

No. 74024-5-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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ROLAND KILLIAN and DENNIS BAILEY,

Petitioners

v.

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL  
609,

Defendant-Respondent

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**RESPONDENT UNION'S SUPPLEMENTAL BRIEF**

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## INTRODUCTION

This case is before the Court on Petition for Review by Roland Killian and Dennis Bailey. Below, the Superior Court granted summary judgment on the claims for breach of duty of fair representation (“DFR”) and the negligent unauthorized practice of law (CP 966-968) and denied Petitioners’ motion to amend to plead a new claim under the Consumer Protection Act (“CPA”). CP 966-968, 971-973. The Court of Appeals affirmed, correctly holding, as did the Superior Court, that all claims asserted or sought to be asserted against Local 609 were claims under the duty of fair representation that were time barred by the applicable six-month statute of limitations. *Killian v. Int’l Union of Operating Engineers Local 609–A*, 195 Wn. App. 511, 381 P.3d 161 (2016), review granted *sub nom. Killian v. Int’l Union of Operating Engineers*, 187 Wn.2d 1016, 388 P.3d 762 (2017).

## ARGUMENT

### **I. THIS COURT SHOULD AFFIRM BECAUSE PETITIONERS’ CLAIMS ARISE UNDER THE DUTY OF FAIR REPRESENTATION AND THOSE CLAIMS ARE TIME BARRED.**

#### **A. This Court Reviews De Novo The Undisputed Material Facts And Affirms Summary Judgment Where A Party Is Entitled To That 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 is appropriate where there is no triable issue of material fact and 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).

**B. Here The Undisputed Facts Are That The Union Settled Its Contractual Grievances Only And Communicated To The Petitioners That It Would Not Proceed To Arbitration On Those Grievances More Than Six Months Before This Suit Was Initiated.**

Here, there are no disputed material facts, and summary judgment was appropriately granted as a matter of law. The undisputed facts are that Local 609, through its non-lawyer representative Mike McBee, received from Petitioners' employer offers facilitated by a Public Employment Relations Commission mediator, that were offered in exchange for two separate concessions: (1) that the Union would settle its outstanding contractual grievances, and (2) that the Petitioners would release their civil public law claims. The Union did not purport to settle

the Petitioners' public law claims; rather, the Petitioners consulted their private attorney concerning those claims. The Union settled only its grievances. The Petitioners, on the advice of their counsel, rejected the District's offers of settlement.

Petitioners were gardeners employed by Seattle Public Schools ("District" or "SPS") and were part of a bargaining unit represented by Respondent International Union of Operating Engineers, Local 609 ("Local 609" or "Union") 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, 69-72.

Through a mediation conducted by the Washington Public Employment Relations Commission ("PERC"), Local 609 settled grievances it filed under its CBA with the District. During mediation, the District conditioned its monetary settlement offers, conveyed by the mediator to Local 609 representative Mike McBee and to the Petitioners, not only on the Union's withdrawal of its contractual grievances, but also on the individual grievants' [now Petitioners'] release of any individual public law claims they might assert against the District. The Petitioners did not accept any of the District's offers to settle their public law claims.

Local 609 settled its contractual grievances only. The settlement it

reached with the District did not address, let alone purport to release, Petitioners' non-union claims or purport to allocate settlement monies between claims. It simply withdrew the grievances in return for the District continuing to extend the lump sum offers of \$100,000 and \$75,000 to Killian and Bailey, respectively, in return for them releasing their civil claims. CP 61-62, 430-431.<sup>1</sup> Local 609 did so because it determined that the amounts offered were sufficient to meet the interests of the bargaining unit as a whole, and it left the Petitioners free to accept or reject the District's offers. CP 61-62; 429, 505-506. Upon reaching a settlement of its grievances, Local 609 informed the Petitioners that it would withdraw the grievances but leave to them whether to accept the monetary offers or reject the offers and pursue their claims in court. CP 383 (182:6-24), 384 (187:17-24), 387 (200:16-21).

With the advice of their individual counsel, the Petitioners rejected the offers. CP 135-136, 504-505 (183:16-184:3), 239-240 (136:12-137:13), CP 204 (102:16-24). Instead, they pursued their claims against the District and also sued the Union in the instant litigation, alleging breach of the duty of fair representation and the unauthorized practice of law against the Union. CP 387, 1-12, 933, 939-942, 974-985 824-828.

Statements by Petitioners about the mediation and settlement of the

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<sup>1</sup> The grievance settlement did not break down these gross sums. CP 430 (¶¶ 2.0 and 2.1)

grievances that appear to create dispute are not supported by the record. For example, the statements that Local 609 “worked to settle Mr. Killian's and Mr. Bailey's non-union civil claims,” and that “the negotiated settlement agreement included” provisions for payment broken down into separate amounts for back wages, compensatory damages and costs. Petition at 2-3 (quoting CP 172). The language quoted in the Petition is actually from a draft settlement agreement proposed by the District through the PERC mediation that was never accepted by the Union. The only agreement entered by the Union did not address the Petitioners’ civil claims or any breakdown of compensation for releasing those claims. CP 430-431. Additionally, there is no evidence in the record that the Union did anything more than receive offers from the District, conveyed through the PERC mediator, that were intended by the District to compensate for the Union dropping its grievances and the Petitioners releasing their civil claims.

Similarly, the contention, without citation to the record, that the Local 609 Executive “Board approved...both the sums for resolution of the grievance, or back pay and the sums for resolution of Mr. Killian and Mr. Bailey' [*sic*] non-union civil claims” is erroneous. Petition at 15. The actions taken by the Local 609 Executive Board were to approve as a pressure tactic moving the grievances to arbitration, CP 381 (174:23-

176:6), 382 (178:15-179:23), and rescinding that decision and approving the settlement embodied in CP 430-31, which left the approval or disapproval of lump-sum offers to the Petitioners. CP 505-506, 383 (184:18-185:2), CP 383 (182:6-24), CP 384 (188:12-15), CP 385 (189:18-190:21).

Further, it is undisputed that Local 609 told Petitioners on September 17, 2013, that Local 609 would not proceed to arbitration on the grievances. As counsel for Petitioners explained:

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 arbitration on their behalf.

*Killian*, 195 Wn. App. at 525, 381 P.3d at 168 (quoting CP 135-136). Despite this acknowledgment and without citation to any evidence other than their stated confusion, Petitioners claim that they did not understand that the Union would not proceed, and contend that even after Petitioner Bailey heard on October 12, 2013, the report at Local 609's membership meeting that Local 609 would not be advancing their claims to arbitration, CP 54, (16:6-16), 133 (101:3-9), 125-126 (175:20-176:2), they were still unclear as to the Union's intent concerning processing the grievances. Next, Petitioners contended that they were entitled to written notice about the status of their grievances, without citation to any authority. As the

Court of Appeals pointed out:

even if written notice was required, on October 18, 2013, [Union counsel] wrote to [Petitioners' counsel] and stated,

In my letter of October 16, 2013, I detail the two communications you sent me on September 17, 2013, acknowledging that you knew that Local 609 had decided not to proceed to arbitration. Your assertions establish your knowledge. Your latest letter asks that the Union put its position in writing. My October 16 letter did that already.

This written communication left no room for doubt about notice of the union's position.

*Killian*, 195 Wn. App. at 525–26, 381 P.3d at 168 (footnotes omitted) (quoting CP 659).

Nor is it disputed that Petitioners filed this suit seeking damages against Local 609 for actions it took in representing the Petitioners in the grievance mediation and settlement process, on May 29, 2014, well after more than six months had passed since the October 18, 2013, letter. CP 387 (198:15-21), CP 1-12, 974-985.

**C. Local 609 Is Entitled To Summary Judgment Because All Claims Asserted By Petitioners Arise Under The Duty Of Fair Representation And Because Those Claims Are Barred By The Statute Of Limitations.**

**1. The limitation period for filing duty of fair representation claims in superior court is six months.**

Claims for breach of the duty of fair representation under chapter 41.56 RCW “include those filed with PERC and those filed in superior

court.” *Imperato v. Wenatchee Valley Coll.*, 160 Wn. App. 353, 363, 247 P.3d 816, 820 (2011) (citing *Wash. State Council of County & City Employees v. Hahn*, 151 Wn.2d 163, 167, 86 P.3d 774 (2004)). The applicable statute of limitations for DFR claims filed with PERC is six months. RCW 41.56.160(1). In its decision below, Division One of the Court of Appeals agreed with the holding of Division Two in *Imperato Killian*, 195 Wn. App. at 524, 381 P.3d at 167 (“We adhere to *Imperato*.”) It cited the sound reasoning by the *Imperato* court, which should be affirmed here:

The court noted that the statutes were silent as to whether unfair labor practice claims filed in superior court were subject to the statute of limitations contained in RCW 41.56.160(1) and RCW 41.80.120(1).<sup>2</sup> *Id.* at 362, 247 P.3d 816. But, the *Imperato* court ultimately held that the six month statute of limitations applies to DFR claims filed directly in superior court. *Id.* at 364, 247 P.3d 816. It reasoned that application of the six month statute of limitation period to DFR claims would serve several important policies: (1) It would prevent piecemeal litigation; (2) Applying a different statute of limitations to DFR claims filed in superior court would frustrate the role of PERC in promptly resolving labor disputes; and (3) It would provide consistency, because federal law also establishes a six month statute of limitations. *Id.* In so holding, the *Imperato* court rejected the argument that it should apply the three year statute of limitations in RCW 4.16.080, the six year statute of limitations for breach of a written agreement in RCW 4.16.040, or the two year statute of limitations in RCW 4.16.130. *Id.* at 362, 364, 247 P.3d 816.

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<sup>2</sup> Ch. RCW 41.80 is a statute governing collective bargaining relationship in state employment, while it is Ch. RCW 41.56 that governs here.

*Killian*, 195 Wn. App. at 523, 381 P.3d at 167.

- a. Claims against a union brought by a bargaining unit member that arise in the context of union representation are duty of fair representation claims in which the courts, for sound policy reasons, accord substantial deference to the union’s decisions.**

As the Court of Appeals observed, the “collective bargaining system by its very nature subordinates the interest of an individual employee to the collective interests of all the employees in the bargaining unit. *Killian*, 195 Wn. App. at 519, 381 P.3d at 165 (2016) (citing *Lindsey v. Mun. of Metro. Seattle*, 49 Wn. App. 145, 148, 741 P.2d 575 (1987). Therefore, although a union owes a duty of fair representation (“DFR”) to employees it represents, the “DFR is breached when a union's conduct is discriminatory, arbitrary, or in bad faith. *Id.* See also *Allen v. Seattle Police Officers' Guild*, 100 Wn.2d 361, 371–72, 670 P.2d 246 (1983). “This duty is imposed as a necessary corollary to the unions' statutory right to exclusively represent their members.” *Lindsey v. Municipality of Metro. Seattle*, 49 Wn. App. 145, 148, 741 P.2d 575, 577 (1987). Because of that exclusive representation and because of the union’s need to balance the interests of the bargaining unit as a whole with the individual grievant’s interests, courts should “accord substantial deference” to a union's decisions regarding grievance processing. *Lindsey*, 49 Wn. App.

145 at 149, 741 P.2d at 577. *See also Allen*, 100 Wn.2d at 368, 670 P.2d 246. Thus, “the DFR is breached only when a union's conduct is discriminatory, arbitrary, or in bad faith.” *Killian*, 195 Wn. App. at 519, 381 P.3d at 165. *See also Muir v. Council 2 Washington State Council of Cty. & City Employees, Local 1849*, 154 Wn. App. 528, 531, 225 P.3d 1024, 1026 (2009).

Because of this unique relationship between a union and individual bargaining unit members and the bargaining unit as a whole, claims that are denominated as non-DFR claims but assert negligence or wrongful actions by the union in carrying out its representational role, are subsumed in the DFR claim, as the Court of Appeals held below. *Killian*, 195 Wn. App. at 519, 381 P.3d at 165 (citing *Peterson v. Kennedy*, 771 F.2d 1244 (9th Cir. 1985)). While this holding was one of first impression, it is in accord with both federal labor law and the labor law of Washington's sister states. *See, e.g., United Steelworkers of America v. Rawson*, 495 U.S. 362, 374, 110 S. Ct. 1904, 109 L. Ed. 2d 362 (1990) (A union's only duty for negligent actions taken in the course of representation is the duty of fair representation); *Callahan v. New Mexico Fed'n of Teachers-TVI*, 139 N.M. 201, 208, 131 P.3d 51, 58 (2006); *Weiner v. Beatty*, 121 Nev. 243, 249, 116 P.3d 829, 833 (2005); *Brown v. Maine State Employees Ass'n*, 1997 ME 24, ¶ 11, 690 A.2d 956, 960 (1997); *Hussey v. Operating*

*Engineers Local Union No. 3*, 35 Cal. App. 4th 1213, 1219-20, 42 Cal. Rptr. 2d 389, 392-93 (1995); *Best v. Rome*, 858 F. Supp. 271, 275 (D. Mass. 1994), *aff'd*, 47 F.3d 1156 (1st Cir. 1995); *Lucien v. Conlee*, No. 081066, 2009 WL 1082367, at \*2-3 (Mass. Super. Mar. 27, 2009).

**b. Here, all the actions Petitioners complain of occurred in the course of representing them with regard to the contractual grievances Local 925 had filed.**

All of Petitioners' claims are based on Local 609's actions while representing Petitioners throughout the grievance process. Because the actions of McBee and the Executive Board were taken in carrying out the union's representation in the collective bargaining process, any claim of negligence or wrongful action in regard to that representation is a DFR claim. Petitioners 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, as the Court of Appeals correctly held. *Killian*, 195 Wash. at 521, 381 P.3d at (citing Peterson, 771 F.2d at 1259). The undisputed evidence shows that all of McBee's actions were taken in his role in representing the Petitioners under the CBA during a mediation process provided for by the CBA and conducted by PERC under this state's labor law. Moreover, it is undisputed that Petitioners' civil claims were not impaired by the Union's representation, as is demonstrated by the Petitioners' assertion of those claims when they filed the instant lawsuit.

Therefore, it cannot be said that Local 609 acted outside its collective bargaining role in any way that would allow the assertion of claims other than DFR.

And it is undisputed that Petitioners filed their claims (DFR claims) more than six months after the last possible time in this record that they knew of their cause of action. Therefore, this Court should affirm on the ground that these claims are time barred.

**II. SHOULD THIS COURT NOT APPLY THE SIX-MONTH LIMITATION PERIOD, THE COURT SHOULD NEVERTHELESS AFFIRM BECAUSE PETITIONERS HAVE NOT PROVEN THAT THE UNION ACTED ARBITRARILY, DISCRIMINATORILY, OR IN BAD FAITH.**

To establish that the Union breached its duty of fair representation, Petitioners must show that Local 609's conduct toward Petitioners was arbitrary, discriminatory or in bad faith. *Lindsey*, 49 Wn. App. at 148, 741 P.2d at 577. A union's decision whether to pursue a grievance based on its 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 v. Tacoma Sch. Dist. No. 10*, 69 Wn. App. 174, 181, 848 P.2d 203 (1993). 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).

Here, Petitioners have adduced no evidence to contradict the fact that (1) the Union fully investigated their terminations; (2) the Union evaluated their 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 Petitioners; 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 Petitioners’ suspensions and subsequent terminations. McBee represented both grievants during the District’s investigation and submitted numerous information requests to secure information relating to the decision to place Petitioners 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 Petitioners 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 arbitrating the grievances outweighed any potential benefits to the Petitioners and the Union's membership. CP 377 (157:6-157:9).

The Union determined that the offer of \$100,000 and \$75,000 to the Petitioners satisfied the Union's interests by penalizing the District for its inadequate investigation and by encouraging it to change the way it conducted investigations into employee misconduct. CP 382-384 (177:3-13; 182:9-18). Further, as the Court of Appeals found, Local 609 notified the Petitioners of its decision to settle the grievances and left the Petitioners to determine their course of action as to claims they wished to assert outside of the CBA.

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 PETITIONERS' NEGLIGENCE, UNAUTHORIZED PRACTICE OF LAW, AND CPA CLAIMS ARE HELD NOT CHARACTERIZED AS NOT DUTY OF FAIR REPRESENTATION CLAIMS, THOSE CLAIMS FAIL ON THIS RECORD.**

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). *See also 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.

Here, the acts 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 Petitioners’ DFR claims. 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.

Pettitioners additionally contend that McBee informed them that the offer made by SPS was fair and reasonable. Although this is disputed, it is not a material fact, because 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 as nothing more than that offered in his role as a union business agent.

Moreover, the CPA claim that Petitioners sought to amend into their complaint was meritless because the CPA does not apply to labor union activities. *Ernst Home Ctr., Inc. v. United Food & Commercial Workers Int'l Union, Local 1001*, 77 Wn. App. 33, 46, 888 P.2d 1196 (1995), because RCW 19.86.070 specifically exempts labor organizations from the scope of the CPA, in that “the labor of a human being is not a commodity or article of commerce.”

### CONCLUSION

Because of the foregoing, this Court should affirm.

RESPECTFULLY SUBMITTED this 13th day of March, 2017.

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## **CERTIFICATE OF SERVICE**

I hereby certify that on this 13th day of March, 2017, I caused a copy of the foregoing Respondent's Supplemental Brief to be emailed to and deposited in the U. S. mail, first class, addressed to:

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