



# I

## Facts and Travel

### A

#### Ms. Hicks's Employment

Ms. Hicks is a self-described black female who, at age fifty-eight, served as a part-time public employee for a period of six months with the DLT. (Fifth Am. Compl. ¶¶ 1, 2.) On or about February 2, 2009, Ms. Hicks began her employment as a Senior Employment and Training Interviewer. *Id.* ¶ 3. Based on state law, the position of Senior Employment and Training Interviewer is a classified position<sup>3</sup> in the noncompetitive branch. Pursuant to the Collective Bargaining Agreement between DLT and the Union, employees in the noncompetitive branch are considered temporary employees and are subject to a one year probationary period, during which time employees may be terminated without cause. (Collective Bargaining Agreement at Arts. 11.11, 11.12 [hereinafter CBA].) During her orientation, Ms. Hicks was informed that all non-civil service and non-management employees must become members of the Union. (Fifth Am. Compl. ¶ 5.) Accordingly, Union dues were regularly deducted from Plaintiff's paycheck, and she became a member of the Union. *Id.* ¶¶ 8, 9, 27.

Ms. Hicks has claimed that, during the course of her employment, she was subjected to race, sex, and age<sup>4</sup> discrimination by DLT. According to Ms. Hicks, the discrimination occurred

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<sup>3</sup> Under G.L. 1956 § 36-4-2, all positions not specifically enumerated are classified positions, and Senior Employment and Training Interviewer is not one of the enumerated positions. Additionally, competitive branch positions are those that utilize a civil service list based on competitive testing for applicants. Sec. 36-4-17. No such exam or list is in place for the Senior Employment and Training Interviewer position. (Def.'s Ex. O.)

<sup>4</sup> Although Ms. Hicks does not expressly claim sex or age discrimination in her Complaint, she does specifically refer to herself as a “[b]lack [f]emale over the age of forty.” (Fifth Am. Compl. ¶ 1.) In her memorandum in opposition to the Motion for Summary Judgment, however, she specifically alleges sex and age discrimination. (Pl.'s Mem. at 8.)

in a variety of circumstances. Ms. Hicks alleged discriminatory conduct by both her managers and coworkers. She asserts that one of her managers skipped over her while distributing paychecks and left the area. (Pl.'s Mem. at 13.) When Ms. Hicks confronted the manager about being skipped, the manager allegedly told her that she would get her paycheck when the manager “[g]ot to it.” Id. The manager returned later that day and gave Ms. Hicks her paycheck. Id.

Ms. Hicks also asserts that the work environment included “[r]acial [c]omments made by [w]hite employees,” which Ms. Hicks found offensive. (Fifth Am. Compl. ¶ 160.) Specifically, the comments that Ms. Hicks complains of were that “the [w]hite employees were [s]alt and the black employees were [p]epper” and that “a [w]hite pregnant employee’s baby better come out white and black because the pregnant employee was so friendly with a [b]lack [m]ale [e]mployee.” Id. ¶¶ 161-62.

Another circumstance occurred upon her returning to work after suffering an on-the-job foot injury in April 2009. Ms. Hicks began parking closer to her building until she was informed by an assistant director of DLT that she would need to submit a doctor’s note validating her need to park closer to the building in order to obtain special parking privileges. Id. ¶¶ 151, 152-54. In her memorandum, Plaintiff states that, even though she was taken to the hospital directly from DLT after her injury, she was penalized, because she is black, by being required to provide documentation that white employees would not have to provide. Additionally, Ms. Hicks alleges that she was not reimbursed for her medical supplies relative to this injury until October 2009 as “a consequence of her color.” (Fifth Am. Compl. ¶¶ 122-23; Pl.’s Mem. at 18.) However, Ms. Hicks provides no details regarding the alleged similarly situated white employees who were allowed to park by the building without submitting doctors’ notes or who received reimbursement in a timelier manner.

Ms. Hicks also alleges discrimination with respect to the treatment of applications that she submitted to DLT for promotions to full-time positions. She had one application lost in interoffice mail, and two weeks later, she observed the application on one of her manager's desks. Id. ¶ 146. According to her Complaint, Plaintiff resubmitted the application and contacted Human Resources about the lost mail, but she was later informed that her application arrived too late to be considered. Id. ¶¶ 149-50. Ms. Hicks alleges in her memorandum that this treatment of her application was racially discriminatory because "white employees had no such problems." (Pl.'s Mem. at 19.) Again, no details were provided about the alleged similarly situated white employees.

Additionally, when Ms. Hicks applied for another position with DLT in April 2009, she did not receive an interview. (Fifth Am. Compl. ¶ 138.) A white female coworker who began employment with DLT at the same time as Ms. Hicks did receive an interview, and eventually received the position. Id. ¶¶ 138, 140, 145. Ms. Hicks asked a manager within her department why she did not receive an interview, and according to Ms. Hicks, the manager informed her that she did not have seniority to be interviewed but that Ms. Hicks should contact Human Resources with additional questions since the manager was not involved in the hiring process. Id. ¶¶ 141, 143. Ms. Hicks alleges that this interview selection was racially discriminatory because the department had utilized a lottery system with the new hires, and Ms. Hicks drew number four while the promoted coworker drew number six.<sup>5</sup> Ms. Hicks concludes that since the coworker

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<sup>5</sup> Although Ms. Hicks does not expressly explain the purpose of this lottery, in her memorandum, she classifies the lottery as a "job promotion lottery system." (Pl.'s Mem. at 17.) At the hearing on the motion for summary judgment, Ms. Hicks stated that the lottery was to determine eligibility for future permanent positions. The Union provided no clarification on the lottery system, and it remains unclear how the lottery system fit into the promotion process.

received an interview when Ms. Hicks did not, the coworker “was hired for the position as a consequence of [] being white.”<sup>6</sup> (Pl.’s Mem. at 18.)<sup>7</sup>

During Ms. Hicks’s employment with DLT, her supervisors indicated displeasure with the quality of her job performance. (Fifth Am. Compl. ¶¶ 175-77, 189.) According to Ms. Hicks, her second performance evaluation stated that she was “[u]sually cheerful and courteous and tactful,” but it also stated that her performance had decreased and she had problems with the Union Steward. Id. ¶¶ 175, 181.

On August 7, 2009, she received a letter from the DLT Human Resources Administrator detailing DLT’s displeasure with her job performance. The letter stated that her “work continues to require careful review by management on a daily basis because of high level of errors.” (Union’s Ex. F, at 1.) The letter also asserts that her work “lacks accuracy,” and that she did not complete an adequate quantity of claims. Id. Ms. Hicks “constantly [sought] guidance from management several times before completing most claims.” Id. The letter indicated that Ms. Hicks failed to understand the various facets of different claim forms, which contributed to the inaccuracy of her work. Id. at 2.

Additionally, the letter detailed interpersonal issues between Ms. Hicks and coworkers occurring throughout July 2009. Specifically, the letter stated that Ms. Hicks often sent instructions directly to coworkers rather than advising a manager of the need for action by a coworker. Id. Ms. Hicks also made errors in handling customer needs at the reception desk throughout July 2009, or failed to take any action at all, resulting in customers having to return to the building a second time or seek assistance from another employee. Id.

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<sup>6</sup> Ms. Hicks additionally asserts that she complained to DLT and the Union about the misapplication of the lottery system, but no remedial action was taken.

<sup>7</sup> These are all of the factual allegations of discrimination set forth by Ms. Hicks. The Court observes that no allegations relate to sex or age discrimination.

The Human Resources letter stated that DLT was considering terminating her employment as a result, and informed her that she had the opportunity to appear at a meeting that afternoon to discuss her employment. (Union's Ex. F, at 1-3.)<sup>8</sup> On August 19, 2009, Plaintiff was terminated, having worked just over six months—182 days—with DLT. (Fifth Am. Compl. ¶¶ 10, 11.) The termination was communicated in a second letter from Human Resources, stating that the termination was the result of poor job performance, repeating the complaints stated in the prior letter. (Union's Ex. H.)

## **B**

### **The Grievances**

Throughout her employment with DLT, Ms. Hicks was a Union member. See Fifth Am. Compl. ¶¶ 5, 8, 9, 27. Pursuant to the CBA entered into between DLT and the Union, a grievance may be taken through a three-step process. At the first step, the aggrieved employee, a union representative, and the immediate supervisor meet and attempt to resolve the grievance. (CBA Art. 25.2.) If Step 1 is unsuccessful, the grievance is reduced to writing, and the Union and aggrieved employee present the grievance at a Step 2 hearing before a designee of the Director of the Department of Administration. Id. If the Union or aggrieved employee is not satisfied with the result of the Step 2 hearing, then the Union may submit the matter to arbitration for a final disposition. Id. Pursuant to the CBA, the first two steps of the three-step process are mandatory for permanent employees. See id. However, the Union has discretion not to pursue a grievance to arbitration for any employee, temporary or permanent. See id.

Before she was terminated, Ms. Hicks requested that the Union file a grievance based upon the alleged various instances of racial discrimination during her employment with DLT, as

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<sup>8</sup> It is unclear from the record whether the meeting actually occurred.

stated above. The Union filed a grievance on her behalf on June 15, 2009 (Grievance 1). (Union's Ex. E, at 1.)<sup>9</sup> After she was terminated, Ms. Hicks alleged that her termination was due to racial<sup>10</sup> discrimination and sought Union representation to grieve her termination. See id. The Union filed a second grievance (Grievance 2) on September 2, 2009, alleging that Ms. Hicks's termination was discriminatory. (Union's Ex. I, at 1.)

The Union and DLT agreed to consolidate the two grievances for a Step 2 hearing, which occurred on September 16 and October 28, 2009. (Union's Ex. J, at 1.) According to Union President Marilyn Tipton, she and the Union's attorney met with Ms. Hicks prior to and throughout the hearing process to gain her input. In addition, the Union's attorney represented Ms. Hicks at the hearing. (Union's Ex. G, ¶¶ 4-6.)<sup>11</sup> The hearing officer issued two written decisions on February 3, 2010, one for each grievance. She found in favor of DLT on both grievances, finding insufficient evidence of racial discrimination against Ms. Hicks. (Union's Exs. J, at 7; K, at 7.) The hearing officer additionally found that Ms. Hicks could be terminated

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<sup>9</sup> The Defendant asserts that the "grievance was not resolved at Step 1 and therefore, it was reduced to writing and submitted for a Step 2 hearing." (Def.'s Mem. at 3.) At the hearing on the motion for summary judgment, Ms. Hicks stated for the first time to this Court that her grievance was never brought before her supervisor for a Step 1 informal discussion. However, both parties agree that a Step 2 hearing was held on the grievance.

<sup>10</sup> The grievance form does not specify the type of discrimination that was alleged, but the hearing officer stated that Ms. Hicks claimed that she was discriminated against because of her race. (Union's Exs. I, at 1; K, at 6.)

<sup>11</sup> While no transcript of the hearing was provided to this Court, the hearing officer's decision indicates that counsel for DLT presented an opening argument and Ms. Hicks testified on September 16. (Union's Ex. J, at 2-3.) On October 28, the hearing officer heard the testimony of Raymond Filippone, Assistant Director for Income Support for DLT, Judy DiGiorgio, Supervising Employee Relations Officer for the General Government Service Center, Sherry Meyer Ruggeri, an Employment and Training Manager with DLT, and Virginia Howard, another Employment and Training Manager. (Union's Ex. J, at 4-5.) Ms. Tipton stated in her affidavit that during her meetings with Ms. Hicks, both before and throughout the hearings, "Ms. Hicks was invited [by] the Union's attorney to ask questions, offer her thoughts, and was asked, specifically, 'is there anything else you would like [the Union's attorney] to ask this witness?' Ms. Hicks's answer to the last question was continually 'no.'" (Union's Ex. G, ¶ 6.)

without recourse because she was a temporary employee, employed for less than one year. (Union's Ex. K, at 7.)

In March 2010, the Union, after consulting with legal counsel, elected not to proceed to arbitration because it believed that the Step 2 hearing had made evident that there was no factual basis for Plaintiff's allegations of racial discrimination supporting either grievance.<sup>12</sup> (Union's Exs. G, at ¶ 7; L, at 1; M, at 1.) In addition, the Union considered that DLT had provided evidence of Plaintiff's poor job performance and that Plaintiff was not entitled to pursue her grievance further because of her status as a temporary employee. (Union's Ex. M, at 1.)

## C

### Case Travel

In August 2010, Plaintiff filed the instant lawsuit. Read liberally, the Complaint alleges race, sex, and age discrimination<sup>13</sup> against DLT in violation of the CBA and state law. It also alleges that the Union breached its duty of fair representation. In September 2010, Ms. Hicks's first Motion to Amend her Complaint was granted, and she filed her First Amended Complaint. A second Motion to Amend was granted, and a Second Amended Complaint followed in November 2010. The State Defendants filed a Motion to Dismiss, and in December 2010, this Court, Fortunato, J., granted a conditional order of dismissal with leave for Plaintiff to amend her Complaint, which she did, resulting in a Third Amended Complaint. In June 2013, this Court, Matos, J., entered a conditional order for summary judgment, again giving Plaintiff leave to amend her Complaint. The Plaintiff filed her Fourth Amended Complaint in July 2013.

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<sup>12</sup> Notes from the applicable executive board meeting on March 10, 2010 indicate in the section entitled "President's Message" that "[a] letter was received from Attorney Tom Landry making a recommendation to the board to not take the case of Phyllis Hicks to arbitration. The board voted unanimously to accept his recommendation and not pursue the arbitration." (Union's Ex. L, at 1.)

<sup>13</sup> See note 17, *infra*, regarding the allegations of sex and age discrimination.

The State Defendants filed another Motion to Dismiss, and in October 2013, this Court, Montalbano, J., granted in part and denied in part. He did so without prejudice, giving Plaintiff sixty days to file an amended Complaint. Plaintiff again amended her Complaint, and the State Defendants again moved to dismiss. In March 2014, after three and one-half years of proceedings and a total of five amendments to the Complaint, this Court, Montalbano, J., granted the Motion to Dismiss under Super. R. Civ. P. 12(b)(6), this time with prejudice, and dismissed all counts against the State Defendants.

In the instant motion, the Union seeks summary judgment of Plaintiff's remaining claim, set forth in Count I of the Fifth Amended Complaint, which alleges that the Union breached its duty of fair representation when it failed to demand arbitration on Ms. Hicks's behalf regarding her complaints of discrimination.

## II

### Standard of Review

Summary judgment is appropriate when—viewing the pleadings and supplemental admissible evidence in a light most favorable to the nonmoving party—there exists no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Super. R. Civ. P. 56(c); MacQuattie v. Malafronte, 779 A.2d 633, 636 (R.I. 2001) (citing Carlson v. Town of Smithfield, 723 A.2d 1129, 1131 (R.I. 1999) (per curiam)). The moving party must “establish that there exists no genuine dispute with respect to the material facts,” and the nonmoving party then has the burden to prove by competent evidence that a factual dispute does exist. Estate of Giuliano v. Giuliano, 949 A.2d 386, 391 (R.I. 2008). If the moving party establishes an absence of a disputed material fact, the party opposing the motion “may not rest upon the mere allegations or denials of his pleading. He has an affirmative duty to set forth specific facts which

show that there is a genuine issue of fact to be resolved at trial.” Steinberg v. State, 427 A.2d 338, 340 (R.I. 1981) (quoting Ardente v. Horan, 117 R.I. 254, 256-57, 366 A.2d 162, 164 (1976)).

In evaluating the evidence presented, “the court does not pass upon the weight or the credibility of the evidence but must consider the affidavits and other pleadings in a light most favorable to the party opposing the motion.” Palmisciano v. Burrillville Racing Ass’n, 603 A.2d 317, 320 (R.I. 1992) (citing Lennon v. MacGregor, 423 A.2d 820 (R.I. 1980)). The role of the Court is to “look for factual issues, not determine them.” Steinberg, 427 A.2d at 340 (citing Hodge v. Osteopathic General Hospital of R.I., 107 R.I. 135, 142, 265 A.2d 733, 737 (1970)). Therefore, the Court’s preliminary task “is to determine whether there is a genuine issue concerning any material fact.”<sup>14</sup> Industrial Nat’l Bank v. Peloso, 121 R.I. 305, 307, 397 A.2d 1312, 1313 (1979) (citing R.I. Hosp. Trust Nat’l Bank v. Boiteau, 119 R.I. 64, 66, 376 A.2d 323, 324 (1977)). If a genuine issue of material fact exists, then the motion for summary judgment must be denied. See id. at 307-08, 397 A.2d at 1313 (citing R.I. Hosp. Trust Nat’l Bank, 119 R.I. at 66, 376 A.2d at 324).

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<sup>14</sup> In evaluating the presence of a genuine issue of material fact, an issue is “genuine” if it is “relevant to the issue . . . [and] sufficiently open-ended to permit a rational factfinder to resolve the issue in favor of either side.” Nat’l Amusements, Inc. v. Town of Dedham, 43 F.3d 731, 735 (1st Cir. 1995). A fact is material if it “has the capacity to sway the outcome of the litigation under the applicable law.” Id.

### III

#### Analysis

##### A

#### **Dismissal of State Defendants from the Case**

At the outset, the Court observes that dismissal of the State Defendants from the case directly impacts the claim against the Union. The Union avers that it is entitled to summary judgment because Plaintiff must prove that the DLT breached the CBA in order to prove that the Union breached the duty of fair representation. The Union asserts that this Court's previous grant of the State Defendants' Motion to Dismiss leaves Plaintiff unable to prove DLT's violation of the CBA.

When a plaintiff brings a so-called "hybrid claim," in which the plaintiff alleges a breach of the CBA by the employer and a breach of the duty of fair representation by the union, the two claims are "inextricably linked," and the plaintiff must prove both. Miller v. U.S. Postal Service, 985 F.2d 9, 11 (1st Cir. 1993). Our Supreme Court has recognized that a plaintiff "cannot prevail on an unfair representation claim if the employer did not contravene the collective bargaining agreement." MacQuattie, 779 A.2d at 636 (citing DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 163-65 (1983)). Likewise, the Court has held that a collective bargaining unit member lacks standing to bring a claim against his or her employer unless he or she can also show that the union breached its duty of fair representation. DiGuilio v. R.I. Bhd. of Corr. Officers, 819 A.2d 1271, 1273 (R.I. 2003).

Our Supreme Court has held that an employee may present evidence against the union to prove the union's breach even if the employee elects to sue only the employer. Id. at 1273 n.1. However, this case is distinguishable because Plaintiff did bring claims against both her

employer and the Union, and another Justice of this Court dismissed the claims against the employer with prejudice pursuant to Super. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted. (Union’s Ex. N, at 1.) Our Supreme Court has held that a dismissal for failure to state a claim upon which relief can be granted constitutes a decision on the merits for res judicata purposes. Huntley v. State, 63 A.3d 526, 532 (R.I. 2013). The Court based its holding on the language of Fed. R. Civ. P. 41(b), which mirrors the language of Super. R. Civ. P. 41(b)(3), which provides:

“[u]nless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.” Cannon v. Loyola U. of Chicago, 784 F.2d 777, 780 (7th Cir. 1986) (quoting Fed. R. Civ. P. 41(b)).

Therefore, the dismissal of Ms. Hicks’s Complaint as against the State Defendants constitutes a decision on the merits of the discrimination claim, and Ms. Hicks is precluded from presenting evidence of that claim to this Court.

By dismissing Plaintiff’s case against the State Defendants with prejudice, this Court rendered a decision on the merits of Plaintiff’s case, thereby invoking the doctrine of res judicata and preventing this Court from deciding the merits of her claims of discrimination. Because Ms. Hicks will be unable to present facts to support her allegations of discrimination by the State Defendants, her claim against the Union remains ripe for summary judgment because the two allegations are dependent upon each other. See Miller, 985 F.2d at 11. However, as the Union has put forth sufficient evidence to support its Motion for Summary Judgment on independent grounds, the Court will address the merits of Ms. Hicks’s claim against the Union.

## B

### A Union's Duty of Fair Representation

Unions, as the exclusive bargaining representatives for employees subject to CBAs, bear a duty to fairly represent those employees. Vaca v. Sipes, 386 U.S. 171, 177 (1967); Lee v. R.I. Council 94, 796 A.2d 1080, 1083 (R.I. 2002) (citing Belanger v. Matteson, 115 R.I. 332, 341, 346 A.2d 124, 131 (1975)). The duty of fair representation had its origins in a series of cases involving employees' allegations of racial discrimination by union representatives. Vaca, 386 U.S. at 177. The United States Supreme Court first confirmed this duty of fair representation under the Railway Labor Act and later extended it to be broadly applicable under the National Labor Relations Act, 29 U.S.C. §§ 151-169. Vaca, 386 U.S. at 177. The Rhode Island Supreme Court first considered this duty of fair representation in Belanger, where it recognized the extensive litigation history in other jurisdictions, "most notably in the federal courts." 115 R.I. at 337, 346 A.2d at 129. The Court agreed with "the persuasive logic of the" federal cases and recognized "as implicit in our [law], a statutory duty on the part of an exclusive bargaining agent to fairly and adequately represent the interests of all of those for whom it negotiates and contracts." Id. at 338, 346 A.2d at 129. Accordingly, Rhode Island law imparts a duty of fair representation on any exclusive bargaining agent.<sup>15</sup>

Courts have recognized that "the congressional grant of power to a union to act as exclusive collective bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination." Vaca, 386 U.S. at 182. The duty of

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<sup>15</sup> The Union in the instant matter would be required to meet a duty of fair representation because it is the exclusive bargaining agent for a class of state employees of which Plaintiff is a member. See Def.'s Ex. C, at art. I, § 1.1.

fair representation “has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law.” Id. The United States Supreme Court has defined the duty of fair representation as an “obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.” Id. at 177 (citing Humphrey v. Moore, 375 U.S. 335, 375 (1964)).

However, the duty of fair representation does not require “perfect representation or even representation that is free of negligence.” Lee, 796 A.2d at 1084 (citing Achilli v. John J. Nissen Baking Co., 989 F.2d 561, 563 (1st Cir. 1993)). A union will be liable for breach of a duty of fair representation if its handling of a grievance is arbitrary, discriminatory, or perfunctory. Lee, 796 A.2d at 1083. A union breaches the duty of fair representation “if it significantly harms its members through actions that are arbitrary, reckless, or in bad faith.” Achilli, 989 F.2d at 563 (citing Vaca, 386 U.S. at 190). Courts generally limit finding a breach of a duty of fair representation to where the union’s “behavior is so far outside a wide range of reasonableness that it is wholly irrational or arbitrary.” Price v. Unite Here Local 25, 883 F. Supp. 2d 146, 151 (D.D.C. 2012) (citing Payne v. Giant Food, Inc., 346 F. Supp. 2d 15, 20 (D.D.C. 2004)); see Hussey v. Quebecor Printing Providence Inc., 2 F. Supp. 2d 217, 224 (D.R.I. 1998). Additionally, a finding of bad faith requires a union member to show that the Union acted in a “fraudulent, deceitful, or dishonest” manner. Sim v. N.Y. Mailers’ Union Number 6, 166 F.3d 465, 472 (2d Cir. 1999).

Courts have determined that “a union should be given ‘great latitude in determining the merits of an employee’s grievance and the level of effort it will expend to pursue it.’” Hazard v. Southern Union Co., 275 F. Supp. 2d 214, 225 (D.R.I. 2003); see Vaca, 386 U.S. at 191;

Belanger, 115 R.I. at 339, 346 A.2d at 130. In fact, courts have recognized that even “simple negligence” in a union’s evaluation of the merits of a grievance is insufficient to establish a breach of the duty of fair representation. Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1273 (9th Cir. 1983) (citing Singer v. Flying Tiger Line Inc., 652 F.2d 1349, 1355 (9th Cir. 1981)). At the same time, a union cannot “arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion.” Id.; Lee, 796 A.2d at 1083 (citing Belanger, 115 R.I. at 341, 346 A.2d at 131).

Here, Plaintiff has alleged that the Union breached its duty of fair representation by failing to pursue her grievances to arbitration and in delaying the Step 2 hearings. The Union, in support of its Motion for Summary Judgment, counters Plaintiff’s claims, alleging that Ms. Hicks had no right to arbitration and that her allegations of discrimination lacked merit. The Union also argues that Ms. Hicks suffered no prejudice regarding any delay that may have occurred throughout the process.

## 1

### **Union’s Discretion to Pursue Arbitration**

The United States Supreme Court has stated that an employee does not have “an absolute right to have his [or her] grievance taken to arbitration,” and employers and unions may choose to limit employee access to arbitration. Vaca, 386 U.S. at 191. A union’s decision not to pursue arbitration in a grievance matter “is not in and of itself an arbitrary or capricious action and, thus, is not automatically a breach of fair representation.” Hussey, 2 F. Supp. 2d at 224. Overall, the grievance process is designed to allow a union discretion to ensure that “frivolous grievances are ended prior to the most costly and time-consuming step in the grievance procedures[:].” arbitration. Id.; see Belanger, 115 R.I. at 340, 346 A.2d at 130.

In the instant matter, the CBA clearly states that no employee, even a full-time, permanent employee, has an absolute right to have the Union pursue a grievance to arbitration. See CBA Art. 25.2. Rather, the decision to pursue arbitration is left to the Union’s discretion. Id. Therefore, Ms. Hicks had no absolute right to have the Union demand arbitration on her grievances.

The Union additionally asserts that because Ms. Hicks was a temporary employee and could be terminated without cause, the CBA specifically denied her a right to grieve her termination. Therefore, the Union could not have breached its duty of fair representation because it did not have a duty to pursue the grievance at all. Article 11.11 of the CBA states, in pertinent part, that:

“[e]mployees appointed from employment or promotional lists shall serve a probationary period of 130 working days . . . . Each new employee not appointed from a list of eligibles shall be considered a temporary employee and shall be subject to dismissal without recourse during the first (1st) year of employment while in temporary status.”

Based on this CBA provision, it is clear that Ms. Hicks, as a temporary employee, was not entitled to utilize the grievance procedure to challenge a lawful termination because she was subject to dismissal without cause during the first year of her employment.

However, Plaintiff’s temporary status, standing alone, does not provide an absolute defense to the Union’s duty of fair representation. A union’s failure to grieve a member’s complaint in the face of a legitimate discrimination claim, even for a temporary employee, may very well constitute an arbitrary or discriminatory action by the union. See Beck v. United Food and Commercial Workers Union, Local 99, 506 F.3d 874, 880 (9th Cir. 2007) (citing Marquez v. Screen Actors Guild, Inc., 124 F.3d 1034, 1043 (9th Cir. 1997)) (holding that action reflecting “reckless disregard for the rights of an individual employee” constitutes arbitrary action); Lettis

v. U.S. Postal Service, 39 F. Supp. 2d 181, 198 (E.D.N.Y. 1998) (citing Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985)) (holding that “a union must provide nondiscriminatory representation to all bargaining unit employees, without reference to union membership status”); see also Lee, 796 A.2d at 1083 (holding that a union will be liable for breach of the duty of fair representation if it handles a grievance in an arbitrary, discriminatory, or perfunctory manner). Therefore, Ms. Hicks’s status as a temporary employee would not provide an absolute defense for the Union’s failure to demand arbitration in the face of a legitimate discrimination claim.

Nevertheless, it is clear that pursuant to the CBA, no employee has an absolute right to demand arbitration. Thus, the Union’s failure to demand arbitration, standing alone, does not provide a basis for Plaintiff’s duty of fair representation claim absent a showing that the Union’s decision was arbitrary, discriminatory, or perfunctory on other substantive grounds. See Hussey, 2 F. Supp. 2d at 224 (citing Williams v. Sea-Land Corp., 844 F.2d 17, 19 (1st Cir. 1988)) (holding that “[a] decision not to arbitrate a claim is not in and of itself an arbitrary or capricious action and, thus, is not automatically a breach of fair representation”). The Court will therefore address the merits of Ms. Hicks’s claims of discrimination against DLT, viewed through the lens of whether there is any genuine issue of material fact as to whether the Union acted in an arbitrary, discriminatory, or perfunctory manner when it failed to demand arbitration on Ms. Hicks’s behalf.

## The Underlying Discrimination Claim

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### Sex and Age Discrimination<sup>16</sup>

Initially, the Court observes that Ms. Hicks has failed to assert any factual basis to support her claims of sex and age discrimination. In detailing her specific allegations of disparate treatment, she only avers that her treatment was the result of her race and compares herself to “white employees.” Because Ms. Hicks has not provided a factual basis to support her claims of sex and age discrimination, those claims are deemed waived. See Town of Coventry v. Baird Props., LLC, 13 A.3d 614, 619 (R.I. 2011) (internal quotations omitted) (holding that “summarily listing issues for appellate review, without a meaningful discussion thereof or legal briefing of the issues, does not assist the Court in focusing on the legal questions raised, and therefore constitutes a waiver of that issue”).

As Ms. Hicks has failed to provide any factual basis supporting a claim of sex or age discrimination, the Court finds that there are no genuine issues of material fact as to whether the Union acted in an arbitrary, discriminatory, or perfunctory manner in not pursuing arbitration based on Ms. Hicks’s allegations of sex or age discrimination during her employment with

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<sup>16</sup> The Plaintiff’s claims in her grievances were exclusively based on racial discrimination with no mention of sex or age discrimination. The grievances themselves merely assert that DLT “discriminated against” Ms. Hicks without any reference to the basis for those claims. (Union’s Exs. E, I.) According to the written decisions of the hearing officer, the only comparisons Ms. Hicks asserted in her hearing testimony were between herself and white coworkers. (Union’s Ex. J, at 3-4.) Similarly, the hearing officer concluded that any negative effects experienced by Ms. Hicks were not “because of her race” as Ms. Hicks claimed. Id. at 6-7. Ms. Hicks’s allegations of sex and age discrimination did not manifest until her filings with this Court, first as a reference to herself as a “Black Female over the age of forty” in her Complaint and then expressly in her Memorandum in Objection to the Union’s Motion for Summary Judgment. (Fifth Am. Compl. ¶ 1.)

DLT.<sup>17</sup> See also Lawtone-Bowles v. City of New York, Dept. of Sanitation, 22 F. Supp. 3d 341, 350 (S.D.N.Y. 2014) (dismissing an age discrimination claim because the plaintiff “fails to allege any facts supporting an inference of adverse employment action due to her membership in this protected class”); Kenefick v. Francis Howell Sch. Dist., 2013 WL 6000459, at \*3 (E.D. Mo. 2013) (granting a motion to dismiss claims of age and disability discrimination because the plaintiff did not assert “the bases for [his] claims of discrimination . . . [and t]his failure leaves to speculation the factual basis for his requested relief and mandates dismissal”) (internal quotations and citations omitted). Ms. Hicks’s claims of age or sex discrimination are not factually supported and are therefore appropriate for summary judgment.

**b**

**Race Discrimination<sup>18</sup>**

The validity of Ms. Hicks’s claims of racial discrimination is at the heart of this matter. The Union asserts that those claims lacked merit. Because the Union’s duty of fair representation is intrinsically linked to its assessment of the merits of Ms. Hicks’s claims, the Court will “employ the now familiar three-part burden shifting framework as outlined by the

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<sup>17</sup> Ms. Hicks’s specific allegations of sex or age discrimination did not appear until her memorandum in objection to the Union’s Motion for Summary Judgment, further supporting that the Union did not breach its duty of fair representation for not pursuing arbitration regarding sex or age discrimination.

<sup>18</sup> Ms. Hicks brought her claims of race discrimination exclusively under the Rhode Island Civil Rights Act, G.L. 1956 §§ 42-112-1 through 42-112-2. Although employment discrimination claims may also be brought under the Fair Employment Practices Act (FEPA), G.L. 1956 §§ 28-5-1 through 28-5-42, Plaintiff has not alleged a violation of FEPA. Additionally, she would be unable to bring such a claim until first obtaining approval to bring suit in Superior Court from the Rhode Island Commission for Human Rights in the form of a right to sue letter. Sec. 28-5-24.1(a), (c)(2); see Ward v. City of Pawtucket Police Dept., 639 A.2d 1379, 1382 (R.I. 1994). Although Ms. Hicks asserts in her Memorandum in Objection to the Motion for Summary Judgment that she met with the Commission for Human Rights, there is no indication in the record that she ever requested approval to bring suit under FEPA. Therefore, the Court will consider her employment discrimination claims solely under the Rhode Island Civil Rights Act.

United States Supreme Court in McDonnell Douglas Corp.,” to evaluate the merits of Ms. Hicks’s claims. Bucci v. Hurd Buick Pontiac GMC Truck, LLC, 85 A.3d 1160, 1169 (R.I. 2014) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973)). Utilization of the McDonnell-Douglas analysis will provide a framework to determine if there is a genuine issue of material fact regarding whether or not the Union acted in an arbitrary, discriminatory, or perfunctory manner when it determined that Ms. Hicks’s claims were not meritorious and elected not to demand arbitration of her grievances.

The first step of the McDonnell-Douglas framework requires that the plaintiff “make out a prima facie case of [race, sex, or] age discrimination.” Bucci, 85 A.3d at 1170. If the plaintiff meets her burden at step one, step two shifts the burden to the defendant “to come forward with legitimate nondiscriminatory reasons for the employee’s termination.” Id. at 1171. If the defendant meets this burden, step three “shifts the burden back to the plaintiff” to “prove that [the] defendants’ legitimate, nondiscriminatory reason for [firing the plaintiff] was merely pretext (which would mean that the real reason for [firing the plaintiff] was unlawful animus).” Id. at 1173. The plaintiff can meet this burden in either of two ways: (1) the plaintiff may demonstrate pretext directly “by persuading the court that a discriminatory reason more likely motivated the employer” or (2) the plaintiff may demonstrate pretext indirectly “by showing that the employer’s proffered explanation is unworthy of credence.” Id. (citing Center for Behavioral Health, R.I., Inc. v. Barros, 710 A.2d 680, 685 (R.I. 1998)).

The Court begins at step one and considers whether Ms. Hicks’s allegations constitute a prima facie case of race discrimination.<sup>19</sup> A prima facie case of discrimination requires that the

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<sup>19</sup> The Court observes that this Court, Montalbano, J., granted DLT’s Motion to Dismiss for failure to state a claim upon which relief can be granted, effectively holding that Plaintiff did not make out a prima facie case of racial discrimination. Such a dismissal is binding on this Court

employee demonstrate that (1) he or she belongs to a protected class, (2) he or she was qualified for the position, (3) despite the requisite qualifications, he or she was discharged from the position [or suffered an adverse employment action by her employer], and (4) the position remained open and was ultimately filled by someone with roughly equivalent qualifications to perform substantially the same work.” Barros, 710 A.2d at 685; DeCamp v. Dollar Tree Stores, Inc., 875 A.2d 13, 21 (R.I. 2005) (citing Smith v. Stratus Computer, Inc., 40 F.3d 11, 15 (1st Cir. 1994)).

The burden to “establish a prima facie case of discrimination is ‘not especially onerous[,]’” and may even be assumed at the summary judgment stage. Bucci, 85 A.3d at 1171 (quoting Barros, 710 A.2d at 685).

In determining whether Plaintiff established a prima facie case, the Court recognizes that, being black, Ms. Hicks is a member of a protected class, satisfying the first prong. While Ms. Hicks details many actions which she avers are discriminatory, she asserts only two adverse employment actions: (1) being passed over for a promotion (Grievance 1) and (2) being terminated (Grievance 2). These two assertions are sufficient to satisfy the third prong.

The Court will now address the second and forth prongs, considering whether or not Ms. Hicks’s allegations constitute a prima facie case of racial discrimination for the purpose of determining whether the Union acted in an arbitrary, discriminatory, or perfunctory manner in evaluating the merits of those allegations. Recognizing that, as stated above, the burden to establish a prima facie case is “not especially onerous,” the Court will consider the factual assertions that Ms. Hicks makes in support of her allegations of discrimination by DLT. See Bucci, 85 A.3d at 1171 (citing Barros, 710 A.2d at 685). As an essential element of setting forth a prima facie case of discrimination is demonstrating an adverse employment action, see

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under the doctrine of res judicata. See Huntley, 63 A.3d at 532 (holding that a dismissal for failure to state a claim upon which relief can be granted constitutes a decision on the merits for res judicata purposes). However, for the purpose of analysis of the Union’s decision not to pursue arbitration, the Court will consider the merits of Plaintiff’s allegations.

DeCamp, 875 A.2d at 21, Plaintiff's allegations of discrimination must be related to the adverse employment action—being passed over for promotion (Grievance 1) and being terminated (Grievance 2).

Several of Ms. Hicks's allegations are entirely unrelated to either of these adverse employment actions. Her assertions that her coworkers made racial comments that were offensive to her and that her manager skipped her over while distributing paychecks<sup>20</sup> have no bearing on whether Ms. Hicks was promoted or terminated and are not related to her claim of disparate treatment, the essence of employment discrimination. Other allegations claim disparate treatment but still fail to demonstrate a link between the alleged disparate treatment and the adverse employment actions. Ms. Hicks alleges that the requirement for her to provide a doctor's note in order to park closer to the building after injuring her foot was different from the requirements that would have been placed on white employees. She also claims she was not reimbursed for medical costs associated with this injury until six months after the injury, allegedly because of her race. She additionally asserts that the job application lost in interoffice mail was a problem not experienced by white employees.

While these allegations speak to disparate treatment by DLT staff, the claims of disparate treatment are neither factually supported nor linked to adverse employment actions. See Barros, 710 A.2d at 685. Ms. Hicks has provided no supporting factual basis for her contention that any of these actions were based on race as Plaintiff does not point to treatment of any other employee for comparison and gives no support for racial motivation to DLT's actions. See Hughes v. General Motors Corp., 212 F. App'x 497, 503 (6th Cir. 2007) (affirming a grant of summary judgment on a race discrimination claim because the plaintiff failed to present a comparison

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<sup>20</sup> Ms. Hicks conceded at the hearing on the Motion for Summary Judgment that she did receive her paycheck later that same day.

between herself and similarly situated coworkers); Payne v. Travenol Laboratories, Inc., 673 F.2d 798, 827-28 (5th Cir. 1982) (affirming a district court rejection of a claim of race and sex discrimination in pay because the plaintiff failed to provide the court with a useful comparison of white male and black female pay). Therefore, these allegations, presented to the Union, fail to support a claim of racial discrimination in employment because they do not provide the necessary factual components to validate her claims and there is no link between her assertions and an adverse employment action.<sup>21</sup>

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<sup>21</sup> While these allegations may be applicable to a hostile work environment claim, Ms. Hicks has not asserted such a claim before this Court. In her Fifth Amended Complaint, she makes a single reference to a hostile work environment, but she does not assert hostile work environment as a cause of action. However, because hostile work environment claims can be brought under the Rhode Island Civil Rights Act, which forms the basis of Ms. Hicks's Complaint, this Court considers the correlation of these allegations and a hostile work environment claim. See DeCamp, 875 A.2d at 23 (holding that maintaining a hostile work environment is a violation of the Rhode Island Civil Rights Act). To establish a hostile work environment, a plaintiff

“must demonstrate that (1) she belonged to a protected group, (2) she was subject to unwelcome harassment, (3) the harassment was based on race, (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and (5) the defendant knew or should have known about the harassment and failed to act.” Williams v. CSX Transp. Co., Inc., 643 F.3d 502, 511 (6th Cir. 2011) (citing Moore v. KUKA Welding Sys. & Robot Corp., 171 F.3d 1073, 1078-79 (6th Cir. 1999)); see also DeCamp, 875 A.2d at 22-23.

Ms. Hicks has failed to meet the third prong of a hostile work environment claim. She has put forth no evidence, other than two isolated comments by coworkers, that the alleged discriminatory actions were based on race. She provides no comparison to treatment of other black employees or similarly situated white employees in regard to her manager skipping her during paycheck distribution, loss of her job application, the requirement to submit a doctor's note for special parking privileges, or the delay in reimbursement of medical costs. Additionally, for these allegations as well as the allegations of race-based statements made by coworkers, Ms. Hicks fails to set forth any evidence that DLT was or should have been aware of this alleged harassment, failing to meet the fifth prong. All of the alleged harassing actions were isolated incidents perpetrated by different individuals, with no evidence indicating a common scheme or design. Ms. Hicks also presented no evidence that this alleged harassing behavior was pervasive throughout the workplace. Considered as a whole, although these statements may have been subjectively offensive to Ms. Hicks, it is a far stretch to conclude that the statements constitute

As stated above, the viability of Ms. Hicks's claims requires a nexus between her allegations and the two adverse employment actions: failure to obtain a promotion and termination, which form the bases for Grievance 1 and Grievance 2, respectively. In support of Grievance 1, Ms. Hicks makes only one factual assertion indicating that her treatment differed from that of her white coworkers. Specifically, she alleges that upon applying for a full-time position with DLT, Ms. Hicks did not receive an interview or the job. By contrast, a white female coworker who was hired at the same time as Ms. Hicks did receive an interview and eventually received the job. Ms. Hicks asserts that a lottery was held among the new hires and she drew a lower number than the white female coworker who received the interview and the job. However, the record is unclear as to what role the lottery was intended to provide in the promotion process.

Nevertheless, this single instance in which a white employee received a job advantage—an interview and associated promotion—that Ms. Hicks did not receive is the exclusive factual assertion regarding an adverse job action that fits within the framework of an employment discrimination claim in Grievance 1. However, Ms. Hicks fails to fully address the fourth prong of the prima facie case by not providing a factual comparison of her own credentials and the

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the pervasive, objectively offensive hostile work environment sought to be remedied by the Rhode Island Civil Rights Act and similar laws. See Barrett v. Whirlpool Corp., 556 F.3d 502, 517-18 (6th Cir. 2009) (affirming summary judgment against complainant in a race discrimination case and holding that “the single comment from [a coworker], the perceived diversion of desirable work by [a supervisor], and the receipt of the ‘cold shoulder’ from a few coworkers is insufficient evidence of severe or pervasive harassment” to constitute a hostile work environment); contra E.E.O.C. v. Skanska USA Bldg., Inc., -- F. Supp. 3d --, 2015 WL 304342, at \*1-2, 4 (W.D. Tenn. 2015) (denying an employer's motion for summary judgment in a race discrimination case where the three black employees had faced daily racial slurs directed at them as well as at least one instance of physical abuse in which a white coworker threw liquid from a portable toilet at one of the black employees). Accordingly, Ms. Hicks did not set forth sufficient evidence of a hostile work environment to make the Union's evaluation of her grievances arbitrary, discriminatory, or perfunctory.

credentials of the person who received the promotion. See Hughes, 212 F. App'x at 503. In regard to Grievance 2, Ms. Hicks provides no factual support to substantiate the allegation that she was fired because of her race, that her treatment differed from that of white coworkers, or that she was replaced by a white person.

Ms. Hicks has failed to provide this Court with any facts supporting an allegation that she was qualified for the position with DLT.<sup>22</sup> Additionally, she has made no factual assertions regarding the comparable qualifications between herself and the person hired in regard to Grievance 1. In addition, she has made no factual assertions regarding who was hired in her place, if anyone, regarding Grievance 2. Ms. Hicks has not set forth specific facts to support a prima facie discrimination case because she has failed to provide factual support for two necessary elements—that she was qualified for the position and was replaced by someone with equal or lesser qualifications. See Baird Props., 13 A.3d at 619.

The record reflects that the incidents relating to Ms. Hicks's claims are not in dispute. Rather, the underlying motivations for those incidents are contested. Considering the record before the Court, it is clearly questionable as to whether or not Ms. Hicks's allegations satisfy the prima facie requirements of a racial discrimination claim. However, assuming for the purpose of analysis that Plaintiff has established a prima facie case of racial discrimination, the Court will next determine whether the Union satisfied its burden of establishing that DLT provided "legitimate nondiscriminatory reasons for the employee's termination." See Bucci, 85 A.3d at 1171 (citing Neri v. Ross-Simons, Inc., 897 A.2d 42, 49 (R.I. 2006)). The "burden is one of production, not persuasion." Id. (citing Neri, 897 A.2d at 49, 50).

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<sup>22</sup> In her memorandum to this Court, she asserts that she satisfies this requirement "because she qualified for the position[.]" (Pl.'s Mem. at 11.) However, she does not provide any factual support for why she was qualified.

Here, the Union has provided documentation from DLT in the form of letters sent to Ms. Hicks during her employment that document DLT's displeasure with Ms. Hicks's job performance. In an August 7, 2009 letter to Ms. Hicks, a Human Resources Administrator explains that Ms. Hicks's "work continues to require careful review by management on a daily basis because of high level of errors." (Union's Ex. F, at 1.) The letter also details that Ms. Hicks's work lacked accuracy and she constantly sought assistance because she failed to understand the various claim forms. Id. at 1-2.

The letter cites interpersonal issues between Ms. Hicks and coworkers as well as Ms. Hicks's inability to attend to customer needs. Id. at 2. On two separate occasions, Ms. Hicks accepted documents from customers without having a manager verify the customers' identities, resulting in the customers having to return to DLT a second time. Id. Additionally, a coworker reported one instance where Ms. Hicks refused to provide a status letter to a customer, and the coworker took it upon herself to generate the status letter because the customer looked "desperate." Id. Given that DLT put forth extensive evidence of poor job performance, it is clearly reasonable for the Union to have concluded that the poor job performance detailed in the Human Resources letters<sup>23</sup> was sufficient to constitute a legitimate, nondiscriminatory reason for Plaintiff's lack of promotion and eventual discharge.<sup>24</sup> See Bucci, 85 A.3d at 1171 (citing Neri, 897 A.2d at 49, 50).

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<sup>23</sup> A second letter dated August 19, 2009 detailed the same instances of poor job performance, and this letter additionally terminated Ms. Hicks's employment. (Union's Ex. H.)

<sup>24</sup> Although the DLT letter was issued after the Union filed Grievance 1, the letter details DLT's displeasure with Plaintiff's job performance over the course of more than a month. The letter was issued before the Union made its determination not to pursue arbitration on Plaintiff's grievances. Therefore, DLT's displeasure with Plaintiff's job performance would support a prior decision to promote another employee over Ms. Hicks in addition to DLT's eventual decision to terminate Ms. Hicks's employment.

Having established that legitimate, nondiscriminatory reasons existed for Plaintiff's lack of promotion and eventual termination, the final step of the McDonnell-Douglas framework requires that Plaintiff provide evidence that DLT's "legitimate, nondiscriminatory reason for [firing Plaintiff] was merely pretext." Bucci, 85 A.3d at 1173 (citing Casey v. Town of Portsmouth, 861 A.2d 1032, 1038 (R.I. 2004)). Plaintiff "need not provide a 'smoking gun,'" but must either (1) persuade the Court that discrimination was a more likely motivator than the claimed nondiscriminatory reasons or (2) show that the employer's nondiscriminatory reasons are not credible. Id. (citations omitted).

Here, Plaintiff has failed to assert a potential dispute regarding whether DLT's assertions of her poor job performance were false or pretextual.<sup>25</sup> She has completely failed to rebut DLT's assertions on this issue. In addition, there is virtually no evidence in the record before the Court to conclude that DLT's actions were merely pretext for unlawful discriminatory animus or that DLT's explanation was "unworthy of credence." See Bucci, 85 A.3d at 1173 (citing Barros, 710 A.2d at 685). Accordingly, Plaintiff has failed to establish the necessary elements to substantiate her claim of race-based employment discrimination under the McDonnell-Douglas framework. See Bucci, 85 A.3d at 1170-73.

In light of Ms. Hicks's temporary status,<sup>26</sup> the only reason for the Union to demand arbitration would be to flush out discriminatory reasons for DLT's actions. While pursuing the grievances through the first two stages, the Union evaluated the absence of evidence of racial

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<sup>25</sup> The only support provided by Ms. Hicks is a single assertion that "[t]he evidence against the Plaintiff (Ms. Hicks) does not support termination." (Pl.'s Mem. at 7.) However, our Supreme Court has held that "[w]hen a plaintiff attempts to counter a claim by an employer that it fired an employee for poor performance, it is simply not sufficient for a plaintiff to present evidence that her performance was satisfactory." Bucci, 85 A.3d at 1175. Unquestionably, a bald assertion that Plaintiff's job performance did not merit termination is insufficient to undermine DLT's express and detailed statements of poor performance.

<sup>26</sup> See Section B(1), supra.

discrimination supporting Plaintiff's claims and made an evaluation that Ms. Hicks had little chance of success at arbitration "given [Ms.] Hicks'[s] status as a temporary employee and the fact that she had not come forward with evidence of discrimination at the Step 2 hearing despite being given the opportunity to do so" by counsel. (Union's Exs. D, ¶ 13; G, ¶¶ 5-6.) Based on the record presented, this Court finds that Plaintiff's allegations, taken individually or as a whole,<sup>27</sup> are so nebulous with most bearing no link to an adverse job action that the Union's decision not to pursue arbitration cannot be classified as arbitrary, discriminatory, or perfunctory.

This Court is mindful of the seriousness of Plaintiff's allegations of discrimination. However, Plaintiff has put forth no evidence to contradict the Union's evaluation of her allegations as lacking merit, particularly in light of the evidence of poor job performance. Consequently, this Court finds that there is no evidence to support the conclusion that the Union's decision<sup>28</sup> was arbitrary, discriminatory, perfunctory, or made in bad faith. See Hussey, 2 F. Supp. 2d at 225 (finding no violation of the duty of fair representation when the union elected to withdraw its demand for arbitration after the union "met with its legal counsel and considered the facts of the case, the likelihood of success in arbitration, the cost of arbitration and the impact of pursuing the grievance on the other Union members"). The Plaintiff has not demonstrated any fraudulent, deceitful, or dishonest motivation behind the Union's decision.

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<sup>27</sup> Even considering all of Ms. Hicks's allegations together, the totality of the circumstances does not create an inference of racial discrimination resulting in an adverse employment action. Most of the complaints that Ms. Hicks puts forth have not been linked to race or are unrelated to negative employment actions. Therefore, considering Ms. Hicks's allegations as a whole does not aide the Court in finding a prima facie case of racial discrimination. See Bucci, 85 A.3d at 1181 (Goldberg, J., dissenting) (dissenting on the grounds that at the summary judgment stage "the correct approach requires a court to look at the case as a whole and consider the ultimate issue based on the totality of the evidence").

<sup>28</sup> The Union evaluated the merits of Plaintiff's evaluation, particularly in light of the Step 2 hearing officer's decision, considered the high cost of arbitration, and consulted with legal counsel in reaching its decision. (Union's Exs. D, ¶¶ 11-13; G, ¶¶ 5-7.)

See, e.g., Achili, 989 F.2d at 562-63 (finding a breach of the duty of fair representation when the union failed to state at the grievance hearing that the employee’s contested action was undertaken at the union’s direction). In fact, the lack of evidence supporting Plaintiff’s discrimination claim, as addressed above, validates the Union’s decision not to pursue arbitration.

Nor has the Plaintiff demonstrated that the Union’s decision was so far outside the range of reasonableness as to be “wholly irrational.” See Crider v. Spectrulite Consortium, Inc., 130 F.3d 1238, 1243 (7th Cir. 1997). In Vaca, the United States Supreme Court found that a union’s decision to withdraw a grievance did not rise to the level of arbitrary even though the employee, who was fired because of his high blood pressure, had medical documentation that he was fit for his job requirements. 386 U.S. at 174-75, 193-94. In contrast here, Plaintiff has not presented any evidence to counter the DLT’s assertions that she was not promoted and in fact fired because of poor job performance. In summation, Ms. Hicks has provided no evidence to support her assertion that the Union’s refusal to demand arbitration violated its duty of fair representation, particularly in light of the employment discrimination framework set forth in McDonnell-Douglas and the facts presented to this Court. As no genuine issues of material fact exist on this issue, the Union is entitled to summary judgment.

## **D**

### **Delay of Step Two Hearing**

In her Complaint, Plaintiff also indicates that her Step 2 grievance hearing was delayed, in contravention of the CBA. (Fifth Am. Compl. ¶¶ 79, 100.) The original hearing on Grievance 1 was cancelled because Ms. Tipton was on vacation, and the hearing did not occur until after Ms. Hicks was terminated. Id. ¶¶ 196-200. This delay exceeded the CBA requirement to hold

the hearing within fourteen days of filing of the written grievance. The Union counters that even if holding the hearing in September and October 2009 constituted a delay, such delay did not constitute a breach of the duty of fair representation because the Plaintiff suffered no harm as a result of the delay.

Even when a union fails to meet a hearing deadline established by a CBA, “mere delay is not sufficient to establish a breach” of the union’s duty of fair representation. Samosky v. United Parcel Service, 944 F. Supp. 2d 479, 509 (S.D.W.V. 2013). Rather, such a delay will only constitute a breach of the duty of fair representation if such delay was discriminatory, arbitrary, or perfunctory, the same standard as any other duty of fair representation breach. Id. at 509-10 (citing Vaca, 386 U.S. at 190-92) (finding no duty of fair representation breach because the union had explained its reasoning for the six and one-half month delay in resolving a grievance); see Gonce v. Veterans Admin., 872 F.2d 995, 999 (Fed. Cir. 1989) (finding a duty of fair representation breach when the union failed to explain a seventeen month delay in requesting an arbitration panel).

The CBA in this case calls for a Step 2 hearing to be held within fourteen days of submission of a written grievance, which is to be submitted within fourteen days of the employee’s or Union’s knowledge of the grievance. (Union’s Ex. C, at Art. 25.2.) Plaintiff filed Grievance 1 on June 15, 2009 and Grievance 2 on September 2, 2009. (Union’s Exs. E, I.) The Step 2 hearing on Grievance 1 was originally set for July 1, 2009, within the period set forth in the CBA. (Fifth Am. Compl. ¶ 197.) However, that hearing was rescheduled because Ms. Tipton was on vacation. Id. The hearings, which were combined by agreement of the parties, were held on September 16 and October 28, 2009—dates selected as mutually convenient for the Union and the State. (Union’s Exs. D, at 2 ¶ 9; J, at 1-2.)

Consequently, the first day of Ms. Hicks's Step 2 hearing was held three months after she filed Grievance 1. Ms. Tipton provided an affidavit stating that the delay resulted because she was on vacation during the initial scheduled date,<sup>29</sup> and she then selected a date that was mutually convenient for the Union and the State. (Union's Ex. D, at 2 ¶ 9.) Therefore, the delay of the Step 2 hearing was not discriminatory, arbitrary, or unreasonable. See Samosky, 944 F. Supp. 2d at 509-10 (citing Smith v. United Steel Workers of America, 2007 WL 2477345, at \*10 (S.D.W.V. 2007)) (recognizing that delays ranging from a few months to two years "do not rise to the level of wholly irrational, perfunctory, or otherwise arbitrary" when the delay is adequately explained). Additionally, the CBA itself indicates that although "every effort shall be made to expedite the processing of grievances, . . . the parties may by mutual agreement extend any time limitation specified herein." (Union's Ex. C, at Art. 25.3.) Therefore, the CBA itself provides for extension of the time limit as long as the parties—the Union and the State—agree, which they did in this case.

A plaintiff must additionally show that she suffered prejudice as a result of the delay in the grievance procedure in order to constitute a violation of the duty of fair representation. See Bloom v. Make-up Artists and Hairstylists Local 706, 1999 WL 909817, at \*10 (C.D. Cal. 1999) (refusing to recognize a breach of duty of fair representation claim even though the arbitration hearing had been held outside the period prescribed in the CBA because the employee "has not even alerted the Court to any prejudice she suffered by the delay"); see also Samosky, 944 F. Supp. 2d at 510. Here, Ms. Hicks has made no showing of harm from the three month delay, and

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<sup>29</sup> Ms. Hicks alleges that other Union representatives were available while Ms. Tipton was on vacation. However, at a prior meeting, Ms. Hicks rejected one of those representatives offered, stating that "she had only been dealing with" Ms. Tipton. (Fifth Am. Compl. ¶¶ 188, 190-92.) Therefore, the Court finds that the decision to postpone the hearing until Ms. Tipton's return was not discriminatory, arbitrary, or unreasonable because Ms. Hicks had previously expressed a preference for Ms. Tipton as her representative.

as she had the opportunity to put forth evidence of discrimination at the Step 2 hearing and failed to do so, this Court cannot find that the delay would have altered the outcome of the hearing. Because Plaintiff has not presented any evidence to this Court that the Union's agreement to delay the Step 2 hearing was discriminatory, arbitrary, perfunctory, or resulted in any harm to Plaintiff, there are no genuine issues of material fact as to whether the delay constituted a breach of the Union's duty of fair representation. The Union, therefore, remains entitled to summary judgment.

#### **IV**

#### **Conclusion**

This Court finds that there are no genuine issues of material fact in regard to whether the Union acted in an arbitrary, discriminatory, or perfunctory fashion in refusing to demand arbitration of Plaintiff's grievances. Ms. Hicks has failed to provide any factual basis to establish that the Union's failure to demand arbitration on her behalf because it evaluated the grievances as lacking merit constituted a breach of its duty of fair representation. Further, as Plaintiff's claims against the State Defendants have been dismissed with prejudice, Plaintiff is precluded from presenting evidence of the substance of her discrimination claims, an essential element of her claim against the Union. Accordingly, for the reasons set forth above, this Court grants the Union's Motion for Summary Judgment. Counsel shall submit an appropriate Order for entry.



**RHODE ISLAND SUPERIOR COURT**

*Decision Addendum Sheet*

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**TITLE OF CASE:** Phyllis E. Hicks v. Sandra Powell, et al.

**CASE NO:** PC 10-4687

**COURT:** Providence County Superior Court

**DATE DECISION FILED:** July 24, 2015

**JUSTICE/MAGISTRATE:** Van Couyghen, J.

**ATTORNEYS:**

For Plaintiff: Phyllis E. Hicks, *pro se*

For Defendant: Carly B. Iafrate, Esq.; Gerard P. Cobleigh, Esq.; Matthew I. Shaw, Esq.