

EMMANUEL NKWENTI-ZAMCHO,	:	IN THE COURT OF COMMON PLEAS OF
Plaintiff	:	LYCOMING COUNTY, PENNSYLVANIA
vs.	:	NO. 04-01,226
THE PENNSYLVANIA STATE EDUCATION ASSOCIATION, an unincorporated association and THE PENN COLLEGE EDUCATION ASSOCIATION,	:	PRELIMINARY OBJECTIONS
Defendants	:	

Date: January 25, 2005

OPINION and ORDER

Before the Court for determination are the Preliminary Objections of Defendants the Pennsylvania State Education Association and the Penn College Education Association filed September 15, 2004 to the Amended Complaint of Plaintiff. The Court will grant the preliminary objections.

The above caption matter was instituted by the filing of a Complaint on August 3, 2004. Defendants filed preliminary objections on August 20, 2004. Plaintiff Emmanuel Nkwenti-Zamcho (hereafter “Nkwenti-Zamcho”) filed an Amended Complaint on September 8, 2004.

Factual Allegations

The Amended Complaint alleges the following facts. Nkwenti-Zamcho is of African descent. He is a U.S. citizen, but was born and educated in Cameroon. Nkwenti-Zamcho's primary language is English, which he speaks with a slight British inflection.

Nkwenti-Zamcho is employed by the Pennsylvania College of Technology (hereafter "Penn College") as an assistant professor. He began his employment at Penn College on August 15, 1997. In September 2002, Nkwenti-Zamcho sought promotion from assistant professor to associate professor. In order to accomplish this, Nkwenti-Zamcho made a request to Dean Edward Henninger, Dean of the School of Business for Penn College, for student evaluations of his classes. Dean Henninger agreed to permit the student evaluations, but also requested to informally visit Nkwenti-Zamcho's classes to observe his teaching style.

Dean Henninger made an informal visit to one of Nkwenti-Zamcho's classes. Following the visit, Dean Henninger provided some suggestions to Nkwenti-Zamcho, which he incorporated into his classes. Later in that fall semester, Nkwenti-Zamcho and Dean Henninger had a conversation discussing Dean Henninger's role in the evaluation process. According to procedure, Dean Henninger was required to have input in the promotion process. Dean Henninger had yet to formally evaluate Nkwenti-Zamcho's classes. Dean Henninger informed Nkwenti-Zamcho that he would rely on the recommendations of the previous dean, Dr. Terry Girton, which recommended that Nkwenti-Zamcho be promoted. However, Dean Henninger did not recommend Nkwenti-Zamcho for promotion.

In the spring of 2003, Nkwenti-Zamcho came up for formal evaluation by Dean Henninger. As part of this formal evaluation, it was customary for the dean to make two class

visits. As such, two class visits were scheduled. On February 19, 2003, Dean Henninger visited Nkwenti-Zamcho's International Business class. Subsequent to the visit, the two conferred about it on February 26, 2003 and later the evaluation report regarding the class visit was given to Nkwenti-Zamcho. On February 24, 2003, Dean Henninger visited Nkwenti-Zamcho's Business Ethics class. On March 4, 2003, a conference was held concerning that class visit in which Dean Henninger expressed to Nkwenti-Zamcho that he believed that Nkwenti-Zamcho presented a biased opinion of affirmative action. Dean Henninger directed Nkwenti-Zamcho teach that affirmative action is a moral issue, not a matter of law or fact.

On March 24, 2003, Dean Henninger made another class visit to Nkwenti-Zamcho's International Business class. A conference between Dean Henninger and Nkwenti-Zamcho was held following the visit. At the conference, Dean Henninger requested Nkwenti-Zamcho to sign an evaluation report without reading it. Nkwenti-Zamcho requested that he be able to take the evaluation report back to his office in order to read it and make appropriate comments. It was also at this conference that Dean Henninger again insisted that Nkwenti-Zamcho teach affirmative action as a moral issue rather than a legal issue.

Dean Henninger was displeased by Nkwenti-Zamcho's refusal to sign the evaluation report when it was given to him at the conference. Dean Henninger then sent Nkwenti-Zamcho an e-mail requesting that the report be brought back to him. Nkwenti-Zamcho responded by saying that he had the right to read the report before signing it. Nkwenti-Zamcho did return the evaluation report after reading it and making comments that refuted and questioned Dean Henninger's allegations concerning his diction, intonation, and delivery methods. After Dean Henninger received Nkwenti-Zamcho's comments, he scheduled two additional classroom

evaluations for Nkwenti-Zamcho. In total, Nkwenti-Zamcho was subjected to five classroom evaluations when the norm was only two. Nkwenti-Zamcho is of the belief that no other faculty member beside him has been subject to a similar number of classroom evaluations.

Believing that Dean Henninger was abusing his discretion and acting inappropriately, Nkwenti-Zamcho met with James Temple, the President of the Penn College Education Association (hereafter "PCEA"), during the week of April 21, 2003 and informed him of the previous events. The PCEA is the local union that represents the Penn College faculty members. Temple expressed dismay and asked to see the comments that Nkwenti-Zamcho made on the evaluation report. Temple also told Nkwenti-Zamcho that if Dean Henninger's conduct continued, then he would take Nkwenti-Zamcho's complaints to the Vice President of Academic Affairs, Victoria Muzic. Temple further advised Nkwenti-Zamcho that he should be ready to face Dean Henninger. Nkwenti-Zamcho sent the evaluation comments to Temple. Temple responded by e-mail on April 25, 2003 stating that the comments were very good.

Before the start of the 2003 fall semester, Dr. Girton, then head of the department, informed Nkwenti-Zamcho that Dean Henninger had assigned a section of Business Ethics in the Spring 2004 semester, which had been previously assigned to Nkwenti-Zamcho, to him. Dr. Girton told Nkwenti-Zamcho that Dean Henninger was doing this for purposes of diversity. Dr. Girton further informed Nkwenti-Zamcho that Dean Henninger planned to call him and explain the reassignment. However, this call never took place. Dr. Girton also informed Nkwenti-Zamcho that this type of reassignment had never been done before. The reassignment of the Business Ethics section left Nkwenti-Zamcho with less than a full class

load for the 2004 spring semester, while overloading Dr. Giridon's class load. Another section of Business Ethics was eventually created and assigned to Nkwenti-Zamcho.

In September 2003, Nkwenti-Zamcho requested assistance from Temple in dealing with the alleged harassment, civil rights violations, and breaches of academic freedom perpetrated by Dean Henninger. Nkwenti-Zamcho informed Temple that the harassment consisted of comments made by Dean Henninger concerning his diction, intonation, and speech volume. Nkwenti-Zamcho further informed Temple that Dean Henninger had subjected him to numerous classroom and student evaluations for the purposes of harassment and intimidation.

On September 25, 2003, a meeting was held between Nkwenti-Zamcho, Dr. Robert Grudgel, the Business Department PCEA representative, and Cary Kurtz, a representative of the Pennsylvania State Education Association (hereafter "PSEA"), which is the state body of the faculty's union. Nkwenti-Zamcho expressed his opinion that Dean Henninger's actions were punitive and an abuse of discretion, since others similarly situated were not receiving the same treatment. It was agreed that an investigation was to be conducted and that Dr. Gridon would be asked about Dean Henninger's comments regarding why the Business Ethics section was taken away from Nkwenti-Zamcho.

Nkwenti-Zamcho provided Temple with copies of Dean Henninger's evaluations. He also gave Temple permission to review his personnel file at the Human Resources office. Temple reported to Nkwenti-Zamcho that he did not find anything negative in his personnel file, but he did not have access to Dean Henninger's evaluations and comments as they were kept in a separate file in the Dean's office.

On October 6, 2003, Nkwenti-Zamcho learned that all of his classes would again be evaluated. On October 7, 2003, he received an e-mail from Dean Henninger stating that he had ordered student evaluations for all of Nkwenti-Zamcho's classes. Nkwenti-Zamcho brought this to the attention of Dr. Grudgel, who sent an e-mail to Temple on October 9, 2003 asking why Nkwenti-Zamcho was being evaluated again. Temple replied by stating that he discussed the matter with Veronica Muzic, the Vice President of Academic Affairs, and she indicated that it was not being done to harass or for the purposes of firing Nkwenti-Zamcho. On October 14, 2003, Nkwenti-Zamcho received an e-mail from Temple stating that Dean Henninger would not be making in class evaluations, but all of his students would evaluate Nkwenti-Zamcho.

Nkwenti-Zamcho twice requested Temple to arrange a meeting with the Vice President of Academic Affairs. However, the PCEA and the PSEA refused to press for the meeting. This was because Temple and others in the PCEA, as well as the PSEA leadership, concluded that Nkwenti-Zamcho was not going to be fired.

On October 14, 2003, Temple e-mailed Nkwenti-Zamcho informing him that no grievance would be filed because the investigation did not reveal anything to bring at the time. This conclusion was reached despite the fact that Temple had previously expressed dismay at the way Nkwenti-Zamcho had been treated and that Dr. Girton had not been contacted for his input concerning the allegations. Temple stated that he did not contact Dr. Girton because he did not want to "start something."

Believing that he had no remedy with the local PCEA, Nkwenti-Zamcho requested assistance from the PSEA. The PSEA concluded that, according to the collective bargaining agreement, supervisors have the discretion and the obligation to evaluate members of the

professional staff as often as they liked. The PSEA made no inquiries as to whether there were any civil rights violations or violations of academic freedom. Furthermore, the PSEA did not seek the input of Nkwenti-Zamcho during its investigation. On January 29, 2004, Nkwenti-Zamcho's counsel was informed that his request for assistance from the PSEA had been denied.

Nkwenti-Zamcho has been notified that Dean Henninger recommended to the Academic Vice President that for the 2004-2005 academic year all of Nkwenti-Zamcho's classes should be evaluated by the students and Dean Henninger. Further, Dean Henninger recommended that Nkwenti-Zamcho be placed on an instructional development plan.

Preliminary Objections

The preliminary objections of significance raised by the PCEA and the PSEA are the demurrers to: the claim for breach of the duty of fair representation against the PCEA; the claim for breach of the duty of fair representation against the PSEA; the conspiracy claim against the PCEA; the intentional infliction of emotional distress claim against the PCEA; and the negligent infliction of emotional distress claim against the PCEA. For the reasons discussed *infra*, the Court finds that Nkwenti-Zamcho has failed to plead the asserted causes of action. Therefore, the demurrers will be granted.

A preliminary objection, in the nature of a demurrer, should only be granted when it is clear from the facts that the party has failed to state a claim upon which relief can be granted. *Sunbeam Corp. v. Liberty Mut. Ins. Co.*, 781 A.2d 1185, 1191 (Pa. 2001). The reviewing court in making such a determination "...is confined to the content of the complaint." *In re Adoption of S.P.T.*, 783 A.2d 779, 781 (Pa. Super. 2001). "The court may not consider factual matters; no testimony or other evidence outside the complaint may be adduced and the court

may not address the merits of matter represented in the complaint.” *Ibid.* The court must admit as true all well pleaded material, relevant facts and any inferences fairly deducible from those facts. *Willet v. Pennsylvania Med. Catastrophe Loss Fund*, 702 A.2d 850, 853 (Pa. 1997). “‘If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected.’” *Ibid.* (quoting *The County of Allegheny v. The Commonwealth of Pennsylvania*, 490 A.2d 402, 408 (Pa. 1985)).

Discussion

The Court will address first whether Nkwenti-Zamcho has pleaded a claim for breach of duty of fair representation against the PCEA. “It is undisputed that a union owes a duty of fair representation to all members of the bargaining unit it is certified to serve.” *Pennsylvania Labor Relations Bd. v. Eastern Lancaster Cty. Ed. Assoc.*, 427 A.2d 305, 307 (Pa. Cmwlth. 1981). A union member may only bring a claim for breach of the duty of fair representation against the union, and is not permitted to bring a negligence claim against the union regarding the handling of a grievance. *Waklet-Riker v. Sayre Area Ed. Ass’n*, 656 A.2d 138, 141 (Pa. Super. 1995), *app. denied*, 668 A.2d 1136 (Pa. 1995). A union breaches its duty of fair representation when the failure to file a grievance or carry a grievance through to arbitration was due to arbitrariness, discrimination, or bad faith. *Dorfman v. Pennsylvania Social Servs. Union B Local 668*, 752 A.2d 933, 936 (Pa. Cmwlth. 2000); *Hughes v. Council 13, Am. Fed’n of State, Cty., and Mun. Employees, AFL-CIO*, 629 A.2d 194, 195 (Pa. Cmwlth. 1993), *aff’d*, 640 A.2d 410 (Pa. 1994). “In order to survive a preliminary objection, the petitioner must allege arbitrariness, discrimination or bad faith on the union’s part by specific facts; mere

conclusory allegations in the pleadings without supporting factual allegations are not sufficient.” *Dorfman*, 752 A.2d at 936.

It must be noted that an employee does not have an absolute right to have a grievance filed or have a grievance taken to arbitration. *See, Vaca v. Sipes*, 386 U.S. 171, 191 (1967). A labor union has broad discretion with regard to grievances. *Hughes*, 629 A.2d at 195. Furthermore, the issue of just cause or whether a grievance has merit is not determinative of liability for a breach of the duty of fair representation. *Id.* at 196.

Nkwenti-Zamcho has failed to plead a claim for breach of the duty of fair representation against the PCEA because he has failed to allege facts which could establish that the PCEA acted arbitrarily, discriminatorily, or in bad faith in processing his grievances against Penn College. A labor union acts arbitrarily when, taking into consideration the factual and legal landscape at the time of the union’s conduct, its conduct is so outside the wide range of reasonableness as to be irrational. *Air Line Pilots Ass’n Int’l v. O’Neill*, 499 U.S. 65, 67 (1991); *See also, Marquez v. Screen Actors Guild, Inc.*, 525 U.S. 33, 46 (1998) (“A union’s conduct can be classified as arbitrary when it is irrational, when it is without rational basis or explanation.”). A labor union also acts arbitrarily when it processes a grievance in a perfunctory manner. *Vaca*, 386 U.S. at 191; *Connor v. Growley Am. Transp., Inc.*, 1994 U.S. Dist LEXIS 1975 at *16 (E.D.Pa.). The alleged conduct of the PCEA cannot be classified as arbitrary.

The alleged grievable conduct perpetrated by Dean Henninger consisted of a denial of academic freedom in that he directed Nkwenti-Zamcho how to teach affirmative action and subjected Nkwenti-Zamcho to discriminatory treatment and harassment in the form of

excessive evaluations. Nkwenti-Zamcho contends that the PCEA breached its duty of fair representation because it failed to conduct a proper investigation into the claims by not contacting Dr. Girton and it failed to arrange a meeting with the Vice President of Academic Affairs to address the situation or file a grievance. When examined in light of the total investigation into the matter, the alleged conduct cannot be considered irrational.

The PCEA gathered the relevant information and had that information in its possession when deciding how to proceed with the claims raised by Nkwenti-Zamcho. Temple talked with Nkwenti-Zamcho to get his view on the situation. Nkwenti-Zamcho provided Temple with the comments he made to Dean Henninger's evaluation and copies of the evaluations made by Dean Henninger. Temple examined Nkwenti-Zamcho's personnel file at the Human Resources office. Temple then sought out the Vice President of Academic Affairs to inquire into the matter. After this, the PCEA decided not to pursue the matter and did not talk to Dr. Girton or filing a grievance, as it determined that there was no issue to grieve. The Court cannot conclude from the facts pleaded that this decision was irrational as it would appear that the PCEA made an informed decision following the investigation. The fact that Nkwenti-Zamcho is not pleased with the outcome of the PCEA's investigation does not make the PCEA's conduct irrational.

Nor do the pleaded facts demonstrate that the PCEA processed Nkwenti-Zamcho's claims in a perfunctory manner. There is nothing in the Amended Complaint from which the conclusion can be drawn that the PCEA was merely going through the motions. The PCEA obtained the relevant information, discussed the matter with a member of the Penn College administration, and made a decision based upon the information before it. Therefore, the Court

cannot conclude from the facts alleged in the Amended Complaint that the PCEA acted arbitrarily in processing Nkwenti-Zamcho's grievances.

In order to demonstrate that a labor union has discriminated against him, a plaintiff must plead facts which show that the union was motivated by a discriminatory animus in failing to seek a remedy for the employer's alleged violation of the collective bargaining agreement. *Boyer v. Johnson Matthey, Inc.*, 2005 U.S. Dist. LEXIS 171, at *30 (E.D.Pa.). Nkwenti-Zamcho has not pleaded any facts which could demonstrate that the union's decision not to speak with Dr. Girdon, pursue a meeting with the Vice President of Academic Affairs, or file a grievance was based on Nkwenti-Zamcho's race, sex, ethnicity, or origin. The Amended Complaint is devoid of any facts demonstrating a discriminatory animus on the part of the PCEA toward Nkwenti-Zamcho.

In order to demonstrate bad faith, a plaintiff "... must show that the union had hostility toward the plaintiff or the plaintiff's class and that the hostility negatively affected the union's representation of the plaintiff. *Boyer*, 2005 U.S. Dist. LEXIS 171, at *32. Mere animosity on the part of the union alone is insufficient to establish bad faith as the plaintiff "... must establish that the way in which the union handled his grievance was 'materially deficient.'" *Id.* at *35 (quoting *Maskin v. USW, Local 2227*, 136 F. Supp.2d 375, 382 (W.D.Pa. 2000)). "If the union representative was shown to be hostile to the plaintiff and his decisions about the grievance were influenced by his hostility rather than by appropriate considerations, it would be clear that the union breached its duty of fair representation." *Maskin*, 136 F. Supp.2d at 382.

The Amended Complaint has failed to allege facts which could establish that the PCEA exhibited bad faith toward Nkwenti-Zamcho in processing his claims. The Amended

Complaint does not plead facts which could establish that the PCEA had any animosity toward Nkwenti-Zamcho and that animosity affected the PCEA's representation of him regarding the claims. Misrepresentations by a labor union can constitute bad faith. *Nichols v. Southeastern Pennsylvania Transp. Auth.*, 550 A.2d 283, 286 (Pa. Cmwlth. 1988). However, the facts alleged belie the contention that the PCEA made misrepresentations to Nkwenti-Zamcho concerning his grievances. Nkwenti-Zamcho contends that the PCEA said it would investigate the matter, which included seeking out Dr. Girton to get his input, and arrange a meeting with the Vice President of Academic Affairs if Dean Henninger's conduct continued. While the PCEA may not have talked to Dr. Girton or arranged for a meeting with the Vice President of Academic Affairs, the Court does not conclude that these failures constitute misrepresentations on the part of the PCEA.

When viewed in isolation, the PCEA's alleged conduct in failing to contact Dr. Girton or arrange the meeting could be considered as constituting misrepresentations. However, upon reading the Amended Complaint in its entirety, it is clear the allegations are that the statements were made to indicate the type of ongoing investigation the PCEA intended to make into the claims raised by Nkwenti-Zamcho. The Amended Complaint also clearly alleges that upon carrying out such an investigation, the PCEA had gathered information from which it determined that talking to Dr. Girton and arranging a meeting with the Vice President of Academic Affairs would not be necessary.

There are no allegations made that the PCEA deceived Nkwenti-Zamcho by not making any investigation or that the PCEA said it had conducted an interview or arranged a meeting when in fact it had not. The central representation made by the PCEA

was that it would investigate the claims raised by Nkwenti-Zamcho. Based upon the facts alleged, it did that. As such, the Court concludes that the Amended Complaint fails to allege facts which could establish that the PCEA made misrepresentations to Nkwenti-Zamcho.

Therefore, the Court concludes that Nkwenti-Zamcho has failed to plead a cause of action in the Amended Complaint for breach of the duty of fair representation against the PCEA.

Turning now to the demurrer to the claim against the PSEA for breach of the duty of fair representation, the Court will also grant that preliminary objection. The Amended Complaint does not plead a basis for imposing liability upon the PSEA for an alleged breach of the duty of fair representation. A parent union has “ ‘... no independent duty to intervene in the affairs of its local chapters even when the [parent] has knowledge of the local’s unlawful acts.’ ” *Scott v. Graphic Communications Int’l Union, Local 97-B*, 2003 U.S. Dist. LEXIS 24985, at *26 (M.D.Pa.) (quoting *Phelan v. Local 305 of United Ass’n of Journeymen*, 973 F.2d 1050, 1064 (2d Cir. 1999)), *aff’d*, 2004 U.S. App. LEXIS 4979. “Common law agency principles govern [a parent] union's liability for the actions of its locals or their officers.” *Ibid*.

Since the Amended Complaint fails to establish a breach of the duty of fair representation on the part of the local union, the PCEA, there is nothing for which to hold the PSEA vicariously liable. The Amended Complaint also fails to allege facts which could establish that the PSEA owed an independent duty of fair representation to Nkwenti-Zamcho. The Amended Complaint alleges that the PSEA “... neglected its obligation to protect Plaintiff as required under the collective bargaining agreement,” failed to properly investigate, and failed to direct the PCEA to file a grievance on behalf of Nkwenti-Zamcho. Amended

Complaint, ¶¶ 73, 75, 76. It is not evident from the portions of the collective bargaining agreement attached to or the allegations in the Amended Complaint that the PSEA was a party to the collective bargaining agreement and thereby bound by it. As such, the Amended Complaint fails to establish how the PSEA is liable to Nkwenti-Zamcho for an alleged breach of the duty of fair representation. Therefore, the demurrer to the claim for breach of the duty of fair representation asserted against the PSEA is granted.

Having determined that the Amended Complaint has failed to plead a cause of action for breach of the duty of fair representation against the PCEA, the demurrer to the conspiracy shall be granted. To bring a cause of action for civil conspiracy, a plaintiff must allege: (1) a combination of two or more persons acting with a common purpose to do an unlawful act or to do a lawful act by unlawful means or for an unlawful purpose; (2) an overt act done in pursuance of the common purpose; (3) actual legal damage. *Goldstein v. Phillip Morris, Inc.*, 854 A.2d 585, 590 (Pa. Super. 2004). “Additionally, ‘absent a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act.’” *Ibid.* (quoting *McKeeman v. Corestates Bank, N.A.*, 751 A.2d 655, 660 (Pa. Super. 2000)). Since there is no cause of action for a breach of the duty of fair representation on the part of the PCEA, there can be no conspiracy between the PCEA and Penn College to breach the duty of fair representation. Therefore, the demurrer to the conspiracy claim is granted

The Court will now address whether, as a matter of law, Nkwenti-Zamcho is prohibited from asserting intentional infliction of emotional distress and negligent infliction of emotional distress causes of action against the PCEA. “As a general rule, members of an unincorporated association cannot recover from the association because the negligence of the association or its

members is imputed to all of the members.” *Waklet-Riker*, 656 A.2d at 140; *See also, Plasterer v. Paine*, 544 A.2d 985, 987 (Pa. Super. 1988). The PCEA is an unincorporated association. As such, Nkwenti-Zamcho cannot bring a negligent infliction of emotional distress claim against the PCEA. The alleged conduct of the PCEA that forms the basis of the tort is imputed to Nkwenti-Zamcho by being part of the PCEA. Nkwenti-Zamcho cannot thereby seek redress for his own negligence. Accordingly, the preliminary objection to the negligent infliction of emotional distress claim is granted.

The answer is not as clear-cut when a member asserts an intentional tort against an unincorporated association. The parties have not cited to nor has the Court been able to locate a Pennsylvania case addressing this specific issue. But in *Jackson v. Local Union 542, International Union–Operating Engineers*, 2000 U. S. Dist. Lexis 10609, at *10-11; 168 L.R.R.M 2070 (E.D.Pa.), the court held plaintiffs were not barred from bringing intentional infliction of emotional distress claims against an unincorporated association based upon infringement of civil rights through facially discriminatory acts. The *Jackson* court, which also found no reported Pennsylvania decisions on point, did recognize the sensible rationale of Pennsylvania law, which imputes negligence of an association to all of its members, but made the following distinction:

Intentional torts, however, are different, in that knowledge, a required element of negligence, is not imputed to an association member, and therefore an individual member can not be said to act in concert with the tortfeasor.

Id. at *11. With all apologies to the *Jackson* court, this Court does not understand the distinction as stated. Further, although all the other cases cited to by the parties and discovered

in the Court's research only dealt with negligence claims asserted against the unincorporated association, their language does not limit the principle to negligence. Rather, the language grants to unincorporated associations immunity from tort claims asserted by members.

There appears to be two basic reasons why a member may not assert a tort claim against an unincorporated association. First, an unincorporated association is composed of its members, and so when a member sues the association for a wrong he is really suing himself for that wrong. The law does not permit one to sue one's self. This prohibition would apply with equal logic to both intentional and negligent claims asserted against the unincorporated association.

The second reason is that the conduct of the unincorporated association can be imputed to all members of the association. In the negligence context, the negligence of one or several members of the association is attributed to all members, including the member wronged by the negligence. However, one of the member's intentional conduct may not be imputed to all of the members of the unincorporated association. This is because the other members of the association would have no basis for knowing of or being aware of one member's subjective intent. But, as such intent may not be imputed to all other members, neither can it be imputed to the unincorporated association. Pennsylvania recognizes that a principal is not normally responsible for the intentional tort of his agent unless the intentional conduct is committed during the course of and within the scope of the agency relationship. *See, Costa v Rexborough Memorial Hosp.*, 708 A.2d 490, 493 (Pa. Super. 1998), *app. denied*, 727 A.2d 1120 (Pa. 1998); *Fitzgerald v McCutcheon*, 410 A.2d 1270, 1271 (Pa. Super. 1979). In most instances, the intentionally tortious conduct of an unincorporated association's member would not be

committed during the furtherance of the common purpose for which the members of the association have joined together to achieve.

The Court concludes that a member cannot recover against an unincorporated association for damages suffered as a result of the association's or a member of the association's intentional tort. "[The association] has no entity or existence apart from that of its members," *DeVillars*, 70 A.2d at 335 (quoting *Hromek v. Gemenide*, 298 N.W. 587, 589 (Wis. 1941)). A unincorporated association "... is not a separate legal entity in the eyes of the law, having no existence apart from that of its individual members." *Mastrini v. Nuova Loggia Monte Grappa*, 1 D. & C.2d 245, 250 (Cambria Cty. 1954) (quoting *Marchitto v. Cent. R.R. of New Jersey*, 88 A.2d 851, 857 (N.J. 1952)). As such, the law treats the member and the association as common principles, and a principle may not recover from his common principle for the tort of their common agent. 14 A.L.R.2d 473.

A member cannot bring a claim against the association for an intentional tort because he would in essence be bringing an intentional tort against himself. If the association is liable for the intentional conduct of one of its members, then the injured member is also liable for the conduct of that member. This is because the association and the member are one and the same. Therefore, Nkwenti-Zamcho is barred from asserting the intentional infliction of emotional distress claim against the PCEA.

Nkwenti-Zamcho argues that there is an exception to the general rule that a member of an unincorporated association may not bring a tort claim against the unincorporated association. He contends that a member may bring a tort claim if he can show by specific facts that the employer actively participated in the union's bad faith or conspired with the union to

deny the employee his rights under the collective bargaining agreement. The Court finds that no such exception exists.

The exception Nkwenti-Zamcho relies upon is actually the exception to the general rule that a member of a union is limited to an order compelling arbitration as a remedy in a claim for breach of the union's duty of fair representation. See, *Martino v. Transp. Worker's Union*, 480 A.2d 242, 252 (Pa. 1984); *Waklet-Riker*, 656 A.2d at 141; *Reisinger v. Commonwealth, Dep't of Corrections*, 586 A.2d 1357, 1360 (Pa. Cmwlth. 1990). The exception provides that the member can seek damages against the union if his employer participated in the bad faith or conspired with the union to deny him his rights under the collective bargaining agreement. *Waklet-Riker*, 656 A.2d at 141; *Runski v. Am. Fed'n of State, Cty., and Municipal Employees, Local 2500*, 598 A.2d 347, 350 (Pa. Cmwlth. 1991), *aff'd*, 642 A.2d 466 (Pa. 1994). The exception in no way addresses the ability of a member to bring a tort claim against the unincorporated association. It merely addresses the type of remedy available to the aggrieved member. Furthermore, that remedy is specifically limited to a certain type of wrong. The wrong to be remedied by permitting the recovery of damages is the collusion between the union and the employer in breaching the duty of fair representation. As such, the exception is not applicable to the issue of whether a member can assert a tort claim against an unincorporated association.

As would relate to Defendants' other preliminary objections (failure to attach the collective bargaining agreement to the Amended Complaint; failure to aver the time and/or place of the alleged conspiracy; failure to specifically set forth any items of special damages;

and failure to join an indispensable party), the Court finds them to be moot based on the earlier determinations of this Opinion.

Accordingly, the preliminary objections of the PCEA and the PSEA are granted.

ORDER

It is hereby ORDERED that Preliminary Objections of Defendants the Pennsylvania State Education Association and the Penn College Education Association filed September 15, 2004 are GRANTED.

The demurrer to Count I of the Amended Complaint is GRANTED. The claim for breach of the duty of fair representation against the Penn College Education Association is DISMISSED WITHOUT PREJUDICE.

The demurrer to Count II of the Amended Complaint is GRANTED. The claim for breach of the duty of fair representation against the Pennsylvania State Education Association is DISMISSED WITHOUT PREJUDICE.

The demurrer to Count III of the Amended Complaint is GRANTED. The conspiracy claim asserted against the Penn College Education Association is DISMISSED WITHOUT PREJUDICE.

The demurrer to Count IV of the Amended Complaint is GRANTED. The intentional infliction of emotional distress claim asserted against the Penn College Education Association is DISMISSED WITH PREJUDICE.

The demurrer to Count V of the Amended Complaint is GRANTED. The negligent infliction of emotional distress claim asserted against the Penn College Education Association is DISMISSED WITH PREJUDICE.

The Plaintiff shall have twenty (20) days from notice of this Order to file a Second Amended Complaint in accordance with the Opinion that accompanied this Order.

BY THE COURT:

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