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THE SUPREME COURT
OF THE
UNITED STATES

CAPTION: EFTHIMIOS A. KARAHALIOS, Petitioner V. NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1263

CASE NO: 87-636

PLACE: WASHINGTON, D.C.

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IN THE SUPREME COURT OF THE UNITED STATES

EFTHIMIOS A. KARAHALIOS,

Petitioner

v. : No. 87-636

NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1263

Washington, D.C.

Tuesday, January 17, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:01 o'clock a.m.

APPEARANCES:

THOMAS R. DUFFY, ESQ., Monterey, California; on behalf of the Petitioner.

H. STEPHAN GORDON, ESQ., Washington, D.C.; on behalf of the Respondent.

RICHARD G. TARANTO, Assistant to the Solicitor General, Department of Justice, Washington, D.C.; as Amicus Curiae supporting the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:01 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in No. 87-636 Efthimios A. Karahalios v. National Federation of Federal Employees.

You may proceed whenever you're ready.

ORAL ARGUMENT OF THOMAS R. DUFFY

ON BEHALF OF THE PETITIONER

MR. DUFFY: Thank you, Mr. Chief Justice. May it please the Court:

The issue before the Court this morning in this case is whether a federal employee who has been injured by his union's breach of the duty of fair representation may bring an action to redress those injuries in district court or, put another way, whether Congress intended a union operating in the federal sector to receive immunity, complete immunity, from such lawsuits, an immunity which has never been permitted in any other national labor relations statute.

It is our view that the congressional grant of exclusive representation powers to the union in the federal sector, coupled with the unreviewable discretion of the general counsel of the FLRA here, mandate jurisdiction, subject matter jurisdiction, in the district court just as exactly those same factors

compelled jurisdiction in this court's decision in Vaca v. Sipes 20 years ago.

QUESTION: Well, suppose the general counsel issues a complaint and then there's a -- there is a provision for an administrative hearing on unfair representation.

MR. DUFFY: That's correct.

QUESTION: So, Congress certainly anticipated that there would be an administrative remedy.

MR. DUFFY: That's correct, Your Honor. And --

QUESTION: So, what would happen if there was an administrative proceeding on an unfair -- and there's a ruling that there wasn't any unfair representation? Can you go to court?

MR. DUFFY: I think that's exactly the wrong which was addressed by the Court in Vaca v. Sipes. The problem is in the focus which the administrative remedy has and the strength of --

QUESTION: But could you go to court in my -- in my question? Could you go to court after that?

MR. DUFFY: In the private sector, Your Honor?

QUESTION: Would you -- yes. Would you just then go up on appeal, or would you start all over in the federal district court or what?

MR. DUFFY: As it's currently structured, Your

Honor, I believe that you can go to district court. I believe that's the doctrine announced -- enunciated by the Court in Vaca v. Sipes. And I think that the reason for that is that the Court recognized in Vaca that the administrative remedies -- the focus which the administrative agency has in fashioning remedies, even given an unfair labor practice finding, is a remedy which isn't necessarily suited to redress the wrongs done to the individual employee.

For example -- and the facts here I think provide a cogent demonstration of that. Here the administrative remedy fashioned by the agency, by the Authority's general counsel, in reaching a settlement, a settlement reached, it bears noting, over the objection of the charging party, over the objection of the injured employee -- the administrative remedy reached here was to achieve a settlement with the union which required the union to post a notice on its bulletin board saying we're not going to repeat the conduct which was wrongful. And that administrative remedy may well have been furthering the institutional goals of the Federal Labor Relations Authority, as similar notice-posting remedies further the institutional goals which the NLRB has in the private sector.

And the problem addressed by the Court in Vaca

is that that administrative remedy, given the strength of the duty of fair representation doctrine -- that administrative remedy does not provide any relief -- that administrative focus does not provide any relief for the injured employee who is wronged by his union.

We believe that the --

QUESTION: Although in that case there had previously been -- before the administrative remedy was adopted, there had previously been judicial relief available though.

MR. DUFFY: In the Vaca v. Sipes case.

QUESTION: Yes, in that situation.

MR. DUFFY: It was an open question in Vaca whether or not the availability of unfair labor practice review was sufficient to allow preemption of a judicial remedy.

QUESTION: No, but hadn't the judicial remedy been -- been available before the administrative remedy was provided?

MR. DUFFY: Certainly, Your Honor.

QUESTION: It was -- there was no question that -- that -- that you have the judicial remedy before the administrative remedy. So, the -- the issue was whether the furnishing of the administrative remedy eliminated a judicial remedy that had previously been

available. And that's not the question here.

MR. DUFFY: Well, I'm not certain that that -- that's actually the case here. Here I think we're working in a very similar setting. In the private sector when Vaca was decided, we had a judicial remedy well recognized in Steele and Tunstall, in -- in that line of cases. Nevertheless, after Vaca we have a setting where we have an administrative remedy and a concurrent judicial remedy. And I think that's the contextual setting in which Congress was passing the CSRA here, and that's what Congress was looking to when it said it wanted to make federal sector labor relations more like the private sector. In other words --

QUESTION: Which came -- which came -- which came first in the Vaca situation? The administrative remedy or the judicial remedy?

MR. DUFFY: Well, the judicial remedy was established in Steele and Tunstall some 20 years before the -- the Vaca remedy.

QUESTION: And it had been before the board decided this would be an unfair practice, didn't it?

MR. DUFFY: That's correct. The board decided that -- that duty of fair representation cases would be prosecuted as unfair labor practices in Miranda Fuel in 1962.

But what we have here is a setting where these cases, Vaca v. Sipes, and its progeny, Bowen, Foust, Mitchell -- these cases are some of the absolute, fundamental principles that we see in our scheme of private sector labor law. And it's our position that, with these principles in mind and with the acknowledged legislative statement that Congress was attempting to fashion a federal sector labor relations setting in the Civil Service Reform Act which more closely approximated private sector collective bargaining, since the principles in Vaca lie at the -- at the absolute base of private sector collective bargaining, that Congress must have intended these principles to apply also in the Civil Service Reform Act.

QUESTION: But you -- you still have to be implying a cause of action.

MR. DUFFY: Well, I think that --

QUESTION: There is no express provision for it.

MR. DUFFY: Well, there's -- there's no question that it's not set forth in the statute, Justice White. And I think that the appropriate analysis here though is not the Touche Ross analysis. Here we're working in a setting where Congress tells us in the legislative history the objective that we're working

towards is a private sector model. True, it has some public sector management differences. But what we want to do is we want to achieve a private sector model. We want to achieve a more efficient way to handle our various employee grievances, and we believe that efficiency can be achieved through -- through channeling those grievances through the grievance and arbitration mechanism.

QUESTION: Of course, what the statute says, as opposed to what the -- what you're reciting from the legislative history, is that there will be an administrative remedy. It doesn't say anything about a judicial remedy.

MR. DUFFY: That's correct, Your Honor, and --

QUESTION: Which makes it different from -- from the National Labor Relations Act, does it not, and the Railway Labor Act?

MR. DUFFY: I don't believe so, Your Honor. The National Labor Relations Act had no provision for district court jurisdiction over duty of fair representation actions.

QUESTION: No, but was there the express administrative remedy provided in those acts?

MR. DUFFY: Certainly in the National Labor Relations Act, there was. In the RLA, no, that's not

the case. There's not the corresponding NLRB counterpart and unfair labor practice counterpart.

And -- and perhaps the better model to look at here or the closer model to look at here is the National Labor Relations Board. And, indeed, the congressional history tells us to look to the National Labor Relations Board to determine what the Federal Labor Relations Authority is all about. There's express congressional history, which we cited in our brief both from the House and from the Senate indicating that the role of the Federal Labor Relations Authority, and in particular the role of the general counsel in the Authority, is to be modeled after the private sector National Labor Relations model.

And it's our view that that model, the private sector model, which grants two things which are particularly troubling in this situation -- first it grants exclusive representational powers to the union. The union -- the majority representative has exclusive access to the bargaining mechanism, which may be less significant in the federal sector, but it has the same access, exclusive access, to the arbitration mechanism which is so very troubling in a case like this. Should the union decide for arbitrary, bad faith or discriminatory reasons not to take a case to

arbitration, what remedy does the employee have?

And is the administrative focus of the institution with the -- the FLRA, that is -- with the institutional goals which it has in fashioning unit-wide remedies, as opposed to individual remedies -- is that institutional focus sufficient to allow us to say that the duty of fair representation in the federal sector is less significant and less worthy of protection than in the private sector?

It's our feeling that had Congress wanted to depart from the principles of Vaca, the reasonable thing for Congress to have done would be to say something about it. The legislative history is actually -- is absolutely bereft of any mention that Congress wished to fashion different rules in this setting.

Moreover, the legislative history is ripe with mention of the things that Congress wished to change, places where it wished to depart from the National Labor Relations model. And those are clearly set forth in the management rights provisions and so forth.

But here --

QUESTION: Fairness is not -- it's not just the legislative history that's rife with that. It's the terms of the statute. You wouldn't have needed the legislative history's reference to those differences.

MR. DUFFY: Well, surely, Your Honor --

QUESTION: Management's rights are set forth in the statute with some specificity.

MR. DUFFY: With a great deal of specificity.

Surely, we'd look to the language of the statute first. My point here is, of course, there is no statutory discussion --

QUESTION: My point is that the departure that the legislative history refers to -- the other departures that the legislative history refers to are departures that are contained in the text of the statute. Right?

MR. DUFFY: That may well be the case, Your Honor. However, I don't think where we have no indication in the statute that Congress wished to depart from the principles in Vaca, then we look to the legislative history, and what does the legislative history tell us? The legislative history tells us nothing about Vaca, no indication that -- there's no indication in the legislative history -- in fact, there's an implication to the contrary -- that the role of the FLRA and the role of the FLRA general counsel is to be modeled after the NLRB.

Surely, if Congress wanted us to change from that model in this significant respect, given the number

of decisions of this Court enforcing the duty of fair representation, there would have been some discussion in the legislative history describing the role of the National -- of the FLRA saying, look, we intend the FLRA to have greater jurisdiction or exclusive jurisdiction. We intend to depart from the principles enunciated in Vaca, and that didn't happen here.

If there are no further questions, I'll reserve my time.

QUESTION: Thank you, Mr. Duffy.

Mr. Gordon, we'll hear now from you.

ORAL ARGUMENT OF H. STEPHAN GORDON

ON BEHALF OF THE RESPONDENT

MR. GORDON: Mr. Chief Justice, and may it please the Court:

In this case the Court is once again called upon to decide whether a private remedy is implicit in a statute which does not expressly provide for it. And in recent years, but starting long before the enactment of the Civil Service Reform Act, this Court has held in a considerable body of case law that the creation of an implied private cause of action to enforce a particular statute -- a statutory duty is the function of the Congress and not of the Court, and that the ultimate issue before the Court in deciding this issue is whether

the Congress did, in fact, intend to create such a private right.

To discern this congressional intent, the Court has said it will look to the language of the statute, the structure of the statute, the legislative history of the statute. And unless a congressional intent can be discerned from these factors or from some other relevant source, the essential predicate for implying a private remedy simply does not exist.

The Petitioner asserts in his brief that the Court's task in ascertaining this matter in this case is simplified because the Congress modeled the Civil Service Reform Act on the Labor Management Relations Act in the private sector, where the Court long ago fashioned a private remedy for the judicially developed doctrine of the duty of fair representation. And Petitioner asserts that Congress, therefore, must be held to have incorporated this private cause of action into Title VII of the Civil Service Reform Act.

This argument, I respectfully submit, is misdirected. I think from the outset it must be emphasized that the Civil Service Reform Act is not an extension of the Labor Management Relations Act. It is, indeed, a new law designed to regulate for the first time labor-management relations in the federal

government, labor-management relations, incidentally, with problems and issues which are unique unto themselves and which differ materially from those to be found in the private sector and particularly wherein the role of the union is far more circumscribed than the role of labor organizations in the private sector.

And moreover, while the Labor Management Relations Act may well have acted as a backdrop to the enactment of the Civil Service Reform Act, the Civil Service Reform Act is far more closely related to the executive orders which governed labor-management relations in the federal government for 18 years prior to the enactment of the Civil Service Reform Act. And, indeed, the language of the duty of fair representation which is at issue here is taken almost in haec verba from the executive order.

Indeed, if the Civil Service Reform Act is related to anything, it is a codification of the executive orders rather than the Labor Management Relations Act.

QUESTION: I must say I've never heard a union argue this before, but it's -- it's an interesting (inaudible) to hear from that side.

MR. GORDON: Thank you, Justice Scalia.

(Laughter)

MR. GORDON: Now, with respect to the language and structure of the legislative history of the Civil Service Reform Act, the Act differs materially from the Labor Management Relations Act, and while there are certainly some similarities between the two acts, the differences far outweigh the similarities.

But with respect to the duty of fair representation, which is the issue before the Court today, this difference is particularly cognizable. Thus, unlike in the private sector, the Congress here expressly treated with a duty of fair representation, which was never done in the private sector. And it did so by expressly codifying the duty into the statute. And moreover, even more importantly, it expressly provided an administrative -- administrative enforcement scheme including an effective remedy for the breach of such duty.

QUESTION: (Inaudible) but they -- but any complaint against a union made administrative could -- could just be stopped dead in the water by the general counsel.

MR. GORDON: That is correct, Justice White. That is true of many aspects --

QUESTION: And the Court made quite a bit about that in Vaca, didn't it?

MR. GORDON: That is correct, Justice White. The Court did speak to this issue in Vaca. But this issue was one of several which the Court considered in Vaca and why it maintained the private cause of action in Vaca. I respectfully submit that the other factors on which the Court relied in Vaca, which may have been equally and even more important to the Court at the time, are not present in the Civil Service Reform Act-.

QUESTION: Such as any equivalent to Section 301.

MR. GORDON: That is one of them, Your Honor, yes. The absence of the 301 section, yes, is certainly one of the considerations and a consideration which the Court took into great consideration in -- in Vaca.

And I, I respectfully submit, Justice White, that if there is only one leg of Vaca remaining, namely, the unreviewable power of the general counsel to dismiss charges and not issue complaints, that this would not warrant an inference that Congress intended to create a private cause of action when the remainder of the statute makes it so eminently clear that Congress, indeed, wanted to limit the -- the role of the judiciary in this respect.

I think what the Congress has done here is that it picked up the very pieces that were missing in

the private sector in Steele and in Syres, and it injected them into this statute in order to prevent and foreclose the necessity of judicial -- of a judicial private cause of action.

Nor is the language of the structure of the legislative history of the statute uninformative regarding judicial involvement. Quite to the contrary. The -- Section 7123 very specifically limits the courts' intervention to three instances: one, that an aggrieved party -- party aggrieved by a final order of the Authority may petition in the appropriate circuit court for review of the Authority's final order.

Secondly, the Authority itself may petition an appropriate circuit court for enforcement of its order.

And the district courts come into play only in one instance, namely, in the third instance where upon the issuance of a complaint by the general counsel, the Authority may petition United States district court for temporary injunctive relief. These are the only instances in which Congress has provided any judicial intervention in the enforcement of the statute.

And as I said before, Congress certainly was aware -- Congress certainly must have been aware that the existence of 301 in the Labor Management Relations Act which empowered the district courts to enforce

labor-management collective bargaining agreements, that this was an intensely -- intensely practical consideration, if I may use the words of Vaca, for maintaining a private cause of action. And yet, the Congress, when a somewhat similar provision was proposed, specifically rejected it.

Moreover, it left it to the -- with the -- not only rejected it, but it transferred the duties which district courts had under 301 directly to the Federal Labor Relations Authority. Thus, for example, where -- In the private sector under 301 federal courts, of course, will review arbitration awards. When this was proposed during the enactment of this law, the Congress rejected it and placed this power into the hands of the Federal Labor Relations Authority, indeed, a nonreviewable power.

And I am sure these compromises were not accidental. This was not done by any oversight by the Congress. These -- this limitation of the judicial function was the product of extensive debate and of legislative compromise.

Now, with respect to the legislative history, which is, of course, another consideration, as I've mentioned, which the board -- which the Court will take into consideration, I must agree with my brother that

there is, indeed, a paucity of legislative history which is directed directly to the duty of fair representation. And Petitioner asserts that this very paucity leads to the inference that Congress must have intended to include the private cause of action which is prevalent in the private sector under the judicially developed doctrine.

Again, I think this kind of an argument is misplaced because the legislative history certainly is not silent regarding the way this Act is meant to be administered. It -- the legislative history may be sparse with respect to the duty of fair representation, but it is quite specific regarding the administration and the enforcement scheme of the statute itself.

I've already spoken, of course, to the legislative compromise regarding the limited judicial involvement. And in this context, the House report specifically said that it is the Federal Labor Relations Authority which shall make the final decision regarding the issuance of unfair labor practice complaints. And the only matters specifically referred to in Section 7123, which I just mentioned, shall be judicially reviewable.

Similarly, the Senate report also said that all complaints of unfair labor practices tha cannot be

resolved by the parties shall be filed with the FLRA. And the conference committee which rejected the -- which rejected the proposal to include a similar -- a -- a -- a clause somewhat similar to Section 301 also said that these matters shall come to the -- for the consideration first of the FLRA.

In the face of this congressional intent to create a comprehensive and administrative enforcement scheme, I submit it is difficult, indeed, to attribute to the Congress an intent to incorporate by silence a private cause of action.

QUESTION: You say the administrative remedy is not only comprehensive, but adequate I suppose.

MR. GORDON: Yes, I believe, Justice White, it is adequate --

QUESTION: What kind of -- what kind of --

MR. GORDON: -- since the -- since Section 7118 specifically provides that the authority is authorized to issue back pay orders, for example, where back pay is indicatec.

QUESTION: Against whom?

MR. GORDON: Well, the -- the -- the Authority has broad remedial powers which I submit are quite adequate and which the Authority has exercised.

QUESTION: Can the -- can the -- can the

Authority order the union to pay anything?

MR. GORDON: Yes. Yes, it may.

QUESTION: What?

MR. GORDON: Whatever -- whatever damages the Authority will seek. There could be back pay, for example.

QUESTION: Well, back pay normally runs against the employer.

MR. GORDON: Well, under Vaca v. Sipes, it runs to the employer, but since Vaca and Bowen, the -- the Court has extended this so that unions have become equally liable to pay back pay --

QUESTION: So, you think --

MR. GORDON: -- the Court --

QUESTION: -- the administrative remedy would include any remedy that might -- a court might give.

MR. GORDON: Well, it would certainly not include punitive damages, for example, since the Authority would not be authorized to issue any orders which -- which are punitive in nature. But in all other respects, the Authority has very broad authority, if I may use that term, to fashion adequate remedies.

And in the light of this, as I say, it -- it is very difficult to attribute to the Congress an intent to incorporate by silence a private cause of action.

Indeed, the result of this would be that an individual employee could completely bypass not only the substantive and procedural provisions of the Act, but also he could bypass the very agency which the Congress has created to administer this Act.

And in the light of the decisions of this Court as recently as a year ago in U.S. v. Fausto and even as recently as six months ago in Schweiker v. Chilkee where -- wherein the Court reaffirmed its holding in Bush v. Lucus, I -- I submit that such a remedy could not be implied.

In conclusion, I only want to say that as in the private sector, the duty of fair representation is alive and well in the federal sector and serves in the words of Vaca v. Sipes as a bulwark to prevent arbitrary union conduct. However, the injection of a private cause of action to enforce the duty would, indeed, circumvent the congressional intent to create a comprehensive and integrated administrative enforcement remedial scheme and might well create the duplication of litigation and inconsistent remedies which the Congress intended to avoid and which this Court has cautioned against.

If there are no other -- and I believe that the holding of the court below should be affirmed.

If there are no other questions, this concludes my argument, Mr. Chief Justice.

QUESTION: Thank you, Mr. Gordon.

Now, Mr. Taranto, we'll hear from you.

ORAL ARGUMENT OF RICHARD G. TARANTO

AS AMICUS CURIAE SUPPORTING THE RESPONDENT

MR. TARANTO: Thank you, Mr. Chief Justice, and may it please the Court:

Virtually the whole of Petitioner's case rests on the assertion that just as there is a private right of action for breach of the duty of fair representation under the RLA and the NLRA, there surely must also be an implied right of action under the CSRA in the federal sector. Like the Respondent union, the government believes that is wrong.

I want to summarize why we think the evidence is simply not sufficient for Petitioners to sustain their claim that the 1978 Congress that enacted the CSRA intended to authorize suits against unions for breach of the duty of fair representation.

The principle factors that this Court's decisions rely on as counting against any implied right of action are present here. The statutory language is duty imposing rather than right creating. The statute, far from failing to address remedies, expressly sets up

an elaborate remedial scheme. There is no evidence in the legislative history of any intent to create an implied right of action, and the legislative history in fact reflects a commitment of collective bargaining agreement disputes to the FLRA and not the courts.

But I want to focus my argument on why it is wrong to suggest that Congress must have meant to borrow the implied right of action from the NLRA, as explained in Vaca v. Sipes.

To begin with, there is no mention of Vaca or of any private sector analogue in the statute or the legislative history. It was from the pre-1978 federal sector labor law, the executive order, that the express provision imposing the duty of fair representation along with the unfair labor practice remedy was taken. Under the executive order, Respondent had the same duty of fair representation rights and Petitioner had -- and Petitioner had the same administrative remedy as he has here, though without judicial review. In fact, there are also affirmative reasons to think that Congress did not intend the private sector analogy in this setting.

It's worth noting first that if there was a borrowing from the NLRA, it's significant that it seems to have been a very carefully limited borrowing, because the CSRA took the duty which was only implied in the

private sector and made it express, but it didn't take the right which was also only implied under the NLRA.

But in any event, the -- the analogy to the NLRA remedial scheme simply does not fit well with the CSRA scheme. The -- the two statutes are sufficiently different in crucial respects, both substantive and remedial, that the rationale of this Court's decision in Vaca does not carry over in significant degree into the federal setting.

First, in the NLRA context, Vaca noted the private right of action was found to be implied in the statute before there was any administrative enforcement mechanism, and there was no evidence of a congressional intent later to preempt that judicially recognized right.

In the FLRA context, the question is not one of congressional displacement of a preexisting right of action for there was no right of action prior to 1978. The question rather is of congressional intent to create the right of action.

And in the CSRA setting, the administrative enforcement scheme was created in the very same act that contains the duty, a key basis for both Vaca and Steele, therefore, namely, the absence of -- of an administrative remedy is missing in this setting.

Vaca also emphasized a closely related

practical aspect of that point. Most duty of fair representation cases involve questions about labor contract negotiating positions or the handling of grievances. But Vaca pointed out that those matters are generally outside the jurisdiction of the NLRB and therefore outside its expertise.

The situation is quite different in the federal sector. The FLRA does have jurisdiction to resolve negotiability disputes, and it also has jurisdiction to review the arbitration awards that result from grievance procedures. Those matters, therefore, are already within the authority of the FLRA; and it makes good sense for Congress to have relied on the agency's expertise.

Vaca rested as well on the idea that the private right of action serves as a necessary counterweight to the union's power to strip employees of preexisting rights and forms of redress, but in the federal sector, unions do not have anything like that kind of power. Perhaps most important, the CSRA expressly provides that a labor contract cannot strip federal employees of their appeal rights under statute or regulation.

In addition, while in the private sector recognition of an exclusive bargaining representative

deprives individual employees of their right to make individual contracts with the employer, in the federal sector, most employees do not lose any such right because they are not employed pursuant to contract in the first place. They are appointed under terms set by statute and regulation.

And the matters that are actually determined by labor contracts are themselves far more limited in the federal sector. Those matters do not include wages, hours or any of the matters covered by certain regulations or the broad statutory management rights provision.

Finally, Vaca stressed that employee suits against employers for breach of the -- of collective bargaining agreements are already in court under Section 301 of the LMRA. And those suits typically require as a precondition to upsetting the finality of an arbitration award that the employee show that the union representing him breached the duty of fair representation. The issue, as Vaca said, will therefore already be resolved in court, and it makes sense to ensure that relief can be had against the union for its share of the harm.

Again, the federal setting is entirely different. There is no analogue to Section 301. Instead, in the situation addressed by Vaca, after

compulsory arbitration, an employee may challenge the arbitral award only before the FLRA, and there is generally no judicial review of FLRA decisions. Thus, a private right of action in the federal sector cannot be supported as an adjunct to an employee/employer case that is already in court.

QUESTION: I would think the reverse argument would be true, that if you want one place to settle -- to settle a claim against the employer and the union, you ought to do it where you can get the employer.

MR. TARANTO: Well, you -- you can get an employer for unfair labor practices before -- before the FLRA.

QUESTION: Exactly. That's what I mean.

MR. TARANTO: That's right. And -- and in an unfair labor practice proceeding, there would eventually be judicial review.

In fact, recognizing a private right of action would run counter to the decision by Congress to keep collective bargaining agreement disputes out of the courts, except where they are tied up with unfair labor practice questions.

As Delcostello noted, most duty of fair representation claims involving grievances require as a precondition to relief that the employee show not only

that the union breached the duty, but also that the employer breached the contract. Thus, if the courts were to recognize the private right of action that Petitioner requests, other than through an unfair labor practice proceeding, they would be addressing precisely the -- the collective bargaining agreement questions that Congress decided to keep out of the courts.

For those reasons, we think that there is no sufficient reason to believe that the 1978 Congress intended to borrow the private sector enforcement scheme as a supplement to the administrative scheme it set forth expressly in the statute. The judgment of the court of appeals should, therefore, be affirmed.

QUESTION: Thank you, Mr. Taranto.

Mr. Duffy, you have 16 minutes remaining.

REBUTTAL ARGUMENT OF THOMAS R. DUFFY

MR. DUFFY: Thank you, Mr. Chief Justice.

The point made by the Solicitor General's Office is that -- and by the union is that the role -- the role of the union may well be circumscribed somewhat in the federal labor relations scheme. That role -- the critical difference is that that role has to do with the union's relationship with the employing agency. The union, as I think everyone recognizes, has less power than in the private sector with regard to certain issues

of bargaining which would normally be reserved in the private sector for the adversarial parties.

What the union's argument ignores are what we feel are the crucial similarities between the statute and those are the similarities which we believe are the underpinning of the Court's decision in Vaca. And those similarities again: exclusive representation and unreviewable discretion of the general counsel.

The fact that there's not a Section 301 direct analogue or analogue of any sort in the Civil Service Reform Act is not, we believe -- doesn't advance the inquiry before the Court significantly. And the reason for that is, after Vaca, the Court has recognized in Delcostello that the basis for the duty of fair representation is not Section 301, but the need for the duty of fair representation is implied from the structure of the entire collective bargaining framework, which grants such exclusive powers to the majority representative, even over the most unwilling minority, grants exclusive access to the arbitration mechanisms and may not have an adequate administrative remedy through the FLRA or the NLRB.

And those we think are the -- the underpinnings of the Vaca decision. The duty of fair representation is implied as a necessary implication

once those sorts of powers are granted to a majority representative. We have to put something in the system that assures that there will be an adequate remedy when the majority representative abuses its power or abdicates its position as the representative, which happened here below when the union told the employee we're not going to consider the merits of your arbitration because we're bound by what we did in our previous arbitration.

There's no indication in passing the CSRA that Congress evinced any more or any reluctance to have judicial review of FLRA actions than of NLRB actions in the National Labor Relations Act. Section 7123, with the exception regarding arbitrability, is essentially what we have in Section 10. We have appellate court review in the -- in the federal circuit courts of appeal for those sorts of activities.

Even the exception with regard to arbitrability, going in the first instance to the FLRA -- even that exception is not the case where we have unfair labor practices, and those are reviewable just as they are reviewable in the private sector model. So, there's no indication from the legislative history that Congress was dissatisfied with the national labor relations system or wanted less judicial review than

what we have long experience with in the -- in the private sector.

The union makes the point that the Federal Labor Relations Authority has broad remedial powers which may well include back pay. We -- I think that everyone recognizes that the Authority, in fact, does have broad remedial powers. It has broad remedial powers which parallel the NLRB, and those same broad remedial powers are what the Court was looking at in Vaca v. Sipes.

And I think that the problem which Vaca recognizes is that it's not the existence of the remedy that's in question. It's the application of the remedy and the access to the remedy. If the individual employee who has been injured by his union's breach of the duty of fair representation through actions, unreviewable actions, of the general counsel's office can't get into the system where he has those sorts of remedies available to him, then the system doesn't work very well.

And it's that wrong about which we believe Justice White was writing in Vaca v. Sipes when he wrote that the existence of even a small group of cases in which the union would be unwilling or unable to remedy the breach of the duty of fair representation would

frustrate the very purposes of the duty.

The Solicitor General's Office suggests that there is a danger here of inconsistent results that you might have a different -- a different result before the FLRA than possibly before the -- the courts, and that the FLRA ought to be given the primacy for developing the duty of fair representation in this area.

I-- I -- I think that, first of all, it doesn't recognize that the duty of fair representation -- the contours of that duty have been well developed for over 40 years of federal court jurisprudence since Steele. We know what the duty of fair representation is. The Authority, in fact, looks to the private sector duty of fair representation, and well it should. We have the -- the law library is full of examples upon which it may draw to determine what is a breach of the duty and what remedies are appropriate. So, we believe that far from reaching inconsistent results, that the Authority will, in fact, look to the private sector law and should, in fact, look to the private sector law to determine the contours of the duty.

QUESTION: Is the -- under -- under the federal law in the federal sector, is the violation of the duty of fair representation -- is that an unfair labor practice?

MR. DUFFY: The Federal Labor Relations Authority has taken the position that it is an unfair labor practice. One of the things --

QUESTION: What did the statute say in giving -- in -- in putting it -- it expressly puts a duty on the union, doesn't it?

MR. DUFFY: That's correct, Your Honor.

QUESTION: But it doesn't say expressly that it's an unfair labor practice?

MR. DUFFY: No. Interestingly enough, the statute -- if -- the statute doesn't say anything at all about whether or not the duty of fair representation is an unfair labor practice. That's no more clear than it is in the private sector.

QUESTION: Yes, but the -- the -- the board has held that it is an unfair labor practice.

MR. DUFFY: The Authority has taken the position, much like the National Labor Relations board --

QUESTION: Has that been subject to judicial review?

MR. DUFFY: I --

QUESTION: I mean, it is subject to -- to judicial review -- that --

MR. DUFFY: Yes, it is subject to judicial review, and I --

QUESTION: And its decision in any fair representation --

MR. DUFFY: Yes.

QUESTION: -- case is subject to judicial review.

MR. DUFFY: That would be reviewable in the courts of appeal --

QUESTION: Yes.

MR. DUFFY: -- much like in the National Labor Relations Act.

And to answer your question, yes, that question has been addressed in Judge Bork's decision in the National -- the NTEU v. FLRA case cited in our brief at 800 F.2d.

QUESTION: And it affirmed -- affirmed the Authority?

MR. DUFFY: Yes, it affirmed the Authority. I'm not certain that it -- no, it did not affirm the Authority. It reversed the Authority because what it held was that the Authority was attempting to impose a broader duty of fair representation with regard to that particular issue, and it said, no, you've got to go with the (inaudible) private sector duty --

QUESTION: But it didn't disagree with the notion that it was an unfair labor practice.

MR. DUFFY: It did not disagree with the notion that it was an unfair labor practice. Judge Bork felt that the language of 7114, in which the duty of fair representation is found, was sufficient to have the duty of fair representation treated as an unfair labor practice.

Interestingly enough, though, the fact that Congress did not specifically provide a remedy for duty of fair representation breaches as unfair labor practices is further -- a further indication, we feel, that Congress intended no different result here in the CSRA context than in the FLRA context. Certainly, this was an opportunity when Congress went through and enumerated the list of unfair labor practices in -- in the Civil Service Reform Act, it had an opportunity to say one of those enumerated practices is breach of the duty of fair representation and, in fact, it didn't.

The only reason that the Court of Appeals for the District of Columbia has found that is that there is a catch-all provision in the unfair labor practice provisions under the Civil Service Reform Act, and the duty of fair representation has been treated as part of that catch-all jurisdiction. But there's certainly no specific legislative indication that Congress wished to -- wished a specific unfair labor practice remedy which

was somehow different than in the private sector.

QUESTION: The D.C. Circuit didn't make that decision on its own. I mean, it was -- it was in -- in effect, validating the FLRA's determination that there -- that there was such a -- a right.

MR. DUFFY: I think that's correct, Justice Scalia. I don't -- I might be wrong, but I don't believe that the FLRA has taken the position in any of the cases of which I'm aware that there is no duty of fair representation -- unfair labor practice jurisdiction. I -- in fact, I think quite the contrary is true.

One of the assertions, one of the arguments, by the Solicitor General's Office is that the Federal Labor Relations Authority will somehow develop greater expertise through its determination of arbitrability than the courts, and that therefore we should give such questions solely to the FLRA where the duty of fair representation is concerned.

I think that that argument has an essential fallacy as a premise. And the -- the fallacy is that only employer -- only duty of fair representation breaches will come up where employer conduct is implicated. And that's certainly not the case, nor was it the case in two out of the three breaches of duty of

fair representation here where the union acting by itself, totally without regard to employer conduct, breached its duty of fair representation. And with regard to those issues, we're not involved with contract administration whatsoever. With regard to those issues, we're involved with the basic substantive duty of fair representation law. Was the union discriminating against this employee? And again, here below, two out of three cases, the -- the union was in this case.

QUESTION: But in most unfair representation cases, aren't you really complaining about the union's failure to -- to take his case against the -- against the employer?

MR. DUFFY: Certainly I think that the bulk of such cases are contract breach cases.

QUESTION: And you're not about to win an unfair labor -- unfair representation case unless you prove that the employer was at fault, too.

MR. DUFFY: I think that's a necessary corollary --

QUESTION: Yes.

MR. DUFFY: -- in the breach of contract cases. It's certainly not a necessary corollary or even part of the analysis in situations where the duty of fair representation doesn't have any employer conduct

implications whatsoever.

QUESTION: For example --

MR. DUFFY: (Inaudible) --

QUESTION: -- (inaudible) something in this case about that.

MR. DUFFY: Oh, in this case? In this case, the union decided to arbitrate for another employee, notwithstanding the fact that this employee Petitioner had -- who had been employed for almost 20 years by the federal government had been functioning in this job. The union decided to arbitrate for the other employee without any consideration of Petitioner's merits whatsoever, and in so doing, held the district court, breached its duty of fair representation.

A second example of that was when the union went to arbitration on behalf of the other employee. When the union went to arbitration on behalf of the other employee, it provided no notice that there was an arbitration going on over Petitioner's job. It provided no opportunity for him to be heard, and it failed to present any of his views to the arbitrator. No employer conduct involved whatsoever there. Yet, nevertheless, the union had failed and we believe failed abjectly in its duty of fair representation.

In summary, we believe that the -- the grant

here of the powers which lie at the heart of the duty of fair representation, the grant of exclusive representational powers, the grant of -- of majority rule, the grant of exclusive access to the grievance and arbitration mechanisms, to the union necessarily compel district court subject matter jurisdiction to provide a judicial forum for employees who are injured by their duty of -- by the union's breach of the duty of fair representation, just as in the private sector.

There are no salient differences between the private sector model and the public sector model which Congress is intending to create. Congress directed us to look to the private sector model when it was fashioning this system. I don't think there is a departure here which is warranted. If Congress had wanted to change -- if Congress had any dissatisfaction with the Court's ruling in Vaca, the -- the -- with the essential premises in any of the duty of fair representation cases under the National Labor Relations structure, we would have seen some congressional mention of that, I'm sure, in the 20 years since Vaca. And instead, we've seen nothing to indicate that Congress in any way is displeased with the necessary implication of a judicial forum where the union has breached its duty of fair representation.

If there are no further questions, we would urge that the decision of the Ninth Circuit be reversed and the case remanded for further proceedings.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Duffy.

The case is submitted.

(Whereupon, at 11:55 o'clock a.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

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NO. 87-636 - EFTHIMIOS A. KARAHALIOS, Petitioner V. NATIONAL FEDERATION OF FEDERAL EMPLOYEES, LOCAL 1263

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BY Judy Freilicher

(REPORTER)