

No. _____

IN THE

Supreme Court of the United States

TERRY FOSTER and JANIE BREWER,

Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1516;

KIRK DOUGLAS, Business Manager/Representative;

SANDRA LEE, Secretary, in her individual and official capacities;
SHAWN PHARES, Business Manager/Representative, in his individual
and official capacities; DAVID McDONALD, President, in his individual
and official capacities; THOMAS WIGTON, Recording Secretary, in his
individual and official capacities; DAVE DOBBINS, Treasurer, in his
individual and official capacities; and LARRY DAUK, JOSH HARDIN,
CLINTON JOHNSON, BILL WINN, and WILLIAM WATSON,
Executive Board, in their individual and official capacities,

Respondents.

On Petition for a Writ of Certiorari To the
United States Court of Appeals for the Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did expulsion of a union member without his presence constitute a lack of due process, good cause as defined by 157.01 LMRDA, Section 501(b)?
2. Did expulsion of a union member without due process constitute violation of fiduciary duties by officers under Section 501 LMDRA?
3. Did the United States District Court lack subject matter jurisdiction over the failure to allege “the use of financial improprieties prescribed by Section 50(a)?
4. Whether good cause is limited to the misuse of union funds.
5. Did the denial of union membership to a prospective member constitute good cause and a violation of a fiduciary duty pursuant to 517.01 LMRDA, Section 501(b)?

PARTIES TO THE PROCEEDING

The parties to the proceeding in the United States District Court for the Eastern District of Arkansas, Northern Division, and the United States Court of Appeals for the Eighth Circuit were Petitioners, Terry Foster and Janie Brewer, and Respondents, International Brotherhood of Electrical Workers Local 1516; Kirk Douglas, Business Manager/Representative; Sandra Lee, Secretary, in her individual and official capacities; Shawn Phares, Business Manager/Representative, in his individual and official capacities; David McDonald, President, in his individual and official capacities; Thomas Wigton, Recording Secretary, in his individual and official capacities; Dave Dobbins, Treasurer, in his individual and official capacities; and Larry Dauk, Josh Hardin, Clinton Johnson, Bill Winn and William Watson, Executive Board, in their individual and official capacities.

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PETITION FOR A WRIT OF CERTIORARI

Terry Foster and Janie Brewer’s petition for a writ of certiorari to review the denial of their motion to approve their Complaint under 29 U.S.C. § 501, for lack of subject matter jurisdiction by the United States District Court for the Eastern District of Arkansas, Northern Division, and affirmed on review by the United States Court of Appeals for the Eighth Circuit, *en banc*.

OPINIONS BELOW

On February 11, 2021, the United States Court of Appeals for the Eighth Circuit, *en banc*, denied rehearing the three-judge panel’s judgment. **App 2a.** The Eighth Circuit Court of Appeals affirmed the September 22, 2020 decision of the United States District Court for the Eastern District of Arkansas, Northern Division. **App 18a.**

JURISDICTION

The Court’s jurisdiction is invoked under 29 U.S.C. § 501(a) and (b), Section 101 of the Labor Management Reporting and Disclosure Act of 1959 (“LMRDA”), as amended, and Section 301 of the Labor Management Relations Act (“LMRA”), pursuant to 29 U.S.C. § 501(a) and (b).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment XIV § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Terry Foster, has been a member of the International Brotherhood of Electrical Workers (“IBEW”), Local 1516 since 1993. Foster’s qualifications are as an Arkansas State Master Electrician, Journeyman.

Pursuant to a Comet Program, Petitioner Foster worked non-union jobs to recruit new union members (salting agreement) at the request of Shawn Phares, Representative/Business Manager of IBEW Local 1516.

Respondents violated their fiduciary duty when Petitioner Foster was expelled by the Executive Board, sitting as a trial board of IBEW Local 1516, on February 7, 2020 while Foster was in Florida working on an assignment. The pretext for Foster’s expungement was his employment by a non-union contractor. Foster was prevented from attending the meeting intentionally because Respondent, Shawn Phares (“Phares”), would not postpone the meeting at the request of Foster. Petitioner Foster has been working for non-union contractors for years under the Comet Program which Respondent Phares had approved, a working tool to get new union members. Foster was expelled, a violation of the Respondents’ fiduciary duty, without benefit of appearing and defending the allegations, breach of contract and violation of due process and equal protection pursuant to the XIV Amendment to the United States Constitution.

Because Petitioner, Janie Brewer (“Brewer”) works as a team member with Petitioner Foster, Respondents, Shawn Phares, Business Manager, and Sandra Lee, Secretary, have prevented Petitioner Brewer from becoming a member of IBEW Local 1516 and denied her her right to take action to protect and improve her job through collective action.

Foster and Brewer exhausted their administrative remedies by discussing the matter with Brent Hall, IO Representative, and IBEW International Representative of the 10th District, who told them it was entirely up to Shawn Phares, Business Manager for IBEW Local 1516.

The events described constitute a lack of due process, good cause, a violation of Respondents' fiduciary duty, and a misuse of union funds through a misuse of Respondents' positions.

A. Court Must Grant Leave To Sue.

517.001 LMRDA, SECTION 501(b)

No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte.

517.005 LEAVE TO SUE

A union member's action charging violations of fiduciary duties by officers under section 501, LMRDA, is not maintainable if the member has not first obtained leave of court upon verified application and good cause shown as required by section 501(b).

Addison v. Grand Lodge of the International Association of Machinists, 318 F. 2d 504 (9th Cir. 1963).

(Technical Revisions: Dec. 2016)

517.100 GOOD CAUSE

Federal courts of appeal have differed over how to define "good cause" for purposes of granting union members leave to bring an action under §501(b). The Second Circuit demands the most of would-be plaintiffs, requiring that plaintiffs show a "reasonable likelihood of success on the merits." The D.C., 3d, 9th and 11th Circuits require less of plaintiffs, holding that if the complaint's allegations support a "good cause" for the suit, that is sufficient. These circuits also decree that a defendant can challenge "good cause" based only on issues such as plaintiff failing to follow the LMRDA's procedures (discussed above) or estoppel, and not based on disputing the complaint's allegations. The Fifth Circuit's test for "good cause" is that the plaintiff must show that the union's refusal to act in response to the plaintiff's request was "objectively unreasonable, assessed from the point of view of the membership as a whole." *See Hoffman v. Kramer*, 362 F.3d 308, 315-318, 174 LRRM 2489 (5th Cir. 2004) (discussing each of these definitions of "good cause"). *See also Executive Board Local 28, IBEW v. International Brotherhood of Electrical Workers*, 184 F.Supp. 649, 653-55 (D. Md. 1960) (in a private action by members comprising the local's executive board to terminate the trusteeship imposed on the local by the International, and

for an accounting of the local's funds, a verified complaint, which alleged acts that would be at least a misuse of union funds, constituted "good cause" within section 501 of the LMRDA).

(Revised: Dec. 2016)

517.200 STATE JURISDICTION

Section 501(b) itself provides that union members can bring claims for breach of fiduciary responsibility in federal district court or "in any State court of competent jurisdiction." However, a defendant to such a claim may remove the case to federal court. *See Clinton v. Hueston*, 308 F.2d 908, 51 LRRM 2273 (5th Cir. 1962).

As the following case demonstrates, union officers, employees and other representatives can also be sued for state law claims in state court: Gilbert and others sued in Oregon State court alleging union officers' disregard of union procedures in the conduct of elections and misuse of union funds. The union defended that Gilbert and the others had not secured the permission of the court to bring suit as required under section 501(b). The Oregon Supreme Court, in affirming the judgment of the lower court, ruled that section 501(b) is not an exclusive remedy; existing remedies are preserved by section 603 and that the Oregon State courts would have always entertained suits of this type, without the need for granting the permission referred to in the LMRDA. The lower court had appointed a CPA firm to report on union finances quarterly for period of one year and to supervise the impending election and report the results to the court.

Gilbert v. Hoisting and Portable Engineers, Local Union No. 701, 237 Or. 130, 54 LRRM 2048 (Sup. Or. 1963).

(Revised: Dec. 2016 and Technical Revisions: Dec. 2019)

Section 603(a) of the Labor Management Reporting and Disclosure Act of 1959 (29 USC § 523a), provides as follows:

"Except as explicitly provided to the contrary, nothing in this chapter shall reduce or limit the responsibility of any labor organization or any officer, agent, shop steward, or other representative of a labor organization, or of any trust in which a labor organization is interested, under any other Federal law or under the laws of any State, and, except as explicitly provided to the contrary, nothing in this chapter shall take away any right or bar any remedy to which members of a labor organization are entitled under such other Federal Law or law of any State."

B. Due Process.

Petitioner Foster alleges that his misconduct hearing violated his "due process" rights under Section 101 of the *Labor-Management Reporting and Disclosure Act* of 1959, as amended,

(“LMRDA”), Section 301 of the Labor Management Relations Act (“LMRA”), and his contractual rights secured by the union constitution under Arkansas state law.

1. Section 101.

Section 101¹ of the LMRDA forbids a labor organization from disciplining one of its members without providing the member a “full and fair hearing.” *United States v. Int’l Bhd. Of Teamsters*, 247 F.3d 370, 385 (2d Cir. 2001) [“IBT”] (quoting *Keubler v. Cleveland Lithographers & Photoengravers Union Local 24-P*, 473 F.2d 359, 363-64 (6th Cir. 1973)). “Not all of the due process protections available in the federal courts apply to union disciplinary proceedings.” *Id.* Instead, only the “basic principles of due process” apply. *Id.* Accordingly, “the LMRDA protects only against a breach of fundamental fairness.” *Id.* (internal quotation marks omitted) (quoting *Wildberger v. Am. Fed’n of Gov’t Employees AFL-CIO*, 86 F.3d 1188, 1193 (D.C. Cir. 1996)).

Petitioner Foster contends that he had an “absolute right” under the constitution to attend his union trial, which right was violated when he was forced to choose between it and “his job in Florida.” “A violation of a procedural provision of a union’s constitution is actionable only if the violation deprived the party of a full and fair hearing under the LMRDA.” *IBT*, 247 F.3d at 387. Foster alleges any facts sufficient to give rise to the inference that his trial was fundamentally unfair.

2. Section 301.

Next, Foster alleges that the same denial of due process violated Section 301 of the LMRA, which provides a cause of action for violation of a union’s constitution. *United Ass’n of Journeymen & Apprentices of Plumbing & Pipefitting Indus. Of U.S. & Canada, AFL CIO v. Local 334*, 452 U.S. 615, 619-22 (1981).

¹ Foster asserts a second cause of action under Section 102. Section 102 provides a private right of action for union members whose rights under Section 101 have been violated. *Finnegan v. Leu*, 456 U.S. 431, 439 n. 10 (1982).

He also pleads that he “exhausted his internal remedies.” Foster requested a hearing with Brent Hall, IO representative, an IBEW international representative of the 10th District, who informed Foster the decision was entirely up to Shawn Phares, Business Manager for IBEW Local 1516. As a practical matter, any meeting Foster would have been allowed to attend would have been a sham as Foster’s expungement was a foregone conclusion.

“Under both the LMRA and the LMRDA, the requirement that a plaintiff exhaust internal union remedies lies within the court’s discretion.” *Maddalone v. Local 17, United Bhd. Of Carpenters & Joiners of Am.*, 152 F.3d 178, 186 (2d Cir. 1998). Three factors guide the exercise of that discretion: “first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee’s grievance or to award him the full relief he seeks . . .; and third, whether exhaustion of internal procedures would unreasonably delay the employee’s opportunity to obtain a judicial hearing on the merits of his claim.” *Clayton v. Int’l Union, United Auto., Aerospace, & Agric. Implement Workers of Am.*, 451 U.S. 679, 681 (1981). All three factors point in favor of exhaustion here. Petitioner Foster was told by Bent Hall, IO representative, that the matter was left up to Shawn Phares. Petitioner Brewer alleges she was denied membership in the union based solely on her association with her former husband, Terry Foster.

REVIEW OF PROCEDURE IN UNITED STATES DISTRICT COURT

Petitioners, Terry Foster and Janie Brewer, filed their Complaint in the United States District Court, Eastern District of Arkansas, Northern Division, on August 4, 2020. On August 5, 2020, Foster and Brewer filed their Motion for Order Approving Complaint and Granting Plaintiffs Leave to Proceed with the Complaint.

On August 6, 2020, the United States District Court, Eastern District of Arkansas, Northern Division, the Honorable D.P. Marshall, Jr., requested a short brief explaining what kind of approval was sought and why this unusual step was necessary. **App 9a.**

On August 7, 2020, Petitioners filed a Brief in support of their Motion for Order Approving Complaint and Granting Plaintiffs Leave to Proceed with the Complaint.

On September 16, 2020, the United States District Court, Eastern District of Arkansas, Northern Division, the Honorable D.P. Marshall, Jr., dismissed the Complaint for lack of subject matter jurisdiction. **App 7a.**

On September 18, 2020, Petitioners filed their Motion to Reconsider or Amend Judgment.

On September 23, 2020, the Honorable D.P. Marshall, Jr. denied Petitioners' Motion to Reconsider or Amend Judgment. **App 5a.**

On October 13, 2020, Petitioners filed their Notice of Appeal.

APPELLATE PROCEDURE

An *en banc* panel of the Eighth Circuit Court of Appeals affirmed a three-judge panel of the Eighth Circuit Court of Appeals' affirmation of the United States District Court's denial of Petitioners' motion to approve their Complaint under 29 U.S.C. § 501, based on lack of subject matter jurisdiction. The basis of the District Court's judgment, finding *inter alia*, that:

Foster and Brewer have sued IBEW Local 1516 and various Union officers and officials. They allege unfair labor practices. Foster says the Union retaliated against him for decades because he worked at non-Union sites. He also says the Union jumped the books, depriving him of work, and eventually kicked him out without adequate process. Brewer was denied a Union card. Both have filed charges with the NLRB. They move the Court to approve their complaint under 29 U.S.C. § 501.

The motion is denied for two reasons. First, the complaint does not allege the kinds of financial improprieties proscribed by § 501(a). *Compare Gould v. Bond*, 2019 WL 3890776, at *2 (E.D. Mo. Aug. 19, 2019). The Court declines to

hold that § 501 reaches the kind of conduct alleged here. Second, while there is no binding precedent in this circuit, this Court agrees that this statute creates an analog to a shareholder derivative action. *E.g., International Union of Operating Engineers, Local 150, AFL-CIO v. Ward*, 563 F.3d 276, 279-80 (7th Cir. 2009). Foster and Brewer have not adequately alleged that they sought relief from Local 1516's executive board, but were unsuccessful, or that a majority of the board could not make an independent and disinterested judgment. Further, and again, this dispute does not appear to be about the alleged mishandling of Union money or property for the personal benefit of Union officers or employees. In the statute's phrase, Foster and Brewer haven't shown "good cause" for pursuing their case outside the usual administrative process. 29 U.S.C. § 501(b).

Motion, Doc. 1, denied. The complaint will be dismissed for lack of subject matter jurisdiction.

So Ordered. **App 7a.**

Even the U.S. District Court had a split of authority, temporarily.

In another case involving the same facts, the Honorable Brian S. Miller held contra to the Honorable D.P. Marshall, Jr., stating:

Plaintiffs' motion to proceed with their complaint [Doc. No. 1] is granted. *See LMRDA § 501(b).*

IT IS TO ORDERED this 8th day of October, 2020. **App 17a.**

The Honorable Brian S. Miller later reversed his decision based on Judge Marshall's decision. **App 15a.** Judge Miller's judgment is not on appeal, but is referred to as why this matter needs this Court's attention.

Petitioners alleged fraud, the misuse of the union's funds, monies by Respondents, through the misuse of their positions of trust, a violation of their fiduciary duty.

The district court hinged its dismissal on lack of jurisdiction, not on the merits.

Terry Foster and Janie Brewer's petitioned the Eighth Circuit Court of Appeals to rehear this case *en banc*, pursuant to Fed. R. App. P. 35.

The issue before this Court is similar to the issue before the Eighth Circuit Court of Appeals in *Johnson v. Nelson*, 325 F.2d 646 (8th Cir. 1963). We respectfully submit that the panel opinion is contrary to 29 U.S.C. § 501(a) and (b), and the decisions of the Supreme Court, denying cert., and this Court, and that full Court review is needed to maintain decisional uniformity.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED TO RESOLVE A CONFLICT CONCERNING THE APPLICATION OF 29 U.S.C. § 501 WHICH REQUIRES A PLAINTIFF TO OBTAIN APPROVAL OF THE COURT OF PLAINTIFFS' COMPLAINT AGAINST A UNION OFFICIAL BEFORE THE COMPLAINT IS FILED

- A. What Constitutes Financial Improprieties Pursuant To 29 U.S.C. § 501(a)?**
- B. What Constitutes Good Cause And A Violation Of A Fiduciary Duty Pursuant To 29 U.S.C. § 501(b)?**

Most of the circuit courts of appeals which have considered the matter have concluded that section 501 imposes a broad fiduciary duty on union officials that extends beyond fiscal matters, although this view has not been accepted with unanimity. In fact, the first United States Court of Appeals to consider the matter that section 501 applied only to fiscal matters. The Second Circuit in *Gurton v. Arons*, 339 F.2d 371 (2d Cir. 1964), based its holding on the view that section 501 was not intended to be an omnibus provision under which union officials could be sued on any ground of misconduct.

The majority position is the one taken by this Court in *Johnson v. Nelson*, 325 F.2d 646 (8th Cir. 1963). There this Court concluded that careful analysis of the whole act refutes the notion that the statute is narrow in its scope and is limited solely to pecuniary responsibilities or improper use of union funds. *Id.* at 649. This approach has been followed by a large majority of the circuit and district courts that have considered it. *See Pignotti v. Local 3, Sheet Metal Workers Int'l Ass'n*,

477 F.2d 825 (8th Cir. 1973); *Sabolsky v. Budzanoski*, 457 F.2d 1245 (3d Cir.), *cert. denied*, 409 U.S. 853 (1972); *Cefalo v. Moffet*, 449 F.2d 1193 (D.C. Cir. 1971); *McCabe v. Electrical Workers Local 1377*, 415 F.2d 92 (6th Cir. 1969); *Parks v. IBEW*, 203 F.Supp. 288 (D. Md. 1962), *aff'd*, 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963).

LAW AND ARGUMENT

The United States District Court for the Eastern District of Arkansas, the Honorable D.P. Marshall, Jr. presiding, frankly stated in his Judgment, “While there is no binding precedent in this circuit, this Court agrees that this statute creates an analog to a shareholder derivation action. E.g. *International Union of Operating Engineers Local 150, AFL-CIO v. Ward*, 563 F.3d 276, 269-80 (7th Cir. 2009). However, Petitioners cited seven Eighth Circuit Court of Appeals cases and a myriad of other circuit cases to the contrary.

Petitioners contend that a violation of a director’s fiduciary duty is “good cause” and that to intentional denial of “due process” during the expulsion of a 19-year union membership is a violation of due process.²

On September 16, 2020, the lower court entered an Order denying Petitioners’ motion to approve their Complaint under 29 U.S.C. § 501. The lower court dismissed Petitioners’ Complaint without prejudice for lack of subject matter jurisdiction. Appellants respectfully requested reconsideration pursuant to Rule 59 of the Federal Rules of Civil Procedure. Rule 59(e) preserves the district court’s right to alter or amend a judgment after the judgment is entered. Motions to alter or amend a judgment are appropriate where they involve reconsideration of matters properly encompassed in the decision on the merits. *White v. New Hampshire Dep’t of Employment Security*,

² Petitioner Foster has since been denied entry into the union while Petitioner Brewer has been granted the right to rejoin.

455 U.S. 445, 451, 102 S.Ct. 1162, 1166, 71 L.Ed.2d 325 (1982). The case law acknowledges four grounds that justify altering or amending a judgment: to incorporate an intervening change in the law, to reflect new evidence not available at the time of trial, to correct a legal error, and to prevent a manifest injustice. *Pacific Ins. Co. v. American Nat'l Fire Ins. Co.*, 148 F.3d 396 (4th Cir. 1998). Petitioners respectfully allege the lower court should have altered or amended its denial of Petitioners' motion to approve their Complaint under 29 U.S.C. § 501, and dismissing their Complaint without prejudice for lack of subject matter jurisdiction to correct a legal error and to prevent a miscarriage of justice.

Most of the circuit courts of appeals which have considered the matter have concluded that section 501 imposes a broad fiduciary duty on union officials that extends beyond fiscal matters, although this view has not been accepted with unanimity. In fact, the first United States Court of Appeals to consider the matter that section 501 applied only to fiscal matters. The Second Circuit in *Gurton v. Arons*, 339 F.2d 371 (2d Cir. 1964), based its holding on the view that section 501 was not intended to be an omnibus provision under which union officials could be sued on any ground of misconduct.

The majority position is the one taken by this Court in *Johnson v. Nelson*, 325 F.2d 646 (8th Cir. 1963). There this Court concluded that careful analysis of the whole act refutes the notion that the statute is narrow in its scope and is limited solely to pecuniary responsibilities or improper use of union funds. *Id.* at 649. This approach has been followed by a large majority of the circuit and district courts that have considered it. *See Pignotti v. Local 3, Sheet Metal Workers Int'l Ass'n*, 477 F.2d 825 (8th Cir. 1973); *Sabolsky v. Budzanoski*, 457 F.2d 1245 (3d Cir.), *cert denied*, 409 U.S. 853 (1972); *Cefalo v. Moffet*, 449 F.2d 1193 (D.C. Cir. 1971); *McCabe v. Electrical Workers*

Local 1377, 415 F.2d 92 (6th Cir. 1969); *Parks v. IBEW*, 203 F.Supp. 288 (D. Md. 1962), *aff'd*, 314 F.2d 886 (4th Cir.), *cert. denied*, 372 U.S. 976 (1963).

Respectfully, Petitioners Foster and Brewer contend the lower court and three judge panel erred as a matter of law. The lower court's reliance on *Gould v. Bond*, 2019 WL 3890776 at *2 (E.D. Mo. Aug. 19, 2019), is misplaced.

Pursuant to 517.01 LMRDA, Section 501(b), states:

"No such proceeding shall be brought except upon leave of the court obtained upon verified application and for good cause shown which application may be made ex parte."

517.005, Leave to Sue, states:

"A union member's action charging violations of fiduciary duties by officers under Section 501, LMDRA, is not maintainable if the member has not first obtained leave of court upon verified application and good cause shown as required by Section 501(b)"

The two issues explicit in the LMRA, quoted above, are good cause and violation of fiduciary duties by officers. Plaintiffs' Brief in Support of Motion for Order of Court Approving Complaint and Granting Plaintiffs Leave to Proceed With the Complaint [Document No. 1] discusses the definition of "how to define good cause," and is adopted by reference herein, in full.

The lower court, in its Order dismissing Plaintiffs' Complaint hinges its reason for "lack of subject matter jurisdiction over the failure to allege" the use of "financial improprieties" proscribed by § 501(a), citing a recent case, *Gould v. Bond*, 2019 WL 3890776, at *2 (E.D. Mo. Aug. 19, 2019).

The lower court candidly admits this question of good cause is not settled in the Eighth Circuit. Respectfully, the lower court has erred by limiting good cause to the "misuse of union funds." The regulation requires a violation of fiduciary duty, and that "good cause" would be at least a misuse of union funds. *See Executive Board Local 28, IBEW v. International Brotherhood*

of *Electrical Workers*, 184 F.Supp. 649, 653-55 (D. Md. 1960). However, “misuse of union funds” is only one definition of good cause, defining violations of fiduciary duties. Respectfully, the lower court, affirmed by the three judge panel, applied their own interpretation to the case law, *Gould, supra*, which is unsettled in the Eighth Circuit.

Section 501(b), LMDRA, resembles a stockholders’ derivative suit brought in the corporate context in that the conditions precedent to instituting a section 501(b) action are similar. Generally, section 501(b) provides that following an alleged violation of a section 501(a) duty, the dissident union *member* must first make demand on the labor organization to sue to recover damages or secure an accounting or other appropriate relief. If the labor organization fails to do so within a reasonable time, the member may sue, in either federal or state court, the union officials who have allegedly breached their duties. However, in order to sue, leave of court must be obtained by verified application and for good cause shown. These procedural prerequisites are designed to protect the union from undue harassment and vexatious litigation. Lastly, section 501(b) provides that the trial judge may allow successful plaintiffs compensation for litigation expenses including counsel fees.

The fiduciary duty is owed to the labor organization and its members as a group. Section 501(b) recognizes this rule by requiring that the relief sought be for the benefit of the labor organization. However, this does not preclude a member from using section 501 to remedy a personal wrong he has suffered at the hands of union officials. For example, in *Johnson v. Nelson, supra*, the court ordered union officials to deliver to the plaintiffs funds duly voted to them by the membership as reimbursement for their expenses in defending themselves against prior wrongfully brought union charges. The court reasoned that the vindication of the plaintiffs’ rights benefitted the organization by restoring integrity to the union’s internal democratic process.

Also, the court does not allow section 501(b) actions to be brought by or against unions. Thus the act is strictly construed as allowing actions to be brought only by union members and only against “union officials” as that term is defined in the act. One court has reasoned that since the union may avail itself of state remedies directly, the union is not a proper plaintiff under section 501(b).

The Fifth Circuit in *Clinton v. Hueston*, 308 F.2d 908, 51 LRRM 2273, interpreted 501(b):

“Section 501(b) itself provides that union members can bring claims for breach of fiduciary responsibility in federal district court or ‘in any State court of competent jurisdiction.’”

The Oregon Supreme Court in *Gilbert v. Hoisting and Portable Engineers, Local Union No. 701*, 237 Or. 130, 54 LRRM 2048, ruled that 501(b) is not an exclusion remedy, existing remedies are present if Section 604 and that the Oregon State courts would have always entertained suits of this type, without the need for granting the permission referred to in the LMDRA.

Respectfully, the lower court has erred, citing a case on appeal, and arguable, an advocate for Respondent, union, violating Petitioners due process and equal protection guaranteed by the XIV Amendment to the United States Constitution.

Petitioner Foster’s Complaint alleges that he sought relief from the Board through Shawn Phares, Business Manager, and that the Board expelled him without his presence and that he was told by Brent Hall, IO representative, an IBEW International Representative of the 10th District, that it was up to Shawn Phares, thus, exhausting his administrative remedies.

Plaintiff Brewer’s Count alleges that she was denied membership by Shawn Phares, and that it would be a waste of time to appeal based on Brent Hall’s statement to Plaintiff Foster regarding the Board’s support of Shawn Phares.

For the sake of argument, Shawn Phares, Business Manager, Sandra Lee, Secretary, and Respondents, Board Members, are salaried employees of IBEW Local 1516. Their conduct described in the Complaint, including, but not limited to expulsion, is a violation of their fiduciary responsibility and constitutes a misuse of the union's funds, a misuse of their positions, by receiving their salaries from the union, and through their actions against Petitioners Foster and Brewer.

The responsibility of holding the union's money is just one example, explicitly described in 29 U.S.C. § 501 of the fiduciary duty of representatives of a labor organization. The conduct of Respondents described in Petitioners' Complaint is a direct, explicit misuse of the union's funds.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court issue a writ of certiorari to review the judgment of the Arkansas Court of Appeals.

Respectfully submitted,

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*Attorney for Petitioners,
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**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 20-3141

Terry Foster and Janie Brewer

Appellants

v.

International Brotherhood of Electrical Workers, Local 1516, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Northern
(3:20-cv-00222-DPM)

MANDATE

In accordance with the judgment of 12/15/2020, and pursuant to the provisions of Federal Rule of Appellate Procedure 41(a), the formal mandate is hereby issued in the above-styled matter.

February 18, 2021

Clerk, U.S. Court of Appeals, Eighth Circuit

-1a-

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

No: 20-3141

Terry Foster and Janie Brewer

Appellants

v.

International Brotherhood of Electrical Workers, Local 1516, et al.

Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Northern
(3:20-cv-00222-DPM)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 11, 2021

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

-2a-

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 20-3141

Terry Foster; Janie Brewer

Plaintiffs - Appellants

v.

International Brotherhood of Electrical Workers, Local 1516; Kirk Douglas, Business Manager/Representative; Sandra Lee, Secretary, in her individual and official capacities; Shawn Phares, Business Manager/Representative, in his individual and official capacities; David McDonald, President, in his individual and official capacities; Thomas Wigton, Recording Secretary, in his individual and official capacities; Dave Dobbins, Treasurer, in his individual and official capacities; Larry Dauk, Executive Board, in his individual and official capacities; Josh Hardin, Executive Board, in his individual and official capacities; Clinton Johnson, Executive Board, in his individual and official capacities; Bill Winn, Executive Board, in his individual and official capacities; William Watson, Executive Board, in his individual and official capacities

Defendants - Appellees

Appeal from U.S. District Court for the Eastern District of Arkansas - Northern
(3:20-cv-00222-DPM)

JUDGMENT

Before GRUENDER, KELLY, and KOBES, Circuit Judges.

This court has reviewed the original file of the United States District Court. It is ordered by the court that the judgment of the district court is summarily affirmed. See Eighth Circuit Rule 47A(a).

December 15, 2020

-3a-

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

-4a-

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

TERRY FOSTER and
JANIE BREWER

PLAINTIFFS

v.

No. 3:20-cv-222-DPM

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 1516, *et
al.*

DEFENDANTS

ORDER

Foster and Brewer respectfully move for reconsideration, which the Court has done. The difficulties presented by the complaint remain. First, they neither demanded that Local 1516's *board* take action nor demonstrated that this demand would have been futile. Second, while the statute speaks of fiduciary duties generally, as a whole it is directed at a violation of those duties connected with Union money or other property. Foster and Brewer's case does not allege that kind of financial misdealing. Motion, *Doc. 7*, denied.

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

23 September 2020

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

TERRY FOSTER and
JANIE BREWER

PLAINTIFFS

v.

No. 3:20-cv-222-DPM

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 1516;
KIRK DOUGLAS; SANDRA LEE;
SHAWN PHARES; DAVID
MCDONALD; THOMAS WIGTON;
DAVE DOBBINS; LARRY DAUK; JOSH
HARDIN; CLINTON JOHNSON; BILL
WINN; and WILLIAM WATSON

DEFENDANTS

JUDGMENT

The complaint is dismissed without prejudice for lack of subject matter jurisdiction.

So Ordered.

DPMarshall Jr.
D.P. Marshall Jr.
United States District Judge

16 September 2020

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

TERRY FOSTER and
JANIE BREWER

PLAINTIFFS

v.

No. 3:20-cv-222-DPM

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL 1516, et
al.

DEFENDANTS

ORDER

Foster and Brewer have sued IBEW Local 1516 and various Union officers and officials. They allege unfair labor practices. Foster says the Union retaliated against him for decades because he worked at non-Union sites. He also says the Union jumped the books, depriving him of work, and eventually kicked him out without adequate process. Brewer was denied a Union card. Both have filed charges with the NLRB. They move the Court to approve their complaint under 29 U.S.C. § 501.

The motion is denied for two reasons. First, the complaint does not allege the kinds of financial improprieties proscribed by § 501(a). *Compare Gould v. Bond*, 2019 WL 3890776, at *2 (E.D. Mo. Aug. 19, 2019). The Court declines to hold that § 501 reaches the kind of conduct alleged here. Second, while there is no binding precedent in this circuit, this Court agrees that this statute creates an analog to a shareholder

derivative action. *E.g., International Union of Operating Engineers, Local 150, AFL-CIO v. Ward*, 563 F.3d 276, 279–80 (7th Cir. 2009). Foster and Brewer have not adequately alleged that they sought relief from Local 1516's executive board, but were unsuccessful, or that a majority of the board could not make an independent and disinterested judgment. Further, and again, this dispute does not appear to be about the alleged mishandling of Union money or property for the personal benefit of Union officers or employees. In the statute's phrase, Foster and Brewer haven't shown "good cause" for pursuing their case outside the usual administrative process. 29 U.S.C. § 501(b).

Motion, *Doc. 1*, denied. The complaint will be dismissed for lack of subject matter jurisdiction.

So Ordered.

D.P. Marshall Jr.
D.P. Marshall Jr.
United States District Judge

16 September 2020

Activity in Case 3:20-cv-00222-DPM Foster et al v. International Brotherhood of Electrical Workers Local 1516 et al Order

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Thu 8/6/2020 1:53 PM

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U.S. District Court

Eastern District of Arkansas

Notice of Electronic Filing

The following transaction was entered on 8/6/2020 at 1:53 PM CDT and filed on 8/6/2020

Case Name: Foster et al v. International Brotherhood of Electrical Workers Local 1516 et al

Case Number: 3:20-cv-00222-DPM

Filer:

Document Number: 3 (No document attached)

Docket Text:

(This is a TEXT ENTRY ONLY. There is no pdf document associated with this entry.)
ORDER: The Court is bumfuzzled by the motion, Doc. [1]. The Court would appreciate a short brief explaining what kind of approval is sought and why this unusual step is necessary. Signed by Chief Judge D. P. Marshall Jr. on 8/6/2020. (slb)

3:20-cv-00222-DPM Notice has been electronically mailed to:

Larry J. Steele steelelaw7622@sbcglobal.net, janarry@hotmail.com

3:20-cv-00222-DPM Notice has been delivered by other means to:

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

**TERRY FOSTER and
JANIE BREWER**

PLAINTIFFS

v. **Case No. 3:20-cv-00285-BSM**

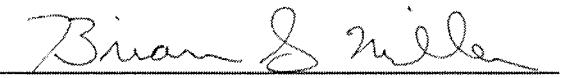
**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1516, *et al.***

DEFENDANTS

ORDER

Plaintiffs' motion for reconsideration [Doc. No. 37] is denied. *Broadway v. Norris*, 193 F.3d 987, 990 (8th Cir. 1999).

IT IS SO ORDERED this 14th day of June, 2021.


UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

**TERRY FOSTER and
JANIE BREWER**

PLAINTIFFS

v. **Case No. 3:20-cv-00285-BSM**

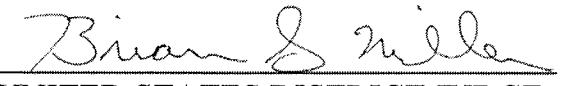
**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1516, *et al.***

DEFENDANTS

ORDER

Plaintiffs' motion for reconsideration [Doc. No. 36] is denied. *Broadway v. Norris*, 193 F.3d 987, 990 (8th Cir. 1999).

IT IS SO ORDERED this 10th day of June, 2021.


UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

**TERRY FOSTER and
JANIE BREWER**

PLAINTIFFS

v.

CASE NO. 3:20-CV-00285-BSM

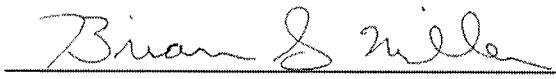
**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 558, *et al.***

DEFENDANTS

JUDGMENT

Consistent with the order entered today, this case is dismissed.

IT IS SO ORDERED this 2nd day of June, 2021.



UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

**TERRY FOSTER and
JANIE BREWER**

PLAINTIFFS

v.

CASE NO. 3:20-CV-00285-BSM

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 558, *et al.***

DEFENDANTS

ORDER

The motion to dismiss for lack of personal jurisdiction of IBEW 558 and William Crosswhite (“558 defendants”) [Doc. No. 21] is granted, and the John Doe defendants are dismissed *sua sponte*.

Specific jurisdiction concerns “causes of action arising from or related to a defendant’s actions within the forum state,” and general jurisdiction concerns “the power of a state to adjudicate any cause of action involving a particular defendant.” *Miller v. Nippon Co., Ltd.*, 528 F.3d 1087, 1091 (8th Cir. 2008). To be subject to general jurisdiction, an organization’s contacts with the forum state must be “so continuous and systematic as to render [it] essentially at home in the forum state.” *Daimler AG v. Bauman*, 134 S.Ct. 746, 760 (2014); *see also Burlington Indus. v. Maples Indus.*, 97 F.3d 1100, 1102 (8th Cir. 1996).

There is no general jurisdiction over the 558 defendants or the John Doe defendants because they do not maintain “continuous and systematic” contacts with Arkansas. *Bauman*, 134 S.Ct. at 760. IBEW 558 is a labor organization located in Alabama, and it represents electricians in Alabama and Tennessee. Mot. Dismiss at 2, Doc. No. 22. None of its 2,500

members reside in Arkansas. Decl. Tony Quillen ¶ 3, Doc. No. 22-1. IBEW 558 may only refer electricians to contractors within its geographic jurisdiction. Mot. Dismiss at 3; Bylaws Article I, Ex. 1, Doc. No. 22-1. Crosswhite is a dispatcher for IBEW 558, and he does not live or work in Arkansas. *See* Decl. William Crosswhite, Doc. No. 22-1. The John Does are members of the IBEW 558 executive board. Compl. ¶ 72, Doc. No. 2.

There is no specific jurisdiction over the 558 defendants or the John Does because plaintiffs' allegations do not arise from any actions taken by the 558 defendants in Arkansas. *Miller*, 528 F.3d at 1091. Terry Foster alleges that IBEW 1516 Secretary, Sandra Lee, told Foster's prospective employer in Alabama that he was a "troublemaker." Compl. ¶¶ 8, 32. After that, Crosswhite informed Foster that he was terminated from the prospective position in Alabama. *Id.* ¶ 32. These facts do not support that the 558 defendants had minimum contacts with Arkansas, such that they could reasonably expect to be haled into court here. *Walden v. Fiore*, 571 U.S. 277, 285 (2014). To the extent that plaintiffs argue personal jurisdiction based on the theory that the 558 defendants conspired with the already-dismissed 1516 defendants, *see* Doc. No. 33, that argument is rejected since the "defendant, not the plaintiff or third parties . . . must create contacts with the forum State." *Fiore*, 571 U.S. 277 at 291.

IT IS SO ORDERED this 2nd day of June, 2021.



UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

**TERRY FOSTER and
JANIE BREWER**

PLAINTIFFS

v.

CASE NO. 3:20-CV-00285-BSM

**INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS, LOCAL 1516, *et al.***

DEFENDANTS

ORDER

Plaintiffs' claims against the International Brotherhood of Electrical Workers, Local 1516; Kirk Douglas; Sandra Lee; Shawn Phares; David McDonald; Thomas Wigton; Dave Dobbins; Larry Dauk; Josh Hardin; Clinton Johnson; Bill Winn; and William Watson (together "1516 defendants") are dismissed *sua sponte* because this court has already determined in an identical case that there was not "good cause" for the claims to proceed pursuant to 29 U.S.C. § 501(b). *Foster v. Int'l Brotherhood of Electrical Workers Local 1516*, No. 3:20-cv-222-DPM, 2020 WL 6074631, at *1 (E.D. Ark. Sep. 16, 2020). *See Arizona v. California*, 530 U.S. 392, 412 (2000) (a court may dismiss a case *sua sponte* when it has previously decided the issue presented). When permission was given for plaintiffs to proceed, Doc. No. 5, nothing in the record indicated that *Foster*, 2020 WL 6074631 had been decided. Finally, plaintiffs' civil conspiracy claims against the 1516 defendants are dismissed because civil conspiracy is not a stand-alone claim. *See Graham v. Catamaran Health Solutions, LLC*, 940 F.3d 401, 408 (8th Cir. 2017). Defendants' motion for an immediate status conference [Doc. No. 31] is denied as moot.

IT IS SO ORDERED this 27th day of May, 2021.

Brian S. Miller
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

**TERRY FOSTER and
JANIE BREWER**

PLAINTIFFS

v. **Case No. 3:20-cv-00285-BSM**

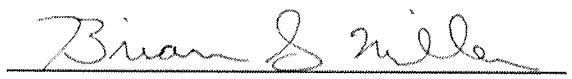
**LOCAL 1516 INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, *et al.***

DEFENDANTS

ORDER

Plaintiffs' motion to proceed with their complaint [Doc. No. 1] is granted. *See* LMRDA § 501(b).

IT IS SO ORDERED this 8th day of October, 2020.


UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF ARKANSAS
NORTHERN DIVISION

**TERRY FOSTER and
JANIE BREWER**

PLAINTIFFS

v. **Case No. 3:20-cv-00285-BSM**

**LOCAL 1516 INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS, *et al.***

DEFENDANTS

ORDER

Terry Foster and Janie Brewer have fourteen days to file a brief in support of their motion to proceed, Doc. No. 1, explaining why they need leave of court to prosecute their claims.

IT IS SO ORDERED this 22nd day of September, 2020.


UNITED STATES DISTRICT JUDGE