**NOT DESIGNATED FOR PUBLICATION**

**ROBIN ROBERTS**

**VERSUS**

**STONE CONTAINER CORPORATION AND UNITED PAPER WORKERS INTERNATIONAL UNION, AFL-CIO LOCAL 840**

**COURT OF APPEAL**

**FIFTH CIRCUIT**

**STATE OF LOUISIANA**

**02-CA-80**

APPEAL FROM
THE TWENTY-FOURTH JUDICIAL DISTRICT COURT,
PARISH OF JEFFERSON, STATE OF LOUISIANA,
NUMBER 546-459, DIVISION "L,"
HONORABLE CHARLES V. CUSIMANO, II, PRESIDING.

**JULY 30, 2002**

# WALTER J. ROTHSCHILD
# JUDGE

Panel composed of Judges Edward A. Dufresne, Jr.
Sol Gothard and Walter J. Rothschild.

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Counsel for Stone Container Corporation, Defendant-Appellee.

**AFFIRMED**

In this suit for wrongful termination and breach of a collective bargaining agreement, the trial court granted defendant's motion for summary judgment, dismissing plaintiff's claims against his employer.[1] Plaintiff appeals from this ruling, arguing that issues of fact preclude the granting of summary judgment in this case. For the reasons stated more fully herein, we affirm the trial court's judgment.

*Facts and Procedural History*

Plaintiff, Robin Roberts, was employed by Stone Container Corporation (hereinafter "Stone") and was a member of the United Paper Workers International Union, AFL-CIO, Local 840 (hereinafter "the Union"). At all pertinent times herein, the Union maintained a collective-bargaining agreement ("CBA") with Stone. The CBA contained the terms and conditions of employment for Roberts and other employees and also contained grievance and arbitration procedures relating to disciplinary actions taken against Union members.

On April 12, 1999, plaintiff worked an eight-hour shift at the Stone plant and left the job at 2:00 p.m. The parties dispute whether plaintiff was expected by his supervisor to work an additional two hours of overtime until 4:00 p.m. Stone contends Roberts was told to stay until 4:00 p.m., and Roberts argues that his job as a general helper did not require

[1]In the same judgment, the trial court denied the motion for summary judgment brought by defendant, United Paper Workers International Union. That portion of the judgment is not part of this appeal.

him to work overtime. Nevertheless, on the following day, April 13, 1999, plaintiff received a five-day suspension for leaving the job without authorization. On April 19, 1999, plaintiff's employment was terminated.

Plaintiff complained to the Union, which apparently made an unsuccessful attempt to get plaintiff reinstated. On November 12, 1999, plaintiff filed the instant suit for damages, naming as defendants both Stone and the Union. Stone brought a motion for summary judgment on the basis that plaintiff's lawsuit was untimely and that plaintiff had failed to prove Stone breached the collective-bargaining agreement or that the Union breached a duty of fair representation to plaintiff. The Union also brought a motion for summary judgment as to the allegations of plaintiff's demand. The trial court granted the motion filed by Stone, but denied the Union's motion.

By this appeal, plaintiff argues that the trial court erred in granting summary judgment in favor of Stone in this case. Plaintiff argues that there remain issues of fact as to whether his claim has prescribed, and as to whether the Union breached its duty of fair representation or whether Stone breached its duties under the collective-bargaining agreement.

*Applicable Law*

The principles of labor law applicable in the present case were set forth by the Louisiana Supreme Court in *Bates v. Foremost-McKesson, Inc.*, 392 So.2d 389 (La. 1980). In that case, the court recognized that an action alleging a breach of a collective-bargaining agreement arises under section 301(a) of the Labor Management Relations Act, 28 U.S.C. section 185(a) (1976). Although suit may be brought in state court for a claim of breach of duty of fair representation/breach of contract, federal labor law applies. Section 301 of the LMRA provides the requisite jurisdiction and remedies for individual employees covered under a collective-bargaining agreement between that individual's employer and the union. *Landry v. Cooper/T. Smith Stevedoring Co., Inc.,* 880 F.2d 846, 850 (5th Cir.1989).

As plaintiff's suit involves both a claim against his employer as well as a claim against the Union, the suit is known as a "hybrid" suit. The U.S. Supreme Court has defined "hybrid" suits, as follows:

> Hybrid suits formally comprise two causes of action. First, the employee alleges that the employer violated [section 301] by breaching the collective-bargaining agreement. Second, the employee claims that the union breached its duty of fair representation, which the Court has implied from the scheme of the NLRA, by mishandling the ensuing grievance-and-arbitration proceedings.

*Reed v. United Transp. Union*, 488 U.S. 319, 328, 109 S. Ct. 621, 627, 102 L. Ed. 2d 665 (1989); *see also, DelCostello v. International Bhd. of Teamsters*, 462 U.S. 151, 164, 103 S. Ct. 2281, 2290, 76 L. Ed. 2d 476 (1983). If the employee so chooses, he may sue one defendant and not the other, but the case to be proved is the same whether one or both are sued. *DelCostello,*462 U.S. at 165, 103 S. Ct. at 2291. However, if the arbitration-and-grievance proceeding is the exclusive remedy for breach of the CBA, the employee may not sue his employer under section 301 until completion of the proceeding. *Daigle v. Gulf States Utilities Co., Local 2286*, 794 F.2d 974, 977 (5th Cir.), *cert. denied*, 479 U.S. 1008, 107 S. Ct. 648, 93 L. Ed. 2d 704 (1986). The applicable statute of limitations for these "hybrid" section 301 claims is six months, as may be found in section 10(b) of the National Labor Relations Act (NLRA), 29 U.S.C. §§ 160(b). *Id.*

A motion for summary judgment is properly granted only if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue of material fact and that mover is entitled to judgment as a matter of law. La. C.C.P. art. 966(B).

Pursuant to La. C.C.P. art. 966, the mover bears the burden of proof to show "that there is no genuine issue as to material fact and that the mover is entitled to judgment as a matter of law." Once the mover has made a prima facie showing that the motion should be granted, the burden shifts to the adverse party to present evidence demonstrating that material factual issues remain. Once the motion for summary judgment has been properly

supported by the moving party, the failure of the adverse party to produce evidence of a material factual dispute mandates the granting of the motion. *Perricone v. East Jefferson General Hosp.*, 98-343 (La.App. 5 th Cir. 10/14/98), 721 So.2d 48; *Hayes v. Autin*, 96-287 (La.App. 3rd Cir. 12/26/96), 685 So.2d 691, *writ denied*, 97-0281 (La.3/14/97), 690 So.2d 41.

However, if the mover will not bear the burden of proof at trial, he only need point out to the court that there is an absence of factual support for one or more of the elements essential to the adverse party's claim. Once the mover establishes that there is no factual support for an essential element of the adverse party's claim, the burden shifts to the adverse party to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If he fails to do so, the mover is entitled to summary judgment. *Perricone, supra; Tonubbee v. River Parishes Guide*, 97-440 (La.App. 5 th Cir. 10/28/97), 702 So.2d 971.

*Discussion*

Defendant contends that plaintiff's suit is untimely as it was not filed within six months of the date on which plaintiff discovered the acts constituting the alleged breach. Defendant contends that plaintiff admits that he was terminated by Stone on April 19, 1999, and that the collective-bargaining agreement allowed him seven working days to file a grievance. Defendant argues that plaintiff had learned of the alleged breach by his employer and by the Union on April 29, 1999, as plaintiff claims the Union did not file a grievance as required by the collective-bargaining agreement.

However, the allegations of plaintiff's petition do not contain an allegation that the Union did not file a grievance as a result of plaintiff's termination. Rather, the petition states that "the Union arbitrarily, discriminatorily, in bad faith, and perfunctorily represented and/or failed to represent petitioner through a grievance procedure pursuant to Article 12 of the CBA." Further, the record in this case contains a copy of a grievance

report compiled in connection with plaintiff's termination from employment. The report contains an entry dated September 12, 1999 indicating that plaintiff's termination was upheld by the company.[2]

Thus, as plaintiff did not discover prior to September 12, 1999 that the grievance filed on his behalf by the Union was unsuccessful or that his termination was being upheld, we find that prescription of his claim against the Union and his employer did not begin to accrue until that date. His suit which was filed on November 19, 1999 was filed within the six month time frame and was therefore timely filed.

We turn next to the issue of whether there remain any genuine issues of fact as to whether the defendant Stone breached the terms of the collective-bargaining agreement with Roberts. In order to prevail at trial, plaintiff will need to prove that Stone breached its duties under the collective bargaining agreement by terminating plaintiff's employment for his refusal to work overtime.

In its motion for summary judgment, Stone argued that on the day at issue, Roberts was informed by his supervisor at 9:00 a.m. that he was required to work two hours of overtime, or until 4:00 p.m. on that day. In support of this position, Stone submitted a copy of the "Warning or Disciplinary Report" which was issued to plaintiff on April 13, 1999 which states that Roberts left his machine at 2:00 p.m. without telling his supervisor, and that this action constituted insubordination. Defendant also submitted a copy of portions of the collective-bargaining agreement dealing with management responsibilities and distribution of overtime. Stone contends that it followed the correct procedures regarding overtime, and that Roberts chose to violate those procedures.

In opposition, Roberts argued that Stone violated the stated policies on the distribution of overtime because he was working as a general helper on April 12, 1999, and

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[2]There is nothing in the record which indicates that this grievance was remitted to arbitration as required by the collective-bargaining agreement. However, we will not address this issue as plaintiff's claim against the Union for breach of its duty of fair representation is not before us in this appeal.

general helpers are not required to work overtime. However, Roberts has failed to produce any type of support for this allegation.

Plaintiff attached to his opposition to the motion for summary judgment a copy of two pages of the collective-bargaining agreement. The distribution of overtime is contained on page 12 of the agreement. Although plaintiff stated in his deposition testimony that general helpers are not required to work overtime, there is no specific provision in the agreement which applies to general helpers. Thus, other than his own testimony, plaintiff failed to submit any proof that he was not required to work overtime on the day in question or that he was not insubordinate for leaving the job without telling his supervisor. As plaintiff has failed to submit evidence that Stone breached the terms of the CBA by terminating his employment for the events which transpired on April 12, 1999, there remain no issues of fact as the employer's liability under the terms of the collective-bargaining agreement. Plaintiff has failed to show that he will be able to meet his evidentiary burden at trial. We therefore conclude that the summary judgment in favor of Stone was properly granted.

*Conclusion*

Accordingly, for the reasons assigned herein, the judgment of the trial court granting summary judgment in favor of Stone Container Corporation and dismissing the claims of Robin Roberts against them is affirmed. All costs of this appeal are to be borne by appellant.

**AFFIRMED**

# Court of Appeal

## FIFTH CIRCUIT
## STATE OF LOUISIANA

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## CERTIFICATE

I CERTIFY THAT A COPY OF THE OPINION IN THE BELOW-NUMBERED MATTER HAS BEEN MAILED OR DELIVERED THIS DAY JULY 30, 2002
TO ALL COUNSEL OF RECORD AND TO ALL PARTIES NOT REPRESENTED BY COUNSEL, AS LISTED BELOW:

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