# 11th Circ. Labor Ruling Shows Limits Of 'Right-To-Work' Laws

**Law360**

**By Peter Spanos** (February 17, 2022)

The U.S. Court of Appeals for the Eleventh Circuit's Jan. 19 decision in Towns v. Directors Guild of America Inc.[1] demonstrates that Georgia's "right-to-work" law can fail to protect workers from union control over access to employment.

The parties to the case were Marvin Towns, an African American man who worked in film production for decades, but not in Georgia, and the Directors Guild of America.

The Directors Guild is a national labor union that is the collective bargaining representative of directors, assistant directors, unit production managers and other members of the directorial team in the film and television production industry. Towns is a member of the Directors Guild.

The Eleventh Circuit provided a summary of the history of the case, including the following facts.

The nationwide collective bargaining agreement between the Alliance of Motion Picture and Television Producers and the Directors Guild, known as the basic agreement, stipulates that unit production managers cannot be hired unless they are listed on qualification lists. The lists are maintained by the Directors Guild of America Contract Administration, an administrative arm of the Directors Guild and the Alliance of Motion Picture and Television Producers.

The Directors Guild Contract Administration maintains separate qualification lists for California, New York and the so-called third area covering the remainder of the U.S. The qualification list at issue here required 120 days of eligible work but did not require membership in the Directors Guild.

Towns was hired by a television production company, And Action LLC, as the unit production manager for a television series to be filmed in Georgia.

However, after Towns moved to Georgia for work on the television series, the Directors Guild notified And Action that Towns was not included on the third area list.

By employing Towns while he was not on the third area list, the production company violated the basic agreement.

The production company asked Towns to produce documentation of his qualifying work so that he could be added to the third area list.

Despite his previous experience, Towns could not submit the necessary documentation. Towns stated that his paperwork was damaged in a flood at his residence.

Facing monetary penalties, And Action terminated the employment of Towns.

Towns sued the Directors Guild and the production company in the U.S. District Court for the Northern District of Georgia, asserting claims under Georgia's right-to-work statute[2] and state law claims for tortious interference with a contractual relationship, failure to act in good faith and negligence for not including him in the third area qualification list.

Towns did not include a claim against the Directors Guild for breach of its duty to fairly represent him as a member of the union.[3]

In his complaint, Towns pled that the Directors Guild was a labor organization covered by the Georgia right-to-work statute but did not provide facts to show that the Directors Guild Contract Administration was a labor organization or an agent of a labor organization.

When the Directors Guild filed a motion to dismiss his claims, Towns and his counsel filed only a three-paragraph response.

According to the Eleventh Circuit, in that response, Towns failed to argue that the Directors Guild Contract Administration was a labor organization or an agent of a labor organization, failed to address the fact that he actually was a member of the Directors Guild entitled to fair representation, and admitted that his state law claims were preempted by federal law.[4]

Under the duty of fair representation, union members may sue for union conduct that is arbitrary, discriminatory or in bad faith. However, Section 301 of the Labor Management Relations Act preempts all state law claims that involve interpretation or application of a collective bargaining agreement.

In his response, Towns made a belated claim to transfer the case to arbitration.

Unfortunately, these missteps doomed his attempts to seek relief.

The federal district court granted the Directors Guild's motion to dismiss in 2020.

Towns appealed, but the Eleventh Circuit upheld the district court's ruling.

The appeals court first determined that in his complaint and response to the motion to dismiss, Towns did not argue that the Directors Guild Contract Administration was a labor organization for purposes of the right-to-work statute.

The Eleventh Circuit rejected Towns' attempt to make this argument for the first time on appeal.

In accordance with well-established law, the appeals court then upheld the district court's ruling that his state law claims were preempted.

Although Towns argued in his appeal that his state law claims, although preempted, should be interpreted as potentially valid claims for breach of the union's duty of fair representation, the circuit court rejected this argument because it was made for the first time on appeal, and his original pleadings did not assert a claim for breach of the duty of fair representation.

Town's failure to establish his right to employment in his profession in Georgia resulted from the defects in his legal pleadings and his choice of remedies.

For that reason, Towns v. Directors Guild primarily serves as a cautionary example of the perils of poor choices in litigation, particularly the perils of belated claims raised first on appeal.

For the same reason, the Towns decision does not serve as precedent regarding an employee's rights, or lack of rights, derived either from the right-to-work statute or from the fair representation protections against unions under federal law.

However, upon closer examination, the facts of the case show how a union may assert domination over the rights of employees to work and employers to hire, regardless of the protections of the right-to-work law and the union's duty of fair representation.

Towns was in fact a member of the Directors Guild. The Directors Guild is a labor organization subject to the right-to-work law and the duty of fair representation of its members.[5]

Nevertheless, the union escaped facing claims from Towns under both laws.

The union's legal arguments were directed to exempting the Directors Guild from claims of interference with an employee's right to work.

The Directors Guild argued in its motion to dismiss that the Directors Guild Contract Administration, an administrative agency that maintains the nationwide qualification lists, was not subject to the right-to-work law because the contract administration was not itself a labor organization.

The Directors Guild Contract Administration is organized separately from the Directors Guild.[6] However, if the Directors Guild Contract Administration is an agent of the Directors Guild, then the guild may be held responsible for the contract administration's breach of contract or unfair actions.[7]

In addition, there are facts that suggest that the Directors Guild Contract Administration is itself a labor organization. According to Title 29 of U.S. Code, Section 402(i), an entity is a labor organization — i.e., a union — if it "exists for the purpose, in whole or in part, of dealing with employers" concerning terms and conditions of employment, including entities subordinate to a national union.[8]

Unfortunately, Towns never succeeded in testing this claim of separation between the Directors Guild and the Directors Guild Contract Administration in court.

This would not have rescued Town's right-to-work law claim, because Towns was a member of the Directors Guild, and his termination from a television production job in Georgia was based on his inability to document his experience, not any lack of union membership.

However, challenging the Directors Guild's claim of separation from the Directors Guild Contract Administration, or lack of agency, would have provided a basis for Towns to make a claim for breach of the duty of fair representation.

Towns also lost a chance to attack the basic agreement under the right-to-work law. The basic agreement expressly stipulates that "[d]uring the entire term of this [basic agreement], each Employee ... shall be or become a member of the [Directors] Guild in good standing."[9]

This language appears to violate the Georgia right-to-work act on its face. The right-to-work act states:

> No individual shall be required as a condition of employment ... to be or remain a member ... of a labor organization or to resign from or refrain from membership in ... a labor organization.[10]

If Towns had successfully pled and pursued claims against the Directors Guild and/or the Directors Guild Contract Administration for violation of the duty of fair representation instead of his doomed state law claims, this case could have shed light on the responsibility of unions to represent their members in seeking jobs, particularly the apparent tension in this case between the union's actions that led to Town's loss of employment and the union's duty under federal law to fairly serve its members' interests.

The case history does not answer some obvious questions: Why was it fair for the Directors Guild or the Directors Guild Contract Administration to withhold required professional qualifications from an experienced member? Was it discriminatory, arbitrary or in bad faith not to assist Towns in transferring his qualifications to the third area? Could this have been racial discrimination? How would a jury of his peers view Towns' situation?

A few legal lessons are clear.

First, the right-to-work statute by itself does not prevent a union from opposing the employment of a member or nonmember where the opposition is not based on membership, but on other grounds.

And the right-to-work law by itself does not prevent a union and employers from establishing exclusionary criteria — even arbitrary criteria — as part of negotiated collective bargaining agreements.

Accordingly, the right-to-work law may prevent mandatory union membership requirements in collective bargaining agreements, but it may not break other forms of control by unions over access to jobs.

Second, in Towns v. Directors Guild, both the district court and appeals court effectively ruled that Towns only had one legal avenue of recourse against the Directors Guild and the Directors Guild Contract Administration for failure to recognize his qualifying experience.

Whether or not Towns should have been granted third area credentials, he had no legal options, under state law and only one legal option under federal law.

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[1] Towns v. Directors Guild of America, 2022 WL 169017.

[2] O.C.G.A. Section 34-6-21(a).

[3] Under decisions of the United States Supreme Court, unions have a duty of fair representation of their members. The duty of fair representation includes an obligation to serve the interests of all members without hostility or discrimination, to act with good faith and honesty, and to avoid arbitrary conduct. Humphrey v. Moore, 375 U.S. 335 (1964). A breach of the duty of fair representation occurs when a union's conduct toward a member is arbitrary, discriminatory or in bad faith. Vaca v. Sipes, 386 U.S. 171 (1967).

[4] Section 301(a) of the Labor Management Relations Act, 29 U.S.C. Section 185, allows unions to sue and be sued by employers or union members for violation of contracts. Section 301(b) provides that both any union and any employers "shall be bound by the acts of its agents" and may be responsible for contract violations by the agent.

[5] As a labor organization, the DGA files the annual LM-2 Labor Organization Annual Report with the U.S. Department of Labor. See https://olmsapps.dol.gov/query/orgReport.do?rptId=750521&rptForm=LM2Form. The LM-2 forms are publicly accessible. However, a search did not reveal any LM-2 forms filed by the Directors Guild Contract Administration.

[6] See DGA website at www.dga.org and the Directors Guild Contract Administration website at www.dgaca.org.

[7] Section 301(b) of the Labor Management Relations Act, 29 U.S.C. Section 185(b).

[8] "Labor organization" means a labor organization engaged in an industry affecting commerce and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization, other than a State or local central body. 29 U.S.C. Section 402(i).

[9] Section 1-401 of the 2017 Basic Agreement, accessible at https://www.dga.org/-/media/96AE83FCF4AB484786E7B229E0B58C13.pdf.

[10] O.C.G.A. Section 34-6-21(a).