

1 of 1 DOCUMENT

**JAMES E. PETERSON, Plaintiff-Appellant, v. HAROLD KENNEDY, RICHARD  
A. BERTHELSEN, and NATIONAL FOOTBALL LEAGUE PLAYERS  
ASSOCIATION, Defendants-Appellees**

**No. 84-5788**

**UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

**771 F.2d 1244; 1985 U.S. App. LEXIS 23077; 120 L.R.R.M. 2520; 103 Lab. Cas.  
(CCH) P11,677**

**February 6, 1985, Argued and Submitted - Los Angeles, California  
September 16, 1985, Decided**

**PRIOR HISTORY:** [\*\*1] Appeal from the United States District Court for the Southern District of California, D.C. NO. CV-80-1810-N, Honorable Leland C. Nielsen, District Judge, Presiding.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Plaintiff professional football player appealed from judgments of the United States District Court for the Southern District of California entered in favor of defendant union on plaintiff's claim for breach of the duty of fair representation and in favor of defendant attorneys on plaintiff's legal malpractice claim.

**OVERVIEW:** Plaintiff football player filed suit against defendant union for breach of the duty of fair representation, alleging that defendant attorneys, who were staff counsel for defendant union, erroneously advised him to file the wrong type of grievance and failed to rectify the error when there was an opportunity to do so. Plaintiff also claimed that defendant attorneys committed malpractice. The trial court entered judgment for defendants. On appeal, the court affirmed. The court found that defendant union did not act in an arbitrary, discriminatory, or bad faith manner and held that mere negligence or an error in judgment was insufficient to impose liability for breach of the duty of fair representation. The court affirmed the directed verdict in favor of defendant first attorney because a union attorney may not be held liable in malpractice to an individual union member for acts performed as the union's agent in the collective bargaining process. The court affirmed the summary judgment entered in favor of defendant second attorney. The trial court lacked personal jurisdiction over him because his only contact with the forum state were phone calls and letters.

**OUTCOME:** The court affirmed the judgment in favor of defendant union because it did not breach its duty of fair representation. The court affirmed the directed verdict in favor of defendant first attorney because he was not liable in malpractice to plaintiff football player for acts he performed as the union's agent. The court affirmed the summary judgment in favor of defendant second attorney because of lack of personal jurisdiction.

**CORE TERMS:** grievance, union member, malpractice, duty of fair representation, arbitrator, bargaining process, non-injury, outside counsel, bargaining agreement, football, handling, law firm, breach of duty, personal jurisdiction, bad faith, arbitration, union official, union officers, discriminatory, bargaining, grievant, matter of law, cause of action, undertaken, breached, player, season, salary, staff, union representatives

**LexisNexis(R) Headnotes**

*Civil Procedure > Pleading & Practice > Pleadings > Complaints > General Overview*

***Governments > Legislation > Statutes of Limitations > General Overview***

[HN1] Under California law, a cause of action is "commenced" when the complaint is filed. Cal. Civ. Proc. Code § 350.

***Civil Procedure > Trials > Judgment as Matter of Law > General Overview***

[HN2] An appeals court reviews the propriety of a judgment notwithstanding the verdict (JNOV) under the same standard that is applied by the district court. A JNOV is proper when the evidence permits only one reasonable conclusion as to the verdict. The court views the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in favor of that party. A JNOV is improper if reasonable minds could differ over the verdict.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation***

[HN3] The duty of fair representation is a judicially established rule imposed on labor organizations because of their status as the exclusive bargaining representative for all of the employees in a given bargaining unit.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation***

[HN4] A union breaches its duty of fair representation only when its conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. The duty is designed to ensure that unions represent fairly the interests of all of their members without exercising hostility or bad faith toward any. Unions must retain wide discretion to act in what they perceive to be their members' best interests. To that end, the unfair representation doctrine is narrowly construed. Courts should accord substantial deference to a union's decisions regarding whether and to what extent it will pursue a particular grievance. A union's representation of its members need not be error free. Mere negligent conduct on the part of a union does not constitute a breach of the union's duty of fair representation.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation***

[HN5] A union acts "arbitrarily" when it simply ignores a meritorious grievance or handles it in a perfunctory manner, for example, by failing to conduct a "minimal investigation" of a grievance that is brought to its attention. A union's conduct is "arbitrary" if it is without rational basis or is egregious, unfair and unrelated to legitimate union interests. A union's unintentional mistake is "arbitrary" if it reflects a reckless disregard for the rights of the individual employee, but not if it represents only simple negligence violating the tort standard of due care. Unintentional union conduct may constitute a breach of the duty of fair representation in situations where the individual interest at stake is strong and the union's failure to perform a ministerial act completely extinguishes the employee's right to pursue his claim.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation***

[HN6] Unions are not liable for good faith, non-discriminatory errors of judgment made in the processing of grievances.

***Civil Procedure > Trials > Judgment as Matter of Law > General Overview******Civil Procedure > Appeals > Standards of Review > Substantial Evidence > Sufficiency of Evidence******Torts > Malpractice & Professional Liability > Attorneys***

[HN7] A directed verdict is proper when the evidence permits only one reasonable conclusion as to the verdict. It is inappropriate if there is substantial evidence to support a verdict for the non-moving party. A court considers all of the evidence in the light most favorable to the non-moving party and draws all reasonable inferences in favor of that party.

***Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation***

[HN8] Union officers, employees and agents are not subject to individual liability for acts performed on behalf of the union in the collective bargaining process.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview******Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview***

[HN9] Where a defendant has "substantial" or "continuous and systematic" contacts with the forum state, there is a sufficient relationship between the defendant and the state to support general personal jurisdiction even if the cause of

action is unrelated to the defendant's forum activities.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > Purposeful Availment***

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview***  
[HN10] Lacking sufficient contacts to support general jurisdiction, non-resident defendants may still be subject to limited personal jurisdiction depending on the nature and quality of the defendant's contacts with the forum in relation to the cause of action. A tripartite test is used for determining whether due process allows for the exercise of limited personal jurisdiction in a given case: (1) the nonresident defendant must do some act or consummate some transaction with the forum or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws; (2) the claim must be one which arises out of or results from the defendant's forum-related activities; and (3) exercise of jurisdiction must be reasonable. Each of the three tests must be satisfied to permit a district court to exercise limited personal jurisdiction over a non-resident defendant.

***Civil Procedure > Jurisdiction > Personal Jurisdiction & In Rem Actions > In Personam Actions > General Overview***

***Civil Procedure > Jurisdiction > Subject Matter Jurisdiction > General Overview***

[HN11] Ordinarily use of the mails, telephone, or other international communications simply do not qualify as purposeful activity invoking the benefits and protection of the forum state.

***Civil Procedure > Jurisdiction > Jurisdictional Sources > General Overview***

***Labor & Employment Law > Collective Bargaining & Labor Relations > Fair Representation***

***Torts > Malpractice & Professional Liability > Attorneys***

[HN12] A union attorney may not be held liable in malpractice to an individual union member for acts performed as the union's agent in the collective bargaining process.

**COUNSEL:** Joseph A. Yablonski, Yablonski, Both & Edelman, Washington, District of Columbia, Robert Simpson, Rose, Klein & Marias, Los Angeles, California, for Appellant.

Edgar Paul Boyko, Esq., Robert K. Schraner, Esq., Miller, Boyko & Bell, San Diego, California, for Appellee.

**JUDGES:** Goodwin, Reinhardt, and Wiggins, Circuit Judges. Wiggins, Circuit Judge, concurring.

**OPINION BY:** REINHARDT

**OPINION**

[\*1248] REINHARDT, Circuit Judge:

Appellant James Peterson brought suit against the National Football League Players Association ("NFLPA" or "union") and two of its attorneys, claiming that the union, through the named attorneys, had furnished him with inaccurate advice upon which he detrimentally relied in pursuing a grievance against his ex-ballclub, the Tampa Bay Buccaneers. Peterson appeals from the district court's decisions to grant summary judgment in favor of one of the individually named union attorneys, to issue a directed verdict in favor of the other union attorney, and to grant the NFLPA's motion for a [\*2] judgment notwithstanding the verdict after the jury had ruled in his favor. We affirm each of the trial court's decisions.

**I. BACKGROUND**

*A. Events Giving Rise to Peterson's Grievance*

James Peterson played college football at San Diego State University. After graduating with a physical education degree in 1973, Peterson was drafted by the Los Angeles Rams of the National Football League (NFL). He played for the Rams until 1976, at which time he was traded to the Tampa Bay Buccaneers.

In the summer of 1976, Peterson signed three separate one-year contracts with Tampa Bay for the 1976, 1977, and 1978 football seasons. Each of the contracts contained a standard clause providing that if Peterson were unable to play professional football because of an injury incurred in the performance of services under that contract, the club would continue to pay him his full salary during the remainder of the contract term. In addition, the club agreed to Peterson's request to include a special "injury protection" clause in the 1977 contract. That clause specified that if Peterson were unable to play football in either 1977 or 1978 because of a football-related injury, he would receive [\*\*3] the full salary to which he was entitled for the year or years that the injury prevented him from playing. Each of the contracts also contained a provision authorizing the ballclub to terminate the agreement if, in the opinion of the head coach, Peterson's level of performance was "unsatisfactory" as compared to that of other members of the club's squad of players.

Peterson's contracts incorporated the terms of the collective bargaining agreement entered into between the NFLPA and the NFL Management Council. The collective bargaining agreement contemplated two distinct grievance procedures by which a player could contest a club's decision to terminate his contract. An "injury grievance" was the proper procedure to be employed by a player seeking to enforce a club's contractual obligation to pay his salary when he incurred an injury in the performance of his services under the contract. A "non-injury" grievance was the appropriate means to resolve all other disputes involving the enforcement of a player's contract. An injury grievance was required to be filed within 20 days of the date on which the dispute arose, a non-injury grievance within 60 days of that date. There were also [\*\*4] differences with respect to the intermediate procedures applicable to the two classifications of grievances, but the final step in each was a hearing before a neutral arbitrator. A player was authorized to file and process both forms of grievance on his own without any involvement by the NFLPA.

Peterson was injured in the third game of the 1976 football season. He had surgery on his right knee and was sidelined for the rest of the season. The club honored its contractual obligation to pay Peterson's salary over the balance of the 1976 [\*1249] season. After his surgery, Peterson underwent a medically supervised rehabilitation program. He reported to the Tampa Bay pre-season camp in mid-July, 1977. After passing a physical examination administered by the team's physician, Peterson participated fully in all practices and drills during the first seven or eight days of training camp.

The club's records reveal that on July 22, 1977, Peterson was verbally advised that he had been "cut" from the team and placed on waivers. Peterson received written notification that his 1977 and 1978 contracts had been terminated on July 25, 1977.

Peterson believed that he was cut from the team [\*\*5] because of reduced mobility attributable to the knee injury that he suffered in the 1976 season. He claimed that, under the "injury protection" clause of the 1977 contract, the club remained obligated to pay him his full salary for both the 1977 and 1978 football seasons. The club disagreed. Its officials told Peterson that he had been released because he lacked sufficient skill to make the team, not because of his knee injury, and that he was therefore not entitled to payment under the "injury protection" clause.

#### *B. The Handling of Peterson's Grievance*

At trial, the parties vigorously disputed the extent of the NFLPA's involvement in the pursuit of Peterson's grievance against Tampa Bay. Peterson claimed that he called his agent, Richard Mangiarelli, as soon as he was told that he had been released. Mangiarelli testified that he called the NFLPA's main office the following day to seek assistance in enforcing the injury protection clause of Peterson's contract against Tampa Bay. Mangiarelli claimed that he spoke with Harold Kennedy, a recent law school graduate who was then serving as an assistant both to the NFLPA's executive director, Edward Garvey, and to the union's staff [\*\*6] counsel, Richard Berthelsen. Mangiarelli said that Kennedy represented to him that he was a practicing attorney, when, in fact, he was not. Mangiarelli testified that he informed

Kennedy of the injury protection clause in Peterson's contract and that Kennedy then dictated to him an injury grievance letter with instructions to send the letter to the ballclub. Peterson signed the injury grievance letter on August 5, 1977, within two weeks of the date that he was notified of his release.

Mangiarelli further testified that once the union assured him that it would handle Peterson's grievance, in mid-August, 1977, he put Peterson in direct contact with Kennedy. Peterson claimed that he remained in frequent contact with both Kennedy and Berthelsen throughout the remainder of 1977 in order to monitor the progress of his grievance. He mentioned specifically that, in early September, he spoke with Kennedy about the injury protection clause and that Kennedy assured him that the union had access to his contract. Peterson testified that he continually relied on the assurances of the two union representatives that they were handling his grievance for him.

The testimony of the union's witnesses [\*\*7] differed sharply from that presented by Peterson and Mangiarelli. Kennedy declared that he could not recall ever speaking with either Mangiarelli or Peterson and that he had no recollection of working on Peterson's grievance. Berthelsen testified that he first became aware of Peterson's grievance in late January or early February of 1978. Berthelsen claimed that it was not until mid-February, 1978 that the union was sent copies of Peterson's contract and that he was made aware of the injury protection clause contained therein. Berthelsen explained that after examining the contracts he determined that Peterson should have filed a non-injury grievance and that, on February 17, 1978, he attempted to "rechannel" Peterson's original injury grievance into a non-injury claim. Berthelsen's efforts were undertaken well beyond the 60-day period in which Peterson could have timely filed a non-injury grievance.

The rechanneled non-injury grievance was heard by Arbitrator James Searce on [\*1250] June 16, 1978. After a hearing in which the merits of Peterson's claim under the injury protection clause were fully argued, Arbitrator Searce dismissed the grievance as untimely filed. He ruled [\*\*8] that Berthelsen's efforts in February, 1978 to rechannel Peterson's claim as a non-injury grievance were undertaken more than 60 days after the dispute arose and that the grievance was therefore time-barred. Arbitrator Searce did not address the merits of Peterson's claim that, because his release was attributable to the knee injury suffered in the 1976 season, the club remained obligated, under the "injury protection" clause, to honor his 1977 and 1978 contracts. Peterson has not challenged the propriety of Arbitrator Searce's ruling.<sup>1</sup>

<sup>1</sup> The arbitrator found that because Peterson prefaced the grievance letter with a statement that it was being filed in accordance with Article IX of the collective bargaining agreement (governing injury grievances), the claim could not be construed as a non-injury grievance filed pursuant to Article VII of that agreement. However, the letter fully communicated the nature and the substance of Peterson's claim to Tampa Bay. On this basis alone, we seriously question the arbitrator's ruling that Peterson's grievance was time-barred. Moreover, the arbitrator failed to consider the fact the NFL and the Players Association had regularly failed to follow some of the strict time limits for handling grievances set forth in the collective bargaining agreement and that there was no equitable reason to hold Peterson to them in this case (Decision of Arbitrator Volz, November 13, 1981, referred to *infra*, slip op. at pp. 7-8). In short, there appears to be little rational basis for the arbitrator's ruling. However, because Peterson has not questioned the arbitrator's ruling, either before the district court or before us, we do not determine its validity.

[\*\*9] Peterson complained to Berthelsen that the NFLPA was at fault for the dismissal of the non-injury grievance. The NFLPA then advised Peterson that it planned to reactivate the original injury grievance. The injury grievance was subsequently heard by Arbitrator Marlin M. Volz. The issue considered by Arbitrator Volz was whether Peterson was entitled to his salary under the 1977 contract pursuant to the club's obligation to continue paying his salary if he was injured in the performance of services under *that* contract. Arbitrator Volz ruled against Peterson, finding that Peterson failed to establish that he was physically unable to play professional football at the time that the contract was terminated because of an injury incurred under *that* contract. The arbitrator apparently based his decision primarily on the fact that Peterson did not incur an injury during the term of the 1977 contract.<sup>2</sup> He also determined, however, that Peterson was not physically unable to play football at the time he was released by Tampa Bay. The latter finding would, in itself, have justified the denial of Peterson's claim.<sup>3</sup>

2 The parties apparently believed that an injury incurred in a prior year is beyond the proper scope of an injury grievance proceeding. We are not at all sure they were correct. It is possible that the question whether Peterson was released due to an injury incurred in the performance of services under the 1976 contract could properly have been considered in the injury grievance proceeding before Arbitrator Volz. There are legitimate arguments for construing Article IX as applicable to grievances involving injuries of the type suffered by Peterson even when they do not qualify as "injury grievances" under a narrow and literal construction of the words of that Article. However, that issue also has not been preserved by Peterson, at least not for purposes of this litigation.

[\*\*10]

3 As in the case of the standard injury clause, under the special "injury protection" clause of the 1977 contract Peterson would have had to establish that he was physically unable to play football at the time of his release. Accordingly, had Arbitrator Scarce reached the merits, he would have been required to determine the identical question that was determined adversely to Peterson by Arbitrator Volz.

### C. Proceedings in the District Court

Dissatisfied with the union's representation, Peterson filed the instant action in district court in November, 1980. The complaint was not served on any of the defendants, however, during the period that the union continued to pursue Peterson's injury grievance before Arbitrator Volz. Shortly after the injury grievance was dismissed, Peterson filed an amended complaint which was ultimately served on the defendants in early February, 1982.

[\*1251] The amended complaint alleged that the NFLPA had breached its duty of fair representation by erroneously advising Peterson to file an injury grievance and by failing to rectify its error while there [\*\*11] was still time to do so. It also alleged that the union did not conduct an adequate investigation prior to rendering its advice. The complaint included a professional malpractice claim against the union attorneys, Berthelsen and Kennedy, for the same misconduct which formed the basis of Peterson's breach of duty claim against the union.

The district court entered summary judgment in favor of Kennedy, finding that he lacked sufficient contacts with the State of California to enable the court to exercise personal jurisdiction over him. After a three and one-half day jury trial, the district court issued a directed verdict in favor of Berthelsen, ruling that the legal malpractice claim against him was "subsumed" in and precluded by Peterson's breach of duty claim against the union. The jury returned a verdict against the NFLPA for the full amount sought by Peterson, finding that the union had breached its duty of fair representation in handling his grievance. The trial judge, however, granted the union's motion for a judgment notwithstanding the verdict (JNOV). On appeal, Peterson challenges each of the trial court's rulings.

## II. THE TIMELINESS OF PETERSON'S COMPLAINT

As a [\*\*12] threshold matter, we reject the union's claim that Peterson's complaint was untimely filed. The Supreme Court has held that the National Labor Relations Act's (NLRA) six-month statute of limitations for the filing of unfair labor practice claims is applicable to suits against a union for breach of the duty of fair representation. *DelCostello v. International Brotherhood of Teamsters*, 462 U.S. 151, 169, 76 L. Ed. 2d 476, 103 S. Ct. 2281 (1983). Prior to *DelCostello*, federal courts applied the relevant state statute of limitations to breach of duty suits against labor unions. See, e.g., *Price v. Southern Pacific Transportation Co.*, 586 F.2d 750, 752 (9th Cir. 1978).

Until quite recently, we had repeatedly refused to give *DelCostello* retroactive effect. See, e.g., *Rodriguez v. Union Carbide Corp.*, 735 F.2d 365, 365-66 (9th Cir. 1984); *Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560, 564 (9th Cir. 1984). However, we have now made it clear that *DelCostello* is to be given retroactive application when doing so serves to lengthen rather than shorten the limitations period that would otherwise be [\*\*13] applicable under state law. See *Aragon v. Federated Department Stores, Inc.*, 750 F.2d 1447, 1451 (9th Cir. 1985); *Glover v. United Grocers, Inc.*, 746 F.2d 1380, 1382 (9th Cir. 1984), cert. denied, 471 U.S. 1115, 105 S. Ct. 2357, 86 L. Ed. 2d 258 (1985).

The parties disagree as to the date on which Peterson's cause of action arose. The union maintains that the cause of