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

Date: May 24, 2005

OPINION and ORDER

Before the court for determination are the Preliminary Objections of Defendants the Pennsylvania State Education Association (hereafter "PSEA") and the Penn College Education Association (hereafter "PCEA") filed March 7, 2005. The court will grant the preliminary objections.

Background

This case 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. Defendants filed preliminary objections to the amended complaint on September 15, 2004. On January 25, 2004, this court issued an Opinion and Order granting the preliminary objections and permitting Nkwenti-Zamcho to file a second amended complaint. He filed a second amended complaint on February 14, 2005. The preliminary objections presently before the court are to the second amended complaint.

The material facts presented in the second amended complaint are identical to those pleaded in the first amended complaint. The two complaints differ, however, in the way the facts are characterized. In both complaints, Nkwenti-Zamcho contends that the conduct of the PCEA and the PSEA constituted a breach of the duty of fair representation that was owed to him. In the first and second amended complaints, Nkwenti-Zamcho alleges that the PCEA's and the PSEA's failure to file a grievance on his behalf regarding the conduct of Dean Edward Henninger was not the result of a properly conducted investigation. In the second amended complaint, Nkwenti-Zamcho has alleged that it was the result of racial discrimination by the PCEA and the PSEA.

The second amended complaint asserts that claim based upon the following factual allegations. Nkwenti-Zamcho is employed by the Pennsylvania College of Technology (hereafter "Penn College") as an assistant professor. He is of African descent and a person of color. Nkwenti-Zamcho is a U.S. citizen, but was born and educated in Cameroon. His primary language is English, which he speaks with a slight British inflection.

In the second amended complaint, Nkwenti-Zamcho alleges that the Dean of the Business School for Penn College, Dean Edward Henninger (hereafter "Henninger"), has engaged in discriminatory conduct against him because of his race and ethnicity. Nkwenti-Zamcho contends that he has been subject to twice the number of classroom observations by Dean Henninger; that no other teacher has been subject to that number of classroom observations; that the misuse of the evaluation process is on going as Dean Henninger has recommended to the Academic Vice-President that for the 2004-2005 school year all of Nkwenti-Zamcho's classes be evaluated by his students and that he be placed on an

instructional development plan; that Dean Henninger had reassigned one of his classes for no other reason other then to punish Nkwenti-Zamcho; that Dean Henninger improperly interfered with his academic freedom by telling him that he presented a biased opinion of affirmative action and directed Nkwenti-Zamcho to refrain from teaching that affirmative action is a matter of law or fact and insisted that he teach affirmative action as a moral issue; and that in a written evaluation, Dean Henninger criticized Nkwenti-Zamcho's classroom speaking, specifically, his diction, intonation, and delivery methods.

Because of Dean Henninger's alleged conduct, Nkwenti-Zamcho sought the assistance of the PCEA. The PCEA is the local union that represents the teachers at Penn College. He met with James Temple, the president of the PCEA, during the week of April 21, 2003 and informed him of Dean Henninger's actions. Temple expressed dismay and asked to see the comments that Nkwenti-Zamcho had made on the written evaluation report done by Dean Henninger. Temple told Nkwenti-Zamcho that if the incidents of breach of academic freedom and harassment continued that he would take the complaints to the Vice President of Academic Affairs, Victoria Muzic. Temple also advised Nkwenti-Zamcho to be prepared to face Dean Henninger regarding these allegations. Nkwenti-Zamcho forwarded the evaluation comments to Temple. Temple responded by e-mail on April 25, 2003 stating that the comments were good.

On September 25, 2003, a meeting was held between Nkwenti-Zamcho, Temple, Dr. Robert Gudgel, the Business Department PCEA representative, and Mr. Cart Kurtz, a representative of the PSEA, which is the parent union of the PCEA. 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. Terry Girdon, head of the Business Department, would be asked about the comments made to him by Dean Henninger regarding why the Business Ethics class 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. Girdon had not been contacted for his input concerning the allegations. Temple stated that he did not contact Dr. Girdon 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.

In the preliminary objections, Defendants raise three demurrers and assert that Nkwenti-Zamcho failed to join an indispensable party.[1] The first demurer is to the breach of the duty of fair representation claim asserted against the PCEA. Defendants argue that the second amended complaint fails to allege sufficient facts to establish that the PCEA's actions were arbitrary, discriminatory, or done in bad faith. Also, Defendants argue that the Pennsylvania Human Relations Act (hereafter "the PHRA"), 43 P.S. §951 et seq., bars Nkwenti-Zamcho's

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[1] By Order dated April 20, 2005, the preliminary objections filed March 30, 2005 were amended to include an objection for the failure to join an indispensable party. The same preliminary objection was raised to the original and first amended complaint, but was not addressed by the court. The parties have stipulated that the court should consider their previous briefs and arguments regarding this issue.

breach of the duty of fair representation claim which is now based upon the PCEA's alleged racial discrimination.

The second demurrer is to the breach of the duty of fair representation claim asserted against the PSEA. Defendants argue that the PSEA had no authority to and no duty to file a grievance on behalf of Nkwenti-Zamcho. Defendants further argue that any claim against the PSEA based upon any alleged racially discriminatory conduct is also barred by the PHRA.

The third demurrer is to the conspiracy claim asserted against the PCEA. Defendants argue that Nkwenti-Zamcho is required to establish the underlying act that is the object of the conspiracy. Since the second amended complaint fails to establish a breach of the duty of fair representation by the PCEA, Defendants contend the second amended complaint fails to plead a conspiracy between the PCEA and Penn College to commit this act.

The final preliminary objection asserts that Nkwenti-Zamcho failed to join an indispensable party. Defendants argue that Nkwenti-Zamcho was required to join Penn College as a party. Relying on ***Casner v. American Federation of State, County and Municipal Employees***, 658 A.2d 865 (Pa. Cmwlth. 1995), Defendants assert that Penn College is an indispensable party because if Nkwenti-Zamcho was able to plead and prevail on a claim for the breach of the duty of fair representation the remedy of arbitration could not be completely and adequately enforced without Penn College.

Discussion

Before addressing their merits, it is appropriate to set forth the standard by which the demurrers will be determined. A preliminary objection in the form of a demurrer tests the legal

sufficiency of a pleading. ***Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co.***, 860 A.2d 1038, 1041 (Pa. Super. 2004). A demurrer will be granted where the challenged pleading is legally insufficient. ***Williams v. Nationwide Mut. Ins. Co.***, 750 A.2d 881, 883 (Pa. Super. 2000). That is, a demurrer will be granted when it is clear from the facts that the party has failed to state a claim upon which relief may be granted. ***Sunbeam Corp. v. Liberty Mut. Ins. Co.***, 781 A.2d 1185, 1191 (Pa. 2001).

The demurrer must be resolved solely on the basis of the pleading; no testimony or evidence outside of the pleading may be considered. ***Williams***, 750 A.2d at 883. Furthermore, the court may not address the merits of the matter presented in the pleading. ***In re S.P.T.***, 783 A.2d 779, 781 (Pa. Super. 2001). All material facts set forth in the pleading as well as all inferences reasonably deducible therefrom shall be admitted as true for purposes of deciding the demurrer. ***Willet v. Pennsylvania Med. Catastrophe Loss Fund***, 702 A.2d 850, 853 (Pa. 1997); ***Ins. Adjustment Bureau***, 860 A.2d at 1041. " 'The question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Where any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the demurrer.'" ***Ins. Adjustment Bureau***, 860 A.2d at 1041 (quoting ***Vulcan v. United of Omaha Life Ins. Co.***, 715 A.2d 1169, 1172 (Pa. Super. 1998).

The court will now address each preliminary objection in turn.

I. Breach of Duty of Fair Representation - PCEA

The first preliminary objection is the demurrer to the breach of the duty of fair representation claim asserted against the PCEA in Count I of the second amended complaint. "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 breaches its duty of fair representation when the failure to file a grievance or to 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). However, a member 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.

The court will determine the demurrer first by examining the second amended complaint to see if it pleads sufficient facts to establish that the PCEA acted arbitrarily or in bad faith with regard to Nkwenti-Zamcho's alleged grievance. The court will then determine whether the PHRA bars Nkwenti-Zamcho's claim that the PCEA breached the duty of fair representation by failing to process his grievance because of his race.

A. <u>Arbitrariness and Bad Faith</u>

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.).

In order to demonstrate bad faith, a plaintiff “… must show that the union had hostility toward the plaintiff or the plaintiff’s class and the hostility negatively affected the union’s representation of the plaintiff.” ***Boyer v. Johnson Matthey, Inc.***, 2005 U.S. Dist. LEXIS 171, at *32 (E.D.Pa.). 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 the 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 court finds that the second amended complaint does not plead sufficient facts to establish that the PCEA acted arbitrarily or in bad faith. The second amended complaint alleges the same material facts as did the first amended complaint concerning the conduct of the PCEA. Therefore, the courts adopts the same reasoning as set forth in its January 25, 2005 Opinion and Order addressing the alleged arbitrariness and bad faith of the PCEA’s conduct.

B. Discriminatory Conduct by a Labor Union and the PHRA

The demurrer to the claim that the PCEA breached the duty of fair representation owed to Nkwenti-Zamcho by discriminating against him because of his race presents a new issue in this litigation and one the court believes to be of first impression in this Commonwealth. The

issue here is whether the PHRA procedures provide the sole remedy for discrimination by a labor union against one of its members thereby preempting a civil claim for breach of the duty of fair representation based on racial discrimination. In order to determine whether an injury is subject to the exclusive remedies of a statute, a court must determine the intent of the legislature by examining the scope of the statute and its remedies. ***Schweitzer v. Rockwell Int'l***, 586 A.2d 383, 387 (Pa. Super. 1990), *app. denied*, 600 A.2d 954 (Pa. 1991).

The intent of the Legislature in enacting the PHRA was to combat discrimination. The legislature has declared that the practice or policy of discriminating against individuals or groups by reason, inter alia, of their race is a matter of concern for the Commonwealth of Pennsylvania. 43 P.S. §952(a). Because of this, the Legislature stated:

> It is hereby declared to be the public policy of this Commonwealth to foster the employment of all individuals in accordance with their fullest capacities regardless of their race, color, religious creed, ancestry, age, sex, national origin, handicap or disability, use of guide or support animals because of the blindness, deafness or physical handicap of the user or because the user is a handler or trainer of support or guide animals, and to safeguard their right to obtain and hold employment without such discrimination, to assure equal opportunities to all individuals and to safeguard their rights to public accommodation and to secure housing accommodation and commercial property regardless of race, color, familial status, religious creed, ancestry, age, sex national origin, handicap or disability, use of guide or support animals because of blindness or deafness of the user or because the user is a handler or trainer of guide or support animals.

43 P.S. §952(b). The Legislature enacted the PHRA to effectuate this policy by creating "… a procedure and an agency specially designed and equipped to attack this persisting problem [of discrimination] and to provide relief to citizens who have been unjustly injured thereby." ***Fye v. Cent. Transp., Inc.***, 409 A.2d 2, 4 (Pa. 1979).

In its battle against discrimination, the Legislature declared certain types of conduct to be unlawful discriminatory practices. Section 955 of the PHRA sets forth the prohibited conduct and defines the scope of the Act. Subsection (c) of Section 955 specifically addresses conduct of labor organizations. It states that it shall be an unlawful discriminatory practice:

> For any labor organization because of the race, color, religious creed, ancestry, age, sex, national origin, non-job related handicap or disability or the use of a guide or support animal because of the blindness, deafness or physical handicap or any individual to deny full and equal membership rights to any individual or otherwise to discriminate against such individuals with respect to hire, tenure, terms, conditions or privileges of employment or any other matter, directly or indirectly, related to employment.

43 P.S. §955(c).

A breach of the duty of fair representation based upon racial discrimination by the union in processing a member's grievance is the type of conduct §955(c) prohibits. Section 955(c) prohibits a labor union from denying a member membership rights based upon his race. A union owes a duty of fair representation to its members. ***Eastern Lancaster Cty. Ed. Assoc.***, 427 A.2d at 307 (Case involved a claim that union breached the duty of fair representation by discriminating against non-union members, but did not address whether the PHRA impacted upon that claim.). The duty of fair representation is a membership right to be enjoyed by each member of the union. Accordingly, when a union breaches the duty of fair representation by discriminating against the member because of his race it is denying him equal membership rights because of his race, and thereby engaging in conduct prohibited by §955(c) of the PHRA. Therefore, the scope of the PHRA encompasses conduct that would constitute a breach of the duty of fair representation based upon racial discrimination.

As far as remedies, the PHRA authorizes both the Pennsylvania Human Relations Commission (hereafter "PHRC") and the courts to require a defendant who has been found to have engaged in an unlawful discriminatory practice to cease such activity and to take such affirmative action as is necessary. 43 P.S. §959(f)(1); 43 P.S. §962(c)(3). The PHRA is remedial in nature so affirmative action would encompass actions designed to serve this goal, including make whole measures. ***Hoy v. Angelone***, 720 A.2d 745, 749 (Pa. 1998).

As would relate to a claim for breach of the duty of fair representation, the general rule is that a plaintiff's sole remedy is an order compelling the union to arbitrate his grievance. ***Reisinger v. Commonwealth, Dep't of Corrections***, 568 A.2d 1357, 1360 (Pa. Cmwlth. 1990). However, there is an exception to this rule. Damages may be awarded where the plaintiff establishes 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." ***Ibid***.

The remedies available under the PHRA would encompass the traditional remedies available for a breach of the duty of fair representation. An order compelling arbitration of the grievance is remedial in nature. Such an order intends to make the plaintiff whole by placing him in the position he would have been in had there been no discrimination. So too would the awarding of damages if it were determined that there had been collusion between the employer and the union in denying the member his rights because of his race. Damages would compensate the member for any monetary loss he suffered as a result of the failure to file the grievance.

The court concludes that the legislature intended the PHRA to be the sole remedy for discrimination by a union against its members; therefore, the PHRA preempts a claim for breach of the duty of fair representation based on racial discrimination by the union. Because the PHRA is Nkwenti-Zamcho's sole remedy, he was required to follow the procedures proscribed therein to remedy the alleged wrong he suffered at the hands of the PCEA.

It is well settled that a plaintiff must exhaust all administrative remedies before seeking bringing a suit in court under the PHRA. ***Marriott Corp. v. Alexander***, 799 A.2d 205, 207 (Pa. Cmwlth 2002); ***Bailey v. Storlazzi***, 729 A.2d 1206, 1214 (Pa. Super. 1999). The Legislature charged the PHRC with the initial jurisdiction to receive, investigate, conciliate, hear, and decide complaints alleging unlawful discrimination. ***Marriott***, 799 A.2d at 1217. The Legislative intent behind requiring a delay in filing a civil suit and exhausting the administrative remedies was the desire "… to use the greater expertise of administrative agencies in the area of unlawful discrimination, to promote voluntary compliance without litigation and to give notice to the charged party." ***Bailey***, 729 A.2d at 1214. Permitting a plaintiff to circumvent the PHRC by filing a civil complaint without first having exhausted his administrative remedies would frustrate the statutory scheme the Legislature intended to create with the PHRA. ***Clay v. Advanced Computer Applications***, 559 A.2d 917, 920 (Pa. 1989). Therefore, the failure to follow the proscribed procedures and exhaust the administrative remedies available under the PHRA forecloses a plaintiff from seeking judicial recourse. ***Id***. at 921.

Accordingly, the court must dismiss Nkwenti-Zamcho's breach of the duty of fair representation claim based upon racial discrimination by the PCEA. Before a plaintiff may file

a civil suit, he must first file a complaint with the PHRC and then wait one year from the filing of the complaint to see if the PHRC dismisses the complaint or fails to enter into a conciliation agreement to which the plaintiff is a party. 43 P.S. §962(c); ***Schweitzer***, 586 A.2d at 386. Nkwenti-Zamcho did not file a complaint with the PHRC, and thereby has failed to exhaust his administrative remedies. As such, the demurrer to the breach of the fair duty of representation claim asserted against the PCEA in Count I of the second amended complaint is granted.

II. Breach of Duty of Fair Representation –PSEA

The second preliminary objection is the demurrer to the claim in Count II of the second amended complaint asserted against the PSEA for breach of the duty of fair representation. The court will grant the demurrer. The second 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 second 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 second amended complaint also fails to allege facts which could establish that the PSEA owed an independent duty of fair representation to Nkwenti-Zamcho. The second 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. Second Amended Complaint, ¶¶ 80, 82, 83. It is not evident from the portions of the collective bargaining agreement attached to or the allegations in the second amended complaint that the PSEA was a party to the collective bargaining agreement and thereby bound by it. As such, the second 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.

III. Conspiracy

The third preliminary objection is a demurrer to the conspiracy claim in Count III of the second amended complaint. Nkwenti-Zamcho has alleged that the PCEA conspired with Penn College to deny him the right to have a grievance filed. In essence, the allegation is that Penn College conspired with the PCEA to breach the duty of fair representation owed to Nkwenti-Zamcho. 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). Furthermore, without a civil cause of action for a particular act, there can be no cause of action for civil conspiracy to commit that act. ***Ibid***.

The court finds that the second amended complaint fails to plead a conspiracy claim. The second amended complaint has failed to allege facts sufficient to establish that the PCEA breached the duty of fair representation owed to Nkwenti-Zamcho. If there is no cause of

action for a breach of the duty of fair representation on the part of the PCEA, then there can be no conspiracy between the PCEA and Penn College to breach the duty of fair representation. Accordingly, the demurrer to the conspiracy claim in Count III is granted.

IV. Failure to Join an Indispensable Party

The final preliminary objection addresses Nkwenti-Zamcho's failure to join Penn College as an allegedly indispensable party. As a preliminary note, despite Defendants' argument ***Casner***, *supra*, does not answer this question. The two issues before the Commonwealth Court in ***Casner*** were: what statute of limitations governed the plaintiffs' claims for breach of the duty of fair representation against their union and whether those claims were barred by the applicable statute of limitations. 658 A.2d at 869. In setting forth the procedural history of the case, the Commonwealth Court stated that a preliminary objection had been granted dismissing the conspiracy claim against the Commonwealth, who was the employer, but the Commonwealth was retained as an indispensable party so that the remedy of arbitration, if warranted, could be completely and adequately enforced.[2] ***Id***. at 867. In ***Casner,*** the Commonwealth Court did not address whether an employer is an indispensable party in a case involving a claim for breach of the duty of fair representation against a union, and thereby, offers little precedential authority on the issue.

The failure to join an indispensable party deprives the court of subject matter jurisdiction. ***Polydyne, Inc. v. City of Philadelphia***, 795 A.2d 495, 496 (Pa. Cmwlth. 2002).

[2] Defendants had included a copy of Judge Pellegrini's unreported October 21, 1993 Memorandum Opinion regarding the preliminary objections. "Unreported opinions of the court shall not be relied upon or cited by a Court or a party in any other action or proceeding, except that such a memorandum decision may be relied upon or cited when it is relevant under the doctrine of law of the case, res judicata, or collateral estoppel." Internal Operating Procedures of the Commonwealth Court §414. Since none of the exceptions apply, the court may not rely upon the unreported memorandum opinion.

This lack of jurisdiction would render any decree or order entered in the matter void. ***Hubert v. Greenwald***, 743 A.2d 977, 980 (Pa. Super. 1999); ***Barren v. Dubas***, 441 A.2d 1315, 1316 (Pa. Super. 1982). In cases involving a claim against a union for breach of the duty of fair representation, it has been held that "…the employer approaches the status of an indispensable party to the litigation in the sense that the dispute cannot be finally resolved with equity and good conscience without his participation." ***Martino v. Transp. Workers Union, Local 234***, 480 A.2d 242, 245 (Pa. 1984); *See also*, ***Summers v. Transp. Workers Union Local 234***, 508 A.2d 1277, 1280 (Pa. Cmwlth. 1986) (The role of the employer in the case was that of an indispensable party in equity.). Absent specific facts that the union conspired with the employer, the sole remedy for breach of the duty of fair representation is an order compelling arbitration of the grievance. ***Casner***, 658 A.2d at 870; ***Reisinger***, 568 A.2d at 1360. This remedy makes the employer indispensable. Therefore, Penn College is an indispensable party to this action, and the preliminary objection for failure to join it is granted.

Conclusion

Accordingly, the preliminary objections are granted.

ORDER

It is hereby ORDERED that the Preliminary Objections of Defendants the Pennsylvania State Education Association and the Penn College Education Association filed March 7, 2005 are GRANTED.

The second amended complaint is DISMISSED. Plaintiff shall have twenty (20) days from notice of this Order to file a third amended complaint.

BY THE COURT:

William S. Kieser, Judge

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