**ANNOTATIONS AND COMMENTS**

This jury instruction applies when an employee or former employee files a hybrid breach of contract - breach of duty of fair representation suit against the employer and union, such as in *Vaca v. Sipes*, 386 U.S. 171 (1967). *See also* Labor Management Relations Act § 301, 29 U.S.C. § 185. A plaintiff may decide to sue one defendant and not the other. *See generally Diaz v. Schwerman Trucking Co.*, 709 F.2d 1371, 1375-76 (11th Cir. 1983) (per curiam); *see also Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 564 (1990) (“Because most collective-bargaining agreements accord finality to grievance or arbitration procedures… an employee normally cannot bring a § 301 action against an employer unless he can show that the union breached its duty of fair representation in its handling of his grievance.”).

Unions have broad discretion in deciding whether to prosecute a grievance, subject only to the duty of fair representation. *Turner v. Air Transp. Dispatchers’ Ass’n*, 468 F.2d 297, 300 (5th Cir. 1972). In deciding whether to prosecute a grievance, the union may consider tactical and strategic factors such as its limited resources and consequent need to establish priorities, as well as its desire to maintain harmonious relations among the workers and between the workers and the employer. *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 362 (7th Cir. 1997).

In *Air Line Pilots Association International v. O’Neill*, 499 U.S. 65 (1991), the Court extended a union’s duty of fair representation to include “all union activity, including contract negotiation.” *Id*. at 67. The Court further defined breach of the duty of fair representation to include union actions which are either “arbitrary, discriminatory, or in bad faith,” and ruled that “a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a ‘wide range of reasonableness,’ as to be irrational.” *Id*. (quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953)).

Bad faith on the part of the union “requires a showing of fraud, deceitful action or dishonest action.” *Mock v. T.G. & Y. Stores Co.*, 971 F.2d 522, 531 (10th Cir. 1992) (citing *Motor Coach Emps. v. Lockridge*, 403 U.S. 274, 299 (1971)). Personal hostility is not enough to establish unfair representation if the representation was adequate and there is no evidence that the personal hostility tainted the union’s actions. *Freeman v. O’Neal Steel, Inc.*, 609 F.2d 1123, 1127-28 (5th Cir. 1980); *accord VanDerVeer v. United Parcel Serv., Inc.*, 25 F.3d 403, 405 (6th Cir. 1994). Mere negligence is never sufficient to sustain a claim for breach of the duty of fair representation. *Parker v. Connors Steel Co.*, 855 F.2d 1510, 1521 (11th Cir. 1988).

A union owes the duty of fair representation to all members of its collective bargaining unit, whether or not the employee in question is a union member. *Sanderson v. Ford Motor Co.*, 483 F.2d 102, 109-10 (5th Cir. 1973).

The limitations period for bringing a hybrid breach of contract – breach of the duty of fair representation claim is six months from the date of the employer or union’s final action, whichever is later. *Coppage v. U. S. Postal Serv.*, 281 F.3d 1200, 1204 (11th Cir. 2002) (citing *DelCostello v. Int’l Bhd. of Teamsters*, 462 U.S. 151, 169-71 (1983)).

Generally, damages are apportioned between the employer and union according to the damage caused by each. *Vaca v. Sipes*, 386 U.S. 171, 197-98 (1967). However, joint and several liability may be appropriate where the employer and union actively participated in each other’s breach. *Lewis v. Tuscan Dairy Farms, Inc.*, 25 F.3d 1138, 1145-46 (2nd Cir. 1994) (citing *Vaca*, 386 U.S. at 197 n.18).