

No. 17-8960

IN THE
Supreme Court of the United States

—
TIM HASKIN,

Petitioner,

v.

US AIRWAYS INC., AMR CORP, AMERICAN AIRLINES INC.,
AND CWA-IBT ASSOCIATION,

Respondents.

—
**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

—
**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI**

—
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QUESTIONS PRESENTED

1. When a federal court dismisses a duty of fair representation claim against a union as untimely may it also dismiss for lack of jurisdiction a breach of contract claim brought against the plaintiff's employer, which is covered by the Railway Labor Act, since both claims are "inextricably interdependent?"

2. Are there any grounds for review of the Ninth Circuit's affirmation of the dismissal of Petitioner's retaliation cause of action without giving him the opportunity to amend?

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INTRODUCTION

This case arises from Petitioner's discharge by US Airways in February 2012 and the alleged lack of representation by his Union, CWA-IBT. He sued in federal court alleging a "hybrid" breach of contract/fair representation claim against US Airways and the Union, as well as various violations of Title VII of the Civil Rights Act. The district court dismissed the fair representation claim against the Union as untimely and dismissed the breach of contract claim against the employer for lack of jurisdiction. The district court also dismissed several of the Title VII claims as untimely and dismissed a retaliation claim for failure to state a claim. The Ninth Circuit affirmed.

Petitioner now asserts that there is a circuit split "under the Railroad Labor Act and Title VII." His garbled claim that there is a "circuit split" is plainly without merit. The sole case upon which Petitioner relies, *White v. White Rose Food*, 128 F.3d 110 (2nd Cir. 1997), actually arose under a different statute (Section 301 of the Labor Management Relations Act as opposed to the Railway Labor Act), and is factually distinguishable in multiple respects from this case and the cases on which the district court relied in granting summary judgment. The breach of contract claim asserted here is also untimely. Petitioner conflates and confuses two entirely separate bodies of law. The Ninth Circuit committed no error affirming the district court's dismissal of the retaliation claim without leave to amend. And finally, and not incidentally, in either case, Petitioner raises no questions implicating any claim against the CWA-IBT.

STATEMENT OF THE CASE

I. Facts Relevant to Petitioner Tim Haskin's Claims

A. Tim Haskin's Employment at US Airways.

Petitioner, Tim Haskin, was employed by US Airways as a Customer Service Representative ("CSR") from 2005 until his termination by the Company on February 9, 2012. *See* Order granting Defendants' Motions for Summary Judgment ("Final Order"), ECF Doc. 126 at 1-2.¹ He and other US Airways CSRs were represented by a joint labor council formed by the Communications Workers of America ("CWA") and the International Brotherhood of Teamsters ("IBT") known as the Airline Customer Service Employee Association ("CWA-IBT" or "the Union."). *See* Final Order, ECF Doc. 126 at 1. At the time of his dismissal, Haskin's employment was covered by a collective bargaining agreement ("CBA") between the Union and the Company that contained a grievance process whereby employees could challenge,

¹ Haskin attached the following documents to his petition for writ of certiorari which shall be cited herein:

- Order denying petition for rehearing en banc, December 7, 2017, Ninth Circuit, Dkt. Entry 35;
- Memorandum affirming decision of the district court, April 21, 2017, Ninth Circuit, Dkt. Entry 31-1;
- Order granting Defendants' Motions for Summary Judgment ("Final Order"), September 25, 2015, United States District Court Central District of California, ECF Doc. 126; and
- Order Granting Defendants' Motions to Dismiss Plaintiff's Second Amended Complaint ("Order II"), April 9, 2015, United States District Court Central District of California, ECF Doc. 55.

among other things, the Employer's decision to discipline or discharge a covered employee. *Id.*

Haskin alleged that he served as a union shop steward at Los Angeles International Airport and that his station manager, David Blakely, began a course of retaliation against him after he began serving in that position. *See* Final Order, ECF Doc. 126 at 1. When Haskin complained about these actions to the Union, he alleges the Union removed him from his shop steward position and that supervisor Blakely increased the harassment and retaliatory discipline. *See* Order II, ECF Doc. 55 at 2. Haskin also claims that US Airways failed to pay his "on the job injury" claims for workplace injuries and that he raised this issue with his manager shortly before his discharge. *See Id.* at 3.

B. Haskin's Termination and Alleged Efforts to Challenge It Under the CBA.

Haskin was terminated on February 9, 2012. *See* Final Order, ECF Doc. 126 at 2. He alleges that at that time he orally grieved his termination. *Id.* Both Respondents have contested Haskin's claim to have grieved his termination, but the district court accepted the allegation as true for the purposes of deciding the motions for summary judgment. *Id.* at 4.

Haskin claims that over the next few days, he attempted but failed to contact the Union. *See* Final Order, ECF Doc. 126 at 2. Haskin nonetheless knew the grievance process should have been concluded no later than May 2012 and concedes that he knew that the Union had not taken any action concerning his alleged grievance by that time. *See Id.* at 4, and 6, fn. 4.

C. Haskin's Efforts to File an EEOC Charge.

On November 27, 2012, Haskin filed an “intake questionnaire” with the Equal Employment Opportunity Commission (“EEOC”) alleging the purportedly discriminatory act as “[f]ired in retaliation for [h]elping other employees file Living Wage and EEOC claims” and asserting that he believed these actions were discriminatory because of an “on the job injury-terminated on next shift after requesting the OJI number.” *See* Order II, ECF Doc. 55 at 6-7. Then, Haskin filed a formal charge on January 29, 2013 alleging “on-going harassment by co-workers.” *Id.* at 8. The EEOC mailed to Haskin and US Airways a right-to-sue letter on January 15, 2014. *Id.* at 8. Haskin did not file an EEOC charge against the Union; the EEOC documents related to his charges against the Company did not even include CWA-IBT’s name and address, nor did it list CWA-IBT as a respondent. *Id.* at 6-8.

II. Proceedings in the District Court.

On April 15, 2014, Haskin, acting *pro se*, filed his Original Complaint in the United States District Court for the Central District of California against US Airways alleging wrongful termination. ECF Doc. 1; *see also* Final Order, ECF Doc. 126 at 2. Haskin then filed his First Amended Complaint (“FAC”) on September 19, 2014, adding Defendants AMR Corp., American Airlines, and CWA-IBT. *See* ECF Doc. 7; *see also* Order II, ECF Doc. 55 at 3; Final Order, ECF Doc. 126 at 2. The district court granted without prejudice defendants’ motions to dismiss (“Order I”). *See* ECF Doc. 35; *see also* Order II, ECF Doc. 55 at 3.

On January 30, 2015, Haskin filed a Second Amended Complaint (“SAC”), in which he alleged

retaliation and hostile work environment in violation of Title VII, and a breach of the duty of fair representation (“DFR”) claim against the Union together with a contract claim against his employer. *See* ECF Doc. 35; *see also* Order II, ECF Doc. 55 at 1-2. At the hearing on Defendants’ Motions to Dismiss the SAC, Haskin, “for the first time” asserted that he attempted to grieve his termination.” *See* Order II, ECF Doc. 55 at 16 (emphasis added).

In its Order Granting Defendants’ Motions to Dismiss the SAC (“Order II”), the district court dismissed Haskin’s Title VII claims alleging retaliation and hostile work environment. *See* Order II, ECF Doc. 55 at 17. The district court found that Haskin failed to timely exhaust administrative remedies with regard to his hostile work environment claim and that he failed to state a claim for retaliation. *Id.* at 13, 15. The Court found that amendment to these claims would be futile and dismissed them with prejudice. *Id.* at 17. The district court also dismissed Haskin’s hybrid breach of contract and DFR claims without prejudice, finding that the DFR claim against the Union was time-barred and, accordingly, that the district court did not have jurisdiction over the breach of contract claim against the Employer. *Id.* at 16.

Haskin filed his Third Amended Complaint (“TAC”) on May 11, 2015 in which he alleged only a “hybrid” DFR/ breach of contract claim. ECF Doc. 56; *see also* Final Order, ECF Doc. 126 at 1. The district court granted Defendants’ motions for summary judgment (“Final Order”), dismissing Haskin’s DFR claim because it was time-barred and finding that it had no jurisdiction over the breach of contract claim. *See* Final Order, ECF Doc. 126., at 4, 7.

III. Proceedings in the Court of Appeals

The Ninth Circuit affirmed in an Opinion dated April 21, 2017. Dkt. Entry 31. The Ninth Circuit found that the district court properly granted summary judgment on Haskin's duty of fair representation claim because Haskin failed to file his action within the six months after the Union's time for asserting the grievance had expired. *See* Dkt. Entry 31-1 at 2. The Ninth Circuit further found that the district court properly dismissed for lack of jurisdiction Haskin's breach of contract claim against US Airways because that claim was "contingent upon a showing by [Haskin] that he had a triable claim against the union." *Id.* (internal citation omitted). The Ninth Circuit also found that the district court did not abuse its discretion in dismissing Haskin's Title VII claims without leave to amend because further amendment would have been futile. *Id.*

Haskin's request for rehearing en banc was denied on December 7, 2017. Dkt. Entry 35.

REASONS FOR DENYING THE PETITION

I. It Is Settled Law that a Court May Not Decide a Breach of Contract Claim Against an Employer Covered by the Railway Labor Act Where It Has Dismissed As Untimely the Duty of Fair Representation Claim Against the Union.

Federal courts do not have general jurisdiction to decide disputes over the enforcement of contracts negotiated under the Railway Labor Act ("RLA"), 45 U.S.C. § 151, *et seq.* Such disputes must be processed exclusively under negotiated grievance procedures. The only exception to this is where there is an allegation that a union has breached its duty of fair

representation, a claim that was inferred by this Court decades ago to avoid serious constitutional questions with the statute in the context of discriminatory actions by an exclusive bargaining agent. *Steele v. Louisville & Nashville Rail Road*, 323 US 192 (1944). In these breach of contract/fair representation cases, it is settled law that the fair representation and breach of contract claims are “inextricably interdependent.” *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983); *see also, e.g., Peters v. Burlington N. RR. Co.*, 931 F.2d 534, 541-42 (9th Cir. 1990).

Here, Haskin alleged that his Employer, US Airways, breached the contract when it disciplined and dismissed him, and that his Union, CWA-IBT, breached its duty of fair representation by failing to vindicate him under the contractual grievance procedure. *See* Final Order, ECF Doc. 126 at 1. The district court found that the DFR claim was untimely and that the court accordingly lacked independent jurisdiction over the breach of contract claim that was “inextricably interdependent” on the DFR claim. *Id.* at 4, 7. The Ninth Circuit upheld this decision, finding that the district court’s jurisdiction “over the contractual claim against [US Airways] was contingent upon a showing by [Haskin] that he had a triable claim against the union.” *See* Dkt. Entry 31-1 (internal citations omitted). Haskin’s First Question Presented only challenges the second issue—whether the court lacked independent jurisdiction over the breach of contract claim against US Airways. He has not challenged the dismissal of his DFR claims, but nonetheless asserts that the district court could still decide his breach of contract claim.

A. There is no circuit split.

Contending that there is a circuit split, Haskin cites *White v. White Rose Food*, *supra*, a case which arose

under Section 301 of the Labor Management Relations Act (“Section 301”), 29 U.S.C. § 185, as opposed to the Railway Labor Act, and which is plainly distinguishable from his case. 128 F.3d 110 (2nd Cir. 1997). In a subsequent decision in the same litigation, the Second Circuit held that to establish a hybrid Section 301 claim, a plaintiff must prove both (1) that the employer breached a collective bargaining agreement, and (2) that the union breached its duty of fair representation vis-a-vis the union members. *White v. White Rose Food*, 237 F.3d 174, 178 (2d Cir. 2001)(finding that union did not breach duty of fair representation). There, the plaintiffs had brought a timely breach of contract claim against the employer. Later, they amended their complaint to name their union as an actual defendant and to allege a DFR violation. The subsequent claim against the union was untimely, and was dismissed for that reason. The Second Circuit, however, held that the claim against the employer could proceed, since it had been timely filed. *See* 128 F.3d at 116.

Here, unlike in *White Rose*, Haskin’s concurrently filed DFR claim and contract claim were untimely. Dismissing the DFR claim left him solely with breach of contract allegations against the Employer that the district court had no jurisdiction to decide.

1. Haskin’s case arose under the Railway Labor Act, where other circuits have ruled similarly to the Ninth Circuit that courts have no jurisdiction over a breach of contract claim when the DFR claim is untimely.

One significant distinction between the *White Rose* case and Haskin’s case is that Haskin’s case arose under the Railway Labor Act (“RLA”), *a different statute than the statute implicated in White Rose*. Labor

relations in the airline industry are governed by the RLA, which governs the jurisdiction of disputes between employees and their employers. 45 U.S.C. § 181. Such disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions are within the exclusive jurisdiction of the parties' contractual grievance processes culminating in binding arbitration.² See *Andrews v. Louisville & N. R. Co.*, 406 U.S. 320, 323 (1972); *Bautista v. Pan Am. World Airlines, Inc.*, 828 F.2d 546, 551 (9th Cir. 1987). This Court has stated that,

since the compulsory character of the administrative remedy provided by the Railway Labor Act for disputes such as that between [employee and employer] stems not from any contractual undertaking between the parties but from the Act itself, the case for insisting on resort to those remedies is if anything stronger in cases arising under that Act than it is in cases arising under s 301 of the LMRA.

Andrews v. Louisville & N. R. Co., 406 U.S. at 323. The RLA sibling to *DelCostello* is *Glover v. St. Louis-S.F. Ry.*, in which the Supreme Court established a similar exception to the grievance procedure exhaustion requirement in the RLA context where an employee alleges both a DFR and a breach of CBA by the employer. 393 U.S. 324 (1969). Given the RLA's

² In the railroad industry, employment disputes growing out of grievances or out of interpretation or application of agreements covering rates of pay, rules, or working conditions are heard before the National Railroad Adjustment Board, 45 U.S.C. 153, and in the airline industry such disputes are heard before the parties' "system boards of adjustment," 45 U.S.C. 184.

dispute resolution structures' otherwise exclusive authority over employment disputes, "a viable duty-of-fair-representation claim against an employee's union is the jurisdictional predicate for a correlative claim against the employer." *Robertson v. Burlington N. & Santa Fe Ry. Co.*, 216 F. App'x 724, 726 (10th Cir. 2007). Thus, if the claim against the union fails, the claim against the employer fails as well. *Id.*; see also *Williams v. Air Wisconsin, Inc.*, 874 F. Supp. 710, 715 (E.D. Va. 1995), *aff'd*, 74 F.3d 1235 (4th Cir. 1996)(a court has jurisdiction over breach of contract claim against employer only if employee also has a claim against the Union for breach of its duty of fair representation).

With respect to the specific question of whether a court has jurisdiction over the breach of contract claim against an employer where the DFR claim was untimely, the Fifth and Tenth Circuits have come to a similar conclusion as the Haskin court. In *Trial v. Atchison, Topeka & Santa Fe Ry. Co.*, a group of employees brought a "hybrid" action only against the employer and not the union. 896 F.2d 120, 123 (5th Cir. 1990). The Fifth Circuit found that the district court had no jurisdiction over the employees' claims against the employer as part of a "hybrid" action because they could not establish the jurisdictional predicate that the union breached its duty of fair representation, since the claims against the union were time-barred. *Id.* at 124; see also *Spaulding v. United Transp. Union*, 279 F.3d 901, 912 (10th Cir. 2002)(untimely DFR claim "doomed" breach of contract claim against employer). The Ninth Circuit's decision in Haskin's case is consistent with those of the Fifth and Tenth Circuits.

2. Haskin's breach of contract claim was not timely filed.

Although Haskin describes his breach of contract claim as "timely filed," the district court made no such finding. *See* Final Order, ECF Doc. 126. In fact, Haskin's breach of contract claim was untimely filed since it was "inextricably interdependent" on the untimely DFR claim.

Even under the Section 301 analysis in *White Rose* and *DelCostello*, Haskin's breach of contract claim would be untimely. Under *DelCostello*, the limitations period for a hybrid suit is six months, regardless of whether the employee sues both the employer and the union or only one or the other. 462 U.S. at 172; *Samples v. Ryder Truck Lines*, 755 F.2d 881, 887 (11th Cir. 1985); *Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 633 (9th Cir. 1990) ("The Ninth Circuit has adopted a six-month time bar for "hybrid" actions under the RLA."). Under that timeframe, Haskin's breach of contract claim is untimely. The final employment action occurred when Haskin was terminated on February 9, 2012. Even if the limitations period were tolled while Haskin pursued a grievance, as discussed below, the limitations period began running in mid-May 2012 and he should have filed his breach of contract claim within six months (November 2012). Haskin did not file his Original Complaint until April 15, 2014, and he did not file a breach of contract claim until he filed his Second Amended Complaint ("SAC") on January 30, 2015. Thus, under the most generous reading of the timeline, Haskin's breach of contract claim accrued no later than mid-May 2012 and he did not initiate this lawsuit until April 2014, well outside the six month limitations period.

Once again, in *White v. White Rose Food*, the DFR claim against the union was added nearly two years after the action against the employer was filed and the plaintiffs did not assert that their DFR claim “related back” to the original complaint. 128 F.3d at 114. Thus the breach of contract claim, which had been filed within the six month limitations period, was timely while the DFR claim was not. Here, all of Haskin’s claims were untimely from the beginning. *White Rose* is plainly distinguishable on the facts, putting aside the fact that it involved claims under a different statute.

B. The question of whether the district court has jurisdiction to hear Haskin’s breach of contract claim does not implicate CWA-IBT.

In any case, even if the question of jurisdiction over the breach of contract claim might somehow merit review, that question does not implicate the Union in this case. Haskin does not dispute the proper dismissal of the DFR claim against the Union. The remaining breach of contract claim only implicates the employer- US Airways.

The district court properly dismissed Haskin’s fair representation claim against CWA-IBT as untimely. This Court has established that a six-month federal statute of limitations applies to Section 301 “hybrid” actions. See *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151. That limitations period uniformly has been applied to DFR claims arising under the RLA. See *Welyczko v. USAir, Inc.*, 733 F.2d 239 (2d Cir. 1984); *Sisco v. Continental Rail Corp.*, 732 F.2d 1188 (3rd Cir. 1984); *Triplett v. Brotherhood of Ry., Airline & S.S. Clerks*, 801 F.2d 700, 702 (4th

Cir. 1986); *Dozier v. Trans World Airlines, Inc.*, 760 F.2d 849, 851 (7th Cir. 1985); *Hunt v. Missouri Pacific R.R.*, 729 F.2d 578 (8th Cir. 1984); *Lea v. Republic Airlines, Inc.*, 903 F.2d at 633; *Barnett v. United Air Lines, Inc.*, 738 F.2d 358 (10th Cir. 1984); *Railway Labor Executives Assoc. v. Southern R. Co.*, 860 F.2d 1038, 1041 (11th Cir. 1988).

This limitations period begins to run “when an employee knows or should know of the alleged breach of the duty of fair representation by a union.” *See Galindo v. Stoodly*, 793 F.2d 1502, 1509-11 (9th Cir. 1986); *see also Mortin v. Youngstown Sheet & Tube Co.*, 911 F.2d 1239, 1246 (7th Cir. 1990); *Meekins v. United Transp. Union*, 946 F.2d 1054, 1057 (4th Cir. 1991). Thus, the statute of limitations has been found to have begun running immediately upon the union informing the grievant it would no longer pursue his grievance, *Zuniga v. United Can Co.*, 812 F.2d 443, 449 (9th Cir. 1987), or when the union’s time for asserting the grievance has expired, *Samples v. Ryder Truck Lines*, 755 F.2d at 887. Where the union did not inform the employee that it is not pursuing his grievance, “the failure and refusal of the Union to file the grievance within the specified time amounted to a final determination” that triggered the running of the limitations period. *See Metz v Tootsie Roll*, 715 F.2d 299, 303 (7th Cir. 1983) (affirming dismissal of complaint against a union for breach of DFR) *see also Samples*, 755 F.2d at 887 (“employee’s cause of action accrues at the latest when his union’s time for asserting the claim has run out”).

The District Court properly found here, based upon Haskin’s own words, that the claim accrued on the date the grievance process would have been complete.

Haskin was terminated on February 9, 2012. *See* Final Order, ECF Doc. 126 at 2. He admitted that, had the Union properly followed protocol, the grievance process should have been concluded no later than May 2012, by which time he had received no communication from the Union.³ *See Id.* at 4, 5 fn. 4. Thus, Haskin's claim accrued at that point in time and should have been filed within six months- by November 2012. His DFR claim, filed almost two years later in September 2014, was untimely.

On appeal, the Ninth Circuit found that the district court properly granted summary judgment dismissing Haskin's duty of fair representation claim "because Haskin failed to file his action within six months after the union's time for asserting the grievances had expired." *See* Dkt. Entry 31-1 at 2.

In his petition Haskin has not challenged any of these conclusions.

The remaining portion of the "hybrid" suit was the breach of contract claim. That claim only lies against US Airways. *See* TAC, ECF Doc. 56 at 11. Even if Haskin were allowed to pursue that claim, CWA-IBT is not a party to it.

II. Haskin Has Garbled and Confused Title VII Claims and Fair Representation Claims.

In his "Reasons for Granting the Petition," Haskin writes:

When the Civil rights act (sic) was amended
in 1972 and the time to report a violation to

³ The time line for the parties' grievance procedure is outlined in Article 25 of the CBA, which is attached to the TAC as Exhibit E. *See* ECF Doc. 56 at 27.

the EEOC was extended to 300 days it created a loophole that the Unions and Companies are exploiting.

The 9th circuit (sic) will not hear a timely filed claim within 300 days under Title VII since the union's portion of the 301 "hybrid" claim had to be filed within 180 days.

The 2nd circuit (sic) will go ahead and rule on the breach of contract portion even if the union portion is time barred.

See Petition for Writ of Certiorari at 4. Haskin argues that the Respondents have taken advantage of this "loophole" to deny him his day in court.

Haskin has garbled or conflated two separate bodies of law- hybrid breach of contract/fair representation claims and claims under Title VII of the Civil Rights Act. These are properly treated as entirely separate claims, including with regard to limitations periods. This Court has found that the contractual rights under a CBA and the statutory right provided by Congress under Title VII "have legally independent origins and are equally available to the aggrieved employee." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 52 (1974)(holding that an arbitrator's decision pursuant to provisions in a CBA was not binding on an individual seeking to pursue his Title VII remedies in court.). "(I)n instituting an action under Title VII, the employee is . . . asserting a statutory right independent of the arbitration process." *Id.* at 54. Likewise, this Court has found that the existence and utilization of grievance or arbitration procedures under a CBA does not toll the running of a limitations period for filing a charge of discriminatory employment practices with the EEOC since Civil Rights Act remedies are

independent of other preexisting remedies available to an aggrieved employee. *Int’l Union of Elec., Radio & Mach. Workers, AFL-CIO, Local 790 v. Robbins & Myers, Inc.*, 429 U.S. 229, 236 (1976).

Citing *Robbins & Myers*, many courts have ruled that pursuit of a discrimination charge with the EEOC does not toll the running of the limitations period for a fair representation claim. *Johnson v. Artim Transp. Sys., Inc.*, 826 F.2d 538, 550 (7th Cir. 1987) (finding hybrid section 301/fair representation claim untimely because time for filing a section 301/ fair representation claim is not tolled by pursuing a Title VII claim with the EEOC); *Youngblood v. Potter*, 262 F. Supp. 2d 1309, 1317 (M.D. Ala. 2003); *Gilliland v. Air Line Pilots Ass’n Int’l*, 741 F. Supp. 2d 1334, 1343 (N.D. Ga. 2009), *aff’d sub nom. Gilliland v. Air Line Pilots Ass’n*, 396 F. App’x 655 (11th Cir. 2010) (finding untimely DFR claim filed eleven months after claim accrued and nine months after he filed EEOC charge). Accordingly, the 300-day limitation period for Haskin’s Title VII claims has no bearing on the DFR claim or the “hybrid” suit.⁴ Likewise, the six month limitations period for the section 301/fair representation claims had no bearing on the Title VII claims which were reviewed under a 300-day limitations period.

⁴ Even if the limitation period for the DFR claim was 300 days, it would still be untimely. As noted above, Haskin’s DFR claim accrued in May 2012. If the limitations period was 300 days, the limitations period would have ended in March 2013. The earliest filing in this lawsuit, the Original Complaint, was filed on April 15, 2014, well beyond that date.

III. Haskin Has Not Presented Any Grounds For Review of the Dismissal of His Retaliation Claim Without Leave to Amend.

In reviewing Haskin's Title VII claims, the district court treated Haskin's November 27, 2012 "intake interview" as a separate charge from the "formal charge" filed on January 29, 2013 because the allegations in those two documents were so different. *See* Order II, ECF Doc. 55 at 10-11. The "formal charge," filed more than 300 days after the final incident of "discrimination" (Haskin's termination), was properly dismissed as untimely, a decision Haskin does not appeal. Consequently, the district court only considered the allegations contained in the intake questionnaire, dismissing them with prejudice for failure to state a claim. Order II, ECF Doc. 55 at 11-12.

Although Haskin questions whether the district court was correct in dismissing his retaliation cause of action without leave to amend, he offers no argument that the Ninth Circuit erred in affirming the district court. The Ninth Circuit applied the proper standard of review- abuse of discretion- and it properly found that the district court did not abuse its discretion in dismissing Haskin's Title VII claims without leave to amend because any further amendment would be futile. In any case, there is no retaliation claim against the Union, because Haskin failed to file an EEOC charge against the Union.

A. The Ninth Circuit applied the proper standard and grounds for review of the denial of leave to amend.

Haskin has not argued that the Ninth Circuit applied the incorrect standard and grounds for review. The Ninth Circuit reviewed the district court's denial

of leave to amend for abuse of discretion and found that it did not abuse its discretion in dismissing Haskin's Title VII claims without leave to amend because any further amendment would be futile. Dkt. Entry 31-1 at 2. This standard of review and analysis is accepted in the First, Second, Third, Fourth, Seventh, Ninth and D.C. Circuits. *Chiang v. Skeirik*, 582 F.3d 238, 243 (1st Cir. 2009); *Kim v. Kimm*, 884 F.3d 98, 105-06 (2d Cir. 2018); *Connelly v. Steel Valley Sch. Dist.*, 706 F.3d 209, 217 (3d Cir. 2013), as amended (May 10, 2013); *Adbul-Mumit v. Alexandria Hyundai, LLC*, 896 F.3d 278, 293 (4th Cir. 2018); *Robertson v. Prince William Hosp.*, 486 F. App'x 375, 376 (4th Cir. 2012); *Cleveland v. Porca Co.*, 38 F.3d 289, 297 (7th Cir. 1994); *Chinatown Neighborhood Ass'n v. Harris*, 794 F.3d 1136, 1141, 1144-45 (9th Cir. 2015); *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 945 (D.C. Cir. 2004). The Fifth, Sixth, Eighth, Tenth and Eleventh Circuits review the denial of a motion to amend for abuse of discretion unless the district court's denial of leave to amend was based solely on futility, in which case they review *de novo* the underlying legal conclusion whether the proposed amendments to the complaint would have been futile. *Thomas v. Chevron U.S.A., Inc.*, 832 F.3d 586, 590 (5th Cir. 2016); *Kottmyer v. Maas*, 436 F.3d 684, 691 (6th Cir. 2006); *H & Q Properties, Inc. v. Doll*, 793 F.3d 852, 857 (8th Cir. 2015); *Combs v. PriceWaterhouse Coopers LLP*, 382 F.3d 1196, 1205 (10th Cir. 2004); *Watson ex rel. Watson v. Beckel*, 242 F.3d 1237, 1239-40 (10th Cir. 2001); *Arthur v. Comm'r, Alabama Dep't of Corr.*, 840 F.3d 1268, 1314-15 fn. 29 (11th Cir. 2016), cert. denied sub nom. *Arthur v. Dunn*, 137 S. Ct. 725 (2017), reh'g denied, 137 S. Ct. 1838 (2017). Haskin has offered no argument that the denial of leave to amend should have been reviewed under *de novo* review or

that he would have been granted leave to amend under such standard.

B. Haskin does not have an actionable retaliation claim against CWA-IBT because he failed to exhaust his administrative remedies.

In any case, any retaliation claim does not lie against CWA-IBT under Title VII because Haskin failed to exhaust his administrative remedies by filing a charge against CWA-IBT with the EEOC. A party not named in an EEOC charge may not be sued under Title VII unless there is a “clear identity of interest” between it and a party named in the EEOC charge or if it has unfairly prevented the filing of an EEOC charge. *See Jones v. Truck Drivers Local Union No. 299*, 748 F.2d 1083, 1086 (6th Cir. 1984) (Where union did not prevent plaintiffs from filing an EEOC claim, there was no basis for setting aside the exhaustion requirement as “technical,” plaintiffs were aware of union’s conduct at time it filed its Title VII claim against employer, union’s and employer’s interests were not similar, and union’s separate interests in EEOC proceedings were prejudiced by failure to file a charge against it, district court’s decision to reinstate plaintiffs’ Title VII claim was erroneous); *see also Schnellbaecher v. Baskin Clothing Co.*, 887 F.2d 124, 127-28 (7th Cir. 1989) (Employer’s parent corporation that was not named in EEOC charge could be dismissed from employment discrimination action, even though parent had notice of charges against employer, because parent did not have notice of any charges against it and did not have opportunity to conciliate on its own behalf.).

Although the district court made no finding as to whether Haskin could bring a Title VII claim against

CWA-IBT, it repeatedly noted that Haskin's charges did not mention the CWA-IBT. The various documents related to the EEOC charge neither mentioned CWA-IBT nor were sent to CWA-IBT, including: the intake questionnaire, a letter from the EEOC acknowledging receipt of the intake questionnaire and scheduling an in-person interview, the formal charge, and the right to sue letter. *See* Order II, ECF 55 at 6-8. Significantly, the charges only describe conduct by Haskin's co-workers and manager, not by CWA-IBT; in particular, the act of retaliation cited in Haskin's intake questionnaire was that he was "[f]ired in retaliation for [h]elping other employees file Living Wage and EEOC claims"- conduct that does not implicate the union. *Id.* at 6-8. Thus, with respect to CWA-IBT, Haskin failed to satisfy the procedural requirement that he first file a charge against CWA-IBT with the EEOC. Accordingly, any retaliation charge cannot lie against CWA-IBT.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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