IN THE COURT OF APPEALS OF TENNESSEE
WESTERN SECTION AT JACKSON

WILLIAM DAVID McEWEN,	)	
	)	
Plaintiff/Appellant,	)	**Gibson Chancery No. 7500**
	)	
VS.	)	**Appeal No. 02A01-9506-CH-00128**
	)	
BROWN SHOE COMPANY at Trenton and GENERAL DRIVERS, SALESMEN, AND WAREHOUSEMENS' LOCAL UNION No. 984, an affiliate of the INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA,	)	
	)	
Defendants/Appellees.	)	

FILED

September 12, 1996

Cecil Crowson, Jr.
Appellate Court Clerk

APPEAL FROM THE CHANCERY COURT OF GIBSON COUNTY
AT TRENTON, TENNESSEE
THE HONORABLE GEORGE R. ELLIS, CHANCELLOR

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AFFIRMED

ALAN E. HIGHERS, J.

CONCUR:

W. FRANK CRAWFORD, P.J., W.S.

DAVID R. FARMER, J.

Plaintiff, William McEwen, was employed as a truck driver with defendant, Brown

Shoe Co., from 1973 until 1987. During his employment at Brown Shoe, plaintiff was a member of the collective bargaining unit represented by defendant, General Drivers, Salesmen, and Warehousemen's Local Union No. 984 ("union"). In 1986, Brown Shoe and the union entered into a collective bargaining agreement, which required "just cause" for termination and contained mandatory grievance and arbitration procedures.

On March 29, 1985, while acting in the course of his employment, plaintiff was involved in an automobile accident. As a result, he suffered injuries to his head, eyes, shoulder, and legs. Dr. Arthur Woods, an ophthalmologist, examined and treated plaintiff in connection with the injuries to his eyes. Dr. Woods was apparently not of the opinion that plaintiff's ability to drive was impaired because Dr. Woods released plaintiff to return to work on July 30, 1985.

In July 1986, plaintiff filed a workers' compensation suit against Brown Shoe, which was ultimately settled. However, because plaintiff alleged in the complaint that the automobile accident rendered him legally blind in one eye, Brown Shoe directed plaintiff to return to an ophthalmologist for an eye exam. The purpose of the exam was to determine whether plaintiff's vision satisfied Department of Transportation (D.O.T.) regulations, which require at least 70 degrees of peripheral vision.

The first ophthalmologist that Brown Shoe directed plaintiff to see declined to render a prognosis regarding plaintiff's vision. Plaintiff was then examined by Dr. Arthur Woods, who concluded that plaintiff was not qualified to drive a commercial vehicle because the peripheral vision in his left eye was only 50 degrees.

In September 1987, Brown Shoe temporarily laid off plaintiff from work due to his impaired vision. Plaintiff's supervisor told plaintiff that he could return to work as soon as he could procure a medical certification indicating that his vision satisfied D.O.T. standards.

On September 20, 1987, plaintiff contacted Mr. Callins, president of the union, and

told him that Brown Shoe would not let him drive until he could pass D.O.T. physical requirements. According to Callins, plaintiff inquired about the possibility of filing a grievance. Callins told plaintiff that a grievance would not be helpful if he could not satisfy D.O.T. vision requirements. Callins offered to refer him to another physician, but plaintiff said that he did not think that he could pass a D.O.T. physical. Plaintiff did not file a grievance with either the union or with Brown Shoe, and did not contact the union at any time after September 1987.

In October 1988, when plaintiff had not produced a medical certification, Brown Shoe sent a letter to plaintiff, stating that his employment would be terminated on November 18, 1988, if he had not produced the requested medical certification. After Brown Shoe received no response, Brown Shoe sent a similar letter to plaintiff's attorney dated January 17, 1989, allowing plaintiff additional time in which to produce a medical certification form. Plaintiff again failed to respond, and Brown Shoe terminated his employment effective February 1, 1989.

Plaintiff filed this suit for declaratory judgment on September 16, 1988, seeking a determination that he was an employee covered by the collective bargaining agreement, that Brown Shoe breached the agreement, and that the union had a duty to represent plaintiff.

The trial court found that there was no evidence of fraud or dishonest conduct by either of the defendants, and that there was no bad faith conduct on the part of the union in representing plaintiff. Accordingly, the trial court dismissed the case, holding that plaintiff failed to carry his burden of proof.

Brown Shoe and the union argue on appeal that the present case is preempted by federal law, and is barred by the six-month statute of limitations found in § 10(b) of the National Labor Relations Act (NLRA). Although plaintiff has raised several issues for our consideration, we find it necessary to discuss only one of these issues, as we agree with

defendants that plaintiff's case is barred by the statute of limitations.

Plaintiff contends that the trial court erred in permitting Brown Shoe to amend its complaint in order to include the affirmative defense of the statute of limitations. According to plaintiff, the statute of limitations is an affirmative defense that must be raised in the answer to the complaint or it is deemed waived. We find this contention to be without merit.

Tennessee case law does not hold that the failure initially to plead the statute of limitations automatically results in waiver. In fact, several cases have explicitly permitted the affirmative defense of the statute of limitations to be raised by amendment after an answer has been filed. See, e.g., Garthright v. First Tennessee Bank of Memphis, 728 S.W.2d 7 (Tenn. App. 1986); Denley v. Smith, No. 48, 1989 WL 738 (Tenn. App. Jan. 9, 1989).

Tenn. R. Civ. P. 15.01 provides in part:

> **Amendments.--** A party may amend his pleadings once as a matter of course at any time before a responsive pleading is served, or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, he may so amend it at any time within fifteen (15) days after it is served. Otherwise a party may amend his pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires....

Rule 15.01 has been construed to afford trial judges wide discretion in allowing amendments at any stage of the proceedings. As this court has stated, "[I]n Tennessee, it is a matter of discretion whether the court will allow the filing of a plea of the statute of limitations after the trial has begun." Steed Realty v. Oveisi, 823 S.W.2d 195, 197 (Tenn. App. 1991). This court will reverse a trial court's decision to grant or deny leave to amend only upon a showing of an abuse of discretion. Derryberry v. Ledford, 506 S.W.2d 152 (Tenn. App. 1973); Merriman v. Smith, 599 S.W.2d 548 (Tenn. App. 1979). We find no evidence of such abuse of discretion in the present case. Having determined that the statute of limitations defense was properly raised, we now turn to the merits of the defense.

Section 301 of the Labor Management Relations Act (LMRA) allows suits for alleged violations of collective bargaining agreements. This section provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce...may be brought in any district court of the United States having jurisdiction of the parties.

29 U.S.C.S. § 185(a) (1993).

Although the language of § 301 is permissive, the U.S. Supreme Court held in Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), that § 301 provides the exclusive remedy for alleged violations of collective bargaining agreements. Id. at 220. It is immaterial whether the suit is explicitly brought pursuant to § 301. As stated by the Sixth Circuit Court of Appeals in Avco Corp. v. Aero Lodge No. 735, 376 F.2d 337 (6th Cir. 1967), *aff'd*, 390 U.S. 557 (1968). "The force of Federal preemption in this area of labor law cannot be avoided by failing to mention Section 301 in the complaint." Id. at 340.

Where state law claims depend substantially upon an analysis of a collective bargaining agreement, such claims are preempted by § 301. Allis-Chalmers, 471 U.S. at 220; Lingle v. Norge Div. of Magic Chef, 486 U.S. 399 (1988). The Court in Allis-Chalmers explained, "Questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended to flow from breaches of that agreement, must be resolved by reference to uniform federal law." Id. at 211.

Plaintiff has alleged in the case *sub judice* that Brown Shoe breached the collective bargaining agreement by failing to comply with certain notice provisions contained therein. Although the complaint is couched solely in terms of state law, the essence of his suit results in the conclusion that § 301 preemption cannot be avoided. Consequently, federal labor law governs the present case and supplies the applicable statute of limitations. Int'l Union, United Automobile, Aerospace and Agricultural Imlement Workers of Amer. v. Hoosier Cardinal Corp., 383 U.S. 696, 701 (1966).

Section 10(b) of the NLRA requires claims for unfair labor practices to be brought within six months of the alleged misconduct. 29 U.S.C. § 160(b) (1992). This six-month time period accrues from the date on which the plaintiff discovers, or in the exercise of reasonable diligence should have discovered the acts constituting the alleged violations. Shapiro v. Cook United, Inc., 762 F.2d 49, 51 (6th Cir. 1985); Chrysler Workers Ass'n v. Chrysler Corp., 834 F.2d 573, 578 (6th Cir. 1987), *cert. denied*, 486 U.S. 1033 (1988).

In DelCostello v. Int'l Brotherhood of Teamsters, 462 U.S. 151 (1983), the Supreme Court held that "hybrid suits," which allege both that the employer breached the collective bargaining agreement and that the union violated its duty of fair representation, are subject to the six-month statute of limitations found in § 10(b) of the NLRA. Id. at 172.

In this declaratory judgment action, the plaintiff sought to establish the following:

> 3. That at the hearing in this cause, the Court declare:
> a. The status of the Plaintiff as an employee of Defendant Brown Shoe Co.;
> b. The Agreement (Exhibit A) to be binding upon the parties;
> c. That Brown Shoe Co. has breached the Agreement with the Plaintiff;
> d. That the Union has responsibility of representing the Plaintiff before the Defendant Brown Shoe Co.;
> e. That the Plaintiff is an employee of Brown Shoe co. [sic], and that Defendant Brown Shoe Co. is to pay Plaintiff wages, fringe benefits, and all other benefits of employment from September 17, 1987, until the determination in this cause;
> f. That Defendant Brown Shoe Co. is in willful breach of the collective bargaining Agreement with Union....

From the foregoing language, it is evident that this action is both a suit against the employer for breach of a collective bargaining agreement, and a suit against the union for breach of the duty of fair representation. In light of Del Costello and the principles enunciated therein, we hold that the statute of limitations in this hybrid § 301 claim is six months.

In a hybrid action, a party is not required to sue until the plaintiff knows or reasonably should know of the union's alleged breach of the duty of fair representation. Schoonover v. Consol. Freightways Corp., 49 F.3d 219, 221 (6th Cir. 1995). It is undisputed that on September 20, 1987, the president of the union told plaintiff that filing a grievance would be futile if plaintiff could not pass the D.O.T. physical.This uncontroverted evidence indicates that plaintiff knew that the union representative refused to pursue his claim on September 20, 1987. Thus, the six-month period accrued on September 20, 1987. Plaintiff did not file his complaint until September 16, 1988, which is well in excess of the six-month period.

Accordingly, the judgment of the trial court dismissing plaintiff's complaint is affirmed. Costs on appeal are adjudged against plaintiff, for which execution may issue if necessary.

HIGHERS, J.

CONCUR:

CRAWFORD, J.

FARMER, J.