STATE OF MICHIGAN

COURT OF APPEALS

WILLIAM SCOTT ZASTROW, Plaintiff-Appellant,	UNPUBLISHED September 5, 2017
v	No. 331791 Kent Circuit Court
CITY OF WYOMING and CITY OF WYOMING ADMINISTRATIVE AND SUPERVISORY EMPLOYEES ASSOCIATION, Defendants-Appellees.	LC No. 15-006824-CK

Before: STEPHENS, P.J., and SHAPIRO and GADOLA, JJ.

PER CURIAM.

This action arose after the city of Wyoming (the City), terminated plaintiff's employment following an incident that occurred on or about January 26, 2015. Plaintiff appeals as of right an order granting the motions for summary disposition filed by the City and plaintiff's union, the City of Wyoming Administrative and Supervisory Employees Association (the Association), regarding plaintiff's claims for breach of the duty of fair representation and breach of the collective bargaining agreement (CBA). On appeal, plaintiff also challenges an earlier order, in which the trial court denied his motion for a preliminary injunction. We affirm.

I. BACKGROUND FACTS

In 2002, the City hired plaintiff as the Assistant Director of its Public Works Department. Plaintiff became a member of the Association at that time. Plaintiff's employment with the City was governed by various CBAs, the latest of which became effective on July 1, 2014, lasting through June 30, 2019. This CBA provided that "[n]o employee shall be discharged . . . without just cause," and in the event of a wrongful discharge, an employee could grieve such action pursuant to Article II, Section 2 of the CBA. Article II, Section 2 provides the following:

> *Step 1.* The Association shall submit a "Notice of Intent" to file a grievance, in writing, to the City Manager within fifteen (15) days after the occurrence of the matter which gave rise to the grievance.
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> *Step 2.* Within thirty (30) days of the submission of the "Notice of Intent" to file a grievance, the Grievance Committee of the Association shall make its decision on the grievance and shall recommend to the City Manager; dismissal of

> the grievance, submittal of a compromise or submittal of a formal grievance to proceed to the next step. In the event the Grievance Committee recommends dismissal, no further proceedings may be had on said grievance. In the event the Grievance Committee recommends a compromise, the City Manager shall have fifteen (15) days in which to accept or reject the compromise. If the City Manager accepts the compromise, the grievance shall be terminated. If the City Manager rejects the compromise or if the Grievance Committee has recommended processing the grievance, Step 3 shall be followed.
>
> *Step 3*. If the grievance is not settled in Step 2, the Grievance Committee shall meet with the City Manager and the employee, and such other persons as the City Manager desires present, in an attempt to resolve the grievance. . . . [T]hereafter the Grievance Committee shall render an opinion in the same manner and within the same time limits as in Step 2. In the event of the dismissal of the grievance by the Grievance Committee, no further steps shall be taken. In the event the Grievance Committee recommends a compromise, the City Manager shall have fifteen (15) days in which to accept or reject the compromise. If the City Manager accepts the compromise, the grievance shall be terminated. If the City Manager rejects the compromise or the Grievance Committee has recommended processing the grievance, Step 4 shall be followed.
>
> *Step 4*. The Arbitrator shall be chosen by the Association and the Employer alternately striking names from a list of five (5) arbitrators agreed to by the Association and Employer. . . . The decision of the arbitrator shall be final and binding. . . . Notice of intent to follow this step shall be filed by the Grievance Committee with the City Manager within fifteen (15) working days of the Manager's decision in the former step.

On January 26, 2015, plaintiff returned to work after taking several weeks off to care for his terminally ill father, who died on January 21, 2015. On or about this day, while working in the maintenance garage, plaintiff saw fellow employee Randy Colvin remove an M-4 semi-automatic rifle from a police cruiser that had come in for maintenance. According to plaintiff, City policy prohibited the police from sending in vehicles for maintenance with weapons still inside. When plaintiff saw Colvin removing the M-4, he approached, inquired about the condition of the firearm, and then took the rifle from Colvin, removed the magazine, checked to see if there was a round in the chamber, and made several comments before handing the rifle back to Colvin. The parties dispute what plaintiff said to Colvin while plaintiff was holding the M-4, and there were no other witnesses to the interaction, but Colvin later discussed the incident with two other employees, Dan Gard and Neal Schoen, who complained to City management.

The City investigated the incident and obtained written statements from both Colvin and Gard. Gard explained in his statement that, on the day in question, "[Colvin] met me on my side of [the] shop [and] he was very excited [and] said [plaintiff] wigged out[,] took the gun from me and said I bet I can get respect with this[,] . . . then said how [plaintiff] didn't like guns in shop and went on to say how P[ublic] W[orks] guys are disrespectful[.]" Colvin stated that plaintiff approached him and "proceeded to take the gun and check[ed] to see if it was loaded and it was not. Then he said, Randy, I wish you did not have them here (that is his pet peeve) and he said a

few things about P[ublic] W[orks] that I can't totally recall everything he said. I took the gun back and we talked for a few more minutes and he mellowed."

Public Works Director Bill Dooley and Human Resources Director Kim Oostindie interviewed Colvin about the incident. According to the meeting notes, "[Colvin] said [plaintiff] was saying some things about respect in P[ublic] W[orks], but that [Colvin] couldn't recall everything [plaintiff] said nor could he recall the specific statement [plaintiff] made." When asked about plaintiff's demeanor during the incident, Colvin said plaintiff "was emotional—not angry—but tearful and he seemed 'bummed out.' He seemed worried." Dooley asked Colvin if he felt threatened by plaintiff, to which Colvin responded, "No." During a second interview, Colvin explained that during the incident, plaintiff was upset with Public Works and said, "[T]his may solve his problems," referencing the gun. Colvin did not want to make a statement regarding what plaintiff exactly said "because I may have one word off." However, Oostindie then gave Colvin different variations of what plaintiff allegedly said during the encounter, one version being that plaintiff said to Colvin while holding the gun, "[M]aybe now I will get some respect." When asked if plaintiff had said that, Colvin replied, "Yes, something like that."

According to the City, management spoke with plaintiff about the incident on January 28, 2015, and February 19, 2015. The City claimed that during the first meeting, plaintiff "acknowledged that [he] had said something that [he] should not have said." However, on February 19, 2015, plaintiff claimed that he "ha[d] not nor will I ever threaten a coworker." Plaintiff stated that he "d[id] not recall the specific day in question," but then described the incident, explaining that he saw Colvin removing an M-4 from a police cruiser, so he approached, "took the M-4, removed the magazine, and insured the chamber was clear of a round." According to plaintiff, he expressed disappointment and concern that a police vehicle had come in for maintenance with weapons still inside, but he did not threaten his coworkers in the Public Works Department.

Following its investigation, the City suspended plaintiff's employment. The City explained that it found plaintiff's comments "escalated emotionally" during the incident and he "expressed . . . frustration about what [he] perceived as a lack of respect among Public Works employees." Then, "[w]hile holding the gun across [his] body, [plaintiff] made a remark to the effect of, 'Maybe now I will get some respect.' " The City concluded that plaintiff's conduct violated City Rule 3(e), which prohibits "abusive, intimidating, threatening or coercive treatment, physical and/or mental, of another employee or the public on City time or premises." The City also concluded that plaintiff violated City Rule 2(a) during the investigation, which prohibits "dishonesty of any kind, including lying, falsification of official City records or reports, and withholding information in a City investigation."

Plaintiff disagreed with the City's conclusions, stating that he did "not recall making the statement that the City attributed to me about getting respect." Plaintiff argued that "[i]f I did make such a statement (which I doubt), making a statement about respect does not violate any City rules or regulations, even if by happenstance I was holding (not pointing) an unloaded firearm at the time." After reviewing plaintiff's response, the City terminated plaintiff's employment on March 12, 2015.

Thereafter, plaintiff asked the Association to pursue a grievance on his behalf. The Association filed a Notice of Intent and formed a Grievance Committee to investigate the matter. During its investigation, the Committee interviewed Dooley, Oostindie, plaintiff, Colvin, and City employee Milt Zaagman about the specifics of the incident. Following its investigation, the Committee recommended against pursuing a formal grievance. On May 6, 2015, the Association Board met with the Grievance Committee and asked questions about the Committee's recommendation and obtained more details about the Committee's interviews with Colvin and Dooley. The Board then voted not to pursue a grievance on plaintiff's behalf. Association President Traci Shaffer informed plaintiff of the Board's decision, but explained that the Association was willing to try to reach a compromise with the City. Shaffer explained, however, that the Association would "not pursue the available remedies past that step in the process if a compromise cannot be reached." Plaintiff agreed to allow the Association to pursue a compromise, and the Association submitted its first offer to the City on May 19, 2015.

The City rejected the first offer and proposed a counteroffer in which it would convert plaintiff's termination to a resignation. Shaffer relayed the City's counteroffer to plaintiff, explaining, "At this point, you may choose to accept the terms proposed by the City, or schedule a meeting. . . . If an acceptable compromise is not reached at this meeting, the Association will submit their decision to dismiss the grievance as approved by majority vote of the Executive Board." Plaintiff rejected the City's counteroffer, and the Association then held a meeting with the City and plaintiff before submitting a second offer. The City also rejected the second offer, reasserting its initial counteroffer of allowing plaintiff to change his termination to a resignation. On July 27, 2015, the Association informed the City that it had sent the counteroffer to plaintiff, but it did not hear back from him and would not be pursuing a formal grievance on his behalf.

That same day, plaintiff filed the instant action, claiming that the Association breached its duty of fair representation because it failed to follow the grievance procedure in the CBA and the City breached the CBA because it fired plaintiff without just cause. Plaintiff also filed a motion for a preliminary injunction, asking the court to compel defendants to arbitrate his grievance. The trial court denied plaintiff's motion, concluding that the City was not contractually obligated to arbitrate the dispute, plaintiff had not demonstrated irreparable harm, and there were no significant public interests at stake because the case involved a private dispute.

Thereafter, the Association filed a motion for summary disposition, arguing that plaintiff failed to present sufficient evidence demonstrating that the Association acted arbitrarily or in bad faith by choosing not to pursue plaintiff's grievance to arbitration. The City concurred in the motion and further asked the court to dismiss plaintiff's breach of contract claim, arguing that an employee whose employment is governed by a CBA cannot pursue a breach of contract claim against an employer unless the employee first establishes a breach of the duty of fair representation by the representative union. Following a hearing, the trial court granted defendants' motions under MCR 2.116(C)(10).

II. PRELIMINARY INJUNCTION

On appeal, plaintiff first argues that the trial court erred by denying his motion for a preliminary injunction compelling defendants to arbitrate his grievance. We review for an abuse of discretion a trial court's decision to grant or deny a motion for mandatory injunctive relief.

Dep't of Environmental Quality v Gomez, 318 Mich App 1, 32; 896 NW2d 39 (2016). "An abuse of discretion occurs when the court's decision falls outside the range of reasonable and principled outcomes." *Id.* at 33-34 (quotation marks and citation omitted).

"Injunctive relief is an extraordinary remedy that issues only when justice requires, there is no adequate remedy at law, and there is a real and imminent danger of irreparable injury." *Janet Travis, Inc v Preka Holdings, LLC*, 306 Mich App 266, 274; 856 NW2d 206 (2014). In deciding whether to issue a preliminary injunction, courts consider

> (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued. [*Alliance for Mentally Ill of Mich v Dep't of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998).]

A particularized showing of irreparable harm is an indispensable requirement to obtain injunctive relief. *Pontiac Fire Fighters Union Local 376 v City of Pontiac*, 482 Mich 1, 9; 753 NW2d 595 (2008). "Equally important is that a preliminary injunction should not issue where an adequate legal remedy is available." *Id.*

In this case, plaintiff failed to demonstrate that he was entitled to arbitration under the CBA. Plaintiff argues that the Association was required to pursue his grievance to arbitration under Step 3 of the CBA once it submitted the second offer because Step 3 states, "If the City Manager rejects the compromise . . . *Step 4 shall be followed*." (Emphasis added.) However, as the trial court noted, Step 4 of the grievance procedure required the Association to file "[n]otice of intent to follow this step . . . within fifteen (15) working days of the Manger's decision in the former step," which the Association did not do. Therefore, at the time plaintiff filed his complaint, the City was no longer contractually obligated to arbitrate his grievance.

Further, plaintiff failed to make a showing of irreparable harm because he could obtain an adequate remedy at law in the form of money damages if he prevailed on his claims against the City and the Association. See *Pontiac Fire Fighters*, 482 Mich at 10. Plaintiff argues that the irreparable harm in this case was the denial of his choice of forum to resolve his grievance against the City because the outcome of the case could depend on who was chosen to resolve the dispute. However, the mere inability to present his case before an arbitrator does not constitute a particularized harm, considering that plaintiff cannot prove that an arbitrator would necessarily return a decision in his favor. Moreover, the fact that plaintiff's claims *might* be more successful before an arbitrator is not proper grounds to obtain a preliminary injunction because an injunction will not issue upon speculative injury. *Pontiac Fire Fighters*, 482 Mich at 8-9.

Finally, the balance of harms and the public interest factors favor the trial court's decision. The interests at stake in this case are largely personal to plaintiff, and even in the absence of an injunction, plaintiff could pursue his claims against the City and the Association before the trial court where a determination could be made regarding whether he was entitled to damages. In contrast, requiring the City to arbitrate plaintiff's grievance would have granted

plaintiff relief that he was no longer entitled to under the CBA. Therefore, the trial court did not abuse its discretion by denying plaintiff's motion for a preliminary injunction.

III. SUMMARY DISPOSITION

Plaintiff next argues that the trial court erred by summarily dismissing his claims against the Association and the City. We review de novo a trial court's decision to grant or deny a motion for summary disposition. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion for summary disposition under MCR 2.116(C)(10) tests the factual sufficiency of a claim. *Murad v Prof & Admin Union Local 1979*, 239 Mich App 538, 541; 609 NW2d 588 (2000). "This Court considers the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted in the light most favorable to the nonmoving party to determine whether a genuine issue of any material fact exists to warrant a trial." *Id.*

The duty of fair representation is an implied duty that requires a labor union to fairly and impartially represent all members within its bargaining unit. *Martin v East Lansing Sch Dist*, 193 Mich App 166, 180; 483 NW2d 656 (1992). The duty encompasses three responsibilities: (1) serving a member's interests without hostility or discrimination, (2) exercising discretion in good faith and honesty, and (3) avoiding arbitrary conduct. *Goolsby v Detroit*, 419 Mich 651, 664; 358 NW2d 856 (1984), citing *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903; 17 L Ed 2d 842 (1967). In processing or refusing to process a grievance, a union must act

> without fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, willful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motive, misconduct, overreaching, unreasonable action, or gross abuse of its discretion in processing or refusing or failing to process a member's grievance. [*Knoke v East Jackson Pub Sch Dist*, 201 Mich App 480, 487; 506 NW2d 878 (1993).]

The duty of fair representation further prohibits a union from acting with "(a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence." *Goolsby*, 419 Mich at 682. Negligence alone does not constitute a breach of the duty of fair representation. *Id.* at 680.

A union has broad discretion to decide what grievances to pursue to arbitration and must be given the latitude to assess each grievance according to its individual merit. *Knoke*, 201 Mich App at 486. "An individual employee does not have the absolute right to have a grievance taken to arbitration, even where, in some instances, the employee's grievance against the employer may have merit under the terms of the applicable collective bargaining agreement." *Silbert v Lakeview Ed Ass'n*, 187 Mich App 21, 25-26; 466 NW2d 333 (1991). A plaintiff "cannot pursue his breach of contract claim against [an employer] unless he is successful in his claim of breach of the duty of fair representation." *Knoke*, 201 Mich App at 485.

Plaintiff first argues that the Association failed to follow the grievance procedure in the CBA. On this point, we agree. To begin, the Grievance Committee did not make a decision on the grievance within 30 days after the Association submitted the Notice of Intent in Step 1.

Then, the Grievance Committee recommended against pursing a grievance on plaintiff's behalf, and the Association Board likewise voted not to pursue a grievance. The language of the CBA does not require the Board to vote on the Committee's decision before the Committee submits its recommendation to the City,[1] and the record does not show when or if the Grievance Committee decided to submit a compromise offer on plaintiff's behalf. Yet, on May 12, 2015, Association President Shaffer informed plaintiff that the Association was willing to pursue a compromise on his behalf. Two compromise offers were submitted to, and rejected by, the City under Steps 2 and 3. Under Step 3 of the grievance procedure, "[i]f the City Manager rejects the compromise . . . *Step 4 shall be followed.*" (Emphasis added.) Therefore, under the plain language of the CBA, once the Association submitted the compromise offer under Step 3 and the City Manager rejected that offer, the Association was required to follow Step 4 of the grievance procedure. The Association argues that it was not required to follow Step 4 because it decided from the beginning not to pursue plaintiff's grievance to arbitration. However, the language of the CBA does not support that the Association had this option. Rather, if the Association did not intend to pursue plaintiff's grievance to arbitration in Step 4, it should have dismissed the grievance before submitting a second compromise offer in Step 3.

Nonetheless, the mere fact that the Association did not strictly follow the grievance procedure does not mean that it breached its duty of fair representation. In *Pearl v Detroit*, 126 Mich App 228, 238 n 4; 336 NW2d 899 (1983), this Court explained that "[a]n incorrect interpretation by the union of a collective bargaining clause, in the absence of bad faith, does not impose liability upon the union." In *Goolsby*, 419 Mich at 680, our Supreme Court explained that, "[a]bsent a reasoned, good-faith, non-discriminatory decision not to process a grievance," if a union fails to comply with the grievance procedure in a collective bargaining agreement, "the union has acted arbitrarily and breached its duty of fair representation." However, a reasoned, good-faith, non-discriminatory decision includes "[f]or example, because the grievance has no merit, or, even if it has merit, because it is not in the best interests of the majority of the union membership." *Id.* at 680 n 13.

Plaintiff has not shown that the Association decided not to pursue his grievance to arbitration as the result of bad faith. Indeed, the Association made its decision only after concluding that the grievance lacked merit and that pursing the grievance would not be in the best interests of the majority of the union membership. See *Goolsby*, 419 Mich at 680 n 13. Before reaching this conclusion, the Grievance Committee conducted an investigation that included interviews of Dooley, Oostindie, Colvin, plaintiff, and Zaagman. From the information

[1] Although the CBA grievance procedure does not require a vote by the Board, the Association's Bylaws are seemingly inconsistent with this procedure and provide the following:

> Within (10) working days of filing of the notice of intent with the City, the Committee shall submit its written recommendation to the Board. Whereupon, the Board shall, within fifteen (15) days of receipt of the recommendation of the Ad Hoc Grievance Committee, shall make its decision on whether to file a formal grievance with the City.

obtained during the interviews, the Committee determined that plaintiff had not been forthcoming and completely truthful and that, during the incident in question, plaintiff was emotional while holding a weapon and made a statement "referencing how the weapon could be used," the implication of which "was to the effect of gaining respect or as a solution to a problem." Under the circumstances, the mere fact that the Association did not strictly follow the grievance procedure would not sustain a breach of the duty of fair representation claim.

Plaintiff argues that the Association breached its duty of fair representation because it decided not to pursue his grievance to arbitration before investigating the matter. Specifically, plaintiff cites the deposition testimony of Jaime Petrovich, a member of the Grievance Committee, in which she stated that the Association decided not to pursue plaintiff's grievance "[f]rom the very beginning when we filed the Notice of Intent and after we made our decision it was communicated all along that there was no intent to file the formal grievance." Read in context, however, Petrovich's testimony does not suggest that the Association decided not to pursue plaintiff's grievance before the investigation occurred. Rather, Petrovich was explaining that the Association's first decision was against pursuing a formal grievance on plaintiff's behalf, and that this remained the Association's position throughout the parties' negotiations.

Plaintiff argues that the Association breached its duty of fair representation by refusing to evaluate whether City policy prohibited the police from bringing in vehicles for maintenance with weapons still inside. Whether City policy prohibits this conduct, however, is irrelevant to whether plaintiff made threatening statements while holding a weapon or was dishonest about his statements during the City's investigation. Plaintiff argues that the Association distorted the record regarding whether he violated any City rules because Colvin stated that he did not feel threatened by plaintiff. However, the fact that Colvin did not personally feel threatened does not suggest that plaintiff's statements could not be construed as threatening to other employees.

Plaintiff also argues that the Association failed to consider his long and favorable employment history and to explain what steps it took to determine that he would not prevail at arbitration. Again, however, plaintiff's employment history is irrelevant to whether he breached a City rule during the incident in question or during the City's subsequent investigation. Further, the Association explained its conclusion that there was insufficient evidence to successfully arbitrate plaintiff's grievance by pointing to the fact that plaintiff was unable to provide details or an explanation of the incident to refute the statements of other employees and because plaintiff's purported lack of memory regarding his statements was inconsistent with his memory of other details of the incident and his conversations with employees after the fact.

Citing the testimony of Petrovich and Shaffer, plaintiff argues that the Association breached its duty of fair representation because it has never pursued a grievance to arbitration. However, Petrovich testified that she "d[id] not know if [a grievance] has gone all the way to arbitration," and Shaffer testified only that the Association had not pursued a grievance to arbitration for "as long as I've been involved with the Association . . . . I don't know about prior to that." Moreover, plaintiff offered no evidence to suggest that the Association systematically refuses to pursue grievances to arbitration, as opposed to merely lacking a reason to do so. In any event, the manner in which the Association has historically processed grievances has no bearing on whether it properly processed plaintiff's request that it pursue a grievance on his behalf.

Finally, plaintiff argues that the trial court erred by dismissing his claims because his case is substantially similar to *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123; 205 NW2d 167 (1973). In *Lowe*, a union decided not to pursue a plaintiff's grievance to arbitration after he was involved in an altercation with another employee. *Id.* at 133-134. The union representative who performed the investigation "had known plaintiff for many years . . . [and] felt that the plaintiff did not deserve to be reinstated in his job." *Id.* at 134. Despite the fact that the union representative "was unable to determine where the fault lay for instigating the altercation[,] [h]e nonetheless concluded that plaintiff had attacked [the other employee], that plaintiff had choked her, [and] that plaintiff was 'in the wrong[.]' " *Id.* The Supreme Court concluded that the union breached its duty of fair representation to the plaintiff by "making no effort whatsoever to settle his grievance, by ignoring his grievance, [and] by processing it in a perfunctory manner[.]" *Id.* at 152.

In contrast to *Lowe*, plaintiff cannot show that any member of the Grievance Committee was predisposed against him, and the record demonstrates that the Association only decided not to pursue plaintiff's grievance to arbitration after a thorough investigation by the Grievance Committee and additional inquiry by the Association Board. Unlike the union in *Lowe*, which ignored the plaintiff's grievance and made no effort whatsoever to settle the grievance, the Association in this case conducted extensive investigation and settlement negotiations between the City and plaintiff. Therefore, *Lowe* does not mandate a contrary result.

Considering the facts outlined above, plaintiff has not shown that the trial court erred by dismissing his breach of the duty of fair representation claim against the Association. Likewise, the court did not err by dismissing plaintiff's breach of contract claim against the City.[2]

Affirmed.

/s/ Cynthia Diane Stephens
/s/ Michael F. Gadola

[2] See *Knoke*, 201 Mich App at 485 ("[A plaintiff] cannot pursue his breach of contract claim against [an employer] unless he is successful in his claim of breach of the duty of fair representation.").

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Before: STEPHENS, P.J., and SHAPIRO and GADOLA, JJ.

SHAPIRO, J. (*dissenting*).

Plaintiff William Scott Zastrow claims that defendant City of Wyoming Administrative and Supervisory Employees Association (the union) violated its obligation to provide him with fair representation in response to his termination by defendant City of Wyoming (the city), his employer. As there was ample evidence to support this claim, we should reverse the trial court and remand for trial as to the union. Accordingly, I respectfully dissent in part.[1]

Plaintiff was a supervisor in the municipal garage that repaired and maintained City of Wyoming vehicles. On January 26, 2015, another worker in the garage discovered a loaded rifle in a police car that had been left for repairs. The gun had been left there by a police officer in violation of department policy. Plaintiff took the gun from the other employee, made it safe and had the employee place it in a secured locker. Plaintiff had complained several times previously about officers leaving loaded weapons in vehicles. While holding the weapon plaintiff made a statement that the city interpreted as a violation of workplace rules. It then terminated plaintiff's employment.

The city's termination letter indicated that plaintiff was fired because he violated two workplace rules: one barring threatening behavior and the other prohibiting theft or dishonesty including the withholding of information relevant to a city investigation. The city's letter does

[1] I agree with the majority in affirming the trial court's dismissal of the claim for injunctive relief.

not state why lesser sanctions were inadequate. Plaintiff asked the union to file a grievance on his behalf. They refused to do so, and this suit followed.

A UNION'S DUTY TO REPRESENT ITS MEMBERS

When an employee is represented by a union, he may not file a grievance or lawsuit on his own behalf against the employer unless the collective bargaining agreement provides for that right.[2] Where such a provision is absent, as here, an employee is wholly dependent upon the union to file the grievance and act as his or her advocate.

The scope of this duty is defined in two Michigan cases: *Lowe v Hotel & Restaurant Employees Union, Local 705*, 389 Mich 123; 205 NW2d 167 (1973), and *Goolsby v Detroit*, 419 Mich 651; 358 NW2d 856 (1984). In my view, the majority fails to afford these cases sufficient consideration. *Lowe*, following the United States' Supreme Court's opinion in *Vaca v Sipes*, 386 US 171; 87 S Ct 903; 17 L Ed 2d 842 (1967), eloquently set forth the fundamental legal principles:

> A labor union has a duty fairly to represent its members.
>
> This duty arises from the nature of the relationship between the union and its members. The union and its members do not deal at arms [sic] length.
>
> The union speaks for the member. It makes a contract of employment on his behalf. The union offers its member solidarity with co-workers, expertise in negotiation, and faithful representation. In exchange, the member pays his union dues, and gives his support and loyalty to the union.
>
> In many ways, the relationship between a union and its member is a fiduciary one. Certainly, it is a relationship of fidelity, of faith, of trust, and of confidence.
>
> If the courts have stopped short of declaring the union and member relationship a fully fiduciary one, it is because the union, by its nature, has a divided loyalty.
>
> It must be faithful to each member, to be sure, but it must be faithful to all the members at one and the same time.
>
> The union must be concerned for the common good of the entire membership. This is its first duty.
>
> That duty of concern for the good of the total membership may sometimes conflict with the needs, desires, even the rights of an individual member.

[2] See *Saginaw v Chwala*, 170 Mich App 459, 463-464; 428 NW2d 695 (1988).

> When the general good conflicts with the needs or desires of an individual member, the discretion of the union to choose the former is paramount.
>
> When the general good conflicts with the legal or civil rights of an individual member, the courts will recognize those rights and enforce them as against the will of the majority of the union membership.
>
> In the area of grievances, the courts have held that the union has considerable discretion to decide which grievances shall be pressed and which shall be settled. It has been said that the union has latitude to investigate claimed grievances by members against their employers, and has the power to abandon frivolous claims. *Vaca v Sipes*, 386 US 171; 87 S Ct 903; 17 L Ed 2d 842 (1967).
>
> It has been held that an individual member does not have the right to demand that his grievance be pressed to arbitration, and the union "obviously" is not required to carry every grievance to the highest level, but must be permitted to assess each with a view to individual merit. *Gunkel v Garvey*, 45 Misc 2d 435; 256 NYS2d 953 (1964).
>
> Having regard for the good of the general membership, the union is vested with discretion which permits it to weigh the burden upon contractual grievance machinery, the amount at stake, the likelihood of success, the cost, even the desirability of winning the award, against those considerations which affect the membership as a whole. [*Lowe*, 389 Mich at 145-146.]

Ten years after *Lowe* was decided, the Supreme Court in *Goolsby* refined these principles into a three part test:

> A union's duty of fair representation is comprised of three distinct responsibilities: (1) "to serve the interests of all members without hostility or discrimination[,"] (2) "to exercise its discretion with completed good faith and honesty[,"] and (3) "to avoid arbitrary conduct." [*Goolsby*, 419 Mich at 664 quoting *Vaca*, 386 US at 177.]

A violation of any of these three responsibilities constitutes a breach of the duty of fair representation. *Id.* at 667. In reviewing the actions of the union, we must view its duty broadly given its special relationship with its members. As noted in *Goolsby*, "for purposes of PERA, we do not interpret a union's responsibility to avoid arbitrary conduct narrowly.[] In addition to prohibiting impulsive, irrational, or unreasoned conduct, the duty of fair representation also proscribes inept conduct undertaken with little care or with indifference to the interests of those affected." *Id.* at 679.

FACTS

Plaintiff had an excellent work record. During his previous 16 years of employment with the city, he had never been subject to any employee discipline, and he was given a 100% rating in the performance review conducted immediately before his termination. On the date in question he had just returned to work after several days of bereavement leave following the death of his father.

The city's workplace rules required that when a police car is left at the garage, the officers must remove all firearms from the vehicle and the garage and store them properly in the police department.[3] As noted above, this rule was not always followed, and Zastrow had several times brought it to the attention of management.[4] The initiating incident began when Randy Colvin, a garage worker, started to work on a police car and discovered that the officers had left a loaded rifle in the front seat. Colvin removed the rifle as plaintiff walked over. One of them immediately made the gun safe though it is not clear whether it was Colvin before plaintiff took the gun or plaintiff after he took possession of the rifle. Plaintiff held the rifle with two hands across his torso, he and Colvin had a conversation, the contents of which is in dispute, and he then directed Colvin to place the rifle in a secure locker until it could be returned to the police department.

Certain facts are not in dispute, though they remain obscured by the misplaced, but powerful image of workplace violence raised by defendants. First and foremost, plaintiff did not bring a weapon to work, and he never did so in the long course of his employment. He was wholly un-responsible for the presence of the weapon in the garage. In fact, he had on several occasions complained about these occurrences on the grounds of workplace safety. Second, plaintiff did not remove the gun from the police car. It is undisputed that the other employee at the scene, Colvin, removed the gun and openly held it before plaintiff approached. Third, plaintiff did not undertake any dangerous actions with the rifle; he did not point it at anyone or even in anyone's direction. He held it across his body, not directed outwards. Fourth, he saw to it that it was unloaded and placed in a safe location. Fifth, he made no threats despite the defendants' attempt to imply the contrary. There was one and only one person who heard what plaintiff said, Randy Colvin. When interviewed by the employer and by the union Colvin repeatedly confirmed that plaintiff did not threaten him, that he did not feel threatened, that plaintiff made no threats directed at others, and that he would feel completely comfortable continuing to work with plaintiff. He reported that plaintiff had, while holding the rifle, said

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[3] Since 1986, the Wyoming Police Department manual has stated that long guns "shall be removed any time the vehicle is going out for repair" and that the weapons are to be secured in the police station armory.

[4] Plaintiff was not alone in this concern. In 2012 a police lieutenant made a written complaint about police cruisers being left in maintenance with long guns still inside. However, it appears that no offending officers, including the officer who left the gun in this case, were ever sanctioned for this dangerous conduct.

something along the lines of, "maybe I could get some respect with this," and Colvin stated that he did not view this as a threat at the time of the incident or later when interviewed.

ANALYSIS

The union asserts that it did not pursue the grievance on behalf of plaintiff for two reasons.

First it asserts that it did not do so because it did not want to set a precedent for the membership regarding what they might expect to be arbitrated in the future. This claim is at best devoid of content, and, at worst, it is clear evidence of arbitrariness. The union's brief wholly fails to articulate how pursuing plaintiff's grievance to arbitration would leave it subject to seeking arbitration for grievances that were without merit. The union's proffered concern about being overwhelmed by the burden of conducting arbitrations on behalf of its members should be viewed with substantial skepticism in light of the fact that it has not pursued a single employee grievance to arbitration in its entire history at this workplace. If the union refused to represent plaintiff in this grievance because it had a policy never to do so then the denial of representation is clearly "arbitrary conduct."

Second, the union states that after considering plaintiff's request, it concluded that the likelihood of prevailing at arbitration was low. The union is entitled to consider this factor, but it must do so fairly and in good faith. The mere fact that the union conducts an investigation does not settle the issue of good faith.[5] If the union, despite substantial evidence to the contrary, merely adopts the employer's view of the facts, then its good faith should not be assumed. Here, the record readily supports a conclusion that the union was exclusively concerned with whether it could convince the employer to unilaterally reverse its decision to fire plaintiff rather than whether it could convince a neutral arbitrator to reverse it. As I read the record, the union's assertion that plaintiff's situation could not be improved at arbitration has little basis. Indeed, a review of the record leads to the conclusion that any attorney moderately skilled at litigation who reviewed the evidence and contractual standards relevant to this grievance would conclude that there was a strong likelihood of success, either of prevailing outright or at least in reducing the sanction.

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[5] There is also evidence that the decision to deny plaintiff's request for representation was made before the union's investigation was fully concluded. Jaimie Petrovich, a member of the Grievance Committee testified that "*[f]rom the very beginning* when we filed the Notice of Intent [March 16, 2015, 5 weeks before the Grievance Committee issued its report] and after we made our decision *it was communicated all along that there was no intent to file a formal grievance*." (Emphasis added). The majority states that "in context" Petrovich's statement did not suggest a premature decision. I disagree with this characterization. As I read the deposition and the rest of the record, it seems to me that the decision not to pursue a formal grievance was made and communicated to plaintiff early in the process. The union made clear that it filed the Notice of Intent to pursue a grievance in order to maintain pressure on the city to compromise, but in fact it had determined from the outset that it would not file a grievance.

The likelihood that a grievance would be successful turns largely on whether an arbitrator would agree with the employer's claim that plaintiff violated the two cited workplace rules, i.e. one barring dishonesty and the other barring threatening conduct. The record demonstrates that these claims rested on suspect interpretations of weak evidence. First, the termination letter stated that plaintiff violated City Rule 2(a) the rule against dishonesty because he was not fully truthful during the investigation.[6] It asserted that plaintiff had violated this rule by initially admitting on January 28, 2015 that he "had said something that [he] should not have said" during the incident but later submitted a written statement about the incident in which he stated that he, " 'did not recall' making any comments about disrespect among Public Works employees and also did not recall saying anything about getting respect while [he was] holding the gun." However, there is no documentary evidence that plaintiff ever stated that he "said something he shouldn't have." Nor did any employee state that they heard defendant make such a remark. The only evidence of this initial statement by plaintiff was the recollections of two managers, which were not documented. Thus, the premise of plaintiff's "dishonesty" rested on a "he said-he said" claim by management. Moreover, assuming plaintiff had made this admission, it contains no specific statements that plaintiff indicated he recalled saying during the incident. It appears that his lack of recollection of what he said to Colvin was consistent throughout. The union does not state why it believes the undocumented assertions of the managers. Nor does the union state why plaintiff's written statement that he "did not recall" making the comments that the managers recollected he made evidences a deliberate lie as opposed to a mere failure of memory. Given these facts, a strong case could be made that even if defendant violated this rule, a lesser sanction was in order.

The termination letter also cited City Rule #3(e), which according to the letter, "prohibit[s] abusive, intimidating, threatening or coercive treatment, physical and/or mental, of another employee." The letter did not refer specifically to any statement or conduct by plaintiff as the basis for its finding that he had violated this rule. However, the letter described the incident as follows:

> [Y]ou were in the Fleet Services area of the Public Works building and observed a staff member removing a gun from the trunk of a police vehicle. You asked the employee if the gun was loaded and he said it was not. You then took the gun to check if it was loaded and it was not. You made comments expressing your frustration about guns being in police vehicles when the vehicles are brought to Fleet Services for maintenance. During the conversation, your comments escalated emotionally and you expressed your frustration about what you perceived as a lack of respect among Public Works employees. While holding the gun across your body, you made a remark to the effect of, "Maybe now I will get some respect."

[6] The rule "prohibit[s] theft or dishonesty of any kind including lying, falsification of City records or reports, and withholding information in a City investigation."

Although the letter of termination ends its description of the incident at that point, it is undisputed that following his remark, plaintiff handed the gun back to the other employee and directed him to place it in the locker used for such purposes. Moreover, there is no dispute that at the time the gun was held by the plaintiff it had already been made safe.[7] And, as already noted, plaintiff was not responsible for the gun's presence. Under these circumstances, it would be quite reasonable for an arbitrator to conclude that plaintiff did not engage in threatening or intimidating behavior and that his conduct, even if unwise, did not rise to the level of good cause for termination.

CONCLUSION

Lowe instructs that "a union has the power to abandon frivolous [grievance] claims." 389 Mich at 146. Plaintiff's claim was by no means frivolous. He was fired after 16 years of excellent performance based upon an incident that occurred because someone else left a gun where it did not belong. After the gun was discovered, plaintiff handled it in a manner to protect his fellow workers. There is evidence that during the incident he made a statement that was ill-advised, but there is no evidence that he ever threatened any or presented a danger to anyone.

Lowe also states that "[w]hen the general good conflicts with the needs or desires of an individual member, the discretion of the union to choose the former is paramount." *Id.* However, defendant has abjectly failed to demonstrate beyond a question of fact that the "general good" of the union's membership conflicted with filing a grievance on behalf of plaintiff. To the contrary, by failing to file a grievance on plaintiff's behalf, the union sent a clear message to the membership and the employer that even where an employee has a long unblemished work record, the union will not come to the assistance of a member who makes a single mistake that results in no harm. Because the evidence clearly establishes a question of fact whether the union met its duty of fair representation I would reverse the grant of summary disposition and remand for trial.

/s/ Douglas B. Shapiro

[7] In addition, Colvin stated that plaintiff was "not angry," but instead seemed "tearful" and "bummed out," unsurprising feelings given that plaintiff had just returned from burying his father.