No. ______

IN THE

Supreme Court of the United States

MATTHEW J. DEBEIKES,

Petitioner,

v.

HAWAIIAN AIRLINES, INC. AND ASSOCIATION OF FLIGHT ATTENDANTS-CWA, AFL-CIO,

Respondents.

Petition for a Writ of Certiorari to the
United States Court of Appeals
For the Ninth Circuit

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Did the facts of this case state a valid hybrid action pursuant to 45 U.S. Code § 151?
2. In the alternative, should Vaca v. Sipes be overruled and the dissent's position in Vaca v. Sipes be adopted in hybrid actions?

## LIST OF PARTIES TO THE PROCEEDINGS

The Petitioner in this case is MATTHEW J. DEBEIKES. The Respondents are HAWAIIAN AIRLINES, INC. AND ASSOCIATION OF FLIGHT ATTENDANTS-CWA, AFL-CIO.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner MATTHEW J. DEBEIKES (hereinafter "DEBEIKES"), the Plaintiff in the United States District Court, for the District of Hawaii and the Plaintiff-Appellant in the United States Court of Appeals for the Ninth Circuit, respectfully petitions for a Writ of *Certiorari* to review the Memorandum Opinion of the Circuit Court of Appeals for the Ninth Circuit, filed February 21, 2018.

## OPINIONS BELOW

The Memorandum Opinion filed February 21, 2018 of the United States Court of Appeals for the Ninth Circuit is unreported and is included herein as Appendix "A". There are two pertinent decisions of the United States District Court for the District of Hawaii. The October 28, 2015 Decision is reported at 141 F. Supp 3d 1075 (2015) and appears as Appendix "B". The February 17, 2015, Decision is unreported and appears as Appendix "C". The pertinent constitutional and statutory provisions are attached as Appendix "D".

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its Memorandum Opinion on February 21, 2018. This Petition to the Supreme Court is timely if filed on or before May 22, 2018. This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 1254(1) and Supreme Court Rule 13.1 and 13.3.

## STATUTE AND CONSTITUTION INVOLVED

45 U.S. Code § 151.

## STATEMENT OF THE CASE

1. *Relevant Facts.*

Debeikes was a flight attendant with Respondent Hawaiian Airlines, Inc. (HAL) for approximately 30 years with a record of commendations and no record of discipline. After sexual harassment allegations were raised against Debeikes, HAL initiated an investigation. As a dues paying member of Respondent Association of Flight Attendants-CWA, AFL-CIO (AFA), Debeikes requested representation from AFA.

On October 3, 2013, Debeikes filed a Complaint alleging that HAL and AFA forced Debeikes into early retirement on May 29, 2013. Specifically, the Complaint contended that HAL violated the collective bargaining agreement ("CBA") governing the terms and conditions of Debeikes' employment with the company, and that AFA breached its duty to fairly represent Debeikes as one of its bargaining unit members.

On October 30, 2014, both HAL and AFA moved for summary judgment. AFA filed a Motion for Summary Judgment ("MSJ") as to Debeikes' claim that it breached the union's DFR, and HAL filed a MSJ as to all of Debeikes' claims. On February 17, 2015, the Court granted HAL and AFA's MSJs as to all of Debeikes' claims and gave Debeikes 30 days leave to file a first amended complaint.

On March 11, 2015, Debeikes filed his First Amended Complaint ("Am. Compl."), bringing a hybrid § 301/fair representation claim against AFA and HAL and a "constructive discharge" claim based on a predetermination termination theory.

On March 25, 2015, HAL filed its Motion to Dismiss, or in the Alternative, Grant Summary Judgment ("Hawaiian Airlines' MTD/MSJ"), AFA filed a Joinder to HAL's MTD/MSJ on March 31, 2015.

On April 14, 2015, AFA also filed its own Motion to Dismiss or, in the Alternative, for Summary Judgment ("AFA's MTD/MSJ"). HAL filed a Joinder to AFA's MTD/MSJ on May 7, 2015.

On May 7, 2015, Debeikes filed an Opposition to AFA's MTD/MSJ and an Opposition to HAL's MTD/MSJ.

On May 14, 2015, AFA filed a Reply Memorandum in Support of MTD/MSJ ("AFA Reply"), and HAL filed a Reply Memorandum in Support of MTD/MSJ, ECF No. 110 ("HAL Reply").

The Court subsequently heard oral arguments on HAL and AFA's MTD/MSJs on October 22, 2015.

On October 28, 2015 the Court granted HAL and AFA's MTD/MSJs and entered judgment that same day.

2. *United States District Court for the District of Hawaii Proceedings:* The district court granted summary judgment in favor of the defendant-appellees, in two decisions. The October 28, 2015 Decision is

reported at 141 F. Supp 3d 1075 (2015) and appears as Appendix "B". The February 17, 2015, Decision is unreported and appears as Appendix "C".

*3. United States Court of Appeals for the Ninth Circuit Proceedings:* Debeikes timely appealed the *United States District Court for the District of Hawaii's orders to the United States Court of Appeals for the Ninth Circuit* which issued a non-published opinion February 21, 2018 affirming the trial court's orders. The Memorandum Opinion filed February 21, 2018 of the United States Court of Appeals for the Ninth Circuit is unreported and is included herein as Appendix "A".

## REASONS FOR GRANTING THE WRIT

HAL refused to provide any documents at the sexual harassment investigatory meeting that could result in discipline as per the Collective Bargaining Agreement (CBA). AFA filed a MEC class grievance with HAL naming Debeikes as John Doe Number One but never informed Debeikes of the filing. The MEC class grievance ultimately prevailed and would have afforded Debeikes the relief sought in his hybrid action. OPINION AND AWARD ~ In the Matter of: Association of Flight Attendants - Communication Workers of America AFL-CIO, Union and Hawaiian Airlines, Inc., Company (hearing date: July 24, 2014, date of award: July 15, 2015). The MEC class grievance found that the company violated Section 23.E.10.c. of the CBA with regard to the cases of Doe I and Doe II," with "Doe I" being Debeikes.

If the AFA had made Debeikes aware of the concealed MEC class grievance, Debeikes would have not retired and elected to continue on with the employer's May 29, 2013 hearing. If the AFA had made Debeikes aware of the concealed MEC class grievance, Debeikes would have had a way to still challenge the denial of due process to review any documents at any meeting that could result in discipline.

It was ultimately proven at the class arbitration grievance that HAL violated Debeikes' right to due process under the CBA by HAL's refusal to provide any documents at a meeting that could result in discipline. AFA concealed the class grievance from Debeikes when Debeikes was named as John Doe 1 in the class grievance.

Debeikes respectfully requests that this Honorable Court adopt as a matter of public policy that a Union (AFA) which has a duty of fair representation cannot conceal a class grievance from a union member where the union member is named as one of the two class representatives and the relief requested on behalf of the John Doe union member would make the John Doe union member whole.

The union as the statutory representative of the employees is "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Ford Motor Co.* v. *Huffman,* 345 U.S. 330, 338 (1953).

The Union owes a duty to its members to not conceal facts that would unfairly prejudice a union member's decision. Browne & Sharpe Mfg. Co., 321 NLRB 924 (1996). A Union not disclosing a crucial fact to its aggrieved union member where the union member would benefit by the concealed fact is a breach of the Union's duty of fair representation.

A Union not disclosing a crucial fact to its aggrieved union member colors a union member's decision as in this case at bar which colored Debeikes' decision as to whether to retire with flight benefits to avoid termination with no flight benefits when one's due process rights have been violated by the Employer and, additionally, the Union gives the false perception that it has been doing nothing to rectify the due process violation through a grievance which has been concealed from the employee.

In the alternative, Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967), should be overruled. In Vaca v. Sipes, Justice Black argued the hardship the majority's ruling would place on Dues Paying Union Employees bringing suit:

MR. JUSTICE BLACK, dissenting.

The Court today opens slightly the courthouse door to an employee's incidental claim against his union for breach of its duty of fair representation, only to shut it in his face when he seeks direct [****60] judicial relief for his underlying and more valuable breach-of-contract claim against his employer. This result follows from the Court's announcement in this case, involving an employee's suit against [**924] his union, of a new rule to govern an employee's suit against his employer. The rule is that before an employee can sue his employer under § 301 of the L. M. R. A. for a simple breach of his employment contract, the employee must prove not only that he attempted to exhaust his contractual remedies, but that his attempt to exhaust them was frustrated by "arbitrary, discriminatory, or . . . bad faith" conduct on [*204] the part of his union. With this new rule and its result I cannot agree.

The Court recognizes, as it must, that the jury in this case found at least that Benjamin Owens was fit for work, that his grievance against Swift was meritorious, and that Swift breached the collective bargaining agreement when it wrongfully discharged him. The Court also notes in passing that Owens has a separate action for breach of [***866] contract pending against Swift in the state courts. And in Part IV of its opinion, the Court vigorously insists that "there is no [****61] reason to exempt the employer from contractual damages which he would otherwise have had to pay," that the "employee should have no difficulty recovering these damages from the employer" for his "unrelated breach of contract," and that "the employee [is] assured of direct recovery from the employer." But this reassurance in Part IV gives no comfort to Owens, for Part IV is based on the assumption that the union breached its duty to Owens, an assumption which, in Part III of its opinion, the Court finds unsupported by the facts of this case. What this all means, though the Court does not expressly say it, is that Owens will be no more successful in his pending breach-of-contract action against Swift than he is here in his suit against the union. For the Court makes it clear "that the question of whether a union has breached its duty of fair representation will . . . be a critical issue in a suit under L. M. R. A. § 301," that "the wrongfully discharged employee may bring an action against his employer" only if he "can prove that the union . . . breached its duty of fair representation in its handling of the employee's grievance," and "that the employee, as part and parcel of his [****62] § 301 action, finds [*205] it necessary to prove an unfair labor practice by the union." Thus, when Owens attempts to proceed with his pending breach-of-contract action against Swift, Swift will undoubtedly secure its prompt dismissal by pointing to the Court's conclusion here that the union has not breached its duty of fair representation. Thus, Owens, who now has obtained a judicial determination that he was wrongfully discharged, is left remediless, and Swift, having breached its contract, is allowed to hide behind, and is shielded by, the union's conduct. I simply fail to see how it should make one iota of difference, as far as the "unrelated breach of contract" by Swift is concerned, whether the union's conduct is wrongful or rightful. Neither precedent nor logic supports the Court's new announcement that it does.

[****63] Certainly, nothing in *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650, supports this new rule. That was a case where the aggrieved employee attempted to "completely sidestep available grievance procedures in favor of a lawsuit." *Id.*, at 653. Noting that "it cannot be said . . . that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so," *ibid.*, the Court there held that the employee

"must *attempt* use of the contract grievance procedure," *id.*, at 652, and "must afford the union the opportunity to act on his behalf," *id.*, at 653. I dissented on the firm belief that an employee should be free to litigate his own lawsuit with his own lawyer in [**925] a court before a jury, rather than being forced to entrust his claim to a union which, even if it did agree to press it, would be required to submit it to arbitration. And even if, as the Court implied, "the worker would be allowed to sue after he had presented his claim to the union and after he had suffered the inevitable discouragement [****64] and delay which necessarily accompanies the union's refusal [*206] to press his claim," *id.*, at 669, [***867] I could find no threat to peaceful labor relations or to the union's prestige in allowing an employee to by-pass completely contractual remedies in favor of a traditional breach-of-contract lawsuit for back pay or wage substitutes. Here, of course, Benjamin Owens did not "completely sidestep available grievance procedures in favor of a lawsuit." With complete respect for the union's authority and deference to the contract grievance procedures, he not only gave the union a chance to act on his behalf, but in every way possible tried to convince it that his claim was meritorious and should be carried through the fifth step to arbitration. In short, he did everything the Court's opinion in *Maddox* said he should do, and yet now the Court says so much is not enough.

In *Maddox*, I noted that the "cases really in point are those which involved agreements governed by the Railway Labor Act and which expressly refused to hold that a discharged worker must pursue collective bargaining grievance procedures before suing in a court for wrongful discharge. [****65] *Transcontinental & Western Air, Inc.* v. *Koppal*, 345 U.S. 653; *Moore* v. *Illinois Central R. Co.*, 312 U.S. 630." 379 U.S., at 666. I also observed that the Court's decision in *Maddox* "raised the overruling axe so high [over those cases] that its falling is just about as certain as the changing of the seasons." *Id.*, at 667. In the latter observation I was mistaken. The Court has this Term, in *Walker* v. *Southern R. Co.*, 385 U.S. 196, refused to overrule in light of *Maddox* such cases as *Moore* and *Koppal*. Noting the long delays attendant upon exhausting administrative remedies under the Railway Labor Act, the Court based this refusal on "the contrast between the administrative remedy" available to Maddox and that available to Walker. If, as the Court suggested, the availability of an administrative remedy determines whether an employee can sue without first [*207] exhausting it, can there be any doubt that Owens who had no administrative remedy should be as free to sue as Walker who had a slow one? Unlike Maddox, Owens attempted to implement the contract grievance [****66] procedures and found them inadequate. Today's decision, following in the wake of *Walker* v. *Southern R. Co.*, merely perpetuates an unfortunate anomaly created by *Maddox* in the law of labor relations.

The rule announced in *Maddox*, I thought, was a "brainchild" of the Court's recent preference for arbitration. But I am unable to ascribe any such genesis to today's rule, for arbitration is precisely what Owens sought and preferred. Today the Court holds that an employee with a meritorious claim has no absolute right to have it either litigated or arbitrated. Fearing that arbitrators would be overworked, the Court allows unions unilaterally to determine not to take a grievance to arbitration -- the first step in the contract grievance procedure at which the claim would be presented to an impartial third party -- as long as the union decisions are neither "arbitrary" nor "in bad faith." The Court derives this standard of conduct from a long line of cases holding that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, [***868] or in bad faith. [****67] " What the Court overlooks is that those cases laid down this standard in the context of situations where the employee's sole or fundamental complaint was against the union. There was not the slightest hint in those cases that the [**926] same standard would apply where the employee's primary complaint was against his employer for breach of contract and where he only incidentally contended that the union's conduct prevented the adjudication, by either court or arbitrator, of the underlying grievance. If the Court here were satisfied with merely holding that in this situation the employee [*208] could not recover damages from the union unless the union breached its duty of fair representation, then it would be one thing to say that the union did not do so in making a good-faith decision not to take the employee's grievance to arbitration. But if, as the Court goes on to hold, the employee cannot sue his employer for breach of contract unless his failure to exhaust contractual remedies is due to the union's breach of its duty of fair representation, then I am quite unwilling to say that the union's refusal to exhaust such remedies -- however nonarbitrary -- does not amount [****68] to a breach of its duty. Either the employee should be able to sue his employer for breach of contract after having attempted to exhaust his contractual remedies, or the union should have an absolute duty to exhaust contractual remedies on his behalf. The merits of an employee's grievance would thus be determined by either a jury or an arbitrator. Under today's decision it will never be determined by either.

And it should be clear that the Court's opinion goes much further than simply holding that an employee has no absolute right to have the union take his grievance to arbitration. Here, of course, the union supervised the grievance into the fourth step of the contract machinery and dropped it just prior to arbitration on its belief that the outcome of arbitration would be unfavorable. But limited only by the standard of arbitrariness, there was clearly no need for the union to go that far. Suppose, for instance, the union had a rule that it would not prosecute a grievance even to the first step unless the grievance were filed by the employee within 24 hours after it arose. Pursuant to this rule, the union might completely refuse to prosecute a grievance filed several days late. [****69] Thus, the employee, no matter how meritorious his grievance, would get absolutely nowhere. And unless he could prove that [*209] the union's rule was arbitrary (a standard which no one can define), the employee would get absolutely no consideration of the merits of his grievance -- either by a jury, an arbitrator, the employer, or by the union. The Court suggests three reasons for giving the union this almost unlimited discretion to deprive injured employees of all remedies for breach of contract. The first is that "frivolous grievances" will be ended prior to time-consuming and costly arbitration. But here no one, not even the union, suggests that Benjamin Owens' grievance was frivolous. The union decided not to take it to arbitration simply because the union doubted the chance of success. Even if this was a good-faith doubt, I think the union had the duty to present this contested, but serious, claim to the arbitrator whose very function is to decide such claims on the basis of what he believes to be right. Second, the [***869] Court says that allowing the union to settle grievances prior to arbitration will assure consistent treatment of "major problem areas in the [****70] interpretation of the collective bargaining contract." But can it be argued that whether Owens was "fit to work" presents a major problem in the interpretation of the collective bargaining agreement? The problem here was one of interpreting medical reports, not a collective bargaining agreement, and of evaluating other evidence of Owens' physical condition. I doubt whether consistency is either possible or desirable in determining whether a particular employee is able to perform a particular job. Finally, the Court suggests that its decision "furthers the interest of the union as statutory agent." I think this is the real reason for today's decision which entirely overlooks the interests of the injured employee, the only one who [**927] has anything to lose. Of course, anything which gives the union life and death power over those whom it is supposed to represent furthers its "interest." I simply fail to see how [*210] the union's legitimate role as statutory agent is undermined by requiring it to prosecute all serious grievances to a conclusion or by allowing the injured employee to sue his employer after he has given the union a chance to act on his behalf.

Henceforth, [****71] in almost every § 301 breach-of-contract suit by an employee against an employer, the employee will have the additional burden of proving that the union acted arbitrarily or in bad faith. The Court never explains what is meant by this vague phrase or how trial judges are intelligently to translate it to a jury. Must the employee prove that the union in fact acted arbitrarily, or will it be sufficient to show that the employee's grievance was so meritorious that a reasonable union would not have refused to carry it to arbitration? Must the employee join the union in his § 301 suit against the employer, or must he join the employer in his unfair representation suit against the union? However these questions are answered, today's decision, requiring the individual employee to take on both the employer and the union in every suit against the employer and to prove not only that the employer breached its contract, but that the union acted arbitrarily, converts what would otherwise be a simple breach-of-contract action into a three-ring donnybrook. It puts an intolerable burden on employees with meritorious grievances and means they will frequently be left with no remedy. Today's decision, [****72] while giving the worker an ephemeral right to sue his union for breach of its duty of fair representation, creates insurmountable obstacles to block his far more valuable right to sue his employer for breach of the collective bargaining agreement.

This case exemplifies the difficulties a dues paying union member has in meeting the principles set forth in Vaca v. Sipes. Debeikes respectfully requests that this Honorable Court overrule Vaca v. Sipes.

## CONCLUSION

This writ of certiorari should be granted because either the current record states a valid hybrid cause of action or, in the alternative, Vaca v. Sipes should be overruled, and the dissent's opinion in Vaca v. Sipes be adopted for the reasoning set forth therein.

Respectfully submitted May 14, 2018.

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