IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Callaghan,	:	
	:	
Appellant	:	
	:	
v.	:	No. 1544 C.D. 2010
	:	
Haverford Township and Haverford Township Employees Association	:	Argued: May 10, 2011

BEFORE: HONORABLE RENÉE COHN JUBELIRER, Judge
HONORABLE P. KEVIN BROBSON, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE COHN JUBELIRER **FILED: July 25, 2011**

Daniel Callaghan (Appellant) appeals from two Orders of the Court of Common Pleas of Delaware County (trial court) dated April 6, 2010 (April Order) and July 16, 2010 (July Order). The April Order granted summary judgment in favor of Haverford Township (Township) based on res judicata arising from a final judgment in a federal lawsuit Appellant had filed against Township. The July Order granted summary judgment in favor of the Township of Haverford Municipal Employees Association[1] (Association), finding that Appellant failed to establish a

[1] The Notice of Appeal refers to the Haverford Township Employees Association rather than the Township of Haverford *Municipal* Employees Association. We refer to this defendant hereinafter as Association.

prima facie case that Association breached its duty to fairly represent Appellant in his grievances against Township.

This is the second time Appellant has sued Township, his former employer. In the first lawsuit in federal court, the District Court for the Eastern District of Pennsylvania entered summary judgment in favor of Township on claims pursuant to Sections 12102 and 12112(a) of the Americans with Disabilities Act[2] (ADA), 42 U.S.C. §§ 12102, 12112(a), and Section 3 of the Pennsylvania Whistleblower Law (Whistleblower Law), 43 P.S. § 1423(a).[3] Callaghan v. Haverford Township, No. 2:06-CV-5001-LDD (E.D.Pa. Feb. 25, 2008) (Callaghan I). The Third Circuit Court of Appeals (Third Circuit) affirmed and entered final judgment in Callaghan I on September 21, 2009. Callaghan v. Haverford Township, 345 Fed.Appx. 767 (3d Cir. 2009).

On September 3, 2008, Appellant filed the instant matter in the case at bar, Callaghan v. Haverford Township, (Delaware County, No. 2569 Civil 2008, filed April 6, 2010 and July 16, 2010) (Callaghan II), seeking to litigate two more claims against Township. The first claim asserts a violation of the Family Medical Leave Act of 1993 (FMLA), 29 U.S.C. §§ 2601-2654; the second claim asserts a novel cause of action alleged to exist under Township's Home Rule Charter. In addition,

[2] The ADA prohibits an employer from discriminating against a qualified individual on the basis of a disability. 42 U.S.C. § 12112(a). Section 12102(1) defines the term disability as "(a) a physical or mental impairment that substantially limits one or more major life activities; . . . (b) a record of such an impairment; or (c) being regarded as having such an impairment." 42 U.S.C. § 12102(1).

[3] Act of December 12, 1986, P.L. 1559.

Appellant, in Callaghan II, asserted a claim for breach of the duty of fair representation against Association, a new defendant.

The operative facts are the same in both Callaghan I and Callaghan II, a brief summary of which follows.[4] Appellant worked for Township from 1991 until his termination on September 22, 2006. During most of his employment, Appellant was in charge of the grass crew, maintaining open fields and areas along roadways in the Township. In February 2005, Appellant took a leave of absence due to employment-related stress[5] and diabetes. Appellant's physician cleared Appellant to return to work in March 2005, as long as he avoided stress. For this reason, Township placed Appellant in the temporary position of "highway inspector," where his duties included inspecting roads and filling potholes. Appellant asserted that he still continued to experience work-related stress stemming from work-related issues and disputes with various Township employees, which caused him anxiety and depression. Appellant's physician recommended another leave of absence. Upon Appellant's return to work in August 2005, Township granted Appellant another transfer for stress-related reasons and reassigned him to oversee landscapers for proper licensing. Shortly after returning to work in this new position, Appellant allegedly discovered various licensing infractions involving Township equipment or operators, which created additional stress for him. In October 2005, the Township

[4] The trial court's opinion notes that "an in-depth discussion of the facts surrounding [Appellant's] employment dispute with Haverford Township may be found in Judge Davis's opinion in [Callaghan I.]" (Callaghan II, (Delaware County, No. 2569 Civil 2008, filed, July 16, 2010, slip op. at 2 n.2)). An additional summary of the facts is also provided in Judge Sloviter's appellate opinion. Callaghan I, 345 Fed.Appx. 767, 768-770 (3d Cir. 2009).

[5] Appellant claimed that his stress was due to the unfitness of the employees he supervised and the disparaging of his concerns by Township.

posted, and Appellant applied for, a permanent position as "highway inspector," but he refused to interview for the position, claiming that the hiring procedure violated his Association contract. After several more developments that included an employer requested independent medical examination (IME), Appellant was placed on temporary disability in November 2005, and the IME physician recommended that Appellant consult with a psychiatrist as a result of his stress. Upon consultation, the psychiatrist advised that Appellant not return to work due to stress and diagnosed Appellant with chronic depression and anxiety. Appellant maintains that the psychiatrist never released him for work and did not inform Township of his limitations. Appellant did not, thereafter, return to work for Township and, after expiration of his sick leave and leave pursuant to the FMLA, Township terminated his employment on September 22, 2006.

Appellant next filed Callaghan I in federal court alleging that Township discriminated against him based upon an actual or perceived disability in violation of the federal ADA and that Township fired him in retaliation and violated the state Whistleblower Law. Following cross-motions for summary judgment, the District Court granted the Township's motion for summary judgment and dismissed the case on February 25, 2008, upon consideration of both federal and state claims. Appellant appealed and, on September 21, 2009, the Third Circuit affirmed the order granting summary judgment on both federal and state claims. The Third Circuit concluded that Appellant was not disabled, had not been perceived to be disabled pursuant to the ADA, and that Appellant failed to present any evidence that Township's act of terminating him was in retaliation after he reported alleged wrongdoing under the Whistleblower Law. Callaghan I, 345 Fed.Appx. at 771.

While Appellant's federal appeal was pending with the Third Circuit, Appellant filed Callaghan II on September 8, 2008. Appellant alleged that he had a right to reinstatement under the FMLA, that the failure by Township to communicate with Appellant about his return to work was contrary to the FMLA, and that Township intentionally violated the FMLA because Appellant was unjustifiably perceived as a "troublemaker." (Compl. ¶¶ 45-48, R.R. at Ex. H.) Appellant further alleged a cause of action against Township for violations of its Home Rule Charter. (Compl. ¶¶ 49-59, R.R. at Ex. H.) Finally, Appellant additionally asserted claims against Association, a defendant not named in Callaghan I, for breach of its duty to fairly represent him in his grievance against Township.

Township moved for summary judgment, which the trial court granted, concluding that the claims asserted against it in Callaghan II were precluded by res judicata. The trial court stated that, although Appellant formerly raised ADA and state whistleblower claims against Township in Callaghan I rather than FMLA and Home Rule Charter claims, by alleging essentially the same wrongful conduct it is clear that Appellant could have and should have brought the claims asserted in Callaghan II against Township in Callaghan I. (Callaghan II, slip op. at 2-3, April 6, 2010.) Association also moved for summary judgment, which the trial court granted on the basis that Appellant failed to allege specific facts of record to support his conclusory allegations that Association's decision not to pursue his grievance to arbitration was based on arbitrariness, discrimination, or bad faith. (Callaghan II, slip op. at 1, 4-5, July 16, 2010.) Appellant now appeals to this Court.[6]

[6] This Court's standard of review of a grant of summary judgment is whether the trial court has committed an error of law, and our scope of review is plenary. Cochrane v. Kopko, 975 A.2d 1203, 1205 (Pa. Cmwlth. 2009). Summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Farabaugh v.

This case presents two issues: (1) whether summary judgment in favor of Township was proper based upon res judicata when Callaghan I involved the federal ADA and Pennsylvania Whistleblower Law and Callaghan II involved the federal FMLA and Township Home Rule Charter; and (2) whether summary judgment in favor of Association was properly granted when the trial court determined that Appellant failed to provide specific facts of record to support his conclusory allegations that Association acted arbitrarily or in bad faith when it decided not to submit Appellant's grievance for arbitration.

I. Whether the doctrine of res judicata bars Callaghan II (against Township)

Appellant argues that his claims against Township pursuant to the FMLA and Home Rule Charter that he now asserts in Callaghan II are not barred pursuant to the doctrine of res judicata arising from Callaghan I, because his claims in Callaghan I were different, with distinct legal issues involving different aspects of his employment and having different and specific types of damages. He maintains that this lack of identity in the causes of action renders res judicata inapplicable.

"It is hornbook law that when a final judgment on the merits has been rendered by a court of competent jurisdiction, the doctrine of *res judicata* will bar any future suit on the same cause of action between the same parties." Glynn v. Glynn, 789 A.2d 242, 249 (Pa. Super. 2001) (citing 10 Standard Pennsylvania Practice 2d § 65:67). This Court has stated that, "[r]es judicata, or claim preclusion, prohibits parties involved in a prior litigation from subsequently asserting claims in a later

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Pennsylvania Turnpike Commission, 590 Pa. 46, 52 n.3, 911 A.2d 1264, 1267 n.3 (2006); Royal v. Southeastern Pennsylvania Transportation Authority, 10 A.3d 927, 929 (Pa. Cmwlth. 2010).

action that were raised, *or could have been raised,* in the previous adjudication." Hillgartner v. Port Authority of Allegheny County, 936 A.2d 131, 141 (Pa. Cmwlth. 2007) (emphasis in original). Hillgartner reaffirmed prior Supreme Court precedent that res judicata "serves to protect the courts from inefficiency and confusion that re-litigation fosters" and discourages claim splitting. Id. "Failure to raise a claim in the first forum and subsequently asserting it in an action arising out of the same facts constitutes a splitting of causes of action." Id. "We note that the doctrine of *res judicata* subsumes the more modern doctrine of issue preclusion which forecloses re-litigation in a later action, of an issue of fact or law which was actually litigated and which was necessary to the original judgment." Yamulla Trucking & Excavating Company v. Justofin, 771 A.2d 782, 785-86 (Pa. Super. 2001). Additionally, we note that the parent doctrine of res judicata encompasses both technical res judicata and collateral estoppel.[7] Weney v. Workers' Compensation Appeal Board (MAC Sprinkler Systems, Inc.), 960 A.2d 949, 954 (Pa. Cmwlth. 2008). Technical res judicata, often referred to as claim preclusion, requires four identities in order to apply: "(1) identity of the thing sued upon or for; (2) identity of the cause of action;

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[7] "The doctrine of collateral estoppel, often referred to as issue preclusion, 'is designed to prevent relitigation of an issue in a later action, despite the fact that the later action is based on a cause of action different from the one previously litigated.'" Weney v. Workers' Compensation Appeal Board (MAC Sprinkler Systems, Inc.), 960 A.2d 949, 954 (Pa. Cmwlth. 2008) (quoting Pucci v. Workers' Compensation Appeal Board (Woodville State Hospital), 707 A.2d 646, 647-48 (Pa. Cmwlth. 1998)).

> Collateral estoppel applies where: (1) the issue decided in the prior case is identical to the one presented in the later case; (2) there was a final judgment on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party in the prior case and had a full and fair opportunity to litigate the issue; and (4) the determination in the prior proceeding was essential to the judgment.

Weney, 960 A.2d at 954.

(3) identity of the persons and parties to the action; and (4) identity of the quality or capacity of the parties suing or sued." Weney, 960 A.2d at 954 (quoting Henion v. Workers' Compensation Appeal Board (Firpo & Sons, Inc.), 766 A.2d 362, 366 (Pa. Cmwlth. 2001)). "Generally, causes of action are identical when the subject matter and the ultimate issues are the same in both the old and the new proceedings." Id.

In Callaghan I, Appellant sued under the federal ADA and state Whistleblower Law alleging that: (1) Township refused to comply with the ADA by refusing to hire him permanently as a Highway Inspector; (2) Township failed to perceive that Appellant was totally disabled; (3) Township terminated Appellant because of his actual or perceived disability despite the fact that he could have continued in the position of Highway Inspector; and (4) Township removed Appellant as Highway Inspector/pothole filler as a result of his whistleblowing. Appellant sued for compensatory and punitive damages, back pay, front pay, and the monetary value of the loss of salary and employment benefits. In the instant case, Callaghan II, Appellant sues based upon the same factual circumstances as in Callaghan I, but raises claims pursuant to the federal FMLA and the Township Home Rule Charter instead of claims pursuant to the federal ADA and the state Whistleblower Law. However, because there is "identity of the thing sued upon or for" (i.e., both cases involve his employment claims with Township for the same period of time under the same circumstances), the first of the four requirements for technical res judicata is satisfied. The third and fourth requirements are also satisfied, as there is identity as to the parties, Appellant and Township, and as to the capacities and qualities of these parties. However, the second requirement of the identity of the cause of action remains. Thus, whether the doctrine of res judicata applies to bar the claims in

Callaghan II against Township turns on whether Callaghan I and Callaghan II arise from the same cause of action and/or whether the claims Appellant now asserts against Township could have been raised in Callaghan I.

In Helmig v. Rockwell Manufacturing Company, 389 Pa. 21, 131 A.2d 622 (1957), the Pennsylvania Supreme Court "applied res judicata" when the first and second suits were couched in two different legal theories, assumpsit and trespass respectively. The fact that the plaintiff sought punitive damages in the second suit in addition to the compensatory damages claimed in both suits was not deemed important when the acts complained of in both actions were identical and would involve calling the same witnesses and introducing the same evidence. Helmig, 389 Pa. at 29-30, 131 A.2d at 626-27. In these circumstances, the Supreme Court in Helmig "pierce[d] the technical differences between the two actions, t[oo]k a broad view of the subject, and [considered] the actual purpose[s] to be attained." Brown v. City of Philadelphia, 2001 WL 884555 at 7 (E.D.Pa. 2001). "Multiple claims do not arise solely because a number of different legal theories deriving from a specific incident are used to assert liability." Id. at 8. Although there may be different shadings of the facts, different elements of the facts may be emphasized between the two lawsuits, and different kinds of relief have been requested, the cause of action still arises from the same operative set of facts and, therefore, remains essentially identical. Id. Moreover,

> "A plaintiff must recover all damages arising from given operative facts in a single action when the first forum has the ability to give the relief sought in the second forum." [internal citation omitted] Failure to raise a claim in the first forum and subsequently asserting it in an action arising out of the same facts constitutes a splitting of causes of action.

Hillgartner, 936 A.2d at 141 (quoting International Prisoners' Union v. Rizzo, 356 F.Supp. 806, 810 (E.D.Pa. 1973)).

Therefore, although Appellant has couched his suits in different legal theories, because the causes of action arise from the same operative set of facts, the acts complained of are identical, and the federal court had the ability to give, in Callaghan I, the relief sought in Callaghan II, res judicata would apply.

Appellant relies upon McArdle v. Tronetti, 627 A.2d 1219 (Pa. Super. 1993) (McArdle II) in support of his argument. McArdle II, decided by the Superior Court, was filed subsequent to the federal claim filed in McArdle v. Tronetti, 769 F.Supp. 188 (W.D. Pa. 1991) (McArdle I). McArdle I was filed in federal court and alleged both federal and state claims on the same operative facts against the same defendants sued in McArdle II, the state suit. The federal court dismissed the claims in McArdle I on summary judgment based upon federal immunity provisions related to the federal claims; however, the federal court *declined to exercise its discretionary jurisdiction over the various pendent matters pursuant to Pennsylvania claims that had been raised.* Id. at 193. In McArdle II, the Superior Court stated that the doctrine of res judicata would bar re-litigation of issues that were raised or could have been raised in a prior proceeding, ("to conserve limited judicial resources, [to] establish certainty and respect for court judgments, and [to] protect the party relying upon the judgment from vexatious litigation"), and that "the doctrine must be liberally construed and applied without technical restriction." McArdle II, 627 A.2d at 1222. Moreover, the Superior Court relied upon Comment e of the Restatement (Second) of Judgments, and stated in relevant part:

> A given claim may find support in theories or grounds arising from both state and federal law. When the plaintiff brings an action on the claim in a court, either state or federal, in which there is no jurisdictional obstacle to his advancing both theories or grounds, but he presents only one of them, and judgment is entered with respect to it, he may not maintain a second action in which he tenders the other theory or ground. If, however, the court in the first action would clearly not have had jurisdiction to entertain the omitted theory or ground (*or, having jurisdiction, would clearly have declined to exercise it as a matter of discretion*), then a second action in a competent court presenting the omitted theory or ground should not be held precluded.

McArdle II, 627 A.2d at 1223 (quoting Restatement (Second) of Judgments § 25, Comment e) (emphasis added). Thus, the McArdle II Court, in reliance upon the Restatement, concluded that it "fail[ed] to discern any logical difference between" a case where the theory was not raised in the first action at all and one "where the theory of relief actually is raised and the court, despite possessing jurisdiction, declines to exercise it as a matter of discretion," as occurred in McArdle I. McArdle II, 627 A.2d at 1223. As such, the Superior Court, in McArdle II, declined to apply res judicata to bar any claims subsequently asserted in state court over which the federal court had declined to exercise jurisdiction in McArdle I.

In contrast to McArdle I, in Callaghan I, the federal district court *exercised its discretionary jurisdiction* over the pendent state claims raised pursuant to the Whistleblower Law and could also have considered claims pursuant to the Home Rule Charter now raised in Callaghan II. Therefore, McArdle II is distinguishable and does not support Appellant's argument.

The trial court relied on Churchill v. Star Enterprises, 183 F.3d 184 (3d. Cir. 1999) (Churchill II), in support of its order granting summary judgment in favor of

Township. Appellant argues that, although Churchill II presents a similar procedural fact pattern to this case, it is not mandatory authority since both Churchill v. Star Enterprises, 3 F.Supp.2d 622 (E.D.Pa. 1998) (Churchill I) and Churchill II were brought in federal court, whereas Callaghan I was brought in the federal district court and ultimately affirmed by the Third Circuit, and Callaghan II was brought in state court, the Court of Common Pleas, and is now before this Court on appeal. Churchill II is remarkably similar to the instant matter with the exception that the Churchill I appellant *first* raised the FMLA claim and only later raised claims under the ADA and the Pennsylvania Human Relations Act[8] (PHRA) in Churchill II - the reverse chronological order of how those claims were brought in Callaghan I and II. In Churchill II, the Third Circuit affirmed the district court's order granting summary judgment, and held that the second suit was precluded because the actions pursuant to the FMLA, ADA, and PHRA were based on the same cause of action. Churchill II, 183 F.3d at 195. As far as the necessity to exhaust administrative remedies for the ADA and PHRA claims, the Third Circuit stated that the appellant "should have moved to consolidate Churchill I and Churchill II for they advanced the same cause of action" and appellant "could have filed both the PHRA and ADA claims presented in Churchill II in time to join them with her FMLA claim in Churchill I." Id. at 191. Although Churchill II was decided in federal court, the analysis therein is congruent with Pennsylvania law, which clearly bars one from bringing additional actions against the same defendant based on different legal theories arising out of the same factual transactions. Spinelli v. Maxwell, 430 Pa. 478, 480, 243 A.2d 425, 427 (1968) (stating that recovery for injuries arising from the same cause and the same act must be pursued in one action and the entry of judgment in the first bars the other).

[8] Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§ 951-963.

As Township points out, res judicata prevents the piecemeal litigation of claims and "relieve[s] the parties of the cost and vexation of multiple lawsuits, conserve[s] judicial resources, prevent[s] inconsistent decisions, and encourage[s] reliance on adjudications." Balent v. City of Wilkes-Barre, 542 Pa. 555, 566, 669 A.2d 309, 315 (1995).

We agree with the trial court that Appellant's complaints are based on different legal theories that arise out of the same factual transaction. Therefore, for all of the foregoing reasons, we conclude that the action against the Township in Callaghan II is barred by the doctrine of res judicata.

II. Whether summary judgment was properly granted in favor of Association

Appellant next argues that the trial court's grant of summary judgment in favor of Association was not proper because material facts remain in dispute about whether Association acted in bad faith when it failed to act upon Appellant's alleged grievance, thereby breaching its duty of fair representation to him. Appellant argues that the Association acted in bad faith when it failed to arbitrate his grievance, did not take his issues seriously, or consider them meritorious.

A union breaches its duty of fair representation to an employee when "refusal to submit a grievance is due to arbitrariness, discrimination or bad faith." Casner v. American Federation of State, County and Municipal Employees, 658 A.2d 865, 870 (Pa. Cmwlth. 1995). "[A] union is not responsible for negligence in processing a grievance" but, instead, is "only responsible to its members for acts of bad faith with

respects to a grievance."[9] Martino v. Transport Workers' Union of Philadelphia, Local 234, 505 Pa. 391, 407 n.12, 480 A.2d 242, 250 n.12 (1984) (relying upon Ziccardi v. Commonwealth, 500 Pa. 326, 456 A.2d 979 (1982)). As the Supreme Court noted in Martino, the necessity to allege specific facts showing bad faith by a union is a *high* standard that "insulates the union from exposure where, after a proper exercise of discretion, it declines to process a frivolous and meritless grievance" in a case of a disgruntled employee. Id. The Supreme Court further elaborated:

> Moreover, we noted the possibly subliminal concern of both employer and union, expressed in argument, that opening the courts to any action by disgruntled employees will force unions to take all grievances to arbitration in order to avoid expensive lawsuits. We cannot believe that experienced, responsible unions will be: so deficient in judgment that they cannot recognize frivolous cases; so ineffective that they cannot demonstrate to aggrieved members of the unit why there is little chance of success at arbitration; or so lacking in courage that they will not make the hard choices required of all fiduciaries when the separate interests of their beneficiaries conflict among themselves, as in seniority disputes, or with the interest of the whole, as in dealing with a dangerously incompetent, violent or clearly dishonest worker. Whether this union's judgment in making that hard choice was so woeful as to constitute bad faith will be the threshold question before Common Pleas here.

Id.

Consequently, we must determine whether Appellant has set forth the necessary factual allegations of bad faith with specificity sufficient to overcome the motion for summary judgment. Appellant's Complaint alleges that Association's refusal to submit his grievance was done in bad faith because: (1) after Appellant

[9] This rule of law has been proclaimed as "the Ziccardi rule." Martino v. Transport Workers' Union of Philadelphia, Local 234, 505 Pa. 391, 407 n.12, 480 A.2d 242, 250 n.12 (1984) (relying upon Ziccardi v. Commonwealth, 500 Pa. 326, 332, 456 A.2d 979, 982 (1982)).

brought his concerns about Township's alleged violation of the FMLA and Home Rule Charter to the Association president in late 2005, the president was awarded the job of "highway inspector" over Appellant in what Appellant claims was a violation of the collective bargaining agreement (CBA); (2) after sending the Association president a statement of his dispute with Township, he received assurances from Association president that "he would help [Appellant]," (Compl. ¶ 64), and finally, Appellant received a letter from Township dated April 19, 2006, that it had only recently received notice of Appellant's grievance and it may be untimely; (3) at the time of Appellant's termination in September 2006, after a meeting with the Association attorney, Appellant alleges he was told he was a "trouble maker" and that his Association could not help him; (4) Appellant requested help from the new Association president on September 27, 2006, in grieving the September 22, 2006, termination letter, but was informed that Association needed additional time to perform its own investigation; and (5) certain agents of Association and Township conspired to ignore and suppress his rights, that Association had a conflict of interest with Township, and that Association had a pattern of ignoring its responsibilities to its members such as when it entered into a new CBA in January 2006 requiring its members to begin paying for certain employee benefits that previously had been provided by Township.

Here, where the claim is against a union by a union member asserting a breach of the duty of fair representation due to bad faith or arbitrariness, the broad discretion possessed by a union under the Ziccardi rule profoundly influences our review of this case. In determining whether sufficiently specific facts have been alleged to support a determination that the Association acted arbitrarily or in bad faith, mere conclusory allegations are not sufficient. Hughes v. Council 13, American Federation of State,

County, and Municipal Employees, AFL-CIO, 629 A.2d 194, 195 (Pa. Cmwlth. 1993). See also Fouts v. Allegheny County, 440 A.2d 698, 701 (Pa. Cmwlth. 1982) (concluding that "appellant's assertions that the Union acted willfully, wantonly and fraudulently were mere conclusions of law on his part and d[id] not rise to the level of well-pleaded facts" in affirming dismissal of the complaint).

Appellant insists that Hughes is not controlling in his case because he did allege specific facts demonstrating bad faith by his Association; whereas, in Hughes, the court concluded that it could find no facts in its "review of the record showing that [union] had breached its duty of fair representation" to appellant. Hughes, 629 A.2d at 195. Appellant further disputes the trial court's statement that he alleged only a "conclusory allegation" that Association's president was "angling" for a better job as a reason why he refused to investigate and pursue Appellant's grievance, noting that the record does not establish that Association engaged in any type of review. Appellant maintains that he testified in detail about Association president's conflict of interest. In sum, Appellant argues that the record contains facts which, if proven, would establish a breach of duty by Association and, thus, granting summary judgment in favor of Association was an error of law.

After review, we agree with the trial court that Appellant has not alleged specific facts showing "this union's judgment in making that hard choice [of not pursuing his grievance] was so woeful as to constitute bad faith." Martino, 505 Pa. at 407 n.12, 480 A.2d at 250 n.12. As set forth by Appellant in his Memorandum of Law filed with the trial court, Appellant met with Association's counsel to discuss his grievances, and was allegedly told his grievances were without merit. (Plaintiff's Memorandum of Law in Response to Motion at 2-3.) Upon his termination,

Appellant submitted a letter to the currently serving Association president stating that he desired his termination be grieved. (Appellant's Letter to Association President (September 27, 2006), R.R. at Ex. F to Plaintiff's Response to Association's Motion.) Association's counsel wrote to Township to formally give notice of a grievance on Appellant's behalf. (Association Counsel's Letter to Township (September 28, 2006), R.R. at Ex. G to Plaintiff's Response to Association's Motion.) Association challenged Appellant's termination "on the basis of [Appellant]'s assertion that the termination is without cause and/or the Township's disparate treatment towards him related to the failure to transfer him." (Association Counsel's Letter to Township (September 28, 2006), Ex. G to Plaintiff's Response to Association's Motion.) Association's counsel also requested additional time to investigate Appellant's claims. (Association Counsel's Letter to Township (September 28, 2006), R.R. at Ex. G to Plaintiff's Response to Association's Motion.) The Association ultimately decided not to pursue Appellant's grievance to arbitration. Association ensured that Appellant filed a timely grievance and processed it even after it determined that it was highly unlikely that an arbitrator would reverse Township's decision to discharge Appellant. Appellant's claim that the Association president was awarded a new position by Township, alone, is not sufficient to create a material issue of bad faith. There is no evidence that the president[10] acted alone in making a decision about Appellant's representation; by Appellant's admission, Association's counsel was involved in the decision-making. Appellant's argument seems to be predicated upon Association's ultimate decision not to pursue Appellant's grievance as if this

[10] In fact, even according to Appellant, there were at least two people who served as Association president during the relevant time periods herein: Eric Gillard and Dan Mariani. (Callaghan Dep. at 13, R.R. at Ex. K; Letter from Appellant to Mr. Mariani (September 27, 2006) at 1, R.R. at Ex. L.)

unfavorable decision for Appellant was enough to support Appellant's assertions of bad faith on the part of Association. However, in view of the standard described in Martino, Appellant's allegations do not set forth the necessary factual allegations for a claim that, in making its decision not to pursue Appellant's grievance, the Association's judgment was "so woeful as to constitute bad faith." Martino, 505 Pa. at 407 n.12, 480 A.2d at 250 n.12 (1984). The Association's decision also is consistent with the order granting summary judgment in favor of Township in Callaghan I. We, therefore, agree with the trial court that Appellant has failed to present a prima facie case of bad faith by Association in representing his grievance. Thus, summary judgment was properly granted in favor of Association.

Accordingly, we affirm the trial court's April Order and July Order, concluding that res judicata precludes the claims against Township in Callaghan II, and that Appellant failed to establish a prima facie case against Association.

RENÉE COHN JUBELIRER, Judge

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Daniel Callaghan,	:	
	:	
Appellant	:	
	:	
v.	:	No. 1544 C.D. 2010
	:	
Haverford Township and Haverford Township Employees Association	:	

O R D E R

NOW, July 25, 2011, the April 6, 2010 and July 16, 2010 Orders of the Court of Common Pleas of Delaware County in the above-captioned matter are hereby **AFFIRMED**.

RENÉE COHN JUBELIRER, Judge