For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ROBERT GRISAR, Appellant/Plaintiff,	**S. Ct. Civ. No. 2017-0004** Re: Super. Ct. Civ. No. 200/2012 (STX)
v.	
AMERICAN FEDERATION OF TEACHERS, AFL-CIO, ST. CROIX FEDERATION OF TEACHERS d/b/a AFT LOCAL 1826, GOVERNMENT OF THE VIRGIN ISLANDS and DEPARTMENT OF EDUCATION, Appellees/Defendants.	

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Considered: June 13, 2017
Filed: June 12, 2020

Cite as 2020 VI 9

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

SWAN, Associate Justice.

¶ 1 Appellant, Robert Grisar ("Grisar"), appeals the judgment embodied in the Superior Court's December 6, 2016 memorandum opinion and order which dismissed his first amended complaint for failure to state a claim for breach of the duty of fair representation by a union and breach of contract by his governmental employer. For the ensuing reasons, we affirm the Superior Court's judgment as embodied in its December 6, 2016 memorandum opinion and order.

I. FACTS AND PROCEDURAL HISTORY

¶2 Grisar was employed as a fine arts teacher at John J. Woodson Junior High School and was a Department of Education ("DOE") employee for over 11 years. On February 23, 2009, Grisar was placed on administrative leave for allegedly sexually harassing his female teenage students. After his suspension, Grisar contacted the American Federation of Teachers, AFL-CIO, ("AFT") St. Croix Federation of Teachers d/b/a American Federation of Teachers-Local 1826 ("Local 1826") to file a grievance on his behalf. Grisar was also a dues paying member of Local 1826, which had entered into a collective bargaining agreement with DOE. DOE placed Grisar on paid administrative leave on February 23, 2009 and subsequently, on May 15, 2009, terminated him from his teaching position for the alleged sexual harassment of his female students. Grisar later contacted Local 1826 and requested that they file a grievance regarding termination of his employment with DOE. In response, Local 1826 appealed Grisar's termination of employment and pursued a formal grievance embodied in a letter dated May 27, 2009. The letter and formal grievance alleged *inter alia* that the recommendation of DOE's superintendent to suspend Grisar without pay and terminate him lacked due process and was in violation of the terms and conditions of the collective bargaining agreement.

¶3 On April 14, 2010, the parties participated in arbitration. The arbitrator found in favor of DOE, denied the grievance sought by Grisar, and closed the case.

¶4 Following the arbitrator's decision, Grisar received a letter dated April 15, 2010 from Governor John P. deJongh, Jr. ("Governor deJongh") that terminated his employment with DOE. On May 24, 2010, Local 1826 responded to Governor deJongh's termination letter, informing him of its receipt of the letter of termination and its intention to appeal the decision to terminate Grisar. Despite Local 1826's letter to Governor deJongh, it did not appeal Grisar's termination any further.

¶5 Grisar filed a civil lawsuit in the Superior Court on May 9, 2012, alleging breach of contract and breach of the duty of fair representation against DOE and Local 1826. Local 1826 filed its answer to the complaint on July 31, 2012. DOE filed a motion to dismiss Grisar's verified complaint on June 7, 2012. Grisar challenged DOE's motion to dismiss on June 27, 2012 and amended his complaint on June 27, 2012.[1] On July 16, 2012, DOE filed a reply to Grisar's response to its motion to dismiss, reiterating its argument that Grisar failed to allege sufficient facts in his complaint necessary to sufficiently lay claims of breach of contract and breach of the duty of fair representation. Subsequently, Grisar filed a motion to strike DOE's reply to Grisar's response to the motion to dismiss on July 31, 2012. On December 6, 2016, the Superior Court granted DOE's motion to dismiss the case. Grisar filed a timely notice of appeal on January 5, 2017 and this appeal ensued.

II. JURISDICTION AND STANDARD OF REVIEW

¶6 This Court has jurisdiction over this appeal pursuant to title 4, section 32(a) of the Virgin Islands Code, which provides that "[t]he Supreme Court shall have jurisdiction over all appeals

[1] The Superior Court noted that neither Local 1826 nor AFT answered Grisar's first amended complaint and neither party joined in DOE's motion to dismiss the case.

arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." Because the Superior Court's December 6, 2016 memorandum opinion and order entirely dismissed Grisar's first amended complaint, it constitutes an appealable final judgment. *See Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 175, 187 (V.I. 2009) (noting that a court's order dismissing a complaint for failure to state a claim is a final order.).

¶7 Additionally, we review a grant of a motion to dismiss pursuant to Rule 12(b)(6) *de novo* and therefore apply the same test the Superior Court should have utilized. *Id.* (citing *Ballentine v. United States*, 486 F.3d 806, 808 (3d Cir. 2007)). "A motion to dismiss pursuant to Rule 12(b)(6) of the [Federal Rules of Civil Procedure] may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to the plaintiff, plaintiff is not entitled to relief." *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1420 (3d Cir. 1997) (citing *Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986)). Importantly, "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to present evidence to support the claims." *Id.* (citing *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

III. DISCUSSION

A. The Superior Court properly dismissed Grisar's first amended complaint for failure to state a claim upon which relief can be granted.

¶8 In its December 6, 2016 memorandum opinion and order, the Superior Court granted DOE's motion to dismiss Grisar's first amended complaint, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. On appeal, Grisar argues that he was effectively terminated from his employment when Local 1826 received Governor deJongh's April 15, 2010 letter approving the recommendation for his termination and that he had a right to file a grievance against

the allegations in the letter. Grisar further contends that Local 1826 "abandoned [his] case by failing to file a grievance following his termination" and that the Government provided no "explanation or justification for not pursuing [his] rights under the CBA [collective bargaining agreement]." (Appellant's Br. 10.)

¶9 DOE, on the other hand, argues that the Superior Court correctly found that Grisar's complaint failed to properly allege a claim of breach of the duty of fair representation and appropriately dismissed the case. DOE further argues that a union breaches its duty of fair representation when its conduct toward a member is arbitrary, discriminatory, or in bad faith and that Grisar failed to allege any facts that would allow the Superior Court to infer that AFT and Local 1826 (collectively, the "Union"), acted arbitrarily, in a discriminatory manner, or in bad faith towards him.

¶10 AFT also participated in the appeal. Similar to the Government, AFT urges this Court to affirm the Superior Court's December 6, 2016 memorandum opinion and order which dismissed Grisar's first amended complaint for failure to state a claim for breach of the duty of fair representation. AFT argues that Grisar failed to plead sufficient facts for the Superior Court to plausibly infer that it acted arbitrarily, discriminatorily, or in bad faith towards him and accordingly the Superior Court did not err in granting the Government/DOE's motion to dismiss.

¶11 Importantly, on March 31, 2017, "this Court . . . adopted the Virgin Islands Rules of Civil Procedure, which superseded all previous civil procedure rules, including the Federal Rules of Civil Procedure that had been applicable through former Superior Court Rule 7." *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017). However, despite the adoption of these rules, we must, in accordance with our prior precedents, apply the procedural rules as they existed at the time the matter was pending in the Superior Court." *Id.* at 585-86.

¶12 Accordingly, because the Superior Court reached its decision on December 6, 2016, prior to the adoption of the new rules "the adequacy of a complaint in the present case is governed by the general rules of pleading set forth in Rule 8 of the Federal Rules of Civil Procedure." *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649 (V.I. 2011) (citing *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491, 499 (V.I. 2008)). Federal Rules of Civil Procedure Rule 8 required that the complaint "set forth a plausible claim for relief, thus allowing courts to dismiss, under Rule 12(b)(6), complaints that fail to meet that standard." *Id.* (citing *Robles*, 49 V.I. at 500).

¶13 In *Joseph*, we outlined the procedure in reviewing a motion to dismiss pursuant to Rule 12(b)(6).

> First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the courts should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked factual assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are remaining sufficient facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.

55 V.I. at 649-50 (internal quotation marks and citation omitted). Grisar's amended complaint alleged that Local 1826 breached its duty of fair representation; that Local 1826 provided incompetent representation; and that DOE breached its contract with him. The Superior Court in its December 6, 2016 memorandum opinion and order concluded that Grisar's allegations that Local 1826 breached its duty of fair representation and that Local 1826 provided incompetent representation both substantively alleged a breach of the duty of fair representation, and, accordingly, it adjudicated both allegations as a single claim. Importantly, Grisar did not appeal

this single claim issue; therefore, it is deemed waived.[2] Accordingly, we address Grisar's breach of the duty of fair representation and breach of contract claims, respectively.

¶14 In the Virgin Islands, a union has a duty to fairly represent its members. *Acosta v. HOVENSA, L.L.C.*, 57 V.I. 792, 804 (V.I. 2012). When the employer has breached such a duty, an employee may file a lawsuit against the employer for breach of a collective bargaining agreement. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 (1983). In order to establish a claim for breach of the duty of fair representation, Grisar must have pled sufficient facts to permit us to plausibly infer that Local 1826 acted in an arbitrary or discriminatory manner or in bad faith. *See Joseph*, 54 V.I. at 654-55; *see also Vaca v. Sipes*, 386 U.S. 171, 190 (1967). Thus, Local 1826 breached its duty of fair representation if it processed Grisar's grievance arbitrarily, discriminatorily or in bad faith. *See Joseph*, 54 V.I. at 655. "[A] union's actions are arbitrary only if, in spite of the factual and legal landscape at the time of the union's actions, [its] behavior is so far outside a wide range of reasonableness to be irrational." *Id.* (quoting *Sanozky v. Int'l Ass'n of Machinists and Aerospace Workers*, 415 F.3d 279, 282-83 (2d Cir. 2005)).

¶15 The allegations set forth in Grisar's first amended complaint were that he was employed by DOE as a fine arts teacher on or about October 6, 1997, but was placed on administrative leave on February 23, 2009 and subsequently terminated from his position on May 15, 2009 for allegedly sexually harassing his teenage female students. Grisar alleged that after he received notice of his termination, he contacted Local 1826 and formally requested that it file a grievance to protest the termination of his employment with the government. Grisar admitted that the Union filed a grievance on his behalf, arguing that he was denied due process in terminating his employment

[2] *See* V.I.S. CT. R. 22(m) ("Issues that were . . . not raised or objected to before the Superior Court . . . are deemed waived for purposes of appeal.")

and that the Government did not adhere to the terms of the collective bargaining agreement. Grisar further admitted that the matter was arbitrated, and that the arbitrator found in favor of DOE and denied his grievance in an opinion and award dated April 23, 2010. Grisar further alleged that after he received a notification from Governor deJongh dated April 15, 2010 terminating his employment with DOE, Local 1826 wrote a letter informing Governor deJongh that it would be appealing Grisar's termination. Grisar then concluded that Local 1826's failure to appeal his termination was done in a manner that was arbitrary and in bad faith.

¶16 Grisar's claims are conclusory and do not identify facts necessary to support such claims. *See City of Broken Arrow v. Bass Pro Outdoor World, L.L.C.*, 250 P.3d 305, 320 n.8 (Okla. 2011) (noting that "[a] conclusory allegation is an allegation that is unsupported by allegations of fact, stipulation of fact or fact of record, does not delineate the facts, and goes no further than to recite the pleader's reaction to, or the inference the pleader draws from the undisclosed facts."). Further, these legal conclusions are "not entitled to the assumption of truth." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). Although under this standard the pleading rules are liberal and "legal conclusions can provide the complaint's framework," these "must be supported by factual allegations." *Id.* Here, Grisar failed to allege any facts that would allow the Superior Court to infer that the Union acted arbitrarily, discriminatorily, or in bad faith in not appealing the arbitrator's decision to deny his grievance. A labor union has an obligation to act fairly when it is a party to a collective bargaining agreement and this includes a duty not to pursue grievances which it believes in good faith do not warrant such action. *See Bazarte v. United Transp. Union*, 429 F.2d 868, 872 (1970). Moreover, a labor union does not breach its duty of fair representation merely because it abandons or settles a grievance short of the formal grievance procedure step, even if a court should later decide the grievance was meritorious. *See Vaca*, 386 U.S. at 190. Accordingly, Grisar is subject

to the discretionary power of Local 1826 to settle or even abandon his grievance so long as the union does not act arbitrarily, discriminatorily, or in bad faith when doing so. *See Bazarte*, 429 F.2d 868 at 872*; see also Haraszthy v. Office and Professional Emps. Int'l. Union, Local 17*, 598 N.E.2d 1210, 1215 (Ohio Ct. App. 1991) (court found that the evidence was insufficient to overcome the presumption that a union's representation of its members is done in good faith.).

¶17 Turning to Grisar's breach of contract claim, we recognize that a claim for breach of the duty of fair representation and breach of contract are hybrid claims. *See Gomez v. Gov't of the V.I.*, 882 F.2d 733, 736 (3d Cir. 1989). Importantly, the two claims are inextricably interdependent and to prevail against the employer or the union, the union member must demonstrate breach of the duty of fair representation by the union and breach of contract by the employer. *DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164 (1983). Because the claims are inextricably interdependent and because Grisar failed to state a claim for breach of the duty of fair representation, we will not review his breach of contract claim.

IV. CONCLUSION

¶18 For the foregoing reasons, we affirm the Superior Court's December 6, 2016 memorandum opinion and order which dismissed Grisar's first amended complaint in its entirety.

DATED this 12th day of June 2020.

/s/ IVE ARLINGTON SWAN
IVE ARLINGTON SWAN
Associate Justice

ATTEST

VERONICA J. HANDY, ESQ.
Clerk of the Court