UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

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 :

IOAN GHILDUTA :

 : 04 Civ. 7494 (BSJ)(GWG)

Plaintiff, :

 : ECF Case

- - against - - :

 :

THE TRUMP CORPORATION and :

MICHAEL P. FISHMAN, as President of LOCAL :

 32B-32J, SERVICE EMPLOYEES :

INTERNATIONAL UNION, AFL-CIO :

 :

Defendants. :

 :

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**PLAINTIFF’S MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT LOCAL 32B-32J MOTION FOR SUMMARY JUDGMENT**

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TABLE OF CONTENTS

TABLE OF AUTHORITIES................................................................................................. 1

STATEMENT OF FACTS.....................................................................................................2

ARGUMENT..........................................................................................................................3

POINT I

THE UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION

BY FAILING TO ADEQUATELY INVESTIGATE AND REPRESENT

PLAINTIFF THROUGHOUT THE ARBITRATION PROCEDURE..........................5

POINT II

THE UNION’S BREACH OF ITS DUTY OF FAIR REPRESENTATION

SERIOUSLY UNDERMINED THE ARBITRATION PROCESS........................…...9

CONCLUSION......................................................................................................................9

**TABLE OF AUTHORITIES**

*Lapir v Maimonides Medical Center*, 750 F. Supp. 1171, 1177. (E.D.N.Y. 1990)

*Gorwin v. Local 282, I.B.T.*, 1997 U.S. LEXIS 3822 \*17 (S.D.N.Y. 1997)

*Samuels v. Air Transport Local*, 504, 992 F.2d 12, 16 (2nd Cir. 1993)

*Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 567

**STATEMENT OF FACTS**

On October 18, 1994, Plaintiff was hired by Defendant The Trump Corporation (“Trump”) as a porter at 721 Fifth Avenue in New York. See Plaintiff’s Deposition, 14, annexed hereto as Exhibit “A”. In order to gain employment within Trump, Plaintiff was required to pay the sum of $1,000.00 to Mr. George Gjieli, a supervisor at 721 Fifth Avenue and an employee of Trump, and to give Mr. Gjieli a “gift”, to wit, a gold crucifix. Id. 110-113.Additional workers known by plaintiff to have given Mr. Gjieli money in exchange for their employment within Trump are Cornel Nedelcu, Sorin Anton, Malancia Petre. Id. 125-126, 137-139. Trump employee Petre Anghel had information regarding said bribe-taking scheme. Id. 135-137.

On December 20, 2002, Plaintiff was to begin work at 3:00 p.m. Id. 18. At approximately 2:45 p.m., Plaintiff was called into Mr. Ukaj’s office and given envelopes containing Christmas cards and money. Id. 20-22. Plaintiff went to the lunchroom and began to open the envelopes given to him by Mr. Ukaj. Id. 34. A short time after Plaintiff began to open his envelopes, Mr. Ukaj told Plaintiff to go to work. Id. 40-42. Plaintiff opened up his last two cards and then went down to the lobby. Id. Plaintiff does not remember what time he went down to lobby. Id. 47-48

About 10-15 minutes after Plaintiff began work, he was called to Mr. Ukaj’s office at which point Mr. Ukaj screamed at Plaintiff and told him to go home. Id. 92. Plaintiff informed Mr. Richie Ukaj that Plaintiff was going to expose the corrupt practices and bribery committed by Trump supervisors, including but not limited to, Mr. Ukaj’s friend George Gjieli. Id. 93. Amended Complaint, ¶ 20, annexed hereto as Exhibit “B”. Plaintiff was never advised that he was suspended and returned to the lobby to continue working. Plaintiff’s Dep., 95. Plaintiff was subsequently escorted out of the lobby by security. Id.

On or about January 9, 2003, Plaintiff received a letter from The Trump Corporation advising him that he was terminated on December 20, 2002 for becoming belligerent and physically threatening the Residential Manager. See discharge letter dated January 9, 2003, annexed hereto as Exhibit “C”. It is from this discharge that Plaintiff filed a grievance with Local 32B-32J, Service Employees International Union, AFL-CIO (“Union”) alleging a violation of Article III, subsection 3 of the Apartment House Agreement (“Collective Bargaining Agreement) for discharging plaintiff without justification. Amended Complaint, ¶ 24. Said grievance was filed on December 23, 2003. Foti Aff. ¶ 6, annexed hereto as Exhibit “D”.

At all relevant times, Mr. Edward Foti was the Union Delegate responsible for enforcing the Union’s collective bargaining agreements and investigating grievances filed by it’s members, including Plaintiff. Mr. Foti’s entire investigation into the Plaintiff’s grievance consisted of the following: 1) two in-person discussions with the Plaintiff over the course of approximately seven months; 2) two or three telephone conversations with plaintiff over the course of approximately seven months; 3) a request for information, submitted to the supervisor responsible for the alleged wrongful termination; 4) a call to Nancy Laura, Trump’s Building Manager for 721 Fifth Avenue, to set up a “step 1" meeting; 5) a second call to Nancy Laura which was not returned and resulted in a cancellation of the “step 1" meeting; 6) referral of Plaintiff’s grievance to arbitration, which resulted in a “step two” meeting. Trump offered Mr. Ghilduta a monetary settlement of two weeks pay which was rejected by Plaintiff. Plaintiff’s Dep. 202.

At the inception of Mr. Foti’s investigation, Plaintiff explained that he was discharged because he was going to expose acts of bribery and corruption within Trump. Id. 299; See Letter to Tom Giordano dated December 17, 2003, annexed hereto as Exhibit “E”. At no time during Mr. Foti’s investigation did Mr. Foti attempt to validate Plaintiff’s claim that his discharge was a pretext and in response to his discussion with Mr. Ukaj. Dep. 213-214, 299; Letter to Justin Cordello, dated June 6, 2004 letter, annexed hereto as Exhibit “F”. Mr. Foti replied that Plaintiff would need to provide proof that he paid to get his job and offered no assistance to Plaintiff. Plaintiff’s Dep. 197. Moreover, Plaintiff alleges that when made aware of said malfeasance by Trump supervisors, Mr. Foti recommended that Plaintiff not file a separate grievance concerning the bribery. Id. 307-308.

 The grievance filed by Plaintiff states that he was “unjustly discharged on 12/20/02". Plaintiff’s Grievance, annexed hereto as Exhibit “G”. Plaintiff did not file a separate grievance concerning the bribery and corruption. Id. 309. Plaintiff’s grievance concerning his alleged unjust discharge was filed in full compliance with the Collective Bargaining Agreement.

Plaintiff’s case was referred to arbitration and Mr. Justin Cordello was assigned by the Union to represent Plaintiff at his discharge hearing. Id. 263. Plaintiff informed Mr. Cordello that his discharge was a pretext and that he was discharged because he was going to expose the bribery and corruption within Trump. Mr. Ukaj testified on one of the hearing dates and was cross-examined by Mr. Cordello. Cordello Aff.,¶ 10, annexed hereto as Exhibit “H.” Mr. Ukaj was not questioned about the bribery or whether he discharged Plaintiff for intending to expose the corrupt practices of Trump supervisors. Plaintiff’s Affidavit, ¶ 8, annexed hereto as Exhibit “I”.

 The allegations that Plaintiff was discharged because he was going to expose the bribery and corruption within Trump were never raised during the arbitration process. Plaintiff’s Affidavit, ¶ 5-18. Mr. Cordello advised Plaintiff that such allegations were not relevant to his discharge hearing. Plaintiff’s Affidavit, ¶ 7.

Ms. Ann Schulman, an attorney for the Union, served as counsel to Plaintiff on the final day of the arbitration hearings. Id. 293. Ms. Schulman did not know Plaintiff’s name and was not familiar with Plaintiff’s grievance. Id. 293-294. Ms. Shulman cross examined Nancy Lara but asked a few questions that were of “no importance” to Plaintiff’s grievance. Id. 293.

On October 15, 2004, Arbitrator Anner issued an arbitration award and opinion, finding that Trump had just cause to discharge Mr. Ghilduta. Arbitration decision dated October 15, 2004, annexed hereto as Exhibit “J”.

**ARGUMENT**

**POINT 1**

**THE UNION HAS BREACHED ITS DUTY OF FAIR REPRESENTATION BY FAILING TO ADEQUATELY INVESTIGATE AND REPRESENT PLAINTIFF THROUGHOUT THE ARBITRATION PROCEDURE.**

In order to survive a summary judgment motion upon a plaintiff’s claim for a breach of the duty of fair representation, the plaintiff must set forth “concrete, specific facts from which one can infer a union’s hostility, discrimination, bad faith, dishonesty, or arbitrary exercise of discretion.” *Lapir v Maimonides Medical Center*, 750 F. Supp. 1171, 1177. (E.D.N.Y. 1990).

Arbitrary conduct amounting to a breach is not limited to intentional conduct by union officials but may include acts of omission which, while not calculated to harm union members, may be so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary. *Gorwin v. Local 282, I.B.T*., 1997 U.S. LEXIS 3822 \*17 (S.D.N.Y. 1997). Examples of arbitrary behavior include the union’s ignoring or perfunctorily pressing a meritorious claim. *Id*.; Samuels v. Air Transport Local, 504, 992 F.2d 12, 16 (2nd Cir. 1993).

Defendant Union asserts that the Plaintiff’s claims fall far short of establishing a breach of the duty of fair representation by characterizing the acts and omissions of their employees as tactical decisions.

Contrary to the Union’s contentions, the cursory investigation of Plaintiff’s grievance, and the Union’s failure to adequately represent the Plaintiff during the arbitration, whether viewed individually or as a whole, constitute egregious and unreasonably poor representation and amount to arbitrary conduct in violation of the Union’s duty of fair representation. The Union’s actions were not “tactical”, i.e. intended to benefit the employee, and cannot be viewed as mere negligence. *Gorwin*, 1997 U.S. LEXIS 3822 \*29; *Samuels*, 992 F.2d at. 16; Lapir,750 F. Supp. at. 1177.

**A. Defendant’s Failure to Conduct an Adequate Investigation of Plaintiff’s Grievance Constitutes a Breach of the Duty of Fair Representation.**

First, Plaintiff has presented sufficient facts such that a reasonable jury could find that the Union breached its duty of fair representation by failing to conduct an adequate investigation into the veracity of the charges levied against him, which necessarily includes Plaintiff’s argument that the dismissal “for cause” was pretextual.

On December 20, 2002, Plaintiff was called to Mr Ukaj’s office. Plaintiff’s Dep. 50, 52-53. Upon entering Mr. Ukaj’s office, Mr. Ukaj screamed at Plaintiff and demanded that he “go home.” Id. 92. Plaintiff was distraught by the actions of his supervisor and told Mr. Ukaj that Plaintiff was going to tell the Vice President of Trump about “whatever is going on, all the abuse, everything which I know.” Id. 93. Plaintiff returned to work for about an hour and twenty minutes at which point Mr. Ukaj came to the lobby and had security remove Plaintiff from the building. Id. 95.

Shortly after Plaintiff was fired, he filed a grievance with the Union stating that he was wrongfully discharged. Plaintiff then met with Mr. Edward Foti, the Union delegate for Plaintiff’s district. Plaintiff explained to Mr. Foti that he had reason to believe that he was discharged because he was going to expose the bribery and corruption within Trump and chose to address this pretextural discharge “through a complaint.” *Id*. 213-214, 299. Mr. Foti failed to take any action to substantiate the claims proffered by Plaintiff.

Mr. Foti failed to conduct even a minimal investigation into the alleged bribery in order to substantiate Plaintiff’s claims of a pretextural discharge when made aware of the allegations of bribery and corruption. Further, Mr. Foti failed to investigate Plaintiff’s claim that he was fired in response to these allegations of bribery and corruption and his intent to reveal same. The Union states that “even if [Plaintiff] had properly raised these claims through the grievance process, Foti’s response, as alleged by Ghilduta, was entirely rational; he told Plaintiff that he would need to provide proof.” See Union’s Memorandum of Law.

Contrary to the Union’s position, once Mr Foti was advised by Plaintiff that the discharge was pretextual and predicated upon exposing alleged bribery and corruption, Mr. Foti had the obligation to perform some minimal investigation into said allegations. *Gorwin*, 1997 U.S. LEXIS 3822 \*24-25.

The Union further alleges that Mr. Ghilduta failed to file a separate grievance regarding the bribe-taking and that this somehow precludes Mr. Ghilduta from advancing his position that the wrongful discharge was based upon his intent to expose said practices. Plaintiff correctly filed a grievance stating that he was “unjustly discharged on 12/20/02.” See Exhibit “G”. The claims of bribery are directly related to this discharge and form the crux of his wrongful discharge claim. Plaintiff’s grievance concerning his alleged unjust discharge was filed in full compliance with the Collective Bargaining Agreement.

Plaintiff has put forth sufficient facts from which a jury can reasonably conclude that Mr. Foti’s failure to investigate Plaintiff’s allegations of a pretextual discharge transcend negligence and poor judgment and amount to a breach of the Union’s duty of fair representation.

**B. Defendant Union’s Failure to Adequately Represent Plaintiff During the Grievance Procedure Constitutes a Breach of the Duty of Fair Representation.**

A Union has breached its duty of fair representation when it fails to investigate and adequately present a grievance. *Samuels*, 992 F.2d 12. In Samuels, the Plaintiff instituted an action alleging that the Union inadequately represented him during the grievance process by neglecting to discuss the case or possible witnesses with the Plaintiff until the day of the hearing and asking Plaintiff “one or two questions that were unrelated to the substance of the grievance”. *Id.* at 14. The jury found that the Union had breached its duty of fair representation by “perfunctorily pressing Plaintiffs claim.” *Id*. at 15.

The Union in the instant action acted with even greater lack of conviction in the merits of Plaintiff’s claim. Plaintiff was discharged for allegedly becoming belligerent and threatening the residential manager Richie Ukaj. Se discharge letter. The focus of the arbitration hearing was on whether Plaintiff threatened resident manager Richie Ukaj and whether based upon these threats Mr. Ukaj was justified in terminating Plaintiff’s employment. The proof relied upon at the hearing was a memo submitted by Mr. Ukaj as well as his oral testimony. Nancy Laura, an employee of Trump, also testified on Trump’s behalf regarding Plaintiff’s alleged belligerent and threatening conduct. Plaintiff’s Dep. 293.

At no point during the entire grievance procedure did the Union address the claims that Plaintiff was discharged without cause as a pretext because he was going to expose the bribery and corruption within Trump. At no point during the entire grievance procedure did any Union attorney discuss the defense of pretextual firing with Plaintiff. See Plaintiff’s Aff., dated November 1, 2004, annexed hereto as Exhibit “J”. Moreover, the Union attorney’s failed to ask Mr. Ukaj or Ms. Laura about the allegations of bribery and corruption or investigate same. See Exhibit “I”.

The Union attorney’s failed to investigate Plaintiff’s allegations which, after even a limited investigation into the pervasive malfeasance of Trump supervisors, would have turned up evidence to support Plaintiff’s position and which could have been used to attack the credibility of Mr. Ukaj and the veracity of the charges levied against the Plaintiff. Mr. Cordello states that he prepared Plaintiff for his arbitration hearing. See Exhibit “H”, ¶ 6. Mr. Cordello’s conclusory statements leave unresolved factual issues as to the extent and adequacy of this alleged preparation.

Further, on the last day of the arbitration procedure Justin Cordello was replaced by Ann Schulman. Ann Schulman was unfamiliar with Plaintiff’s case and, moreover, did not even know Plaintiff’s name. Plaintiff’s Dep. 293. Ms. Schulman told Plaintiff to “just sit there” and that she would handle the matter. Exhibit “I”, ¶ 16. Ms. Schulman’s cross examination of Nancy Laura consisted of a few questions unrelated to the substance of the grievance. *Id*. 15. Ms. Schulman’s preparation was a cursory one and proffered with an obvious lack of conviction as to its merit and constitutes a breach of the duty of fair representation. *Samuels*, 992 F.2d at 16.

**POINT II**

**THE UNION’S BREACH OF ITS DUTY OF FAIR REPRESENTATION SERIOUSLY UNDERMINED THE ARBITRATION PROCESS.**

In order to survive a motion for summary judgment, the plaintiff must also prove that the Union’s breach “seriously undermined the arbitration process.” *Hines v. Anchor Motor Freight*, *Inc.*, 424 U.S. 554, 567. Plaintiff respectfully submits that there is a material question of fact as to whether the lack of investigation and inadequate representation by the Union could have undermined the arbitration process.

The Union’s lack of investigation and utter failure in addressing Plaintiff’s claim of pretextual discharge directly bear on the veracity of Mr. Ukaj. Had the Union raised the allegations put forth by plaintiff, the arbitrator may have been less inclined to credit Mr. Ukaj’s version of what occurred in his office where he was alone with Plaintiff. Had the Union addressed the allegations of pretextual discharge, the arbitrator would have an alternate version of what occurred and may have been more inclined to conclude that Mr. Ukaj had fabricated his story to protect himself and his friend George Gjieli and to punish plaintiff for intending to expose the bribery and corruption within Trump.

As such, Plaintiff has put forth a sufficient showing of facts from which a jury could reasonably conclude that the conduct of Mr. Cordello and Ms. Schulman were arbitrary and that the actions of the Union undermined the arbitral process.

**CONCLUSION**

The Union characterizes the Plaintiff’s allegations as nothing more than complaints about tactical decisions but fails to present evidence that the decisions were truly “tactical,” i.e., that the Union intended that their actions benefit plaintiff. *Gorwin*, 1997 U.S. Dist. LEXIS 3822 \*29. To the contrary, the actions of the Union fail to meet even the most minimal standards of competence and constitute a breach of the duty of fair representation. Based upon the aforementioned, Plaintiff respectfully requests that the Defendant Local 32 BJ’s’ motion for summary judgment and The Trump Corporations cross-motion be denied in their entirety.

Respectfully Submitted,

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By:\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

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