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Employees' Recovery of Attorney's Fees from Unions Under Section 301 of the Labor Management Relations Act

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NOTES

EMPLOYEES' RECOVERY OF ATTORNEYS' FEES FROM UNIONS UNDER SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT

INTRODUCTION

Section 301 of the Labor Management Relations Act[1] permits an employee to bring an action in state or federal court against an employer who allegedly has violated a collective bargaining agreement ("CBA").[2] Because most CBAs give the employee's labor union exclusive power to challenge the employer's conduct,[3] courts generally refuse to entertain individual employee claims on the ground that such claims usurp union power.[4] Courts, however, will hear the employee's case if the union has abused this power by unfairly refusing to represent the employee[5] or by representing the employee inadequately.[6] Courts have read section 301 to provide a mechanism called a "hybrid" section 301/duty of fair representation action[7] for such situations. Under the hybrid action, the employee sues the employer for violating the CBA and sues the union for breaching its duty of fair representation.[8]

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1. Ch. 120, 61 Stat. 136, 156 (1947) (codified at 29 U.S.C. § 185(a) (1982)).

2. Section 301(a) provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Id. *See also* Vaca v. Sipes, 386 U.S. 171, 183-84 (1967) (courts are not preempted by National Labor Relations Board jurisdiction); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 101-04 (1962) (state and federal courts have concurrent jurisdiction, but states must follow federal law).

3. *See, e.g.*, Bowen v. United States Postal Serv., 459 U.S. 212, 216 & n.5 (1983); Vaca v. Sipes, 386 U.S. 171, 175 n.3, 185 (1967); Republic Steel Corp. v. Maddox, 379 U.S. 650, 660 & n.2 (1965) (Black, J., dissenting); *see also* Tidwell, *Major Issues in the Duty of Fair Representation Cases Since 1977*, 62 U. Det. L. Rev. 383, 384 (1985) ("Under most collective bargaining agreements, unions have the exclusive right to process, settle, and arbitrate grievances.").

4. *See Republic Steel Corp.*, 379 U.S. at 653 ("employee must afford the union the opportunity to act on his behalf").

5. *See* Vaca v. Sipes, 386 U.S. 171, 192 (1967) (union did not "breach its duty of fair representation, and thereby open up a suit by the employee for breach of contract"); Seymour v. Olin Corp., 666 F.2d 202, 207 (5th Cir. Unit B 1982) (union cannot refuse to pursue grievance merely because employee sought to consult with private attorney); Del Casal v. Eastern Airlines, 634 F.2d 295, 301 (5th Cir. Unit B Jan.) (union cannot consider employee's non-union status in decision not to provide assistance of staff attorney), *cert. denied*, 454 U.S. 892 (1981).

6. *See infra* notes 32-33 and accompanying text.

7. *See* DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 165 (1983); Bagsby v. Lewis Bros., Inc., 820 F.2d 799, 799 (6th Cir. 1987).

8. A hybrid action arises when the employee brings both claims simultaneously. *See DelCostello*, 462 U.S. at 165. While the Labor Management Relations Act only expressly

When an employer has discharged an employee in what the employee believes to be a violation of the CBA,[9] the employee initially relies upon his union to represent him, since most CBAs give the union the exclusive power to challenge the employer.[10] If the union refuses to represent him,[11] or does so inadequately,[12] the employee may challenge the union under its constitution.[13] More likely, however, the employee commences a hybrid action, primarily in the hope of receiving reinstatement and lost wages.[14] To succeed, the employee must prove the union's breach of its duty of fair representation[15] before the court will review the employer's conduct under the CBA.[16] If, after proving the union's breach, the employee also proves that the employer violated the CBA, the court will order the employer to reinstate the employee and pay damages consisting of lost wages through the date on which the dispute would have been resolved had the union fulfilled its duty.[17] For the union's breach of its

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grants federal jurisdiction for claims under the CBA, the Supreme Court has held that § 301 implicitly includes jurisdiction for duty of fair representation claims against the union because of the intricate relationship that exists between the two claims. *See id.*; Vaca v. Sipes, 386 U.S. 171, 183-84 (1967).

9. A recent study revealed that 56.6% of hybrid actions assert wrongful discharge, 16.4% involve seniority disputes, 7.4% allege employment discrimination, 6.4% involve pay disputes, 4.6% raise pension or fringe benefit disputes, 4.1% assert an improper change in working conditions, and 2.0% allege improper discipline, short of discharge. *See* Goldberg, *The Duty of Fair Representation: What the Courts Do in Fact*, 34 Buffalo L. Rev. 89, 134 (1985). For the purposes of discussion, this Note assumes the circumstances surrounding allegations of wrongful discharge.

10. *See supra* note 3.

11. *See, e.g., infra* notes 30-31 and accompanying text.

12. *See, e.g., infra* notes 32-33 and accompanying text.

13. The union constitution, which governs union-member relations, may require union members to challenge the union through an internal appeals process. This challenge usually entails an appeal to the local union, then to the international union, and, if necessary, to a public review board comprised of impartial non-union members. *See, e.g.*, Clayton v. International Union, UAW, 451 U.S. 679, 682-83 (1981).

If the union constitution does not include an appeal provision, the employee may sue the union. If he challenges the union's conduct without alleging a CBA violation, federal courts have jurisdiction for such suits, not under § 301, but under 28 U.S.C. § 1337 (1982). Section 1337 grants federal courts jurisdiction over suits arising under congressional acts regulating commerce. *Id. See In re* Carter, 618 F.2d 1093, 1104 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981).

14. *See, e.g.*, Clayton v. International Union, UAW, 451 U.S. 679, 690 (1981); United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 61 (1981); Ellenbogen v. Rider Maint. Corp., 794 F.2d 768, 769 (2d Cir. 1986).

15. *See* Vaca v. Sipes, 386 U.S. 171, 190 (1967) (unions have a duty not to act arbitrarily, discriminatorily, or in bad faith).

16. *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976); *Vaca*, 386 U.S. at 186; Cote v. Eagle Stores, Inc., 688 F.2d 32, 35 (7th Cir. 1982) (per curiam), *cert. denied*, 459 U.S. 1218 (1983); Findley v. Jones Motor Freight, 639 F.2d 953, 958 (3d Cir. 1981). If the union has not breached its duty, courts will defer to the mechanism for private resolution contained in the CBA, thereby avoiding review of the employer's conduct. *See Hines*, 424 U.S. at 567 (Court refused such deference because union's breach "seriously undermine[d] the integrity of the arbitral process"); *see also Findley*, 639 F.2d at 961 (on appeal, the circuit court reversed the lower court judgments against both union and employer when it found no breach of union's duty).

17. *See* Bowen v. United States Postal Serv., 459 U.S. 212, 215, 230 & n.19 (1983).

duty of fair representation, the court will order the union to pay as damages that portion of lost wages attributable to the period running from the end of the employer's liability to the resolution of the hybrid action,[18] plus the attorney's fees incurred by the employee in his suit against the employer.[19] Thus, when the employee proves both a breach of the duty of fair representation and a violation of the CBA, the employee receives full compensation.[20]

Courts currently disagree, however, on whether to allow recovery of attorney's fees for a union's breach of its duty of fair representation in the absence of a CBA violation by an employer.[21] Those that allow such

18. *See id.* at 215, 230 & n.19; Bowman v. TVA, 744 F.2d 1207, 1215 (6th Cir. 1984), *cert. denied*, 470 U.S. 1084 (1985); Pitts v. Frito-Lay, Inc., 700 F.2d 330, 334 (6th Cir. 1983).

In *Bowen*, the Supreme Court noted that damages to the employee initially resulted from improper discharge by the employer but later were aggravated by the union's breach. *See id.* at 223. Thus, the Court divided the back pay liability award between the employer and the union.

Prior to *Bowen*, the union's liability for damages was limited to court costs, attorney's fees, and other litigation costs. *See, e.g.*, Seymour v. Olin Corp., 666 F.2d 202, 215 (5th Cir. Unit B 1982); Milstead v. International Bhd. of Teamsters, Local Union No. 957, 649 F.2d 395, 396 (6th Cir.) (per curiam), *cert. denied*, 454 U.S. 896 (1981); *see also* De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 289-90 (1st Cir.) ("entire amount of lost earnings . . . properly charged to the [employer]"), *cert. denied*, 400 U.S. 877 (1970).

Commentators have criticized the *Bowen* decision as making unions responsible for damages caused by employers. *See* Aaron, *Rights of Individual Employees Under the Act*, in American Labor Policy 119, 138 (C. Morris ed. 1987); Lansing & Peters, Bowen v. United States Postal Service: *The Duty of Fair Representation Becomes a Burden*, 2 Hofstra Lab. L.J. 123, 150-54 (1984).

19. *See infra* note 70. The American rule against recovery of attorney's fees by a prevailing litigant in the absence of statutory or contractual authorization, *see* Arcambel v. Wiseman, 3 U.S. (3 Dall.) 306 (1796), would normally preclude an employee's claim for attorney's fees incurred in his suit against the union. This rule, like most, has its exceptions, and courts may exercise equitable power to award attorney's fees when justice so requires. *See* Hall v. Cole, 412 U.S. 1, 4-5 (1973). Courts have made such an exception to the American rule in duty of fair representation cases. *See* Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382, 385 (8th Cir. 1977); Harrison v. United Transp. Union, 530 F.2d 558, 564 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

In addition, an employee's claim against his *union* for attorney's fees incurred in his suit against his *employer* can be thought of as an ordinary claim for damages and, therefore, does not fall within the purview of the American rule. *See* Scott v. Local Union 377, Int'l Bhd. of Teamsters, 548 F.2d 1244, 1246 (6th Cir.) (per curiam), *cert. denied*, 431 U.S. 968 (1977); *infra* notes 63-69 and accompanying text.

20. *See, e.g.*, Zuniga v. United Can Co., 812 F.2d 443, 451-52, 455 (9th Cir. 1987) (employee collected wrongfully-denied sick leave benefits from employer and attorney's fees from union); Milstead v. International Bhd. of Teamsters, Local Union No. 957, 649 F.2d 395, 396 (6th Cir.) (per curiam) (employee settled with employer after jury verdict in his favor and collected attorney's fees from union), *cert. denied*, 454 U.S. 896 (1981); *Scott*, 548 F.2d at 1245-46 (employee collected $12,500 from employer plus attorney's fees from union).

Of course, "full" compensation does not entail recovery of the attorney's fees incurred in a suit against the union; they fall under the American rule. *See supra* note 19.

21. *Compare* Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1275-76 (9th Cir. 1983) (allowing recovery of attorney's fees in the absence of CBA violation by employer)

recovery recognize that the union's breach causes distinct harm to the employee, regardless of the outcome of his claim against the employer, and argue that damages should be apportioned according to liability.[22] Courts that deny such recovery hold that the employee's two claims are inextricably interdependent; to prevail against either the employer or the union, the employee must prove both a breach of the union's duty of fair representation and a violation of the CBA.[23]

Part I of this Note considers a union's duty of fair representation, its origin and its scope. Part I also examines the role of the union's duty as a threshold question in hybrid actions and the rationale underlying such a requirement. Part II focuses on the competing arguments relating to whether recovery of attorney's fees should be allowed for a union's breach absent an employer's violation and concludes that courts should allow such recovery.

I. THE DUTY OF FAIR REPRESENTATION

A. *Origin and Scope*

The unions' duty of fair representation has its genesis in the Railway Labor Act ("RLA").[24] The RLA grants statutory authority to bargaining representatives to represent all members of a collective bargaining unit.[25] The RLA also implies a concomitant duty to exercise this author-

and Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61, 620 F.2d 439, 444 (4th Cir. 1980) (same) *with* Wood v. International Bhd. of Teamsters, Local 406, 807 F.2d 493, 503 (6th Cir. 1986) (denying recovery of attorney's fees in absence of CBA violation by employer), *cert. denied*, 107 S. Ct. 3232 (1987) *and* Foster v. United Steelworkers, Local 13600, 752 F.2d 1533, 1534 (11th Cir. 1985) (per curiam) (same).

22. *See infra* notes 64, 69 and accompanying text.

23. *See infra* notes 77-78, 82 and accompanying text.

24. Ch. 691, 48 Stat. 1185 (1934) (codified as amended at 45 U.S.C. §§ 151-64 (1982)).

25. Section 2 of the RLA, in relevant part, provides: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The 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 Act." *Id.* at 1187. While the bargaining representative is often a labor union, it need not be. *Cf.* 29 U.S.C. § 159(c)(1)(A) (1982) (employee can petition the National Labor Relations Board to decertify the "individual or labor organization, which has been certified . . . as the bargaining representative").

Similarly, when a labor union acts as the collective bargaining representative, the represented employees often are members of that union, but need not be. *See* 29 U.S.C. § 164(b) (1982); Del Casal v. Eastern Airlines, 634 F.2d 295, 297, 300-01 (5th Cir. Unit B Jan.), *cert. denied*, 454 U.S. 892 (1981); Tobias, *The Plaintiff's View of "301-DFR" Litigation*, 5 Emp. Rel. L.J. 510, 515 (1980). If, for example, an employee's religion prevents union membership, *see* 29 U.S.C. § 169 (1982), or he lives in a "right-to-work" state, the employee need not be a member of the union. *See* Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co., 335 U.S. 525, 537 (1949) (upholding Nebraska and North Carolina laws that outlawed required union membership). Labor leaders term these nonunion members of the collective baragining unit "free riders" because they do not pay union dues but receive the same benefits as those who do. *See* W. Gould, A Primer on American Labor Law 50-51 (2d ed. 1986). Thus, unions often negotiate a "union secur-

ity "without hostile discrimination [based on the employee's union membership or race], fairly, impartially, and in good faith."[26]

Although this duty of fair representation initially applied only to the negotiation of CBAs,[27] the Supreme Court subsequently demonstrated that a union's duty included the administration of CBAs as well.[28] As a result, while unions have the authority to sift out wholly frivolous grievances against the employer, they must represent union members in grievance proceedings honestly and without arbitrary discrimination.[29] Ways in which unions have breached their duty of fair representation in the administration of CBAs include refusing to pursue an employee's grievance because of the employee's race[30] or lack of union membership,[31]

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ity clause" that requires workers to pay periodic dues and initiation fees as a condition of employment. *See id.* at 50.

26. Steele v. Louisville & N.R.R., 323 U.S. 192, 204 (1944). In *Steele*, the exclusive bargaining representative of all locomotive firemen breached its duty of fair representation under the RLA by negotiating and entering into a CBA with the employer that set quotas for blacks. *See id.* at 203; *see also* Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 213 (1944) (companion case holding that federal courts have jurisdiction to hear non-diversity suit).

The Supreme Court soon extended this duty as developed under the RLA to representatives certified under § 9(a) of the National Labor Relations Act ("NLRA"), ch. 372, 49 Stat. 449, 453 (1935) (codified as amended at 29 U.S.C. § 159(a) (1982)). *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). While the Court recognized that it must allow a bargaining representative a wide range of reasonableness in serving the unit it represents, the union's conduct is "subject always to complete good faith and honesty of purpose in the exercise of its discretion." *Id.*

Today, courts use the duty of fair representation as developed under the RLA and NLRA virtually interchangeably. *See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 Calif. L. Rev. 663, 676-718 (1973); VanderVelde, *A Fair Process Model for the Union's Fair Representation Duty*, 67 Minn. L. Rev. 1079, 1091 n.29 (1983).

27. *See* Steele v. Louisville & N.R.R., 323 U.S. 192, 203 (1944).

28. *See* Humphrey v. Moore, 375 U.S. 335, 350 (1964) (holding that union had met its duty in representing seniority rights of employees at joint employer-employee committee meeting); Conley v. Gibson, 355 U.S. 41, 47 (1957) (holding that union could not discriminate unfairly against blacks in its refusal to process grievances).

29. *See Humphrey*, 375 U.S. at 349-50. In the landmark case of Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court set forth a broad, tripartite standard for determining whether a union has breached its duty in administration. *See id.* at 190. Under the *Vaca* test, a union breaches its duty of fair representation when its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Id.*

Commentators disagree over whether the *Vaca* test applies to a union's duty in negotiation. *Compare* Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. Pa. L. Rev. 251, 259 (1977) (asserting that *Vaca* Court distinguished between negotiation and administration) *with* Harper & Lupu, *Fair Representation As Equal Protection*, 98 Harv. L. Rev. 1212, 1260-61 (1985) (positing that the *Vaca* decision left open the question whether the union's duty in negotiation differs from that in administration) *and* Levine & Hollander, *The Union's Duty of Fair Representation in Contract Administration*, 7 Emp. Rel. L.J. 193, 198 (1981) (same).

30. *See* Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81, 87 (3d Cir. 1982); Jennings v. American Postal Workers Union, 672 F.2d 712, 716 (8th Cir. 1982). In cases of racial discrimination, Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2(c) (1982), provides another avenue of relief. *See* Emporium Capwell Co. v. Western Addition Com-

improperly investigating an employee's grievance,[32] inadequately presenting a grievance,[33] and trading different employee claims.[34]

Despite the many ways in which a union may breach its duty[35] and the various standards against which courts judge union conduct,[36] employees

munity Org., 420 U.S. 50, 70 (1975); Bugg v. International Union of Allied Indus. Workers, Local 507, 674 F.2d 595, 597 (7th Cir.), *cert. denied*, 459 U.S. 805 (1982).

31. *See* Del Casal v. Eastern Airlines, 634 F.2d 295, 301 (5th Cir. Unit B Jan.), *cert. denied*, 454 U.S. 892 (1981); Richardson v. Communications Workers, 443 F.2d 974, 982 (8th Cir.), *cert. denied*, 414 U.S. 818 (1971).

32. *See* Castelli v. Douglas Aircraft Co., 752 F.2d 1480, 1483 (9th Cir. 1985) (although requisite degree of thoroughness varies with each situation, union must conduct *some* investigation before deciding whether or how to present grievance). For specific examples of improper investigations, see Tenorio v. NLRB, 680 F.2d 598, 602 (9th Cir. 1982) (breach occurred when union declined to arbitrate without interviewing discharged employees); Hughes v. International Brotherhood of Teamsters, Local 683, 554 F.2d 365, 368-69 (9th Cir. 1977) (per curiam) (reversing summary judgment for union because union possibly breached duty by performing only perfunctory interview with employee before deciding not to arbitrate); De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir.) (failure to conduct *any* investigation was arbitrary, thus constituting breach of union's duty), *cert. denied*, 400 U.S. 877 (1970).

33. *See, e.g.*, Milstead v. International Bhd. of Teamsters, Local Union No. 957, 580 F.2d 232, 235-36 (6th Cir. 1978) (union breached by failing to present a critical fact at grievance hearing), *cert. denied*, 454 U.S. 896 (1981); Griffin v. UAW, 469 F.2d 181, 184 (4th Cir. 1972) (union acted arbitrarily by presenting employee's grievance to supervisor with whom employee had had a fist fight rather than to more objective depot manager). A union's failure to raise every issue or call every witness, however, does not necessarily constitute a breach of its duty. *See* Findley v. Jones Motor Freight, 639 F.2d 953, 959 (3d Cir. 1981) (failure to call witness who would have refused to testify not a breach); Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 294 (7th Cir. 1975) (given all circumstances, union's failure to raise particular issue was not a breach).

34. *See* Buchholtz v. Swift & Co., 609 F.2d 317, 327 (8th Cir. 1979) (union may not trade claims in bad faith), *cert. denied*, 444 U.S. 1018 (1980); Harrison v. United Transp. Union, 530 F.2d 558, 560 (4th Cir. 1975) (per curiam) (employer arranged for another employee to be reinstated on the condition that union did not pursue plaintiff-employee's grievance), *cert. denied*, 425 U.S. 958 (1976).

35. *See supra* notes 30-34 and accompanying text.

36. *See* Vaca v. Sipes, 386 U.S. 171, 190 (1967). *Vaca* holds that unions breach the duty of fair representation by acting arbitrarily, discriminatorily, or in bad faith. *Id.* Although courts can determine relatively easily whether a union has acted in bad faith or discriminatorily, *see, e.g.*, cases cited *supra* notes 30-31, the determination of "arbitrariness" has proved more difficult.

The various standards play an instrumental role in deciding whether to allow recovery of attorney's fees without a violation of CBA: the higher a court's standard for union liability, the more egregious the union's conduct must be before the duty is breached, and the more compelling the argument must be in favor of such recovery. While a full discussion of the various interpretations of "arbitrariness" extends beyond the scope of this Note, an abbreviated discussion follows.

Several courts require a finding of gross negligence before holding that the union, by acting arbitrarily, has violated its duty of fair representation. *See* Poole v. Budd Co., 706 F.2d 181, 184 (6th Cir. 1983); Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980); Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082, 1089-90 (9th Cir. 1978). *But see* Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1273-74 (9th Cir. 1983) (ordinary negligence can be arbitrary and breach duty of fair representation if individual interest at stake is strong and union's failure to perform a ministerial act completely extinguishes employee's right to pursue claim).

The Court of Appeals for the Seventh Circuit equates arbitrariness with intentional

generally find it difficult to prove a union breach.[37] Courts render the employee's task even more difficult when, in an effort to avoid interference in union-employee relations, they require the employee to exhaust the union's internal grievance procedures before allowing the employee to pursue a hybrid action in federal court.[38] Courts exercise discretion in this area,[39] however, and may properly excuse the employee's failure to exhaust intra-union remedies if resort to such remedies would prove futile.[40]

B. *Role as a Prerequisite to an Employee's Section 301 Standing*

To recover damages for a violation of a CBA, an employee must abide by it.[41] Therefore, if the CBA sets forth a grievance procedure, the employee first must seek reinstatement and lost wages using that proce-

misconduct, holding consistently that negligence, even when gross, is not enough to violate the duty of fair representation. *See* Grant v. Burlington Indus., 832 F.2d 76, 80 (7th Cir. 1987); Camacho v. Ritz-Carlton Water Tower, 786 F.2d 242, 244 (7th Cir.), *cert. denied*, 106 S. Ct. 3282 (1986); Dober v. Roadway Express, Inc., 707 F.2d 292, 294 (7th Cir. 1983); Hoffman v. Lonza, Inc., 658 F.2d 519, 520 (7th Cir. 1981). *See also* Turner, *Intentional Misconduct and the Union's Duty of Fair Representation: The Seventh Circuit's* Hoffman *Standard*, 63 Chi.-Kent L. Rev. 43, 44 (1987) (intentional misconduct standard may best accommodate rights of union, employer and employee).

37. *See* Joy, *A Framework for Protection of Liberty*, in American Labor Policy 190, 194 (C. Morris ed. 1987) (employee's heavy burden of proof serves to encourage collective bargaining and arbitration); Tobias, *supra* note 25, at 523 (employees face a "lonely, uphill, and losing battle" in hybrid actions).

38. *See, e.g.*, Sosbe v. Delco Elect. Div. of GMC, 830 F.2d 83, 86-87 (7th Cir. 1987); Miller v. General Motors Corp., 675 F.2d 146, 150 (7th Cir. 1982); Curry v. Ford Motor Co., 646 F. Supp. 261, 264 (W.D. Ky. 1983).

39. *See, e.g.*, Clayton v. International Union, UAW, 451 U.S. 679, 689 (1981); NLRB v. Industrial Union of Marine & Shipbuilding Workers, 391 U.S. 418, 428 (1968); Sosbe v. Delco Elect. Div. of GMC, 830 F.2d 83, 86 (7th Cir. 1987).

40. *See Clayton*, 451 U.S. at 689 (court may excuse employee's failure to exhaust internal union appeal if union hostility would prevent fair hearing, if internal union appeals procedure would prove inadequate because it could not reactivate employee's grievance or award complete relief, or if exhaustion would cause unreasonable delay). The UAW, however, has successfully required exhaustion of internal union remedies because its CBAs provide that the employer will allow the reactivation of an employee's grievance when the employee has missed the filing deadline only as a result of his internal appeal to the union. *See* Klein, *Exhaustion of Internal Union Remedies After* Clayton *and* Bowen, in The Changing Law of Fair Representation 70, 76 (J. McKelvey ed. 1985).

Although courts often excuse an employee's failure to exhaust the grievance mechanism provided in the union constitution, several commentators have criticized the requirement's very existence. *See* Fox & Sonenthal, *Section 301 and Exhaustion of Intra-Union Appeals: A Misbegotten Marriage*, 128 U. Pa. L. Rev. 989, 1034 (1980); Tobias, *supra* note 25, at 515. They argue that it is wrong to require exhaustion because the duty of fair representation claim concerns the union-to-employee relationship, not the union-to-union member relationship. *See* Tobias, *supra* note 25, at 515. Furthermore, because the union constitution does not bind a non-member employee, an employee could clear the exhaustion obstacle by not joining the union. *See* Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 295 (1st Cir. 1978). Thus, the exhaustion requirement merely leads to the disparate treatment of employees and penalizes those who join unions. *See* Fox & Sonenthal, *supra*, at 1014-15.

41. *See* Vaca v. Sipes, 386 U.S. 171, 184 (1967).

dure.[42] Courts generally respect the outcome of a CBA's grievance procedure as final, unless they find that the union's breach of its duty of fair representation undermined the integrity of the procedure.[43] When a union wields exclusive power to challenge the employer's conduct,[44] the employee must prove that the union breached its duty of fair representation as a threshold requirement within his hybrid action.[45] When the employee meets this requirement, he provides either an excuse for his failure to exhaust the grievance procedure contained in the CBA[46] or grounds for a court's review of the decision reached in such a procedure.[47] Under such circumstances, courts are freed from their traditional deference to the CBA scheme.[48]

This threshold requirement stems from the federal labor policy preference for private resolution, as espoused in section 203(d) of the Labor Management Relations Act.[49] The Act recognizes that industrial peace

42. *See* Clayton v. International Union, UAW, 451 U.S. 679, 686 n.11 (1981); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 562-63 (1976); *Vaca*, 386 U.S. at 184; *see also supra* notes 3-4 and accompanying text.

43. *See Hines*, 424 U.S. at 567; Del Casal v. Eastern Airlines, 634 F.2d 295, 299-300 (5th Cir. Unit B Jan.), *cert. denied*, 454 U.S. 892 (1981).

44. *See supra* note 3. A union should exercise exclusive control over grievance procedures because such control complements the union's status as exclusive bargaining representative and provides the union with an opportunity to enhance its prestige among employees. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965).

Professor Cox argues that a union should have exclusive control over grievance procedures because: (1) when a CBA violation has not injured an identifiable individual, the union is the only party qualified to prosecute the claim; (2) the union must protect the interests of the group by considering future implications of the resolution of a particular grievance; (3) CBA violations often indirectly affect others than those filing a grievance; (4) there is a greater likelihood that necessary uniformity of grievance resolution will occur; (5) the union can prevent competition between rival employee groups; and (6) when conflicting interests are at stake, the union's self-government is better than outside arbitration. Cox, *Rights Under a Labor Agreement*, 69 Harv. L. Rev. 601, 625-27 (1956).

45. *See* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 62 (1981); Sanders v. Youthcraft Coats and Suits, Inc., 700 F.2d 1226, 1231 (8th Cir. 1983); Cote v. Eagle Stores, Inc., 688 F.2d 32, 35 (7th Cir. 1982) (per curiam), *cert. denied*, 459 U.S. 1218 (1983). Courts should excuse this threshold requirement in certain circumstances. *See* Vaca v. Sipes, 386 U.S. 171, 185 (1967). When the employer has repudiated the CBA, *see id.*, or when the CBA does not contain a grievance procedure, *see* Smith v. Evening News Ass'n, 371 U.S. 195, 196 n.1 (1962), employees need not prove that the union breached its duty of fair representation before a court will review the employer's conduct under the CBA. However, in these cases, the employee's § 301 action is not a hybrid claim.

46. *See* Vaca v. Sipes, 386 U.S. 171, 185-86 (1967); *supra* note 43.

47. *See* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 61 (1981); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976); Thomas v. Bakery, Confectionery and Tobacco Workers Union Local No. 433, 826 F.2d 755, 763 (8th Cir. 1987), *cert. denied*, 56 U.S.L.W. 3569 (1988).

48. *See* cases cited *supra* note 43.

49. Ch. 120, 61 Stat. 136, 154 (1947) (codified at 29 U.S.C. § 173(d) (1982)). Section 203(d) of the Labor Management Relations Act provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The [Federal Mediation and Conciliation] Service is directed to make its conciliation

depends upon labor and management settling their own differences.[50] With this freedom from excessive government intervention, unions and employers create mechanisms to handle grievances that arise under CBAs,[51] tailoring grievance machinery to their own problems and needs. Such procedures frequently provide for the resolution of problems at informal levels before more elaborate arbitrations become necessary.[52] Under the Act, the parties must exhaust such procedures before they may elicit federal court review.[53]

Labor experts concur in the congressional appraisal that grievance procedures contained in CBAs offer a superior alternative to court proceedings.[54] This stems, in part, from the procedures' flexibility and low cost.[55] Grievance procedures also allow parties to resolve disputes more quickly.[56] Moreover, such grievance mechanisms greatly reduce laborers' need to seek resolution of their disputes through more drastic and disruptive measures,[57] such as strikes. The use of grievance procedures, therefore, avoids industrial strife by establishing a labor-management quid pro quo: the employer consents to adopt grievance mechanisms in return for labor's inclusion of a "no strike" clause in the CBA.[58] Because

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and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

Id.

50. *See id.*; *see also* 29 U.S.C. § 171 (1982).

51. Most CBAs create a three- to five-step process in which exchanges take place between increasingly higher-level labor and management representatives. The initial stages are informal, and arbitration is invoked only as a last resort. Gould, *supra* note 25, at 137-38; *see* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 557 n.2 (1976) (five-step process); *Vaca*, 386 U.S. 171, 175 n.3. (1967) (same); Robins, *Unfair Dismissal: Emerging Issues in the Use of Arbitration As a Dispute Resolution Alternative for the Non-union Workforce*, 12 Fordham Urb. L.J. 437, 447 n.43 (1984) ("96% of all collective bargaining agreements contain procedures for the settlement of disputes through mutual discussion and arbitration"); Tidwell, *supra* note 3, at 384.

52. *See supra* note 51; *see also Vaca*, 386 U.S. at 191 (process allows for early termination of frivolous grievances).

53. 29 U.S.C. § 173(d) (1982). *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 566 (1960). "When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of collective bargaining agreements, it usurps a function which under that regime is entrusted to the arbitration tribunal." *Id.* at 569. "The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance [as can an arbitrator], because he cannot be similarly informed." United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582 (1960) (companion case).

54. *See* Edwards, *The Duty of Fair Representation: A View from the Bench*, in The Changing Law of Fair Representation 93, 95 (J. McKelvey ed. 1985); Gould, *supra* note 25, at 137-40; Staudohar, *Exhaustion of Remedies in Private Industry Grievance Procedures*, 7 Emp. Rel. L.J. 454, 455 (1982).

55. *See* Edwards, *supra* note 54, at 95.

56. *See id.*; Gould, *supra* note 25, at 139; Staudohar, *supra* note 54, at 455.

57. *See* Bowen v. United States Postal Serv., 459 U.S. 212, 225 (1983) (use of grievance procedure avoids industrial strife); J. London, *The Scab*, in Revolution: Stories and Essays 49 (compiled by R. Barltrop 1979) (strikes result in employer's use of scabs, to which striking employees would naturally respond with violence).

58. *See* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-05 (1962) (when

labor sacrifices its right to strike in exchange for this mechanism, the grievance procedure must be enforced.[59] Consistent with this congressional scheme, the Supreme Court has held that an employee must at least attempt to use the grievance procedure, thus allowing the union an opportunity to act on his behalf,[60] before personally suing the employer in federal court.[61]

With this brief introduction to a union's duty of fair representation and its role in hybrid actions, one may better understand that an employee should recover attorney's fees from his union even when his employer has not violated the CBA.

II. ATTORNEY'S FEES SHOULD BE RECOVERABLE EVEN WHEN THE EMPLOYER HAS NOT VIOLATED THE COLLECTIVE BARGAINING AGREEMENT

In a hybrid action, an employee must prove that the union's breach of its duty of fair representation has frustrated his right to recover on a valid claim against the employer before a court can award back pay.[62] The question then arises whether a court may award attorney's fees when the court finds that the union has breached its duty but that the employer did not violate the CBA. Several federal courts of appeals have held that fairness requires such a recovery.[63]

Courts that allow recovery of attorney's fees when the union has

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CBA contains grievance procedure, no-strike clause is implied); Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 455 (1957) ("the entire tenor of the [Labor Management Relations Act's] history indicates that the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement").

59. *See Textile Workers Union*, 353 U.S. at 454, (CBA clauses forcing employers to arbitrate enforceable in federal courts).

60. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 652-53 (1965).

61. This requirement is rooted, in part, in the rationale behind the existence of unions:

> [T]hey [are] organized out of the necessities of the situation; that a single employee [is] helpless in dealing with an employer; that he [is] dependent ordinarily on his daily wage for the maintenance of himself and family; that if the employer refuse[s] to pay him the wages he [thinks] fair, he [is] nevertheless unable to leave the employ and resist arbitrary and unfair treatment; that union [is] essential to give laborers opportunity to deal on an equality with their employer.

NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937). Similarly, Professor Oberer notes that, by definition, "[a] free society is one the rules of which allow the collectivizing of individual weakness into organized strength for the sake of countering a power center of otherwise incontestable proportions." Oberer, *The Regulation of Union Economic Power*, 1986 Utah L. Rev. 267, 268-69.

62. *See* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 73 n.2 (1981); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976); San Francisco Web Pressmen and Platemakers' Union No.4 v. NLRB, 794 F.2d 420, 424-25 (9th Cir. 1986).

63. *See Web Pressmen*, 794 F.2d at 423; Dutrisac v. Caterpillar Tractor Co., 749 F.2d 1270, 1275-76 (9th Cir. 1983); Del Casal v. Eastern Airlines, 634 F.2d 295, 301 (5th Cir. Unit B Jan.), *cert. denied*, 454 U.S. 892 (1981); Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61, 620 F.2d 439, 444 (4th Cir. 1980).

breached its duty of fair representation but the employer has not violated the CBA conclude that union breaches cause employees to suffer damages whether or not the employer violated the CBA.[64] They contend that because the union wrongfully refused to present the grievance, or did so in a wrongful manner, the union denied the employee the opportunity to have his grievance properly heard, forcing the employee to seek substitute representation.[65] These courts often rely upon the Supreme Court's decision in *Vaca v. Sipes*.[66] In *Vaca*, a hybrid action, the Court never reached the attorney's fees issue because the employee failed to prove a breach by the union.[67] The Court nevertheless indicated that had the employee prevailed in his wrongful discharge claim against the employer, the liability for damages should have been shared by the employer and the union according to the injury each caused.[68] Courts that allow the recovery of fees find that attorney's fees accurately reflect the damage to employees caused by negligent or otherwise wrongful union conduct.[69]

The same rationale that justifies recovery of attorney's fees where the employer has violated the CBA and the union has breached its duty also justifies recovery of attorney's fees in the absence of a violation of the CBA by the employer.[70] Whenever the possibility reasonably exists that

64. In *Dutrisac*, a union's failure to file a timely request for arbitration precluded an employee's grievance against his employer. 749 F.2d at 1274. In the subsequent hybrid action, the Court of Appeals for the Ninth Circuit held that even though the employer had not violated the CBA, the union was liable for the attorney's fees that the employee incurred in his nonfrivolous suit against the employer. *Id.* at 1275-76. The court stressed that it did not award attorney's fees per se, but rather awarded attorney's fees as damages suffered by the employee as a result of the union's breach. *Id.* at 1276.

In San Francisco Web Pressmen and Platemakers' Union No.4 v. NLRB, 794 F.2d 420 (9th Cir. 1986), the court enforced a NLRB order that permitted an employee to hire private counsel at the union's expense for the remainder of his grievance procedure. *See id.* at 423. Following the lead of the *Dutrisac* decision, the court awarded attorney's fees but refused to award back pay because the employer had not violated the CBA. *Id.* at 423-24.

65. *See Web Pressman*, 794 F.2d at 423; *Dutrisac*, 749 F.2d at 1275-76; Del Casal v. Eastern Airlines, 634 F.2d 295, 301 (5th Cir. Unit B Jan.), *cert. denied*, 454 U.S. 892 (1981); Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61, 620 F.2d 439, 444 (4th Cir. 1980).

66. 386 U.S. 171 (1967).

67. *See id.* at 194-95.

68. *See id.* at 197.

69. *See* Del Casal v. Eastern Airlines, 634 F.2d 295, 301-02 (5th Cir. Unit B Jan.), *cert. denied*, 454 U.S. 892 (1981); Self v. Drivers, Chauffeurs, Warehousemen & Helpers Local Union No. 61, 620 F.2d 439, 444 (4th Cir. 1980).

70. Courts that allow recovery of attorney's fees when the employer has violated the CBA rely on Supreme Court dictum in one of two cases. *See* Zuniga v. United Can Co., 812 F.2d 443, 455 (9th Cir. 1987) (court adopted Supreme Court's reasoning in International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42 (1979), which established that unfair representation suits were designed to compensate employees for injuries caused by violation of their rights by unions); Seymour v. Olin Corp., 666 F.2d 202, 214 (5th Cir. Unit B 1982) (court allowed recovery of attorney's fees from union, recognizing that award of attorney's fees and costs against union was a fair measure of the "difficulty and expense of collecting" from employer (quoting Czosek v. O'Mara, 397 U.S. 25, 29

the employer violated the CBA, the union has an obligation to fairly represent the employee.[71] The absence of a CBA violation, therefore, does not bear on the employee's right to recover attorney's fees.[72]

Although in hybrid actions the claim against the employer and the claim against the union are closely related, the two claims may be separated for purposes of apportioning damages liability.[73] The Court in *Vaca* concluded that a court may find that the union breached its duty and caused damage to the employee without also finding that the employer violated the CBA.[74] It follows that when such circumstances exist, the union should be liable for any damage it causes employees. Courts have found that employees suffer loss in the form of fees paid to such privately-retained attorneys because the wrongful conduct of the unions effectively forces employees to retain private counsel.[75]

Courts that deny any recovery by an employee unless the employee proves both that the union breached its duty and that the employer violated the CBA reason that "the two claims are inextricably interdependent"[76] with respect to damages recoverable by employees.[77] In support of their position, these courts place mistaken primary reliance[78] on

(1970))); Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 298 (1st Cir. 1978) (also relying on *Czosek*); Scott v. Local Union 377, Int'l Bhd. of Teamsters, 548 F.2d 1244, 1246 (6th Cir.) (per curiam) (same), *cert. denied*, 431 U.S. 968 (1977).

71. Though the employee does not have an absolute right to have his grievance pursued, the union may not refuse representation discriminatorily, arbitrarily, or in bad faith. *See* Vaca v. Sipes, 386 U.S. 171, 190-91 (1967).

72. *See* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 73 (1981) (Stevens, J., concurring in part, dissenting in part); *supra* note 65.

73. *See Mitchell*, 451 U.S. at 73.

> [T]o prevail against the union, the employee must prove that the union breached its duty of fair representation and, if he wishes to recover loss-of-employment damages for which the union is responsible, that the employer breached the agreement. However, despite this close relationship, the two claims are not inseparable.

Id. at n.2 (citations omitted). "The determination whether the employer breached the agreement may be highly relevant to the amount of damages caused by the union's alleged breach of duty, but it is not necessarily controlling with respect to the threshold question whether there was any breach of duty by the union at all." *Id.* at n.4.

74. *See* Vaca v. Sipes, 386 U.S. 171, 196 (1967). In dictum, the Court remarked that one possible remedy for the union's breach was to order the union to arbitrate the employee's grievance. *Id.* Thus, the Court could determine that the union breached without first determining that the CBA had been violated.

75. *See supra* note 65.

76. United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 66-67 (1981) (Stewart, J., concurring).

77. *See* Bagsby v. Lewis Bros., Inc., 820 F.2d 799, 801 (6th Cir. 1987); Wood v. International Bhd. of Teamsters, 807 F.2d 493, 502 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 3232 (1987); Foster v. United Steelworkers, 752 F.2d 1533, 1534 (11th Cir. 1985).

78. *See Bagsby*, 820 F.2d at 801 (relying on Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976)); *Wood*, 807 F.2d at 502 (relying on *Hines*, 424 U.S. at 570-71, and United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 62 (1981)); *Foster*, 752 F.2d at 1534 (relying on DelCostello v. International Bhd. of Teamsters, 462 U.S. 151, 164-65 (1983)).

Supreme Court dictum in *Hines v. Anchor Motor Freight, Inc.*[79] and its progeny.[80] In *Hines*, the Court stated that to prevail under the CBA against either the employer or the union, the employee "must not only show that [the] discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the [u]nion."[81] These courts extend this language to bar recovery of attorney's fees as well.[82]

The Supreme Court in *Hines*, however, concerned itself only with

79. 424 U.S. 554, 570-71 (1976).

80. Subsequent to the *Hines* decision, the Court considered two hybrid actions determining the correct statute of limitations to be applied to such actions. In United Parcel Service, Inc. v. Mitchell, 451 U.S. 56 (1981), Justice Stewart, concurring, repeated the *Hines* quote, prefacing it with the statement that the claims against the employer and the union are "inextricably interdependent." *Id.* at 66-67. In DelCostello v. International Brotherhood of Teamsters, 462 U.S. 151 (1983), the Court quoted *Mitchell*'s preface and the *Hines* language and concluded that "[t]he employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both." *DelCostello*, 462 U.S. at 164-65.

Although courts that deny recovery of attorney's fees rely on these cases, their holdings do not control because they relate only to the proper statute of limitations in hybrid actions, not to whether attorney's fees are recoverable in the absence of a CBA violation. *See id.* at 154-55; *Mitchell*, 451 U.S. at 58.

81. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976).

82. *See* Bagsby v. Lewis Bros., Inc., 820 F.2d 799, 801 (6th Cir. 1987); Wood v. International Bhd. of Teamsters, 807 F.2d 493, 503 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 3232 (1987); *see also* Foster v. United Steelworkers, 752 F.2d 1533, 1534 (11th Cir. 1985) (following DelCostello v. International Bhd. of Teamsters, 462 U.S. 151 (1983), court held it could not enforce the order against union to pay employee's attorney's fees if lower court determined the employer had not violated CBA).

A trio of cases from the Court of Appeals for the Sixth Circuit illustrates the error involved in such an extension. In Wood v. International Brotherhood of Teamsters, 807 F.2d 493, 503 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 3232 (1987), the court declined to follow the holdings of other courts of appeals allowing recovery, reasoning that because the union is intended to serve as the exclusive agent of the employees, the "employees should be discouraged from pursuing their claims independently." *Id.* at 503. In addition to its reliance on *Hines* and *Mitchell*, the court also relied on Badon v. General Motors Corp., 679 F.2d 93 (6th Cir. 1982), which held that it was against " 'sound judicial policy to encourage actions to recover only the costs of litigation where no underlying right can any longer be vindicated in the action.' " *Wood*, 807 F.2d at 503 (quoting *Badon*, 679 F.2d at 98).

This reliance on the *Badon* decision is misguided. The *Badon* court inserted the language quoted by the *Wood* court as an argument in favor of the application of the same statute of limitations to duty of fair representation claims as to CBA claims. *See Badon*, 679 F.2d at 98. The *Badon* court reasoned that if duty of fair representation claims have a longer statute of limitations than CBA claims, it would be possible for an employee to sue his union after his suit against his employer was time-barred. *See id.* Unlike typical hybrid actions, in which the employees with non-frivolous claims reasonably can expect to recover, such time-barred suits should be discouraged because the employee knows from the start of the action that he cannot recover from his employer. In hybrid actions, the employee has every reason to believe that he will prevail against both defendants.

In Bagsby v. Lewis Bros., Inc., 820 F.2d 799 (6th Cir. 1987), the court held that *Hines*, not the American rule, prevented the award of attorney's fees from the union unless the employer has violated the CBA. *See Bagsby*, 820 F.2d at 801 & n.3; *see also supra* note 19.

damages recoverable under the CBA.[83] First, the Supreme Court merely reemphasized the duty of fair representation's role as a threshold question.[84] Further, the Court recognized the self-evident; even if the employee has met this threshold, the employee could only collect damages for a CBA violation if the employer violated the CBA.[85] Reliance on the *Hines* language by courts opposing attorney's fees recovery from unions, therefore, is misplaced. Because the present controversy concerns recovery for damages caused by the union's breach of its duty of fair representation, and not damages recoverable under the CBA, *Hines* does not apply.

In addition to the separability of claims argument, a comparison of hybrid actions to ordinary legal malpractice actions also reveals that a union's breach of its duty results in damage to the employee even without a CBA violation by his employer. In legal malpractice actions, a plaintiff's cause of action depends upon his demonstration that, but for the attorney's negligence, he would have received a more favorable result in the litigation in which he was represented by the attorney.[86] For example, if the plaintiff proves that the attorney's negligence prevented recovery, the plaintiff's damages would then consist of the value of that lost claim.[87]

In both legal malpractice claims and duty of fair representation claims brought in hybrid actions, courts award damages caused by a representative's wrongful conduct.[88] In attorney malpractice actions, damages consist of the value of the lost claim.[89] In hybrid actions, however, the employee has not lost his claim against the employer. The union's breach, rather than extinguishing his claim, has only made it more difficult to vindicate. The employee must engage legal counsel to fulfill the union's breached obligation.[90] Thus, when the employer has violated the CBA, the union is liable for both its portion of back pay and the attorney's fees incurred by the employee in suing the employer.[91] When the employer has not violated the CBA, so that back pay is not available, the employee still should be entitled to recover attorney's fees incurred as a

83. *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976).

84. *See id.*

85. *See id.*

86. *See* R. Mallen & V. Levit, Legal Malpractice § 551, at 675-76 (2d ed. 1981).

87. *See id.* § 552, at 676-77, § 557, at 690-92.

88. The union representative is not a lawyer and cannot be expected to meet the same standards of conduct. *See* Early v. Eastern Transfer, 699 F.2d 552, 557 (1st Cir.), *cert. denied*, 464 U.S. 824 (1983). However, once the respective breaches have been established (that the union breached its duty and that the attorney committed malpractice), the primary differences cease to exist and the two actions are analogous. *See* United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 74 (1981) (Stevens, J., concurring in part, dissenting in part) (statute of limitations for legal malpractice actions should be applied to employee suits against union for breach of its duty of fair representation).

89. *See* Stewart v. Hall, 770 F.2d 1267, 1269 (4th Cir. 1985); Williams v. Bashman, 457 F. Supp. 322, 326 (E.D. Pa. 1978).

90. *See supra* note 65.

91. *See supra* notes 17-18.

result of the union's wrongful conduct.[92] Unlike legal malpractice claims, the employees in hybrid actions incur additional attorney's fees precisely because of the hybrid nature of the action. The union's wrongdoing forces the employee to obtain private counsel in an attempt to resolve his CBA claim against the employer. These attorney's fees should be recoverable without regard to whether the employer wrongfully discharged the employee.

Opponents may contend that allowing recovery of attorney's fees absent a violation of the CBA will undermine the union's discretion to sift out frivolous grievances. Opponents may fear that unions defensively will pursue *all* grievances to avoid the costly possibility of later challenges, overwhelming the grievance process.[93] Admittedly, union discretion serves an essential role in the proper functioning of the collective bargaining system.[94] Unions must have the ability to promote settlement and avoid processing frivolous claims. This argument, however, merely provides a rationale for a lower standard of care for union conduct.

Adoption of a lower standard of care simultaneously satisfies both union and employee interests. By requiring a union to have acted with gross negligence or wrongful discrimination before finding a breach of the duty of fair representation,[95] courts can ensure that union discretion remains intact. If the union truly believes that an employee's grievance lacks merit, its failure to pursue the employee's claim will not constitute a breach of its duty.[96] A breach occurs when the union has acted discriminatorily and has failed to exercise any discretion in evaluating the claim's merit.[97] In such a case, allowing recovery of attorney's fees will encourage unions to exercise discretion—not prevent it. Allowing the recovery of fees absent a CBA violation, therefore, will act as a mechanism to keep unions honest. Such awards will ensure that unions faithfully perform their legal obligations in the administration of grievance processes.

Opponents further may suggest that holding unions liable for attorney's fees incurred by employees when the union breaches its duty of fair representation but the employer did not violate the CBA will force a change in unions' long-standing tradition of popularity-contest elec-

92. *See supra* note 65.

93. *See* Kopp, *The Duty of Fair Representation Revisited*, 5 Emp. Rel L.J. 3, 12 (1979); Rabin, *The Duty of Fair Representation in Arbitration*, in The Duty of Fair Representation 84, 85-86 (J. McKelvey ed. 1977); Waldman, *A Union Advocate's View*, in The Changing Law of Fair Representation 109, 111-12 (J. McKelvey ed. 1985).

94. *See* International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 51 (1979); Vaca v. Sipes, 386 U.S. 171, 191 (1967).

95. *See supra* note 36.

96. When the union believes in good faith that a grievance lacks merit, the union has a duty *not* to pursue the grievance. *See* Sanders v. Youthcraft Coats and Suits, Inc., 700 F.2d 1226, 1229 (8th Cir. 1983); Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970); Faust v. RCA Corp., 657 F. Supp. 614, 621 (M.D. Pa. 1986). *See also supra* notes 29-36 and accompanying text.

97. *See supra* note 96.

tions.[98] Because the position of shopsteward would require more expertise,[99] union membership would be forced to elect representatives who would be less likely to process claims negligently or in bad faith.[100] Admittedly, aggrieved employees are more likely to approach a steward whom they like. An emphasis on expertise, as well as popularity, however, would not ruin union democracy. In addition to popularity and membership support the steward should possess sufficient expertise to handle grievances, once approached. When the union's gross negligence or discriminatory tactics preclude a wrongfully discharged employee's reinstatement, that employee takes little solace in his steward's popularity and accessability. Rather, the election of competent representation would invite union members to become more integrally involved in the administration of their rights under a CBA.[101]

While allowing recovery might weaken unions to a certain extent by depleting funds, the financial strength of unions is not the paramount goal of labor legislation. Union honesty and the effectiveness of unions as representative bodies also occupy positions of vital importance.[102] Unions have an obligation to expend union funds, whether in properly processing a grievance claim or in paying damages for breaching their duty to represent an employee fairly.

The justifications favoring recovery of attorney's fees form a weighty, persuasive argument. They demonstrate that union breaches cause employees to suffer damages regardless of CBA violations by the employer.

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98. Vladeck, *The Conflict Between the Duty of Fair Representation and the Limitations on Union Self-Government*, in The Duty of Fair Representation 44, 45 (J. McKelvey ed. 1977).

Courts repeatedly have protected an employee's right to hold union office without having to meet unreasonable qualifications. *See, e.g.*, Local 3489, United Steelworkers v. Usery, 429 U.S. 305, 312-13 (1977) (striking down candidacy requirement that member have attended at least one-half of local meetings for the three years prior to election); Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492, 500-05 (1968) (striking down candidacy requirement that member hold or have previously held some elective office); Donovan v. Local Union No. 120, 683 F.2d 1095, 1102-04 (7th Cir. 1982) (striking down candidacy requirement that member be "competent to perform the duties of the office for which he is a candidate").

These courts have concluded that "open democratic elections, unfettered by arbitrary exclusions" offer the best means to the election of knowledgeable and dedicated leaders. *Usery*, 429 U.S. at 312. *See Wirtz*, 391 U.S. at 496; *Donovan*, 683 F.2d at 1102. Members therefore remain free to elect inexperienced, unqualified candidates. *See also* Waldman, *supra* note 93, at 111-12 (pointing out inconsistency between courts imposing higher standards in duty of fair representation cases and courts not allowing union election requirements that will ensure the election of representatives capable of meeting these higher standards).

99. *See* Vladeck, *supra* note 98, at 45.

100. *See* Vladeck, *supra* note 98, at 44-46 (expressing concern whether any union member possesses the ability to interpret CBAs or level of literacy needed to present grievances adequately).

101. *See* Tobias, *supra* note 25, at 510-11 (citing employees' recent awareness and protection of their rights provided by CBA).

102. *See* Wirtz v. Hotel, Motel & Club Employees Union, Local 6, 391 U.S. 492, 497 (1968).

The arguments offered against recovery fail to convince because, in every case, either an effective counterargument or more reasonable compromise exists.

CONCLUSION

Federal labor policy acknowledges that, under the collective bargaining system, some individuals must make sacrifices so that the whole may gain.[103] This policy, however, does not require an employee to withstand wrongful conduct by his union without compensation for the injury such conduct causes. When a union breaches its duty of fair representation, the group does not gain by the harm suffered by the individual employee. Although denial of recovery of attorney's fees absent an employer breach of the CBA will leave more money in the union's treasury and, therefore, give the union a greater ability to represent the workers, the union will have exercised this ability wrongfully and to the detriment of all. In the process, the union has undermined the collective bargaining system and has become a barrier to, rather than a conduit for, the vindication of worker's rights. All employees will view the union's conduct with resignation, knowing they cannot rely on their union to represent them fairly.

For the reasons given, courts should allow the recovery of attorney's fees for a union's breach of its duty of fair representation in the absence of an employer's CBA violation. The award of such fees as damages will properly compensate employees and promote fair collective bargaining.

Joseph J. Vitale

103. *See* J.I. Case Co. v. NLRB, 321 U.S. 332, 339 (1944). In *J.I. Case*, the Court found an individual's employment contract subordinate to the collective bargaining unit's CBA and incapable of waiving any benefits secured by the CBA. Under a collective bargaining system, any advantage that could have been secured by an individual instead will remain with the union as a contribution to the collective result. *Id.*