

FILED

JUN 11 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
B

NO. 289133

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROSSI IMPERATO

Appellant,

v.

WENATCHEE VALLEY COLLEGE, ET AL.

Respondent.

BRIEF OF APPELLANT

STEVEN C. LACY
Attorney for Appellant
Lacy Kane
455 6th Street NE
P.O. Box 7132
East Wenatchee, WA 98802
(509) 884-9541
WSBA NO. 10814

FILED

JUN 11 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON

NO. 289133

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

ROSSI IMPERATO

Appellant,

v.

WENATCHEE VALLEY COLLEGE, ET AL.

Respondent.

BRIEF OF APPELLANT

STEVEN C. LACY
Attorney for Appellant
Lacy Kane
455 6th Street NE
P.O. Box 7132
East Wenatchee, WA 98802
(509) 884-9541
WSBA NO. 10814

TABLE OF CONTENTS

	<u>Page</u>
I. ASSIGNMENT OF ERROR	1
II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR	1 - 2
III. STATEMENT OF THE CASE	2 - 14
A. Statement of Facts	2 - 13
1. Dave Pritchard	3 - 4
2. Linda Fryant	4
3. The Alliance of Pritchard, Edwards, and Fryant	5 - 10
a. February 28, 2007	5 - 7
b. Imperato joins the Rank and File	8
c. Pritchard keeps at it	8 - 9
d. Fryant wants Imperato to be History	10
4. Final Chapter	10 - 13
B. Procedural History	13 - 14
IV. ARGUMENT	14 - 29
A. Summary Judgment and the Standard of Review ..	14 - 15
B. Statutes of Limitation	15 - 17
C. The Hybrid Claim	17 - 25
1. Matter is not Subject to the Six-Month Limitation	18

a.	The Six-Month Limitation	18 - 19
b.	LMRA not Applicable	19 - 20
c.	State Law Applies	20 - 25
i.	The Third Circuit's Treatment	20 - 23
ii.	State Law provides a Limitation Period	23 - 25
D.	An Action Sounding in Tort	25 - 29
1.	A Tort Claim is Required	25 - 28
2.	Not an Unfair Labor Practice	28 - 29
V.	CONCLUSION	29 - 30

Washington Cases

Allen v. Seattle Police Officer’s Guild, 100 Wn.2d 361,
670 P.2d 246 (1983) 24, 25

Castro v. Stanwood School District No. 401, 151 Wn.2d 221,
86 P.3d 1166 (2004) 26, 27

French v. Gabriel, 57 Wn.App. 217, 788 P.2d 569 (1990)
aff’d 116 Wn.2d 584, 806 P.2d 1234 (1991) 15

Lindsey v. Municipality of Metropolitan Seattle, 49 Wn.App. 145,
741 P.2d 575 (1987) 24, 25

Marquis v. Spokane, 130 Wn.2d 97,
922 P.2d 43 (1996) 15

Olympic Fish Prods., Inc.v. Lloyd, 93 Wn.2d 596,
611 P.2d 737 (1980) 15

Stenberg v. Pacific Power & Light, 104 Wn.2d 710,
709 P.2d 793 (1985) 16, 17

Wilson v. Steinbach, 98 Wn.2d 434,
656 P.2d 1030 (1982) 15

Wright v. Terrell, 162 Wn.2d 192,
170 P.3d 570 (2007) 28, 29

Federal Cases

Adkins v. International Union of Elec., Radio & Mach. Workers, AFL-CIO-
CLC., 769 F.2d 330, (6th Cir. 1985) 28, 29

Banks v. United States, 81 F.3d 874 (9th Cir. 1996) 28

Delcostello v. Int’l Bhd. of Teamsters,
462 U.S. 151 (1983) 14, 17, 18, 19, 22, 23

Farber v. City of Paterson, 440 F.3d 131 (3rd Cir. 2006) 20, 21, 23

Gomex v. Government of the Virgin Islands,
882 F.2d 733 (3rd Cir. 1989) 21, 22

McNaughten v. Dillingham Corp., 722 F.2d 1459 (9th Cir. 1984) 28

Nitsche v. Stein, Inc., 797 F. Supp. 595 (N.D. Ohio 1992) 28

Railway Telegraphers v. Railway Express Agency,
321 U.S. 342 (1944) 15

United States v. Marion, 404 U.S. 307 (1971) 16

White v. Anchor Motor Freight, Inc.,
683 F. Supp. 1177 (W.D. Mich. 1988) 28

Other Jurisdiction Cases

Griffin v. United Transportation Union,
190 Cal.App.3d 1359, 236 Cal. Rptr. 6 (1987) 20

Hanshaw v. City of Huntington, 193 W.Va. 364,
456 S.E. 2d 445 (1995) 19

Statutes

RCW 4.16 2, 25

RCW 4.16.005 25

RCW 4.16.040 25

RCW 4.16.080 25

RCW 4.16.130 25

RCW 4.92 2, 26, 30

RCW 4.92.100 26

RCW 4.92.110 2, 14, 27, 28, 30

RCW 4.96.020 (4) 26

RCW 41.56 25

RCW 41.56.080 24

RCW 41.56.140 (1) 29

RCW 41.56.150 29

RCW 41.56.160 1, 2, 18, 23, 24

RCW 41.80 24, 25

RCW 41.80.070 24

RCW 41.80.110 29

RCW 41.80.120 1, 2, 24

Federal Statutes

29 U.S.C. § 152 (2) 19

Washington Court Rules

56 (c) 15

I. ASSIGNMENT OF ERROR

The trial court erred by granting summary judgment based on the expiration of the statute of limitations.

II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

Appellant, Rossi Imperato, was discharged by Wenatchee Valley College (“WVC”). His union, Washington Public Employees Association (“WPEA”), refused to grieve his discharge. Imperato filed the below action alleging that WVC breached the collective bargaining agreement and WPEA breached its duty of fair representation. The Supreme Court has held that a hybrid § 301 Labor Management Relations Act (LMRA) breach of contract/breach of duty of fair representation claim is subject to a six-month limitations period provided by § 10(b) of the Fair Labor Relations Act. The LMRA does not apply to state employees. Are Imperato’s claims against WVC and WPEA subject to the six-month limitation under § 10(b)?

RCW 41.56.160 and RCW 41.80.120 require that a complaint to the Public Employees Relation Commission (PERC) for an unfair labor practice

must be filed within six (6) months of the unfair practice. No statute or case law directs that the six-month limitation period be applied to legal actions filed in superior court. Should the six-month limitation under RCW 41.56.160 and RCW 41.80.120 apply to this matter rather than the limitation periods provided under RCW 4.16?

Imperato was discharged by WVC on February 18, 2008. WPEA, by letter dated February 25, 2008, refused to represent him in grieving his discharge. Imperato served a claim for damages pursuant to RCW 4.92. RCW 4.92.110 tolls the statute of limitations and extends the period sixty (60) days. If a six-month limitations period applies, was Imperato's action timely when it was filed on October 14, 2008?

III. STATEMENT OF THE CASE

A. Statement of Facts

In 2006, Rossi Imperato was the supervisor of the custodial staff at WVC. It was not to be an easy job. Instead of a group of loyal employees, Imperato was in charge of a group of dissenters. Certain members of the crew were downright hostile when it came to their rights under the collective bargaining agreement. When teamed with a union representative who shared their fervor, it did not spell good news for Imperato.

A. Dave Pritchard

One of Imperato's antagonists was Dave Pritchard. A major cause for Pritchard was his opposition to the use of work study students. (CP 184). Imperato presented an informal memo to Pritchard to address the insubordination. The informal memo was meant to provide clarity to the issue and place Pritchard on notice that a continuation of the behavior could lead to disciplinary action. (CP 185-86). Pritchard reacted negatively to the memo. (CP 186). In fact, Pritchard filed a legal action requesting a restraining order against Imperato. (CP 208-09).

The petition was dropped after an arrangement was reached to separate Pritchard and Imperato. (CP 208-09). Special arrangements were instituted so that Imperato did not directly supervise Pritchard. (CP 186-87). Pritchard reported to Travis Taylor, the Physical Plant Director. (CP 187). Any communication between Imperato and Pritchard was through e-mail. If something needed to be discussed, Imperato and Pritchard went through Human Resources (HR) or Travis Taylor. (CP 188).

In October, 2006, the arrangement was discarded at Pritchard's initiation. (CP 189-90). Pritchard and Imperato were to have a normal supervisor/subordinate relationship with direct communication. (CP 190).

Any peace between Imperato and Pritchard was short-lived. Pritchard continued his opposition to the use of work study students. (CP 240). Pritchard enlisted the assistance of the then HR director, Dale Johnson. Johnson got a taste of Pritchard's antics as he disputed Pritchard's claim that he had promised no work study students. (Id.). At the time, Pritchard documented a discussion he had with Imperato regarding a one month reprieve from work study students for his area. (CP 241). In his e-mail, Pritchard alleged "harassment" by Imperato and a "hostile work environment." (Id.). "Linda" from the WPEA was copied. (Id.).

B. Linda Fryant

Linda Fryant is a staff rep for WPEA. (CP 251). Fryant had entered the fray on behalf of Pritchard in early October, 2006. (CP 259-60). Pritchard had claimed that during a discussion on the use of work study students, Imperato shouted at him and waived the WPEA contract in his face. (CP 259). Fryant alleged that such conduct by Imperato constituted an "assault." (Id.). She promised to research the codes to substantiate her claim that a crime had been committed. (Id.). Travis Taylor, Imperato's supervisor, investigated the matter and determined that an "overreaction" on [Pritchard's] part [was] an understatement." (CP 260 (modified)).

C. The Alliance of Pritchard, Edwards, and Fryant

In late 2006, Pritchard and Dan Edwards became job reps for WPEA. (CP 262; CP 228-31). Pritchard's and Edwards' aim was to be in a position to scrutinize Imperato's actions as agents for the Union. (CP 227).

1. February 28, 2007

Matters came to a head on February 28, 2007. On that date, Imperato had issued an e-mail to his staff directing that they engage in team cleaning. (CP 191). Pritchard e-mailed Fryant with Imperato's e-mail attached. (CP 242). Besides taking issue with team cleaning, Pritchard also addressed turning timesheets in before the work was performed. (Id.). Pritchard wrote: "Rossi is out of control." (Id.).

Early in the shift, Imperato checked on his staff to see how things were going. He contacted Rich Ralston, a custodian, who was to be with a team which included Pritchard and Edwards. (CP 192-93). Ralston replied that he had not seen Pritchard and Edwards. Pritchard and Edwards stated to Ralston that they were not going to team clean and went their own way. (CP 193).

Imperato contacted Suzie Benson, the Vice President of WVC, and discussed having a meeting with the employees. (CP 200). After receiving

approval, Imperato then called a meeting. (CP 191-92).

Imperato's intent on calling the meeting was to reinforce to his crew that they were to follow his directives and not engage in actions which could be characterized as insubordination. (CP 192-93). During the meeting, Pritchard and Edwards constantly interrupted Imperato about other matters which they perceived as a concern instead of the matter at hand—following directives of the supervisor. (CP 192; CP 194-96). Frustrated at the deterioration of the meeting into a management bashing slugfest, Imperato terminated the meeting. (CP 192).

After the meeting, Imperato again called Ms. Benson to let her know how things were going and that he wanted to meet separately with Pritchard and Edwards regarding their behavior at the meeting. (CP 221-22). Benson cautioned Imperato to be careful. (Id.). Imperato then called Edwards and Pritchard back to the his office. (CP 192). Imperato wished to address their disrespectful and unprofessional behavior at the meeting. (Id.; CP 197). Imperato interpreted their behavior as an affront to his authority with the aim to humiliate him before his subordinates. (Id.). Imperato wished to inform the two how he felt. (CP 198).

Unfortunately, this meeting deteriorated into a raucous affair with

Pritchard and Edwards not listening to Imperato while they obstinately boasted of their rights as union members. (Id.). Exasperated, Imperato dropped the union contract he was holding onto the table, uttered “a dirty word”, and stated that he had rights, too. (Id.). Pritchard got up and muttered something. (CP 199). As Pritchard started to walk out the door, Imperato asked him what he said. Imperato placed his left hand on Pritchard’s right shoulder as Pritchard passed him on his way out the door. Pritchard screamed a couple of obscenities at Imperato and stormed out of the office. (Id.). Imperato turned towards Edwards to read his reaction of the event only to find Edwards calling the police. (Id.).

The police arrived and the situation was diffused. Pritchard claimed that he had been shoved against a wall by Imperato. (CP 232; CP 244-46). Pritchard claimed that he had received a low back injury. (CP 233). During his deposition, Pritchard changed his story and now claims that he was shoved into a corner of a desk. (CP 233).

While Imperato was placed on administrative leave, WVC investigated the matter. (CP 223). After the investigation, WVC determined that Imperato should be demoted from the supervisor position. (CP 201-02). With Imperato’s blessing, he was demoted. (CP 203).

2. Imperato joins the Rank and File

After he learned that he would be demoted, Imperato called Linda Fryant. He informed her of his impending demotion and that he would be rejoining the bargaining unit. He wanted assurance that he would have her support as a WPEA member. Fryant responded that he would receive her support. (CP 204).

Fryant had filed two grievances against Imperato as a consequence of the February 28, 2007, meetings. (CP 252-54; CP 265-70). Of course, WPEA would serve in an advocacy role on behalf of its members. However, the union had intense feelings against Imperato as displayed in its Executive Director's letter of April 2, 2007. (CP 271-72). Fryant always considered Pritchard's and Edwards' versions of events as closer to the truth than Imperato's. (CP 256). The grievances were eventually settled or dropped as a result of the investigation and the demotion of Imperato. (CP 254-55).

Taylor, HR, President Richardson, and Imperato agreed that he would be assigned the graveyard shift to separate him from his two nemeses. (CP 205-06). It was common knowledge among the staff that Imperato was on the graveyard shift in order to be separate from the crew. (CP 238-39).

3. Pritchard keeps at it.

For the second time, Pritchard filed a petition for a restraining order in the Chelan County District Court. (CP 207). Pritchard desired that Imperato remain on the graveyard shift permanently. (Id.). Fryant encouraged Pritchard to petition the court for the order. (CP 235-36). The district court denied the requested relief and dismissed the petition. (CP 208; CP 234, CP 236).

Besides keeping the heat on Imperato through legal action, Pritchard continued to report on Imperato to WVC management. Pritchard reported a “new Rossi incident” on September 17, 2007, to Travis Taylor. (CP 247-48). Among others, Pritchard copied Fryant. (Id.). Fryant responded by demanding specifics regarding the incident. (Id.). The alleged incident involved Imperato losing his temper when interacting with Roy Hale, the acting lead. (Id.). Pritchard wrote of his concern for new hires to be working with Imperato. (Id.). As the “victim” of a previous “assault,” Pritchard felt a duty to report the incident to management. (CP 237). Roy Hale does not describe any problem when he worked with Imperato. Hale testified that Imperato “was just - - was a good person to work with. He was always friendly. Always laughter. You know, just a good person all the way around.” (CP 275).

4. Fryant wants Imperato to be History

Fryant's interest in derogatory information regarding Imperato was typical. This continued after Imperato was demoted to a bargaining unit position within her union. Kathy Brown, the chief job rep for WPEA at WVC, reported a rampant animosity by Fryant against Imperato. After Imperato returned to a regular custodian position, Fryant stated during job rep meetings: "The College was very wrong, he should have been fired." (CP 282). During the months from September to December, 2007, Fryant would state at the meetings: "Don't worry, we're going to get rid of him. You know, he'll be gone. He shouldn't be here. The College was wrong, shouldn't have kept him." (*Id.*). Attending the job rep meetings, besides Brown and Fryant, were Pritchard and Edwards. (CP 284). It was obvious from the discussions at the meetings that Fryant, Pritchard, and Edwards were having many communications regarding Imperato outside Brown's presence. (CP 282-83).

D. Final Chapter

On December 20, 2007, Imperato received a memo from his supervisor announcing a possible schedule change. (CP 211). A meeting of the custodial staff was to be held on December 24 to discuss the possible

change. (Id.). Imperato was to be on vacation and would miss the meeting. (Id.). Imperato e-mailed his supervisor to oppose the schedule change. If there was a change in the schedule, it would be his third schedule change within a year. He was happy on graveyard and did not want to change. (CP 211-12).

Imperato returned from vacation on January 3, 2008. (CP 212). He opened an e-mail which indicated that a schedule change was to occur effective January 6 or 7. (CP 213).

During the evening of January 3, Imperato called Fryant. (CP 213, CP 216). Imperato desired that a grievance be filed regarding the improper notification he received for the schedule change. (CP 213). Fryant appeared receptive of a grievance. Not only was there an issue regarding the notification for the schedule change, there was also a possible issue regarding the changing of work conditions. (CP 214-15).

Imperato was very concerned about working on the swing shift with Pritchard. He asked Fryant whether, instead of the normal process of doing as management dictated and grieving the issue, a waiver could be instituted wherein he would be excused from the schedule change while the grievance was processed. (CP 215-16). Imperato was especially concerned because he

had just found a Christmas card from Pritchard in his box. Imperato viewed the card as a warning from Pritchard: “You’re coming back on swing shift, and I’m going to be right around the corner.” (CP 210). Imperato asked Fryant what would happen if Pritchard was to antagonize him to a point that he hit him? (CP 217-18). Imperato expressed his fear that if something like that happened, he would lose his job and probably be arrested. (CP 217). Fryant had a negative reaction to Imperato’s concern and told him she did not want to hear anything of the sort. (CP 218).

Fryant contacted Travis Taylor the next morning about her phone call with Imperato. (CP 257-58). Fryant then documented her version of the conversation with Imperato in an e-mail sent to Taylor, Tim Marker, and Suzie Benson. (CP 263-64). Fryant stressed her concern for Edward’s and Pritchard’s safety. (Id.). Fryant provided increased anxiety by reporting information that Imperato had just purchased a gun. (Id.). Fryant pleaded: “Something has to be done about this - IMMEDIATELY.” (Id.).

Imperato received a phone call from Tim Marker that morning. (CP 219). Marker told Imperato that he was not to come to work that night. (Id.). After he was pressed, Marker explained that Imperato was being taken off work for making threats against some employees. (Id.).

An investigation by Marker ensued. Imperato was assisted by Kathy Brown, the chief job rep for WPEA. (CP 220). Both Imperato and Brown expected that a staff representative from WPEA would be representing him. (CP 281). During an interview by Marker, Imperato reiterated that his comments to Fryant were a question of what would happen to him if the antagonists—Edwards and Pritchard—pushed so hard that he took a swing at one of them. (CP 278-79). For the Loudermil hearing, Imperato merely submitted a written statement without any presentation provided by WPEA. (CP 279-80).

Imperato was terminated on February 18, 2008, by WVC because of the alleged threats he had made to Fryant. Imperato requested that a grievance be filed over his discharge. Brown delivered the request by Imperato to Fryant. (CP 279). By a letter dated February 25, 2008, WPEA denied Imperato's request for representation in filing a grievance. (CP 94).

B. Procedural History

Imperato filed suit in Chelan County Superior Court on October 14, 2008. (CP 1-7). Imperato alleged that WVC had breached the collective bargaining agreement by terminating him without just cause and that the union had breached its duty of fair representation. (Id.).

WVC and the union filed motions for summary judgment with the position that a six-month statute of limitations applied to the action. (CP 21-35; CP 95-160). WVC and the union cited RCW 41.56.160, the statute of limitations for bringing unfair labor actions before PERC as support. WVC and the union argued that the policy for adopting the six-month statute of limitations was espoused by Delcostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983). (CP 27-29; CP 102-03).

Imperato responded by arguing that RCW 4.92.110 extended the statute of limitations by 60 days. (CP 172-74). Imperato also maintained that the six-month statute of limitations did not apply to this matter which involved a state defendant. (CP 175). The appropriate statute of limitations was provided under state law. (CP 178-79).

The trial court granted summary judgment finding that the tolling provision of RCW 4.92.110 did not apply to an unfair labor practice action. (CP 300). The trial court determined that a six-month statute of limitations applied to this matter. (CP 301-02). The trial court granted summary judgment and dismissed Imperato's action. (CP 303-04).

IV. ARGUMENT

A. Summary Judgment and the Standard of Review

When reviewing an Order granting summary judgment, the appellate court engages in the same inquiry as the trial court for a de novo review. Marquis v. Spokane, 130 Wn.2d 97, 105, 922 P.2d 43 (1996). For a motion for summary judgment, judgment shall be entered for the moving party if there exists no genuine issue as to any material fact. CR 56(c). In its determination, the court will consider the facts and all reasonable inferences from the facts in the light most favorable to the nonmoving party. Wilson v. Steinbach, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). An order for summary judgment can be granted only if reasonable persons could reach but one conclusion. 98 Wn.2d at 437; Olympic Fish Prods., Inc. v. Lloyd, 93 Wn.2d 596, 601, 611 P.2d 737 (1980).

B. Statutes of Limitation

The nature of the dismissal by the trial court requires consideration of the policies behind the statutes of limitation. Statutes of limitation are in derogation of the common law and should, therefore, be strictly construed. French v. Gabriel, 57 Wn. App. 217, 226, 788 P.2d 569 (1990) aff'd, 116 Wn.2d 584, 806 P.2d 1234 (1991). They are meant to put an adversary on notice for a specified period of time and protect potential parties from stale claims. Railway Telegraphers v. Railway Express Agency, 321 U.S. 342, 349

(1944). Such statutes also help to ensure the accuracy of the fact finding process by limiting time's effect on the impairment of memories, death or disappearance of witnesses, and the loss of evidence. United States v. Marion, 404 U.S. 307, 322, n.14 (1971).

The Washington Supreme Court offered the following discussion regarding statutes of limitation:

The Limitation Act, 1623, 21 Jac. 1, ch. 16 (7 Chitty's Eng. Stats., at 619 (6th ed. 1912)) marked the beginning of the modern law of limitations on personal actions in the common law. The purposes behind the act were to keep out inconsequential claims and to minimize hardships on poor defendants. Developments in the Law-Statute of Limitation, 63 Harv. L. Rev. 1177 (1950).

Today, all states have limitation statutes for the majority of actions before their courts. The purposes have remained intact; courts apply limitation statutes to compel the exercise of a right of action within a reasonable time so opposing parties have fair opportunity to defend. 51 Am. Jur. 2d Limitation of Actions § 17 (1970).

Statutes of limitation are in their nature arbitrary. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper.

Tioga R.R. v. Blossburg & C. R.R., 87 U.S. (20 Wall.) 137, 150, 22 L. Ed. 331 (1873) (Hunt, J., concurring).
In Washington, the goals of our limitation

statutes are to force claims to be litigated while pertinent evidence is still available and while witnesses retain clear impressions of the occurrence. Summerrise v. Stephens, 75 Wn.2d 808, 811, 454 P.2d 224 (1969). Our policy is one of repose; the goals are to eliminate the fears and burdens of threatened litigation and to protect a defendant against stale claims. Ruth v. Dight, 75 Wn.2d 660, 664, 453 P.2d 631 (1969). A statute of limitation, in effect, deprives a plaintiff of the opportunity to invoke the power of the courts in support of an otherwise valid claim.

However, in applying a limitation statute, this court has insisted on a careful scrutiny of the changing conditions and needs of the times to prevent any application of the common law as an instrument of injustice. Lundgren v. Whitney's Inc., 94 Wn.2d 91, 95, 614 P.2d 1272 (1980). When there is uncertainty as to which statute of limitation governs, the longer statute will be applied. Rose v. Rinaldi, 654 F.2d 546 (9th Cir. 1981); Shew v. Coon Bay Loafers, Inc., 76 Wn.2d 40, 51, 455 P.2d 359 (1969).

Stenberg v. Pacific Power & Light, 104 Wn.2d 710, 714-15, 709 P.2d 793 (1985).

C. The Hybrid Claim

A claim for breach of a collective bargaining agreement and a claim for breach of the duty of fair representation are “inextricably interdependent.” DelCostello v. Int’l Bhd. of Teamsters, 462 U.S. 151, 164 (1983). The plaintiff must prove both causes of action to prevail in an action. 462 U.S. at 165. The proceeding has been recognized as a “hybrid § 301/fair

representation claim.” 462 at 165. Section 301 is a reference to a provision within the Labor Management Relations Act (LMRA). As discussed below, Imperato’s cause of action does not fall under the LMRA because the matter involves a state employer. However, the principle of the interdependency of the actions is still present. The plaintiff must prove both causes to prevail.

1. Matter is not Subject to the Six-Month Limitation

The WPEA argued to the trial court that the six month limitation to file a complaint for an unfair labor practice before PERC should apply to actions in superior court. See RCW 41.56.160 (complaint before the PERC not to be processed if filed later than six months after alleged unfair labor practice). WPEA acknowledged that no Washington appellate court has ruled that the six-month limitation of RCW 41.56.160 applies to actions in superior court. WPEA cited Michigan Court of Appeals’ decisions in support of its argument. (CP 31-32).

WVC emphasized federal precedent. It argued that the claim was a hybrid § 301/fair representation claim and that the six month statute of limitations under federal law pursuant to § 10(b) of the National Labor Relations Act (NLRA) should apply. (CP 102-07).

a. The Six-Month Limitation

WPEA and WVC supported their arguments by reciting the policy considerations expressed by the United States Supreme Court in DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983). In DelCostello, the Court held that the six month limitation provided by § 10(b) of the NLRA for filing a complaint with the National Labor Relations Board applied to a hybrid § 301 claim under the Labor Management Relations Act (LMRA). 462 U.S. at 170-71. The Supreme Court declined to follow the long established practice of applying an analogous state statute of limitations. Instead, it determined that federal law provided the appropriate limitations which would balance the interests of management, labor, and the individual employee while providing uniformity for the resolution of labor disputes on a national scale. 462 U.S. at 171.

b. LMRA not Applicable

The LMRA does not apply to a State employer. 29 U.S.C. § 152 (2) (“‘employer’ . . . shall not include . . . any State or political subdivision thereof”). The case at bar is not a hybrid § 301 breach of contract/fair representation claim. The six month limitations period of § 10(b) of the NLRA does not apply. See Hanshaw v. City of Huntington, 193 W.Va. 364, 456 S.E.2d 445, 449-50 (1995)(dispute not subject to LMRA as City defined

as political subdivision of the state; ten year statute of limitations for claims for breach of contract applied); see also Griffin v. United Transportation Union, 190 Cal.App.3d 1359, 236 Cal. Rptr. 6 (1987)(six month statute of limitations did not apply because employer was public entity and exempt from NLRA; three year statute of limitations for liability created by statute applied).

c. State Law Applies

i. The Third Circuit's Treatment

The Third Circuit provides constructive guidance as to cases involving public employees and the applicability of the six-month limitation under § 10(b). In Farber v. City of Paterson, 440 F.3d 131 (3rd Cir. 2006), the Third Circuit considered a breach of duty of fair representation claim and the appropriate limitations period. In New Jersey, the duty of fair representation arises from the New Jersey Employer-Employee Relations Act's ("EERA") grant of an exclusive right for a union to represent the interests of public employees. 440 F.3d at 143. A breach of the duty of fair representation ("DFR") may be brought as an "unfair practice" claim before New Jersey's Public Employment Relations Commission ("PERC"). 440 F.3d at 143 (citing N.J. Stat. Ann. § 34:13A-5.4(c)). An unfair practice claim brought before PERC has a six-month statute of limitations. 440 F.3d at 143 (citing N.J. Stat.

Ann. § 34:13A-5.4(c)).

The Third Circuit affirmed the district court's decision that an action at law for breach of DFR was not preempted by PERC's "exclusive power" to hear unfair practice claims. 440 F.3d at 143. The Third Circuit also affirmed the district court's application of New Jersey's six-year statute of limitations for "any tortious injury to the rights of another." 440 F.3d at 144.

In Farber, the Third Circuit considered its previous decision in Gomez v. Government of the Virgin Islands, 882 F.2d 733 (3rd Cir. 1989). The Virgin Islands has enacted the Virgin Islands Public Employee Labor Relations Act (PELRA). 882 F.2d at 734. The Third Circuit reversed the district court's decision to apply the six-month statute of limitations of § 10(b) of the NLRA. 882 F.2d at 736. The matter, arising from the PELRA rather than the LMRA, was not subject to the six month limitation under federal law. The federal law applied to private sector employers and their employees. 882 F.2d at 736.

PELRA provides for the creation of a Public Employees Relations Board (PERB). A violation of PERLA, including claims involving an unfair labor practice, may be brought before the PERB. 882 F.2d at 737. Such complaints must be brought within 180 days after the alleged violation. 882 F.2d at 737.

PERLA did not provide a statute of limitations for bringing a claim at law for the hybrid action of breach of DFR and breach of contract. The government argued that the six-month period for bringing claims before the PERB be applied. 882 F.2d at 738. It supported its argument with the policy reasons which led the Supreme Court to adopt the NLRA § 10 (b)'s six-month limitations period for bringing complaints before the NLRB in DelCostello.

The Third Circuit declined to adopt the six-month limitation because the Virgin Islands legislature provided a general statute of limitations. 882 F.2d at 738-39. For the action against the union, the Third Circuit ruled that the two-year statute of limitations for a tort action was appropriate because an action for breach of DFR was analogous to a claim for breach of fiduciary duty or legal malpractice. 882 F.2d at 738. The employee's action for breach of the collective bargaining agreement would appropriately be subject to a six-year statute of limitations for breach of contract actions. 882 F.2d at 738. The Third Circuit remanded the case to the district court for its determination of which statute of limitations to apply with consideration given to a full record. In any event, the employee's action was timely despite his commencing the action 17 months after the union refused to arbitrate on his behalf. 882 F.2d at 738.

The Third Circuit provided comparisons with Gomez in Farber:

Each Act [New Jersey's EERA and the Virgin Island's PERLA] has a section that permits unfair labor practice claims to be brought before an administrative body subject to a six-month statute of limitations. *See* N.J.Code. Ann. § 34:13A-5.4 (PERC); V.I. Code Ann. Tit. 24, § 379 (PERB). Each act also permits (either expressly or impliedly) DFR claims to be brought before a court from a source other than the section that provides for unfair labor practice claims before the administrative body. *See* N.J.Code. Ann. § 34:13A-5.3 (implied by District Court here); V.I.Code Ann. Tit 24, § 383 (express). Thus, under both Acts, the six-month statute of limitations must be "borrowed" from some external source in order to apply to a DFR claim brought in court. In *Gomez*, we explained that we cannot circumvent a state legislature's decision to provide a general catch-all statute of limitations for tort claims, and thus may not borrow the six-month limitations period. Our reasoning in *Gomez* is applicable here.

440 F.3d at 144. The Third Circuit stressed that the applicability of a shorter statute of limitations based on the policy considerations of DelCostello is a matter for the legislature and not the courts. 440 F.3d at 145 (quoting Gomez, 882 F.2d at 739 n.9).

ii. State Law provides a Limitations Period

The adoption of the six-month limitation under RCW 41.56.160 was limited to complaints for unfair labor practices brought before PERC. The Legislature was not considering actions brought in the superior court. In its

description of the pending legislative action, the Senate Bill Report for HB 136 stressed that there was “no specific statute of limitations applying” to unfair labor practice complaints before PERC. (CP 52). The Bill Analysis by the House of Representatives for HB 136 also pointed out the lack of a time limit for the aggrieved party to file a complaint for an unfair labor practice under former RCW 41.56.160. (CP 53). No mention is made in the Bill Analysis, Senate Bill Report, or the communications to the Governor and the Legislature by PERC that the six-month limitation should be applied to actions at law in superior court. (CP 49-53).

The Legislature enacted RCW Chapter 41.80 in 2002. RCW 41.80 applies to collective bargaining for state employees. RCW 41.80.120 is identical to RCW 41.56.160.

The duty of fair representation arises from a union’s statutory right to exclusively represent its members. RCW 41.56.080; Allen v. Seattle Police Officers’ Guild, 100 Wn.2d 361, 371-72, 670 P.2d 246 (1983); Lindsey v. Municipality of Metropolitan Seattle, 49 Wn.App. 145, 148, 741 P.2d 575 (1987); see also RCW 41.80.070 (certification of bargaining unit for state employees). Similar to New Jersey, the Washington Legislature has not expressly provided that a cause of action may be brought before the superior

court. Nothing in RCW 41.56 and RCW 41.80 prevent such an action. Washington court's clearly recognize the right to bring the action before the superior courts. See Allen, 100 Wn.2d at 365; Lindsey, 49 Wn.App. at 147-48.

The Washington Legislature has provided statutes of limitation for actions at law and equity. See RCW 4.16. RCW 4.16.005 provides:

Except as otherwise provided in this chapter, and except when in special cases a different limitation is prescribed by a statute not contained in this chapter, actions can only be commenced within the periods provided in this chapter after the cause of action has accrued.

The statute of limitations for an action for injury to a person or rights of a person is three years. RCW 4.16.080. An action for breach of a written agreement must be commenced within six years. RCW 4.16.040. An action for relief not listed in RCW 4.16 must be commenced within two years after the cause of action has accrued. RCW 4.16.130.

Imperato brought his action well within the shortest limitation period provided by the Legislature. The trial court erred in dismissing Imperato's causes of action.

D. An Action in sounding in Tort

1. A Tort Claim was Required

The plaintiff is required to file a claim for damages with the state under RCW 4.92. The statute requires that a claimant serve a claim for damages caused by the tortious conduct of the state upon the office of risk management. As discussed below, the claim for breach of DFR sounds in tort. The hybrid contract/tort action is not purely contract and it is not purely tort. The mixture of these causes makes it imperative that the plaintiff comply with the tort claim statute. Unable to file his action until he is able to allege both causes, the plaintiff is at a severe risk to proceed without a tort claim being filed.

A claim for damages must be filed with the state's risk management office. RCW 4.92.100. An action cannot be commenced in superior court until sixty (60) days has elapsed after the filing of the claim with the risk management office. RCW 4.92.110. The statute of limitations governing the action "shall be tolled during the sixty-day period." RCW 4.92.110.

RCW 4.96.020 (4), applying to claims against local governmental entities, likewise contains a sixty day waiting period. During the sixty-day period, the applicable statute of limitations period "shall be tolled." RCW 4.96.020 (4).

In Castro v. Stanwood School District No. 401, 151 Wn.2d 221, 226, 86 P.3d 1166 (2004), the Washington Supreme Court considered RCW 4.96.020 (4). In Castro, the plaintiff had served his claims upon the defendants 51 and 52 days before the expiration of a three years statute of

limitations. The statute of limitations was set to expire on January 27, 2002. 151 Wn.2d at 223. The plaintiff filed his complaint on March 1, 2002. 151 Wn.2d at 223. The Supreme Court resolved the argument that the claim filing statute merely tolls the expiration of the statute of limitations. Rather, the claim filing statute temporarily stops and then resumes the period of time within which the plaintiff must file suit. 151 Wn.2d at 226. “Essentially, the provision adds 60 days to the end of the otherwise applicable statute of limitations.” 151 Wn.2d at 226.

RCW 4.92.110 contains the identical requirement that the statute of limitations be tolled. The statute of limitations temporarily stops for the sixty-day period. An additional 60 days is added to the applicable statute of limitations.

Even if the six-month statute of limitations would apply as WVC and WPEA contend, the action by Imperato would be timely. At the earliest, the six month period would have begun when Imperato received the February 25, 2008, denial letter by WPEA. In order to pursue the claims, Imperato was required to present a claim pursuant to RCW 4.92.110. This adds 60 days to the limitations period.

If a six-month statute of limitations was applicable, with the tolling period, the statute of limitations would have expired on October 25, 2008. Imperato filed this lawsuit on October 14, 2008. Imperato was well within a

six-month limitations period.

2. Not an Unfair Labor Practice

The trial court determined that Imperato had filed an unfair labor practice claim. (CP 300). Following Wright v. Terrell, 162 Wn.2d 192, 196, 170 P.3d 570 (2007), the trial court stated that unfair labor practice claims under RCW 41.56 are not tort claims for damages and are not subject to the claims filing statute. The trial court determined that the statute of limitations was not tolled by RCW 4.92.110. (CP 300).

The Ninth Circuit has remarked that at least four federal circuits have held that a DFR action sounds in tort. McNaughten v. Dillingham Corp., 722 F.2d 1459, 1461 (9th Cir. 1984)(citing cases for support). In considering the taxation of funds from a settlement in an action for breach of the duty of fair representation, the Ninth Circuit has described the cause as a “tort-like cause of action.” Banks v. United States, 81 F.3d 874, 876 (9th Cir. 1996). The DFR claim is a form of a breach of fiduciary duty and is, therefore, a tort. Nitsche v. Stein, Inc., 797 F. Supp. 595, 598 (N.D. Ohio 1992). Because it is a tort, remedies for a DFR claim include general compensatory damages such as emotional distress. White v. Anchor Motor Freight, Inc., 683 F. Supp. 1177, 1182 (W.D. Mich. 1988).

A claim for breach of the duty of fair representation is independent of an unfair labor practice charge. Adkins v. International Union of Elec., Radio

& Mach. Workers, AFL-CIO-CLC, 769 F.2d 330, 335 (6th Cir. 1985).

Therefore, a filing of an unfair labor practice charge before the NLRB does not toll the statute of limitations for a DFR claim. 769 F.2d at 335.

Unfair labor practices for a union are defined as:

- (1) To interfere with, restrain, or coerce public employees in the exercise of their rights guaranteed by this chapter;
- (2) To induce the public employer to commit an unfair labor practice;
- (3) To discriminate against a public employee who has filed an unfair labor practice charge;
- (4) To refuse to engage in collective bargaining.

RCW 41.56.150. RCW 41.80.110 enumerates a similar listing of unfair labor practices by a labor union or the state. The DFR claim is not described in RCW 41.56.150 or RCW 41.80.110. It is a specific legal cause of action and is not an unfair labor practice claim.

Unlike the plaintiffs in Wright v. Terrell, Imperato did not bring a claim for interference with collective bargaining rights in violation of RCW 41.56.140(1). See 162 Wn.2d at 193. Imperato brought a tort claim for breach of the duty of fair representation. (CP 6). Imperato prayed for tort damages—general compensatory damages—as a remedy. (Id.). The trial court erred in ruling that Imperato’s DFR claim was an unfair labor practice claim and not a tort. Imperato was required to file a tort claim.

V. CONCLUSION

WPEA's and WVC's motions for summary judgment should have been denied. The six-month statute of limitations is not applicable. Regardless, Imperato was required to comply with RCW 4.92. Any limitations period was tolled and extended by sixty days pursuant to RCW 4.92.110. The trial court should be reversed and this matter should be remanded for trial.

Respectfully submitted this 10th day of June, 2010.

LACY KANE, P.S.

By 
STEWART R. SMITH, WSBA NO. 22746
Attorney for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

18 West Mercer Street, Suite 400
Seattle, Washington 98119-3971

Patricia A. Thompson
Assistant Attorney General
Attorney General of Washington
West 1116 Riverside Avenue
Spokane, Washington 99201-1194

Rossi Imperato
706 Kittitas St.
Wenatchee, WA 98801

Stuart J. Bates
STUART J. BATES

SUBSCRIBED AND SWORN to before me this 10th day of June 2010.



Tandie K. Dillard
NOTARY PUBLIC
Printed Name: Tandie K. Dillard
My Notary expires: 7/23/12

LACY KANE, P.S.
455 6th Street NE
P.O. Box 7132
East Wenatchee, WA 98802
(509) 884-9541 ♦ Fax: (509) 884-4805

