

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division**

DANIEL P. FLING,)	
)	
<i>Plaintiff,</i>)	
v.)	Civil Action No. 1:17-cv-1266
)	Hon. Liam O'Grady
MEGAN J. BRENNAN, POSTMASTER)	
GENERAL, ET AL.,)	
)	
<i>Defendants.</i>)	
)	

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on the Postal Service’s Motion to Dismiss (Dkt. 29) and the National Association of Letter Carriers’ (NALC) Motion for Judgment on the Pleadings (Dkt. 43). The motions are fully briefed and the Court dispensed with oral argument on the motions scheduled for April 6, 2018. For the following reasons and for good cause shown, both motions are **GRANTED**.

I. Background

Plaintiff initiated this lawsuit on November 7, 2017. In his amended complaint, Plaintiff, a former Postal Service city letter carrier, alleges he was improperly dismissed from his position by the Postal Service and was harmed when NALC, his union, failed to grieve his dismissal. In count one of the amended complaint, Plaintiff pleads a hybrid claim of breach of collective bargaining agreement by the Postal Service and breach of the duty of fair representation by NALC. Dkt. 9, p. 19.

The Postal Service investigated Plaintiff for improper conduct toward a woman on his delivery route. Am. Compl. Plaintiff received the Notice of Removal from his position on March

29, 2017. Dkt. 44, Ex. 2. The Notice advised him that he would be terminated within thirty days. *Id.* The Notice also explicitly advised him, “You have the right to file a grievance under the grievance/arbitration procedure set forth in Article 15 of the National Agreement within fourteen (14) calendar days of your receipt of this notice.” *Id.* Plaintiff did not bring the Notice of Removal to the attention of NALC until May 12, 2017 at the earliest. Dkt. 57, p. 1. The only contact Plaintiff had with anyone associated with NALC or the Postal Service during the fourteen days following Plaintiff’s receipt of the Notice of Removal, as pleaded in the amended complaint, was “[a] few days after receiving the Notice...” Dkt. 9, p. 11. On that day, Plaintiff spoke with Andrew Martin, a Postal Service Customer Service Supervisor, and discussed evidence Plaintiff had on his cell phone relevant to the grounds for his termination. *Id.* Ultimately, NALC did file a grievance on Plaintiff’s behalf, but it was denied as untimely. Dkt. 58, Ex. 1.

In the instant motions, the Postal Service and NALC contend that Plaintiff has failed to state a claim and that his claim is time-barred.

II. Legal Standard

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint must contain sufficient factual information to “state a claim to relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 550 (2007). A motion to dismiss pursuant to Rule 12(b)(6) must be considered in combination with Rule 8(a)(2), which requires “a short and plain statement of the claim showing that the pleader is entitled to relief” so as to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” FED. R. CIV. P. 8(a)(2); *Twombly*, 550 U.S. at 555. While “detailed factual allegations” are not required, Rule 8 does demand that a plaintiff provide more than mere labels and conclusions stating that the

plaintiff is entitled to relief. *Id.* Because a Rule 12(b)(6) motion tests the sufficiency of a complaint without resolving factual disputes, a district court “‘must accept as true all of the factual allegations contained in the complaint’ and ‘draw all reasonable inferences in favor of the plaintiff.’” *Kensington Volunteer Fire Dep’t v. Montgomery County*, 684 F.3d 462, 467 (4th Cir. 2012) (quoting *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 637 F.3d 435, 440 (4th Cir. 2011)). Accordingly, a complaint may survive a motion to dismiss “‘even if it appears that a recovery is very remote and unlikely.’” *Id.* (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). A motion for judgment on the pleadings is analyzed under the same motion to dismiss standard. *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 861 F.3d 502, 506 (4th Cir. 2017).

III. Analysis

As a preliminary matter, both defendants have appended to their instant motions a copy of the National Agreement and a copy of Plaintiff’s Notice of Removal. In general, Courts may not look to documents outside of the complaint when considering a Rule 12 motion. FED. R. CIV. P. 12(d); *Sec’y of State For Defence v. Trimble Navigation Ltd.*, 484 F.3d 700, 705 (4th Cir. 2007). However, the Court may take judicial notice of matters of public record and it may also consider documents attached to the complaint, “‘as well as those attached to the motion to dismiss, so long as they are integral to the complaint and authentic.’” *Id.* For these purposes, documents can be deemed authentic when the opposing party does not challenge their authenticity in its filings. *Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006).

What the rule seeks to prevent is the situation in which a plaintiff is able to maintain a claim of fraud by extracting an isolated statement from a document and placing it in the complaint, even though if the statement were examined in the full context of the document, it would be clear that the statement was not fraudulent.

Am. Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212, 234 (4th Cir. 2004) (quoting *In re Burlington Coat Factory Securities Litigation*, 114 F.3d 1410, 1426 (3d Cir. 1997) (quotation marks omitted)). Plaintiff does not contest the authenticity of these documents – rather, they are integral to the complaint in that they serve as the foundation for his claim against NALC and the Postal Service.

Claim against NALC

Taking the facts of the amended complaint in a light most favorable to Plaintiff, as well as considering the complementary facts contained in the National Agreement and the Notice of Removal, Plaintiff has failed to state a claim that NALC breached its duty of fair representation.

A breach of duty of representation occurs when a union's actions are arbitrary, discriminatory, or taken in bad faith. *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991). While Plaintiff contends in his complaint that this duty was breached when NALC failed to grieve Plaintiff's Notice of Removal by the deadline of April 12, 2017, Plaintiff has not pleaded facts to plausibly conclude that NALC had been timely notified of the Notice of Removal. The Notice of Removal advised Plaintiff that he had 14 days to file a grievance and he did not. Plaintiff does not contend that NALC somehow prevented him from grieving the Notice of Removal, and there are no facts to support such an allegation. *See Groves v. Commc'ns Workers of Am.*, 815 F.3d 177, 181 (4th Cir. 2016).

Instead, Plaintiff contends that the NALC was properly notified on February 18, 2017 at the time Plaintiff was under investigation and contends that he discussed the issue with his supervisor, Andrew Martin, "a few days" after receiving the Notice of Removal. Neither fact can save his claim. Providing notice that you are under investigation, subsequent to a "Pre-Disciplinary Interview," is not the same as providing notice that you have actually been

subjected to an adverse employment action. There is nothing in the procedures or in the pleadings that rationally supports Plaintiff's contention that this February 18, 2017 notice, more than a month *before* he received his Notice of Removal, was sufficient to trigger NALC's obligation to grieve his termination under the National Agreement. While Plaintiff discussing the Notice of Removal with a supervisor may meet the requirements of Informal Step A of the grievance procedure under the National Agreement, Plaintiff would still have been required to notify the Union to move the grievance into a Formal Step A within seven days of that discussion with Martin. *See* Dkt. 44, Ex. 1, p. 3. The record is clear at this stage that that notification did not occur.

Plaintiff also contends he assumed NALC would grieve automatically on his behalf and that the Postal Service should have sent a copy of the Notice of Removal to NALC. Plaintiff has not put forth a scintilla of evidence that could support either contention. Plaintiff was made aware in the Notice of Removal that the ball was in his court to take steps to ensure a grievance was timely filed and he is assumed to have knowledge of the requirements of the National Agreement. He and he alone failed to meet those requirements to properly grieve his dismissal.

Finally, Plaintiff contends that the NALC breached its duty of fair representation when it failed to file a plainly time-barred grievance within fourteen days after it first learned of the Notice of Removal on May 12, 2017. This contention is neither supported by law,¹ nor the plain terms of the National Agreement, nor common sense. Any such grievance would have been inexcusably time-barred and frivolous, as is demonstrated by the fact NALC ultimately did grieve Plaintiff's termination and it was rejected as time-barred. While Plaintiff contends that it was rejected as time-barred based on the 14-day grievance window beginning on May 12, 2017,

¹ Plaintiff's legal support for his contention comes from two arbitration opinions from 1989 in which the underlying facts bear few similarities to the instant case. Both cases involved employees who provided notice within fourteen days of first learning of the adverse employment action in their cases.

this assertion is plainly contradicted by the Step B decision, rejecting that grievance, which found that the 14-day grievance window closed on April 12, 2017. *See* Dkt. 58, Ex. 1.²

Claim against the Postal Service

Because Plaintiff's claim against the Postal Service is a hybrid claim encompassing both a breach of duty of representation claim against NALC and a breach of collective bargaining agreement claim against the Postal Service, NALC's entitlement to judgment on the pleadings is necessarily fatal to Plaintiff's claims against the Postal Service. *See DelCostello v. Int'l Bhd. of Teamsters*, 462 U.S. 151, 164-65 (1983); *Thompson v. Aluminum Co. of Am.*, 276 F.3d 651, 656-57 (4th Cir. 2002) (holding that a plaintiff "must prevail upon his unfair representation claim before he may even litigate the merits of his [hybrid] claim against the employer.").

Statute of Limitations

Plaintiff's claims are time-barred under a six-month statute of limitations, running from the latter of the date of the breach by the employer or the date of the breach by the union. *Del Costello*, 462 U.S. at 169; *Harmon v. Am. Elec. Power Serv. Corp.*, 371 F. Supp. 2d 804, 812 (W.D. Va. 2005). Viewing Plaintiff's complaint in a light most favorable to him, the November 7, 2017 filing date for this lawsuit was untimely. The Postal Service terminated Plaintiff on March 29, 2017. NALC allegedly failed to grieve that termination on April 13, 2017, the day the 14 day window to grieve closed following the Notice of Removal. Accordingly, this lawsuit could only have been timely if filed on or before October 13, 2017. *See Harmon*, 371 F. Supp. 2d at 812-13. It was not.

Plaintiff argues that he is entitled to equitable tolling of the statute of limitations. However, equitable tolling is an extraordinary remedy, reserved for rare instances where

² The Court considers the Step B decision both integral to the complaint and authentic. Accordingly, it is proper for the Court to consider it at this juncture. *See Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006).

circumstances beyond a plaintiff's control have resulted in the expiration of the statute of limitations and manifested a gross injustice. *CVLR Performance Horses, Inc. v. Wynne*, 792 F.3d 469, 476 (4th Cir. 2015). Plaintiff cannot meet this heavy burden because the record is clear that he did not diligently exercise his rights under the National Agreement to grieve his Notice of Removal or that either Defendant caused Plaintiff to miss the deadline for that Notice. Accordingly, Plaintiff has failed to demonstrate that he is entitled to equitable tolling of the statute of limitations and the Court holds his claim to be time-barred.

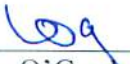
IV. Conclusion

For these reasons and for good cause shown, the Postal Service's motion to dismiss is **GRANTED**. The case against the Postal Service is **DISMISSED**. Plaintiff has requested leave to file a second amended complaint. Dkt. 50, p. 14. He has not formally moved for such leave under FED. R. CIV. P. 15 and has not included for the Court's review proposed new factual allegations. Consequently, the Court is unable to test the sufficiency of a proposed amendment. Because the Court sees no conceivable way for these claims to be adequately pleaded, particularly given the expiration of the statute of limitations, permitting a second amended complaint at this stage would be futile. Accordingly, this dismissal is **WITH PREJUDICE**.

For these reasons and for good cause shown, NALC's motion for judgment on the pleadings is **GRANTED**. The Clerk of Court is instructed to enter judgment pursuant to FED. R. CIV. P. 58 in favor of the National Association of Letter Carriers and against the Plaintiff.

It is so **ORDERED**.

April 26, 2018
Alexandria, Virginia



Liam O'Grady
United States District Judge