

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONSTANCE L. MELLODY : CIVIL ACTION
 :
v. :
 :
UPPER MERION AREA :
SCHOOL DISTRICT, et al. : NO. 97-5408

MEMORANDUM

Dalzell, J.

January 30, 1998

Constance Mellody brought this action pursuant to 42 U.S.C. § 1983, claiming that defendants violated her First Amendment right to free speech when they transferred her to another school after she criticized a school program. Defendants have move to dismiss pursuant to Fed. R. Civ. P. 12(b)(1), arguing that she failed to exhaust contractual/administrative remedies. Though our resolution is by no means free from doubt, we will deny the motion.

I. Factual Background

Constance Mellody has been an employee of the Upper Merion Area School District for the past seventeen years, seven years of which she spent as a teacher/reading specialist at the Caley Road School. Since 1994, Ms. Mellody was, by her own admission, an outspoken critic of a Pennsylvania state-mandated and state-funded program called "Instructional Support Team" (hereinafter "IST"), which was in effect at Caley Road School. In late 1996 or early 1997, the School District conducted a survey of teachers to solicit views about the IST. Ms. Mellody responded to the survey by providing both the program head and the school principal with her written assessment of the program

at Caley Road School. Ms. Mellody alleges that on May 23, 1997, in retaliation of her written assessment and prior criticism of the IST program, she was transferred to an inferior teaching position at another school.

Ms. Mellody brought this action on August 25, 1997, claiming that the transfer chilled her First Amendment right to free speech. After a request for temporary restraining order was denied that day, and before commencement of the preliminary injunction hearing, defendants moved to dismiss this action pursuant to Fed. R. Civ. P. 12(b)(1).¹ They argue that we lack

¹ A Rule 12(b)(1) motion to dismiss for lack of subject matter jurisdiction can take two forms: it can attack a complaint on its face, known as a "facial attack," or it can attack the existence of subject matter jurisdiction, commonly referred to as a "factual attack." See Mortensen v. First Fed. Sav. and Loan Ass'n, 549 F.2d 884, 891 (3d Cir. 1977); see also Young v. Francis, 820 F.Supp. 940, 943 (E.D. Pa. 1993). Mellody's motion is a factual attack because it challenges the court's subject matter jurisdiction over this action. Thus, according to our Court of Appeals,

[b]ecause at issue in a factual 12(b)(1) motion is the trial court's jurisdiction -- its very power to hear the case -- there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.

Mortenson, 549 F.2d at 891. The burden of proving that subject
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subject matter jurisdiction because plaintiff failed² to pursue the grievance and arbitration procedures provided for in the September 11, 1996 collective bargaining agreement (hereinafter "Agreement") between the Upper Merion Area Education Association (hereinafter "teachers' union"), of which plaintiff is a member, and the Upper Merion Area Board of School Directors (hereinafter "school district"), see Docket Entry no. 5 at ¶¶19 et seq.

II. Analysis

Article XIX of the Agreement provides that whenever a "Professional Employee" -- which definition includes plaintiff -- believes that there is a basis for a grievance -- as defined by the Agreement, see infra -- the employee is first required to discuss the alleged "grievance" with her immediate supervisor in an attempt to resolve the matter informally, id. at ¶19.6.1. If the matter is not resolved informally, the grievant may then submit a written grievance which is processed through a three-tiered system that culminates in arbitration, id. at ¶19.6.2.³

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matter jurisdiction exists lies with the plaintiff. Young v. Francis, 820 F.Supp. 940, 943 (E.D. Pa. 1993).

² Plaintiff concedes that on June 30, 1997 she filed a written grievance at Level One of the collective bargaining agreement's grievance arbitration process. The grievance was denied on July 3, 1997, and she did not pursue her contractual remedies beyond that point.

³ The grievance procedure proceeds as follows:

- a. Level One. [The grievant] shall, within thirty . . . days from the time of the alleged

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The parties differ over the proper Supreme Court authority to which we should refer in determining whether plaintiff is required to exhaust her administrative remedies under the Agreement. Plaintiff offers the case trilogy of Alexander v. Gardner-Denver Co., 415 U.S. 36, 94 S.Ct. 1011 (1974), Barrentine v. Arkansas-Best Freight Sys., Inc., 450 U.S. 728, 101 S.Ct. 1437 (1981), and McDonald v. City of West Branch, 466 U.S. 284, 104 S.Ct. 1799 (1980), in support of her argument

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occurrence, file a written grievance with a principal or supervisor and the President of the Association. The principal or supervisor in consultation with the Superintendent shall review the grievance and shall respond within ten . . . days from receipt of the grievance with a written decision on the matter.

b. Level Two. If the grievance has not been resolved at Level One, the grievant shall, within ten . . . days, submit the grievance in writing to the President of the Board. The President of the Board will, within fifteen . . . days, hold a hearing before a committee of the Board appointed by him. The committee shall, within ten . . . days of the hearing date, respond with a written decision to the grievant.

c. Level Three. If the grievance has not been resolved by the Board in Level Two, the Professional Employee may submit the grievance to arbitration within ten . . . days from the date of the decision at Level Two. . . .

that her claim is neither subject to the Agreement's arbitration provisions nor barred by her failure to exhaust them. Defendants counter with Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S.Ct. 1647 (1991), which they argue bars plaintiff's claim for failing to pursue to conclusion the agreed-upon grievance and arbitration remedies.

In order to decide which is the proper authority to follow, we will examine the factors Gilmer cited in distinguishing it from the Alexander-Barrentine-McDonald trilogy:

First, [Alexander-Barrentine-McDonald] did not involve the issue of the enforceability of an agreement to arbitrate statutory claims. Rather, they involved the quite different issue whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims. Since the employees there had not agreed to arbitrate their statutory claims, and the labor arbitrators were not authorized to resolve such claims, the arbitration in those cases understandably was held not to preclude subsequent statutory actions. Second, because the arbitration in those cases occurred in the context of a collective-bargaining agreement, the claimants there were represented by their unions in the arbitration proceedings. An important concern therefore was the tension between collective representation and individual statutory rights, a concern not applicable to the present case. Finally, those cases were not decided under the [Federal Arbitration Act], which . . . reflects a "liberal federal policy favoring arbitration agreements."

id. at 1657 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 625, 105 S.Ct. 3346, 3353 (1985)). The first Gilmer element compels us to reject plaintiff's argument that the Alexander-Barrentine-McDonald line of cases is applicable to the present action, because the issue of law before us is not "whether arbitration of contract-based claims precluded subsequent judicial resolution of statutory claims," - - because no arbitration has occurred here -- but instead "the enforceability of an agreement to arbitrate statutory claims," Bolden v. Southeastern Pa. Transp. Auth., 953 F.2d 807, 826 n.26 (3d Cir. 1991)(quoting Gilmer, 111 S.Ct. at 1656-57)(emphasis added). Whether we may apply Gilmer in determining the latter relevant issue, however, is a much closer question, see Bolden, 953 F.2d at 626 and n.26, which requires us to examine the remaining elements considered in Gilmer.

Plaintiff attempts to distinguish Gilmer principally on the second element, arguing that because the grievance and arbitration procedure here was part of a collective bargaining agreement, rather than a private agreement -- as in Gilmer -- Gilmer is per se inapplicable.⁴ We decline to accept what seems

⁴ We perceive no principled distinction between a union entering an agreement to arbitrate statutory claims and an individual doing so. Indeed, as our Court of Appeals has stated, "a union's authority as exclusive bargaining agent necessarily entails some restrictions on constitutional rights that individual employees would otherwise enjoy." Bolden, 953 F.2d at 827 (citing Abood v. Detroit Board of Educ., 431 U.S. 209, 97 S.Ct. 1782 (1977)). To that extent, we agree with the Fourth Circuit's holding in Austin v. Owens-Brockway Glass Container,
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to us to be plaintiff's facile reading of Gilmer, and instead look to Gilmer's logic and language. By parsing the language quoted supra at 5, we think that Gilmer's concerns were twofold in distinguishing the collective bargaining setting from that of individual bargaining: first, Gilmer was concerned that there be an agreement -- whether by the teachers' union or by the individual -- to grieve-arbitrate statutory claims; and second -- and more importantly -- Gilmer cited the "important concern [of] the tension between collective representation and individual statutory rights," id. at 1657, due to the crucial fact that in a collective bargaining setting the union normally controls the grievance-arbitration process.

As to the first concern, the teachers' union here agreed to arbitrate statutory as well as contractual claims, as evidenced by the broad definition of "grievance" in the Agreement: "A grievance is defined as a claim that there has been a violation, misinterpretation or misapplication of the

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Inc., 78 F.3d 875 (4th Cir. 1996), that "[w]hether the dispute arises under a . . . simple employment contract, or a collective bargaining agreement, an agreement has yet been made to arbitrate the dispute. So long as the agreement is voluntary, it is valid, and we are of opinion it should be enforced." Id. at 885. We also note that the two Circuits which have held to the contrary have done so because of the "essential conflict . . . between majority and minority rights" caused by the fact that the grievance and arbitration procedure can be invoked only by the union and not by the worker. Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir. 1997); see also Varner v. National Super Markets, Inc., 94 F.3d 1209, 1213 (8th Cir. 1996). This circumstance, however, is not present in the instant case. See infra.

terms and conditions of employment as contained in existing State Laws, existing school policy, or any matter incorporated in this Agreement," id. at ¶19.1 (emphasis added); see also id. at ¶4.1 ("The Board hereby retains and reserves all rights and responsibilities vested in it by the laws and the Constitution of the Commonwealth of Pennsylvania and the United States."); id. at ¶5.1 ("The parties agree that they will not discriminate against any Professional Employee because of Association activity, age, sex, race, color, creed, national origin, marital status, religion, or disabilities."). The Agreement is unambiguous that it covers statutory claims, and thus such claims are subject to the grievance-arbitration process in the Agreement. Cf. Alexander, 94 S.Ct. at 1015 n.3 (reproducing collective bargaining agreement provisions which provide, inter alia, that the grievance-arbitration procedure may be invoked "[s]hould differences arise between the Company and the Union as to the meaning and application of the provisions of this Agreement") (emphasis added).⁵

⁵ Although the plain language of the Agreement is sufficient to support inclusion of statutory claims within the scope of the Agreement's grievance-arbitration procedures, we also note that under the Federal Arbitration Act's (hereinafter "FAA") "liberal federal policy favoring arbitration agreements," Gilmer, 111 S.Ct. at 1657, whether a certain issue is covered by a collective bargaining agreement is for a court to decide, see United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 574, 583 n.7, 80 S.Ct. 1347, 1353 n. 7 (1960), and "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor

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As to the second Gilmer concern regarding collective versus individual bargaining, we reject plaintiff's bald assertion that "it is the teacher's union, and not Mrs. Mellody herself, that must process grievances under the [Agreement]," Pl.'s Mem. Law Opp'n Mot. Dismiss at 6. To the contrary, the plain language of the Agreement allows the plaintiff herself -- without any assistance from the teachers' union -- to pursue her grievance through every level of the formal grievance-arbitration process, see id. at ¶19.6.2(a) ("If the grievant is not satisfied with results of his/her informal discussion, he/she shall . . . file a written grievance with the principal or supervisor and the President of the Association."); id. at ¶19.6.2(b) ("If the grievance has not been resolved at Level One, the grievant shall . . . submit the grievance in writing to the President of the Board."); id. at ¶19.6.2(c) ("If the grievance has not been resolved by the Board in Level Two, the Professional Employee may submit the grievance to arbitration"). Since the teachers' union's involvement is not required at any stage of the grievance-arbitration process the Agreement creates, it is immaterial to the present dispute whether there is a conflict of interests between plaintiff and the teachers' union. In that

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of coverage." Id. at 1353; see also id. at 1354 (holding that only "the most forceful evidence of a purpose to exclude the claim from arbitration" will avoid a finding that the grievance is covered by the collective bargaining agreement). We cannot say here "with positive assurance" that the Agreement's arbitration provisions are not applicable to the dispute at hand, and thus we find that they are included.

crucial sense, the grievance-arbitration process more closely resembles the one analyzed in Gilmer.

As to the last requirement listed in Gilmer -- i.e. that the FAA applies to the Agreement, thus carrying with it a "liberal federal policy favoring arbitration agreements," 111 S.Ct. at 1657 -- plaintiff has offered nothing but the bald assertion that the Agreement is not one "evidencing a transaction involving commerce," see 9 U.S.C. § 2, and thus is outside the scope of the FAA. Moreover, even if the FAA does not literally apply in this case, see, e.g., Cirelli v. Town of Johnston School Dist., 888 F.Supp. 13 (D.R.I. 1995), plaintiff has failed to point out features of the instant Agreement before us that disturb a similarly liberal policy regarding the scope of arbitration under Pennsylvania law, see Pa. Cons. Stat. Ann. § 7303 (West 1982); Johnson v. Pennsylvania Nat'l Ins. Cos., 594 A.2d 296, 300 (Pa. 1991)(citing Mendelson v. Shrager, 248 A.2d 234 (Pa. 1968)); Flightways Corp. v. Keystone Helicopter Corp., 459 Pa. 660, 331 A.2d 184 (Pa. 1975). Furthermore, plaintiff is mistaken when she relies on Alexander to cast aspersions on the general ability of arbitrators to hear and decide statutory claims: "[W]e are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution," Mitsubishi Motors Corp., 105 S.Ct. at 3354; see also Rodriguez de Quijas v.

Shearson/American Express, Inc., 490 U.S. 477, 109 S.Ct. 1917, 1920 (1989).

The Agreement before us does not run afoul of any of Gilmer's listed concerns, so we therefore find it applicable to the present action. Thus, "'having made the bargain to arbitrate, [plaintiff] should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue,'" Gilmer, 111 S.Ct. at 1652 (quoting Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S.Ct. 2332, 2337 (1987)). "If such an intention exists, it will be discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes." Id. The burden of proof in this regard is on plaintiff. Id.

Plaintiff has cited nothing from the text or legislative history of 42 U.S.C. § 1983 that demonstrates a Congressional intent to exempt § 1983 claims from grievance-arbitration provisions in collective bargaining agreements. In Patsy v. Board of Regents, 457 U.S. 496, 501-02, 102 S.Ct. 2557, 2560 (1982), however, the Supreme Court examined the language and legislative history of 42 U.S.C. § 1983 in reaffirming the long line of cases that "stated categorically that exhaustion is not a prerequisite to an action under § 1983." Id. (citing cases); see also Heck v. Humphrey, 114 S.Ct. 2364, 2369 (1994); Hochman v. Board of Educ., 534 F.2d 1094, 1096 (3d Cir. 1976). There are, though, different kinds of remedies to exhaust, and the specific

holding of Patsy was that "exhaustion of state administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." Id. at 2568; see also McCarthy v. Madigan, 112 S.Ct. 1081, 1086-88 (1992)(discussing Patsy's holding solely within the context of administrative agency remedies). In addition, none of the precedent Patsy cited, nor any of its progeny in this Circuit, address the question of whether voluntarily agreed-to remedies in private collective bargaining agreements are properly includable within the Patsy prohibition. It thus appears to be an open question whether plaintiff should be required after Gilmer to exhaust her contractual remedies with regard to her First Amendment claim.

Three reasons suggest that we should not require her to do so. First, given the Supreme Court's near uniform application of the prohibition on exhaustion requirements for § 1983 actions, see Hochman, 534 F.2d at 1096 (citing Supreme Court cases), we think it more likely than not that the Court would find no exception despite the private and voluntary nature of Ms. Mellody's alternative remedy. Second, at least three other Circuits -- two of them pre-Gilmer -- agree with that conclusion, and have extended the logic of Patsy, albeit after only brief analysis, to preclude exhaustion in labor settings. See Butcher v. City of McAlester, 956 F.2d 973, 979 (10th Cir. 1992); Narumanchi v. Board of Trustees, 850 F.2d 70, 73 (2d Cir. 1988); Clark v. Yosemite Community College Dist., 785 F.2d 781, 790-91 (9th Cir. 1986); see also Freeland v. Lower Merion School Dist.,

Civ. A. No. 94-2559, 1995 WL 129200 at *3 (E.D. Pa. Mar. 24, 1995); Comer v. Board's Legal Dep't, Civ. A. No. 84-3206, 1985 WL 2988 at *1 (E.D. Pa. Oct. 3, 1985). Third, our Court of Appeals has admonished that "[w]hen appropriate federal jurisdiction is invoked alleging violation of First Amendment rights . . . we may not insist that [plaintiff] first seek his remedies elsewhere no matter how adequate those remedies may be." Hochman, 534 F.2d at 1097.

We recognize that this conclusion is by no means free from doubt, particularly in light of the fact that our Court of Appeals has not since Gilmer revisited the issue of preclusion of exhaustion of remedies in § 1983 actions. The issue here goes to our subject matter jurisdiction in this action, and thus its resolution through an immediate appeal "may materially advance the ultimate termination of the litigation", 28 U.S.C. § 1292(b). Since the collision of two powerful federal interests is at stake here -- one favoring arbitral resolution of disputes, especially in the labor setting, the other favoring judicial resolution of disputes involving free expression -- this issue palpably involves an important and "controlling question[] of law as to which there is substantial ground for difference of opinion." Id.

An Order follows.

Stewart Dalzell, J.