No. 1-10-1714

FOURTH DIVISION
April 28, 2011

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MICHAEL LYMAN, Petitioner, v. STATE OF ILLINOIS LABOR RELATIONS BOARD, LOCAL PANEL; JOHN F. BROSNAN, Executive Director; JACALYN J. ZIMMERMAN, Chairman, CHARLES E. ANDERSON, Member; EDWARD F. SADLOWSKI, Member; and CHICAGO FIRE FIGHTERS UNION, LOCAL #2, Respondents.	)	Petition for Review of an Order the Illinois Labor Relations Board, Local Panel No. L CB 08 012

PRESIDING JUSTICE LAVIN delivered the judgment of the court.
Justices Salone and Sterba concurred in the judgment.

ORDER

Held: The determination by the Illinois Labor Relations Board, Local Panel, that the Chicago Fire Fighters Union, Local No. 2, did not engage in intentional misconduct by declining to arbitrate petitioner's grievance was not clearly erroneous.

Petitioner Michael Lyman seeks administrative review in this court of a decision by the Illinois Labor Relations Board, Local Panel (Board), which dismissed a unfair labor practice charge he brought against the Chicago Fire Fighters Union, Local No. 2 (Union). For the reasons

discussed below, we affirm the decision of the Board.

On April 16, 2005, the Chicago Fire Department (CFD) Internal Affairs Division alleged that Lyman had committed payroll fraud. Lyman was employed as a firefighter by CFD at that time, and it was alleged that he, over a two-year period, had reported for duty at his CFD assignment while he was simultaneously on the payroll at his Chicago Public Schools (CPS) assignment as a substitute engineer. According to the Board's findings of facts, which are generally not disputed, Lyman was interviewed by CFD's Internal Affairs Division around September 16, 2005, pursuant to those allegations. Thomas Cody, a business agent for the Union, was present at the interview. During the interview, CFD provided Lyman with a written summation of the charges, which Lyman signed a receipt for. The summation read:

> "It is alleged that Firefighter Michael Lyman committed payroll fraud in that over the course of two years he reported for duty at his Chicago Fire Department assignment while he was simultaneously on the payroll at his Chicago Public Schools assignment. It is further alleged that Lyman accepted pay from both the Chicago Fire Department and the Chicago Public Schools for those dates."

On November 9, 2005, Lyman was presented with a formal notification of the charges against him, but Lyman refused to sign the receipt and only provided his initials and a date on the signature line. On March 22, 2006, Lyman's employment with CFD was terminated and on that same day, Lyman filed a grievance through the Union contending that his termination was unjust.

On March 27, 2006, Lyman was notified that his grievance could not be advanced because he did not provide corroborating or substantiating testimony, or the necessary

documentation supporting his position. On July 13, 2006, Lyman petitioned the Union's Executive Board for a review of his grievance and he was eventually provided the opportunity to present his case to them. On June 18, 2007, a meeting regarding Lyman's grievance took place with Lyman present; however, he was later notified that the denial of his grievance was upheld and that it would not forwarded to arbitration. On December 12, 2007, Lyman filed a charge with the Board alleging that the Union engaged in unfair labor practices.

According to Lyman's charge, he alleges that Union business agents Thomas Cody and Marc McDermott referred to Lyman as a "thief" during the June 18, 2007, meeting, and that Cody admitted that he did not personally furnish Lyman with a list of charges being made against him. Lyman also alleges that during the meeting, his brother asked who the accuser was and that Cody indicated it was an anonymous individual. Lyman speculated in his charge that his accuser was either Michael Howard or clerk Brenda Smith at Coles School, a CPS school where Lyman worked. Lyman indicated either Howard or Smith were in a "conspiracy situation with the Black female permanent custodian at the Holmes School." While Lyman was assigned to Holmes School, another CPS school, he had filed a written charge at the direction of the principal against a custodian for leaving the building open and unsecured. That custodian subsequently filed charges unrelated to the instant case against Lyman. Lyman states that during a subsequent meeting, with the principal and a Union representative present, the charges were to be read to him. When the charges were being read to Lyman, however, he left the room. Lyman claimed that he departed because he was entitled to have those charges filed against him so he could prepare a response. He alleges that later on that day, "the Black woman permanent custodian

saw [him] in a school building, and made it a point to state to him: You'll be gone before I will."

Lyman was later transferred, at his request, to Coles School. He alleges that clerk Brenda Smith gave him a "cold shoulder." In his allegations, Lyman also denies that he swiped in to work at Coles School at 5:56 a.m. on May 10, 2005, and that Smith had signed him in electronically using his social security number to "support Michael Howard, a permanent custodian at Coles, who did not like Michael Lyman." Although Howard had told investigators that he saw Lyman at the school that day, Lyman asserts that he was working at the firehouse and that investigators had verified that fact.

Lyman alleged in his charge that Cody, the Union business agent, predetermined his guilt and had stated to investigators at one point that Lyman had committed "double dipping." Lyman also argued that if Cody had properly investigated the matter, Lyman would not have been terminated. Among other things, Lyman argues that Cody should have secured certain "trade forms" that are executed by firefighters when exchanging shifts, and that those trade forms would have allegedly shown that Lyman was not trading shifts to "double dip," but instead to play basketball on Friday and work on Saturday.

Initially, the Board dismissed Lyman's charge as untimely. This court, however, reversed the decision in an unpublished order and remanded the matter for consideration on the merits. *Lyman v. State of Illinois, Illinois Labor Relations Board*, No. 1-08-1900 (2008) (unpublished order under Supreme Court Rule 23). After reviewing Lyman's claims, the Board's Executive Director, on March 9, 2010, determined that the Union did not commit an unfair labor practice and dismissed Lyman's charge. The written determination explained that Lyman was required to

show that the Union's conduct as intentional and directed at him, as well as show that the action occurred in retaliation of Lyman's past actions, status (such as race or gender), or animosity between him and the Union's representatives. The Executive Director found insufficient evidence to satisfy these requirements, instead finding that the Union did not advance Lyman's grievance simply because it determined it could not prevail on it. The Board sustained the dismissal in a written decision on May 28, 2010, finding Lyman's claims that a CPS employee was racially biased against him to be irrelevant to the Union's representation. It further found that Lyman's claims that Cody did not sufficiently investigate the matter to discover exonerating evidence or that Lyman was referred to as a "thief" were insufficient to show any intentional action was taken against him. Instead, the Board found that the findings and comments were simply consistent with Lyman's inability to corroborate his story, leading the Union to decline pursuing his grievance. Lyman now appeals to this court from the Board's ruling.

Lyman contends that the Union's decision to not forward his grievance to arbitration constituted an unfair labor practice under section 10(b)(1) of the Illinois Public Labor Relations Act (Act) (5 ILCS 315/10(b)(1) (West 2008)). Section 10(b)(1) of the Act provides, in pertinent part:

> "It shall be an unfair labor practice for a labor organization or its agents:
> (1) to restrain or coerce public employees in the exercise of the rights guaranteed in this Act, provided, *** (ii) that a labor organization or its agents shall commit an unfair labor practice under this paragraph in duty of fair representation cases only by intentional misconduct in representing employees under this Act." 5 ILCS 315/10(b)(1) (West

2008).

Section 11 of the Act provides that if an individual is alleged to have engaged in an unfair labor practice, an investigation on the charge is required. 5 ILCS 315/11(a) (West 2008). After this investigation, the Board considers whether the charge involves an issue of law or fact sufficient to warrant a hearing, and if it does not, the charge shall be dismissed. 80 Ill. Adm. Code 1220.40(a)(4) (2010). To establish intentional misconduct under section 10(b)(1) of the Act, a charging party must prove by a preponderance of the evidence that:

> "(1) the union's conduct was intentional, invidious and directed at him; and (2) the union's intentional action occurred because of and in retaliation for some past activity by the employee or because of the employee's status (such as race, gender, or national origin), or animosity between the employee and the union's representatives (such as that based upon personal conflict or the employee's dissident union practices)." *Metropolitan Alliance of Police v. State of Illinois Labor Relations Board*, 345 Ill. App. 3d 579, 588-89 (2003).

Because the significant facts are not disputed, we are asked to examine the legal effect of the given set of facts. In such cases where there is a mixed question of law and fact, a Board's decision will only be overturned where it is clearly erroneous. *Id.* at 586.

Lyman's arguments regarding alleged unfair labor practices revolve around three assertions: the Union never provided him with a list of charges, Cody failed to adequately investigate the charges, and Cody and McDermott referred to Lyman as a "thief" on June 18, 2007. As for the list of charges, although Lyman alleges he was never provided with one, there are undisputed factual findings that Lyman was provided with a summation of charges, which he

signed a receipt for, as well as a formal notification of the allegations, which Lyman refused to sign for but did initial. Even if we were to assume that Lyman was not provided with a list of charges, Lyman has not presented any persuasive evidence suggesting that conduct was more than arguable negligence, much less intentional and invidious conduct. A similar analysis is applicable to Lyman's allegations regarding the extent of Cody's investigation, that is, Lyman has not shown that any shortcomings in the investigation were the result of anything more than negligence. In point of fact, this was the finding of the Board, that no intentional misconduct occurred. That finding was not, in our view, clearly erroneous.

Lyman also alleges that he was referred to as a "thief" by Cody and McDermott, and that on one occasion, Cody had stated that Lyman "double dipped" before investigators. Allegations of "hostility and condescension" on the part of a union, however, do not necessarily require the conclusion that intentional misconduct occurred. *Murry v. American Federation of State, County and Municipal Employees, Local 1111*, 305 Ill. App. 3d 627, 634 (1999). Furthermore, even if intentional and invidious conduct did occur and was directed at Lyman, it appears he would be unable to satisfy the second element of the test here: that any misconduct occurred because of and in retaliation for some past activity by the employee or because of the employee's status or animosity between the employee and the union's representatives.

To establish the second element, the charging party must prove a *prima facie* case of unlawful discrimination by a preponderance of the evidence that: (1) the employee has engaged in activities tending to engender the animosity of union agents or that the employee's mere status, such as race, gender, religion or national origin, may have caused animosity; (2) the union was

aware of the employee's activities and/or status; (3) there was an adverse representation action taken by the union; and (4) the union took an adverse action against the employee for discriminatory reasons. *Metropolitan Alliance of Police*, 345 Ill. App. 3d at 588-89. As a threshold matter, we note that Lyman has failed to argue this element of the intentional misconduct analysis in his initial brief. None of the aforementioned factors in establishing a *prima facie* case are mentioned in Lyman's brief, and generally speaking, "points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing." Ill. Sup. Ct. R. 341(h)(7) (eff. Jul. 16, 2008). Lyman, however, does conclude that Cody had "predetermined [Lyman's] guilt which also constitutes an unfair labor practice," and that the union's "intentional action occurred because of animosity" between Lyman and Cody. For the sake of completion, therefore, we will address this argument.

We have held that circumstantial evidence to establish discrimination can include "expressions of hostility toward protected activities." *Metropolitan Alliance of Police*, 345 Ill. App. 3d at 589. Payroll fraud is obviously not a protected activity, but we acknowledge that Lyman was only alleged, at that time, to have engaged in payroll fraud. Accordingly, Lyman's argument here is that his perceived "double dipping" resulted in the determination to not advance his grievance to arbitration. The only evidence Lyman advances, however, to prove this is that his grievance was not advanced and that there were expressions of hostility directed at him. We are unpersuaded that this is sufficient to establish a *prima facie* case of discrimination. First, a decision to not pursue a grievance to arbitration is not itself indicative of intentional misconduct. *Id.* at 588. The only relevant evidence applicable here, therefore, is Lyman's allegation that he

was called a "thief" and that Cody had referenced that Lyman had "double dipped."

We question whether those specific isolated statements are sufficient to show a *prima facie* case of discrimination by a preponderance of the evidence. Although Lyman cites to *Metropolitan Alliance of Police* in support of his position, we find that case to be distinguishable. There, the petitioner was a correctional officer who had circulated a petition seeking to replace the petitioner's union with a rival union. The petitioner was later suspended without pay for three days due to an unrelated matter, and filed grievances based on the suspension. After his grievance was denied at various stages of the process, the petitioner wrote a letter to his union's president requesting that his grievance be taken to arbitration. The reply to his letter stated that the union "does not pursue grievances for individuals who are working for other unions," and that the petitioner's actions in circulating the petition would "nullify this union for pursuing any grievances and discipline for you since you were not doing any authorized union duties." *Id.* at 583. Furthermore, the union's executive had confused certain fundamental facts of petitioner's case, indicating it had "failed to engage in a full and impartial consideration of the case." *Id.* at 591. This court found that the Board correctly concluded that the letter and other circumstances provided clear evidence that the petitioner's union declined to arbitrate the petitioner's grievance based on animosity in regard to petitioner's participation in a protected activity. In fact, the Board found the letter at issue to be " 'an unprecedented admission of retaliation against an employee for exercising his statutory right to assist the labor organization of his choice.' " *Id.* at 590.

The evidence and comments in the instant case differ than those in *Metropolitan Alliance*

of Police, which involved clear, documentary evidence of retaliation. Here, there is only circumstantial evidence in the form of Lyman's allegations and, more importantly, there is no admission of retaliation or a refusal to arbitrate a grievance based on Lyman's participation in a neutral and protected activity, nor has the Union confused any key facts relevant to Lyman's charges. The Board here did not consider the comments at issue to be anything more than statements "consistent with the Union's reasons for not pursuing the grievance: Lyman's apparent inability to corroborate his story." Moreover, we find that such references, under the circumstances, are not such extreme expressions of hostility that would require us to find that the Board's determination was clearly erroneous, given that unions are afforded "substantial discretion in deciding whether and to what extent a particular grievance should be pursued." *Id.* at 588. Accordingly, the Board's determination that no intentional misconduct occurred on the part of the Union was not clearly erroneous.

For the foregoing reasons, we affirm the decision and order of the Local Panel of the Illinois Labor Relations Board.

Affirmed.