September 17, Plaintiffs received settlement offers in the amounts of $75,000 and $100,000, were given copies of the settlement offers, and were informed that the Union would settle its grievance and would not proceed to arbitration regardless of whether Plaintiffs chose to accept the offers. CP 304, 384-385, 650-651, 668-672.

resolution of his civil claims, and he was informed both by PERC mediator and McBee that any proposed settlement would likely include a waiver of all claims against the District, and that they should consult with their attorney prior to making a decision with respect to any proposed settlement amount. CP 58-60, 67. On August 5, SPS offered $4,000 to Killian and $3,000 to Bailey, respectively. CP 374-375. There was no written proposal that included a waiver of all claims against the District. Plaintiffs rejected these offers. CP 58-60.

On September 9, during the second day of mediation, Plaintiffs received settlement offers in the amounts of $75,000 to Killian and $60,000 to Bailey, the proposed settlement agreements contained a waiver of all claims against the District. The mediator and McBee once again informed Plaintiffs they should consult with their attorney prior to making a decision about whether to accept the settlement offers. CP 239 (135:18-136:1), 376 (154:2-155:1), 377-378 (159:23-161:9).

On September 17, Plaintiffs received a final settlement offer from the District in the amounts of $100,000 for Killian and $75,000 for Bailey. McBee presented these offers to the Plaintiffs, and advised them that the Union had decided to rescind the decision to arbitrate in light of the offers, and that they should consult with counsel prior to making a decision about whether to accept or reject the offers. CP 379 (167:9-19), 383 (184:15-

17), 388 (203:4-18).

Thereafter, on September 20, McBee settled the Union's grievance with SPS in exchange for two settlement offers being extended to the Plaintiffs in the amounts of $100,000 for Killian and $75,000 for Bailey, leaving Plaintiffs with complete freedom to decide whether to take the settlement agreement and waive their claims against the District, or to reject the offers and pursue their non-union civil claims. Plaintiffs, after consulting with counsel, opted to reject the offers and preserve their non-union civil claims.

Plaintiffs were free to decide whether to accept the $75,000 and $100,000 offers that resulted from the PERC mediation, attempt to increase the offers through further negotiations, or to take their chances in court and pursue their civil claims against SPS. Plaintiffs may now regret their decision to forego the offers that the Union's efforts achieved, but it does not show bad faith or arbitrary conduct on the part of the Union, or any prejudice to Plaintiffs from the Union's actions.

Under the DFR standard discussed above, there exists no genuine issue of material fact with respect to whether Local 609 acted in bad faith in deciding not to advance the grievances to arbitration, and in settling its grievances with District.

III. EVEN IF NOT CHARACTERIZED AS THE DUTY OF FAIR REPRESENTATION CLAIMS THEY ARE, PLAINTIFFS' UNAUTHORIZED AND NEGLIGENT PRACTICE OF LAW CLAIMS MUST FAIL FOR REASONS OTHER THAN DFR.

This Court need not reach the merits of Plaintiffs' allegations that McBee engaged in the unauthorized and negligent practice of law because there are several other reasons those claims must fail. However, even if this Court were to conduct such an analysis, Plaintiffs still could not prevail on those claims, and summary judgment is appropriate, as the undisputed facts establish that the Union has not engaged in the unauthorized and negligent practice of law.

A layperson who attempts to practice law is liable for negligence. *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 586-87, 675 P.2d 193, 198 (1983). "The inquiry into whether an activity constitutes the practice of law has two steps: the determination as to whether the activity is the practice of law and, if so, determining whether the practice is unauthorized." *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 301, 45 P.3d 1068, 1073 (2002).

> The well-settled definition of the "practice of law" in Washington case law includes three categories of activities: It is now a generally acknowledged concept that the term "practice of law" includes not only the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity with the adopted rules of procedure, but *in a larger sense includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal*

rights are secured.

Id. at 302 (emphasis in original). "It is the nature and character of the service performed which governs whether given activities constitutes the practice of law." *Wash. State Bar Ass'n v. Great W. Union Fed. Sav. & Loan Ass'n,* 91 Wn.2d 48, 54, 586 P.2d 870 (1978). Services that are ordinarily performed by licensed lawyers and that involve legal rights and obligations constitute the practice of law. *Id.* at 55 ("The services at issue [selection and completion of form legal documents or drafting of legal documents] are ordinarily performed by licensed attorneys, involve legal rights and obligations, and by their very nature involve the practice of law.").

Here, the acts which Plaintiffs allege McBee engaged in are not of the "nature and character" that would allow this Court to find the unauthorized and negligent practice of law, even if those claims were not subsumed in Plaintiffs' DFR claims. Plaintiffs have provided no evidence that McBee prepared legal instruments or contracts by which legal rights are secured. The mere act of negotiating a settlement of a grievance filed under a CBA is not of the "nature or character" of practicing law; instead it is something union representatives are authorized to do under Ch. 41.56, and under the collective bargaining agreement. Were such functions characterized as the "practice of law," the administration of unions would

become overly legalistic, with unions being paralyzed and unable to conduct routine and day to day business without the involvement of lawyers.

While the District made settlement offers which included a release of Plaintiffs' civil claims, McBee's role was limited to attempting to settle *the Union's* grievance. While the District sought to resolve the grievances and any potential civil claims the Plaintiff's might bring, there is simply no evidence that McBee made any proposals that would have required release of civil claims. Although the District made proposals that addressed civil claims, McBee explained to Bailey that "he could consult with his attorney on any offers the district might make [and] that he was not going to be forced to sign something on that day or any day, that anything that we discussed or came to an agreement on or offers that were made could and should be discussed with his attorney before he makes a decision on accepting any offer that the district makes him." CP 372-373. McBee "strenuously" encouraged both Plaintiffs to consult with their separately retained legal counsel about the impact SPS's offer could have on those claims. CP 388, (203:10-13).

Plaintiffs additionally contend that McBee informed them that the offer made by SPS was fair and reasonable. Even if this were true, it does not amount to the practice of law. McBee is an experienced union

business agent well-versed in the collective bargaining agreement and in negotiating grievance settlements with SPS. CP 341, (13:16-24). His opinion as to whether SPS's offer was a fair and reasonable resolution of the *contractual* grievances that he was tasked with resolving does not amount to the practice of law. His opinion can be construed nothing more than that offered in his role as a union business agent. Plaintiffs had retained counsel at the time of the mediation, who they were free to consult about every offer. There was no risk they could have misunderstood McBee's role as that of handling Plaintiffs' civil claims when they had each undertaken the step of retaining separate counsel to do just that.

Significantly, the Union *never* purported to have authority to negotiate away Plaintiffs' civil claims. The settlement agreement entered into between the Union and the District said nothing about Plaintiffs' civil claims and dealt only with the Union's grievance arguing that the District violated the CBA when it terminated Plaintiffs' employment. CP 430-431. The settlement reached between the Union and SPS required SPS to make Plaintiffs an offer of $100,000 and $75,000, respectively. *Id.* The settlement agreed to by the Union said nothing about Plaintiffs' civil claims. CP 387-388 (198:18-21; 201:1-5). From the Union's perspective, requiring District to offer to pay Plaintiffs $175,000 sufficiently protected

the collective membership's interests such that further pursuit of additional remedies would not be worthwhile, regardless of whether Plaintiffs accepted the offers. CP 429. Simply put, at no point did the Union represent to the Plaintiffs or to the District that it had authority to waive Plaintiffs' civil claims nor did it ever try to do so.

Finally, even if McBee *had* engaged in the practice of law, which he has not, this Court should still dismiss those claims because the undisputed facts show that Plaintiffs have suffered no harm as a proximate cause of McBee's actions. It is undisputed that Plaintiffs had the opportunity to consult with their own legal counsel after every settlement offer was negotiated between SPS and the Union, and that they did in fact consult their attorney on September 17, 2013 and again on or about October 14, before turning down SPS's settlement offer. Thus, Plaintiffs were free to accept or reject those offers and acted after consulting legal counsel. If they believed the value of their civil claims exceeded $100,000 and $75,000 respectively, they were under no obligation to give up those claims and accept the amount the Union negotiated to resolve the contractual grievance. CP 383 (182:18-24). Plaintiffs have failed to show that they suffered any prejudice by Local 609's actions.

IV. PLAINTIFFS' MOTION TO AMEND THEIR COMPLAINT TO INCLUDE VIOLATIONS OF THE CPA WAS PROPERLY DENIED.

A. The Motion Was Correctly Denied Because The Amendment Is Untimely And Prejudicial To Defendant.

The trial court properly denied Plaintiffs' motion to amend the complaint. CP 971-973. Undue delay is a legitimate ground for denying leave to amend the pleadings, so long as it is accompanied by prejudice to the nonmoving party. *Walla v. Johnson* 50 Wn.App. 879, 336, 751 P.2d 334 (1988)(*citing Appliance Buyers Credit Corp. v. Upton*, 65 Wn.2d 793, 399 P.2d 587 (1965)). The actions that lead up to this lawsuit happened between the summer of 2011 and September of 2014. and ended eight months before this lawsuit was formally filed. CP 1-12, CP 974-985. Plaintiffs waited more than a year after the original complaint was filed to add on this additional claim of violation of CPA and two months after Plaintiffs' motion to continue trial to amend the complaint was granted by the court. CP 824-828, 933, 939-942.

Local 609 would have been prejudiced by Plaintiffs' late amendment. *Ives v. Ramsden*, 142 Wn.App. 369, 174 P.3d 1231 (2008) ("A trial court should generally deny a motion to amend a pleading if the amendment would prejudice the opposing party."). In *Donald B. Murphy Contractors, Inc. v. King County*, 112 Wn.App. 192, 49 P.3d 912 (2002),

this Court affirmed the trial court in denying plaintiff's motion to amend its complaint, where the motion was made more than a year after action commenced, the parties had previously filed a confirmation of joinder of parties, claims, and defenses in which they indicated no additional claims or defenses would be raised, less than two months remained before the discovery cutoff, and less than three months remained before deadline for dispositive pretrial motions and trial date, and the witnesses were already determined and disclosed, and new experts would have to be retained to support defenses to the new claims.

Here, Plaintiffs asserted that Local 609 would not been prejudiced by this late amendment as Plaintiffs would not be conducting any new discovery. If that is the case, this only strengthens Local 609's position that Plaintiffs should have included their alleged CPA claim in their original complaint, or conversely, filed the amendment of the complaint immediately after the Court granted Plaintiffs' motion to continue trial. The sole purpose of Plaintiffs' motion to amend was to gain an argument to survive Local 609's summary judgment motion. It was not the assertion of a newly discovered claim as Plaintiffs' CPA violation claim is unsubstantiated.

This tactic on Plaintiffs' part would have been prejudicial to Local 609 because if amendment was allowed, Local 609 Defendant would have

had less than two months to investigate and prepare a defense before discovery cutoff. CP 2: 939-942. The deadline to disclose primary witnesses had already passed under the newly issued case schedule. CP 2: 824-828, 940. Local 609 would not have had sufficient time to refute Plaintiffs' new claim and obtain the experts needed in order to properly defend Plaintiffs' allegations. Therefore, the trial court did not abuse its discretion by denying plaintiffs' motion to amend the complaint.

B. The Amendment of the Complaint Would Have Been Futile as Plaintiffs' alleged Violation of the CPA was without Merit and Would Not Have Survived Summary Judgment Motion.

When an amendment would be futile, the trial court should properly deny the amendment. *See*, *Deschamps v. Mason Cnty. Sheriff's Office*, 123 Wash. App. 551, 563, 96 P.3d 413, 419 (2004) (Amendment to prospective firearm purchaser's complaint against sheriff's office and its employees was futile and therefore denying motion to amend was not abuse of discretion).

Any CPA claim would in substance be a DFR claim and be barred by the applicable statute of limitations. Plaintiffs' allegation of violation of the CPA arises entirely from Local 609's resolution of a grievance under a collective bargaining agreement during a mediation conducted by PERC. This means that any claims arising from those facts are properly subject to the six month statute of limitations applicable to an alleged

breach of the duty of fair representation. *See Peterson v. Kennedy,* 771 F.2d at 1255; *Imperato*., 160 Wn. App. at, 364, 247 P.3d 816.

Plaintiffs admit that the CPA claim would have been based on "the unlawful acts associated with the unauthorized practice of law" by McBee. (Appellant Brief at 27). By their own assertion, Plaintiffs present no evidence of McBee doing anything other than the steps he took concerning the CBA. The trial court clearly agreed by ruling that the alleged violation of the CPA would have fallen under a DFR claim and was consequently, barred by the statute of limitations. CP 971-3. Therefore, even if the court did grant Plaintiffs' motion for amendment of the complaint, Plaintiffs' alleged violation of CPA claim was time barred.

Furthermore, the CPA claim was meritless because the CPA does not apply to labor union activities. In *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union, Local 1001,* 77 Wash. App. 33, 46, 888 P.2d 1196 (1995), the Court held that the Washington CPA explicitly exempts certain activities and organizations from liability and that RCW 19.86.070 specifically exempts labor organizations from the scope of the CPA, stating that "the labor of a human being is not a commodity or article of commerce." The court in *Ernst* found that since the Defendants in that case were acting on behalf of the Union in "furtherance of a legitimate labor interests," defendants were exempt from CPA liability

pursuant to RCW 19.86.070. As McBee was clearly acting as the union representative in this case, there was no legal basis for a CPA claim and the trial court correctly denied Plaintiffs' motion to amend their complaint.

CONCLUSION

Labor law in Washington is a statutory scheme based on the National Law Relations Act and the State Labor Relations Act, as defined by Federal and State Court decisions. The law has created a balance between the duty of unions to represent the best interests of all their members under their collective bargaining agreement and the interests of individual members. *Ford Motors Co. v. Huffman*, 345 U.S. 330, 73 S. Ct. 681 (1953). This was done by creating duties on the part of unions that did not exist at common law, i.e. the duty of fair representation which recognizes the unique relationship of unions to their bargaining units as a whole. *Clayton v. Republic Airline*s, 716 F.2d 729 (9th Cir. 1983). The appropriate limitations period for those for DFR claims is six months, because that period reflects the policy concerns inherent in DFR actions. *Imperato*, 160 Wn. App. at 363-64, 247 P.3d at 821

Plaintiffs in this case failed to file their lawsuit within the statutory six months. They have attempted to circumvent the statute by claiming the union committed legal malpractice. The law does not permit this claim, because it would undermine the balance struck by the duty of fair

representation. A CPA claim would also disrupt that balance and therefore is not permitted. It is respectfully submitted that the trial court's denial of plaintiffs' attempt to escape the effect of Washington Law should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of March, 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of March, 2016, I caused the foregoing Respondent's Brief to be served hand delivery, addressed to:

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