

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX

ROBERT GRISAR,

Plaintiff,

v.

AMERICAN FEDERATION OF TEACHERS,  
AFL-CIO, ST. CROIX FEDERATION OF  
TEACHERS d/b/a AMERICAN  
FEDERATION OF TEACHERS-LOCAL  
1826, GOVERNMENT OF THE VIRGIN  
ISLANDS and DEPARTMENT OF  
EDUCATION,

Defendants.

SX-12-CV-200

ACTION FOR BREACH OF  
CONTRACT AND BREACH OF  
DUTY OF FAIR REPRESENTATION

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Government of the Virgin Islands, Department of Education's (DOE) Reply to Plaintiff's Response to Defendant's Motion to Dismiss (Motion),<sup>1</sup> filed July 16, 2012, and Plaintiff Robert Grisar's Reply thereto (Reply), filed May 29, 2014.<sup>2</sup> For the reasons that follow, Defendant DOE's Motion will be granted and Plaintiff's First Amended Complaint will be dismissed.

**Background**

Plaintiff Robert Grisar alleges that while he was employed as a Fine Arts teacher at John J. Woodson Junior High School, he was a dues paying member of Local 1826<sup>3</sup> which had entered into a Collective Bargaining Agreement (CBA) with DOE.<sup>4</sup> First Amended Complaint ¶¶ 3, 7. Plaintiff

<sup>1</sup> In response to Plaintiff's original Complaint, Defendant DOE filed a Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(6), which was followed by Plaintiff's Response and timely filed First Amended Complaint. Defendant DOE's Reply was filed after Plaintiff filed his First Amended Complaint, and was accepted as its Motion to Dismiss First Amended Complaint. See Order entered January 29, 2014, which denied DOE's original Motion to Dismiss as moot.

<sup>2</sup> Defendant St. Croix Federation of Teachers d/b/a American Federation of Teachers-Local 1826 (Local 1826) filed its Answer to the original Complaint on June 6, 2012. Defendant American Federation of Teachers, AFL-CIO (AFT) filed an Answer to the original Complaint on July 31, 2012, after Plaintiff's June 27, 2012 filing of his First Amended Complaint. Neither Local 1826 nor AFT has responded to the First Amended Complaint, and neither has joined in DOE's Motion.

<sup>3</sup> The Court notes that from the commencement of this action, the case caption and various submissions of the parties and Orders of the Court have referred to "Local 1862." However, Defendant St. Croix Federation of Teachers identifies itself as "St. Croix Federation of Teachers d/b/a American Federation of Teachers- Local 1826," and the Court herein corrects the case caption to reflect accordingly.

<sup>4</sup> Plaintiff states that AFT is "the national organization which controls local St. Croix Federation of Teachers, including Local 1862 [sic]." First Amended Complaint ¶ 4.

alleges that he was placed on administrative leave on February 23, 2009, and was discharged on May 15, 2009 for allegedly sexually harassing female students. *Id.* ¶ 8. Plaintiff alleges that after he was suspended/discharged without pay, he contacted Local 1862 to file a grievance on his behalf protesting the suspension/discharge.” *Id.* ¶ 10. Local 1826 appealed Plaintiff’s discharge by letter and formal grievance dated May 27, 2009, alleging that DOE’s Superintendent’s recommendation of immediate suspension without pay and discharge without due process did not adhere to the terms of the CBA. *Id.* ¶¶ 11-12. Arbitrator Marc A. Winters conducted a hearing and closed the record on April 14, 2010, finding in favor of DOE denying Plaintiff’s grievance. *Id.* ¶ 14; Exhibit 4. Thereafter, Plaintiff was terminated from his employment by letter dated April 15, 2010 from Governor John P. DeJongh, Jr., received by Local 1826 on May 14, 2010. *Id.* ¶ 16.

Plaintiff alleges that despite Local 1826’s May 24, 2010 response to the Governor’s letter indicating that the union would appeal the termination, Local 1826 took no further action on Plaintiff’s behalf. *Id.* ¶¶ 18-19. Plaintiff alleges that Local 1826’s failure to continue to represent him violated its obligations under the CBA, was arbitrary, and done in bad faith. *Id.* ¶¶ 20-21. Plaintiff alleges the following counts: Count I: breach of their fiduciary duty of fair representation against AFT and Local 1826; Count II: incompetent representation by AFT and Local 1826; and Count III: breach by DOE of its employment contract with Plaintiff. *Id.* ¶¶ 22-32.

### **Legal Standard**

The Supreme Court of the Virgin Islands has articulated a three-prong analysis in reviewing motions to dismiss filed, as is Defendant’s here, pursuant to Fed. R. Civ. P. 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 court 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 sufficient remaining 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.

*Joseph v. Bureau of Corrections*, 54 V.I. 645, 649-650 (V.I. 2011) (internal quotations and citations omitted); *see also Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 471-472 (V.I. 2013); *Fleming v. Cruz*, 62 V.I. 702, 713-14 (V.I. 2015).

Generally, if a court considers matters outside the pleadings when ruling on a Rule 12(b)(6) motion to dismiss, it must convert the motion into one for summary judgment under Rule 56. Fed. R. Civ. P. 12(d). See *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 612 (V.I. 2012). While there is some disagreement among different jurisdictions over precisely what qualifies as being “outside the pleadings,” the great weight of authority holds that generally courts are free to consider the allegations contained in the complaint, exhibits attached to the complaint and matters of public record when ruling on Rule 12(b)(6) motions. See 5A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 299 (2d ed. 1990); *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993); *Watterson v. Page*, 987 F.2d 1, 3-4 (1st Cir. 1993); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988). Additionally, courts may consider “documents whose contents are alleged in the complaint and whose authenticity no party questions, but which are not physically attached to the pleading.” See *Pryor v. NCAA*, 288 F.3d 548, 560 (3d Cir. 2002) (internal citations omitted). The reasoning underlying this approach is particularly sound where the exhibit being considered is the very document forming the basis of a plaintiff’s complaint. Thus, “when ruling on a motion to dismiss, courts may consider undisputed documents relied upon by the claimant.” *Gov’t Guar. Fund of Fin. v. Hyatt Corp.*, 955 F. Supp. 441, 449 (D.V.I. 1997).

Here, the Court need not convert Defendants’ Motion to one for summary judgment. “In consideration of a motion to dismiss, the Court may consider documents that are attached to or submitted with the complaint and any matters incorporated by reference or integral to the claim, and items subject to judicial notice.” *Benjamin v. Esso V.I., Inc.*, 2010 V.I. LEXIS 12, at \*5-6 (V.I. Super. Ct. 2010) (citations and quotations omitted). Therefore, the Court considers the following exhibits attached to the First Amended Complaint: (1) the CBA (effective date: September 1, 2001, expiration date: August 31, 2011); (2) Letter from Local 1826 to DOE, dated May 27, 2009, noting appeal of discharge of Robert Grisar; (3) May 27, 2009 Grievance Form submitted by Robert Grisar and Local 1826; (4) Arbitrator Marc A. Winter’s Opinion and Award issued April 23, 2010; and (5) Letter from Local 1826 to Governor deJongh, dated May 24, 2010, noting appeal of Robert Grisar’s termination. See Plaintiff’s Notice of Filing Exhibits for the First Amended Complaint, filed July 2, 2012.

## **Discussion**

Count I of the First Amended Complaint alleges: “Defendants, AFT and AFT Local 1826, breached their duty of fair representation to Plaintiff by failing to continue to represent the Plaintiff

after having appealed his April 15, 2010 termination.” First Amended Complaint ¶ 24. Count II states: “Defendants’ refusal and failure to represent Plaintiff and to adequately grieve his complaint amounted to incompetent representation.” *Id.* ¶ 28. These two claims each allege a breach of duty of fair representation. As noted, neither Defendant AFT nor Defendant Local 1826 has responded to the First Amended Complaint, and neither has joined in DOE’s present Motion.

In Count III of the First Amended Complaint, Plaintiff alleges the liability of DOE for breach of the CBA contract, alleging that:

Defendants, Government of the Virgin Islands and Department of Education breached its contract of employment with Plaintiff by terminating Plaintiff on April 15, 2010, without following the due process requirements afforded to Plaintiff through the collective bargaining process and the law. As a direct and proximate result of defendants’ breach of contract, Plaintiff suffered the damages in the loss of his employment, salary, medical and retirement benefits, and other financial loss past, present and future.

*Id.* ¶¶ 31-32.

The First Amended Complaint alleges “hybrid” claims: that DOE, as Plaintiff’s employer, breached the CBA by suspending and discharging him without due process; and that AFT and Local 1826 breached their duty of fair representation, by failing to adequately represent him in the grievance process, resulting in the adverse Arbitration Award, and by failing to continue the representation through appeal of that adverse ruling as Defendants had indicated they would in Local 1826’s letter to Governor deJongh. *See DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 164-165 (1983) (“Under general principles of labor law, an employee’s only remedy for a breach of contract by an employer is the grievance and arbitration procedure provided by his collective bargaining agreement.” 462 U.S. at 163); *Gomez v. Government of Virgin Islands*, 882 F.2d 733, 737 (3d Cir. 1989) (“an employee proceeding under 24 V.I.C. § 361-383<sup>5</sup> must bring both a claim against the public employer for breach of contract and a claim against the union for breach of fair representation simultaneously. The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both”).<sup>6</sup>

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<sup>5</sup> Virgin Islands Public Employee Labor Relations Act.

<sup>6</sup> “[W]hen that employee has no control over his grievance during the arbitration process and the union representing the employee breaches its duty to fairly represent him, the employee by necessity has a cause of action to pursue his rights under the contract. *See Vaca v. Sipes*, 386 U.S. 171, 186 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 572 (1976). ‘In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding.’ *DelCostello*, 462 U.S. at 164.” *Gomez*, 882 F.2d. at 737.

On DOE's Motion, we first take note of the elements that Plaintiff must sufficiently plead to state his cause of action alleging both breach of contract against DOE and breach of the duty of fair representation against Local 1826. *See Joseph v. Bureau of Corrections*, 54 V.I. at 655. Plaintiff's First Amended Complaint is subject to dismissal when if Plaintiff has "failed to allege all of the elements of *both* a breach of contract claim and a breach of the duty of fair representation." *Id.* (emphasis in original).

In *Joseph*, the Supreme Court addressed the first prong of its analysis as to the claim of the union's breach of the duty of fair representation, as follows:

To establish a claim for a breach of fair representation, Joseph must have pled sufficient facts to permit us to plausibly infer that the Union acted in an arbitrary or discriminatory manner or in bad faith. A union's actions are arbitrary only if, in light of the factual and legal landscape 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.

*Joseph*, 54 V.I. at 655 (internal citations and quotations omitted).

A union's negligent representation or its exercise of poor judgment are insufficient to sustain a claim for breach of the duty of fair representation in the event of an adverse ruling. *Findley v. Jones Motor Freight*, 639 F.2d 953, 959 (3d Cir. 1981). The mere refusal of a union to take a complaint to arbitration does not establish a breach of its duty of fair representation, even when the employee's claim was meritorious. *Id.* at 958 (citing *Vaca v. Sipes*, 386 U.S. 171, 192-93 (1967)). Rather, proof of the union's arbitrary or bad faith conduct in deciding not to proceed with the grievance is necessary to establish a breach of its duty of fair representation. *Id.* A union's actions may be considered reasonable under a wide set of circumstances and "any substantive examination of a union's performance, therefore, must be highly deferential, recognizing the wide latitude that negotiators need for the effective performance of their bargaining responsibilities." *Air Line Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 78 (1991) (holding that "discrimination" between striking pilots and working pilots did not constitute a breach of fair representation).

The Supreme Court of the Virgin Islands, in *Joseph*, determined that a "union's actions are arbitrary only if, in light of the factual and legal landscape 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." 54 V.I. at 655 (relying on *Vaca*, 386 U.S. at 190) ("Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual



employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement.”)

Here, Plaintiff alleges that once he “received notice that he was being suspended/discharged without pay, Plaintiff contacted the Union and requested that the Union file a grievance protesting the Employer’s suspension/discharge on his behalf.” First Amended Complaint ¶ 10. Plaintiff admits that Local 1826 filed a formal grievance on his behalf on or about May 27, 2009. *Id.* ¶ 12 (Exhibit 3). Further, Local 1826 did represent Plaintiff at the arbitration; albeit unsuccessfully, as the Arbitrator found in favor of DOE. *Id.* ¶¶ 13-14. Following the post-arbitration termination of Plaintiff’s employment, “by letter dated May 24, 2010, Mr. Molyneaux, wrote the Governor acknowledging receipt of the termination and indicating that the Union would be appealing the termination.” *Id.* ¶ 18 (Exhibit 5). Plaintiff further alleges:

The Union’s failure to continue to represent the Plaintiff subsequent to its own letter of May 24, 2010 was both inconsistent with the Union’s previous representation of the Plaintiff and contrary to the Collective Bargaining Agreement. Further, the Union’s failure to continue to represent the Plaintiff despite its appeal of the April 24, 2010 termination was arbitrary and done in bad faith.

First Amended Complaint ¶¶ 20-21.

Plaintiff also claims that AFT and Local 1826 “breached their duty of fair representation by failing to continue to represent the Plaintiff after having appealed his April 15, 2010 termination,” and that “Defendants’ refusal and failure to adequately grieve his complaint amounted to incompetent representation.” *Id.* ¶¶ 24, 28.

These last allegations “are merely conclusions that do not receive the assumption of truth.” *Joseph*, 54 V.I. at 655. Even assuming the veracity of the remaining, well-pleaded, factual allegations of the First Amended Complaint discussed above, taken together those allegations do not plausibly give rise to a reasonable inference that Plaintiff is entitled to relief. The First Amended Complaint does not contain any allegations that AFT and/or Local 1826 acted in a discriminatory or arbitrary manner in failing to follow through with the appeal of Plaintiff’s final termination. While claiming that Defendants failed to appeal his termination, Plaintiff has failed to allege any facts from which the Court may reasonably infer that the decision not to pursue the appeal represents an arbitrary, discriminatory, or otherwise objectively unreasonable action, as opposed to a sound, deliberate determination to proceed no further. Rather, it is equally plausible, based on the facts alleged, that the

decision of Local 1826 and/or AFT resulted from the type of typical cost/benefit analysis that is associated with every decision concerning whether or not to appeal an unfavorable result.

Plaintiff has failed to allege any facts from which the Court may infer the basis for Defendants' decision in declining to appeal. As the Court cannot infer from Plaintiff's allegations that the actions of Local 1826 and AFT were made in bad faith or were so far out of the range of reasonableness as to be irrational, Plaintiff has failed to plausibly state a claim for breach of Defendants' duty of fair representation.

Because Plaintiff's Counts I and II fail to state a claim for breach of the duty of fair representation, the Court need not reach the issue of whether Plaintiff has adequately pled a breach of the CBA alleged in Count III. *See Joseph*, 54 V.I. at 646, n.8.<sup>7</sup> Plaintiff's hybrid claim fails and his Amended Complaint must be dismissed.<sup>8</sup>

Therefore, on the basis of the foregoing, it is hereby

ORDERED that Defendant Department of Education's Motion to Dismiss is GRANTED. It is further,

ORDERED that Plaintiff's First Amended Complaint is DISMISSED. It is further

ORDERED that this matter is CLOSED.

Dated: December 5, 2016.

  
DOUGLAS A. BRADY, JUDGE

ATTEST:

ESTRELLA GEORGE  
Acting Clerk of the Court

By:   
Court Clerk Supervisor 12/11/16

<sup>7</sup> Defendant DOE argues that because the Arbitrator reviewed and ruled "without merit" Plaintiff's claim that DOE breached the CBA's requirement of due process, "the doctrine of *res judicata* bars Plaintiff from relitigating the issue of whether he received due process prior to his termination." Motion, at 3-4. As noted, the Court need not address the question of the applicability of the doctrine of *res judicata* to the Arbitrator's decision because Plaintiff has failed to plead sufficient facts to sustain the breach of fair representation half of the hybrid claim.

<sup>8</sup> Despite the fact that neither of the union Defendants joined in the Motion to Dismiss, the Court necessarily determines that Plaintiff has failed to make out a cause of action against the union Defendants. Plaintiff's claims against all parties must, for the reasons discussed above, succeed or fail together. *See supra*, n. 5 and accompanying text. Accordingly, Plaintiff's Complaint is dismissed on all counts as to all Defendants.