The Propensity to Sue and the Duty of Fair Representation: A Second Point of View

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As a lawyer who has on occasion represented clients in duty of fair representation (DFR) litigation and as a scholar who has studied the cause of action empirically (Goldberg 1985), I found quite interesting Thomas Knight's recent article in this journal on the tactical use of the DFR (Knight 1987a). In that article, based on a study of DFR litigation before the British Columbia Labour Relations Board (BCLRB), Knight attempted to demonstrate empirically that recent increases in the volume of DFR litigation can be explained in part by tactical uses of the doctrine not contemplated by the doctrine's proponents. These tactical uses, according to Knight, involve the filing of DFR claims in cases that even the complainants know have no merit (Knight 1987a:185). Such cases impose significant costs “not only on unions and management but on workers with legitimate claims” as well, making necessary a consolidation and clarification of the doctrine to discourage frivolous litigation (Knight 1987a:192).

In this response to Professor Knight's article, I will argue that the data and analysis Knight presents do not support the policy changes he recommends, and I will suggest that the current parameters of the doctrine, at least in the United States, already make it too difficult for DFR complainants to prevail. I will also highlight some of the key differences between the DFR cause of action in British Columbia and in the United States, pointing out that even if Knight's findings are valid with respect to BCLRB cases, those findings are not necessarily valid with respect to DFR litigation in the United States.

The British Columbia Labour Board Study

Knight's studies of the DFR (see also Knight 1985, 1987b) are valuable additions to the small body of empirical literature focusing on this important cause of action. For example, they tend to confirm the widespread assumption that DFR filings have increased dramatically in recent years (Knight 1987a:183). They also demonstrate statistically how difficult it is for a DFR complainant to prevail (Knight 1987a:185), although, in this regard, the 16 percent success rate in British Columbia would look very good to a potential DFR plaintiff in the United States, who faces a success rate in the courts of less than 5 percent (Goldberg 1985:136).

1 But see Goldberg (1985:116–19). In that paper I suggested that DFR litigation in the United States has increased at a slower rate than generally assumed, and argued that misperceptions of the DFR litigation growth rate may result from the rising percentage of such cases that have generated published opinions in recent years.

2 This figure was derived from Knight's Table 3 (Knight 1987a:185).
Among the most interesting of Knight's findings are those related to the gender of DFR complainants: women are disproportionately less likely than men to file DFR claims, despite the fact that women prevail on their claims more often than men. Knight notes that this result is consistent with other studies suggesting that women tend to be more conciliatory and less confrontational than men, and he attributes the gender differences he finds to that fact (Knight 1987a: 186-88).

Gender-based behavioral differences may indeed explain the divergent DFR experiences of men and women, but caution should be exercised before attributing pivotal importance to group stereotypes. Knight might have noted, for example, that women tend to be less active than men in union affairs (Goldberg 1983:652-55, 661-63), often for reasons totally unrelated to personality. As a result, they may be less informed about their legal rights and thus less likely to assert them. Moreover, in predominantly male unions (Knight 1987a: 187), the possibility of gender discrimination in grievance handling or contract negotiation creates for women an entire basis for DFR claims that would be of small use to men. Knight might have explored whether the greater success rates for women in his sample had any correlation to allegations of gender discrimination.

But even if Knight's explanation for the gender differences he discovered is correct, I am not persuaded it provides much support for his broader conclusions about the tactical use of the DFR. True, men file more charges than women and withdraw fewer of them, but from those facts can we conclude anything more than that men are more aggressive and combative than women? Before revising the DFR because of the purported tactical use of the doctrine by men, it would be useful to know whether the gender patterns in DFR litigation differ significantly from those in other litigation contexts and, if so, why.

Knight's comparison of DFR complaint and rejection rates in factionalized versus nonfactionalized locals is a more relevant basis for studying the DFR's tactical uses. It is not surprising that more DFR cases are filed in factionalized locals (Knight 1987a:191-92): members who have lost grievances or who have been shortchanged in negotiations are more likely to believe those setbacks result from discriminatory or bad faith treatment if they are aligned with a minority faction in a bitterly factionalized local. The more interesting inquiry is why in such locals a disproportionately high number of DFR complaints are rejected (Knight 1987a:189-90). Knight's explanation is that there is a greater tactical use of the cause of action in these locals (Knight 1987a: 192), but I am troubled by his definition of that tactical use: the willful pursuit of DFR claims, for purposes of generating tactical leverage, by grievants who know that their charges are without merit (Knight 1987a:185, 186).

It is certainly true that litigation is often used for tactical purposes going beyond the hope of obtaining a favorable result in

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3 Two studies, however, suggest that women tend, if anything, to be more litigious than men (although this difference may not be statistically significant). (Borba and Appel 1987:426; Hoyman and Stallworth 1981:129.) A third study, on the other hand, found no overall gender-related filing differences, but it did find that single parents, who overwhelmingly tend to be women, file more readily than non-single parents (Hoyman and Stallworth 1986:78-81).

4 For example, working mothers with substantial responsibilities in the home often lack the time necessary to participate actively in union affairs, and may be further discouraged from doing so by the lack of child care at most union meetings. Baker and Robeson (1981:28).

5 Women may be particularly apt to be inadequately informed when a union's breach of the duty is the result of gender discrimination: the victim's better-informed male co-workers may be unable or unwilling to advise their female colleague of her rights, either because they fail to perceive the violation or because they themselves have sexist attitudes. In any event, two studies have found that regardless of the cause of action, workers who are not active in union affairs are much less likely to file a suit against their unions or employers than those who are active. Hoyman and Stallworth (1986:80, 1981:137).

6 Gender discrimination is expressly recognized as a basis for DFR claims in British Columbia. See, for example, Rayonier Canada, 2 Can LRBR 196, 201, BCLRB No. 40/75 (1975).
the particular case at hand, and I have no quarrel with Knight's suggestion that DFR claims are sometimes used that way. I do question, however, whether Knight's evidence advances his claim that such uses of the DFR are being made by parties who know their allegations are without foundation. Indeed, Knight's own finding that group complaints are more likely to obtain favorable rulings than individual complaints (Knight 1987a:188) suggests otherwise, since the collective action underlying group complaints may very well entail politically sophisticated tactical thinking.

More filings resulting in a disproportionately high number of rejected claims do not necessarily indicate that more baseless complaints are knowingly filed. An equally plausible inference, particularly in factionalized locals, is that more complainants genuinely believe they have been the victims of retaliation by opposing factions. They may have a vague understanding that the law prohibits this form of misconduct, leading them to file more DFR charges, but at the same time, their knowledge of the law may not extend to an understanding of how difficult it is to prove allegations of such misconduct without the rarely present "smoking gun" (Goldberg 1985:147-49). Indeed, it may be the very sincerity of a complainant's belief that he or she has been victimized that makes the complainant unwilling to withdraw a charge even after being told by Labour Board personnel that his or her evidence is insufficient.

Rather than address this alternative interpretation of his data, Knight buttresses his claim of widespread, intentional misuse of the DFR by relying on an informal survey of union and management officials (Knight 1987a:185, n. 17), who, not surprisingly, are all too eager to disparage the motivations of their common adversaries in this controversial cause of action. Knight is surely correct in believing that the data generated by his study can best be understood when interpreted in light of surveys of the actual participants in DFR litigation. Unfortunately, the voices of those best able to shed light on the motivations of the complainants in DFR cases—the complainants themselves—are conspicuously absent from Knight's study.

Such a survey of DFR complainants, of course, would probably reveal that some portion of them have mixed motives. A complainant might sincerely believe he or she is entitled to a remedy for an apparent DFR violation, and at the same time have additional tactical reasons for pursuing the claim, such as a desire to embarrass politically the union's dominant faction. But even if such claims would not be pursued "but for" these tactical motives, they would not constitute abuses of the cause of action, so long as the first reason is legitimately present. The DFR, like the causes of action created by the Landrum-Griffin Act, is part of a larger legislative scheme designed to promote political democracy in the labor movement, and it is entirely consistent with that scheme for minority factions in unions to utilize those causes of action with political purposes in mind, so long as their claims are not otherwise frivolous or in bad faith.

Implications for the United States

All this is not to say that Knight's theories about the tactical use of the DFR do not remain a plausible explanation for the litigation patterns he documented in British Columbia. Knight's data are for the most part consistent with his theories, even if in my view they do not prove them. Nevertheless, great care must be taken

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7 For a classic discussion of the tactical uses of litigation by institutional "repeat players," see Galanter (1974).
8 This phenomenon would be more common in factionalized locals because complainants from minority factions are more likely to jump to the conclusion, whether justified by objective evidence or not, that union officials from the dominant faction have discriminated against them. Moreover, DFR violations probably do occur more often in factionalized locals, even if the victims of such misconduct cannot prove it. As the old joke in defense of paranoids goes, sometimes they really are out to get you!
9 For some interesting studies of litigious workers in other contexts, see Hallauer (1972); Hoyman and Stallworth (1981, 1986).
before Knight's theories, however valid they may be for British Columbia, are transplanted into an analysis of DFR litigation in the United States. There are too many important differences between the two jurisdictions in both the substance and procedure of the DFR to permit a casual assumption that what is true of the litigation patterns in one jurisdiction is necessarily true in the other.

In British Columbia, for example, a breach of the duty can be established by proving gross negligence in grievance handling (Lanyon 1984:8.11). In the United States, on the other hand, the gross negligence standard has been rejected in a number of important jurisdictions, where courts have held that only intentional or bad faith misconduct can constitute a breach. Moreover, the DFR remedies available from the BCLRB are more complete than those available from the NLRB in the United States. In British Columbia, a union's breach can result in an employer being compelled by the BCLRB to waive contractual time limits for the submission of grievances to arbitration, or to provide other relief (Lanyon 1984:8.26–27). In the United States, in contrast, the NLRB has no power to order an employer to help remedy a union's breach unless the employer actually participated in the union's misconduct, and a mere contract violation on the part of an employer does not constitute such participation (Morris 1983:1344–45).

This potential availability of BCLRB remedies against employers may give some DFR complainants in British Columbia, as Knight theorizes, the incentive to file DFR actions they know are without foundation in the hope of obtaining settlements from employers who wish to avoid the costs of defending these nuisance cases. Such a strategy is less likely to be tried in proceedings before the NLRB, however, for two related reasons. First, as discussed above, the employer will probably not even be a party to the proceeding, making complete relief unlikely in any event. Second, my admittedly undocumented impression is that unions in DFR cases are much less willing than employers to even contemplate settling cases they perceive as having little merit, perhaps because of political or ideological considerations that are less important to employers.

Thus, in the United States, complainants who might be inclined to use the DFR in the tactical sense discussed by Knight would be more likely to do so through “hybrid” DFR/section 301 suits filed in the courts. But there is a crucial difference between these lawsuits and BCLRB cases that makes it much less likely that DFR plaintiffs in the United States who know their claims are without merit would actually file such cases in the courts: the presence of lawyers.

Charging parties are not required to be represented by lawyers before the BCLRB, and they frequently are not, at least during the prehearing stages of the proceedings, in which most frivolous claims are weeded out. On the other hand, DFR plaintiffs in the courts of the United States generally are represented by lawyers, who can be counted on to discourage most potential plaintiffs from proceeding with cases that appear from the start to

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10 I am not suggesting that Knight himself has applied his findings to the United States, but his abundant citations of U.S. court decisions and scholarly commentary might invite some of his readers to do so.

11 See, for example, Dober v. Roadway Express, Inc., 707 F.2d 292 (7th Cir. 1983); Anderson v. Airline Pilots, 650 F.2d 133 (8th Cir.), cert. denied, 454 U.S. 1063 (1981); but also see, for example, Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir. 1983); Ruzicka v. General Motors, 523 F.2d 306 (6th Cir. 1975).

12 Labeled “hybrid” by the Supreme Court in DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 165 (1983), these cases actually entail two separate but related claims—one against the union for breach of the DFR in handling a grievance, and another against the employer for the contract violation underlying the allegedly mishandled grievance.

13 Unlike the NLRB, the BCLRB does not have a general counsel to prosecute complaints, so most charging parties in British Columbia do obtain the services of lawyers—sometimes legal aid lawyers—if their cases advance to formal hearings. Telephone interview with Professor and former BCLRB Chair Paul Weiler, June 3, 1987.
have no foundation. Lawyers perform this function for two reasons. First, they are usually unwilling to take cases that offer little prospect of generating a fee, and baseless DFR cases fall into that category.\(^{14}\) Second, the intentional filing of frivolous cases is an ethical violation for lawyers that can be sanctioned by stiff penalties, including the award of attorneys fees, payable by the plaintiffs' attorneys, to their harassed defendants (Rampacek 1987).

What, then, explains the very low success rates of DFR plaintiffs in the United States even when they are represented by lawyers? In my view, the explanation can be found not in the intentional filing of groundless complaints, but rather in two other factors: the nature of the lawyers available to represent plaintiffs in these cases, and the doctrinal evolution of the DFR cause of action itself.

Potential DFR plaintiffs usually have great difficulty in obtaining the services of experienced labor attorneys. One reason for this problem is that lawyers familiar with the cause of action know how difficult it is for plaintiffs to prevail. Also important, however, is the fact that very few labor lawyers are willing to risk alienating their usual union or management clients in order to represent rank and file employees in these matters (Rabin 1978:876; Modjeska 1980). My study found that only 17.8 percent of the plaintiffs' lawyers in DFR cases are specialists in labor law, compared to 67.2 percent of the defendants' lawyers. Indeed, plaintiffs' lawyers are almost five times more likely than the defendants' lawyers to be totally inexperienced in DFR litigation (Goldberg 1985:143, n. 198).

Thus, contrary to Knight's assumption, many DFR cases that may appear after the fact to have been filed for tactical reasons by complainants who knew their cases lacked merit may actually have been filed in good faith by lawyers who simply lacked the experience necessary to properly evaluate the merits of their clients' claims. Indeed, such errors have become more likely in recent years as changes in the doctrine have placed in the paths of unsuspecting DFR plaintiffs often insurmountable procedural obstacles, such as a short limitations period and the frequently present requirement that internal union remedies be exhausted.\(^{15}\) Moreover, even for a complainant who satisfies the procedural requirements, the very exacting substantive standards for establishing a DFR violation result in a low probability of success on the merits. Direct evidence of union hostility toward a plaintiff, resulting from dissident activity or other factors, is often not enough: the plaintiff must also present difficult-to-find evidence connecting that hostility with the loss of a particular grievance.\(^{16}\)

Some courts in the United States appear to be moving toward an easing of these substantive standards,\(^{17}\) but others are moving in the opposite direction.\(^{18}\) The policy recommendations Knight makes based on his study seem to endorse the trend toward tougher standards (Knight 1987:192-93). In my view, such a move would be a mistake, at least in the context of discharge cases.\(^{19}\)

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\(^{14}\) The plaintiffs, particularly if they are unemployed, usually cannot pay substantial retainers, and contingency fee arrangements or the potential for court-awarded attorneys' fees are no substitutes in cases that look like losers.

\(^{15}\) Short limitations periods were imposed by DelCostello v. International Bh'd of Teamsters, 462 U.S. 151 (1983) (six months) and, before that, by United Parcel Service v. Mitchell, 451 U.S. 56 (1981) (90 days). The requirement of exhaustion of internal remedies was upheld in certain situations by Clayton v. United Automobile Workers, 451 U.S. 679 (1981). In as many as 45 percent of the DFR cases filed, the merits of the plaintiffs' claims are never even reached because of the plaintiffs' failure to satisfy these procedural requirements. Goldberg 1985:96, 141.

\(^{16}\) For cites to cases of this type, see Goldberg (1985:147, n. 216).

\(^{17}\) See, for example, Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270 (9th Cir., 1983).

\(^{18}\) See, for example, Dober v. Roadway Express, Inc., 707 F.2d 292 (7th Cir. 1983).

\(^{19}\) Easier standards of proof are warranted in DFR discharge cases because the discharged worker usually has so much more at stake than the union or employer. See, for example, Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1274 (9th Cir., 1983);
representation has been an important shield against the abuse of unpopular or dissident union members by their union officials, and it would be unfortunate if Knight’s study contributed toward the de facto, if not de jure, demise of that important doctrine.

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