UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
PIKEVILLE

CIVIL ACTION NO. 86-01

CHARLIE JOHNSON, PLAINTIFF,

VS:

REPORT AND RECOMMENDATION

DISTRICT 30, UNITED MINE
WORKERS OF AMERICA, ET AL., DEFENDANTS.

INTRODUCTION

The above-styled case was brought pursuant to section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. Sections 185 by a laid-off employee of the defendant Beth Energy Mines, Inc. (Beth Energy). It is presently before the undersigned on a number of motions, including the motion to dismiss which will be the subject of the present Report and Recommendation.

FACTS

The plaintiff, Charlie Johnson, was employed as a classified lineman first class by the defendant Beth Energy. On October 31, 1984 the plaintiff and at least thirty other employees holding other positions (including one Kenneth Broome) were laid off. However, approximately two months afterward, three lineman first class positions were set for recall.

Two senior persons who had worked in the position previously were recalled, as well as Broome; the latter had more seniority than the plaintiff, although he had only worked as a repairman in the past. One condition of Broome's recall, however, was that he be able to perform work according to the following standard set forth in the pertinent collective bargaining agreement:

> Seniority at the mine shall be recognized in the industry on the following basis: length of service and the ability to step into and perform the work of the job at the time the job is awarded. . .

National Bituminous Coal Wage Agreement, Article XVII(a). To that end, he was administered a test to establish his ability; management determined that he had not passed the test. Johnson was then recalled for the job.

Broome then filed a grievance and challenged the company's decision. On March 25, 1985, Arbitrator William Hannan issued Award No. 84-30-85-34, in which he concluded:

> The company elected to test the grievant solely on his ability to climb and work on a pole, an ability of which it had no knowledge. It raised no question of his other abilities, such as electrical work, and, hence, it must be assumed that it only needed to be satisfied as to climbing and working on a pole. Although the grievant did not work as an experienced lineman he did, according to the Company witnesses, do what he was told to do in a satisfactory, safe manner, although not climbing smoothly nor working at what would be an acceptable rate for an experienced lineman. Having been told that time was not a consideration, the latter factor is of minor importance.
> . . .
>
> The Grievant is to be offered the job of Lineman, 1st Class as of April 8, 1985, without back pay, if his seniority permits. He is advised to use the intervening time to sharpen his skills as a pole climber so as to assure the adequate performance necessary to continue in the job.
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> Jurisdiction is retained until May 8, 1985, should the Grievant's ability on the job be raised by the Company.

On April 8, 1985, Beth Energy notified the plaintiff that he would be laid off because of the arbitrator's decision that Broome would be given a "trial period." In May 8, 1986, the plaintiff was told that Broome had been removed from the job because he was not qualified; he was told that the company was "trying to get the arbitrator to issue a final decision" in the matter. On August 19, 1986, however, he was told that the arbitrator had decided that Broome was to be permanently retained.

Eleven days later, the plaintiff filed his own grievance. Several days thereafter the union notified him that it would refuse to process the grievance.

The above-styled action was filed January 2, 1986. Subsequently, the defendant company moved to dismiss the case on the grounds that the plaintiff's action was barred by the statute of limitations.

LIMITATIONS PERIOD

Federal courts must consider the appropriate state statutes in determining the proper statute of limitations to apply in cases brought under section 301 of the Labor Management Relations Act, since that legislation contains no such provision. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 150, 156-166 (1982); United Parcel Service v. Mitchell, 29 U.S. 56, 60 (1981).

The statute of limitations found in KRS 417.160(2) does not apply in this actions since Chapter 417 of the Kentucky Revised Statutes is inapplicable to "arbitration agreements between employers and employees". KRS 417.050. Instead, the appropriate provisions are contained in KRS 336.1661 through 336.1664, in which no statute of limitations is included. Some early decision hold that actions brought under a written collective bargaining agreement are subject to the fifteen year limitations period found in KRS 413.090(2). E.g., Gray v. International Association of Heat and Frost Insulation, 447 F.2d 1118 (6th Cir. 1971).

However, it should be noted that the Supreme Court in Mitchell rejected that state statute for breach of contract in favor of the state's statute for vacation of arbitration awards, Mitchell, 451 U.S. at 64, and in DelCostello, rejected the statute of limitations for legal malpractice in favor of the six month statute found in the National Labor Relations Act, DelCostello, 462 U.S. at 71. While consideration must be given to state statutes, then, perfect analogies are not always possible. DelCostello, 462 U.S. at 71.

Since there is no appropriate state statute on point, the applicable statute must be the sixth month statute of limitations found at 29 U.S.C. Section 160(b).

ACCRUAL OF CAUSE OF ACTION

In order for the action to have been timely filed, the plaintiff's cause of action must have accrued after July 1, 1986.

The defendant company--adding this argument in its memorandum--maintains that the plaintiff's cause of action was complete as of April 8, 1986, when the plaintiff admittedly knew of the "arbitration award" and its implementation by the company.

The plaintiff contends, and supplements its assertion with his own affidavit, that he had been told no "final decision" would be entered until after the "thirty-day trial period" had passed. He indicates that it was not until August 19, 1986 that he was informed that a final decision had "just" been entered and that the company now felt it was obliged to permanently retain Broome.

According to a recent pronouncement by the Sixth Circuit Court of Appeals, a cause of action accrues when the plaintiff-employee knows or should have known that the other party violated section 301. Dowty v. Pioneer Rural Electric Co-Operative, 770 F.2d 52, 56 (6th Cir. 1985). In that particular case, the employee who complained of the union's poor representation of him during grievance proceedings was held to have had a cause of action which accrued when he learned of the arbitrator's award, rather than when he actually received arbitration papers. Id. at 7. Under the facts recited in the opinion in the cause, however, the plaintiff's own affidavit was said to have introduced evidence that indicated when he learned of the actual contents of the arbitration panel's award when he had an earlier, extended and complete meeting with union officials. Id.

At any rate, this issue appears to revolve around what the plaintiff "knew or should have known", and is not appropriately determined on a motion to dismiss.

RECOMMENDATION

It is, therefore, RECOMMENDED that the motion to dismiss be denied in so far as it seeks to assert that any other limitations period other than the six month period cited in the National Labor Managment Relations Act should be used. The issue of when the plaintiff should have known that his cause of action accrued, for purposes of determining the date from which the limitations period begins to run, should be more appropriately addressed by formally converting the motion to one for summary judgment.

Objections to this Report and Recommendation must be filed within ten days of the date of same or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd ____ U.S. _____ (1984); Fed. R. Civ. P. 72(b).

This the _____ day of December, 1986.

JOSEPH M. HOOD,
UNITED STATES MAGISTRATE

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The above-styled action was filed January 2, 1986. Subsequently, the defendant company moved to dismiss the case on the grounds that the plaintiff's action was barred by the statute of limitations.

LIMITATIONS PERIOD

Federal courts must consider the appropriate state statutes in determining the proper statute of limitations to apply in hybrid cases brought under section 301 of the Labor Management Relations Act, since that legislation contains no such provision. DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151, 156-166 (1982); United Parcel Service v. Mitchell, 451 U.S. 56 (1981).

The statute of limitations found in KRS 417.160(2) does not apply in this actions since Chapter 417 of the Kentucky Revised Statutes is inapplicable to "arbitration agreements between employers and employees". KRS 417.050. Moreover, the provisions of KRS 336.1661 through 336.1664, which do apply to such disputes, contain no statute of limitations. Some decisions hold that actions brought under a written collective bargaining agreement are subject to the fifteen year limitations period found in KRS 413.090(2). See, e.g., Gray v. International Association of Heat and Frost Insulators,447 F.2d 1118 (6th Cir. 1971). However, in Mitchell, the Supreme Court rejected that state statute for breach of contract in favor of the state's statute for vacation of arbitration awards, 451 U.S. at 64, and in DelCostello, rejected the statute of limitations for legal malpractice in favor of the six month statute found in the National Labor Relations Act, 462 U.S. at 71. Thus, were, as here, there is no appropriate state statute on point, the six-month statute of limitations found at 29 U.S.C. Section 160(b) must be applied.

ACCRUAL OF CAUSE OF ACTION

In order for the action to have been timely filed, the plaintiff's cause of action must have accrued after July 1, 1986.

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The plaintiff contends, and supplements its assertion with his own affidavit, that he had been told no "final decision" would be entered until after the "thirty day trial period" had passed. He indicates that it was not until August 19, 1986 that he was informed that a final decision had "just" been entered and that the company now felt it was obliged to permanently retain Broome.

According to a recent pronouncement by the Sixth Circuit Court of Appeals, a cause of action accrues when the plaintiff-employee knows or should have known that the other party violated section 301. Dowty v. Pioneer Rural Electric Co-Operative, 770 F.2d 52, 56 (6th Cir. 1985). In that particular case, the employee who complained of the union's poor representation of him during grievance proceedings was held to have had a cause of action which accrued when he learned of the arbitrator's award, rather than when he actually received arbitration papers. Id. at 7. Under the facts recited in the opinion in the cause, however, the plaintiff's own affidavit was said to have introduced evidence that indicated when he learned of the actual contents of the arbitration panel's award when he had an earlier, extended and complete meeting with union officials. Id.

In the present case, the major (and pertinent) claim for relief is against the union, which has allegedly refused to fairly represent him. Even under the facts set forth in the plaintiff's own affidavit, Johnson should at least have been award by April of 1985 that the union was taking a position contrary to his interests under the collective bargaining agreement and was pursuing that position through arbitration. It is then that his cause of action under section 301 accrued.

RECOMMENDATION

The plaintiff having filed his complaint in an untimely manner, It is, RECOMMENDED that the motion to dismiss be GRANTED.

Objections to this Report and Recommendation must be filed within ten days of the date of same or further appeal is waived. Thomas v. Arn, 728 F.2d 813 (6th Cir. 1984), aff'd ____ U.S. _____ (1984); Fed. R. Civ. P. 72(b).

This the _____ day of December, 1986.

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JOSEPH M. HOOD,
UNITED STATES MAGISTRATE