STATE OF MICHIGAN

COURT OF APPEALS

CORNELIUS MEADS,

Plaintiff-Appellant/Cross-Appellee,

v

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, COUNCIL 25,

Defendant-Appellee/Cross-Appellant,

and

UNIVERSITY OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED
February 28, 1997

No. 186658
Washtenaw Circuit Court
LC No. 94-001614

Before: Bandstra, P.J., and Neff and M.E. Dodge,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's grant of defendant labor union's (AFSCME) motion for summary disposition pursuant to MCR 2.116(C)(10). Plaintiff claims on appeal that his complaint against defendant union for breach of duty of fair representation should not have been dismissed because plaintiff established a genuine issue of material fact sufficient to warrant discovery. Defendant union cross-appeals claiming that the trial court erred by finding that defendant was not entitled to sanctions and costs. We affirm.

Review of a motion for summary disposition is de novo. *Baker v Arbor Drugs, Inc*, 215 Mich App 198, 202; 544 NW2d 727 (1996). A motion under MCR 2.116(C)(10) tests the factual basis underlying the plaintiff's claim. *Id*. A court reviewing such a motion must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence in favor of the party opposing the motion. *Id*. This Court's task is to review the record evidence and all reasonable inferences drawn

* Circuit judge, sitting on the Court of Appeals by assignment.

from it, and decide whether a genuine issue regarding any material fact exists to warrant a trial. *Id.* Summary disposition is premature if discovery on a disputed issue is incomplete; however, summary disposition may be appropriate prior to discovery if further factfinding is not likely to uncover support for the opposing party's claim. *American Comm Mut Ins Co v Comm'r of Ins*, 195 Mich App 351, 363 n 4; 491 NW2d 597 (1992).

Plaintiff filed a grievance with defendant union after he was terminated by defendant employer (University of Michigan) for making unauthorized long-distance phone calls in the amount of $26. Plaintiff claims that by delaying in the preparation for his arbitration hearing, failing to follow up on informational requests submitted to defendant employer, and failing to inform the arbitrator of prior recent instances in which an employee was given a penalty less than termination for making unauthorized long-distance phone calls, defendant union's conduct was so unreasonable as to constitute a breach of duty of fair representation. A union breaches its duty of fair representation if its actions are "arbitrary, discriminatory, or in bad faith." *Air Line Pilots Ass'n, International v O'Neill*, 499 US 65, 67; 111 S Ct 1127; 113 L Ed 2d 51 (1991); *Martin v Shiawassee Co Bd of Comm'rs*, 109 Mich App 32, 34-35; 310 NW2d 896 (1981). Plaintiff makes no allegation that defendant union treated him in a discriminatory fashion.

We considered the meaning of "bad faith" in *Martin*. The plaintiff alleged that the defendant union failed to introduce certain evidence and permitted other evidence to be introduced that should not have been considered by the arbitrator. *Id*. at 35. This Court stated:

> However, Martin has failed to allege any *bad faith* on the part of AFSCME. Her complaint does not allege that AFSCME refused to represent her or failed to take her grievance to arbitration. While she does allege that AFSCME's representative made some errors at the arbitration proceedings, these tactical errors, if in fact they were errors, do not evidence *bad faith*. [*Id*. Emphasis added.]

Therefore, any error on the part of the union in determining what evidence to present to the arbitrator did not constitute a breach of duty of fair representation because there was no evidence of "bad faith." *Id*.

However, a plaintiff claiming breach of duty of fair representation may sustain a claim even in the absence of a showing of bad faith. *Goolsby v Detroit*, 419 Mich 651, 678; 358 NW2d 856 (1984). It is sufficient that the union acted arbitrarily. *Id*. at 679. The duty of fair representation proscribes inept conduct undertaken with little care or with indifference to the interest of those affected, including: (1) the failure to exercise discretion when the failure can reasonably be expected to have some adverse effect on any or all union members, and (2) extreme recklessness or gross negligence that can reasonably be expected to have an adverse effect on any or all union members. *Id*. However, mere negligence is insufficient to support a claim for breach of the duty of fair representation. *Id*. at 676. A union's actions are arbitrary only if, in light of the facts and circumstances at the time of the union's actions, the union's behavior is so far outside a "wide range of reasonableness" as to be irrational. *Air Line Pilots, supra*.

With respect to defendant union's investigation, the undisputed facts show that union representatives submitted two inquiries to defendant employer seeking information regarding other employees who were given penalties less than termination for unauthorized long-distance phone calls. This resulted in information concerning an employee who was given a five-day suspension in lieu of termination for making $1.06 in unauthorized long-distance calls. The union had requested information regarding two other employees about which there was no response. However, defendant employer's nonresponse as to those employees was consistent with union records showing no disciplinary proceedings regarding those employees. Although defendant union arguably could have pursued its investigation more vigorously, this Court does not believe that the uncontroverted evidence surrounding the investigation demonstrates conduct so "inept" and "indifferent" as to constitute arbitrariness. *Goolsby, supra* at 679. This is true even if plaintiff could establish through discovery that there were other instances in which employees were not terminated for unauthorized long-distance calls.

Although plaintiff argues that failing to inform the arbitrator about the other employee's lesser sanction was an instance of negligent omission, defendant claims it was a conscious choice. Defendant union chose not to introduce this matter into evidence because by its express terms, the agreement providing for the sanction was entered into without prejudice to the University. Defendant union believed that introducing such evidence would jeopardize any future settlements with defendant employer that could potentially benefit other members of the bargaining unit. Further, while the settlement agreement showed that one employee was not terminated for making unauthorized long-distance phone calls, the situation involved a significantly lesser offense and the agreement specifically stated that this lesser offense was sufficient reason for termination as well as suspension. Even if defendant union made a tactical error, it presented a reasoned explanation for withholding the evidence which does not indicate irrational, unreasonable conduct or bad faith on the part of defendant union. The trial court did not err in granting defendant union's motion for summary disposition under MCR 2.116(C)(10).

Defendant union argues on cross-appeal that plaintiff's complaint was not filed within the applicable six-month statute of limitations and that AFSCME Local 1583 should properly have been named the defendant in this action. We need not decide these issues as we have concluded that summary disposition was properly granted against plaintiff for other reasons.

Defendant union also argues on cross-appeal that it is entitled to sanctions under MCR 2.114(D)(2) and (E) because plaintiff's claim was clearly time barred and frivolous. The claim was not clearly time barred, in light of plaintiff's filing in federal court. See *Shrader, Inc v The Ecclestone Chemical Co, Inc*, 22 Mich App 213; 177 NW2d 241 (1970). A determination whether an attorney or party has violated the "reasonable inquiry" standard of MCR 2.114(D)(2) depends largely on the facts and circumstances of the claim. *In re Stafford*, 200 Mich App 41, 42; 503 NW2d 678 (1993). The reasonableness of the inquiry is determined by an objective standard taking into consideration the particular facts and circumstances of the case. *LaRose Market, Inc v Sylvan Center, Inc*, 209 Mich App 201, 210; 530 NW2d 505 (1995). A trial court's finding that a claim was or was not frivolous will be reversed on appeal only if clearly erroneous. *Stafford, supra*. A finding is clearly erroneous

when, although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake was made. *Id.*

We conclude that plaintiff presented a good-faith argument that the union's limited investigation and failure to introduce evidence of the settlement agreement at arbitration were sufficiently arbitrary to constitute a breach of its duty of fair representation. Although defendant union cites precedents where a union's tactical errors in the handling of a case did not constitute a breach of its duty, that does not bar the possibility that a union's decisions in another case could be so arbitrary as to constitute such a breach. This Court is not left with a definite and firm conviction that the trial court erred in denying sanctions against plaintiff.

We affirm.

/s/ Richard A. Bandstra
/s/ Janet T. Neff
/s/ Michael E. Dodge