LABOR LAW-DUTY OF FAIR REPRESENTATION

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In 1971, plaintiff, a member of the International Brotherhood of Electrical Workers (IBEW), was discharged by his employer, Union Pacific Railroad Company, for failing properly to request an extension of his medical leave of absence. Fifty-two days after the initial discharge, IBEW received a letter from plaintiff’s attorney requesting that the union commence proceedings on plaintiff’s behalf. Although Rule 21 of the collective bargaining agreement required presentation of grievances “by or on behalf of the employee involved . . . within sixty days from the date of the occurrence on which the claim or grievance is based,” IBEW refused to initiate the grievance procedure without a personal, written authorization from plaintiff. By the time plaintiff received the union’s letter notifying him of this further requirement, the sixty day deadline had expired. IBEW subsequently filed plaintiff’s grievance which was disallowed by Union Pacific for failure to comply with the specified time period. As a result, plaintiff brought an unfair representation action against the union in federal district court. A jury verdict awarded plaintiff forty thousand dollars actual damages and seventy-five thousand dollars punitive damages. On appeal, the United States Court of Appeals for the Tenth Circuit held that punitive damages were allowed if the union acted with wanton or reckless disregard of the employee’s rights. The United States Supreme Court granted certiorari to consider a conflict among the circuit courts of appeals on the availability of punitive damages against a union for breach of its duty of

2 Foust v. IBEW, 572 F.2d 710, 719 (10th Cir. 1978).
fair representation.\footnote{Compare DeBoles v. Trans World Airlines, Inc., 552 F.2d 1005, 1019 (3d Cir.), cert. denied, 434 U.S. 837 (1977) and Williams v. Pacific Maritime Ass'n, 421 F.2d 1287, 1289 (9th Cir. 1970) (suggesting that punitive damages are impermissible in a fair representation suit) \textit{with} Harrison v. United Transp. Union, 531 F.2d 558, 563-64 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976) (punitive award appropriate if union acted wantonly or in reckless disregard of employee's rights) \textit{and} Butler v. Local Union 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 454 (8th Cir.), cert. denied, 423 U.S. 924 (1975) (punitive damages allowed only when union officer displays malice toward employee and when needed to deter future union misconduct).}

\textit{Held, reversed in part:} Punitive damages may not be assessed under federal labor law against a union that breaches its duty of fair representation by failing to pursue an employee's grievance against his employer. \textit{IBEW v. Foust, --- U.S. ---}, 99 S. Ct. 2121 (1979).

\textit{Origins and Development of the Duty of Fair Representation}

The duty of fair representation is a judicial creation, inferred from the powers delegated by Congress to unions under section 2 of the Railway Labor Act (RLA)\footnote{445 U.S.C. \$ 152 (1976) provides, in part, that "[t]he majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this chapter." \textit{Id. See Order of R.R. Telegraphers v. Railway Express Agency}, 321 U.S. 342 (1944) (minority members of bargaining unit may not select another representative or engage in individual bargaining over matters properly the subject of collective bargaining).} and section 9(a) of the National Labor Relations Act (NLRA).\footnote{29 U.S.C. \$ 159(a) (1976) provides, in part:
Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. . . .

Although the duty of fair representation is the result of the Supreme Court's interpretation of the RLA and the NLRA, it derives from general common-law fiduciary principles, Steele v. Louisville & N. R.R., 323 U.S. 192, 202 (1944), and the Court has indicated it may have a constitutional basis. \textit{Id.} at 198-99.} The doctrine essentially provides that a union's statutory authority as the exclusive bargaining representative of a designated unit includes a corresponding obligation to exercise that authority fairly.\footnote{Manifest in the duty of fair representation is the judicial recognition of the conflict between union strength and individual rights. In order for the union to bargain effectively, it must have maximum discretionary powers. Limitations placed upon unions by the courts can weaken a union's position \textit{vis-\-a-vis} the employer. Juxtaposed with this concern, however, are the individual's rights which must be safeguarded if that person is to be assured the benefits which collective}
recognized in the landmark case of Steele v. Louisville & Nashville Railroad. At issue was the power of a union, certified under the RLA, to enter into a collective bargaining agreement which favors white union members over black non-member employees in the bargaining unit. Declaring the discrimination unlawful, the United States Supreme Court held the RLA requires "that the organization chosen to represent all its members, the majority as well as the minority, . . . is to act for and not against those whom it represents."

Delineating the scope of the duty further, the Court indicated that the obligation does not deprive a union of the latitude reasonably necessary to carry on the bargaining process. While a union may not make discriminations which are "irrelevant and invidious," the bargaining agent is permitted to make contracts, otherwise based upon relevant considerations, which may produce adverse results for some portion of the members represented.

In finding the union's conduct impermissible, the Court concluded that the statute "require[s] the union, in collective bargaining . . . to represent non-union or minority members of the craft without hostile discrimination, fairly, impartially, and in good faith."

As formulated, the union's duty of fair representation only protected workers subject to the RLA from racial discrimination by the union actually representing them, and the protection was limited to the negotiation and drafting of the written collective bargaining agreement. Extending the doctrine, later cases applied

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7 323 U.S. 192 (1944).
10 Id. at 203.
11 Id.
12 Id. at 204.
it to non-racial discrimination, administration and enforcement of the collective bargaining agreement, industries and workers subject to the NLRA, and non-union members. It is now recognized that the duty of fair representation encompasses the prohibition of all types of hostile discrimination.

Although the unions' duty of fair representation was expanded somewhat by federal case law, and decisions nonetheless limited the scope of the duty by requiring a showing of bad faith to support a claim. Bad faith was variously defined as racial or political

14 Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Cunningham v. Erie R.R., 266 F.2d 411, 415-16 (2d Cir. 1959).

Collective bargaining is a continuous process. . . . It involves day-to-day adjustments in the contract. . . . resolution of new problems not covered by existing agreements, and the protection of employee rights already secured by contract. The bargaining representative can no more unfairly discriminate in carrying out these functions than it can in negotiating an agreement.

Conley v. Gibson, 355 U.S. at 46.

For a comparison of the standards to be applied in measuring the union's duty in negotiating as opposed to administering an agreement, see Summers, The Individual Employee's Rights Under the Collective Agreement, in THE DUTY OF FAIR REPRESENTATION, 60, 62 (1977). See Elgin, J. & E. Ry. v. Burley, 325 U.S. 711 (1945) in which the Supreme Court indicated that a union's discretion in compromising individual claims in the administration stage of the bargaining contract may not be as broad as in the negotiation stage. Id. at 739-41.


17 See Jones v. Trans World Airlines, Inc., 495 F.2d 790 (2d Cir. 1974) (discrimination based solely upon non-membership in the union is unreasonable). See also Steele v. Louisville & N. R.R., 323 U.S. 192 (1944) (involving discrimination against blacks who were non-members).


In Mount v. Grand Int'l Bhd. of Locomotive Eng'rs, 226 F.2d 604 (6th Cir. 1955), cert. denied per curiam, 350 U.S. 967 (1956), the Sixth Circuit declined to limit the duty of fair representation to instances of racial discrimination, stating, "[i]t is true that the particular discrimination involved in the early cases which recognized the duty was based upon race, but the rulings are based upon the broad principle that the RLA prohibits 'hostile discrimination' between members of the craft, irrespective of whether it is based on race." Id. at 607.

19 See Brady v. Trans World Airlines, Inc., 401 F.2d 87, 104 (3d Cir. 1968), cert denied, 393 U.S. 1048 (1969) (requiring malice and bad faith); Cunningham v. Erie R.R., 266 F.2d 411, 417 (2d Cir. 1959) (arbitrariness shown
discrimination, fraud, personal animosity, or similarly inap-
priate motives. The courts interpreted the duty so narrowly that
it was rendered largely ineffective as a basis for a cause of action
except in instances of overt and hostile discrimination.

In 1967, the United States Supreme Court announced in Vaca
v. Sipes what is generally viewed as a "calculated broadening" of
the union's duty of fair representation. In that case, an em-
ployee was discharged due to poor health. The union processed
the worker's grievance through the preliminary steps but dismissed
it prior to arbitration after concluding that further action would
be futile. The Court held that a union does not necessarily breach
its duty of fair representation when it refuses to take a member's
grievance to arbitration. Beyond that, however, the Court shifted

must be of bad faith kind). See also Clark, The Duty of Fair Representation,

See Humphrey v. Moore, 375 U.S. 335, 348 (1964) (no breach of duty
of fair representation in absence of "substantial evidence of fraud, deceitful
action or dishonest conduct"); Balowski v. UAW, 372 F.2d 829, 834 (6th Cir.
1967) (duty of fair representation requires "fraud, misrepresentation, bad faith,
dishonesty of purpose or such gross mistake or inaction as to imply bad faith");
Gainey v. Brotherhood of Ry. & S.S. Clerks, 313 F.2d 318, 324 (3d Cir. 1963)
(classifying cases into three groups: racial discrimination, political discrimi-
nation, and personal animosity); Cunningham v. Erie R.R., 266 F.2d 411, 417
(2d Cir. 1959) (requiring "something akin to factual malice").

See Pekar v. Local Union No. 181 of United Brewery Workers, 311 F.2d
628, 637 (6th Cir. 1962), cert. denied, 373 U.S. 912 (1963) (no duty of fair
representation without "hostile discrimination"); Cunningham v. Erie R.R., 266
F.2d 411, 417 (2d Cir. 1959) (duty of fair representation is "no more than to 
forebear from 'hostile discrimination'"); Clark, The Duty of Fair Representation,
51 Tex. L. Rev. 1119, 1132-33 (1973) (for a discussion of the bad-faith stand-
ard's inability to insure employee rights). See also Local Union No. 12 United
Rubber Workers v. National Labor Relations Bd., 368 F.2d 12 (5th Cir. 1966),
cert. denied, 389 U.S. 837 (1967), where the court reflected upon the utility of
the duty of fair representation as a remedy against the union, stating:

The adequacy of existing judicial remedies afforded individual
unfair representation claims has been seriously questioned. Under
current practices, the aggrieved employee is not only compelled to
bear the substantial expense of an individual lawsuit, but must also
face the burden of overcoming the strong judicial presumption of
legality of union action in this area. Thus, confronted with juris-
dictional, monetary, and procedural obstacles, the individual em-
ployee may well find his right to fair representation as enforced by
the courts more theoretical than real.

Id. at 23.

See 386 U.S. 171 (1967).

See Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972).

its emphasis from a bad faith standard to one which requires only arbitrary conduct. In addition, the Court added another element to the union’s duty of fair representation, that is, that a union may not process a meritorious grievance in perfunctory fashion. Subsequent cases have interpreted the expansive language in *Vaca* as imposing three separate obligations on the union:

First, it must treat all factions and segments of its membership without hostility or discrimination. Next, the broad discretion of the union in asserting the rights of its individual members must be exercised in complete good faith and honesty. Finally, the union must avoid arbitrary conduct. Each of these requirements represents a distinct and separate obligation, the breach of which may constitute the basis for a civil action.

Hence, *Vaca* indicates that the duty of fair representation may be violated if a union processes a grievance in an arbitrary or irrational manner, even though the union’s action or omission is performed without any hostile motive. In so doing, *Vaca* injects a requirement of rationality in the union’s decisionmaking in an attempt to better protect the rights of individual employees.

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25 The Court stated that a union may be liable in a fair representation suit when the union’s conduct is “arbitrary, discriminatory, or in bad faith.” *Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967) (emphasis added).

26 *Id.* at 191.


28 Indicative of the union’s new responsibilities under the duty of fair representation after *Vaca* is the Fourth Circuit’s statement in *Griffin* v. *UAW*, 469 F.2d 181 (4th Cir. 1972), stating that:

> Without any hostile motive of discrimination and in complete good faith, a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. A union may refuse to process a grievance . . . for a multitude of reasons, but it may not do so without reason, merely at the whim of someone exercising union authority.

DAMAGES IN FAIR REPRESENTATION SUITS, IN LMRDA ACTIONS AND AT THE STATE LEVEL

When in Steele v. Louisville & Nashville Railroad the Supreme Court announced the existence of the bargaining representative’s duty of fair representation under the RLA, the opinion indicated that the lower courts must look to the goals of the statute and general federal labor policy in order to fashion an appropriate remedy. Although the availability of punitive damages was not discussed specifically, the Court stated that “the statute contemplates resort to the usual judicial remedies of injunction and award of damages when appropriate for breach of [the duty of fair representation].” Steele thus instructed the federal courts to fashion effective remedies under federal statute which would promote collective bargaining and industrial peace. Having only these broad directives with which to work, the courts were left largely to their own discretion in formulating relief in fair representation suits. Generally held compensable were claims for past lost wages and benefits directly attributable to the union’s wrongful conduct. Many courts ruled, however, that the amount of

Section 2 of the Railway Labor Act provides as follows:

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matter of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.


Id. at 207.


Federal law is to be applied in fashioning relief and “[t]he range of judicial inventiveness will be determined by the nature of the problem.” Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457 (1957). See Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489, 493 (4th Cir.), cert. denied, 386 U.S. 960 (1966). The Fourth Circuit has stated that “Lincoln Mills mandates the federal courts to fashion effective remedies for the impairment of federally created rights in the field of labor relations.” 367 F.2d at 493.

Harrison v. United Transp. Union, 530 F.2d 558, 562-63 (4th Cir. 1975),
damages permitted was limited to those financial losses and that neither attorney's fees, mental damages, nor recovery for humiliation and embarrassment could be awarded. Conversely, some courts were more liberal in granting relief. Applying a “common-benefit” theory, the Fourth and Eighth Circuit Courts of Appeals allowed recovery for attorney's fees. Reasoning that fair representation suits vindicated the rights of all union members, it was deemed appropriate that all members, through the union, should pay the attorney's fees of the plaintiff. The Eighth Circuit also permitted an award of damages for mental distress where the union engaged in intentional and invidious discrimination. Similarly, the Fourth Circuit allowed recovery for loss of future earnings despite objections that such losses were too speculative.

Given the complexities of labor law policy, it was not surprising that the courts failed to reach a consensus as to the appropriateness of punitive damages. Noting that the RLA and NLRA impose no express criminal sanctions upon the union, some courts found the statutes to be remedial rather than punitive in nature.

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25 See DeArroyo v. Sindicato De Trabajadores Packing, 425 F.2d 281, 293 (1st Cir.), cert. denied, 400 U.S. 877 (1970) (denying mental damages while recognizing that the court could conceive of extreme conduct by either the employer or union which might in some cases warrant such an award); St. Clair v. Local Union No. 515 of the Int'l Bhd. of Teamsters, 422 F.2d 128, 132 (6th Cir. 1969) (disallowing an award for humiliation and embarrassment); Crawford v. Pittsburgh-Des Moines Steel Co., 386 F. Supp. 290, 295 (D. Wyo. 1974) (attorney fees not ordinarily recoverable absent statutory or contract right or unless the cost is an inherent element of the breach of contract itself).


29 Compare DeBoles v. Trans World Airlines, Inc., 552 F.2d 1005, 1019 (3d Cir.), cert. denied, 434 U.S. 837 (1977) and Williams v. Pacific Maritime Ass'n, 421 F.2d 1287, 1289 (9th Cir. 1970) (suggestion that punitive damages are impermissible in fair representation suits) with Harrison v. United Transp. Union, 530 F.2d 558, 563-64 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976) (punitive award is appropriate if a union has acted wantonly or in reckless disregard of an employee's rights and when needed to deter future union misconduct).

30 DeBoles v. Trans World Airlines, Inc., 552 F.2d 1005, 1019 (3d Cir.),
To impose liability upon a union in excess of the employee's actual damage was, according to this view, "discordant with the limited remedies" available under federal labor law and hence contrary to legislative intent.\textsuperscript{41}

The view that congressional intent disfavors punitive awards under federal labor statute was buttressed by numerous labor law decisions which arose both within and without the context of the fair representation suit. Specifically, \textit{Republic Steel Corp. v. Nacert. denied, 434 U.S. 837 (1977)}; \textit{Crawford v. Pittsburgh-Des Moines Steel Co., 386 F. Supp. 290, 295 (D. Wyo. 1974)}.

The Third Circuit in \textit{DeBoles} concluded:

There is no indication that the Railway Labor Act deviates from this general pattern of remedies, at least with respect to union misconduct. Reballoting is the statutory remedy for instances where a vote has been impaired by misconduct of the carrier. Section 2 (Ninth). . . . Criminal sanctions are imposed by Section 2 (Tenth) of the Act upon carriers (and not unions) but only with respect to willful failure or refusal of a carrier to comply with the [sic] certain of the Act's duties, such as the duty to refrain from interference with the organization chosen by the employees.


The [National Labor Relations] Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. The Act does not prescribe penalties or fines in vindication of public rights or provide indemnity against community losses as distinguished from the protection and compensation of employees. Had Congress been intent upon such a program, we cannot doubt that Congress would . . . have defined its retributive scheme.


Federal labor laws are strictly "remedial" in the sense that they are to be applied only to redress particular acts of misconduct; imposition of sanctions which exceed what is necessary to pacify the particular labor-management irritation before the court are not permitted. Such excessive sanctions would be "punishments." \textit{Republic Steel} . . . makes it clear that the labor laws do not contemplate awards which do not cure a specific problem. . . . However, where the award is a uniquely effective device for changing a specific pattern of illegal conduct by a party before the court, it comes within the remedial purpose of the labor laws, even though the defendant may suffer as if he had been "punished" for other reasons.

\textit{DeBoles} at 670-71.

tional Labor Relations Board\textsuperscript{43} and Local 20, Teamsters, Chauf-
feurs \& Helpers Union v. Morton\textsuperscript{44} were deemed indicative of a
general national labor policy which favors remedial as opposed
to punitive sanctions.\textsuperscript{45} In Republic Steel, a case originating under
the NLRA, the United States Supreme Court held that the Na-
tional Labor Relations Board exceeded its statutory authority when
it employed punitive sanctions against a company which engaged
in unfair labor practices. The Court ruled that the Act’s language
authorizing the Board to take “such affirmative action, including
reinstatement of employees with or without back pay, as will
effectuate the policies of this Act”\textsuperscript{46} is remedial rather than punit-
itive in nature. Turning to the purposes of the statute, the Court
stated:

We think that the theory advanced by the Board proceeds upon
a misconception of the National Labor Relations Act. The Act is
essentially remedial. It does not carry a penal program declaring
the described unfair labor practices to be crimes. The Act does not
prescribe penalties or fines in vindication of public rights or provide
indemnity against community losses as distinguished from the
protection and compensation of employees.\textsuperscript{46}

\textsuperscript{43} 311 U.S. 7 (1940).
\textsuperscript{44} 377 U.S. 252 (1964).
\textsuperscript{45} See DeBoles v. Trans World Airlines, Inc., 552 F.2d 1005, 1019 (3d Cir.),
cert. denied, 434 U.S. 837 (1977) (awarding damages without showing of actual
injury is a “punishment” and thus contrary to Republic Steel and Morton).
\textsuperscript{46} Republic Steel Corp. v. National Labor Relations Bd., 311 U.S. 7, 11
\textsuperscript{46} Republic Steel Corp. v. National Labor Relations Bd., 311 U.S. 7, 10
(1940). Referring to the scope of the Board’s authority under the NLRA, the
Court concluded:

We do not think that Congress intended to vest in the Board a
virtually unlimited discretion to devise punitive measures, and thus
to prescribe penalties or fines which the Board may think would
effectuate the policies of the Act. We have said that “this authority
to order affirmative action does not go so far as to confer a puni-
tive jurisdiction enabling the Board to inflict upon the employer
any penalty it may choose because he is engaged in unfair labor
practices even though the Board be of the opinion that the policies
of the Act might be effectuated. . . .” We have said that the power
to command affirmative action is remedial, not punitive. . . . [I]t
is not enough to justify the Board’s requirements to say that they
would have the effect of deterring persons from violating the Act.
That argument proves too much, for if such a deterrent effect is
sufficient to sustain any order of the Board, it would be free to
In *Morton*, the Supreme Court held that punitive damages may not be recovered in suits brought under section 303 of the Labor Management Relations Act which provides that a person "injured in his business or property" by illegal secondary boycotting "shall recover the damages by him sustained." In reversing the exemplary damage award, the Court stated that "[p]unitive damages for violations of § 303 conflict with the congressional judgment, reflected both in the language of the federal statute and in its legislative history, that recovery for an employer's business losses caused by a union's peaceful secondary activities . . . should be limited to actual compensatory damages."

Opposition to punitive awards in federal labor cases was further strengthened by the Supreme Court's decision in *Vaca v. Sipes.* The majority there vacated an award of punitive and compensatory damages against the union, though it had breached its duty of fair representation by failing to process an employee's grievance. Finding that the employer had initiated the controversy which resulted in the employee's damages, the Court, in dicta, stated that the union could not be held liable for the employer's share of the damages where the union did not induce the wrongful discharge:

> The governing principle, then, is to apportion liability between the employer and the union according to the damage caused by the fault of each. Thus, damages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer."

Although the Court restricted its apportionment principle to those cases where the union did not participate in the wrongful dis-

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48 29 U.S.C. § 187(b) (1976). The costs of the suit may also be recovered.
49 Id. at 11-12.
50 386 U.S. 171 (1967).
51 Id. at 195-98.
52 Id. at 197-98.
charge,\textsuperscript{52} \textit{Vaca} has been interpreted by some courts as limiting union liability to compensatory damages only. Hence, the United States Court of Appeals for the Ninth Circuit, relying on \textit{Vaca}, has held that federal labor law disallows punitive damages even though the union allegedly participates in the employee's wrongful discharge.\textsuperscript{44}

While some courts found punitive awards to be out of harmony with federal labor law, other courts reasoned that exemplary awards, in appropriate circumstances,\textsuperscript{55} promoted the objectives of the federal labor statutes by deterring union misconduct. Since union liability for compensatory damages was frequently inconsequential in fair representation suits, the additional sanction provided by punitive damages was viewed as necessary to enforce the bargaining agents' affirmative responsibilities.\textsuperscript{56}

A parallel line of cases employing similar reasoning has developed in non-fair representation suits arising under the Labor Management Reporting and Disclosure Act of 1959 (LMRDA).\textsuperscript{57} Federal courts favor punitive awards under the Act to curtail union abuses which conflict with the policies and objectives of the LMRDA.\textsuperscript{58} Indicative of the liberal approach taken by the courts

\textsuperscript{52} Id. at 197 n. 18.


\textsuperscript{55} See Harrison v. United Transp. Union, 530 F.2d 558, 563-64 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976) (punitive award is appropriate if a union has acted wantonly or in reckless disregard of an employee's rights); Butler v. Local Union 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 454 (8th Cir.), cert. denied, 423 U.S. 924 (1975) (punitive damages allowed only when union officer displays malice toward employee and when needed to deter future union misconduct); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292, 298 (M.D.N.C. 1970) (suggesting that exemplary damages are available against a union in cases of extreme conduct).

\textsuperscript{56} Harrison v. United Transp. Union, 530 F.2d 558, 563 (4th Cir. 1975), cert. denied, 425 U.S. 958 (1976). The court stated:

While compensatory damages may to some degree serve the same purpose, it is not unusual in a fair representation suit against a union to find the liability for compensatory damages to be \textit{de minimis}. [Citation omitted]. Unless punitive damages are available, an employee may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation.

\textit{Id.}

\textsuperscript{57} 29 U.S.C. §§ 401-531 (1976).

\textsuperscript{58} See Keene v. International Union of Operating Eng'rs Local 624, 569 F.2d
is *International Brotherhood of Boilermakers v. Braswell* where the United States Court of Appeals for the Fifth Circuit approved the following standard:

Strong reasons of policy promote the use of exemplary damages to deter union officials from conduct designed to suppress the rights of members to a fair and democratic hearing on legitimate disciplinary charges. . . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect.\(^\text{60}\)

Though the LMRDA decisions somewhat refute the broad proposition that federal labor law disfavors punitive sanctions against unions, comparisons between LMRDA cases and fair representation suits are of limited utility. Unlike fair representation cases which require a balancing of the legitimate interests of both the union and individual employees,\(^\text{59}\) the LMRDA is oriented heavily toward the preservation of the individual employees' rights. Subchapter II of the Act\(^\text{58}\) is a "Bill of Rights" which guarantees every union member "equal rights and privileges within such organization," the right to sue the union or its officers, "freedom of speech and assembly," and additional "safeguards against improper disciplinary action" by a union.\(^\text{61}\) These rights are subject only to the "reasonable rules and regulations in such organization's constitution and bylaws,"\(^\text{62}\) provided further, that any constitutional provision or bylaw which is inconsistent with the statute is void.\(^\text{63}\) Thus, while the goals and language of the LMRDA sup-

1375, 1381-82 (5th Cir. 1978) (punitive damages allowed against a union when malice, gross fraud, wanton or wicked conduct, violence or oppression are present); Morrissey v. National Maritime Union, 544 F.2d 19, 24-25 (2d Cir. 1976) (indicating punitive damages are allowable under the statute); Cooke v. Orange Belt Dist. Council of Painters No. 48, 529 F.2d 815, 820 (9th Cir. 1976) (exemplary damages permitted where union acts with actual malice or reckless or wanton indifference to the rights of individual members). *Contra*, Burris v. International Bhd. of Teamsters, 224 F. Supp. 277, 280-81 (W.D.N.C. 1963).

\(^{60}\) 388 F.2d 193 (5th Cir.), cert. denied, 391 U.S. 935 (1968).

\(^{61}\) Id. at 200.

\(^{62}\) See note 6 supra.


\(^{64}\) Id. at § 411(a)(1).

\(^{65}\) Id. at § 411(b).
port broad judicial remedies, including punitive damages, as a means of preserving employee rights under the Act, suits brought under the statute are not authority for exemplary awards in fair representation cases, and apparently no federal court has ever relied upon the LMRDA line of decisions to support a punitive damages award in a fair representation suit.

On the state level, courts commonly award compensatory and punitive damages for union misconduct actionable under local law. State jurisdiction has been invoked under a variety of claims including malicious interference with employment, willful interference with contractual relations, fraud, misrepresentation and conspiracy. Applying traditional tort law, state courts have allowed recovery for loss of past and future wages, property damages, medical expenses, physical and mental suffering, emotional distress, damages to reputation, deprivation of spousal services, loss of consortium, and punitive damages. While punitive dam-

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66 See 29 U.S.C. § 412 (1976) (authorizing "such relief . . . as may be appropriate."). In addition, section 411 assures every union member an adequate forum in which to bring his grievance. 29 U.S.C. § 411(a)(4) (1976).

67 International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 200 (5th Cir.), cert. denied, 391 U.S. 935 (1968). The court stated:

In the statutory statement of findings and purposes of LMRDA Congress declares that there are instances of union's "disregard of the rights of individual employees" and that it "is necessary to eliminate or prevent improper practices on the part of labor organizations . . . ." 29 U.S.C. § 401. The awarding of punitive damages in appropriate cases serves as a deterrent to those abuses which Congress sought to prevent.

Id.

68 But see Brief for Respondent at 7, 18-19, IBEW v. Foust, ___ U.S. ___, 99 S. Ct. 2121 (1979) (relying on LMRDA cases to support argument that exemplary damages are proper in fair representation suits).

69 See Fletcher v. Colorado & Wyo. Ry., 141 Colo. 72, 347 P.2d 156 (1959) (claims against union included fraud, conspiracy and lack of due diligence); Haefele v. Davis, 399 Pa. 504, 160 A.2d 711 (1960) (action against union and its officers for tortious interference with seniority rights causing loss of employment); Schwab v. International Ass'n of Bridge Workers Local 782, 482 S.W.2d 143 (Tenn. Ct. App. 1972) (action against union for malicious interference with union member's employment).

70 See U.A.W. v. Palmer, 267 Ala. 683, 104 So. 2d 691, 696 (1956) (damages recovered against union for loss of wages, mental anguish and punitive damages); Gonzales v. International Ass'n of Machinists, 142 Cal. 2d 207, 298 P.2d 92, 101-02 (1956) (damages assessed against union for loss of wages and mental distress); Kuzma v. Millinery Workers Union Local 23, 27 N.J. Super. 579, 99 A.2d 833, 841 (1953) (damages recovered against union for mental anguish and illness, husband's medical expenses, loss of wife's services and society, and
ages as well as damages for mental suffering and other intangibles are recoverable on the state level against union tort-feasors, ordinary principles of tort law prohibit such relief unless the union's actions can reasonably be characterized as malicious, wanton, outrageous, or oppressive. Where these elements are present, however, the union's status as a labor organization generally will not immunize it from liability.

The Decision in IBEW v. Foust

The Supreme Court in IBEW v. Foust partly resolved the damages conflict among the courts by adopting a wholesale ban on punitive damage awards in fair representation suits brought against a union for failure to process an employee's grievance. The majority's decision indicates that punitive damages are hostile to national labor policy which is compensatory in nature. Relying heavily upon Vaca and Steele, the Court articulated what it perceived to be a dominant premise in the logic of those cases, that the doctrine of fair representation was judicially created and developed only to compensate for injuries caused by breach of the duty. Drawing upon the decisions' language, the Court discerned a "compensation principle" which prohibits recovery in a fair representation action except to the extent necessary to "make the punitive damages); Schwab v. International Ass'n of Bridge Workers Local 782, 482 S.W.2d 143, 149-50 (Tenn. Ct. App. 1972) (indicating that punitive damages, losses for future damages, and damages for mental suffering may be recovered against union).

See Kuzma v. Millinery Workers Union Local 24, 27 N.J. Super. 579, 99 A.2d 833, 840-41 (1953) (one who is guilty of wilful, malicious and oppressive interference with employment may be liable for mental anguish and suffering and punitive damages); Taxicab Drivers' Local 889 v. Pittman, 322 P.2d 159, 168 (Okla. 1957) (punitive damages justified when evidence plainly shows oppression, fraud, malice, or gross negligence in reckless disregard of another's rights); Schwab v. International Ass'n of Bridge Workers Local 782, 482 S.W.2d 143, 149-50 (Tenn. Ct. App. 1972) (recovery for mental suffering and punitive damages is proper where unions' conduct is malicious or oppressive).

But see Chambers v. United Farm Workers Organizing Comm., 25 Ariz. App. 104, 541 P.2d 567, 571 (1975) (suggesting that punitive damages might be inappropriate where union would be exposed to large punitive award).

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Id. Citing Republic Steel Corp. v. National Labor Relations Bd., 311 U.S. 7, 10-12 (1940) and Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252, 260-61 (1964), the Court stated that the RLA, like the NLRA, is "essentially remedial" in purpose. Id.

injured employee whole."\textsuperscript{76} By authorizing the lower courts to "resort to the usual judicial remedies,"\textsuperscript{77} Steele was said to implement the basic purpose of fair representation suits, namely compensation.\textsuperscript{78} Similarly, Vaca's refusal to impose damages upon the union for the employer's wrongful conduct\textsuperscript{79} was read as limiting recovery against the union to those damages required to compensate the employee for his actual injuries.\textsuperscript{80}

The Court also found punitive damage awards to be extremely detrimental to the labor union's effectiveness as a collective bargaining representative. Emphasizing the "careful accommodation" between the individual employee's rights and the collective rights of union members,\textsuperscript{81} the Court determined that the latter interests are far too great to risk their destruction by threats of "punitive award[s] of unforeseeable magnitude. . . ."\textsuperscript{82} The virtually unlimited discretion traditionally afforded juries when awarding punitive damages concerned the Foust Court greatly.\textsuperscript{83} Thus, the likelihood that improvident jury awards may soon bankrupt union coffers

\textsuperscript{76} Id.
\textsuperscript{79} For a discussion of Vaca's apportionment formula, see notes 51-52 supra and accompanying text.
\textsuperscript{80} IBEW v. Foust, --- U.S. ---, 99 S. Ct. 2121, 2126-27 (1979). While the Court read Vaca's apportionment principle, supra note 52, as the primary rationale behind its "compensation principle," the Court also found support for its theory "in Vaca's refusal to hold unfair representation claims within the exclusive jurisdiction of the National Labor Relations Board." IBEW v. Foust, --- U.S. ---, 99 S. Ct. 2121, 2126 n. 12 (1979). Noting that the Board's duty encompasses broader interests than the individual employee represented before it, id., the Court reasoned that the judicial forum which Vaca assures in fair representation cases is intended to guarantee that the grievant is compensated for his actual damages. Id.
\textsuperscript{83} Id. at 2127 n. 14. Quoting Gertz v. Welch, Inc., 418 U.S. 323, 350 (1974), the Court stated:

Since juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused, . . . they remain free to use their discretion selectivity to punish expressions of unpopular views. Like the doctrine of presumed damages, jury discretion to award punitive damages unnecessarily exacerbates the danger. . . .
convinced the majority that punitive damages are inappropriate in a fair representation suit.  

As further support for its decision, the Court reasoned that punitive damages greatly restrict a union's discretion when processing grievances and hence "disrupt the responsible decision-making essential to peaceful labor relations."  

Reasoning that a fear of punitive awards will compel union officials "to process frivolous claims or resist fair settlements," the Court surmised that the union's grievance process would thereby be rendered inadministerable and the union-employer relationship would be undermined.  

In view of these potentially destructive effects, the majority concluded that such an "extraordinary sanction" must be imposed by the legislative rather than the judicial branch.  

The concurring justices disagreed with the Court's rule banning punitive damages in fair representation cases. Rejecting the Court's restrictive interpretation of Vaca and Steele, the minority viewed those decisions as indicative of an "affirmative compensation policy" which favors punitive awards in fair representation suits.  

Unlike the majority's "compensation principle" which limits recovery to actual damages, the concurring justices contended that

65 Id. at 2127-28.
66 Id. at 2128.
67 Id. at 2127.
68 Id. at 2126.
69 Id. at 2128.
70 Rather than prohibit exemplary damages entirely, the concurring justices would merely limit their application to cases where the union's conduct is sufficiently outrageous. Id. at 2132. Drawing upon the LMRDA line of cases (see notes 57-68 supra and accompanying text) they argued that federal labor law favors punitive awards in those circumstances. IBEW v. Foust, ___ U.S. ___, 99 S. Ct. 2121, 2131 (1979).
71 The concurring justices are particularly baffled by the majority's willingness to adopt such a broad rule under these facts. Arguing that the union's conduct is negligent at most, the concurring justices would merely declare, as a matter of law, that punitive damages were inappropriate under the circumstances of the case. Id. at 2132.
72 These decisions, upholding the right of employees to bring an unfair representation claim in federal court in the absence of an "adequate administrative remedy," Vaca v. Sipes, 386 U.S. 171, 182-83 (1967) and Steele v. Louisville & N. R.R., 323 U.S. 192, 206-07 (1944), were read as authorizing federal courts to employ the full range of judicial remedies available, including punitive damages. IBEW v. Foust, ___ U.S. ___, 99 S. Ct. 2121, 2129 (1979).
compensatory damages represent the minimum rather than the maximum damages recoverable in a fair representation suit.\footnote{\textsuperscript{92}IBEW v. Foust, \textemdash{} U.S. \textemdash{}, 99 S. Ct. 2121, 2129 (1979). The minority stated that "Steele and Vaca . . . stand for the proposition that a worker injured by his union's breach of duty must at least be made whole." Id. (Emphasis added).}

The concurring justices were unpersuaded by the Court's reliance upon \textit{Republic Steel Corp. v. National Labor Relations Board}\footnote{\textsuperscript{93}411 U.S. 7 (1940).} and \textit{Local 20 Teamsters, Chauffeurs \& Helpers v. Morton}\footnote{\textsuperscript{94}377 U.S. 252 (1964).} to support its theory that fair representation suits are remedial in nature and thus hostile to exemplary damages.\footnote{\textsuperscript{95}IBEW v. Foust, \textemdash{} U.S. \textemdash{}, 99 S. Ct. 2121, 2129-30 (1979). See note 74 supra.} Noting that the issue in \textit{Republic Steel} centered upon the authority of the National Labor Relations Board to impose punitive sanctions,\footnote{\textsuperscript{96}Republic Steel Corp. v. National Labor Relations Bd., 311 U.S. 7, 10 (1940). See notes 45-46 supra and accompanying text.} the Foust minority concluded that \textit{Republic Steel} left unaffected "both the jurisdiction and the authority [of the federal courts] to impose punitive sanctions" in fair representation suits.\footnote{\textsuperscript{97}IBEW v. Foust, \textemdash{} U.S. \textemdash{}, 99 S. Ct. 2121, 2129-30 (1979).} The Court's reliance on \textit{Morton} was also criticized because the statute involved there, the Labor Management Relations Act, contains an express Congressional judgment which disfavors punitive awards.\footnote{\textsuperscript{98}Local 20, Teamsters, Chauffeurs \& Helpers v. Morton, 377 U.S. 252, 260 (1964). See notes 47-49 supra and accompanying text.} "Since Congress . . . expressed no such prohibition on punitive damages in unfair representation suits," the concurring justices contended that \textit{Morton} did not "[support] the Court's invocation of an 'essentially remedial' theory in the fair representation area."\footnote{\textsuperscript{99}IBEW v. Foust, \textemdash{} U.S. \textemdash{}, 99 S. Ct. 2121, 2130 (1979). \textsuperscript{100}Id. at 2130, 2131.} The concurring justices were equally unconvinced by the majority's conclusion that punitive awards in fair representation suits threaten the union's financial stability and impair its discretion in processing employee grievances.\footnote{\textsuperscript{100}Id. at 2130, 2131.} The concurring opinion suggested that the Court's fears of union bankruptcy are exaggerated in view of \textit{Vaca}'s apportionment principle restricting union lia-
bility in the majority of fair representation cases.\textsuperscript{101} Hence, punishing a union in the few instances when its conduct is said to be outrageous would not expose it to any undue financial burden.\textsuperscript{102} The concurring justices were likewise unpersuaded that punitive awards adversely affect union discretion in handling grievances.\textsuperscript{103} They reasoned that, except for the rare occasions when a union's action has been truly egregious, it would not be liable for exemplary damages.\textsuperscript{104} Where a union's conduct would support such an award, the concurring justices felt that a "chilling of union discretion" would be appropriate.\textsuperscript{105}

\textit{Analysis and Implications of IBEW v. Foust}

Preservation of the union's bargaining strength is of paramount concern in \textit{Foust}, and the ruling has potential application to other situations involving exclusive bargaining representatives.\textsuperscript{106} While

\textsuperscript{101} Id. at 2130. See notes 51-52 \textit{supra} and accompanying text.


\textsuperscript{103} Id.

\textsuperscript{104} Id. at 2130-31. Traditionally, before punitive damages may be awarded "[i]f there must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that his conduct may be called willful or wanton." W. Prosser, \textit{Law of Torts}, § 2, at 9-10 (4th ed. 1971).


\textsuperscript{106} Although the Court's holding is specifically limited to instances in which a union fails to properly pursue an employee's grievance, \textit{id.} at 2128, the \textit{Foust} rule may be extended by later decisions to include fair representation suits brought against unions for violations occurring during the negotiation stage of the collective bargaining process. \textit{See id.} at 2128 (Blackmun, J., concurring) (characterizing the Court's holding as a \textit{per se} rule against exemplary damages). Hence, where a union negotiates a collective bargaining agreement in bad faith, a fair representation suit brought by the members collectively could expose the union to a grossly excessive punitive damage award and thereby warrant invocation of the \textit{Foust} Court's ban on punitive damages. While the threat posed by exemplary damages in such circumstances is quite real, it is nonetheless contended that the \textit{Foust} rule will not be expanded to apply in this context. As the decision indicates, the Court is primarily concerned with protecting the union members' interest as a collective whole. \textit{Id.} at 2127. Consequently, it would be incongruous for the Court to shield a union from potential liability where it ceases to fairly represent the bargaining unit. \textit{See Anderson v. United Paperworkers Int'l Union, 484 F. Supp. 76, 85 (D. Minn. 1980) (holding \textit{Foust} not to be controlling where a union misrepresents to its members the true effect of certain provisions in the collective bargaining agreement).
the Court excludes LMRDA cases from its holding, the analysis employed logically encompasses those decisions as well if unions organized under the Act are to be shielded from the dangers which the majority concludes are presented by punitive awards. That Foust will subsequently be held applicable to LMRDA decisions is by no means certain, however. The statutory scheme established under the LMRDA is designed to safeguard the rights of the individual member. The language and goals of the Act manifest an implied intent to provide the full panoply of judicial and administrative sanctions in order to preserve those rights. This view is supported by recent LMRDA cases which have consistently permitted the imposition of punitive damages against union defendants. In light of these considerations, it appears improbable that the Court will ban punitive remedies under the LMRDA.

Foust has broad implications for state claims brought against a union organized under federal statute. Since federal labor policy prohibits the assessment of punitive awards against a labor union in fair representation suits, it appears that state courts may not grant exemplary relief under a related tort claim because that accomplishes, indirectly, the same frustration of federal policy.

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107 For a discussion of the LMRDA and relevant cases which developed under that statute, see notes 57-68 supra and accompanying text.


109 Id. at 2131. As the concurring justices noted, "pronouncements about 'the compensation principle,' about the 'windfall' nature of punitive damages, about the need to safeguard union treasuries, and about the 'essentially remedial' quality of federal labor policy, all would seem to apply with equal force to § 412 suits..." Id.

110 See notes 61-68 supra and accompanying text.

111 Id.


113 Though it is unlikely that the Supreme Court will bar punitive damages totally, it is conceivable that subsequent Court decisions might limit the assessment of punitive damages to carefully prescribed situations, perhaps where actual malice is involved. A ceiling also could be placed upon damages recoverable against a union. These measures seem adequate to protect the interests represented under the LMRDA.

114 See notes 69-72 supra and accompanying text for a discussion of state tort claims.
Thus, subject only to those few instances where a "compelling state interest" is shown,115 Foust could preclude state courts from awarding punitive damages against union defendants.116

The Court's rule against punitive damages is not entirely consistent with the judicial policy which originated and fostered the duty of fair representation. Prior case law reflected "the careful balance of individual and collective interests"117 which is so necessary in the unfair representation area.118 Recognizing that unions must be afforded sufficient leeway of discretion in the negotiation, administration, and enforcement of collective-bargaining agreements,119 previous decisions ruled that a union may not, for the benefit of the whole, act in an arbitrary, discriminatory, or bad-faith manner when processing an individual's grievance.120 Where the union did so act, the cases have affirmed the employee's right to seek redress in the courts121 and, in appropriate circumstances,122

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115 The Supreme Court has previously indicated that states have a "compelling state interest" in controlling union "conduct marked by violence and imminent threats to the public order." Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252, 257 (1964); UAW v. Russell, 356 U.S. 634, 646 (1958). See United Constr. Workers v. Laburnum Corp., 347 U.S. 656, 666 (1954). Thus, where a union's actions constituted both a tort under state law and an unfair labor practice, federal and state courts were allowed to assess punitive damages under state law, even though punitive damages were not recoverable under federal law. UAW v. Russell, 356 U.S. 634, 646 (1958). See Local 20, Teamsters, Chauffeurs & Helpers Union v. Morton, 377 U.S. 252, 257 (1964); United Constr. Workers v. Laburnum Corp., 347 U.S. 656, 665-66 (1954). This exception would seem to have continued viability in fair representation suits after Foust. However, for an excellent discussion opposing exemplary awards under these circumstances, see UAW v. Russell, 356 U.S. 634, 647 (1958) (Warren J., dissenting).

116 See Williams v. Pacific Maritime Ass'n, 421 F.2d 1287, 1289 (9th Cir. 1970) (punitive damages are contrary to federal labor law and hence not recoverable against union defendant under state law).


118 See Vaca v. Sipes, 386 U.S. 171, 190-94 (1967) and Steele v. Louisville & N. R.R., 323 U.S. 192, 202-03 (1944) where the Supreme Court attempted to accommodate the competing interests of the union and the individual grievant.


122 Generally, there must be evidence of wilful or wanton action, malice, or similarly outrageous conduct before exemplary damages are recoverable. Harrison v. United Transp. Union, 530 F.2d 558, 563-64 (4th Cir. 1975), cert. denied,

In barring punitive damages, however, \textit{Foust} tips the balance decidedly in favor of collective interests. In the absence of substantial pecuniary loss, the fair representation suit will be largely ineffectual as a guaranty of personal rights\footnote{Even where an employee sustains a significant pecuniary loss and a fair representation suit is consequently brought, \textit{Vaca}'s apportionment formula (see notes 51-52 supra) and \textit{Foust}'s broad rule against punitive damages will shield the union defendant from the full consequences of its wrongful actions. Substantially insulated from economic liability, the union will remain undeterred by the threat of a fair representation suit.} because an aggrieved employee will lack economic incentive to seek judicial recourse.\footnote{Where an individual's injury is slight or nonexistent, the members' collective interest in maintaining a strong posture vis-a-vis the employer must be considered paramount, hence, the individual's rights are properly subordinated in those circumstances. See Clark, \textit{The Duty of Fair Representation}, 51 Tex. L. Rev. 1119, 1120-21 (1973).}

Admittedly, this result is preferable to the extent that it immunizes unions from frivolous claims.\footnote{Where a union's conduct is malicious, motivated by personal spite, or otherwise egregious in nature, the union should be liable for exemplary damages because such action in no way furthers federal labor policy and, hence, deserves no judicial protection. \textit{IBEW v. Foust}, ___ U.S. ___, 99 S. Ct. 2121, 2132 (1979) (Blackmun, J., concurring).} The cogency of this argument diminishes, however, when the bargaining representative wilfully destroys significant rights guaranteed an employee under the collective bargaining agreement. In those instances, the courts must not allow the members' collective interests to sacrifice the individual's rights lest the labor unions become instruments of abuse. Thus, the courts must accommodate the individual's interests and provide punitive sanctions against unions, when appropriate, to deter conduct which serves no function other than the malicious destruction of an employee's rights and freedoms.\footnote{By way of illustration, consider the following hypothetical:}

Grievance proceedings were initiated on behalf of two em-

\footnote{See \textit{St. Clair v. Local Union No. 515 of the Intl Bhd. of Teamsters}, 422 F.2d 128, 132 (6th Cir. 1969) (actual damages caused by a union's failure to pursue grievances may be \textit{de minimus}). See \textit{generally} W. Prosser, \textit{Law of Torts}, § 2, at 11 (4th ed. 1970) and D. Dobbs, \textit{Law of Remedies}, § 3.9, at 225 (1973) for discussions of the "private attorney general" theory.}

\footnote{See generally D. Dobbs, \textit{Law of Remedies}, § 3.9, at 220 (1973) for a brief discussion of the effectiveness of punitive damages as a deterrent to wrongful conduct.}
ployees. Forster, a fifty year old dockworker and former union officer, was discharged because of repeated violations of company rules, including intoxication while on the job. Though evidence of Forster's misconduct was well-documented and the company's action justified, the union committee insisted on arbitration as a means of repaying Forster's "many years of faithful service to the Local." Gonzales, a young dockworker only recently hired, was discharged due to an altercation with his supervisor. Union investigation revealed that Gonzales had been subjected to repeated acts of harassment and discrimination by his supervisor. Prior to arbitration, the union offered to withdraw the Gonzales grievance in exchange for Forster's reinstatement. Racial and personal bias were primary factors motivating the union in making its proposal. The company accepted the union's offer.\footnote{These facts were suggested by Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), \textit{cert. denied}, 425 U.S. 958 (1976).}

This example demonstrates the abuses which can occur when a bargaining representative discriminates against unpopular members and fails to process individual grievances on their merits. In trading away Gonzales' claim, the union did not represent Gonzales' interests fairly and impartially. Instead, the union sacrificed Gonzales' right to a job in order to achieve a preferred result. In so acting, the union engaged in precisely that type of wrongful conduct which the duty of fair representation was designed to eliminate. When such a flagrant misuse of the bargaining agent's power occurs, liability for punitive damages can only be consistent with basic notions of justice.

While an individual's rights must not be totally relinquished, the Court does not err in allowing majority interests to gain ascendancy. \textit{Foust} correctly demonstrates that labor organizations have valid institutional interests which must be protected if employees are to realize the advantages of collective bargaining. Notwithstanding the validity of these concerns, the Court adopts an overbroad solution. The problem addressed in \textit{Foust} is the assessment of indiscriminate and excessive punitive awards by juries governed by passion and bias. The remedy then is to reduce jury discretion rather than ban punitive damages altogether when a union improperly refuses to process an employee's complaint. As
a matter of law, trial courts could prohibit jury consideration of exemplary damages except in a few, narrowly defined circumstances. Key factors in submitting the punitive damages issue would include the culpability of the union's acts, the extent of the union's disregard of member rights, actual harm suffered by the plaintiff, motives actuating the union's conduct, the public's interest in punishing the wrongful conduct and the prospective deterrent effect of such an award. Hence, in the absence of conduct which is truly outrageous or motivated by actual malice, the trial court should hold punitive damages to be unrecoverable. Even when punitive damages may properly be awarded in a particular case, trial courts possess adequate means to control jury discretion. Methods of judicial supervision include remittitur of that amount of an award which unreasonably exceeds the employee's actual injuries, limiting recovery to the costs of litigation, placing a ceiling amount on the punitive damages recoverable, and requiring punitive damages to bear some reasonable proportion to the actual damages found. By allowing exemplary awards only within carefully prescribed boundaries established by the courts, they could continue to accommodate "the careful balance of individual and collective interests"19 in fair representation suits. In prohibiting punitive damages totally when a union fails to pursue an employee's grievance, however, Foust needlessly removes an effective judicial sanction against invasions of individual rights.

Conclusion

Whether the duty of fair representation will long remain a viable cause of action to redress employee grievances against unions is a valid question after Foust. Gross violations of an individual member's rights demand strong, effective remedies if fair representation is to remain a realistic goal. To limit union liability when it acts with malice or similarly inappropriate motives only encourages additional misconduct by frustrating needlessly the deterrent effect of the fair representation suit. Clearly, alternative methods of judicial supervision exist to control jury discretion in awarding exemplary damages against union defendants, but the Foust Court refused to adopt these alternatives. The announce-

ment in *Foust* of an extensive ban on punitive damages may thus represent a deliberate effort by the Supreme Court to reduce the role of the duty of fair representation as a judicial cause of action.

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