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Apportionment of Damages in Section 301 Duty of Fair Representation Actions: The Impact of Bowen v. United States Postal Service

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APPORTIONMENT OF DAMAGES IN SECTION 301 DUTY OF FAIR REPRESENTATION ACTIONS: THE IMPACT OF *BOWEN V. UNITED STATES POSTAL SERVICE*

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In *Bowen v. United States Postal Service,*[1] the United States Supreme Court established a new standard for apportioning damages in cases in which an aggrieved employee sues the employer for breach of a collective bargaining agreement and the union for breach of its duty of fair representation. The Court held that when an employee has been wrongfully discharged, his union may be held primarily liable for the increase in the employee's damages caused by the union's breach of its duty of fair representation. This holding departs significantly from established precedent and dramatically increases the union's potential liability in such cases.

This article will analyze the impact of *Bowen* on the traditional collective bargaining relationship and on national labor policy. The first section outlines the development of the union's duty of fair representation and the right of action under section 301(a) of the Labor Management Relations Act of 1947.[2] The second section examines the judicial precedent, established prior to *Bowen,* regarding the apportionment of damages between the union and the employer in section 301 suits. The *Bowen* opinion is discussed in the third section. The final section analyzes the scope of *Bowen,* its relationship to prior precedent, and its impact on the traditional collective bargaining

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1. 103 S. Ct. 588 (1983). For commentary regarding *Bowen,* see B. FELDACKER, LABOR GUIDE TO LABOR LAW 388-89 (2d ed. 1983); Allred, *The* Bowen *Decision: Mandate for Re-examination of Apportionment of Damages in Fair Representation Cases,* 34 LAB. L.J. 408 (1983); VanderVelde, *A Fair Process Model for the Union's Fair Representation Duty,* 67 MINN. L. REV. 1079, 1161 n.232, 233 (1983); A. Hajjar, remarks at the American Bar Association's Section of Labor and Employment Law (Aug. 4, 1983), *reprinted in* 113 LAB. REL. REP. 316 (BNA) (Aug. 15, 1983); W. Isaacson, remarks at the American Arbitration Association's Arbitration Day (May 18, 1983), *reprinted in* 1983 D. LAB. REP. (BNA) No. 100, D-1; D. Wollett, remarks at the American Bar Association's Section of Labor and Employment Law (Aug. 1, 1983), *reprinted in* 1983 D. LAB. REP. (BNA) No. 151, D-1.

2. Section 301(a) states:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, 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.

29 U.S.C. § 301 (1976).

relationship. The article concludes that *Bowen* fails to serve the traditional interests and goals of the national labor policy.

I. DEVELOPMENT OF THE DUTY OF FAIR REPRESENTATION AND THE SECTION 301 CAUSE OF ACTION

A. Duty of Fair Representation

The duty of fair representation is a judicially created doctrine derived from the union's statutory right to act as the exclusive representative of all the employees in a designated bargaining unit.[3] Section 9(a) of the National Labor Relations Act (NLRA)[4] provides that a union elected by a majority of the employees in a bargaining unit for purposes of collective bargaining, shall be the exclusive representative of those employees in negotiating the terms of a collective bargaining agreement with the employer.[5] In such an agreement, the union may establish itself as the employees' exclusive representative in the contractual grievance procedure, which provides individual employees with remedies for the employer's breach of the collective bargaining agreement.[6]

This exclusivity principle is a critical mechanism for accomplishing the objectives that Congress sought to achieve by enacting the NLRA and promoting collective bargaining. The Act was designed to ensure employee self-determination, to protect employees' rights, and to promote industrial peace and stability[7] by advancing democratic ideals in the area of labor rela-

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3. Note, *The Duty of Fair Representation in Grievance Administration: A Specific Test Modeled on Judge Bazelon's Dissent in* United States v. DeCoster, 39 WASH. & LEE L. REV. 185 (1982) [hereinafter cited as Note, *Duty of Fair Representation in Grievance Administration*].

4. Section 9(a) provides:

> 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 a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided,* That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of the collective-bargaining contract or agreement then in effect: *Provided further,* That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 159(a) (1976).

5. *See* Note, *Duty of Fair Representation in Grievance Administration, supra* note 3, at 185-86.

6. *Id.* at 186 n.8.

7. Section 1 of the NLRA discusses how the economy was hindered before the promulgation of the Act:

> The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining led to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of

tions.[8] Congress believed that viable collective bargaining could be achieved only by giving one representative the exclusive right to bargain on behalf of all the employees within a given bargaining unit.[9] As a result of this exclusive representation requirement, the union has a duty to represent fairly all of the employees in the bargaining unit.[10] This duty applies to collective bargaining with the employer[11] and to enforcement of the resulting agreement.[12]

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commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce or the prices of such materials or good in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce.

29 U.S.C. § 151 (1976).

8. The NLRA was created under the presumption that democracy is an indivisible system. By viewing the employer-employee relationship as one of the most common and important spheres of economic activity, Congress sought to extend democratic methods of decision making into this sphere in order to assure the survival of our economic and political systems.

9. The policy reasons behind the exclusive bargaining agent are expressed in the legislative history of the NLRA and in several judicial interpretations of the Act. One of the major policy reasons reiterated in the case law is that a single representative is necessary to adequately protect workers' interests in negotiations with the employer. This policy is based upon the premise that the strength and bargaining power of the group as a whole are greater than the sum total of each of its individual members. For instance, in J.I. Case v. NLRB, 321 U.S. 332 (1944), the Court noted that "[t]he very purpose of providing by statute for the collective agreement is to supersede the terms of separate agreements of employees with terms which reflect the strength and bargaining power and serve the welfare of the group." *Id.* at 338. The Court reasoned that by allowing individual bargaining, an employer is better able to retard the advances in wages and working conditions that come more readily from a united group effort. *Id.* An exclusive bargaining agent thus increases the employees' bargaining power and thereby provides protection for the individual worker's interests.

A second policy reason underlying the exclusivity requirement is that it affords equal treatment to each member of the bargaining unit. The legislative history of § 9(a) stresses that the primary purpose of the exclusivity principle is to preserve an orderly procedure for collective bargaining by precluding an employer from bargaining with splinter groups. The House Report summarizes this purpose by stating:

> There cannot be two or more basic agreements applicable to workers in given unit; this is virtually conceded on all sides. If the employer should fail to give equally advantageous terms to nonmembers of the labor organization negotiating the agreement, there would immediately result a marked increase in the membership of that labor organization. On the other hand, if better terms were given to nonmembers, this would give rise to bitterness and strife, and a wholly unworkable arrangement whereby men performing comparable duties were paid according to different scales of wages and hours. Clearly then, there must be one basic scale, and it must apply to all.

H.R. REP. No. 1147, 74th Cong., 1st Sess. (1935), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE NATIONAL LABOR RELATIONS ACT, 1935, at 3069 (1949). An exclusive bargaining agent prevents this kind of strife and instability by taking a single, unified position that protects the interests of the workers as a whole in its relationship with the employer.

10. Vaca v. Sipes, 386 U.S. 171, 177 (1967); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 202-03 (1944).

11. *Vaca*, 386 U.S. at 177; Syres v. Oil Workers Local 23, 350 U.S. 892 (1962); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953).

12. *Vaca*, 386 U.S. at 177; Humphrey v. Moore, 375 U.S. 335 (1964). For a discus-

In *Vaca v. Sipes,*[13] the Supreme Court established the current standard for evaluating a union's representation of its bargaining units. Under this standard, a union breaches its duty of fair representation if its "conduct toward a member of the collective bargaining unit is arbitrary, discriminatory or in bad faith."[14] The *Vaca* Court stated that a union may neither arbitrarily ignore an employee's meritorious grievance nor process it in a perfunctory manner.[15] Finally, the Court stressed that the duty of fair representation stands "as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law."[16]

B. *The Section 301 Cause of Action*

In *Smith v. Evening News Association,*[17] the Supreme Court held that an employee has an individual right to sue an employer for breach of a collective bargaining agreement under section 301(a)[18] of the Labor Management Relations Act of 1947. This right is limited by the requirement that before proceeding with a section 301 suit, an employee must attempt to exhaust the grievance and arbitration procedures provided in the collective bargaining agreement.[19] The employee must also attempt to exhaust her internal union remedies prior to suing the union, for breach of its duty of fair representation, and the employer, for breach of the collective bargaining agreement.[20]

These exhaustion requirements are not absolute. In *Clayton v. Automobile Workers,*[21] the Supreme Court established that an employee is not required

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sion of the distinction between a union's duty in grievance administration and its duty in collective bargaining, see generally Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling,* 1979 U. ILL. L.F. 35 (1979); Levine & Hollander, *Union's Duty of Fair Representation in Contract Administration,* 7 EMP. REL. L.J. 193 (1981).

13. 386 U.S. 171 (1967).

14. *Id.* at 190. For extensive commentary on the proper standard for evaluating the union's conduct, see generally Cheit, *Competing Models of Fair Representation: The Perfunctory Processing Cases,* 24 B.C.L. REV. 1 (1982); Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CALIF. L. REV. 663 (1973); Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee,* 8 SUFFOLK U.L. REV. 1096 (1974); Steinhauer, IBEW v. Foust: *A Hint of Negligence in the Duty of Fair Representation,* 32 HASTINGS L.J. 1041 (1981); VanderVelde, *supra* note 1; Note, *The Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent Arbitrary or Perfunctory Grievance Administration,* 46 MO. L. REV. 142 (1981); Note, *Determining Standards for a Union's Duty of Fair Representation: The Case for Ordinary Negligence,* 65 CORNELL L. REV. 34 (1980).

15. 386 U.S. at 191.

16. *Id.* at 182.

17. 371 U.S. 195 (1962).

18. *See supra* note 2 for text of § 301(a).

19. Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).

20. Clayton v. Automobile Workers, 451 U.S. 679 (1981).

21. 451 U.S. 679, 685 (1981). For a discussion of this case see Note, Clayton v. UAW: *A Temporary Reprieve from the Exhaustion of Internal Union Appeals in Duty of Fair Representation Actions,* 31 CATH. U.L. REV. 311 (1982).

to exhaust her internal union remedies when such procedures would be futile or would provide an inadequate remedy. Similarly, in *Vaca,* the Court held that an employee is not required to exhaust her contractual remedies when her employer repudiates the exclusive contractual procedure or when the union breaches its duty of fair representation.[22]

When the contractual exhaustion bar is removed, however, an employee may bring suit against both his union and employer, notwithstanding the finality of the contractual remedial procedure.[23] This action is characterized as a "hybrid § 301 and breach of duty suit."[24] Finally, such a suit comprises two causes of action. The suit against the employer is founded on section 301 because the employee is alleging a breach of the collective bargaining agreement.[25] The action against the union is one for breach of the duty of fair representation, a judicially developed concept implied from the NLRA.[26]

In *Del Costello v. Teamsters,*[27] the Supreme Court characterized these two claims as "inextricably interdependent."[28] The Court held that to prevail against either his union or employer, the employee must prove that the union breached its duty and that the employer violated the collective bargaining agreement.[29] Therefore, before an employee may even litigate his section 301 claim against his employer, he must prove that his union breached its duty of fair representation. If the court decides that the union has not breached its duty, the suit is properly dismissed because the employer has no liability unless the union violated its duty of fair representation.[30] When the union is found to have breached its duty, the court will decide whether the employer breached the collective bargaining agreement.[31] Consequently, even though the union violated its duty, the employee may lose his suit if the court finds that the employer did not breach the contract.[32]

The primary remedies[33] available to an employee in a hybrid section 301

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22. 386 U.S. at 185; *see* Del Costello v. International Bhd. of Teamsters, 103 S. Ct. 2281, 2290 (1983).

23. Del Costello v. International Bhd. of Teamsters, 103 S. Ct. 2281, 2290 (1983).

24. United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 66 (1981).

25. Del Costello v. International Bhd. of Teamsters, 103 S. Ct. 2281, 2290 (1983).

26. *Id.*

27. 103 S. Ct. 2281 (1983).

28. *Id.* at 2290 (citing United Parcel Serv., Inc. v. Mitchell, 451 U.S. 56, 66-67 (Stewart, J., concurring)).

29. *Id.*

30. B. FELDACKER, *supra* note 1, at 386.

31. *Id.*

32. *Id.*

33. Coverage of the duty of fair representation in the context of unfair labor practices is beyond the scope of this article. In general, a union's breach of its duty of fair representation may violate §§ 8(b)(1)(A) and 8(b)(2) of the NLRA. The NLRB has reasoned that a union's breach of its obligation under § 9 of the Act to represent all of the employees fairly results in an infringement of the employee's § 7 right and therefore constitutes a § 8(b)(1)(A) violation. Miranda Fuel Co., 140 N.L.R.B. 181 (1962), *rev'd,* 326 F.2d 172 (2d Cir. 1963). A union's breach of its duty of fair representation may also violate § 8(b)(2) because arbitrary union conduct may adversely affect an employee and tend to encourage or discourage union

suit[34] are compensatory damages in the form of back pay,[35] attorney fees[36] and litigation costs, and reinstatement or prospective future losses if reinstate-

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membership. *Id. See generally* AMERICAN BAR ASSOCIATION SECTION OF LABOR AND EMPLOYMENT LAW, THE DEVELOPING LABOR LAW 1308-11 (2d ed. 1983) (discussion of Board rulings that a union's breach of its duty of fair representation violates §§ 8(b)(1)(A) and 8(b)(2)) [hereinafter cited as THE DEVELOPING LABOR LAW]. In cases in which the union and the employer are guilty of unfair labor practices involving a breach of duty by the union, the Board has held the union and employer jointly and severally liable for any lost earnings caused by their wrongful conduct. *Id.* at 1344; *see, e.g.*, Kaiser Co., 259 N.L.R.B. 1 (1981) (the union was held responsible for the grievant's back pay until the date the union obtained consideration of his grievance by the prior position, or the date he acquired substantially equivalent employment elsewhere); Pacific Coast Utils. Serv., Inc., 238 N.L.R.B. 599 (1978), *enforced*, 638 F.2d 73 (9th Cir. 1980). *See generally* Schwartz, *The National Labor Relations Board and the Duty of Fair Representation*, 34 LAB. L.J. 781 (1983).

34. *See* THE DEVELOPING LABOR LAW, *supra* note 33, at 1347-58; Note, *Duty of Fair Representation in Grievance Administration*, *supra* note 3, at 188 n.12; Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays For the Union's Breach*, 1981 WIS. L. REV. 155, 162-63 [hereinafter cited as Comment, *Apportionment of Damages*].

35. THE DEVELOPING LABOR LAW, *supra* note 33, at 1348 n.320 ("Back pay is measured as the difference between what the plaintiff actually earned, or with the exercise of due diligence could have earned, and what he would have earned but for the breach.")

36. Attorney fees are routinely awarded in hybrid § 301 suits. *See* Seymour v. Olin Corp., 666 F.2d 202, 215-16 (5th Cir. 1983); Milstead v. International Bhd. of Teamsters, 649 F.2d 395, 396 (6th Cir.), *cert. denied*, 454 U.S. 896 (1981); Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 61, 620 F.2d 439, 444 (4th Cir. 1981); Scott v. Local Union 377, Int'l Bhd. of Teamsters, 548 F.2d 1244, 1246 (6th Cir.), *cert. denied*, 431 U.S. 968 (1977); THE DEVELOPING LABOR LAW, *supra* note 33, at 1350.

The courts have held the union solely liable for the employee's attorney fees, *Seymour*, 666 F.2d 202 (5th Cir. 1983), or apportioned the liability for such fees between the union and the employer. *See* Bowen v. United States Postal Serv., 470 F. Supp. 1127 (W.D. Va. 1979), *rev'd on other grounds*, 642 F.2d 79 (4th Cir. 1981), *rev'd*, 103 S. Ct. 588 (1983); Holodnak v. Avco Corp., 381 F. Supp. 191 (D. Conn. 1974), *aff'd in part and rev'd on other grounds*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975); Comment, *Apportionment of Damages*, *supra* note 34, at 173 n.128.

The courts, however, have been inconsistent in analyzing the union's liability for attorney fees. In Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 420 (1975), the Supreme Court reaffirmed the traditional American rule regarding attorney fees. This rule provides that attorney fees may not be recovered by the prevailing party in federal litigation in the absence of authorizing legislation. There is no federal statute providing for the recovery of attorney fees in an action against the union for breach of the duty of fair representation. Hardesty v. Essex Group, Inc., 550 F. Supp. 752 (N.D. Ind. 1982). In *Alyeska*, the Court recognized certain exceptions to the American rule. These exceptions apply when a party recovers or preserves a fund for the benefit of others in addition to himself, or "when the losing party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.' " *Alyeska*, 421 U.S. at 258-59 (quoting F.D. Rich Co. v. United States *ex rel.* Industrial Lumber Co., 417 U.S. 116, 129 (1974)).

In Richardson v. Communication Workers of Am., 530 F.2d 126 (8th Cir.), *cert. denied*, 429 U.S. 824 (1976), the court held that the union's intentional failure to discharge its duty of fair representation to nonmember employees represented bad faith and justified the plaintiff's right to recover attorney fees under *Alyeska's* bad faith exception. In Emmanuel v. Omaha Carpenters Dist. Council, 422 F. Supp. 204, 210-11 (D. Neb. 1976), *aff'd*, 560 F.2d 382 (8th Cir. 1977), the court awarded attorney fees under *Alyeska's* common benefit exception. The *Emmanuel* court held that the plaintiff's suit rendered a service to the union and the persons

ment is not feasible.[37] In *IBEW v. Foust,*[38] the Supreme Court held that punitive damages are not recoverable against a union for breaching its duty of fair representation. Moreover, courts have awarded damages for mental distress, but only in those exceptional cases in which the employee has suffered an actual injury because of extreme and malicious treatment by the union.[39]

The issue of apportioning damages between the union and the employer[40] must be addressed after the liability issues have been resolved. Controversy over the apportionment issue has increased in the wake of the Supreme Court's decision in *Bowen v. United States Postal Service.*

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it represented. In a recent case, Dutrisac v. Caterpillar Tractor Co., 113 L.R.R.M. 3532 (9th Cir. 1983), the court held that the award of attorney fees "assessed against the union represented damages, not attorneys fees per se. . . ." *Id.* at 3537. Thus, the award did not violate the American rule. *Id.; see also* Foster v. Bowman Transp. Co., 562 F. Supp. 806, 818 (N.D. Ala. 1983) (the plaintiff was awarded attorney fees, incurred in the prosecution of his claim against the employer, as part of his ordinary damages recoverable against the union). *But see* Cronin v. Sears, Roebuck & Co., 588 F.2d 616 (8th Cir. 1978) (attorney fees incurred in § 301 actions do not have the status of compensatory damages).

37. It is established that reinstatement, if practical, is a proper remedy in a § 301 cause of action. De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 291 (1st Cir.), *cert. denied,* 400 U.S. 877 (1970). In cases in which reinstatement is impractical for any or all of the parties involved, such as when circumstances have changed and a significant period of time has lapsed since an employee's discharge, an award for future lost earnings is appropriate. *Id.* at 292; *see also* Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291, 297 (1st Cir. 1978).

Courts have established that the difficult problems of proving future lost earnings should not preclude a court from awarding prospective damages, nor force the parties to accept the more drastic remedy of reinstatement. Thompson v. Brotherhood of Sleeping Car Porters, 367 F.2d 489, 493 (4th Cir. 1966), *cert. denied,* 386 U.S. 960 (1967).

In *De Arroyo,* the Court of Appeals for the First Circuit held that an award of future lost earnings was an appropriate remedy provided it was apportioned between the union and the employer in accordance with the principles established in Vaca v. Sipes, 386 U.S. 171 (1967), and Czosek v. O'Mara, 397 U.S. 25 (1970). The court noted that *Vaca* does not preclude an award of properly apportioned future damages. *De Arroyo,* 425 F.2d at 292 n.14. For cases in which awards for prospective damages were found to be appropriate, see Smith v. Hussman, 449 U.S. 839 (1980); *Thompson,* 367 F.2d 489, 492-93 (4th Cir. 1966); Bowen v. United States Postal Serv., 470 F. Supp. 1127, 1131 (W.D. Va. 1974), *rev'd,* 642 F.2d 79 (4th Cir. 1981), *rev'd,* 103 S. Ct. 588 (1983).

38. 442 U.S. 42 (1979).

39. Farmer v. ARA Servs., Inc., 660 F.2d 1096, 1107 (6th Cir. 1981) (the union participated in the employer's breach of collective bargaining agreement and negotiated sexually discriminatory contractual provisions); Richardson v. Communications Workers of Am., 443 F.2d 974, 982 (8th Cir. 1971), *cert. denied,* 414 U.S. 818 (1973) (the union subjected the nonunion grievant to several months of verbal and physical abuse, in addition to wrongfully inducing the employer to discharge the grievant and acting in bad faith in refusing to process the plaintiff's grievance); Rogers v. Fedco Freight Lines, Inc., 564 F. Supp. 1169, 1170 (S.D. Ohio 1983); Soto Segarra v. Sea-Land Serv., Inc., 550 F. Supp. 752, 767 (N.D. Ind. 1982); Murphy v. Operating Eng'rs, Local 18, 99 L.R.R.M. 2074, 2124, 2132 (N.D. Ohio 1978) (the union acted in an outrageous and malicious fashion in breaching its duty of fair representation; it denied the plaintiff his rights under the collective bargaining agreement by engaging in intentional and severe discrimination regarding employment referrals).

40. For articles addressing the issue of apportionment of damages between the union and

II. ESTABLISHED JUDICIAL PRECEDENT ON THE ISSUE OF APPORTIONMENT OF DAMAGES

A. Supreme Court Decisions

The Supreme Court first specifically addressed the apportionment issue in *Vaca v. Sipes*.[41] In that case, the Court established the governing principle for apportioning damages between the union and the employer.[42] In *Vaca,* a discharged employee filed suit against his union and his former employer. The employee alleged that he had been discharged in violation of a collective bargaining agreement and that "the union had arbitrarily, capriciously and without just or reasonable reason or cause"[43] refused to process his grievance to arbitration, thus breaching its duty of fair representation.[44] The employee complained that the union failed to furnish him with the arbitration remedy against the employer provided for in the collective bargaining agreement.[45] The grievant's remedial claim was based on damages he incurred as a direct result of the employer's breach of contract.[46]

The *Vaca* Court found that the union had not breached its duty of fair representation. Nevertheless, focusing on the facts before it, the Court proceeded to analyze the apportionment issue. The Court held that an award of damages against the union cannot include "damages attributable solely to the employer's breach of contract."[47] Justice White, writing for the majority, explained that when a union violates its duty by failing to process a grievance, it is the employer's unrelated breach of the collective bargaining agreement, by the wrongful discharge of the employee, that initiates the controversy and causes this portion of the employee's damages. The Court stated that the employee should have no difficulty recovering such damages from the employer, "who cannot . . . hide behind the union's wrongful failure to act."[48]

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employer, see Linsey, *The Apportionment of Liability for Damages Between Employer and Union in § 301 Actions Involving a Union's Breach of Its Duty of Fair Representation,* 30 MERCER L. REV. 661 (1979); Martucci, *Employer Liability for Union Unfair Representation: The Judicial Prediction and Underlying Policy Considerations,* 46 MO. L. REV. 78 (1981); Comment, *Apportionment of Damages, supra* note 34; Note, *A Proposal for Apportioning Damages in Fair Representation Suits,* 14 U. MICH. J.L. REF. 497 (1981) [hereinafter cited as Note, *A Proposal for Apportioning Damages*].

41. 386 U.S. 171 (1967).

42. *See* Linsey, *supra* note 40, at 669.

43. *Vaca,* 386 U.S. at 173.

44. The plaintiff had been discharged due to poor health. The union had filed a grievance on his behalf and processed it through the fourth step, the last step prior to arbitration. The union then procured a third medical opinion and voted not to take the grievance to arbitration when the medical evidence did not support the plaintiff. *Id.* at 174-75.

45. *Id.* at 173.

46. *Id.* at 195.

47. *Id.* at 197.

48. *Id.* The Court further stated that even if the failure to resort to arbitration had violated the union's duty to the employee, there was no reason to exempt the employer from contractual damages he would otherwise have to pay. This holding has generated much controversy.

The majority in *Vaca* implicitly recognized the union's financial interest in the context of employee suits under section 301. The Court noted that a union could suffer "a real hardship" if it had to pay the damages resulting from the employer's wrongful conduct, even if the union possessed a right of indemnification against the employer.[49] To prevent unjustly punishing the union for the employer's wrongs, the Court determined that an apportionment of damages between the union and the employer was proper when each contributed to the employee's damages.[50]

The *Vaca* Court then established the standard for apportioning damages between the union and the employer, stating:

> 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. In this case, even if the Union had breached its duty, all or almost all of [the employee's] damages would still be attributable to his allegedly wrongful discharge by [the employer].[51]

In a footnote, the majority set out a key factual distinction regarding the application of the governing apportionment principle.[52] The Court emphasized that its analysis was not directed to a situation in which the union "has affirmatively caused" the employer's alleged breach of contract.[53] According to *Vaca,* in those situations the National Labor Relations Board has found both the union and the employer guilty of an unfair labor practice. In such cases, the Board has held the union and the employer jointly and severally liable for any back pay owed to the particular employee who was the subject of the joint discrimination.[54] Although it did not decide if such an approach was proper for a hybrid section 301 suit, the Court stated that joint liability was inappropriate when the union played no role in the employer's

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See, e.g., Linsey, *supra* note 40, at 679 (holding the employer liable for damages caused by the union's breach imposes the duty of fair representation on the employer as well as the union); Note, *A Proposal for Apportioning Damages, supra* note 40, at 501 (*Vaca* implies that the employer is liable for the bulk of damages in duty of fair representation suits, with the union liable only for any increases caused by its breach).

49. 386 U.S. at 197. Even if the employer indemnified the union, the union would still have to pay attorney costs and would also lose time and the use of the money used to pay the employee's damages stemming from the employer's conduct. For differing viewpoints as to whether the financial vulnerability of the union should be considered in apportioning damages in § 301 suits, compare Comment, *Apportionment of Damages, supra* note 34, at 177 (even if union finances are in need of protection there is no reason to make the employer the shield) with Note, IBEW v. Foust: *A Hint of Negligence in the Duty of Fair Representation,* 32 HASTINGS L.J. 1041, 1059 (the union must maintain sufficient financial resources to police the contract; vulnerability of the union treasury is a legitimate reason to limit the scope of the union's liability).

50. 386 U.S. at 196-97.

51. *Id.* at 197-98.

52. *Id.* at 197 n.18.

53. *Id.*

54. *Id.*

breach of the contract and the employer did not participate in the union's breach of duty.[55]

In *Czosek v. O'Mara,*[56] the Court addressed the apportionment issue and the related concept of the role of an alternative grievance procedure. In *Czosek,* the employees were furloughed and never recalled by their employer. The employees sued their employer for wrongful discharge and their union for breaching its duty of fair representation by refusing to process their grievances.[57]

In addressing the issue of apportionment, the *Czosek* Court applied *Vaca's* governing principle.[58] The union contended that it could not be sued exclusively when the employees' damages were a result of a wrongful discharge by the employer prior to the union's alleged breach of duty.[59] The Court, explaining that the union would not be responsible for damages for which the employer was wholly or partly liable, stated that the union could be held liable only for damages that flowed directly from its own conduct.[60] *Czosek* also addressed the apportionment issue in the context of an employer's wrongful discharge, independent of any union misconduct, and a subsequent breach of the union's duty by refusing to process the grievances based on the discharge. In this context, the Court held that "damages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievance[s] added to the difficulty and expense of collecting from the employer."[61]

Subsequent to its decision in *Czosek,* the Court in *Hines v. Anchor Motor Freight, Inc.*[62] expressly recognized the employer's responsibility for a wrongful discharge. The employees' grievances, based on their discharge for dishonesty, were processed through the arbitration procedure established by

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55. *Id.*

56. 397 U.S. 25 (1970).

57. *Id.* at 26. The employees sued their employer for wrongful discharge under the Railway Labor Act (RLA) and under an agreement entered into between the employer and its employees. The Court affirmed the appellate court's decision that the employees' complaint was sufficient to allege a breach of duty by the union, notwithstanding their failure to pursue their administrative remedies under the RLA.

58. *Id.* at 28.

59. *Id.* The appellate court dismissed the complaint against the employer because it failed to allege that the employer took part in the union's breach of duty. Neither the employees nor the employer challenged this ground for dismissal. *Id.* The union, on the other hand, did raise this issue before the Supreme Court. *Id.*

60. *Id.* at 29.

61. *Id.* The Czosek decision clarified the issue of what constitutes an increase in damages for which the union is liable. *See* Note, *A Proposal for Apportioning Damages, supra* note 40, at 502 (*Czosek* rule limits employer's liability to damages related to loss of employment, such as contractual back pay and benefits; the union's liability extends only to added expenses the employee incurs in collecting from the employer, such as attorney fees and court costs). This author interprets *Czosek* as separating damages on the basis of the duty owed to the employee. Employment duty is contractual and, thus, contractual damages are delegated to the employer. Since the union's duty is to represent, the cost of securing outside counsel is on the union. *Id.* at 506.

62. 424 U.S. 554 (1976).

the collective bargaining agreement. Subsequent to an arbitration decision in favor of the employer, the employees discovered evidence supporting their claim that they had acted honestly. The employees then sued their employer for wrongful discharge and their union for breach of its duty of fair representation. The employees argued that the union could have discovered the falsity of the employer's charges with minimal investigation.[63] The Court held that the dismissed employees were entitled to relief against both the union and the employer if they could prove an erroneous discharge by the employer and a breach of the union's duty of fair representation that tainted the decision of the joint arbitration panel.[64]

The *Hines* majority rejected the argument that the employer should escape liability on the basis of the federal labor policy favoring arbitration and the finality of the grievance procedure. The Court reasoned that the employer was originally responsible for the discharge. If the charges of dishonesty were in error, the employer played a role in initiating the dispute.[65] The Court held that the employees were not foreclosed from bringing a section 301 suit against their employer if their remedies under the collective bargaining agreement were severely limited by the union's breach of duty.[66] Therefore, the union's breach of its duty relieves the employee of any requirement that his grievance be settled through the established contractual procedures.[67]

Justice Stewart, in a concurring opinion, directly addressed the issue of apportioning liability for damages. He agreed with the majority opinion that proof of the union's breach of duty would remove the bar of finality from the arbitration award.[68] He contended, however, that this premise did not mean that proof of the union's breach would render an employer potentially liable for the employee's back pay, accruing from the time of the "tainted" arbitration decision until a fair and final determination that the employer wrongfully discharged the employees.[69] Justice Stewart argued that an employer, relying in good faith on a favorable decision, is justified in failing to reinstate the discharged employee until there is a contrary determination.[70] Therefore, he concluded, the union should be liable for any intervening wage loss.[71]

In *IBEW v. Foust*,[72] a majority of the Court held that punitive damages may not be assessed against a union for breaching its duty of fair representation by failing to process a grievance. The Court reasoned that the federal

63. *Id.* at 558.
64. *Id.* at 572.
65. *Id.* at 569.
66. *Id.* at 570. The Court reached this conclusion even though the employer prevailed in the arbitration proceeding after fairly presenting its case. *Id.* at 569.
67. *Id.* at 567.
68. *Id.* at 572.
69. *Id.* at 572-73.
70. *Id.* at 573.
71. *Id.*
72. 442 U.S. 42 (1979).

labor policy disfavors punishment, and the adverse consequences of such damage awards could be substantial.[73] In *Foust,* the union filed the discharged employee's grievance two days after the time for submitting grievances had expired. Justice Marshall, writing for the Court, first considered the employee's argument that a strong remedy, such as punitive damages, "is essential to encourage unfair representation suits and [therefore] inhibit union misconduct."[74] The Court acknowledged that the threat of large punitive sanctions would be a strong incentive to bring unfair representation actions and would also affect the union's willingness to pursue individual complaints.[75] Nevertheless, the Court noted that such punitive measures "could impair the financial stability of unions and unsettle the careful balance of individual and collective interests which this Court has previously articulated in the unfair representation area."[76]

Moreover, Justice Marshall stated that the fundamental purpose of unfair representation suits is to compensate employees for injuries caused by violation of their rights.[77] The *Foust* Court cited *Vaca* for the proposition that a union that fails to process a grievance cannot be held liable for damages attributable to the employer's conduct.[78] The *Foust* majority, relying on the Court's reasoning in *Vaca,* stated that because large damage awards could impose a real hardship on the union, the union should not be required to pay the employer's share of the employee's proven damages.[79] Justice Marshall stressed that this limitation on union liability was designed to provide individual employees with compensation for their injuries caused by the union's misconduct, "without compromising the collective interests of union members in protecting limited union funds."[80]

The *Foust* Court further recognized that awarding punitive damages against the union could adversely affect federal labor policy. First, large punitive damage awards would risk the depletion of union treasuries and, thus, impair the union's effectiveness as the collective bargaining representative.[81] Ultimately, this risk would be borne by the individual employees because their welfare in collective bargaining is directly related to the strength of their union. The Court determined that this risk outweighed any benefit that punitive damages may have as a deterrent to improper union conduct.[82] Second, the prospect of punitive sanctions would diminish the union's discretion in administering the collective bargaining agreement. Since union discretion is necessary to promote the system of private dispute resolution, the

73. *Id.* at 52.
74. *Id.* at 48.
75. *Id.*
76. *Id.*
77. *Id.* at 48-49.
78. *Id.* at 49-50.
79. *Id.* at 50.
80. *Id.*
81. *Id.* at 50-51.
82. *Id.*

threat of punitive damages is adverse to the private resolution of labor disputes.[83] Finally, the threat of punitive damages could have an impact on the responsible decision making that is critical to peaceful labor relations. The threat of a punitive damage award could cause the union to process frivolous grievances or reject fair settlements. Accordingly, the Court maintained that the union's fear of such sanctions might prevent it from acting in the clear interests of its members.[84]

B. United States Courts of Appeals Decisions

The Supreme Court, starting with *Vaca,* developed the general principles governing the apportionment of liability for damages. The United States courts of appeals have invariably applied these principles. Prior to *Bowen,* the courts of appeals were not in conflict regarding the apportionment of damages between the union and the employer. The circuits consistently distinguished between two types of cases in assessing liability for damages.[85] First, the courts of appeals have continually held that when the union's breach of its duty of fair representation consists solely in its failure to process an employee's grievance properly, the employer remains totally liable for those damages flowing directly from its breach of the collective bargaining agreement that gave rise to the grievance.[86] Accordingly, the employer is solely liable for the employee's back pay, while the union is liable for the employee's difficulty and expense in collecting from the employer.[87] Thus, the courts have routinely held that the union is liable only for the employee's attorney fees and litigation expenses.[88]

In a second category of cases, where the union's breach of duty involves participating in, or contributing to, the employer's breach of the collective

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83. *Id.*

84. *Id.* at 51-52. Justice Blackmun, joined by Chief Justice Burger and Justices Rehnquist and Stevens, wrote a concurring opinion in which he joined in the result only. Justice Blackmun viewed the majority opinion as adopting "a *per se* rule that a union's breach of its duty of fair representation can never render it liable for punitive damages." *Id.* at 52-53 (Blackmun, J., concurring). Justice Blackmun stated that such a holding was unnecessary because the union's conduct in this case was merely negligent, and therefore, it was clear that an award of punitive damages was improper. *Id.* at 53 (Blackmun, J., concurring). Justice Blackmun reasoned that an award of punitive damages would serve to deter a union's egregious conduct in exceptional cases, such as when the union's breach of duty involves intentional racial discrimination, deliberate personal hostility, or willful infringement of first amendment freedoms. *Id.* at 60 (Blackmun, J., concurring).

85. *See* Farmer v. Hotel Workers, Local 1064, 99 L.R.R.M. (BNA) 2166, 2187 (E.D. Mich. 1978), *aff'd in part, rev'd in part sub nom.* Farmer v. ARA Servs., Inc., 660 F.2d 1096 (6th Cir. 1981).

86. *Id.;* Brief for Respondent Union at 15-16 n.17, Bowen v. United States Postal Serv., 103 S. Ct. 588 (1983) [hereinafter cited as *Bowen* Union Brief].

87. *See* Seymour v. Olin Corp., 666 F.2d 202, 213-14 (5th Cir. 1982); Hardesty v. Essex Group, Inc., 550 F. Supp. 752, 767 (N.D. Ind. 1982); *Bowen* Union Brief, *supra* note 86, at 15-16.

88. For a discussion of the awarding of attorney fees and litigation costs in § 301 suits, see *supra* note 36.

bargaining agreement, or engaging in arbitrary, discriminatory, or bad faith conduct to harm the employee's interests, the union has been held liable for the employee's lost earnings.[89] The union may be held jointly or severally liable with the employer,[90] or liability may be apportioned to the extent that each party shares responsibility for the employee's entire injury.[91] In these cases, the union's misconduct may involve instigating or participating in the grievant's discharge, preventing a willing employer from remedying the wrongful discharge, precluding the grievant from any alternative remedy against the employer, intentionally covering up exculpatory evidence or preventing the employer from discovering the true facts of the matter, or negotiating an arbitrary and discriminatory contract provision.[92]

Illustrative of the first category of cases is the decision of the Fifth Circuit Court of Appeals in *Seymour v. Olin Corp.*[93] After being discharged for theft, an employee informed his union and retained independent counsel. The union, pursuant to a union rule, refused to process the employee's grievance unless he dismissed his lawyer. The employee refused to terminate his counsel and no grievance was filed with the employer.[94] The employee then sued his former employer for wrongful discharge and his union for violating its duty of fair representation.[95] In the district court, the employer was held liable for all of the employee's back pay and the union was found liable for the employee's attorney fees.[96] On appeal, the employer argued that the trial court's division of damages was improper, asserting that it was only responsible for the damages accruing "prior to the time an arbitrator would have issued an award had the grievance process been followed."[97] According to the employer's assertion, the union should be held responsible for any damages accruing after the hypothetical date on which the arbitration award would have been issued. The court of appeals rejected this argument and held that the district court properly apportioned the damages.[98]

The *Seymour* court cited *Vaca* for the proposition that the employer, not

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89. For recognition of this distinction, see Vaca v. Sipes, 386 U.S. 171, 197 n.18 (1967); Seymour v. Olin Corp., 666 F.2d 202, 215 n.14 (5th Cir. 1982); Peterson v. Rath Packing Co., 461 F.2d 312, 316 (8th Cir. 1972); Richardson v. Communications Workers of Am., 443 F.2d 974, 981 (8th Cir. 1971), *cert. denied,* 414 U.S. 818 (1981); Farmer v. Hotel Workers, Local 1064, 99 L.R.R.M. (BNA) 2166, 2187 (E.D. Mich. 1978), *aff'd in part, rev'd in part,* 660 F.2d 1096 (6th Cir. 1981); *Bowen* Union Brief, *supra* note 86, at 14 n.16.

90. *See* Jones v. Trans World Airlines, Inc., 495 F.2d 790, 798-99 (2d Cir. 1974).

91. *See* Lowe v. Pate Stevedoring Co., 558 F.2d 769, 770 (5th Cir. 1977); Peterson v. Rath Packing Co., 461 F.2d 312, 316 (8th Cir. 1972).

92. *See* Seymour v. Olin Corp., 666 F.2d 202, 215 n.14 (5th Cir. 1982); Farmer v. Hotel Workers, Local 1064, 99 L.R.R.M. (BNA) 2166, 2187 (E.D. Mich. 1987), *aff'd in part, rev'd in part,* 660 F.2d 1096 (6th Cir. 1981); *Bowen* Union Brief, *supra* note 86, at 14-15 n.16.

93. 666 F.2d 202 (5th Cir. 1982).

94. *Id.* at 205-06.

95. *Id.* at 204.

96. *Id.*

97. *Id.* at 212.

98. *Id.*

the union, is responsible for a wrongful discharge and the damages that subsequently accrue.[99] The court then applied the Supreme Court's analysis in *Czosek* in determining the amount of loss of employment damages for which the union may be held liable.[100] The court reasoned that the award of attorney fees and litigation costs against the union was "a fair measure of the difficulty and expense of collecting [from the employer]" and, thus, was recoverable from the union.[101] The court of appeals held that, on the basis of *Vaca* and *Czosek,* the district court's apportionment of damages was correct because there was no evidence that the union participated in the employer's discharge of the grievant.[102] Nevertheless, the court emphasized that its opinion, holding the employer solely liable for damages flowing directly from its wrongful discharge, was limited to cases in which the union did not engage in affirmative misconduct in breaching its duty of fair representation.[103]

The *Seymour* court stated that its analysis of the apportionment issue reflected sound policy.[104] The court found no reason to relieve the employer of the natural consequences flowing from its wrongful discharge simply because the union breached a separate duty to the employee.[105] The Court of Appeals for the Fifth Circuit expressly recognized the need to accommodate the employee's interest in a proper remedy and the union's interest in protecting its treasury on behalf of the collective interests of its members.[106] Finally, the *Seymour* court reasoned that awards of attorney fees and court costs, which may often be substantial, will provide the union with a proper incentive to execute its responsibilities diligently.[107]

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99. *Id.* at 213.

100. *Id.* at 213-14. For a discussion of *Czosek,* see *supra* notes 56-61 and accompanying text.

101. 666 F.2d at 213-14.

102. *Id.* at 214.

103. *Id.* at 215 n.14.

104. *Id.* at 215.

105. *Id.* at 214.

106. *Id.* at 215.

107. *Id.* There is another Fifth Circuit case that would seem to contradict the *Seymour* holding. In Lowe v. Pate Stevedoring Co., 558 F.2d 769 (5th Cir. 1977), the plaintiff charged that the employer unjustifiably discharged him and that the union breached its duty of fair representation in processing his grievance. The jury returned a guilty verdict against both the union and the employer. The jury determined that the employee's damages were $25,000 and that the union was responsible for 67% and the employer for 33% thereof. The trial court entered a judgment notwithstanding the verdict in favor of the defendants. *Id.* at 770-71. The Fifth Circuit reversed the district court but did not address the issue of apportionment. In light of the court's failure to address the apportionment issue and the court's comprehensive analysis of apportionment in *Seymour,* the *Lowe* decision does not reflect the Fifth Circuit's position on the apportionment of damages.

The Fifth Circuit's analysis and holding in *Seymour* is supported by the decision of the Second Circuit Court of Appeals in Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir. 1975). The plaintiff in *Holodnak* was discharged and his subsequent grievance was arbitrated; the arbitration award affirmed his dismissal. The plaintiff sued the union and the employer, seeking vacation of the arbitration award, back pay, attorney fees, and reinstatement. The district court held that the employee had not been adequately represented by the union's attorney at the arbitra-

Another illustration of the first class of cases is the First Circuit's decision in *De Arroyo v. Sindicato de Trabajadores Packinghouse.*[108] The district court found that the union had breached its duty of fair representation to six of seven discharged employees by failing to process their grievances.[109] The court of appeals found that although the employees' claim against the union was barred by the applicable statute of limitations, the employer could still be liable for damages.[110] The *De Arroyo* court refused to hold the union accountable for lost wages when it did not participate in the employee's wrongful discharge, and when there was no evidence that, but for the union's conduct, the employee would have been reinstated or reimbursed at an earlier date.[111] In such situations, the court determined that the employer is liable for the entire amount of the plaintiff-employee's lost earnings. The court reasoned that the union cannot be said to have increased, or contributed to, the employee's damages that were attributable to the employer's breach of the collective bargaining agreement.[112]

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tion hearing, because counsel acted in a perfunctory and arbitrary manner in preparing the plaintiff's case. The court found that the plaintiff was entitled to back pay from the employer. Citing *Vaca,* the court stated, "since essentially all the loss suffered here was due to [the employer's] improper discharge of the plaintiff, it must be held liable for the plaintiff's back pay and interest thereon." *Holodnak,* 381 F. Supp. 191, 205 (D. Conn. 1974). The district court also found the employer liable for punitive damages, while the award of attorney fees and expenses was apportioned between the employer and the union. The union was held liable for one third of this award and the employer for two thirds. On appeal, the court of appeals reversed the district court's award of punitive damages and affirmed the decision in all other respects. *Holodnak,* 514 F.2d 285 (2d Cir. 1975).

108. 425 F.2d 281 (1st Cir.), *cert. denied,* 400 U.S. 877 (1970).

109. *Id.* at 283.

110. *Id.* at 289.

111. *Id.* at 290.

112. *Id.* at 289-90. The First Circuit's position in *De Arroyo* was reaffirmed in Soto Segarra v. Sea-Land Service, Inc., 581 F.2d 291 (1st Cir. 1978). In *Soto,* the court expressly stated, "where there is no allegation that the union participated in the improper discharge or evidence that, but for the union's conduct, the employee would have been reinstated earlier, no part of the back pay award is chargeable to the union." *Id.* at 298. The district court did not hold the union liable for any of the back pay due the employee, but it did find the union liable for the employee's attorney fees caused by the union's failure to process his grievance, plus $30,000 for mental damages. The mental damages award was reversed, but the attorney fees award was not appealed. *Id.* at 298-99.

The Fourth Circuit also refused to hold the union liable for an employee's lost wages caused by an employer's wrongful discharge when the union did not participate in the employer's breach of contract. In Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir. 1981), *rev'd,* 103 S. Ct. 588 (1983), the Fourth Circuit stated that an employee's compensation is at all times payable by his employer, and thus, reimbursement of the employee's lost earnings continues to be the exclusive obligation of the employer. 642 F.2d at 82. The Fourth Circuit's position on apportionment of damages between the union and the employer is also presented in Self v. Drivers, Chauffeurs, Warehousemen and Helpers Local Union No. 61, 620 F.2d 439 (4th Cir. 1980), and Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888 (4th Cir. 1980). In *Self,* the trial court held that the union breached its duty of fair representation by failing to represent the discharged employees adequately in a contractual grievance procedure and for participating in the wrongful discharge. The court of appeals reversed the damage award. The court held that the union was not liable for the employees' lost wages where there

The Sixth Circuit has adopted the same position regarding the union's liability for back pay. In *St. Clair v. Local 515, International Brotherhood of Teamsters,*[113] the court of appeals set forth its interpretation of *Vaca* but did not decide the apportionment issue. The court stated that "the Supreme Court has strongly implied that in cases . . . involving a discharge and an alleged failure by the union to take all available steps to remedy the employee's complaint, the increment of damages caused by the union's breach of duty is virtually de minimis."[114]

In *Milstead v. International Brotherhood of Teamsters,*[115] the court clearly established the Sixth Circuit's position on apportionment. In the first *Milstead* case, the court of appeals vacated a damage award against the union because it may have included some damages for lost wages.[116] On appeal following remand, the court held that the district court acted properly in excluding evidence of lost wages and fringe benefits against the union because the union was not liable for lost wages. The court of appeals allowed the plaintiff to introduce evidence of attorney fees, court costs, travel expenses, and other costs related to the plaintiff's attempt to recover against the union.[117]

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was no evidence that (1) the "union caused the conduct for which the plaintiffs were discharged," or that (2) the plaintiffs' dismissals would not have been upheld even if the union had not breached its duty. 620 F.2d at 443-44. The court held that the union was not liable for the employees' losses arising from their discharge. The union was held responsible for the employees' attorney fees and expenses incurred as a result of the union's failure to process their grievances properly. *Id.* at 440. In *Wyatt,* the court held that the discharged employee's lost earnings were caused by his discharge. Thus, these damages could not be recovered from the union where the employee was foreclosed from recovery against the employer because of the dismissal of the employee as a party-defendant. *Wyatt,* 623 F.2d at 892-93. In another case, Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972), the lower court awarded the plaintiff $12,000 in his hybrid § 301 suit. After the employee was discharged for fighting with a supervisor, the union filed a grievance with that supervisor. Finding that the union acted in an arbitrary manner, the lower court held the union liable for breach of its duty of fair representation. The appellate court affirmed the district court's judgment against the union without addressing the issue of apportionment. *Id.*

113. 422 F.2d 128 (6th Cir. 1978).

114. *Id.* at 132.

115. 649 F.2d 395 (6th Cir. 1981), *cert. denied,* 454 U.S. 896 (1982).

116. 580 F.2d 232, 236 (6th Cir. 1980).

117. 649 F.2d at 396. Pitts v. Frito-Lay, Inc., 700 F.2d 330 (6th Cir. 1982), strongly reaffirms the Sixth Circuit's position. In *Pitts,* the union processed the discharged employee's grievance through the preliminary stages of the grievance procedure but refused to arbitrate the matter. *Id.* at 331. The district court entered judgment against the union and the employer for back pay and attorney fees. *Id.* at 332. The court of appeals reversed, holding that the union and the employer could not be held jointly and severably liable for the total award of back pay, attorney fees and costs. *Id.* at 334-35. The *Pitts* court relied on the *Vaca* decision for the rule that damages must be attributed to each defendant based on its respective fault. *Id.* Thus, the district court in *Pitts* erred in holding both the employer and the union jointly liable for the whole of the damages, regardless of their relative fault. An opinion by a district court within the Sixth Circuit, Ruzicka v. General Motors Corp., 96 L.R.R.M. (BNA) 2837 (E.D. Mich. 1977), *vacated on other grounds,* 649 F.2d 1207 (6th Cir. 1981), has been cited as authority for holding the union equally liable with the employer for back pay in hybrid § 301 cases. *See* Linsey, *supra* note 40, at 676-78; Martucci, *supra* note 40, at 105-06; Com-

In the second category of cases, the courts of appeals have held unions liable for back pay when the union has contributed to the employer's breach of contract or engaged in affirmative misconduct to harm the employee's interests.[118]

This analysis was adopted in *Richardson v. Communication Workers of America.*[119] In *Richardson,* the employee sued his employer for wrongful discharge and his union for breach of its duty of fair representation. Prior to his discharge, the employee became concerned about the use of union funds and withdrew from union membership. Subsequent to his resignation from the union, the employee was continually harassed and abused in and out of the plant and was constantly a target of obscenities from officers, stewards, and members of the union.[120] The employee was discharged after an altercation with another employee. At a subsequent meeting with the employer, the union urged the grievant's discharge.[121] The district court entered judgment in favor of the grievant against his union and former employer.[122] On appeal, the United States Court of Appeals for the Eighth Circuit held that a union may be held liable for an employee's loss of wages when it participates in the employee's wrongful discharge. The court stated that "[w]here the union's breach of duty involves only a failure to process an employee's grievance, its apportioned damage arising from the unrelated wrongful discharge is usually *de minimis.* [Under] such circumstances, the employer is solely responsible for the damages flowing from the breach of contract."[123] The court continued, "Under the [principles of *Vaca*], where the union also wrongfully induces the discharge, it follows that its liability

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ment, *Apportionment of Damages, supra* note 34, at 169-70. In *Ruzicka,* the district court found that the employer wrongfully discharged the employee and that the union breached its duty of fair representation. 96 L.R.R.M. (BNA) at 2833. The court apportioned the award of compensatory damages, including back pay, equally between the union and the employer. *Id.* at 2837. This method of apportionment has never been adopted by the Sixth Circuit. *See, e.g.,* Pitts v. Frito-Lay, Inc., 700 F.2d 330, 334 n.4 (6th Cir. 1983) (expressly stating that the district court's opinion in *Ruzicka* "conflicts with the law of this circuit").

118. For a district court decision holding the union liable for back pay damages because of affirmative misconduct in breaching its duty of fair representation, see Freeman v. O'Neal Steel, Inc., 436 F. Supp. 607 (N.D. Ala. 1977), *rev'd,* 609 F.2d 1123 (5th Cir. 1980). In *Freeman,* the district court held the union and the employer jointly and severally liable for all of the employee's injuries, including back pay. 436 F. Supp. at 613. The court found the union and the employer "equally culpable" in the wrongful acts directed against the employee. *Id.* The court determined that the union's conduct in withdrawing the employee's discharge grievance from the grievance committee was arbitrary and done in bad faith because the decision was motivated by racial discrimination and personal hostility toward the employee. *Id.* at 611-12. The Fifth Circuit Court of Appeals reversed the district court's finding of a breach of the duty of fair representation. 609 F.2d at 1125. Accordingly, the court did not consider whether the employer violated the collective bargaining agreement or the issue of the apportionment of damages. *Id.* at 1128.

119. 443 F.2d 974, 976 (8th Cir.), *cert. denied,* 414 U.S. 818 (1971).

120. *Id.* at 977.

121. *Id.*

122. *Id.* at 976.

123. *Id.* at 981 (citations omitted).

for damages may be apportioned to the extent that it is responsible for the whole of such damage."[124]

In *Harrison v. United Transportation Union,*[125] the Fourth Circuit addressed the apportionment issue in the context of a union's deliberate misconduct in denying an employee any right of action against his employer. After an employee was suspended from his position, he appealed to the company president, and the president upheld the suspension. The collective bargaining agreement provided that an employee, or his representative, had sixty days to file an appeal from the president's decision. In a meeting with the employer, the union and the company agreed that another employee would be reinstated provided that the plaintiff's grievance would not be processed until it was too late to provide him with a right of action against the employer. In violation of the union's constitution, the plaintiff was not advised of the union's agreement to not process his grievance. Subsequently, the grievant's right to process his claim against the employer, either individually or through a union representative, lapsed under the Railway Labor Act.[126] The jury issued a verdict against the union, awarding the plaintiff lost earnings and punitive damages.[127]

On appeal, the United States Court of Appeals for the Fourth Circuit held that the union's "deliberately misleading conduct"[128] justified holding the union responsible for compensatory damages. Accordingly, the plaintiff was entitled to recover, from the union, his loss of earnings during his suspension.[129] The *Harrison* court reasoned that the union's breach of duty extinguished the plaintiff's right to pursue his claim. Therefore, the union was responsible to the grievant for the value of the right he lost because of the union's deliberate misconduct.[130]

In *Peterson v. Rath Packing Co.,*[131] the Eighth Circuit Court of Appeals concluded that a union may be held liable for back pay when it acts in bad faith by adopting a discriminatory grievance policy. In *Peterson,* the union adopted and adhered to an absolute policy of never transferring women to a certain job classification, despite the fact that women employees had the right under the collective bargaining agreement to be transferred to such positions.[132] The plaintiffs in *Peterson* were denied transfers, and the union's

124. *Id.* at 982 (citations omitted).

125. 530 F.2d 558 (4th Cir. 1975), *cert. denied,* 425 U.S. 958 (1976).

126. *Id.*

127. *Id.* at 559.

128. *Id.* at 563.

129. *Id.* at 562.

130. *Id.* at 562-63.

131. 461 F.2d 312 (8th Cir. 1972).

132. *Id.* The collective bargaining agreement included three job classifications: male jobs, female jobs, and jobs that both sexes could hold. *Id.* at 314. The agreement further provided that if a female was laid off, she could request any job held by a less senior employee, male or female, provided that the employer determined she was able to perform the job adequately like any other individual. *Id.* When the two plaintiffs were laid off, they sought employment as a cook and a baker in the plant cafeteria. At that time, these positions were held by less

policy prevented the grievants from having their grievances adequately processed through the contractual procedure. The court viewed the union's policy and conduct as a bad faith breach of the duty of fair representation and wrongful participation in the employer's breach of the contract.[133] The court stated that "[a] good faith refusal of a union to process a grievance is not a basis for union liability in a § 301(a) suit. . . . However, where the union's refusal to represent its member results from its wrongful participation in the breach of contract, then damages may be apportioned to the union to the extent that it shares responsibility for the whole damage."[134] Thus, the court of appeals affirmed the district court's judgment against the union and the employer for loss of wages and vacation pay.[135]

IV. THE *BOWEN* DECISION

A. The Facts

Charles Bowen was suspended without pay from his employment with the United States Postal Service and eventually was formally terminated. The reason for the discipline was his involvement in an altercation with a co-employee. Bowen was a member of the American Postal Workers Union, AFL-CIO, the recognized collective bargaining agent for Service employees. Subsequent to his discharge, Bowen filed a grievance, but the union declined to process his grievance through arbitration.[136] Bowen thereafter sued the

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senior male employees. *Id.* Both the union and the employer decided not to grant the plaintiffs their requested positions without assessing the plaintiffs' individual capabilities. *Id.* at 315-16. The court found this decision to be a breach of the collective bargaining agreement. *Id.*

133. *Id.* at 315-16.

134. *Id.* at 316 (citations omitted).

135. *Id.* at 314 n.1. For a similar decision in the Sixth Circuit, see Farmer v. ARA Servs., Inc., 660 F.2d 1096 (6th Cir. 1981). In *Farmer,* the union breached its duty of fair representation by (1) negotiating and entering into collective bargaining agreements, the provisions of which were sexually discriminatory and not adequately or honestly explained to members prior to ratification, and (2) capriciously failing or refusing to arbitrate the plaintiffs' grievances. The court of appeals affirmed the district court's finding that the union could be held jointly and severally liable with the company for the employees' damages when, as in the instant case, the union's breach of duty resulted from its wrongful participation in the employer's breach of contract or from the negotiation of discriminatory contractual provisions. *Id.* at 1107.

Atwood v. Pacific Maritime Ass'n, 432 F. Supp. 491 (D. Ore. 1977), *aff'd,* 657 F.2d 1055 (9th Cir. 1981), has been cited as support for the apportionment of lost earnings between the union and the employer. *See* Comment, *Apportionment of Damages, supra* note 34, at 173 n.127. In fact, *Atwood* does not support the apportionment of back pay between the union and the employer. The court did not apportion the damages at issue. The court cited *Vaca* and *Hines,* and it stated that the issue of apportionment of damages would be before the court or arbitrator if a breach of contract was found, and that the employer could then argue that a part of the injured employee's damages was attributable to the union. *Atwood,* 432 F. Supp. at 495-96. The court did not use the term "lost earnings," nor did it distinguish between the various forms of damages, i.e., attorney fees, back pay, or litigation costs. The court merely cited *Vaca*'s governing principle in the course of denying the plaintiff's motion to dismiss the union as a party. *Id.* at 496.

136. Bowen v. United States Postal Serv., 103 S. Ct. 588, 590 (1983).

employer for violating the collective bargaining agreement by dismissing him without just cause, and the union for breaching its duty of fair representation.[137] Bowen sought damages and injunctive relief. The evidence showed that the responsible union officials recommended pursuing the matter through the grievance process, but for no apparent reason, the union's national office refused to take the matter to arbitration.

In the district court, the jury was instructed that the issue of apportioning liability was primarily in its discretion. The court added, however, that the jury could "equitably . . . base apportionment on the date of a hypothetical arbitration decision—the date at which the [employer] would have reinstated Bowen if the Union had fulfilled its duty."[138] The court indicated that the employer could be liable for damages prior to that date, and the union could be liable for damages thereafter. The court found that the employer and the union had engaged in illegal acts and, therefore, were liable to Bowen. In determining that Bowen could not have independently proceeded with his claim,[139] the court found that if the grievance had been arbitrated, Bowen would have been reinstated by August 1977, one year and five months after his discharge.[140] The jury held the union liable for $30,000 in compensatory damages, in the form of lost benefits and wages, and the employer liable for $22,954 of such damages.[141]

On appeal, the United States Court of Appeals for the Fourth Circuit reversed the damage award against the union. The court held that, as a matter of law, "Bowen's compensation was at all times payable only by [his employer and] reimbursement of . . . lost earning continued to be the [employer's exclusive obligation]."[142] Consequently, no portion of Bowen's lost wages was chargeable to the union.[143] This holding, however, was subsequently reversed by the Supreme Court.

B. The Majority Opinion

In *Bowen,* the Supreme Court held that when an employee has been wrongfully discharged, the union may be held primarily liable for the

137. Bowen's suit was technically under § 1208(b) of the Postal Reorganization Act, 39 U.S.C. § 1208(b) (1976). Section 1208(b) is identical, in all relevant aspects, to § 301 of the Labor Management Relations Act, 29 U.S.C. § 185 (1976). *Bowen,* 103 S. Ct. at 600 n.2 (White, J., dissenting).

138. *Bowen,* 103 S. Ct. at 591.

139. *Id.* at 591-92.

140. *Id.* at 592 n.6.

141. *Id.* at 592. The jury also found the employer and the union liable for punitive damages of $30,000 and $10,000 respectively. The district court determined that the Postal Service could not be held liable for punitive damages because of the principle of sovereign immunity. The court also set aside the punitive damage award against the union because it would not be fair to hold the union liable when the employer was immune. Bowen did not appeal the court's ruling on punitive damages. *Id.* at 591 n.4.

142. Bowen v. United States Postal Serv., 642 F.2d 79, 82 (4th Cir. 1981), *rev'd,* 103 S. Ct. 588 (1983).

143. *Id.*

employee's increased damages caused by the union's breach of its duty of fair representation.[144] The Court's holding was expressly directed toward situations in which the union did not participate in the employer's breach of the collective bargaining agreement.[145] Justice Powell's majority opinion[146] interpreted *Vaca* and the federal labor policy as consistent with this holding.[147]

The Court noted that *Vaca* held that an employee's failure to exhaust his contractual remedies would not bar his suit against the employer if the union's breach of duty prevented him from exhausting such remedies.[148] Stressing that the right of the individual employee to be made whole is paramount, the Court reasoned that the "fault that justifies dropping the bar to [an] employee's suit for damages also requires the union to bear some responsibility for increases in the employee's damages resulting from its breach."[149] Finding that the union's breach of duty caused the grievance procedure to malfunction, resulting in an increase in the employee's damages, the Court held that the union was liable for this increase in damages.[150]

The Court also recognized that grievance procedures are fundamental to federal labor policy. The Court noted that the union plays a pivotal role in the grievance process because, as the exclusive representative, it has the responsibility of determining whether to process a grievance.[151] The majority reasoned that the union has a duty to the employees it represents and that the employer may justifiably rely on the union's exercise of this duty.[152] Justice Powell stated that if the employer could not rely on the union's decision, the grievance procedure "would not provide the uniform and exclusive method for the orderly settlement of employee grievances which the Court has recognized is essential to the national labor policy."[153] The Court feared that incentives for the parties to comply with the contractual grievance procedure would be diminished if damages were not apportioned when each party's default contributes to the employee's injury. The majority noted that the employer may not be willing to agree to traditional arbitration clauses if he is held totally responsible for the employee's damages.[154]

The Court believed that apportionment of damages would not impose an undue burden on the union. The majority stated that apportionment would act as an incentive for the union to pursue justifiable employee claims.[155] The Court considered this incentive to be consistent with the union's fair

144. 103 S. Ct. at 595.
145. *Id.* at 595 n.11.
146. Justice Powell's opinion was joined by Chief Justice Burger, and Justices Brennan, Stevens, and O'Connor.
147. 103 S. Ct. at 595-98.
148. *Id.* at 595.
149. *Id.*
150. *Id.*
151. *Id.* at 596.
152. *Id.* at 597.
153. *Id.* (citing Clayton v. UAW, 451 U.S. 679, 686-87 (1981)).
154. *Id.*
155. *Id.* at 597-98.

representation duty and its "commitment to the employer under the arbitration clause."[156] The majority concluded that Bowen's damages were initially caused by the employer's unlawful discharge and increased by the union's breach of its duty of fair representation. Therefore, the apportionment of damages was required by *Vaca,* and the judgment of the court of appeals was reversed and remanded.[157]

In a significant footnote,[158] the Court acknowledged that its opinion left two issues unresolved. First, the Court did not decide whether the district court's instructions on the apportionment of damages were proper. The union had objected to the instructions only on the basis that no back pay could be assessed against it; the union did not object to the manner of apportionment. Secondly, the Court noted that it did not consider what, if any, difference in degrees of fault existed between the union and the employer.[159]

C. *The Dissenting Opinion—The Back Pay Issue*

Justice White dissented from the Court's analysis of the union's liability for back pay damages.[160] He interpreted the majority opinion as holding that an employer is only responsible for back pay that accrues prior to a "hypothetical date upon which an arbitrator would have issued an award had the union processed the grievance to arbitration."[161] According to Justice White's interpretation of the majority opinion, the union has the sole responsibility for all back pay damages accruing after this hypothetical date, even when it is not involved in the employer's decision to discharge the employee.[162] Justice White argued that this result was not supported by judicial precedent, equity, or national labor policy.[163]

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156. *Id.* at 598.

157. *Id.*

158. *Id.* at 599 n.19.

159. *Id.*

160. Justice White concurred in part in the judgment and dissented in part. In regard to the majority's opinion holding the union responsible for back pay damages, Justice White dissented and his opinion was joined by Justices Marshall, Blackmun, and Rehnquist.

The district court awarded Bowen $52,954 for lost benefits and wages, with the union responsible for $30,000 and the employer for $22,954. The Fourth Circuit Court of Appeals held that because the union was not liable for lost earnings, the district court erred in assessing the $30,000 against it. However, the court did not increase the $22,974 award against the employer. Thus, Bowen was left with an award of $22,954, although the district court awarded him lost earnings and benefits of $52,954. The court justified this result because Bowen failed to file a cross appeal against the employer. 642 F.2d 79, 82 n.6 (4th Cir. 1981). Justice White, in Part IV of his opinion, which was joined by Justices Marshall and Blackmun, disagreed with the failure of the court of appeals to hold the employer entirely liable for the amount the district court assessed against the union. Justice White would have affirmed the decision of the court of appeals that the union was not liable for back pay, but reversed and remanded the case with instructions to hold the employer liable for all of Bowen's lost earnings. 103 S. Ct. at 607.

161. 103 S. Ct. at 599 (White, J., dissenting in part and concurring in part).

162. *Id.*

163. *Id.* at 605.

In Justice White's dissent reviewing the apportionment precedent, the *Vaca* and *Hines* decisions were cited for the principle that the union's breach of duty merely removes the procedural exhaustion of remedies bar to a section 301 suit by an employee against his employer. Under this precedent, the union's breach does not affect the employer's potential back pay liability if the employee successfully proves the employer breached the collective bargaining agreement.[164]

Justice White relied on *Vaca, Czosek,* and *Foust* in developing the dissent's view of the proper measure of a union's damages in a hybrid section 301 suit. He argued that the union is liable for damages to the extent that its breach "adds to the difficulty and expense of collecting from the employer."[165]

The dissent also argued that the majority's new rule would subject the union to liability far greater than that to which the employer was subjected, and that the rule did not relate this greater liability to the union's comparative fault. Moreover, the dissent asserted that the union will not have any means to limit its constantly increasing liability.[166] The dissent reasoned that it was the employer who caused the employee's discharge, and therefore only the employer could remedy this wrong by reinstating the employee. In fact, the union never prevented the employer from reinstating Bowen; the employer could have done so at any time.[167] Justice White stated that "[u]nder these circumstances, it is bizarre to hold . . . that the relatively impotent union is *exclusively* liable for the bulk of the back pay."[168] Furthermore, the dissent contended that neither the collective bargaining agreement, nor the union's duty of fair representation, provided any support for the Court's holding that the union has a commitment to protect the employer, and that the employer has a right to rely on the union as a means of limiting its liability.[169]

In his dissent, Justice White further argued that the majority's rule will have the practical effect of forcing unions to process many unmeritorious grievances to arbitration in order to avoid potential liability for the increase in the employee's damages. Justice White declared that this effect will impair the ability of the contractual grievance procedure to provide an orderly resolution of disputes.[170]

Finally, the dissent recognized two situations in which a union should bear some responsibility for back pay. First, as the *Vaca* Court recognized, the union and the employer may be jointly and severally liable when the union has affirmatively induced the employer to breach the collective bargaining

164. *Id.* at 601.
165. *Id.* at 602 (quoting Czosek v. O'Mara, 397 U.S. 25, 29 (1970)).
166. *Id.* at 603.
167. *Id.* at 604.
168. *Id.* (emphasis in original).
169. *Id.*
170. *Id.* at 605.

agreement.[171] Second, the union should be held secondarily liable when it is not responsible for the initial discharge of an employee. This occurs when the union's breach of duty prevents an employee from collecting the back pay to which he is entitled from the employer, who is primarily liable for these damages. In such cases, the employee should be entitled to collect from the union.[172]

V. ANALYSIS

A. Scope of the Bowen *Holding*

The *Bowen* majority held that a union may be found liable for an employee's increased damages, in the form of lost wages, caused by the union's breach of its duty of fair representation.[173] The Court did not establish a precise rule for apportioning damages between the union and the employer. Justice White's dissent interpreted the Court's opinion as holding that, in a typical wrongful discharge case, the employer will only be responsible for back pay that accrues prior to the hypothetical date on which an arbitration award would have issued if the union had processed the grievance to arbitration. The union will be responsible for back pay damages that accrue after the hypothetical arbitration date.[174] Justice White's interpretation of the majority opinion is correct regarding its application to the facts presented. Nonetheless, the *Bowen* Court expressly refused to decide whether the apportionment rule applied by the district court was proper.[175] The Court also declined to address the issue of whether the parties' relative fault is a proper consideration in apportioning damages.

In light of *Bowen*'s limited holding and its lack of guidance regarding apportionment, lower courts are implicitly assigned the task of developing a rule of apportionment. The Court's limited holding may be interpreted to support three different apportionment rules. First, the union may be held responsible for back pay that accrues after a hypothetical date upon which an arbitration award would have issued had the union processed the grievance through arbitration. This rule was applied by the district court in *Bowen*.[176] Second, the employer and the union could be held liable on the basis of their relative degrees of fault. After establishing the employer's and the union's relative faults, the principle of comparative fault could then be employed to apportion damages among the employer and the union in section 301 suits.[177] Under comparative fault principles, the union and the employer would

171. *Id.*

172. *Id.* at 605-06.

173. B. FELDACKER, *supra* note 1, at 389.

174. *Bowen,* 103 S. Ct. at 599 (White, J., dissenting in part and concurring in part).

175. *Id.* at 599 n.19; *see* VanderVelde, *supra* note 1, at 1161 n.232.

176. 103 S. Ct. at 591.

177. Comparative negligence is a fault concept that apportions liability according to the extent that each party's conduct contributed to the damages incurred. Four types of comparative

be held liable for the portion of the employee's damages that equals its percentage of fault in causing the employee's injury.[178] Finally, a third rule could be that the union is liable for the increase in the employee's damages from the point at which the employee first contacted the union regarding his grievance, if the union's conduct at or near that point constituted a breach of its duty. This approach is arguably supported by the *Bowen* majority's focus on holding the union responsible for that portion of the employee's damages which was "increased by the Union's breach of its duty of fair representation."[179] While this formula would impose a greater share of liability on the union than it was forced to bear in *Bowen,* the Court's holding does not prohibit such a division of liability.

The Court established a procedure for the union to diminish its share of

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negligence systems are presently in effect: pure comparative negligence, two modified theories, and the slight-gross theory. The primary difference between these systems lies in the point at which contributory negligence ceases to reduce the plaintiff's recovery and serves to bar recovery completely.

The pure comparative negligence system is the easiest method of allocating damages. Under this system, the plaintiff recovers damages up to the point at which the plaintiff's negligence was the sole cause of her damage. For example, a plaintiff who is 99% at fault can recover from a defendant who is 1% causally negligent. The plaintiff's recovery is merely reduced in proportion to the extent that she is deemed to be contributorily at fault.

Two modified systems of comparative negligence have developed. The first applies the "not as great as" rule while the second applies the "not greater than" rule. A plaintiff may recover under the former rule, sometimes called the 49% system, if her negligence is less than the negligence of the defendant. As with pure comparative negligence, the plaintiff's recovery is reduced in proportion to the percentage of her fault in contributing to damages. When the plaintiff's negligence is equal to or greater than the defendant's negligence, however, the plaintiff is barred from any recovery.

Under the "not greater than" rule, or the 50% system, a plaintiff can recover damages if his negligence is less than or equal to that of the defendant. In contrast to the "not as great as" rule, the plaintiff not only recovers when his negligence is less than the defendant's, but also when each party's negligence is determined to be equal. Although this differs from the "not as great as" rule by only one percent, the difference is crucial because it is common for juries in close two-party cases to apportion fault equally.

A plaintiff may recover reduced damages under the "slight versus gross" system only when the defendant's negligence is gross and the plaintiff's negligence is slight in comparison. When this determination of negligence is made, the plaintiff's recovery is reduced by an amount proportional to her causal contribution. However, when this wide disparity between the fault of each party is not found, the plaintiff is barred from recovery.

In the context of a § 301 action, the principle of comparative fault was used to apportion damages in Lowe v. Pate Stevedoring Co., 558 F.2d 769 (5th Cir. 1977). The plaintiff in *Lowe* brought an action against his employer and the union, alleging wrongful discharge and breach of the duty of fair representation because the union refused to investigate the plaintiff's termination. The jury returned a verdict in favor of the plaintiff and against the union and the employer. The jury found that the employee's total damages were $25,500 and that the employer was responsible for 33% of the damages, while the union was liable for the remainder. *Id.* at 770.

178. *See* B. FELDACKER, *supra* note 1, at 280-81. *See generally* Comment, *Apportionment of Damages, supra* note 34, at 156 (lost earnings damages should be apportioned between the union and the employer by a method approximating the results of a "properly functioning" grievance procedure).

179. *Bowen,* 103 S. Ct. at 599.

liability. The Court noted that the union has the option, at the point when it realizes it may have breached its duty, to bring its possible default to the employer's attention.[180] According to the Court, a jury can take such union conduct into account when apportioning the parties' liability for damages.[181] The majority noted this possible union tactic in response to Justice White's dissent. Justice White argued that because only the employer, not the union, could act to prevent continuing increasing liability, the union should not be held responsible for the employee's back pay accruing past the hypothetical arbitration date.[182]

The majority raised three objections to Justice White's argument. First, the dissent's position would leave the employer with the "dubious option"[183] of "either reinstat[ing] the employee promptly or leav[ing] itself exposed to open-ended liability" for back pay.[184] The Court viewed such an option as defeating the purpose of the grievance procedure, which is to provide the exclusive means of resolving this type of dispute.[185] Secondly, the Court stated that an employer has no way of knowing that a union's failure to process a grievance through arbitration constitutes a breach of its duty of fair representation.[186] Finally, the majority feared that the dissent's position would allow the union and the employee, after a case reached the trial stage, to agree to a settlement in which the union would acknowledge its breach of duty in exchange for the employee's willingness to look to the employer for his entire recovery. The Court viewed this possibility as creating an improper incentive for the union and its member to agree to such a settlement.[187]

Contrary to the arguments raised by the dissent, the Court's holding in *Bowen* does not absolve the employer of liability for its breach of the collective bargaining agreement. The employer is still liable for that portion of damages resulting from its breach of the contract.[188] Moreover, the majority noted that the employer remains secondarily liable for the full amount of the employee's lost wages.[189] *Bowen* permits the union to be held primarily responsible for that portion of damages resulting from the breach of its duty of fair representation. Yet, if the successful plaintiff-employee is unable to collect the damages due from the union, the employer remains secondarily liable for the entire amount of the employee's lost wages.[190]

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180. *Id.* at 597 n.15.

181. *Id.*

182. *Id.* at 603-04 (White, J., dissenting in part and concurring in part). Justice White reasoned that only the employer had the continuing ability to remedy a wrongful discharge by reinstating the employee. *Id.* at 604.

183. *Id.* at 597 n.15.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.* at 595.

189. *Id.* at 595 n.12.

190. *Id.*

B. Bowen's *Relationship to Prior Precedent*

Ironically, Justice Powell, writing for the majority in *Bowen,* frequently cited *Vaca* as support for a rule holding the union liable for a portion of the employee's lost wages when the union did not participate in the employer's breach of contract or engage in affirmative misconduct.[191] The *Vaca* decision, however, and other Supreme Court precedent do not support the Court's holding in *Bowen.*

Prior to *Bowen,* the Supreme Court issued four major decisions addressing the question of liability for damages in suits against a union for breach of its duty of fair representation, and an employer for breach of a collective bargaining agreement.[192] These cases were *Vaca, Czosek, Hines,* and *Foust.* The apportionment issue was directly addressed in *Vaca* and *Czosek. Vaca* established the governing principle for apportioning liability. In *Czosek,* the Court expressly adopted and clarified *Vaca's* governing principle.[193] The *Czosek* Court held that "damages against the union . . . are unrecoverable except to the extent that refusal to handle the grievances added to the difficulty and expense of collecting from the employer."[194] Although *Hines* and *Foust* did not directly address the issue of apportionment, *Vaca* was cited approvingly in each case and the governing principle was not modified.

In *Hines,* Justice Stewart filed a two paragraph concurring opinion in which he argued that the employer should not be held liable for an employee's lost wages that accrued from the time of a tainted arbitration determination until the time of a subsequent valid determination that the discharge was wrongful.[195] Justice Stewart contended that if an employer relies, in good faith, on a favorable arbitration award, his failure to reinstate the discharged employee is proper until there is a contrary decision.[196] This opinion is inadequate support for the majority's position in *Bowen.* First, Justice Stewart's opinion was not joined by any other member of the Court.[197] Four Justices, other than Stewart, joined Justice White's majority opinion in *Hines.*[198] Consequently, the majority did not need Stewart's vote.[199] If the majority had been willing to accept Stewart's position, there would have been no need

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191. *Id.* at 593-99 (1983).

192. For a development of pre-*Bowen* Supreme Court precedent regarding apportionment, see *supra* notes 41-84 and accompanying text.

193. *See* Note, *A Proposal for Apportioning Damages, supra* note 40, at 502-03.

194. Czosek v. O'Mara, 397 U.S. 25, 29 (1970).

195. Hines v. Anchor Motor Freight, 424 U.S. 554, 572-73 (1976). For an analysis of the shortcomings of Justice Stewart's opinion, see *Bowen,* 103 S. Ct. at 601 n.3 (White, J., dissenting in part and concurring in part); Note, *A Proposal for Apportioning Damages, supra* note 40, at 506-09.

196. *Hines,* 424 U.S. at 573 (Stewart, J., concurring).

197. *Bowen,* 103 S. Ct. at 601 n.3 (White, J., dissenting in part and concurring in part).

198. Justice White delivered the opinion of the Court, joined by Justices Brennan, Stewart, Marshall, and Blackmun. Justice Rehnquist filed a dissenting opinion joined by Chief Justice Burger. Justice Stevens took no part in the case.

199. Note, *A Proposal for Apportioning Damages, supra* note 40, at 509.

for him to concur.[200] Secondly, Justice Stewart's concurrence in *Hines* was based on an employer's good faith reliance on an actual favorable arbitration decision.[201] *Bowen* greatly exceeds the scope of this concurring opinion because it grants the employer the right to rely on a nonexistent arbitration proceeding.[202] In addition, *Bowen*'s failure to adopt a clear rule of apportionment allows lower courts to develop a rule which could impose liability on the union at an earlier point than the date of an actual arbitration award, the date that Justice Stewart argued was proper for determining the union's liability for back pay damages.[203]

Justice White wrote the Court's opinions in *Vaca, Czosek,* and *Hines,* the most significant decisions regarding the apportionment issue. In *Bowen,* Justice White wrote a compelling dissent[204] in which he contended that the Court's decision was contradictory to "[p]recedent, equity, and [the] national labor policy."[205] In light of Justice White's previous opinions and his dissent in *Bowen,* the Court's holding in *Bowen* is a significant departure from the apportionment principles developed in *Vaca, Czosek,* and *Hines.*

In this departure from prior precedent, the Court effectively imposed a substantive duty on the union that was not included in the collective bargaining agreement. The *Bowen* majority concluded that the employer had a right to rely on the union's decision not to pursue an employee's grievance.[206] This right of reliance thus enables the employer to diminish its exposure in the event that an employee sues it for breaching the collective bargaining agreement. Accordingly, the Court effectively imposed a duty upon the union to indemnify the employer for its breach of the contract, even though such an obligation was not included in the collective bargaining agreement as a product of arm's-length negotiations.[207] The employer should be forced to

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200. *Id.*

201. *Bowen,* 103 S. Ct. at 601 n.3 (White, J., dissenting in part and concurring in part).

202. *Id.*

203. Battle v. Clark Equipment Co., 579 F.2d 1338 (7th Cir. 1978), has been cited as support for the position adopted by former Justice Stewart in his concurring opinion in *Hines. See* Comment, *Apportionment of Damages, supra* note 34, at 172-73. In *Battle,* the court found that the union did not breach its duty of fair representation but, it did not apportion damages between the union and employer. Although the court in *Battle* cited Justice Stewart's opinion in *Hines, Battle* does not stand for the adoption of Justice Stewart's approach because, unlike *Hines,* there was no wrongful conduct by the union or the employer and there was no occasion to apportion liability.

In Chambers v. Local Union No. 639, 578 F.2d 375 (D.C. Cir. 1978), a case involving a seniority dispute following a merger of two plants, the court did not follow Justice Stewart's position. The *Chambers* court stated:

> When the employer relies on the advice and interpretation of a labor union to the detriment of an employee, it does so at its own risk, subject to an apportionment of any liability between itself and the Union. This liability runs even to instances where the employer has been entirely sustained in a grievance-arbitration hearing.

Id. at 380 (footnote and citations omitted).

204. 103 S. Ct. at 599-607.

205. *Id.* at 605.

206. *Id.* at 596-97.

207. *See id.* at 604-605 (White, J., dissenting in part and concurring in part).

bargain for the protection provided by such a broad indemnity clause.[208] *Bowen*'s analysis is clearly contradictory to the established principle that courts may not impose, upon either the employer or the union, requirements to which they have not previously agreed in the collective bargaining agreement.

This principle was clearly articulated by the Court in *Carbon Fuel Co. v. United Mine Workers of America*[209] and *United Mine Workers of America, Health and Retirement Funds v. Robinson.*[210] In *Carbon Fuel*, the Court stated that Congress, in the 1947 Taft-Hartley Act, sought to promote the policy of free collective bargaining. Accordingly, Congress clearly intended to "leave the parties entirely free of any Government compulsion to agree to a proposal, or even reach an agreement. . . ."[211] This intent was expressed in section 8(d) of the NLRA, which provides that the obligation to collectively bargain "does not compel either party to agree to a proposal or require the making of a concession."[212]

In *Robinson*, the Court followed *Carbon Fuel* and held that "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract."[213] In light of the principles articulated in *Carbon Fuel* and *Robinson*, the *Bowen* majority's imposition of a substantive collective bargaining provision, in the form of the implied duty of the union to indemnify the employer, is contrary both to principles previously established by the Supreme Court and to the national labor policy favoring free collective bargaining.

The *Bowen* Court's analysis is also inconsistent with the union's financial and institutional interests. In *Bowen*, the Court reasoned that a rule requiring the union to pay damages will provide an additional incentive for the union to execute its duty of fair representation properly.[214] The majority viewed this rule as consistent with the interests recognized in *Foust*,[215] although the *Foust* Court held that labor unions could not be held liable for punitive damages.[216] *Bowen* distinguished the impact of compensatory damages from that of punitive damages by stating:

> [In *Foust*,] [t]he interest in deterring future damages by the union was outweighed by the debilitating impact that "unpredictable and potentially substantial" awards of punitive damages would have on the union's exercise of discretion in deciding what claims to pursue. An award of com-

208. *Id.*; Edwards, *Employers' Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Reality?*, 27 LAB. L.J. 686, 691-92 (1976).

209. 444 U.S. 212 (1979).

210. 455 U.S. 562 (1982).

211. 444 U.S. at 218-19.

212. 29 U.S.C. § 158(d) (1976).

213. 455 U.S. at 576.

214. *Bowen*, 103 S. Ct. at 597-98.

215. IBEW v. Foust, 442 U.S. 42 (1979).

216. *Id.* at 52. The *Bowen* Court reiterated this holding. 103 S. Ct. at 597 n.16.

> pensatory damages . . . normally will be limited and finite. Moreover, the union's exercise of discretion is shielded by the standard necessary to prove a breach of the duty of fair representation. Thus, the threat that was present in *Foust* is absent here.[217]

This distinction drawn in *Bowen,* however, is not supported by the Court's decisions in *Vaca* and *Foust,* which were premised on the recognition that union responsibility for damage awards, either punitive *or* compensatory, can seriously undermine a union's role as exclusive bargaining representative by draining its financial resources.

In holding that the union should not be liable for the compensatory damages attributable to the employer's breach of contract, the *Vaca* Court stated that "[i]t could be a real hardship on the union to pay these damages, even if the union were given a right of indemnification against the employer."[218] Additionally, *Foust* recognized that the debilitating impact of punitive damages on the union treasury outweighed the interest in deterring future misconduct by the union.[219] The *Bowen* majority, however, did not acknowledge *Vaca's* recognition of the union's financial interest in the context of compensatory damages. The *Bowen* court merely attempted to distinguish *Foust* on the basis that compensatory damages are "normally limited and finite."[220] The fallacy of the Court's distinction is that while an employee's lost wages may be calculated in a reasonably accurate manner, the union's share of liability is uncertain and potentially debilitating after *Bowen.* Under *Bowen,* it is unclear whether liability will be determined on the basis of the hypothetical date on which an arbitration award would have issued if the union had processed the grievance to arbitration, or on the basis of some other concept of relative fault. In either situation, *Bowen's* limited holding makes the specific nature of the adopted rule unclear and creates the potential for unforeseeably large damage awards that threaten the union's interest in a stable treasury—consequences that the Court sought to avoid in *Vaca* and *Foust.*

A rule requiring the union to pay for the employee's increased damages may substantially injure its resources. Moreover, it is unnecessary to provide an incentive for the proper handling of grievances or to deter union misconduct. In *Republic Steel v. Maddox,*[221] the Court recognized the union's institutional interest in grievance administration. The *Maddox* Court stated that the "[u]nion interest in prosecuting employee grievances is clear. Such activity complements the union's station as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees."[222] The union, therefore,

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217. 103 S. Ct. at 597-98 n.16 (citations omitted).
218. *Vaca,* 386 U.S. at 197.
219. IBEW v. Foust, 442 U.S. 42, 50-52 (1979).
220. *Bowen,* 103 S. Ct. at 597-98 n.16.
221. 379 U.S. 650 (1965).
222. *Id.* at 653.

has an incentive to handle grievances effectively because this will serve its interests as the exclusive bargaining representative. Moreover, the political and personal interests of elected local union officials in preserving their status provides these individuals with an incentive to ensure that its constituency (the employees) view the union as a valuable representative. These tangible and immediate interests provide for the union and its officials a greater incentive to represent its bargaining unit members fairly and vigorously than would the potential of a large damage award.

The realities of fair representation litigation also provide effective safeguards against union misconduct.[223] The threat of being forced to bear the costs of the employee's attorney fees and litigation expenses, disregarding any potential back pay award, is a real and significant deterrent to the union's breach of its duty of fair representation. The decision of the Court of Appeals for the Fifth Circuit in *Seymour v. Olin Corp.*[224] illustrates this point.[225] In *Seymour,* the court held that the union was not liable for any of the employee's lost wages.[226] The union, however, did not escape financial responsibility for its breach of duty. The court held the union solely liable for the employee's attorney fees, an amount in excess of $39,000.[227] Prior to *Bowen,* therefore, unions already had a significant financial incentive to process grievances fairly.

The *Bowen* Court's analysis is also inconsistent with *Vaca's* concept of fault in apportioning damages. *Vaca* established that apportionment of liability should be according to the damage caused by the fault of the union and the employer.[228] The *Vaca* Court stated that the employer should not be shielded from the natural consequences of his breach of contract by the union's breach of its duty.[229] Accordingly, the Court held that an award against a union should not include damages attributable solely to the employer's breach of the collective bargaining agreement.[230] In *Bowen,* the Court viewed its analysis of the concept of fault as consistent with *Vaca.* The *Bowen* majority acknowledged that the employer wrongfully discharged the employee and was liable for back pay. Nevertheless, the Court reasoned that the union's breach of duty caused the grievance procedure to malfunction, and this caused an increase in the employee's damages. *Bowen* held that the union was solely liable for this increase in damages, even though both the union and the employer caused the employee's damages.[231]

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223. *See generally,* Note, *A Proposal for Apportioning Damages, supra* note 40, at 508.

224. 666 F.2d 202 (5th Cir. 1982).

225. *See id.* at 215; *see also* Del Casal v. Eastern Airlines, Inc., 634 F.2d 295 (5th Cir. 1981) (union held liable for $35,000 for services of an employee's attorney in a duty of fair representation action); Scott v. Teamster Local 377, 548 F.2d 1244 (6th Cir. 1977) (court held union liable for miscellaneous expenses incurred by the employee in collecting from the employer); *Bowen* Union Brief, *supra* note 86, at 13 nn.14-15.

226. *Seymour,* 666 F.2d at 212-15.

227. *Id.* at 215-16.

228. *Vaca,* 386 U.S. at 197.

229. *Id.* at 186.

230. *Id.* at 197.

231. *Bowen,* 103 S. Ct. at 595.

It is unfair and illogical to hold the union responsible for an employee's loss of earnings for the period of time after a hypothetical arbitration date on the ground that the union's conduct increased the employee's damages. First, the employer was solely responsible for wrongfully discharging the employee. If the employee had not been discharged, he would have remained working and not suffered any lost wages. Therefore, but for the employer's wrongful discharge, there would be no need for anyone to reimburse the employee for damages accumulated before or after a hypothetical arbitration date.[232] Second, the union did not cause the employer to breach the collective bargaining agreement. The union did not demand that the employee be discharged nor provoke the employer to breach the contract.[233] Moreover, the employer had the sole power to reinstate the employee and remedy the breach of contract;[234] the union did not prevent the employee's reinstatement.[235]

The weakness of this aspect of the *Bowen* analysis was expressly addressed in *Seymour v. Olin Corp.*[236] The *Seymour* court refused to hold the union liable for an employee's back pay damages that accrued after a hypothetical arbitration date. The court reasoned that the employer should be responsible for the back pay as a natural consequence of its wrongful discharge and should not be relieved of this liability merely because the union breached a separate duty to the employee to promptly rectify the employer's breach of contract.[237] The *Seymour* court explained, "The weakness of [the employer's] position is revealed when it is expressed somewhat more starkly: [employer], the wrongdoer, protests to the Union: you should be liable for all damages flowing from my wrong from and after a certain time, because you should have caught and rectified my wrong by that time."[238] Under this reasoning, the *Bowen* Court's position incorrectly allows a union to be held liable for the wrongful conduct of the employer.

Finally, *Bowen* allows the union to be held liable for a far greater share of damages than the employer.[239] The hypothetical arbitration date, which serves to limit the employer's apportioned liability, will usually be less than one year after the employee's discharge.[240] The majority of recent hybrid section 301 cases, however, have taken over five years to be fully litigated.[241] In light of these time patterns, the union's share of liability, which under *Bowen* may cover the portion of lost wages accruing after a hypothetical arbitration date, could cover a span of three to four years. Yet, in such

232. *Id.* at 603 (White, J., dissenting in part and concurring in part); *Bowen* Union Brief, *supra* note 86, at 38.

233. *Bowen* Union Brief, *supra* note 86, at 14.

234. *Id.* at 16 and 39.

235. *Id.* at 14; *Bowen,* 103 S. Ct. at 604 (White, J., dissenting in part and concurring in part).

236. 666 F.2d 202 (5th Cir. 1982).

237. *Id.* at 214-15.

238. *Id.* at 215.

239. *Bowen,* 103 S. Ct. at 603 (White, J., dissenting in part and concurring in part).

240. *Id.*

241. *Id.*

cases, the employer's liability for back pay will only cover a period of nearly a year. This great disparity in liability is totally unrelated to the parties' relative fault in causing the employee's injuries.[242] The result is that the union, which has had nothing to do with the wrongful discharge of an employee, will pay three to four times as much in back pay damages as will the employer, who actually discharged the employee.

C. Bowen's *Impact on the Collective Bargaining Relationship*

1. *Statute of Limitations*

Subsequent to *Bowen* in *Del Costello v. Teamsters*,[243] the Supreme Court addressed the issue of what statute of limitations applies in an employee suit against an employer and a union, alleging the employer's breach of a collective bargaining agreement and the union's breach of its duty of fair representation by mishandling the grievance or arbitration proceedings. The Court held that section 10(b) of the NLRA is the proper statute of limitations governing these hybrid section 301 suits against both the employer and the union.[244] Section 10(b) provides a six-month period for presenting unfair labor practice charges to the NLRB.[245] *Del Costello* implicitly applies to cases in which the employee's grievance was processed through the arbitration proceeding, and cases in which the grievance was not taken to arbitration or even through the preliminary stages of the grievance procedure.[246]

The *Del Costello* Court reasoned that an individual employee is often unsophisticated in labor relations and will usually be represented by a union. Within the applicable statute of limitations, however, the employee must evaluate the quality of her union's representation, retain an attorney, investigate matters not in issue in the arbitration proceeding, and develop her lawsuit. State statutes for vacating arbitration awards typically provide a very short time, such as thirty days,[247] in which to sue to vacate an arbitration award. The Court, therefore, concluded that "state limitations periods for vacating arbitration awards fail to provide an aggrieved employee with a satisfactory opportunity to vindicate his rights under § 301 and the fair representation doctrine."[248]

In *Del Costello,* the Court had its first opportunity to interpret *Bowen.*

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242. *Id.*

243. 103 S. Ct. 2281 (1983).

244. *Id.* at 2291.

245. Section 10(b) provides, in relevant part, "That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the change with the Board. . . ." 29 U.S.C. § 160(b) (1979).

246. 103 S. Ct. at 2291 n.16.

247. In United Parcel Serv. v. Mitchell, 451 U.S. 56 (1981), however, the New York State statute of limitations for vacating an arbitration award was 90 days. This short period in which to file suit severely restricts a grievant's ability to seek redress under state law. In the prescribed time, an aggrieved employee must discover misconduct on the part of the union, retain an attorney, and develop his case for trial.

248. *Del Costello,* 103 S. Ct. at 2291.

Justice Brennan, writing for a majority, revealed that *Bowen* was neither intended to alter the apportionment principles established in *Vaca* and *Czosek,* nor to expand the scope of the union's liability for damages in the form of lost wages. In holding that the application of a state statute of limitations for legal malpractice to an employee's claim against the union was inappropriate, the majority opinion declared:

> The most serious objection [to applying the state's statute of limitations period] is that it does not solve the problem caused by the too-short time in which an employee could sue his employer under borrowed state law. In a commercial setting, a party who sued his lawyer for bungling an arbitration could ordinarily recover his entire damages, even if the statute of limitations foreclosed any recovery against the opposing party to the arbitration. The same is not true in the § 301/fair representation setting, however. We held in *Vaca,* and reaffirmed . . . in *Bowen,* that the union may be held liable *only* for "increases if any in [the employee's] damages caused by the union's refusal to process the grievance." Thus, if we apply state limitations periods, a large part of the damages will remain uncollectible in almost every case unless the employee sues within the time allotted for his suit against the employer.[249]

The Court did not apply its interpretation of *Bowen* to the facts presented in *Del Costello.* Thus, it is unclear whether the Court views *Bowen* as proper authority for a new rule of apportioning damages, such as a rule holding the employer liable for an employee's damages up to the hypothetical date of an arbitration award and holding the union responsible for damages from such a date until the time of the employee's reinstatement. Nevertheless, it is clear that the Court views *Bowen* as consistent with *Vaca* and *Czosek* in the following respects. First, the Court indicated that the employee cannot recover his entire damages from the union.[250] A verdict holding the union entirely responsible for the employee's damages was conceivable, although unlikely, if *Bowen* was interpreted to allow a jury to apportion the liability for damages purely on the basis of each party's degree of fault. Secondly, the Court's interpretation of *Bowen* will not allow the employer to completely hide behind the union's breach of duty. In *Del Costello,* the Court emphasized that "the union may be held liable *only* for increases if any in [the employee's] damages caused by the union's" breach of duty.[251] The Court added that "a large part of the [employee's] damages will remain uncollectible in almost every case unless the employee sues within the time allotted for his suit against the employer."[252] Thus, *Del Costello* clearly indicated that the Court recognizes a limit to the union's liability and the scope of the *Bowen* decision.[253]

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249. *Id.* at 2292 (citations and footnote omitted) (emphasis and brackets in original).

250. *Id.*

251. *Id.*

252. *Id.*

253. The United States circuit courts of appeals are divided on the issue of the retroactive application of the six-month limitations period mandated by *Del Costello.* The Third, Fifth, Sixth, Seventh, and Eleventh Circuits have held that the six-month limitations period should

2. Union's Response

Although *Del Costello* indicated that *Bowen* may not radically increase the union's exposure to liability for damages, the scope of the *Bowen* decision remains unclear. *Del Costello* neither addressed, nor defined, the proper application of the majority opinion in *Bowen* regarding the apportionment issue. Therefore, labor unions and their counsel must consider how they are going to alter their policies and procedures to respond to the uncertainty presented by *Bowen*.

a. Role of the Grievance Procedure

The most important feature of a collective bargaining agreement is the grievance procedure.[254] The grievance/arbitration procedure involves the adjudication and enforcement of rights under an existing collective bargaining agreement.[255] This procedure provides employees with a contractual remedy for the employer's breach of the collective bargaining agreement.[256]

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be applied retroactively to bar § 301 suits against employers and unions that were filed more than six months after the claim arose. *See* Perez v. Dana Corp., Parish Frame Div., 718 F.2d 581 (3d Cir. 1983); Edwards v. Sea-Land Serv., Inc., 1983 D. LAB. REP. (BNA) No. 245, D-1, No-81-2283 (5th Cir. Dec. 5, 1983); Curtis v. International Bhd. of Teamsters, Local 299, 716 F.2d 360 (6th Cir. 1983); Storck v. International Bhd. of Teamsters, Local Union No. 600, 712 F. 2d 1194 (7th Cir. 1983); Hand v. International Chemical Workers Union, 712 F.2d 1350 (11th Cir. 1983); Rogers v. Lockheed-Georgia Co., 1983 D. LAB. REP. (BNA) No. 245, A-2, Nos. 81-7810, 82-8137, 82-3005, 82-5625, 82-5115, 82-5194, 82-5313, 82-5589 (11th Cir. Dec. 5, 1983). The Ninth Circuit has held that the *Del Costello* decision should not be applied retroactively. *See* Edwards v. Teamsters Local Union No. 36, 1983 D. LAB. REP. (BNA) No. 245, E-1, No. 82-5326 (9th Cir. Nov. 3, 1983); *see also* 1983 D. LAB. REP. (BNA) No. 245, A-1.

254. Feller, *supra* note 14, at 742. The grievance procedure varies greatly, usually depending upon the size of a company. Small companies may have a simple, informal one- or two-step procedure. Major companies, however, often have very complex and formal grievance procedures. These grievance procedures usually contain four basic steps. First, the individual union member reports his problem either orally or in writing to the foreman or union steward in the complainant's department. If the matter is not settled at this stage, it will be referred to higher officers of the union and the company for an informal hearing. At the third stage, the grievance is heard before a meeting of the management grievance committee and the union shop committee. Finally, if the dispute remains unsettled, the grievance will proceed to arbitration.

At arbitration, the dispute is submitted to either a single arbitrator or a panel of arbitrators. One of arbitration's chief advantages is that it is adaptable to the needs of the parties and may vary greatly in its structure. Arbitration may range from an informal presentation and discussion of the dispute to a proceeding that closely resembles a formal trial. The arbitrator may make no formal record of the proceeding or the decision, or the hearing may be fully recorded and transcribed by a court reporter and a formal written opinion issued.

This flexibility is beneficial to meeting the needs of labor and management in a wide variety of contexts. Moreover, arbitration utilizes experts whose experience and familiarity with labor-management relations enable them to understand and satisfactorily resolve the subtle and complex issues that arise in labor disputes.

255. H. EDWARDS, R.T. CLARK, JR. & C. CRAVER, LABOR RELATIONS IN THE PUBLIC SECTOR 666 (2d ed. 1979); D. ROTHSCHILD, L. MERRIFIELD & H. EDWARDS, COLLECTIVE BARGAINING AND LABOR ARBITRATION 284-85 (2d ed. 1979); Feller, *supra* note 14, at 742.

256. Note, *Duty of Fair Representation in Grievance Administration, supra* note 3, at 186.

Arbitration of grievances is a private method of self-regulation that is supported and sanctioned by the national labor policy.[257] Section 203(8) of the Labor Management Relations Act of 1947 provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .[258]

The grievance process serves four primary functions. First, it provides the interested parties a relatively inexpensive and expeditious means of settling disputes. Second, it provides the employee with the knowledge that the ultimate resolution of his grievance will rest with a neutral third party, or panel, rather than solely with his employer. Third, the private resolution process conserves judicial resources. Finally, and most significantly, the grievance procedure serves the national labor policy of maintaining labor peace.[259]

The process is an alternative to the strike in the resolution of traditional and reoccurring labor disputes.[260] In *Textile Workers Union v. Lincoln Mills,*[261] the Supreme Court established that "the agreement to arbitrate grievance disputes is the quid pro quo for an agreement not to strike."[262] In other words, the employer agrees to submit a dispute to final and binding arbitration in exchange for the union's promise not to strike over that issue prior to the arbitration award. This arrangement contributes to stable and peaceful labor relations.

The establishment of a grievance procedure is closely related to the exclusivity principle. Section 9(a) of the NLRA[263] provides that a union, selected by a majority of the employees in the appropriate bargaining unit, shall be the employees' "exclusive representative . . . for the purposes of collective bargaining. . . ."[264] The proviso to section 9(a) permits individual employees to present their grievances to their employer.[265] Notwithstanding

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257. H. EDWARDS, R.T. CLARK, JR. & C. CRAVER, *supra* note 255, at 665. For instance, § 203(d) of the Labor Management Relations Act of 1947 provides:

> Final adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for the settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement. . . .

29 U.S.C. § 173(d) (1949).

258. *See, e.g.,* Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95 (1962); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

259. H. EDWARDS, R.T. CLARK, JR. & C. CRAVER, *supra* note 255, at 665.

260. *Id.*

261. 353 U.S. 448 (1957).

262. *Id.* at 455; *see also* United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960).

263. For text of § 9(a), see *supra* note 4. For a discussion of the exclusivity principle, see *supra* note 9 and accompanying text.

264. *See supra* note 4.

265. *See* T. BOYCE, FAIR REPRESENTATION, THE NLRB AND THE COURTS 11 (Labor Relations and Public Policy Series No. 18, 1978).

this proviso, the overwhelming majority of collective bargaining agreements provide for exclusive union control over employee complaints in a grievance procedure ending in final and binding arbitration.[266] Moreover, the parties to a collective bargaining agreement usually provide that the grievance procedure established in the collective bargaining agreement will be the exclusive procedure for resolving grievances arising under the contract.[267]

b. Nonexclusive Access Grievance Procedure

Bowen limited the union's potential liability in a grievance procedure to which it does not have exclusive access.[268] The *Bowen* Court developed this limitation in distinguishing *Czosek*. While *Czosek* involved an alternative procedure to the one provided in the collective bargaining agreement, *Bowen's* analysis of *Czosek* applies to a single grievance procedure in which an individual could process his grievance over the union's objection.

In *Czosek,* the employees had an alternative grievance procedure under the Railway Labor Act. This procedure permits an employee to pursue his grievance, without the union, against the employer when the union fails to process his grievance.[269] The *Czosek* Court viewed the employee's claim against his union as separate from the employee's statutory right to pursue his claim against his employer.[270] *Czosek* held that "judgment against [the union] can in any event be had only for those damages that flowed from [its] own conduct. . . . [D]amages against the union for loss of employment are unrecoverable except to the extent that its refusal to handle the grievances added to the difficulty and expense of collecting from the employer."[271]

In *Bowen,* the Court interpreted *Czosek* as consistent with its opinion. The *Bowen* Court viewed the *Czosek* scenario as one in which the union "did not increase the damages the employer would otherwise have to pay [because the] union's conduct did not deprive the employees of immediate access to a remedy."[272] Therefore, in such a suit, the only damages flowing from the union's wrongful conduct were the injured employee's added expenses. The *Bowen* majority viewed this analysis as consistent with *Vaca's* holding that each party should be responsible for the damages caused by its fault.[273]

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266. Lehmann, *The Union's Duty of Fair Representation*—Steele *and Its Successors,* 30 FED. B.J. 280, 282 n.15 (1971).

267. *Bowen,* 103 S. Ct. 588, 596 (1983).

268. In *Bowen,* the grievant had access to an alternative procedure. Bowen could have appealed his discharge to the Civil Service Commission; however, his right to do so expired 15 days after he receive notice of the Postal Service's action. Bowen would have waived his access to the contractual remedies had he selected the administrative procedure. Because Bowen chose the grievance procedure provided by the collective bargaining agreement, he was prevented from subsequently presenting his claim to the Civil Service Commission. *Bowen,* 103 S. Ct. at 592 n.5.

269. *See* 45 U.S.C. § 153 (i), (j) (1976).

270. 397 U.S. at 28.

271. *Id.* at 29.

272. 103 S. Ct. at 599.

273. *Id.*

The *Bowen* Court recognized that a union becomes the exclusive representative in a contractual grievance procedure by acquiring exclusive control of the procedure through collective bargaining.[274] In response to *Bowen,* the union could attempt to negotiate a grievance procedure for "just cause" cases, such as discipline and discharge actions, in which the union does not have exclusive access to the procedure.[275] It is arguable that these cases impact the entire collective bargaining unit to a lesser extent than policy questions.[276] The just cause cases are likely to involve the application of a clear contractual provision to a unique and disputed set of facts.[277] Policy issues, however, such as promotions and seniority, have a broad impact on the bargaining unit because they place the rights of one employee against the rights of another employee.[278] Moreover, a policy issue is likely to require the interpretation of an ambiguous provision in the collective bargaining agreement, and such a ruling will govern the rights of all the bargaining unit members prospectively.[279]

Pursuant to the collective bargaining agreement governing such a grievance procedure, the resolution of just cause matters would not have any precedential impact on future cases. The procedure would not provide for resolution of grievances through final and binding arbitration. An employee could select the union to process his grievance. As an alternative, the employee, at his own expense, could process his grievance or retain an attorney or nonunion agent as his representative in the procedure.[280]

In the nonexclusive access procedure, if the employee selects the union to process his grievance, the union will be guilty of breaching its duty of fair representation if its conduct violates the fair representation standards established in *Vaca.* Under such circumstances, *Bowen* held that the union would be liable only for the added expenses that the employee eventually incurred in processing his claim against the employer. This liability is based on the fact that the employee had the right to process his own grievance in the nonexclusive procedure. Accordingly, the union's conduct did not increase the amount of damages the employer would otherwise have to pay because the union's breach did not deprive the employee of immediate access to a remedy. Therefore, the only damages flowing from the union's breach of duty would be the employee's added expenses.[281]

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274. *Id.* at 596 n.14.

275. The general concept of the alternative grievance procedure proposed in this article is derived from the following: Telephone interview with Kathy Krieger, Attorney, United Brotherhood of Carpenters & Joiners of America, Washington, D.C. (March 14, 1983); Interview with Anton G. Hajjer, Attorney, O'Donnell & Schwartz, Washington, D.C. (March 15, 1983) [hereinafter cited as Interviews, Krieger & Hajjer].

276. *Id.*

277. *See generally* R. GORMAN, BASIC TEXT ON LABOR LAW 389 (1976).

278. *See* Interviews, Krieger & Hajjer, *supra* note 271.

279. *See generally* R. GORMAN, *supra* note 277, at 389.

280. *See* Interviews, Krieger & Hajjer, *supra* note 275.

281. A recent district court decision recognized that *Bowen* provided for limited liability in the context of an alternative grievance procedure. See Parker v. Baltimore & Ohio R.R., 555 F. Supp. 1182, 1185 n.10 (D.D.C. 1983).

The negotiation of a nonexclusive access procedure, which *Bowen* implicitly suggests may be used by unions to limit their liability, is neither a realistic nor beneficial option for the union. This procedure will not serve the interests of the union or the employer. The union's interest[282] will not be served by negotiating a procedure in which it does not have exclusive control of processing discharge and discipline cases. The Supreme Court has recognized that the union's "conscientious handling of grievance claims will enhance the union's prestige with employees."[283] A union will not be able to enhance its prestige among members of the bargaining unit if it does not have a role to play in processing grievances over discharges and disciplinary measures; these sanctions are crucial to the individual employee. Moreover, an employee may be reluctant to support a union that is not absolutely committed to representing her interests in these critical areas. In addition, an effective grievance procedure is recognized as a strong asset in any union organization campaign. The union's failure to negotiate a comprehensive grievance procedure may harm the union's future efforts to organize new members. The benefits that a union may receive, in terms of limiting its potential liability for damages under *Bowen,* do not outweigh the threat of losing permanent support from present and potential members.

An employer is unlikely to agree to a nonexclusive access grievance procedure for two reasons. First, in light of *Bowen's* interpretation of *Czosek,* the employer would be liable for all of the employee's back pay when the union's breach of duty consists solely in its failure to process the employee's grievance. Second, such a grievance procedure will not provide for final and binding arbitration. As a result, the employer will subject itself to the threat of a strike over each discharge or other disciplinary measure. As previously outlined, the Supreme Court has established that an employer's agreement to arbitrate grievances is the "quid pro quo" for a union's agreement not to strike.[284] Moreover, the Court in *Local 174, Teamsters v. Lucas Flour*[285] held that the employer's agreement to submit an issue to final and binding arbitration creates an implied promise on the part of the union not to strike over that issue prior to the arbitration award. In the nonexclusive access procedure, without final and binding arbitration, there will not be any union

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282. For a general discussion of the union's interests as the exclusive bargaining representative in the collective bargaining relationship, see Cheit, *supra* note 14, at 34.

283. Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965).

284. *See supra* notes 256-58 and accompanying text. In Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 454 (1957), the Court stated:

> The chief advantage which an employer can reasonably expect from a collective bargaining agreement is the assurance of uninterrupted operation during the term of the agreement. Without some effective method of assuring freedom from economic warfare for the term of the agreement, there is little reason why an employer would desire to sign a [collective bargaining] contract.

Id.

285. 369 U.S. 95 (1962).

promises, express or implied, not to strike regarding grievances involved in such a procedure.[286]

An employer's interest will not be served by agreeing to a contractual grievance procedure in which the employer subjects itself to liability for all of its employee's back pay damages and a work stoppage over every unresolved discharge or disciplinary grievance during the term of the agreement. Moreover, this result undermines the union's role as exclusive bargaining agent and is antithetical to the express national labor policy favoring grievance and arbitration as the most desirable method of resolving labor disputes.

c. Arbitration Policies

In response to *Bowen,* a union may adopt one of three general arbitration policies. First, the union may process an increased number of grievances to arbitration. Second, the union could develop a rigid internal standard to limit the number of cases that qualify for arbitration. Finally, the union has the option of merely rededicating itself to performing its duty of fair representation effectively.

1. Increase the Number of Arbitrations.—The union may adopt a policy in which every grievance is processed to arbitration, or a significantly increased number of complaints are arbitrated. *Bowen*'s threat of devastating liability for back pay damages is a legitimate justification for such a position. Nevertheless, a union procedure which requires and ensures that all, or even an increased number of, grievances will be arbitrated is contradictory to national labor policy.

As the exclusive bargaining agent of the employees, the union has a right to use its discretion in administering the grievance and arbitation machinery.[287] The Supreme Court expressly recognized this right in *Humphrey v. Moore,*[288] in which the Court stated:

> The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents. . . . Just as a union must be free to sift out wholly frivolous grievances which would only clog the grievance process, so it must be free to take a position on the not so frivolous disputes.[289]

In *Vaca,* the Court reiterated this view by noting that it did "not agree that an individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement."[290]

In general, unions have limited financial resources for administering col-

286. *See* Feller, *supra* note 14, at 757-58.
287. *See* Vaca v. Sipes, 386 U.S. 171, 191, 194 (1967).
288. 375 U.S. 335 (1964).
289. *Id.* at 349.
290. Vaca v. Sipes, 386 U.S. 171, 191 (1967).

lective bargaining agreements.[291] Implicit in the union's right to use discretion is its right to marshall its funds for arbitrating only meritorious grievances.[292] This concern was articulated by Judge Hug in his dissent in *Tenorio v. NLRB*.[293] He stated that "[i]n addition to [the union's] responsibility to protect the rights of aggrieved members, [it] has a duty to its membership as a whole to expend its resources wisely."[294] Accordingly, a union's scarce financial resources may be a legitimate basis for the union's decision not to process a grievance to arbitration.[295]

A firm practice of processing an increased number of cases to arbitration, regardless of their individual merits, will harm the interests of both the individual and the bargaining unit membership as a whole. The union will be forced to allocate its resources to many frivolous grievances. The employees with meritorious grievances will be deprived of the thorough representation to which they are entitled because the union will be devoting its resources toward arbitrating an increased number of grievances. Thus, the meritorious grievances may be inadequately investigated and presented, resulting in an award favorable to the employer. This result does not serve the employees' interest in fair and effective union representation in the contractual grievance procedure.

Similarly, because unions have limited financial resources for administering collective bargaining agreements, the union's treasury will be depleted if it processes virtually every grievance to arbitration. First, the arbitration process is costly;[296] the union's mere participation in an increased number of arbitrations will deplete its treasury even further. Second, due to the increase in arbitrations, the union may not have the time or money to investigate, prepare, and present the meritorious grievances properly at each stage of the procedure. As a result, subsequent to an arbitration award, a dissatisfied grievant may sue the union for breach of its duty of fair representation. An increase in such suits and a continued pattern of inadequate grievance representation will gradually result in the union losing the confidence and support of the employees it represents.

The parties' collective bargaining relationship may be harmed by a union policy requiring a significantly increased number of grievances to be processed to arbitration. The union's arbitration policy may force the parties to sacrifice the traditional benefits of the settlement process in contract administration. In negotiating a grievance and arbitration procedure, each party contemplates that the other will act in good faith to settle grievances prior to arbitration.[297] This is not an implied agreement to indemnify the other

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291. W. Isaacson, *supra* note 1, at D-6.

292. *Id.*

293. 680 F.2d 598 (9th Cir. 1982).

294. *Id.* at 605 (Hug, J., dissenting) (cited in W. Isaacson, *supra* note 1, at D-6).

295. VanderVelde, *supra* note 1, at 1145; *see* Curth v. Faraday, Inc., 401 F. Supp. 678 (E.D. Mich. 1975); Encina v. Tony Lama Co., 316 F. Supp. 239 (W.D. Texas 1970), *aff'd*, 448 F.2d 1264 (5th Cir. 1971).

296. VanderVelde, *supra* note 1, at 1145.

297. Vaca v. Sipes, 386 U.S. 171, 191 (1967).

party for liability incurred in breaching the agreement, but rather, it is a legitimate expectation arising from the collective bargaining agreement. The settlement process allows frivolous grievances to be resolved prior to arbitration, the most costly and time consuming stage of the proceeding.[298] The settlement of cases creates the potential for future problems to be handled similarly and for problem areas in the interpretation of the contract to be addressed and resolved.[299] *Bowen* implicitly imposes an obligation on the union to indemnify the employer for a portion of the liability incurred in breaching the contract, while potentially destroying the traditional benefits of the settlement process in the administration of a collective bargaining agreement. Furthermore, if *Bowen* forces the union to arbitrate more grievances, the union and the employer will have to reconsider the benefits of agreeing to a final and binding arbitration procedure.[300] In light of this potential development, it is ironic that the *Bowen* Court viewed its apportionment analysis as necessary to maintain the employer's interest in agreeing to final and binding arbitration.[301]

The *Bowen* rule may force the employer to refuse to agree to traditional arbitration provisions. The *Bowen* decision limits the employer's potential liability for back pay damages. Accordingly, he may not want to agree to final and binding arbitration. It is conceded that he will be faced with a potential strike over every grievance. Nevertheless, the employer may be willing to take the risk. If the union processes every grievance to arbitration, the employer will have to participate in these costly and time consuming proceedings. To avoid the effort and expense of arbitration, the employer may refuse to agree to arbitration and dare the union, and his employees, to strike. Current economic factors provide employers with increased immunity from labor strikes. The nation's consistently high unemployment rate creates an abundant supply of labor.[302] Also, in the first fifty weeks of 1983, the first-year wage settlements of collective bargaining agreements in all industries showed an actual decline of 2.5% from the corresponding period in 1982.[303] This reduction in the median first-year wage increase reflects the unions' willingness to accept wage concessions to preserve their members employment. Moreover, a strike over a grievance would be an economic strike,[304] allowing the employer to hire permanent replacements for the

298. *Id.*

299. *Id.*

300. *See infra* notes 297-302 and accompanying text.

301. *Bowen,* 103 S. Ct. at 597.

302. Through December 1983 the national unemployment rate for the civilian population was 8.2%. N.Y. Times, Jan. 7, 1984, at 1, col. 1.

303. 1983 D. LAB. REP. (BNA) No. 248, B-5.

304. An excellent summary of the distinction between economic and unfair labor practice strikes is set forth in THE DEVELOPING LABOR LAW, *supra* note 33, at 1007, where it is stated:

> Section 2(3) of the [NLRA] provides that strikers retain their employee status while on strike. Whether they have an absolute right to reinstatement, however, depends primarily upon whether the stoppage is determined to be an unfair labor practice strike or an economic strike. An *unfair labor practice strike* is strike activity initiated in whole or in part in response to unfair labor practices committed by

striking employees.[305] Therefore, in light of the fact that unions may decide to arbitrate more grievances, the reduction of employers' potential liability in breach of contract cases, and the present state of the economy, *Bowen* provides the employer with a legitimate incentive to refuse to be bound by traditional arbitration provisions.

2. *Internal Union Standard.*—A union may establish a clear policy that raises its internal standards for processing grievances to arbitration.[306] Pursuant to such a policy, a case will not be arbitrated unless it fits into one of the few categories of arbitrable cases. For example, the union could decide that only discharge cases will be arbitrated. This practice would allow the union to concentrate its resources on investigating, preparing, and presenting meritorious discharge cases without being subjected to unfair representation suits for failing to arbitrate less serious grievances.

This response, however, suffers from the same weaknesses as the non-exclusive access grievance procedure. The union will not be benefitted because it may not be viewed as an effective representative by present and potential members. The individual employee also will not benefit because throughout the grievance process he will not receive effective representation on matters crucial to his employment status.

3. *Recommitment to the Duty of Fair Representation.*—*Bowen* does not provide a clear standard for apportioning damages between the union and the employer. Accordingly, a union's most logical and practical response to *Bowen* may be a recommitment to performing its duty of fair representation effectively. In so doing, the union should reevaluate its grievance handling procedures to ensure that each grievance is promptly and thoroughly investigated. Also, the grievant should be kept fully advised as to the status of her case.[307] If the union decides not to process the grievance, the employee should be promptly informed of the union's decision and the reasons for that decision.[308] If the union decides to process the grievance, the union officials should present the grievance in a comprehensive and well-reasoned manner at each stage of the proceeding. The union's renewed commitment to its responsibility as the exclusive bargaining representative will serve the interests of the individual employee. The employees' bargaining agent will be acting in a positive, consistent, and aggressive fashion to enforce the

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> the employer. An *economic strike* is one that is neither caused nor prolonged by an unfair labor practice on the part of the employer. Although economic strikes generally are used in attempting to enforce economic demands upon the employer, such an object is not an absolute requirement.

Id.

305. *See* NLRB v. International Van Lines, 409 U.S. 48, 50 (1972); NLRB v. Mackay Radio & Telegraph Co., 304 U.S. 333, 345-46 (1938).

306. *See generally* Interviews, Krieger & Hajjer, *supra* note 275.

307. B. FELDACKER, *supra* note 1, at 383.

308. *Id.*

employees' rights against their employer. The union's interest will also be served because the work force will view the union as a fair and effective representative in the grievance procedure.

Additionally, the union's renewed effort will help it to avoid many fair representation suits.[309] Employees are less likely to sue their union when it handles their grievances in a consistent and efficient manner. When such suits are filed, the union's conscientious performance will diminish its risk of being found guilty of a breach of duty. In *Bowen,* the Court neither addressed nor modified the standard established in *Vaca* for determining whether the union breached its duty of fair representation. A union's recommitment to performing its duty of fair representation effectively is a practical way to avoid the potential liability for damages under the *Bowen* decision.

VI. CONCLUSION

The Supreme Court's decision in *Bowen* establishes a new standard for apportioning damages between the union and the employer in hybrid section 301 suits. The *Bowen* Court held that when an employee has been wrongfully discharged, her union may be held primarily liable for the employee's increased damages, in the form of lost earnings, caused by the union's breach of its duty of fair representation. The Court expressly did not adopt a precise rule for apportioning damages. Nevertheless, the Court's reasoning indicates that it favored a rule holding the union solely responsible for all of a wrongfully discharged employee's back pay damages accruing after a hypothetical date upon which an arbitration award would have issued if the union had processed the employee's grievance to arbitration. Yet *Bowen* is not limited to such an interpretation.

The Court clearly held that a union may be found liable for back pay damages when its breach of duty consists solely in failing to process an employee's grievance. This holding contradicts the principles and interests previously established, and consistently recognized, by the Supreme Court and the federal appellate courts.

Finally, *Bowen* does not provide the courts and the interested parties clear guidance regarding the governing standard for apportioning damages between the union and the employer. As a result, *Bowen*'s precise impact will be determined by further judicial consideration and the response of employers, unions, and employees.

In *Bowen,* the Supreme Court significantly altered established judicial precedent without providing reliable guidelines to govern collective bargaining relationships in the future. Therefore, *Bowen* fails to serve the traditional interests and goals of the national labor policy.

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309. *Id.*