

No. _____

In the
Supreme Court of the United States

Mauricio Baez Romero,
Petitioner

vs.

DHL Express, Inc., Local Union 295 I.B.T.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

APPENDIX OF PETITIONER

Mauricio Baez Romero
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Bronx, New York 10463
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**UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 31st day of July, two thousand seventeen.

Mauricio Baez Romero,

Plaintiff - Appellant,

v.

DHL Express (USA), Inc., Local 295 I.B.T.,

Defendants - Appellees,

Jide Dawodu, John Montecalvo,

Defendants.

Appellant, Mauricio Baez Romero, filed a motion for panel reconsideration, or, in the alternative, for reconsideration *en banc*. The panel that determined the appeal has considered the request for reconsideration, and the active members of the Court have considered the request for reconsideration *en banc*.

IT IS HEREBY ORDERED that the motion is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk

Catherine O'Hagan Wolfe



A1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
MAURICIO BAEZ ROMERO,

Plaintiff,

-against-

12 Civ. 1942 (LAK)

DHL EXPRESS, INC., et al.,

Defendants.
----- X

MEMORANDUM OPINION

Appearances:

Mauricio Baez Romero

Plaintiff Pro Se

David Wirtz

David Kenneth Broderick

LITTLER MENDELSON, P.C.

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Attorneys for Defendant Local 295 I.B.T.

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LEWIS A. KAPLAN, *District Judge*.

Plaintiff Mauricio Baez Romero was a member of International Brotherhood of Teamsters Local 295 and an employee of DHL Express, Inc. for twenty years until DHL terminated his employment in August 2011. Local 295 grieved his termination and proceeded to arbitration with DHL under their collective bargaining agreement ("CBA"). The arbitrator upheld Romero's termination. Romero subsequently filed suit against Local 295 and DHL seeking damages under numerous New York and Federal statutes. Now before this Court is DHL's cross-motion to confirm the arbitration award.

Background

Romero was working for DHL Express at its 39th Street location in New York, New York when he suffered an injury loading a truck on June 2, 2011.¹ He alleges that his superiors harassed him for reporting the injury, causing him to file a grievance with his Union.² Romero took time off from work until July 24, 2011 to recover from his injury.³ Upon his return, his supervisors, particularly one Jide Dowadu, allegedly continued to harass him and began to threaten him physically because of his injury and Dominican nationality.⁴ Romero complained to DHL's human

¹ Amended Complaint ("Cpt.") [DI 64] ¶¶ 14, 18 (hereinafter Cpt. ¶ __).

² *Id.* at ¶¶ 18–30.

³ *Id.* at ¶ 31.

⁴ *Id.* at ¶¶ 40–70.

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resources department and filed two more grievances with Local 295.⁵ On August 15, 2011, Romero allegedly told certain of his supervisors that he could not continue to work in what he perceived as a hostile work environment.⁶ He did not come to work on August 16, 17, or 18.⁷ On August 18, DHL sent him a letter indicating that, in accordance with the CBA, DHL had removed him from the employee seniority list and that, as a result, he was dismissed.⁸

The CBA provides for a scheme of employee seniority. The more senior an employee, the more desirable work the employee is entitled to and the greater protection from layoffs the employee enjoys.⁹ In certain circumstances an employee's seniority is "broken."¹⁰ Section 6F(f) of the CBA provides that the "unauthorized failure to report to work for three (3) consecutive days when work is available" breaks seniority.¹¹ DHL determined that Romero had failed to report to work for three consecutive days and thus lost his seniority, justifying his termination. Romero filed a fourth grievance with Local 295 contesting his termination.¹²

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Id. at ¶¶ 73–75, 77, 84.

6

Id. at ¶ 82.

7

Id. at ¶ 85.

8

Romero Aff. [DI 1] Ex. E.

9

Romero Aff. [DI 1] Ex. B CBA § 6.

10

Id. at § 6F.

11

Id. at § 6F(f).

12

DI 69 at 8.

A 4

Local 295 grieved Romero's termination and unsuccessfully argued for his reinstatement at a formal meeting with DHL.¹³ Local 295 allegedly did not allow Romero to speak at the meeting, did not bring a witness who Romero thought would provide exculpatory information, and did not discuss Romero's other grievances against DHL supervisors.¹⁴

Local 295 then proceeded to arbitration in accordance with the CBA. The CBA provides that an experienced arbitrator named Stanley Aiges is to serve as arbitrator for all such disputes.¹⁵ He served as the arbitrator in Romero's case.

The only two issues before the arbitrator were whether Romero lost his seniority under Section 6F of the CBA and, if so, whether this justified his termination. Local 295 appointed an experienced labor attorney to represent Romero's interests at the arbitration.¹⁶ The attorney presented arguments and allowed Romero to testify on his own behalf.¹⁷ Contrary to Romero's wishes, the attorney did not object to the admission into evidence of a video showing an incident between Romero and one of his superiors and did not present certain documents and emails related to the grievances that Romero filed against his superiors for discrimination.¹⁸

¹³

Cpt. ¶¶ 91-97.

¹⁴

Id.

¹⁵

Romero Aff. [DI 1] Ex. B CBA § 20D.

¹⁶

Wirtz Aff. [DI 18] ¶ 3.

¹⁷

DI 69 at 7. Romero argues in his memorandum that Local 295 did not present any argument as to why he should get his job back, but then notes that the attorney questioned DHL's witnesses and allowed Romero to testify on his own behalf.

¹⁸

Id.

AS

The arbitrator found that Romero lost his seniority under the CBA and that this justified his termination.¹⁹ Dissatisfied with the arbitrator's ruling, Romero sought relief in New York State court. After a complicated procedural history that need not be explained here, the case is now before this Court on DHL's cross-motion to confirm the arbitration award.

DHL argues that Romero does not have standing to challenge the arbitration award and that the Federal Arbitration Act mandates confirmation of the award.

Romero claims that he does have standing to challenge the award and that the arbitrator's award should be vacated because (1) the arbitrator did not act within his authority under the CBA,²⁰ (2) the arbitrator was partial to DHL,²¹ and (3) the award was incorrect.²² He alleges that a member of DHL management who harbored personal animus toward him had a role in the negotiations between DHL and Local 295 in which they chose Aiges as the arbitrator for all disputes under the CBA.²³ He alleges also that the arbitrator improperly disregarded or misinterpreted certain evidence that Romero presented at the arbitration.²⁴

¹⁹ Cpt. Ex. A at 7.

²⁰ DI 64 at 14-15.

²¹ Cpt. ¶¶ 116-22.

²² DI 69 at 12.

²³ Cpt. ¶¶ 116-22.

²⁴ DI 64 at 15-17.

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The Court notes that Romero is currently proceeding *pro se*. He has, through apparently great effort, filed extensive papers and exhibits in support of his position that the arbitration award should be vacated. The Court has reviewed Romero's submissions carefully in rendering this decision.

Discussion

Standing

An employee whose claims are arbitrated under a collective bargaining agreement normally does not have standing to challenge the arbitration award.²⁵ There is an exception to this rule when the union has breached the duty of fair representation that it owes to the employee.²⁶ A claim for breach of the duty of fair representation exists where the union's actions toward the employee were "arbitrary, discriminatory, or in bad faith."²⁷ A union's actions are arbitrary where its "behavior is so far outside the wide range of reasonableness[] as to be irrational."²⁸ A union's

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Katir v. Columbia Univ., 15 F.3d 23, 24-25 (2d Cir. 1994).

²⁶

See id.

²⁷

White v. Rose Food, 237 F.3d 174, 179 (2d Cir. 2001).

²⁸

Id. (internal quotation marks omitted).

A7

actions are in bad faith where they are “fraudulent, deceitful, or dishonest.”²⁹ Mere negligence is not a breach of the duty of fair representation.³⁰

“If a union pursues a termination through arbitration, a plaintiff must establish that the [the union’s misconduct] . . . seriously undermine[d] the arbitral process.”³¹ Tactical errors in arbitration are insufficient to constitute a breach of the duty of fair representation.³²

Here, Romero fails even to allege facts sufficient to support a claim that Local 295 breached its duty of fair representation. He alleges essentially that Local 295 made tactical errors at the initial meeting with DIII, and at the arbitration by not presenting certain evidence and making certain arguments. But he fails to identify any fraudulent or dishonest actions or any behavior so unreasonable as to be irrational. In fact, Romero’s papers reveal the opposite. Local 295 contested the propriety of Romero’s termination. It took the dispute to arbitration and presented evidence and arguments on his behalf. The evidence that Romero argues Local 295 should have presented relates to the disputes that he had with his supervisors and the grievances he filed against him. Local 295 could have determined that presenting extensive evidence related to these grievances was not desirable because the evidence was not directly relevant to the issues at the arbitration – whether Romero’s loss of seniority and termination were proper. These tactical considerations were within

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Id.

³⁰

Scibilia v. Verizon Communications, Inc., 493 Fed. Appx. 225, 227 (2d Cir. 2012); *Barr v. United Parcel Serv.*, 868 F.2d 36, 43 (2d Cir. 1989).

³¹

Simmons v. Local Union 1199, 319 Fed. Appx. 33, 33 (2d Cir. 2009) (quoting *Barr*, 868 F.2d at 43 (internal quotation marks omitted)).

³²

Barr, 868 F.2d at 43.

Local 295's discretion,³³ and Romero has failed to identify why Local 295's conduct was arbitrary or in bad faith.³⁴ At most, Local 295 was negligent in its tactical decisions, which is not a breach the duty of fair representation.³⁵

Lacking a claim that Local 295 breached its duty of fair representation, Romero does not have standing to challenge the arbitrator's award. Nevertheless, the Court considers below his arguments for vacating or resisting confirmation of the award.

Motion to Confirm the Award

When presented with a motion to confirm an arbitration award under the Federal Arbitration Act ("FAA"), the Court normally "must grant" the motion "unless the award is vacated, modified, or corrected."³⁶ "The FAA narrowly defines the Court's authority to vacate an arbitration award."³⁷ The Court has discretion to do so:

"(1) where the award was procured by corruption, fraud, or undue means;

³³

See id.

³⁴

To the extent that Romero is arguing that Local 295 did not pursue his first three grievances against DHL supervisors, that simply is not relevant to whether Local 295 fairly represented him in contesting his termination.

³⁵

See Scibilia, 493 Fed. Appx. at 227 (holding no breach of duty where union was, at worst, negligent in not pursuing employee grievances further).

³⁶

9, U.S.C. § 9.

³⁷

Global Reins. Corp. v. Argonaut Ins. Co., 548 F. Supp. 2d 104, 109–10 (S.D.N.Y. 2008); *see Porzig v. Dresdner, Kleinwort, Benson, N. Am. LLC*, 497 F.3d 133, 139 (2d Cir. 2007).

- “(2) where there was evident partiality or corruption in the arbitrators, or either of them;
- “(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing . . . ; or
- “(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”³⁸

An award may be vacated also where it was issued in manifest disregard of the law or of the parties’ relevant agreement.³⁹

Romero argues that the award should be vacated for three reasons — that the arbitrator did not exercise his authority under the CBA properly, that the arbitrator exhibited evident partiality to DHL, and that the award was incorrect under the CBA. None of these arguments is persuasive.

Romero claims that the arbitrator did not exercise his authority properly because the CBA does not allow the arbitrator to “disregard” any of its provisions, but that the arbitrator disregarded some of Romero’s evidence.⁴⁰ This argument misapprehends the CBA. The CBA provides that the arbitrator is not allowed to apply some provisions but ignore others. This limitation does not apply to weighing evidence presented at arbitration. The CBA does not dictate how the arbitrator should credit or discredit evidence.

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⁹ U.S.C. § 10.

³⁹

Schwartz v. Merrill Lynch & Co., Inc., 665 F.3d 444, 451–52 (2d Cir. 2011).

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DI 64 at 14–15; *see also* Romero Aff. [DI 1] Ex. B CBA § 20E.

Romero argues also that the arbitrator exhibited “evident partiality.” “[E]vident partiality, within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would *have* to conclude that an arbitrator was partial to one party to the arbitration.”⁴¹ The possibility that someone at DIHL who had personal issues with Romero was involved in choosing the arbitrator during the CBA negotiations, which occurred long before Romero’s termination, even if true, would provide no support for Romero’s claim that the arbitrator was partial to DHL. Nor does the fact that the arbitrator failed to credit or consider certain of Romero’s evidence and testimony indicate partiality — the arbitrator was simply performing his role as adjudicator. Romero has not alleged anything that would oblige a reasonable person to conclude that the arbitrator was partial to DHL.

Romero argues finally that the award should be vacated because it was incorrect. The Court does have some doubts about the soundness of the arbitrator’s decision to uphold Romero’s termination. The arbitrator read the provision governing what conduct breaks an employee’s seniority to permit also termination.⁴² It is not immediately evident on the face of the CBA why a loss of one’s seniority justifies termination.⁴³ And if it was Romero’s absences that caused DIHL to dismiss him, then the arbitrator likely should have looked to Appendix B of the CBA, which

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Applied Indus. Materials Corp. v. Ovalar Makine Ticaret Ve Sanayi, A.S., 492 F.3d 132, 137 (2d Cir. 2007) (quoting *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1984)) (internal quotation marks omitted).

⁴²

Cpt. Ex. A. at 7.

⁴³

Romero Aff. [DI 1] Ex. B CBA § 6F.

mandates a system of progressive discipline for unauthorized absences.⁴⁴ Under the rules laid out in Appendix B, it does not appear that Romero's termination was proper.

Nevertheless, "[i]t is well-settled that courts play a limited role when asked to review the decision of an arbitrator made pursuant to a grant of authority to interpret a collective bargaining agreement. Courts are not empowered to reexamine the merits of an arbitration award, even though the parties to the agreement may argue that the award arises out of a misinterpretation of the contract or a factual error."⁴⁵ "[A]s long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, a court's conviction that the arbitrator has committed serious error in resolving the disputed issue does not suffice to overturn his decision."⁴⁶ An arbitrator's award is enforceable "as long as it draws its essence from the collective bargaining agreement."⁴⁷

The interpretation of the seniority provision implicates the proper construction of the CBA. The Court is persuaded that the arbitrator's award "draws its essence from the collective bargaining agreement."⁴⁸

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Id. at App. B.

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Int'l Broth. of Elec. Workers, Local 97 v. Niagra Mohawk Power Corp., 143 F.3d 704, 714 (2d Cir. 1998).

⁴⁶

ReliaStar Life Ins. Co. of N.Y. v. EMC Nat'l Life Co., 564 F.3d 81, 86 (2d Cir. 2009) (internal quotation marks omitted); see *Matter of Andros Compania Maritima, S.A.*, 579 F.2d 691, 703 (2d Cir. 1978).

⁴⁷

Niagra Mohawk Power Corp., 143 F.3d at 714 (quoting *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593, 597 (1960)) (internal quotation marks omitted).

⁴⁸

See *United Steelworkers*, 363 U.S. at 597.

* * *

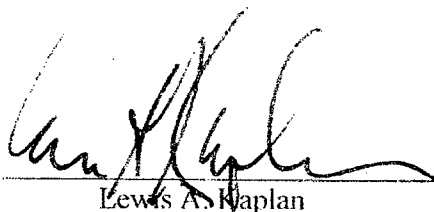
The Court has considered Romero's remaining arguments and finds them to be without merit.

Conclusion

In the absence of any statutory grounds to vacate the arbitration award, the Court grants DHL's cross-motion to confirm [DI 16]. In confirming the award, the Court does not in any way mean to be dismissive of Romero's claims of work place discrimination. On this motion, however, it is not the Court's role to delve into the merits of those claims.

SO ORDERED.

Dated: April 2, 2013

A handwritten signature in black ink, appearing to read 'Lewis A. Kaplan', is written over a horizontal line.

Lewis A. Kaplan
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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DATE FILED: 3/24/2015

----- X
MAURICIO BAEZ ROMERO,

Plaintiff,

-against-

DHL EXPRESS, INC. AND LOCAL 295, I.B.T.,

Defendants. :
----- X

12-CV-1942 (VEC) (RLE)

MEMORANDUM
OPINION & ORDER

VALERIE CAPRONI, United States District Judge:

Pro se Plaintiff Mauricio Baez Romero (“Baez”), a former courier of Defendant DHL Express Inc. (“DHL” or the “Company”), and former member of the collective bargaining unit represented by Defendant Local 295, I.B.T. (the “Union”), brings this suit against DHL and the Union alleging seventeen causes of action following his termination by DHL in August 2011.

Inter alia, Baez alleges that DHL subjected him to a hostile working environment and to discriminatory and retaliatory treatment as a result of his race, national origin and disability after he filed for Workers’ Compensation Benefits. Baez further alleges that the Union breached its duty of fair representation by processing his grievances in bad faith and in a manner that was arbitrary and discriminatory.

Now pending before the Court are the Union’s Motion for Summary Judgment as to Plaintiff’s Sixteenth cause of action, and DHL’s Motion for Partial Summary Judgment as to Plaintiff’s Second, Fourth, Eighth, Thirteenth, Fifteenth and Seventeenth causes of action. For the reasons stated below, the Union’s Motion for Summary Judgment is GRANTED, and DHL’s Motion for Partial Summary Judgment is GRANTED in part and DENIED in part.

A14

BACKGROUND

At the time of his termination, Baez was employed as a “vacation relief” courier driver for DHL. *See* Defendants’ Joint Rule 56.1 Statement (“Defs.’ 56.1 Statement”) ¶ 1. The Union and DHL are parties to a collective bargaining agreement (“CBA”) governing couriers employed at DHL. *Id.* ¶¶ 2-3.

On June 2, 2011, Baez was injured while loading a DHL truck. Defs.’ 56.1 Statement ¶¶ 6-7. Baez filed a Workers’ Compensation claim, *id.* ¶ 8, Broderick Decl., Ex. E, and reported his injury and intention to file for Workers’ Compensation benefits to his manager, John Montecalvo. Am. Compl. ¶ 19. Montecalvo allegedly insulted and harassed Baez for filing a Workers’ Compensation claim. *Id.* ¶¶ 23-28. Following this conversation, Baez filed a grievance against Montecalvo. Defs.’ 56.1 Statement ¶ 24; Kane Decl., Ex. D; Plaintiff’s Response to Defendants’ Joint 56.1 Statement (“Pl.’s 56.1 Resp.”) ¶ 24.

Baez received Workers’ Compensation benefits and was out of work from June 3, 2011 through July 24, 2011. Defs.’ 56.1 Statement ¶ 8. When Baez returned to work on July 25, 2011, his supervisor, Jide Dawodu, allegedly assigned him to “off-load” operations in violation of his “light duty” status and also required him to work eight hours consecutively without a meal break. Am. Compl. ¶¶ 41, 43. Baez alleges that Dawodu also called him a “stupid Dominican” in front of two of his co-workers, *id.* ¶ 45, and “constantly mock[ed] [his] accent.” *Id.* ¶ 44. Whenever a mistake was made, Dawodu would allegedly blame Plaintiff saying “only a stupid Dominican like Baez would do something like this.” *Id.* ¶ 48.

On August, 2, 2011, Baez and Dawodu argued regarding Baez’s claim that Dawodu was “short[ing]” his hours. Defs.’ 56.1 Statement ¶ 26; Am. Compl. ¶¶ 52-64. During the argument, which was recorded on video and witnessed by Plaintiff’s shop steward, Ignacio Garcia, and another DHL supervisor, Dave Gabrielli, Dawodu allegedly insulted Baez and threatened to

punch him. Am. Compl. ¶¶ 58-64; Baez Decl., Ex. F at ECF p. 3-4. Following the argument, Baez filed a police report, Defs.' 56.1 Statement ¶ 33; Kane Decl., Ex. M, and a grievance against Dawodu. Defs.' 56.1 Statement ¶ 33; Pl.'s 56.1 Resp. ¶ 33; Kane Decl., Ex. E. Dawodu left for vacation on August 3, 2011. Defs.' 56.1 Statement ¶ 34; Kane Decl., Ex. A (Transcript of Deposition of Mauricio Baez Romero dated September 17, 2013 ("Pl. Dep.") at 190:12-13.

Between Baez's absence on Workers' Compensation leave and the absence of others who were involved in the grievance process, the Union did not take immediate action to investigate Plaintiff's grievances. On August 5, 2011, Garcia and Jack Ruggiero, a business agent and member of the Union's Executive Board, met with Plaintiff regarding his grievances. Defs.' 56.1 Statement ¶¶ 46, 50-52; Pl. Dep. at 172:2-12, 177:13-16. At the meeting, Garcia and Ruggiero said that it would take several weeks to schedule a "Step 2" meeting. Defs.' 56.1 Statement ¶ 54; Pl. Dep. at 173:11-22.

On or around August 15, 2011, Dawodu returned from vacation. Defs.' 56.1 Statement ¶ 34; Pl. Dep. at 201:25-202:3. Baez decided to leave work because he did not want to be near Dawodu, even though another supervisor had offered him work on another floor. Defs.' 56.1 Statement ¶¶ 36-37; Pl. Dep. at 202:4-203:14, 448:16-22. Before leaving work, Baez filed another grievance, Defs.' 56.1 Statement ¶ 42, Kane Decl., Ex. F, and told a supervisor that he was not coming back due to the unsafe and hostile working environment. Defs.' 56.1 Statement ¶¶ 36-37; Pl. Dep. at 90:17-20; Am. Compl. ¶¶ 85-86. Garcia advised Baez to call in sick every day that he was not reporting to work. Defs.' 56.1 Statement ¶¶ 21, 40-41; Pl. Dep. at 210:18-212:2; Kane Decl., Ex. B (Transcript of Deposition of Ignacio Garcia dated March 18, 2014 ("Garcia Dep.") at 118:22-119:11, 168:19-169:8. Baez did not report to work on August 16 and 17, nor did he call in sick or otherwise communicate with his supervisors. Defs.' 56.1 Statement

¶ 43; Pl. Dep. at 214:20-24. Baez's only communication with the Company during this time was with a DHL Human Resources representative. Defs.' 56.1 Statement ¶ 43; Pl. Dep. at 214:20-24.

Baez was terminated on August 18, 2015 for unauthorized failure to report to work for three consecutive days. Defs.' 56.1 Statement ¶ 11; Broderick Decl., Ex. H. Baez promptly filed a grievance for "unjust termination," stating that he had left work because he could not work with Dawodu and that he had asked another supervisor to call him "when [Montecalvo] and Human Resources were ready to address [his] case." Defs.' 56.1 Statement ¶ 45; Broderick Decl., Ex. I. On or about September 16, 2011, Baez, Garcia and Ruggiero attended a "Step 2" grievance meeting with a DHL Labor Relations Officer and Montecalvo, during which DHL denied Baez's grievances and upheld its termination decision. Defs.' 56.1 Statement ¶ 56; Broderick Decl., Ex. I. After the Step 2 meeting, Baez filed an NLRB complaint against the Union for breaching its duty of fair representation; that complaint was subsequently withdrawn after an NLRB field attorney convinced Baez that the Union's decision to proceed with arbitration demonstrated that the Union was acting in good faith. Am. Compl. ¶¶ 98-99, Exs. W, Y; Defs.' 56.1 Statement ¶ 114; Kane Decl., Ex. I.

The arbitration occurred on November 18, 2011. Defs.' 56.1 Statement ¶¶ 13-14. During the arbitration, counsel for the Union focused on Baez's termination, rather than his earlier grievances against Montecalvo and Dawodu. Pl. Dep. at 96:23-97:10; Garcia Dep. at 258:13-262:10. Baez testified at the arbitration, however, and discussed his first grievance. Pl. Dep. at 166:7-24. With respect to Plaintiff's unfair termination claim, counsel for the Union argued that because Baez had been in contact with Human Resources on August 15, 16 and 17th, he was not a "no call no show" employee. Garcia Dep. at 358:14-24. Counsel also questioned two supervisors as to whether Baez's August 15, 2011 departure was unauthorized, Garcia Dep. at 292:7-294:25; Am. Compl. ¶¶ 146-47, but the Union did not call Montecalvo, Dawodu, Garcia

or Gabrielli to testify. Defs.' 56.1 Statement ¶¶ 66-71; Am. Compl. ¶ 114. DHL showed a portion of the video of the August 2, 2011 argument between Baez and Dawodu, and counsel for the Union did not object or request that the entire video be shown. Garcia Dep. at 211:23-213:9. Counsel for the Union also chose not to present a note from Baez's doctor indicating that his mental health had suffered as a result of his termination. Am. Compl. ¶ 115; Kane Decl., Ex. N. The arbitrator upheld Baez's termination. Defs.' 56.1 Statement ¶ 17; Broderick Decl., Ex. J.

On or around January 30, 2012, Baez filed a second NLRB complaint against the Union for breach of its duty of fair representation. Kane Decl., Exs. I, J. On April 20, 2012, the NLRB Regional Director dismissed Baez's complaint. Kane Decl., Ex. K. Baez appealed that decision to the NLRB Office of Appeals; his appeal was dismissed on July 23, 2012. Kane Decl., Ex. L. Baez also filed a discrimination complaint with the New York State Workers' Compensation Board, alleging "retaliation for filing work-related injury, hostile environment and wrongful discharge." Am. Compl. ¶ 12; Broderick Decl., Ex. L. at ECF p. 2.

Plaintiff initiated this litigation on March 15, 2012. DHL promptly moved to affirm the arbitration award. Dkts. 16-18. Judge Kaplan, to whom this case was previously assigned, granted DHL's motion, Dkt. 73, and then affirmed that decision over Plaintiff's objection. Dkt. 77.

DISCUSSION

Summary judgment is appropriate when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "A material fact is one that would 'affect the outcome of the suit under the governing law,' and a dispute about a genuine issue of material fact occurs if the evidence is such that 'a reasonable [factfinder] could return a verdict for the nonmoving party.'" *Sista v. CDC Ixis N. Am., Inc.*, 445 F.3d 161, 169 (2d

Cir. 2006) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). Thus, “[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial.” *Scott v. Harris*, 550 U.S. 372, 380 (2007) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986) (internal quotation marks omitted)).

The moving party bears the burden of showing that it is entitled to summary judgment, *Huminski v. Corsones*, 396 F.3d 53, 69 (2d Cir. 2004) (citing *Castro v. United States*, 34 F.3d 106, 112 (2d Cir. 1994)), and courts must therefore “construe the evidence in the light most favorable to the non-moving party and . . . draw all reasonable inferences in [the non-movant’s] favor.” *Huminski*, 396 F.3d at 69 (citing *World Trade Ctr. Props., L.L.C. v. Hartford Fire Ins. Co.*, 345 F.3d 154, 166 (2d Cir. 2003)). Because Plaintiff, the non-movant, is proceeding *pro se*, the Court grants him “special latitude,” *Salahuddin v. Coughlin*, 999 F. Supp. 526, 535 (S.D.N.Y. 1998), and reads his pleadings and briefs “liberally,” so as to “raise the strongest arguments they suggest.” *Zdorenko v. Meow Inc.*, No. 12 CIV. 671 (KBF), 2013 WL 3528587, at *2 (S.D.N.Y. July 11, 2013) (quoting *Bertin v. United States*, 478 F.3d 489, 491 (2d Cir. 2007)).

To overcome a motion for summary judgment, however, Plaintiff “may not rely on mere conclusory allegations nor speculation, but instead must offer some hard evidence showing that [his] version of the events is not wholly fanciful.” *D’Amico v. City of New York*, 132 F.3d 145, 149 (2d Cir. 1998). *See also Lipton v. Nature Co.*, 71 F.3d 464, 469 (2d Cir. 1995) (“mere conclusory allegations or denials in legal memoranda or oral argument are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist.”) (internal quotations and citation omitted). This rule applies with equal force to counseled and *pro se* litigants alike. *Saldana v. Local 32B–32J Serv. Emps. Int’l Union*, No. 03 CIV.1853

(DF), 2005 WL 66895, at *2 (S.D.N.Y. Jan. 12, 2005) (“Even a *pro se* plaintiff [] cannot withstand a motion for summary judgment by relying merely on the allegations of a complaint.”). *See also Carey v. Crescenzi*, 923 F.2d 18, 21 (2d Cir. 1991) (a *pro se* party’s “bald assertion,” without evidentiary support, cannot overcome a properly-supported motion for summary judgment).

I. DHL is Entitled to Summary Judgment on Plaintiff’s Fourth Cause of Action

In his Fourth cause of action, Plaintiff claims that DHL “violated NYS Workers’ Compensation Law Section 120 by retal[iating] against [him] for reporting an on the job injury and seeking workers’ compensation benefits.” Am. Compl. ¶ 191. DHL argues that this claim must be dismissed because Plaintiff’s exclusive remedy under New York law is to file a complaint with the Workers’ Compensation Board, which he has already done. *See* DHL Mem. at 4-6. DHL is correct.

Section 120 of the New York Workers’ Compensation Law makes it unlawful “for any employer . . . to discharge or in any other manner discriminate against an employee as to his or her employment because such employee has claimed or attempted to claim compensation from such employer” N.Y. Workers’ Comp. Law § 120. Employees wishing to report a violation of Section 120 must file a complaint with the Workers’ Compensation Board. *Id.* This administrative procedure is the exclusive remedy available to aggrieved employees. *See Burlew v. American Mutual Ins. Co.*, 63 N.Y.2d 412, 416 (N.Y. 1984) (“[A]ll employer conduct that is regulated by the Workers’ Compensation Law is subject to the protection of that law’s exclusivity; if the employer violates any provision of the code, an employee’s remedies cannot exceed those granted in the statutes.”).

Plaintiff initiated a complaint with the Workers’ Compensation Board alleging “retaliation for filing work-related injury, hostile environment and wrongful discharge.” *See*

Broderick Decl., Ex. L. Because that proceeding is the sole forum in which Plaintiff can litigate his claim under Section 120, Plaintiff's Fourth cause of action is dismissed.

II. DHL's Motion for Summary Judgment as to Plaintiff's Second, Eighth and Thirteenth Causes of Action is Denied

In his Second, Eighth and Thirteenth causes of action, Plaintiff claims that DHL created a hostile work environment in violation of federal law (Second cause of action), state law (Eighth cause of action) and municipal law (Thirteenth cause of action). Am. Compl. ¶¶ 187, 198, 208. *See also* 42 U.S.C. 2000e *et seq.* (2); New York State Human Rights Law § 290 *et seq.* ("NY State HRL"); New York City Human Rights Law § 8-101 *et seq.* ("NY City HRL").

DHL argues that these claims must be dismissed because Plaintiff has failed "to link the hostility about which he complains to a particular protected class." DHL Mem. at 6-7.¹ Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2. Both the NY State HRL and NY City HRL expand upon the classes protected under federal law to include, as relevant here, one's disability status. *See* N.Y. Exec. Law § 296; N.Y. City Admin. Code § 8-107. DHL argues that Plaintiff has claimed discrimination solely based on his filing for Workers' Compensation Benefits, rather than on his membership in a protected class. DHL Reply at 2-3 ("Workers' Compensation eligibility is not among the protected classes.").

The Court disagrees. However sparse and inartfully pled, Plaintiff has in fact alleged that he was subject to a hostile work environment at DHL as a result of his race, national origin and—as applicable under the NY State HRL and NY City HRL—disability. *See* Am. Compl. ¶¶

¹ The Court notes that although DHL's preliminary statement argues that Plaintiff's Second, Eighth and Thirteenth causes of action should be dismissed, the argument in the body of its brief is limited to Plaintiff's Eighth and Thirteenth causes of action. *See* DHL Mem. at 1, 6. Because all three causes of action raise hostile work environment claims, the Court considers DHL's argument to relate to all three causes of action.

44-48, 124, 125. In addition, Plaintiff's Sur-reply Memorandum reiterates Plaintiff's claims based on his national origin (Dominican) and his disability (allegedly arising from his back injury). Pl.'s Sur-reply Mem. at 1. While Plaintiff's opposition argument is far from clear, considering his *pro se* status, the Court denies DHL's Motion for Partial Summary Judgment on the limited grounds presented.

A serious question nonetheless remains as to whether a genuine issue of material fact exists in relation to Plaintiff's hostile work environment claims. The standard for establishing a hostile work environment under Title VII and the New York State HRL is essentially the same. *See Schiano v. Quality Payroll Sys., Inc.*, 445 F.3d 597, 609 (2d Cir. 2006) (citation omitted). A plaintiff must show that the conduct at issue is "severe or pervasive enough to create an objectively hostile or abusive work environment," and "the victim must also subjectively perceive that environment to be abusive." *Feingold v. New York*, 366 F.3d 138, 150 (2d Cir. 2004) (citation omitted). Factors to be considered in determining whether the alleged conduct is sufficiently severe include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with [the] employee's work performance." *Id.* (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)). In general, "[f]or racist comments, slurs, and jokes to constitute a hostile work environment, there must be 'more than a few isolated incidents of racial enmity.'" *Schwapp v. Town of Avon*, 118 F.3d 106, 110 (2d Cir. 1997) (citation omitted). *See also Kotcher v. Rosa and Sullivan Appliance Ctr.*, 957 F.2d 59, 62 (2d Cir. 1992) ("The incidents must be repeated and continuous; isolated acts or occasional episodes will not merit relief.") (citation omitted).

While a rational fact-finder could conclude that Plaintiff subjectively experienced a hostile work environment, it is less clear that Plaintiff's claims rise to the level of objective

severity necessary to maintain a claim. Plaintiff's allegations suggest that Dawodu's racial slurs and jokes were more episodic than continuous and were confined to the week-long period between July 25, 2011, when Plaintiff returned from leave, and August 3, 2011, when Dawodu left for vacation. Am. Compl. ¶¶ 44, 45, 48. Plaintiff also alleges that Dawodu physically threatened him on August 2, 2011, but the evidence suggests that this was an isolated occurrence that was not necessarily related to Plaintiff's membership in a protected class, and which did not cause Plaintiff to be fearful. Pl. Dep. at 265:2-9. Nonetheless, because DHL did not raise this argument and give Plaintiff an opportunity to respond, the Court declines to dismiss Plaintiff's hostile work environment claims *sua sponte* at this time.

III. DHL is Entitled to Summary Judgment on Plaintiff's Fifteenth Cause of Action

Plaintiff's Fifteenth cause of action alleges that, by creating a hostile work environment, and by subjecting him to discrimination, retaliation, and wrongful termination, DHL breached its contract with him. Am. Compl. ¶ 212. The only contract mentioned in Plaintiff's Complaint is the CBA, which Plaintiff alleges is "a contract governing [his] employment relationship with Defendant DHL." Am. Compl. ¶ 17. Because Plaintiff is not a party to the CBA, DHL argues that he lacks standing to maintain a breach of contract claim. DHL Mem. at 7-8.

Plaintiff's breach of contract claim based on the CBA is preempted by Section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). *See Avedisian v. Quinnipiac Univ.*, 387 Fed. Appx. 59, 62-63 (2d Cir. 2010). "[W]hen resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985) (internal citation omitted). *See also Vera v. Saks & Co.*, 335 F.3d 109, 114 (2d Cir. 2003). LMRA § 301's preemption applies "even when the plaintiff's complaint makes no reference to

federal law and appears to plead an adequate state claim.” *Doyle v. United Airlines, Inc.*, 914 F. Supp. 2d 325, 336 (E.D.N.Y. 2012) (citing *Livadas v. Bradshaw*, 512 U.S. 107, 122 n.16 (1994)).

Nonetheless, Plaintiff could still pursue his claim as a “hybrid” LMRA § 301 claim if he could show (1) that DHL violated the collective bargaining agreement and (2) that the union breached its duty of fair representation. *Sanozky v. Int’l Ass’n of Machinists & Aerospace Workers*, 415 F.3d 279, 282 (2d Cir. 2005) (citing *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 164–65 (1983)). *See also McKee v. Transco Products, Inc.*, 874 F.2d 83, 85–86 (2d Cir. 1989) (citing *Vaca v. Sipes*, 386 U.S. 171, 185–86 (1967)). Unionized employees are typically required to exhaust any grievance or arbitration remedies provided under their collective bargaining agreement and will generally be bound by the result of those remedies according to the finality provisions of the agreement. *DelCostello*, 462 U.S. at 164 (citations omitted). If, however, the employee can show that the union breached its duty of fair representation in redressing the grievance, then the employee will not be bound to the contractual remedies provided under the collective bargaining agreement but instead may bring an action directly against the employer. *DeFrancesco v. Bottalico*, No. 10-cv-8193, 2011 WL 6382610, at *5 (S.D.N.Y. Dec. 16, 2011) (citing *Vaca*, 386 U.S. at 184–86)).

Although this Court previously confirmed the arbitrator’s finding that DHL had just cause to terminate Plaintiff, the Court did not address at that time Plaintiff’s allegations regarding other ways in which DHL may have violated the CBA. The Court therefore rejects the Union’s argument that “[b]ecause the Court confirmed the arbitration award, [Plaintiff] cannot demonstrate that the agreement was breached and so his claim must fail.” Nevertheless, as discussed further *infra*, the Union did not breach its duty of fair representation to Plaintiff, and,

therefore, to the extent Plaintiff's claim can be construed as a hybrid LMRA § 301 claim, it also fails. *See White v. White Rose Food*, 237 F.3d 174, 178–79 (2d Cir. 2001).

IV. DHL Is Entitled to Summary Judgment on Plaintiff's Seventeenth Cause of Action

Plaintiff's Seventeenth cause of action alleges that DHL violated Section 162 of the New York Labor Law by "directing [him] to work eight straight hours without meal break after [Plaintiff's] return to work on July 25, 2011." Am. Compl. ¶ 216. DHL argues that this claim fails as a matter of law because there is no private cause of action under Section 162 of the New York Labor Law. N.Y. Lab. Law § 162. Employer violations of New York Labor Laws are enforced by the New York Commissioner of Labor pursuant to the administrative procedure codified at Section 218, N.Y. Lab. Law § 218, and Courts have therefore found that "there is no private right of action for a violation of § 162." *Cyr v. Berry Plastics Corp.*, No. 5:11-CV-817, 2011 WL 6337713, at *6 (N.D.N.Y. Dec. 19, 2011). *See also Browne v. IHOP*, No. 05-CV-2602 (DGT), 2005 WL 1889799, at *1 (E.D.N.Y. Aug. 9, 2005) (citing cases). Because Section 162 violations can *only* be enforced by the Commissioner of Labor, Plaintiff's Seventeenth cause of action is dismissed.

V. The Union is Entitled to Summary Judgment on Plaintiff's Sixteenth Cause of Action for the Union's Breach of Its Duty of Fair Representation

The duty of fair representation serves as a "bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law." *Vaca*, 386 U.S. at 182. While the duty arises from the need to balance the broad powers granted to unions under national labor policy, it is inherently limited in scope. *See Breininger v. Sheet Metal Workers Int'l Ass'n Local Union No. 6*, 493 U.S. 67, 87 (1989) (citing *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967)). Accordingly, courts show considerable deference in reviewing a union's representation. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65,

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78 (1991). *See also Vaca*, 386 U.S. at 191-93 (union representatives have substantial discretion to determine whether and how to process grievances). A breach of the duty of fair representation will only be found where the union has acted in a manner that is “arbitrary, discriminatory, or in bad faith.” *Vaughn v. Air Line Pilots Ass’n, Intl.*, 604 F.3d 703, 709 (2d Cir. 2010).

“Negligence, poor judgment, or ineptitude on the part of union officials in representing a grievant is not actionable.” *DeFrancesco*, 2011 WL 6382610, at *5 (citing *Barr v. United Parcel Serv., Inc.*, 868 F.2d 36, 43-44 (2d Cir. 1989)).

A. The Union’s Conduct Was Not Arbitrary

A union’s actions are arbitrary only if “in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness,’ ... as to be irrational.” *Spellacy v. Airline Pilots Association–International*, 156 F.3d 120, 129 (2d Cir. 1998) (citing *O’Neill*, 499 U.S. at 67). A union’s decision whether to arbitrate a particular grievance is “discretionary,” *Vaughn v. Am. Tel. & Tel. Co.*, 92 F.App’x 21, 23 (2d Cir. 2004), and the union’s “good faith, non-arbitrary failure to take an action that [was] unlikely to be advantageous does not subject it to liability for breach of its duty of fair representation.” *Barr*, 868 F.2d at 44 (2d Cir. 1989).

Although many of Plaintiff’s arguments are unclear or internally inconsistent, the Court reads his Amended Complaint and briefs to suggest that the Union acted arbitrarily by (1) failing timely to investigate or arbitrate his non-termination grievances and (2) processing and arbitrating his wrongful termination grievance in a “perfunctory” and irrational manner. *See* Pl.’s Opp. Mem. at 2-3, 6, 8, 13-16, 19-20, 30-31. With respect to his non-termination grievances, the Court finds that the evidentiary record undermines Plaintiff’s account of the events. *See e.g.*, Baez Decl., Ex. F at ECF. p. 3-4 (report from Human Resources representative concluding that eyewitness accounts and other evidence of the incidents substantially refuted

Plaintiff's claims). Therefore, it was not irrational for the Union to focus on Plaintiff's wrongful termination claim (which was his most significant claim), rather than his other grievances. Also, although the Union could have taken steps to begin investigating Plaintiff's June 2, 2011 grievance while he was on Workers' Compensation leave, the Union's failure to do so does not mean it breached its duty of fair representation, particularly where, as here, there has been no allegation that DHL denied any of Plaintiff's grievances on untimeliness grounds.

With respect to the manner in which the Union argued Plaintiff's wrongful termination claim at arbitration, the Union's tactical decisions in presenting certain witnesses, evidence and arguments over others were not irrational. Indeed, reasonable minds could find that the Union acted wisely in not presenting Montecalvo, Dawodu, Garcia or Gabelli as witnesses, because none of them appears to have supported Plaintiff's view that his termination was unjustified. *See* Pl.'s Opp. Mem. at 19; Union Mem. at 15-16. Likewise, the Union's decision not to present at arbitration: (1) Plaintiff's police report, which was contradicted by his own prior statements; (2) the complete video footage of his August 2, 2011 exchange with Dawodu, which may have cast him in a negative light, and (3) a medical note discussing his mental health issues cannot be said to be irrational. Finally, the Court finds that the Union acted reasonably in deciding not to argue that Plaintiff's August 15, 2011 departure should have been treated as a standard work "absence" rather than an "unauthorized failure to report to work." Pl.'s Opp. Mem. at 27-32. Apart from Plaintiff's bald assertion that "[a]ctive employees do not need authorization to fail to report to work, nor do they need to check if work is available for them that day," *id.* at 30, there is no evidence to support his interpretation of the CBA.

Moreover, even if the Union's strategic choices about how to proceed in arbitration were flawed, they are not actionable. *See Barr*, 868 F.2d at 43 ("Tactical errors are insufficient to show a breach of the duty of fair representation; even negligence on the union's part does not

give rise to a breach.”). This is particularly true where, as here, Plaintiff had the opportunity to testify on his own behalf during the arbitration. *See Santiago v. Nat'l Cleaning Contractors*, No. 88 CIV. 1172 (CSH), 1992 WL 168258, at *6 (S.D.N.Y. June 29, 1992) (“Where an employee has had a chance to present his case, despite union lapses in representation, courts have granted summary judgment dismissing fair representation claims.”) (citing *Phillips v. Lenox Hill Hosp.*, 673 F. Supp. 1207, 1215 (S.D.N.Y. 1987)).

B. There is No Evidence Showing that the Union Acted in a Discriminatory Manner or in Bad Faith

“A union’s acts are discriminatory when ‘substantial evidence’ indicates that it engaged in discrimination that was ‘intentional, severe, and unrelated to legitimate union objectives.’” *Vaughn*, 604 F.3d at 709 (quoting *Amalgamated Ass’n of St., Elec. Ry. & Motor Coach Emps. of Am. v. Lockridge*, 403 U.S. 274, 301 (1971)). A union official acts in bad faith when he acts with an “improper intent, purpose, or motive.” *Spellacy*, 156 F.3d at 126. Plaintiff alleges that the Union acted in bad faith or with a discriminatory intent towards him because: (1) the Union had a history of corruption, Pl.’s Opp. Mem. at 7; (2) Ruggiero was hostile towards Plaintiff during the Step 2 meeting, *id.* at 2; (3) Garcia wanted to maintain an “advantageous relationship” with Montecalvo and Dawodu, *id.* at 2; (4) Garcia’s feelings had soured toward Plaintiff as the result of a debt, *id.* at 20-22; and (5) during the arbitration, the Union colluded with DHL and the arbitrator in a “crafty legal scheme” in order to evade legal review. *Id.* at 10. Apart from these wholly unsupported allegations, there is simply no potentially admissible *evidence* that the Union acted in bad faith or in a discriminatory manner towards Baez in processing and arbitrating his claim.

The evidence presented demonstrates that, far from being hostile or acting from ill-will, Garcia actively tried to help Baez keep his job by encouraging him to call in sick rather than

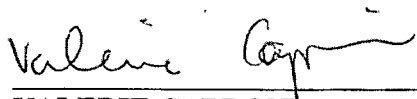
simply not reporting to work after August 15, 2011. Pl. Dep. at 87:11-88:4, 210:18- 212:2; Garcia Dep. at 118:22-119:11, 168:19-169:8. Plaintiff also admitted that Garcia had never discriminated against him and was “well-intentioned” in trying to help Plaintiff keep his job. Pl. Dep. at 255:7-9; 257:22-258:4. The evidence further shows that the Union investigated all of Baez’s grievances and represented him throughout the grievance process. It brought his wrongful termination claim to arbitration, even though it was not required to do so and had valid concerns regarding the merits of his case. Kane Decl. Exs. D-F; Broderick Decl. Ex. I. At the arbitration, the Union presented arguments in Plaintiff’s favor, and Plaintiff testified on his own behalf. Although ultimately unsuccessful, there is no evidence (apart from Plaintiff’s bald assertions) that the Union acted in bad faith or in a manner that was arbitrary or discriminatory. Accordingly, Plaintiff’s Sixteenth cause of action for breach of the duty of fair representation must be dismissed.

CONCLUSION

For the foregoing reasons, the Union’s Motion for Summary Judgment is GRANTED, and DHL’s Motions for Partial Summary Judgment is GRANTED in part and DENIED in part. Plaintiff’s Fourth, Fifteenth, Sixteenth and Seventeenth causes of action are dismissed. Because Plaintiff has no remaining claims against the Union, the Union is dismissed as a Defendant in this action. The Clerk of Court is respectfully requested to terminate the open motions at docket numbers 135 and 140.

SO ORDERED.

Date: March 24, 2015
New York, NY



VALERIE CAPRONI
United States District Judge

S.D.N.Y.-N.Y.C.
12-cv-1942
Caproni, J.
Ellis, M.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5th day of June, two thousand seventeen.

Present:

José A. Cabranes,
Gerard E. Lynch,
Circuit Judges,
Paul G. Gardephe,
District Judge.

Mauricio Baez Romero,

Plaintiff-Appellant,

v.

16-2045

DHL Express (USA), Inc., Local 295 I.B.T.,

Defendants-Appellees,

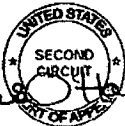
Jide Dawodu, John Montecalvo,

Defendants.

Appellant, pro se, moves for leave to proceed in forma pauperis. Upon due consideration, it is hereby ORDERED that the motion is DENIED and the appeal is DISMISSED because it "lacks an arguable basis either in law or in fact." *Neitzke v. Williams*, 490 U.S. 319, 325 (1989); *see also* 28 U.S.C. § 1915(e).

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk


Catherine O'Hagan Wolfe

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* Judge Paul G. Gardephe, of the United States District Court for the Southern District of New York, sitting by designation.