UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 10-3616

BRANDON CHAPMAN

PLAINTIFF-APPELLANT

v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRIGULTURAL IMPLEMENT WORKERS OF AMERICA, LOCAL NO. 1005; GENERAL MOTORS COMPANY

DEFENDANTS – APPELLEES

Appeal of Final Judgment from the United States District Court
For the Northern District of Ohio, Eastern Division
Case No. 1:09 CV 00074

PETITION FOR HEARING EN BANC

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NOW COMES Defendant-Appellee, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1005 and pursuant to Rule 35 of the Federal Rules of Appellate Procedure petitions this Court for Hearing En Banc for the reason that Appellant's assignments of error are based primarily upon two Sixth Circuit cases – *Williams v. Molpus*, 171 F.3d 360 (6th Cir. 1999) and *Burkholder v. International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 12*, 299 Fed. Appx. 531, 2008 WL 4771950 (6th Cir. Ohio) both of which conflict with *Clayton v. International Union, UAW*, 451 U.S. 679 (1981); *Rogers v. Board of Education Buena Vista Schools*, 2 F.3d 163 (6th Cir. 1993); *Wagner v. General Dynamics*, 905 F.2d 126 (6th Cir. 1990); *Monroe v. International Union, UAW*, 723 F.2d 22 (6th Cir. 1983) and *Willetts v. Ford Motor Company*, 583 F.2d 852 (6th Cir. 1978). En Banc Hearing is necessary to secure uniformity of the Court's decisions and this proceeding involves a question of exceptional importance as it affects the many, many fair representation cases filed each year.

Molpus held that the general requirement that a plaintiff claiming breach of the duty of fair representation must first exhaust his or her internal union remedies is excused if the union breaches its duty of fair representation. *Burkholder, supra* relied upon *Molpus* and reversed the district court's grant of summary judgment on the basis of failure to exhaust internal union remedies and directed the district court

upon remand to consider whether appellants' failure to exhaust was excused by a breach of the duty of fair representation. Judge Gilman, the author of *Molpus*, concurred in the decision in *Burkholder* but stated:

> "as the author of *Molpus*, I must sheepishly admit that I now believe the exhaustion/exception language in that opinion was overbroad. [citations omitted]. *Molpus'* exception to the administrative-exhaustion requirement does not simply mirror the first two *Clayton* factors as the lead opinion states, instead its broad language unconditionally waives the exhaustion requirement for any plaintiff who alleges a breach of the duty of fair representation in his or her complaint. This consequence is contrary to the general policy of having labor disputes first submitted to internal union grievance procedures. [citation omitted], and the UAW appropriately criticizes the *Molpus* language for that reason." 2008 WL 4771950 at **6

Judge Gilman concluded:

> But because this panel is powerless to overrule a prior panel's published opinion [citation omitted], *Molpus* must govern our decision on the exhaustion issue. *Molpus* should, however, be closely scrutinized if the issue comes before a future en banc panel of this court."
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> *Id* at **7.

Not only do *Molpus* and *Burkholder* contravene the labor policy encouraging submission of labor disputes to internal proceedings, their holdings

contradict the Supreme Court and Sixth Circuit precedent. If these cases are broadly interpreted conceivably a court could not reach the exhaustion issue unless it first determined that the union did not breach its duty of fair representation.

In *Clayton v. International Union, UAW*, 451 U.S. 679 (1981) none of the courts below or the Supreme Court addressed the underlying fair representation claim. The only issue answered by the *Clayton* courts was whether the plaintiff had to exhaust internal union remedies. The remedies at issue in *Clayton* could not reinstate a grievance or grant complete relief. The remedies in the case at bar are able to reinstate a grievance and/or grant complete relief. The *Clayton* court observed:

> Where internal union appeals procedures can result in either complete relief to an aggrieved employee or reactivation of his grievance, exhaustion would advance the national labor policy of encouraging private resolution of contractual labor disputes. In such cases, the internal union procedures are capable of fully resolving meritorious claims short of the judicial forum. Thus, if the employee received the full relief he requested through internal procedures, his § 301 action would become moot, and he would not be entitled to a judicial hearing. Similarly, if the employee obtained reactivation of his grievance through internal union procedures, the policies underlying *Republic Steel* would come into play, and the employee would be required to submit his claim to the collectively bargained dispute-resolution procedures. In

> either case, exhaustion of internal union remedies could result in final resolution of the employee's contractual grievance through private rather than judicial avenues.
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> 451 U.S. at 692.

At footnote 20 the *Clayton* court went on to state:

> Allowing a defendant in a § 301 action to demand exhaustion of internal union procedures when those procedures could lead to reactivation of a stalled grievance is wholly consistent with *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 85 S.Ct. 614, 13 L.Ed.2d 580 (1965). In *Republic Steel*, we held that an employer may rely on a provision in a collective-bargaining agreement requiring its employees to submit all contractual grievances to arbitration prior to bringing suit under § 301. If a provision in the collective-bargaining agreement also permits reactivation of a grievance after an internal union appeal, an employer or union should also be able to rely on the provision and thus defend the § 301 suit on the ground that the employee failed to exhaust internal union procedures.

By either reactivating a grievance or otherwise providing complete relief the Union may be able to rectify the very wrong of which Plaintiff complains – the breach of the duty of fair representation.

In *Willetts v. Ford Motor Company*, *supra* this court found that plaintiff raised a question of material fact on his fair representation claim but that summary judgment was nonetheless proper because plaintiff failed to exhaust his internal

union remedies. Similarly in *Monroe v. UAW*, *supra*; *Wagner v. General Dynamics*, *supra* and *Rogers v. Buena Vista Board of Education*, *supra* this Court affirmed decisions granting the unions summary judgment without reaching the merits of the fair representation claim.

Molpus is based on a fundamental failure to acknowledge the difference between contractual grievance procedures and internal union remedies. As the *Clayton* court recognized, contractual grievance procedures are bargained for between the employer and the union and are set forth in the collective bargaining agreement. Internal union remedies are wholly a creation of the union constitution and are not part of the collective bargaining agreement. *Clayton*, *supra* 451 U.S. at 687. In *Vaca v. Sipes*, 386 U.S. 171, 184, (1967) the court recognized that the contractual grievance procedure is designed by and controlled by the union with the union having sole power to invoke the higher stages of the grievance procedure. Thus an employee may be prevented from exhausting the grievance procedure by the union's wrongful refusal to process the grievance. For those reasons the *Vaca* court held that an employee may bring an action against his employer in the face of a defense based on the failure to exhaust contractual remedies if the employee can prove that the union breached its duty of fair representation in handling the grievance.

Hines v. Anchor Motor Freight, 424 U.S. 554 (1976) followed *Vaca* regarding contractual remedies. The *Hines* passage cited by the *Molpus* court is specifically limited to an employer's defense that an employee plaintiff had failed to exhaust the contractual grievance procedure. In fact *Molpus* even quotes the *Hines* passage:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures. . . (emphasis added).

Molpus 171 F.3d at 369; *Hines* 424 U.S. at 567.

The internal union procedures at issue here are separate and distinct from the contractual grievance procedures addressed by the *Molpus* court. They are created by the union constitution and are designed to settle the disputes between the union and its members. Unlike the grievance procedure, the members, not the union, determine how far their internal appeal will go.

In *Burkholder* the majority mistakenly held that *Molpus* merely applies the first and second factors set forth in *Clayton* and stated that "failing to process a grievance or submit evidence in support of a grievance could potentially fall under the first or second exceptions to exhaustion set forth in *Clayton*". Again, the *Clayton* factors as quoted by the majority apply only to internal union appeals not the grievance procedure. The fair hearing *Clayton* speaks of in the first factor is a

fair hearing by the union in an appeal not by the company in the grievance procedure. The second factor looks to the adequacy of the internal remedies to either reinstate a grievance or grant full relief.

Molpus is clearly wrong and conflicts with long held Supreme Court and Sixth Circuit precedent. Its application to the case at bar is also wrong. This Court should take this opportunity to set an En Banc hearing to overrule *Molpus* and *Burkholder* and to apply the proper precedent to affirm the district court's decision that summary judgment to the Union was proper because Plaintiff failed to exhaust available, adequate internal union remedies.

Respectfully submitted,

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NOTICE OF SERVICE

I hereby certify that one copy of the foregoing *Petition For Hearing En Banc* of Defendant-Appellee, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW Local 1005 was filed electronically this 27th day of September, 2010. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's system.

/s/Joan Torzewski
Joan Torzewski