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# ALLOCATION OF BACK-PAY LIABILITY FOR VIOLATION OF EMPLOYEE RIGHTS

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In recent years, federal courts have devoted considerable attention to the allocation of back-pay liability[1] between union and employer when both are at fault for wrongdoing against an individual employee or class of employees. This issue typically has arisen in two contexts. First, an employee who has been wrongfully treated under a collective bargaining agreement may file an action pursuant to section 301 of the Labor Management Relations Act (LMRA)[2] alleging breach of contract by the employer and breach of the duty of fair representation by the union.[3] Second, an employee who has been the victim of unlawful discrimination in employment[4] may sue both the employer and the



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1. Lost wages are the most common form of damages sought by employees who have been unlawfully treated by an employer or union, and therefore back pay is the most appropriate monetary relief. Back pay first became available as a remedy for unfair labor practices in § 10(c) of the National Labor Relations Act, 29 U.S.C. § 160(c) (1982). Since then, back pay has generally been available to remedy injuries caused by any unlawful conduct of employers. For a thorough discussion concerning the availability and computation of back pay in the employment discrimination context, *see* Special Project, *Back Pay in Employment Discrimination Cases*, 35 VAND. L. REV. 893 (1982).

2. Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1982).

3. Labor unions are required to represent fairly all employees in the bargaining unit, both in negotiation and administration of the collective bargaining agreement. The "duty of fair representation" was first enunciated in Steel v. Louisville & Nashville R.R., 323 U.S. 192 (1944), and has evolved through a long line of Supreme Court decisions. *See* Sear v. Cadillac Auto. Co., 501 F. Supp. 1350 (D. Mass. 1980), *aff'd*, 654 F.2d 4 (1st Cir. 1981). Breach of the duty of fair representation must be proved by evidence of arbitrary, discriminatory, or bad faith conduct by the union. *See* Vaca v. Sipes, 386 U.S. 171 (1967). *See generally* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973). The mechanics involved in an unfair representation lawsuit under § 301 are discussed *infra* at text accompanying notes 106 to 117.

4. The general antidiscrimination laws in the United States are Title VII of the Civil Rights

union on the theory that they were mutually responsible for the wrongful discrimination.[5]

In both situations, the employer and the union must each be culpable for wrongdoing against the employee in order to be held liable,[6] but apportionment of damages[7] between employer and union may vary, depending on the source of the employee's substantive right.[8] Part I of this article will discuss union liability for back pay in actions based on violation of the duty of fair representation in negotiation and administration of the labor contract and in actions based on violation of federal statutory rights. Part II will discuss apportionment of back pay between employer and union, comparing the approaches to apportionment under the LMRA and civil rights statutes. Part III focuses on the role of contribution in actions when there is mutual employer and union responsibility for wrongdoing. The thesis of this article is that liability should be apportioned among employers and unions according to fault, and that an employer or union held liable for damages in excess of actual fault should be entitled to contribution from the other party to the labor contract.

## I. *Union Liability for Back Pay*

There has never been serious doubt that an employer is liable for lost wages attributable to its own breach of contract or unlawful discrimination for the simple reason that employers pay wages and

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Act of 1964, 42 U.S.C. §§ 2000e-1 to e-17 (1982), and § 1981 of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982).

5. An employee also may join both employer and union in a discrimination case when both parties may be necessary for complete relief, even though one of the parties may not be liable for any wrongful act. *See, e.g.*, Townsend v. Exxon Co., 420 F. Supp. 189 (D. Mass. 1976) (union joined as necessary party where plaintiff sought reinstatement with seniority despite lack of any allegations of wrongdoing against union).

6. The standard for employer liability in § 301 actions by individual employees is breach of the applicable collective bargaining agreement. Unions will be liable under § 301 only for breach of the duty of fair representation. See *infra* notes 86 to 107 and accompanying text. The standards governing union or employer liability under the employment discrimination laws cannot be readily summarized, but it is safe to say that neither union nor employer will be found liable for unlawful employment discrimination without some degree of participation in a decision, policy, or practice resulting in unlawful discrimination. *See generally* W. DIEDRICH & W. GAUS, DEFENSE OF EQUAL EMPLOYMENT CLAIMS (1982).

7. Unless stated otherwise, damages in this article will refer solely to back pay.

8. Frequently the employee's actual injury will be the same regardless of whether relief is sought for breach of the labor contract or for violation of federal employment discrimination laws. That is, an improperly discharged employee loses wages regardless of the reason for discharge. Similarly, an employee unlawfully denied a promotion on account of race or national origin suffers lost wages, as does an employee improperly denied a promotion under terms of the applicable labor contract.

salaries.[9] Unions, however, act as employee representatives and can only indirectly cause loss of income to an employee.[10] Moreover, because a union has a duty to represent the interests of a majority of its members,[11] an award of back pay against the union to a single employee or a group of minority employees conflicts with the majority's interest in having a financially strong union. Finally, when an employee is awarded back pay against the union, that employee must indirectly subsidize the award as must other innocent dues-paying members.[12] The different roles performed by employer and union have led to a great deal of uncertainty and inconsistency in case law as to union liability for back pay.

### *Union Liability for Back Pay Based on Employer Breach of a Collective Bargaining Agreement*

The Supreme Court has interpreted section 301 of the Labor Management Relations Act as allowing employees to enforce their rights under a collective bargaining agreement in both state and federal courts.[13] At the same time, the Supreme Court has attached conditions to this right that are designed to promote the resolution of labor disputes through contractual grievance procedures.[14] Before a section

9. *See, e.g.*, Youngdahl, *Suggestions for Labor Unions Faced with Liability under Title VII of the Civil Rights Act of 1964*, 27 ARK. L. REV. 631, 646 (1973).

10. *See, e.g.*, Czosek v. O'Mara, 397 U.S. 25 (1970); Vaca v. Sipes, 386 U.S. 171, 209-10 (1969) (Black, J., dissenting). *See also* Youngdahl, *supra* note 9, at 646.

11. *See* Humphrey v. Moore, 375 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1952); Board of Educ. v. Nyquest, 590 F.2d 1241 (2d Cir. 1979); Sear v. Cadillac Auto. Co., 501 F. Supp. 1350 (D. Mass. 1980), *aff'd*, 654 F.2d 4 (1st Cir. 1981).

12. The commentator making this point also argued that bargaining unit employees displaced by reinstated victims of past discrimination should not be required to contribute directly or indirectly to a back-pay award. Youngdahl, *supra* note 9, at 646. This reasoning is suspect, because the duty of fair representation is owed to all employees in the bargaining unit, including employees who do not belong to the union and do not pay dues. *See, e.g.*, Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965); Smith v. Evening News Ass'n, 371 U.S. 195 (1962); Del Casal v. Eastern Airlines, Inc. 634 F.2d 295 (5th Cir. 1981); NLRB v. Boss Mfg., 107 F.2d 574 (7th Cir. 1939).

13. Section 301 provides that:

> 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.

LMRA § 301(a), 29 U.S.C. § 185(a) (1982). *See* Courtney v. Charles Box Co., 368 U.S. 502 (1962); Masonite Corp. v. International Woodworkers of America, 215 So. 2d 1466 (Miss. 1968), *cert. denied*, 394 U.S. 974 (1969).

14. As a general proposition, an employee is not entitled to maintain an action under § 301 unless he has exhausted his contractual remedies and had been denied fair representation by the

301 action may be maintained, an employee must show that the union did not fairly represent him in the contractual grievance procedure.[15] This requirement means that an employer will rarely be liable to an employee under section 301 without some measure of wrongdoing by the union.[16]

Notwithstanding that unfair union representation is a necessary element of section 301 actions, federal courts have historically been uncertain about union liability for back pay under section 301. This uncertainty has coexisted for several years with repeated recognition by the courts that unions may be liable for some damages attributable to breach of the duty of fair representation. Reluctance by the United States Supreme Court to articulate the elements of damages available against the union for unfair representation was most notably illustrated in *Vaca v. Sipes*.[17] Although the Court was not directly presented with the question of union liability for back pay in *Vaca*,[18] it stated that breach of the duty of fair representation could give rise to union liability for damages:

> The governing principle, then, is to apportion liability between the employer and the union according to the damages 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.[19]

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union. The exceptions to this rule were summarized by the court in Rabalais v. Dresser Indus., Inc., 566 F.2d 518, 519 (5th Cir. 1978):

> An employee who claims a violation by his employer of the collective bargaining agreement is bound by the terms of that agreement as to the method of enforcing his claim. Ordinarily, he must exhaust the remedies provided in that agreement, but he may bring suit without exhaustion if he can fit within one of the three exceptions to this general rule. No exhaustion is necessary if: (1) the union wrongfully refuses to process the employee's grievance, (2) the employer's conduct amounts to a repudiation of the remedial procedures specified in the contract, thus violating its duty of fair representation, or (3) exhaustion of contractual remedies would be futile because the aggrieved employee would have to submit his claim to a group "which is in large part chosen by the [employer and union] against whom [his] real complaint is made." [Citations omitted.]

15. See *infra* notes 107 to 117 and accompanying text for a more detailed discussion concerning the mechanics of an unfair representation suit under § 301.

16. *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Czosek v. O'Mara, 397 U.S. 25 (1970); Vaca v. Sipes, 386 U.S. 171 (1967); Conley v. Gibson, 355 U.S. 41 (1957).

17. 386 U.S. 171 (1967).

18. In *Vaca* the Supreme Court announced that breach of the duty of fair representation must be proved by evidence of "arbitrary or bad-faith conduct on part of the Union. . . ." *Id.* at 193. Under this standard, the Court held that the union was not liable for breach of the duty of fair representation. *Id.* at 194.

19. *Id.* at 197-98.

The Court did not explain exactly what form of damages is assessable against a union under section 301.[20]

Three years later, in *Czosek v. O'Mara*,[21] the Court focused on union liability for breach of its duty of fair representation by failing to process grievances filed by a group of improperly discharged employees. Relying on dicta in *Vaca* that the employer's breach of contract is the primary cause of damages to employees in section 301 suits,[22] the Court refused to extend back-pay liability to the union. The Court stated:

> Assuming a wrongful discharge by the employer independent of any discriminatory conduct by the union and a subsequent discriminatory refusal by the union to process grievances based on the discharge, damages 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.[23]

Until last Term, the Court did little to clarify the scope of union liability under section 301[24] and the lower courts reached different results on the issue of back-pay liability.[25]

20. The *Vaca* court did not decide whether a union could be held liable for back pay in a § 301 action, but the court suggested back pay was inappropriate due to the financial hardship that would result to the union and the primary liability of the employer. *Id.* at 196-97.

21. 397 U.S. 25 (1970).

22. *Vaca*, 386 U.S. at 196-97. See *supra* note 20.

23. *Czosek*, 397 U.S. at 29.

24. In Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), the Court reiterated that unions are liable for damages for failure to fairly represent a discharged employee, but the Court once again did not delineate the scope of union liability. Justice Stewart, however, did state that a union could be liable for back pay:

> If an employer relies in good faith on a favorable arbitral decision, then his failure to reinstate discharged employees cannot be anything but rightful, until there is a contrary determination. Liability for the intervening wage loss must fall not on the employer but on the union. Such an apportionment of damages is mandated by *Vaca's* holding that "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 . . . ." To hold an employer liable for back wages for the period during which he rightfully refuses to rehire discharged employees would be to charge him with a contractual violation on the basis of conduct precisely in accord with the dictates of the collective agreement. [Citation omitted.]

*Id.* at 573 (Stewart, J., concurring). The Court also discussed union liability under the principles of *Vaca* in IBEW v. Foust, 442 U.S. 42 (1979) (union not liable for punitive damages in § 301 suit) and in Clayton v. UAW, 451 U.S. 679 (1981) (comparison of internal union procedures and remedies with remedies available to employees in § 301 suits).

25. *See, e.g.*, Seymour v. Olin Corp., 666 F.2d 202 (5th Cir. 1982) (employer liable for all back pay); Milstead v. International Bhd. of Teamsters, 649 F.2d 395 (6th Cir. 1981), *cert. denied*, 454 U.S. 896 (1982) (same); Holodnak v. Avco Corp., 514 F.2d 285 (2d Cir.) *cert. denied*, 423 U.S. 892 (1975) (same); Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291 (1st Cir.

To clarify this uncertainty, the Supreme Court granted certiorari in *Bowen v. United States Postal Service*.[26] In *Bowen*, the Fourth Circuit had sustained a verdict[27] in favor of an employee who was discharged in violation of the collective bargaining agreement and denied fair representation by the union in processing his grievance,[28] but reversed the lower court's assignment of back-pay liability to both the employer and union. Despite the jury's finding the union was partially at fault for the employee's loss of income,[29] the circuit court reasoned that "[a]s Bowen's compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations . . . was chargeable to the Union."[30] Interestingly, the circuit court did not increase the amount of damages by the amount of lost income the jury attributed to the union's breach of duty of fair representation.[31]

In the Supreme Court's first direct response to the issue of union liability for back pay under section 301, a five-member majority reversed the Fourth Circuit and held the Postal Workers' Union liable for lost wages caused by its breach of the duty of fair representation.[32] Underlying the Court's decision was the belief that the federal policy

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1978) (attorney's fees properly apportioned between union and employer, but employer solely liable for back pay). *Compare* Smart v. Ellis Trucking Co., 580 F.2d 215 (6th Cir. 1978) (remanded for determination of damages in view of employer's reliance on results of arbitration); Harrison v. Chrysler Corp., 558 F.2d 1273 (7th Cir. 1977) (stating in dictum that union may be liable for back pay); Freeman v. O'Neal Steel, Inc., 436 F. Supp. 607 (N.D. Ala. 1977) (employer and union each liable for half of back pay and back pension payments); Ruzicka v. General Motors Corp., 96 L.R.R.M. (BNA) 2822 (E.D. Mich. 1977) (back-pay liability apportioned between employer and union according to sequence and degree of wrongful act).

26. 103 S. Ct. 588 (1983).

27. Pursuant to 28 U.S.C. § 2402 (1982), the jury sat only in an advisory capacity with regard to the United States Postal Service because it is an agency of the federal government. The district court followed the jury's advice.

28. Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir. 1981).

29. For the text of the district court's instructions to the jury, see *supra* note 169.

30. 642 F.2d at 82, *citing* Vaca v. Sipes, 386 U.S. 171, 195 (1967).

31. *Id.* at 82 n.6. Although the circuit court indicated that it might have revised the judgment to award full back pay against the employer if Bowen had cross-appealed against the Postal Service, the Supreme Court noted that Bowen was in any event entitled to the full amount of damages awarded and that a cross-appeal was not necessary to revise the damages award. *Bowen*, 103 S.Ct. at 592 n.7.

32. *Bowen*, 103 S.Ct. at 599. Justice Powell wrote the majority opinion and was joined by Chief Justice Burger, Justice Brennan, Justice O'Connor, and Justice Stevens. Justice White concurred in the judgment, but dissented to the assignment of partial back-pay liability to the union. Justices Marshall and Blackmun joined in the minority opinion without reservation. Justice Rehnquist joined in the minority opinion except as to its opinion that damages against the Postal Service should be increased to the full amount of lost income despite plaintiff's failure to cross-appeal.

of encouraging private resolution of labor disputes[33] would be better served by subjecting both parties to the grievance procedure to liability for back pay. Justice Powell explained:

> The principle announced in *Vaca* reflects this allocation of responsibilities in the grievance procedure—a procedure that contemplates that both employer and union will perform their respective obligations. In the absence of damages apportionment where the default of both parties contributes to the employee's injury, incentives to comply with the grievance procedure will be diminished. Indeed, imposing total liability solely on the employer could well affect the willingness of employers to agree to arbitration clauses as they are customarily written.[34]

Moreover, an employer has a right to rely on the results of the grievance procedure, which necessarily implies union liability for conduct resulting in "malfunction" of that procedure.[35] Thus, sixteen years after announcing "the governing principle" concerning apportionment of damages in section 301 suits,[36] the Supreme Court has finally decided that damages in the form of back pay may be awarded against the union for breach of its duty of fair representation.[37]

### *Union Liability for Back Pay in Actions Based on Violations of Federal Antidiscrimination Laws*

#### *Title VII*

In contrast to section 301 of the LMRA, Title VII of the Civil Rights Act of 1964[38] expressly provides that unions, as well as

33. The policy of encouraging resolution of labor disputes through private means was most emphatically set forth by the Supreme Court in 1960 in a series of cases that have come to be known as the *Steelworker's Trilogy*. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960).

34. 103 S. Ct. at 597 n.15.

35. *Id.*

36. Vaca v. Sipes, 386 U.S. 171, 197 (1967) ("The governing principle, then, is to apportion liability between the employer and union according to damage caused by the fault of each.").

37. In *Bowen* the court did not hold that the union was exclusively liable for damages caused by breach of the duty of fair representation. Although the union is "primarily" liable for damages caused by its breach, the employer may nevertheless be required to pay the full amount of the back-pay award. 103 S.Ct. at 595 n.12. Presumably, the union also is subject to a full liability and both the employer and union would be entitled to contribution for payment of damages exceeding their respective degree of fault. For discussion of the basis for apportioning damages after *Bowen*, see *infra* notes 164-183 and accompanying text.

38. 42 U.S.C. §§ 2000e to -17 (1982). 42 U.S.C. § 2000e-2(c) (1982) provides:

> It shall be an unlawful employment practice for a labor organization—(1) to exclude or expel from its membership, or otherwise to discriminate against, any in-

employers, may be held liable for back pay for unlawful discrimination.[39] The courts have had no difficulty holding labor unions liable for back-pay awards for Title VII violations.[40] A back-pay award against a union most commonly results from its role in negotiating and administering discriminatory seniority and promotion provisions.[41] Other union practices creating back-pay liability under Title VII include discriminatory membership or referral practices[42] and the

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dividual because of his race, color, religion, sex, or national origin; (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex or national origin; or (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

39. Section 706(g), 42 U.S.C. § 2000e-(5)(g) (1982) provides:

> If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate. Back pay liability shall not accrue from a date more than two years prior to the filing of a charge with the Commission.

40. In EEOC v. Enterprise Ass'n, Steamfitters Local 638, 542 F.2d 579, 586 (2d Cir.) *cert. denied*, 430 U.S. 911 (1976), a union found to have engaged in discriminatory referral practices argued that it was not subject to back-pay liability, citing Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). In the alternative, the union argued that it should be exempted from an award of back pay because of its poor financial condition. The appellate court rejected the union's argument that it was per se exempt from back-pay liability, citing § 706(g), and held that the union's claim of financial inability to pay the back-pay award was properly left to the district court's discretion. 542 F.2d at 579, 586. *See also* Ingram v. Madison Square Gardens Center, Inc., 482 F. Supp. 918 (S.D.N.Y. 1979).

41. *See generally* Note, *Union Liability under Title VII for Employer Discrimination*, 68 GEO. L.J. 959 (1980); Note, *Union Liability For Employer Discrimination*, 93 HARV. L. REV. 702 (1980). *See, e.g.*, Jackson v. Seaboard Coastline R.R., 678 F.2d 992 (11th Cir. 1982) (discriminatory promotion system); Patterson v. American Tobacco Co., 634 F.2d 744 (4th Cir. 1980), *vacated & remanded on other grounds*, 456 U.S. 63 (1982) (local union and international union liable for effects of discriminatory seniority system); Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374 (5th cir. 1978), *cert. denied*, 441 U.S. 968 (1979); Johnson v. Goodyear Tire Co., 491 F.2d 1364 (5th Cir. 1974) (discriminatory seniority system); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (discriminatory seniority system); Bennett v. Central Tel. Co., 545 F. Supp. 893 (N.D. Ill. 1982) (discriminatory job bid procedure). For a discussion of the legality of seniority systems under § 703(h), 42 U.S.C. § 2000e-2(h) (1982), see Note, *Employment Discrimination and the Seniority System Exceptions: American Tobacco Company v. Patterson*, 36 SW. L.J. 1039 (1982).

42. *See, e.g.*, EEOC v. Enterprise Ass'n, Steamfitters Local 638, 542 F.2d 579 (2d Cir.), *cert. denied*, 430 U.S. 911 (1976) (discrimination in membership and referral practices); Ingram v. Madison Square Gardens, Inc., 482 F. Supp. 918 (S.D.N.Y. 1979) (discriminatory referral

maintenance of segregated locals.[43] Finally, some courts have construed the duty of fair representation to encompass a duty to affirmatively resist Title VII violations by an employer.[44] Nevertheless, two commentators[45] have noted that the element of causation necessary for union liability under Title VII[46] suggests that a union should not be liable for employer actions not sanctioned by the collective bargaining agreement unless the union's failure to oppose discrimination by the employer is attributable to unlawful motivations.[47]

*Section 1981*

Section 1981 of the Civil Rights Act of 1866[48] protects the right of all persons in the United States to "make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws . . . ." This language was virtually ignored during its first century of existence,[49] but in the 1970s section 1981 was rediscovered and in-

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practices); Commonwealth v. Local Union 542, Int'l Union of Operating Eng'rs, 469 F. Supp. 329 (E.D. Pa. 1978) *rev'd*, 102 S. Ct. 3141 (1982) (discriminatory hiring hall system).

43. *See, e.g.*, Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974).

44. Dickerson v. U.S. Steel Corp., 439 F. Supp. 55 (E.D. Pa. 1977), *vacated in part on other grounds*, 616 F.2d 698 (3d Cir. 1980). *See also* Sears v. Bennett, 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982); Romero v. Union Pac. R.R., 615 F.2d 1303 (10th Cir. 1980); Sinyard v. Foote & Davies Div., 577 F.2d 943 (5th Cir. 1978); Donnell v. General Motors Corp., 576 F.2d 1292 (8th Cir. 1978), *cert. denied*, 103 S.Ct 97 (1982); EEOC v. Detroit-Edison Co., 515 F.2d 301 (6th Cir. 1975) *vacated*, 431 U.S. 951 (1977); Macklin v. Spector Freight Sys., Inc., 478 F.2d 979 (D.C. Cir. 1973). *But see* Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974); Kinard v. National Supermarkets, Inc., 458 F. Supp. 106 (S.D. Ala. 1978).

45. Note, *Union Liability Under Title VII for Employer Discrimination*, 68 GEO. L.J. 959 (1980); Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702 (1980).

46. Section 703(c)(3), 42 U.S.C. § 2000e-2(c)(3) (1982), provides:

> (c) It shall be an unlawful employment practice for a labor organization—
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> (1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
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> (2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which could deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

47. *See e.g.*, Bennett v. Central Tele. Co., 545 F. Supp. 893 (N.D. Ill. 1982).

48. 42 U.S.C. § 1981 (1982).

49. An early Supreme Court decision is largely responsible for the historical apathy toward § 1981. In Hodges v. United States, 203 U.S. 1 (1906), the Court held that the thirteenth amendment proscribed only involuntary servitude. Since § 1981 was enacted pursuant to the thirteenth amendment, *Hodges* severely limited the applicability of § 1981. *Id.* at 18-19. Section 1981 was further limited in 1948 by a Supreme Court decision inserting a state-action requirement into § 1981. Hurd v. Hodge, 334 U.S. 24 (1948). In Jones v. Alfred H. Mayer Co., 392 U.S. 409, 413

terpreted to proscribe discrimination in private employment.[50] To remedy violations of section 1981 by private employers, the circuit courts have uniformly held that an award of back pay is appropriate.[51]

In one of the earliest reported decisions discussing liability under section 1981 for discrimination in private employment, *Waters v. Wisconsin Steel Works*,[52] the Seventh Circuit held that a union, as well as an employer, is subject to liability for back pay.[53] Soon after *Waters*,[54] the Fifth Circuit held in *Johnson v. Goodyear Tire & Rubber Co.*[55] that a union may be held liable for back pay under both Title VII and section 1981 as a result of its assent to a discriminatory labor contract.[56] Although the Fifth Circuit did not expressly discuss the overlap of Title VII and section 1981, its discussion of union back-pay liability suggests that, for the most part, the same principles govern union back-pay liability under both statutes.[57] There are no reported decisions holding that labor unions are not subject to an award of back pay under section 1981.

*Equal Pay Act and Age Discrimination in Employment Act*

Union liability for back pay under the Equal Pay Act (EPA)[58] and

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(1968), the Supreme Court overruled this narrow interpretation of the Civil Rights Act of 1866, holding that a private realtor violated § 1982 of the Civil Rights Act of 1866 by refusing to sell a home on account of the prospective buyer's race.

50. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975). *See generally* Special Project, *Back Pay in Employment Discrimination Cases*, 35 VAND. L. REV. 895, 911-14 (1982).

51. *See* Campbell v. Gadsden County Dist. School Bd., 534 F.2d 650 (5th Cir. 1976); Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974) *cert. denied*, 425 U.S. 997 (1976); Brown v. Gaston County Dyeing Mach. Co., 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972). *See also* Davis v. County of Los Angeles, 566 F.2d 1334 (9th Cir. 1977), *vacated as moot*, 440 U.S. 625 (1979).

52. 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

53. *Id.* at 1321.

54. Waters v. Wisconsin Steel Works, 502 F.2d 1309 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976).

55. 491 F.2d 1364 (5th Cir. 1974).

56. *See also* Sabala v. Western Gillette, Inc., 516 F.2d 1251 (5th Cir. 1975) *vacated*, 431 U.S. 951 (1977). The plaintiffs in *Johnson* sought the same relief under Title VII and § 1981 and the court considered both statutes simultaneously throughout its opinion.

57. *Johnson*, 491 F.2d at 1381-82. Notwithstanding the *Johnson* court's interpretation of § 1981 and Title VII as imposing the same requirements for back-pay liability, it must be remembered that back pay under Title VII is available only for a 2-year period. 42 U.S.C. § 2000e-5(j) (1982). This limitation period has been held inapplicable in actions under § 1981. Johnson v. Railway Express Agency, 421 U.S. 454 (1975); Allen v. Amalgamated Transit Local 788, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977).

58. 29 U.S.C. § 206(d) (1982) provides:

> (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of

the Age Discrimination in Employment Act (ADEA)[59] is a more difficult issue than union back-pay liability under section 1981 or Title VII because the remedial procedures for violation of the EPA and the ADEA are incorporated into the Fair Labor Standards Act (FLSA).[60] In contrast to Title VII,[61] the FLSA exempts labor unions from liability in minimun wage or overtime pay actions by individual employees.[62] As a result, union back-pay liability for violations of the EPA[63] and the ADEA has been uncertain.[64]

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the opposite sex in such establishment for equal work on jobs than performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employees.

(2) No labor organization, or its agents, representing employees of an employer having employees subject to any provisions of this section shall cause or attempt to cause such an employer to discriminate against any employee in violation of ¶ (1) of this subsection.

59. 29 U.S.C. §§ 621-634 (1982). Section 4(a) of the ADEA, 29 U.S.C. § 633, provides in relevant part:

(a) It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or attempt to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

(3) to reduce the wage rate of any employee in order to comply with this chapter

. . . .

(c) It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

60. 29 U.S.C. §§ 201-219 (1982).

61. The pertinent section of Title VII is quoted *supra* note 39.

62. 29 U.S.C. § 216(b) (1982).

63. *See, e.g.*, Denicola v. G.C. Murphy Co., 562 F.2d 889 (3d Cir. 1977) (union not liable for back pay under EPA); EEOC v. Ferris State College, 493 F. Supp. 707 (W.D. Mich. 1980) (same); Brennan v. Emerald Renovators, Inc., 410 F. Supp. 1057 (S.D.N.Y. 1975) (same). *But see* Love v. Temple Univ., 366 F. Supp. 835 (E.D. Pa. 1973) (suggesting that employer could have right to contribution in action under EPA); Wirtz v. Hayes Indus., Inc., 1 Empl. Prac. Dec. (CCH) ¶ 9874 (N.D. Ohio 1968) (same).

64. See *infra* notes 71-79 and accompanying text.

This uncertainty could have been resolved by the Supreme Court in *Northwest Airlines, Inc. v. Transport Workers Union*,[65] but a narrowly written opinion left open the possibility of union back-pay liability in EPA actions by individual employees. Justice Stevens, writing for a unanimous Court, held that an employer does not have a right to contribution from a union partially at fault for wage differentials in violation of the EPA.[66] Northwest Airlines contended throughout the proceedings that there was an implied cause of action for contribution under the EPA or, in the alternative, that federal common law provided for contribution in suits based on discriminatory wage differentials. In rejecting Northwest's implied contribution argument, the district court reasoned that because employers and unions do not share common liability under the EPA, employers had no implied right of contribution.[67] The District of Columbia Circuit agreed with the trial court, reasoning that "[t]he statutory scheme of enforcement is comprehensive and by omission, it insulates unions from suits by employers."[68] If it had adopted the lower court's rationale for rejecting an implied cause of action for contribution under the EPA, the Supreme Court could have eliminated any doubt concerning union back-pay liability in private lawsuits. Focusing instead on congressional intent, however, the Court concluded that Northwest did not have an implied right to contribution because employers are in no sense "members of the class for whose especial benefit . . . the Equal Pay Act . . . was enacted."[69] The Court expressly left open the possibility that an employee could state a cause of action against a union for involvement in negotiating wage differentials violating the EPA.[70]

65. 451 U.S. 77 (1981). A union may still be subject to back-pay liability in actions by the government to recover back wages due affected employees. 29 U.S.C. §§ 216(c), 206(b)(c) (1982).

66. *Northwest Airlines*, 451 U.S. at 98. The Court also held that there is no right to contribution under Title VII when there is mutual responsibility for discrimination. *Id.* For a more detailed discussion of this aspect of *Northwest Airlines* see *infra* notes 236-251 and accompanying text.

67. No. 75-0223 (D.D.C. July 7, 1977) (unpublished).

68. Northwest Airlines v. Transit Workers Union, 606 F.2d 1350, 1355 (D.C. Cir. 1979).

69. *Northwest Airlines*, 451 U.S. at 92. For discussion of the principles governing implied statutory causes of action, see Cort v. Ashe, 422 U.S. 66 (1975). *See also* Universities Research Ass'n Inc. v. Coutu, 450 U.S. 754 (1981); Cannon v. University of Chicago, 441 U.S. 677 (1979).

70. 451 U.S. at 88 n.20. The Court stated:

> The Court of Appeals in this case relied upon the uncertain availability of such a remedy under the Equal Pay Act as a basis for rejecting petitioner's claim for contribution. The availability of this implied remedy, however, is relevant primarily to the question whether the elements of a contribution claim have been established; if no right to contribution exists at all, it is irrelevant that the elements of a traditional contribution claim may or may not have been established in this case.

In one of the few decisions discussing union liability under the ADEA, *EEOC v. Air Line Pilots Association*,[71] the court held that a union is liable for back pay for its involvement in negotiating a vacation benefits package that adversely affected pilots over age sixty. Since the action was brought by the EEOC, however, the court was not required to determine whether the same relief could be obtained against the union in a private cause of action.[72]

In contrast, the ADEA was construed narrowly in *Marshall v. Eastern Air Lines, Inc.*[73] to preclude joinder of a union as a party defendant and union liability for contribution in government-prosecuted actions. Eastern argued that Title VII has been interpreted to require joinder of labor unions that are partially responsible for discriminatory contract provisions.[74] The court simply held that case law under the FLSA was more pertinent than Title VII authority and that under the FLSA joinder was unnecessary.[75] Further, the court

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> Because we conclude that no right to contribution exists under either the statute or the federal common law, we need not decide whether the elements of a contribution claim have been established in this case. Therefore, we need not and do not decide the question whether employees have an implied right of action for backpay against their unions for violations of the Equal Pay Act. [Citation omitted.]

Although actionability against unions is unclear under the EPA, unions may nevertheless be held liable for back pay in Title VII actions challenging discriminatory wage differentials. See *supra* notes 38-47 and accompanying text. Thus, if the Supreme Court ever endorses the theory of "comparative worth" under Title VII, unions would appear to face a challenging duty in wage negotiations to protect their minority group members in traditionally lower-paying job classifications. The Supreme Court preserved the possibility of a comparative worth action by holding in County of Washington v. Gunther, 452 U.S. 161 (1981) that the "equal work" standard applied in Equal Pay Act cases was not incorporated into Title VII by the Bennett Amendment and was not a prerequisite to recovery in Title VII actions alleging unlawful wage differentials. For an excellent and concise discussion of *Gunther*, see Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. COLO. L. REV. 1, 63-74 (1981).

71. 489 F. Supp. 1003 (D. Minn. 1980), *rev'd. on other grounds*, 661 F.2d 90 (8th Cir. 1981).

72. The district court opinion is nevertheless a significant decision under the ADEA. The union argued that 29 U.S.C. § 626(b) (1982), providing that damages available in ADEA actions shall include the same remedies available under the FLSA, precludes an award of back pay against the union. The union based this conclusion on case law interpreting the FLSA as making the employer solely responsible for unpaid minimum wages or overtime compensation. The district court rejected this argument on the ground that limiting back-pay liability to the employer would not serve the broad remedial purposes of the ADEA. 489 F. Supp. at 1009.

73. 20 Fair Empl. Prac. Cas. (BNA) 908 (S.D. Fla. 1979).

74. *Citing* EEOC v. McLean Trucking Co., 525 F.2d 1007 (6th Cir. 1975); EEOC v. MacMillan-Bloedel Containers, Inc., 503 F.2d 1086 (6th Cir. 1974). *See also* Sears v. Bennett, 645 F.2d 1365 (10th Cir. 1981), *cert. denied*, 456 U.S. 964 (1982); Romero v. Union Pac. R.R., 615 F.2d 1303 (10th Cir. 1980); Donnell v. General Motors Corp., 576 F.2d 1291 (8th Cir. 1978), *cert. denied*, 103 S. Ct. 97 (1983); Sinyard v. Foote & Davies Div., 577 F.2d 943 (5th Cir. 1978); EEOC v. Detroit Edison Co., 515 F.2d 301 (6th Cir. 1975), *vacated*, 431 U.S. 951 (1977); Macklin v. Spector Freight Sys., Inc., 478 F.2d 978 (D.C. Cir. 1973). *But see* Williams v. General Foods Corp., 492 F.2d 399 (7th Cir. 1974); Kinard v. National Supermarkets, Inc., 458 F. Supp. 106 (S.D. Ala. 1978).

75. *Marshall*, 20 Fair Empl. Prac. Cas. (BNA) at 909-10.

denied Eastern's request for contribution from the union on the basis of analogous case law under the EPA,[76] citing *Brennan v. Emerald Renovators, Inc.*[77] In *Brennan*, the district court denied the employer's claim for contribution from the union on grounds that it lacked subject matter jurisdiction over an EPA action for damages against a labor organization.[78] However, the Supreme Court specifically left open the issue of union back-pay liability under the EPA in *Northwest Air Lines v. Transport Workers Union*,[79] thereby deflating the rationale for denying Eastern Air Lines' right to contribution. Consequently, the issue of union liability for back pay in employee actions under the ADEA and the EPA remains unsettled.

## II. *Apportionment of Back Pay Between Union and Employer*

This part concerns the approaches followed by the courts in allocating back-pay liability between an employer and a union that share responsibility for actionable wrongdoing against an employee.[80] Throughout the remainder of this article, the term "apportionment" will refer to the division of responsibility for injury to an employee between employer and union on the basis of fault.[81] The term "entire liability" will refer to an employee's right to collect the full amount of back pay from either defendant, notwithstanding the mutual responsibility for the employee's lost income. The term "separate" liability will refer to a plaintiff's right to collect from each defendant only the amount of back pay attributable to that defendant's wrongdoing.

### *Apportionment of Damages in Actions Based on Section 301 of the LMRA*

Although *Bowen v. United States Postal Service*[82] confirms that a union may be held liable for back pay for failure to provide fair

76. *Id.* at 910.

77. 410 F. Supp. 1057 (S.D.N.Y. 1975).

78. *Id.* at 1063.

79. 454 U.S. 77 (1981). For a discussion of *Northwest Airlines* as it applies to the EPA, see *supra* notes 65-70 and accompanying text.

80. In contrast to Part I, discussing rules of liability in actions by employees against an employer or union, Part II assumes mutual union/employer liability and focuses on the degree of liability.

81. "Apportionment," as used in this article, does not bear on a plaintiff's right to collect full back pay from either defendant. Rather, the term is used in the more limited sense of attributing fault to mutual wrongdoers. As pointed out by one commentator, the term "apportionment of damages" is also used in personal injury cases to refer to the allocation of separate liability for separate injuries. Comment, *Contribution Between Parties to a Discriminatory Collective Bargaining Agreement*, 79 MICH. L. REV. 173 n.5 (1980), *citing* W. PROSSER, TORTS § 52 (4th ed. 1971).

82. 103 S. Ct. 588 (1983).

representation,[83] the scope of this liability under section 301 and the basis for apportioning back pay requires further examination of the peculiar nature of "hybrid"[84] section 301 actions. The starting point is an analysis of the nature of union wrongdoing actionable under section 301; that is, what constitutes a breach of the duty of fair representation.[85] Next, the relationship between union breach of the duty of fair representation and employer breach of the collective bargaining agreement in causing loss of income to affected employees will be examined.

### *The Duty of Fair Representation*

Breach of a union's duty of fair representation arises in two general contexts—during contract negotiations and during administration of the contract. Because unfair representation in negotiations cannot result in section 301 liability,[86] this discussion will focus on unfair representation during contract administration. As with the issue of union liability for back pay under section 301,[87] the seminal Supreme Court decision concerning the standard of fair representation in contract administration is *Vaca v. Sipes*.[88] The employee in *Vaca* filed a grievance with his union contending that he had been wrongfully discharged because of prolonged ill health. Before exhausting all steps in the contractual grievance procedure, the union concluded that the employee was physically unfit for continued employment and refused to press his grievance to arbitration. In the trial of the employee's

83. See *supra* notes 26-37 and accompanying text.

84. Actions by employees against their employer and union pursuant to § 301, are "hybrid" actions in the sense that the employee is suing the union for breach of the duty of fair representation and the employer for breach of contract. *See, e.g.*, Bowen v. United States Postal Service, 103 S. Ct. 588, 602 (1983) (White, J., concurring in part, dissenting in part); United Parcel Serv. v. Mitchell, 451 U.S. 56, 60 n.2. (1981).

85. See *generally* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973).

86. Section 301 creates a cause of action for breach of a labor contract and, therefore, is inapplicable to conduct occurring before a contract is signed. See *infra* note 108. The duty of fair representation is derived from § 9 of the National Labor Relations Act, 29 U.S.C. § 159 (1982), which grants unions supported by a majority of bargaining unit employees the right to exclusively represent all employees in the bargaining unit. In order to prevent arbitrary union action against bargaining unit employees, the duty of fair representation circumscribes union conduct both before and after a contract is signed. *See, e.g.*, Humphrey v. Moore, 373 U.S. 335 (1964); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944) (under Railway Labor Act); Farmer v. ARA Serv., Inc., 660 F.2d 1096 (6th Cir. 1981). *See generally* Clark, *The Duty of Fair Representation: A Theoretical Structure*, 51 TEX. L. REV. 1119 (1973); Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957); Note, *Expanding the Duty of Fair Representation*, 49 UMKC L. REV. 105 (1980).

87. See *supra* notes 9-37 and accompanying text.

88. 386 U.S. 171 (1967).

wrongful discharge claim, the jury returned a verdict against the union on a finding that the employee was medically qualified to continue working.[89] The Missouri Supreme Court affirmed.[90] The United States Supreme Court reversed, holding that the Missouri Supreme Court erred in sustaining a jury instruction premising union liability under section 301 on the merits of the underlying grievance.[91] The Supreme Court explained that a union's breach of the duty of fair representation for refusing to fully process a grievance must rest upon a finding that the union acted arbitrarily, discriminatorily, or in bad faith toward the grievant.[92]

This standard was extended to unfair representation cases in *Hines v. Anchor Motor Freight, Inc.*,[93] which involved a claim against a union after all steps of the grievance machinery had been exhausted. As explained by the Court:

> The union's breach of duty released the employee of an express or implied requirement that disputes be settled through a contractual grievance procedure; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the contract . . . . As is the case where there has been a failure to exhaust, however, we cannot believe that

89. Sipes v. Vaca, 397 S.W.2d 658 (Mo. 1965).

90. *Id.*

91. The essential issue submitted to the jury was whether the union . . . arbitrarily . . . refused to carry said grievance . . . through the fifth step . . . .

"We have concluded that there was sufficient substantial evidence from which the jury reasonably could have found the foregoing issue in favor of plaintiff. It is notable that no physician actually testified in the case. Both sides were content to rely upon written statements. Three physicians certified that the plaintiff was able to perform his regular work. Three other physicians certified that they had taken plaintiff's blood pressure and that the readings were approximately 160 over 100. It may be inferred that such a reading does not indicate that his blood pressure was dangerously high. Moreover, plaintiff's evidence showed that he had actually done hard physical labor periodically during the four years following his discharge. We accordingly ruled this point adversely to defendants."

Vaca v. Sipes, 386 U.S. 171, 189 (1967), *quoting* Sipes v. Vaca, 397 S.W.2d 658, 665 (Mo. 1965).

92. As explained by the Court:

> Some have suggested that every individual employee should have the right to have his grievance taken to arbitration. Others have urged that the union be given substantial discretion (if the collective bargaining agreement so provides) to decide whether a grievance should be taken to arbitration, subject only to the duty to refrain from patently wrongful conduct such as racial discrimination or personal hostility.
>
> Though we accept a proposition that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration . . . .

*Vaca*, 386 U.S. at 190-91.

93. 424 U.S. 554 (1976).

> Congress intended to foreclose the employee from his § 301 remedy otherwise available against the employer if the contractual process has been seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct.[94]

The Supreme Court most recently reaffirmed the *Vaca* standard of scrutiny for unfair representation in contract administration in *Del Costello v. Teamsters*.[95]

Application of the *Vaca* standard has been a frequent task for the lower courts.[96] When all steps of the grievance process have been followed, as in *Hines*, lower court decisions are decidedly pro-union.[97] In *Harris v. Schwerman Trucking Co.*,[98] for example, the Eleventh Circuit rejected an employee's claim that union representation before an arbitral panel was perfunctory, stating that:

> Nothing less than a demonstration that the union acted with reckless disregard for the employee's rights or was grossly deficient in its conduct will suffice to establish such a claim. . . . [W]e believe that a claim that a union acted "perfunctorily" requires a demonstration that the union ignored the grievance, inexplicably failed to take some required step, or gave the grievance merely cursory attention. [Citations omitted.][99]

94. *Id.* at 567, 570. Plaintiffs in *Hines* were truck drivers who had been discharged for allegedly falsifying expense reports for lodging. The union processed plaintiffs' grievances through all steps of the arbitration procedure, but the joint arbitration committee ruled in favor of the company. Plaintiff contended that the union breached its duty of fair representation by failing to conduct an investigation that according to plaintiffs, would readily have produced evidence that the alleged falsification was actually due to a mistake by a motel clerk in recording receipts. The appellate court held that union negligence in failing to investigate the circumstances underlying a grievance could rise to the level of unfair representation. Hines v. Local 377, Int'l Bhd. of Teamsters, 506 F.2d 1153 (6th Cir. 1974), *rev'd in part sub nom.* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976).

95. 103 S. Ct. 2281 (1983). *See also* IBEW v. Foust, 442 U.S. 42, 47 (1979).

96. *See, e.g.*, Dober v. Roadway Express, Inc., 707 F.2d 292 (7th Cir. 1983); Harris v. Schwerman Trucking Co., 668 F.2d 1204 (11th Cir. 1982); Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981); Findley v. Jones Motor Freight, 639 F.2d 953 (3d Cir. 1981); Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888 (4th Cir. 1980); Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980). *See generally* Morgan, *Fair is Foul, and Foul is Fair—Ruzicka and the Duty of Fair Representation in the Circuit Courts*. 11 TOL. L. REV. 335 (1980).

97. *See, e.g.*, Morgan, *supra* note 96.

98. 668 F.2d 1204 (11th Cir. 1982).

99. *Id.* at 1206-07, *citing* Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888 (4th Cir. 1980); Robesky v. Qantus Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978). *See also* Dober v. Roadway Express, Inc., 707 F.2d 293 (7th Cir. 1983); Hart v. National Homes Corp., 668 F.2d 791 (5th Cir. 1982); Findley v. Jones Motor Freight, 639 F.2d 953 (3d Cir. 1981); Franklin v. Southern Pac. Transp. Co., 593 F.2d 899 (9th Cir. 1979). *Cf.* Miller v. Gateway Transp. Co., 616 F.2d 272 (7th Cir. 1980).

Similarly, the lower courts have given unions wide discretion to institute or discontinue grievance processing.[100] As explained by the Fourth Circuit in *Buchanan v. NLRB*[101]: "[T]he duty to avoid arbitrary conduct does not require a union to take every employee grievance to arbitration, and it has considerable discretion in sifting out grievances which it regards as lacking merit. Without such discretion, a union's effectiveness as bargaining agent would be undermined. [Citations omitted.]"[102] In addition, lower courts have held that a union may properly decide not to process a grievance that might unduly strain limited union resources[103] or because processing the grievance would not be in the best interest of the bargaining unit.[104]

100. When a union's failure to process a grievance is due to inadvertent neglect, as opposed to a reasoned decision, courts have not applied *Vaca* standards with uniformity. *Compare* Hoffman v. Lonza, Inc., 658 F.2d 519 (7th Cir. 1981) (negligent failure to timely file appeal under union constitution is not breach of duty of fair representation); Coe v. URW, 571 F.2d 1349 (5th Cir. 1978) (union unfair representation must be based on deliberate conduct); Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853 (8th Cir. 1975) (negligence not enough for finding of unfair representation) *with* Ruzicka v. General Motors Corp., 649 F.2d 1207 (6th Cir. 1981) (unexplained failure to timely pursue necessary step in grievance procedure to timely pursue necessary step in grievance procedure is breach of duty of fair representation); Robesky v. Qantus Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978) (gross negligence may breach duty of fair representation); Byrne v. Buffalo Creek R.R., 536 F. Supp. 1301 (W.D.N.Y. 1982) (union neglect in failing to advise grievant of necessity of filing written grievance with union was breach of duty of fair representation).

101. 597 F.2d 388 (4th Cir. 1979).

102. *Id.* at 394, *citing* Vaca v. Sipes, 386 U.S. 171, 191-92 (1976); Hardee v. North Carolina Allstate Serv., Inc., 537 F.2d 1255, 1259 (4th Cir. 1976). *See also* Freeman v. O'Neal Steel, Inc., 609 F.2d 1123 (5th Cir.), *reh. denied*, 614 F.2d 294, *cert. denied*, 449 U.S. 833 (1980); Ness v. Safeway Stores, Inc., 598 F.2d 558 (9th Cir. 1979); Ethier v. United States Postal Serv., 590 F.2d 733 (8th Cir. 1979); Fleming v. Chrysler Corp., 575 F.2d 1187 (6th Cir. 1978); Lewis v. Greyhound Lines-East, 555 F.2d 1053 (D.C. Cir.), *cert. denied*, 434 U.S. 997 (1977); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335 (6th Cir. 1975). *But cf.* Seymour v. Olin Corp., 666 F.2d 202 (5th Cir. 1982) (union refusal to process grievance due to grievant's hiring of attorney was breach of duty of fair representation); Soto Segarra v. Sea-Land Serv., Inc., 581 F.2d 291 (1st Cir. 1978) (unexplained failure to file grievance is breach of duty of fair representation); Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972) (union may not refuse to process grievance "merely at whim" of someone exercising union authority); de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (1st Cir. 1970), *cert. denied*, 400 U.S. 877 (1971) (union violated duty of fair representation by refusing to process grievance due to mistaken belief that claims would be resolved in unfair labor practice case). One commentator has argued that a union's decision not to process a grievance should be analyzed pursuant to a "good reason" test. Clark, *supra* note 85, at 1161-67.

103. *See* Encina v. Tony Lama Boot Co., 448 F.2d 1264 (5th Cir. 1971). *See also* Freeman v. O'Neal Steel, Inc., 609 F.2d 1123 (5th Cir. 1980) (dictum); Hershman v. Sierra Pac. Power Co., 434 F. Supp 46 (D. Nev. 1977) (dictum).

104. *See, e.g.*, Singer v. Flying Tiger Line, Inc., 652 F.2d 1349 (9th Cir. 1981) (union refusal to process repeated grievance not arbitrary); Kowalski v. Wisconsin Steel Works, 433 F. Supp 314 (N.D. Ill. 1977) (employee disciplinary record proper consideration); Pesola v. Inland Tool & Mfg., Inc., 423 F. Supp. 30 (E.D. Mich. 1976) (employee absentee record proper union consideration).

Finally, in contract interpretation of grievances involving competing interests among bargaining unit employees, the courts again emphasize the need to give unions broad discretion,[105] with the added caution that the union must make a reasoned assessment of the competing employee interests and cannot be motivated by improper considerations.[106]

### *Breach of the Duty of Fair Representation as a Necessary Element in § 301 Actions by Individual Employees*

Cases applying the duty of fair representation under section 301 uniformly hold that an award of back pay must be based on decisive wrongdoing by the union.[107] Union liability for unfair representation in section 301 actions is also contingent on a breach of contract by the employer.[108] Thus the role of union misconduct in causing section 301 back-pay liability to accrue is twofold: (1) by failing to fulfill its duty of fair representation, the union removes a bar to a suit under section 301 against both employer and union;[109] and (2) by failing to provide an employee with fair representation, the union reduces the possibility of remedying an alleged breach of contract before an employee is significantly injured.

Breach of the duty of fair representation as the threshold requirement for maintenance of a section 301 action by individual employees was first announced by the Supreme Court in *Vaca v. Sipes*.[110] Prior to *Vaca*, the Supreme Court provided employees with a remedy against

105. See *supra* note 102 and accompanying text.

106. *See, e.g.*, King v. Space Carriers, Inc., 608 F.2d 283 (8th Cir. 1979); Ekas v. Carling Nat'l Breweries, Inc., 602 F.2d 664 (4th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980); Burchfield v. United Steelworkers, 577 F.2d 1018 (5th Cir. 1978); Thacker v. Palm Beach Co., 450 F. Supp. 761 (E.D. Tenn. 1978). *Cf.* Smith v. Hussmann Refrigerator Co., 619 F.2d 1229 (8th Cir. 1980) (union breached duty of fair representation by failure to consider interest of employees with low seniority); Larry v. Penn Truck Aids, Inc., 94 F.R.D. 708 (E.D. Pa. 1982) (employees stated claim based on unfair representation resulting from union's failure to consider plaintiff's related interest while processing grievance of another employee). *See generally* Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Consideration?* 126 U. PA. L. REV. 251 (1977).

107. See *supra* notes 86-106 and accompanying text.

108. *See* Sear v. Cadillac Auto. Co., 501 F. Supp. 1350 (D. Mass. 1980), *aff'd*, 654 F.2d 4 (1st Cir. 1981); Chuy v. National Football League Players Ass'n, 495 F. Supp. 137 (E.D. Pa. 1980); Pajares v. United Steelworkers Local 5769, 432 F. Supp. 418 (E.D. La. 1977). *Cf.* Foust v. IBEW, 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979).

109. See *infra* notes 113-117 and accompanying text.

110. 386 U.S. 171 (1967). *See also* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Florey v. Air Line Pilots Ass'n, Int'l, 575 F.2d 673 (8th Cir. 1978); Rabalais v. Dresser Indus., Inc., 566 F.2d 518 (5th Cir. 1978); Shepherd v. Chrysler Corp., 433 F. Supp. 950 (E.D. Mich. 1977); Hardwick v. United States Postal Serv., 391 F. Supp. 20 (E.D. Tenn. 1974).

their union for a breach of duty of fair representation[111] and conditioned an employee's right to sue under section 301 on exhaustion of contractual remedies.[112] The Supreme Court connected the concepts of fair representation and exhaustion of remedies in *Vaca*, holding that an employee who has not exhausted contractual remedies may seek relief under section 301 when "the union has sole power under the contract to invoke the higher stages of the grievance procedure, *and* if, as is alleged here, the employee-plaintiff has been prevented from exhausting his contractual remedies by the union's *wrongful* refusal to process the grievance."[113] In *Hines v. Anchor Motor Freight, Inc.*,[114] the Court further held that unfair representation by the union will remove the bar of finality[115] if the union's breach "seriously undermines the integrity of the arbitral process . . . ."[116] One district court has summarized *Vaca* and *Hines* as follows: "The essence of *Vaca* and *Hines* is that the union's misconduct, its breach of DFR, must effectively deprive the employee of his *contractual* remedy in order to remove the bar of either the exhaustion requirement or the finality clause to the employee's independent suit under § 301."[117] Thus, any award of back pay to an employee under section 301 is necessarily traceable to the employer's breach of contract giving rise to the initial grievance and to the union's breach of duty enabling the employee to sue in federal court.

### *Lower Court Decisions Apportioning § 301 Back-Pay Liability*

Although back-pay liability for breach of employee contractual rights is contingent on a finding of unfair representation by the union, lower courts confronted with the issue of apportioning back-pay liability in section 301 actions have either discussed causation solely in relation to the merits of the grievance[118] or have rejected causation analysis by summarily concluding that union deprivation of employee

111. Humphrey v. Moore, 375 U.S. 335 (1964). See *supra* note 86.

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

113. 386 U.S. at 185 (emphasis in original).

114. 424 U.S. 554 (1976).

115. Collective bargaining agreements customarily provide that exhaustion of the contractual grievance procedure will act as a bar to any subsequent litigation concerning the alleged breach of contract. Finality clauses in collective bargaining agreements are uniformly enforced by the federal courts. *See* W.R. Grace & Co. v. Local 759, 103 S.Ct 2177 (1983); Rehmar v. Smith, 555 F.2d 1362 (9th Cir. 1976); Otero v. International Union of Elec., Radio & Machine Workers, 474 F.2d 3 (9th Cir. 1973); Haynes v. U.S. Pipe & Foundry Co., 362 F.2d 414 (5th Cir. 1966).

116. *Hines*, 424 U.S. at 567.

117. Sear v. Cadillac Auto. Co., 501 F. Supp. 1350, 1358 (D. Mass.), *aff'd*, 654 F.2d 4 (1st Cir. 1981).

118. *See* Self v. Teamsters Local 61, 620 F.2d 439 (4th Cir. 1980).

contractual remedies is not an adequate basis for an award of back pay.[119] The former approach, illustrated by *Self v. Teamsters Local 61*,[120] imposes back-pay liability on unions only if satisfaction of the duty of fair representation would have resulted in an award favorable to the grievant.

The plaintiffs in *Self* were a group of truck drivers discharged from Carolina Freight Lines for engaging in an unauthorized work stoppage. In a section 301 action, the plaintiffs alleged that they had been improperly discharged under the labor contract[121] and that the union breached its duty of fair representation by failing to press their claims against the employer.[122] The plaintiffs also alleged that the union breached its duty of fair representation by failing to keep the union membership apprised of the status of negotiations for a new national collective bargaining agreement.[123] The unauthorized work stoppage resulted from plaintiffs' mistaken belief that contract negotiations had broken down.[124]

After determining that the union improperly failed to inform members about the status of contract negotiations, the district court held that the union had "participated" in the discharge by improperly failing to keep employees abreast of contract negotiations and that the union breached its duty of fair representation in processing plaintiffs' grievances. The court awarded $600,000 for back pay and other monetary relief against the union.[125] Although the Fourth Circuit accepted the district court's findings of wrongdoing by the union,[126] it reversed the district court's assessment of back pay against the union. After determining that the union's failure to properly inform the employees about the status of ongoing collective bargaining did not constitute participation in the discharge of plaintiffs,[127] the court held that the union's unfair representation in processing grievances was not a sufficient basis for back-pay liability: "[D]espite the District Court's

119. *See* Seymour v. Olin Corp., 666 F.2d 202 (5th Cir. 1982); Milstead v. International Bhd. of Teamsters, 649 F.2d 395 (6th Cir. 1981); Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir. 1981), *rev'd*, 103 S.Ct. 588 (1983).

120. 620 F.2d 439 (4th Cir. 1980).

121. The district court dismissed the action against Carolina Freight after the joint grievance committee determined that the unauthorized work stoppage provided grounds for discharge. *Id.* at 441.

122. *Id.*

123. *Id.* at 442. Carolina Freight Lines and Local 61 were signatories to the National Master Freight Agreement and the North Carolina Supplement, which were being negotiated for a three-year renewal before the plaintiffs began their work stoppage.

124. *Id.*

125. *Id.* at 441.

126. *Id.* at 443.

127. *Id.*

findings of inadequacy in the union's representation in the initial grievance proceedings, there was no showing that the plaintiffs' dismissals would not have stood even had the union done its duty and pressed the case more zealously."[128] In other words, according to the Fourth Circuit, a union is not subject to back-pay liability in section 301 actions unless the court determines that satisfaction of the duty of fair representation would have resulted in a grievance resolution favorable to the plaintiff.[129]

The approach taken by both the district court and the circuit court in *Self* is troublesome for a number of reasons. First, section 301 is essentially a breach of contract action and neither the union nor the employer should be liable for back pay when the employer did not breach the labor contract.[130] Whether the grievance would have been resolved differently had the union performed its duty of fair representation is irrelevant when the district court has independently determined that there has been no breach of contract. Second, conditioning union liability on a finding that the arbitrator would have ruled favorably for the plaintiff, had he been fairly represented by the union, injects an extremely intangible and subjective element of proof into section 301 actions. Third, with regard to apportionment of back-pay liability between employer and union, the approach to causation discussed in *Self* ignores the fact that the union's breach of duty removed the exhaustion and finality bars to the employee's section 301 action and thereby subjected the employer to back-pay liability.[131] Finally, the *Self* approach subjects employers to exclusive liability for back pay despite their lack of control over union representation.

One advantage of the *Self* approach to apportioning back-pay liability in section 301 actions is that it recognizes that unions may properly be held liable for back pay in actions based on breach of contract. By contrast, several lower courts have stubbornly concluded that the loss of back pay is not caused by union unfair representation and may not properly be awarded against labor organizations in actions arising out of the employment relationship.[132] *Seymour v. Olin Corp.*[133] is particularly representative of this line of cases.

128. *Id.* at 443-44.

129. Although the district court concluded that plaintiffs might well have not been discharged if the union fairly represented them in processing a grievance, the appellate court suggested that a more affirmative finding on this point would be necessary in order to impose back-pay liability on the union. *Id.* at 443 n.11.

130. See *supra* note 108 and accompanying text.

131. See *supra* notes 110-117 and accompanying text.

132. *See* Peterson v. Lehigh Valley Dist. Council, 676 F.2d 81 (3d Cir. 1982); Seymour v. Olin Corp., 666 F.2d 202 (5th Cir. 1982); Milstead v. International Bhd. of Teamsters, 649 F.2d 395 (6th Cir. 1981), *cert. denied*, 454 U.S. 896 (1982); Bowen v. United States Postal Serv., 642 F.2d

Seymour, an electrician employed by Olin Corporation, was discharged in 1977 for selling electrical wire that he had allegedly misappropriated from his employer.[134] Shortly after learning of his discharge, Seymour contacted the president of the local union and was informed that the union would conduct an investigation. The union conducted an investigation, but refused to process Seymour's grievance unless Seymour "got rid" of an attorney he had retained to protect his interest in continued employment and to defend against possible criminal charges.[135] On appeal from a judgment that the union breached its duty of fair representation by refusing to process Seymour's grievance, the Fifth Circuit affirmed the district court's instruction on breach of duty of fair representation and held that there was a rational basis for the jury's determination that the union's conduct was arbitrary.[136]

The Fifth Circuit further held that the district court properly instructed the jury "to assess all of the damages for loss of income incurred by Seymour against Olin if it found for Seymour on the fair representation and wrongful discharge claims."[137] In response to Olin's arguments that liability for back pay should be apportioned between union and employer, the appellate court held that under *Vaca* back pay is not attributable to breach of the duty of fair representation and will not be assessed against a union. Obviously impatient with the employer's request for apportionment of back pay, the court characterized Olin's argument as follows: "Olin, 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."[138] The Fifth Circuit's lack of sympathy for the employer's argument that the union was partially responsible for the employee's loss of income is typical of other recent circuit court decisions in section 301 actions.

In *Milstead v. International Brotherhood of Teamsters*,[139] the Sixth Circuit, in a per curiam opinion, upheld a district court ruling denying

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79 (4th Cir. 1981), *rev'd*, 103 S.Ct. 588 (1983). *See generally* Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays for the Union's Breach?*, 1981 WIS. L. REV. 155.

133. 666 F.2d 202 (5th Cir. 1982).

134. *Id.* at 205.

135. *Id.* at 206. Seymour testified, and the jury determined, that the local union president told plaintiff that it could not process plaintiff's grievance until he discharged his lawyer because it was against union policy to allow a lawyer to sit in on union business. The jury found that the union refused to process plaintiff's grievance whether or not his attorney would be present at the grievance hearing. *Id.*

136. *Id.* at 210.

137. *Id.* at 212.

138. *Id.* at 215.

139. 649 F.2d 395 (6th Cir. 1981).

the plaintiff an opportunity to submit evidence of lost wages during the damages phase of a hybrid section 301 action in which the union was the sole defendant.[140] Relying on *Vaca*, the Sixth Circuit explained that evidence of lost wages could not properly be considered by the jury because back pay was not a proper component of union liability.[141] Accordingly, plaintiff Milstead was limited to introducing evidence of court costs, attorney's fees, travel expenses, "and other costs incidental to his attempts to recover against the union."[142]

*Milstead* is particularly interesting because an earlier Sixth Circuit decision, *Ruzicka v. General Motors Corp.*,[143] has traditionally been cited as authority for apportioning section 301 back-pay liability.[144] As in *Milstead*, the plaintiff in *Ruzicka* contended that he had been improperly discharged under the labor contract and that he was denied reinstatement as a result of the union's failure to represent him fairly through the grievance procedure. The district court dismissed the action on the ground that Ruzicka, as a matter of law, had failed to establish unfair representation.[145] On appeal, the Sixth Circuit reversed and remanded,[146] instructing the district court to submit the discharge issue to an independent arbitrator,[147] and further instructing that union liability, if any, would be limited to "that portion of

140. *Id.* at 396. During the trial on the merits, both union and employer were parties defendant. The jury returned a verdict in favor of plaintiff and assessed $20,000 damages against the union and $10,000 against the employer. After trial, the employer settled with plaintiff, but the International Brotherhood of Teamsters appealed the amount of damages. The appellate court upheld the finding of liability, but remanded for a new trial on size of the damages award against the union. Milstead v. International Bhd. of Teamsters, 580 F.2d 232 (6th Cir. 1978).

141. 649 F.2d at 396.

142. *Id. See also* Soto Segarra v. Seal & Serv., Inc., 581 F.2d 291 (3d Cir. 1978); Milstead v. International Bhd. of Teamsters, 580 F.2d 232 (6th Cir. 1978); Scott v. Local Union 377, 548 F.2d 1244 (6th Cir. 1977); Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); de Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281 (3d Cir. 1971).

143. 523 F.2d 306 (6th Cir. 1975).

144. *See generally* 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. 651, 675-78 (1979); Martucci, *Employer Liability For Union Unfair Representation: The Judicial Predilection and Underlying Policy Considerations*, 46 MO. L. REV. 78, 104-09 (1981); Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays For The Union's Breach?*, 1981 WIS. L. REV. 155.

145. Ruzicka v. General Motors Corp., 86 L.R.R.M. (BNA) 2030, 2031 (E.D. Mich. 1973). Ruzicka based the claim of unfair representation on the union's negligent failure to file notice of appeal to the third step of the grievance procedure on time. The district court refused to characterize the union's negligence as unfair representation, but the appellate court concluded that the union's overall processing of plaintiff's grievance could have been perfunctory, and therefore reversed the district court on this issue. *Ruzicka*, 523 F.2d at 310.

146. 523 F.2d at 315.

147. *Id.*

Appellant's injury representing 'increases, if any, in those damages [chargeable to the employer] caused by the union's refusal to process the grievance.' "[148] On remand, the district court adopted an arbitrator's finding that Ruzicka had been improperly discharged and, after receiving additional evidence, held that the union's representation of Ruzicka was perfunctory.[149]

Turning to the issue of damages, the district court elaborated on the instructions from the Sixth Circuit,[150] explaining that "a proper apportionment of damages must consider not only the chronology of the defendants' wrongful acts but also the gravity and nature of [the] wrongdoing. Each defendant contributed in its own way to the injuries suffered by [the] plaintiff, and each must answer for damages accordingly."[151] Although the court's formulation appears to require evaluation of several factors in determining the proper allocation of liability, the court concluded with little analysis that each defendant was liable for one-half of the total back-pay award.[152]

Since Sixth Circuit rejection of union liability for back pay in *Milstead*, the most favorable authority for the apportionment of back-pay liability is *IBEW v. Foust*.[153] In *Foust*, a radioman discharged by the Union Pacific Railroad Company brought suit against his union under the Railway Labor Act[154] contending that he was denied fair representation. As in *Milstead*,[155] the plaintiff settled with the employer and sought relief in federal court solely against the union.[156] In contrast to *Milstead*, however, the court instructed the jury that a finding of unfair representation could subject the union to liability for plaintiff's loss of "salary and wages, overtime pay, vacation pay, insurance, seniority and fringe benefits which the plaintiff would have received during the period he would have been working for the railroad company."[157] The district court also instructed the jury that a

148. *Id.* at 312, *citing* Vaca v. Sipes, 386 U.S. 171, 197-98 (1967).

149. *Ruzicka*, 96 L.R.R.M. (BNA) 2822, 2830 (E.D. Mich. 1977).

150. See *supra* note 148 and accompanying text.

151. *Ruzicka*, 96 L.R.R.M. (BNA) at 2837.

152. *Id.*

153. 572 F.2d 710 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979).

154. 45 U.S.C. §§ 151-58 (1982). Unions representing employees of companies subject to the Railway Labor Act are held to the same standards of representation established by the Labor Management Relations Act. In fact, the duty of fair representation was established in a series of cases arising under the Railway Labor Act. *See, e.g.*, Graham v. Brotherhood of Locomotive Firemen & Enginemen, 338 U.S. 232 (1949); Tunstall v. Brotherhood of Locomotive Firemen & Enginemen, 323 U.S. 210 (1944); Steele v. Louisville & Nashville R.R., 323 U.S. 192 (1944).

155. Milstead v. International Bhd. of Teamsters, 649 F.2d 395 (6th Cir. 1981). See *supra* notes 139-142 and accompanying text.

156. 572 F.2d at 718.

157. *Id.*

finding of wrongful discharge was unnecessary to an award of back pay against the union.[158] The jury found the union breached its duty of fair representation and assessed damages, primarily in the form of back pay, against the union in the amount of $40,000. The district court entered judgment in this amount and the Tenth Circuit affirmed.[159]

The Tenth Circuit's decision in *Foust* is commendable for its recognition that back-pay liability may properly be imposed on a labor organization for unfair representation during the processing of a grievance. However, the assessment of back-pay liability to a union without a finding that the employee was wrongfully discharged goes too far in removing causation as an element of back-pay liability. At the other extreme, the courts excluding unions from back-pay liability,[160] or suggesting as in *Self* that union back-pay liability is conditioned on a finding that unfair representation caused an erroneous arbitration decision,[161] ignore the role of unfair representation in individual section 301 actions as an inseparable cause of the employee's injury and the award of back pay against the employer. Failure to analyze the role of the duty of fair representation in the overall context of contract administration has been a common error in circuit court decisions considering apportionment of back-pay liability under section 301.

### *Bowen v. United States Postal Service*

Earlier in this article,[162] *Bowen v. United States Postal Service*[163] was discussed in connection with its holding that an employee may properly be awarded back pay against a union in hybrid section 301 actions. *Bowen* is also significant for its clarification of the role of causation in apportioning section 301 liability between employer and union. As in many lower court cases discussing apportionment of section 301 back-pay liability, the plaintiff, Charles V. Bowen, alleged that his discharge from employment violated the collective bargaining

158. *Id.*

159. Punitive damages totalling $75,000 were also assessed against the union in *Foust*. The Supreme Court granted certiorari to the union on the sole issue of the availability of punitive damages against a union for breach of the duty of fair representation. Reasoning that federal labor policies would be ill-served by subjecting unions to punitive damages for unfair representation, the Court held that punitive damages could not be assessed against a union under § 301. IBEW v. Foust, 442 U.S. 42, 52 (1979).

160. See *supra* notes 133-152 and accompanying text.

161. See *supra* notes 120-129 and accompanying text.

162. See *supra* notes 26-37 and accompanying text.

163. 103 S. Ct. 588 (1983).

agreement[164] and that the union failed to fairly represent him by failing to take his grievance to arbitration without sufficient reason.[165]

In response to a set of questions submitted as a special verdict, the jury found[166] that Bowen was discharged without just cause and that the union handled Bowen's grievance in an arbitrary and perfunctory manner. The district court credited the jury's findings and entered judgment against both defendants.[167] The district court also approved the verdict finding the Postal Service liable for $17,000 back pay and the union liable for $30,000 back pay.[168] This apportionment of back-pay liability was based on an instruction that back-pay liability should be apportioned to the employer prior to the date on which arbitration would have been conducted and to the union thereafter, until the date of Bowen's reinstatement.[169]

On appeal, the Fourth Circuit affirmed the district court's judgment in most respects,[170] but ruled that the district court improperly assessed back-pay liability to the union: "As Bowen's compensation was at all times payable only by the Service, reimbursement of his lost earnings continued to be the obligation of the Service exclusively. Hence, no portion of the deprivations—$47,000.00 plus $5,954.12 was chargeable to the Union."[171] Despite its refusal to impose back-pay liability on the union, the appellate court apparently accepted the district court's

164. The Postal Service discharged Bowen effective April 20, 1976, citing an alleged assault by plaintiff on a fellow employee and his alleged failure to attend and pass two separate qualification tests required for distribution clerk. Brief for the Respondent Union, On Writ Of Certiorari to the United States Court of Appeals for the Fourth Circuit, No. 81-525, at 3, Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir. 1981).

165. 103 S. Ct. 588 (1983). The union processed Bowen's grievance through three of the four steps involved in the grievance procedure under the applicable collective bargaining agreement. The national union cited the following reasons for not appealing Bowen's discharge to arbitration: (1) the union had been unsuccessful in winning reversal of discipline through arbitration of assault cases; (2) the Postal Inspector's investigative memorandum was thorough and credible; and (3) the information in the file supported the view that Bowen had an apparent propensity for violence directed at fellow employees. Brief for Respondent Union, *supra* note 164, at 7.

166. The jury sat in an advisory capacity only on the claims against the United States Postal Service. See *supra* note 27.

167. Bowen v. United States Postal Serv., 470 F. Supp. 1127 (W.D. Va. 1979).

168. *Id.* at 1131.

169. *Id.* Question 3 of the Special Verdict stated: "If [you find that the Union breached its duty of fair representation and/or the Service discharged Bowen without just cause], state from a preponderance of the evidence or with reasonable certainty the amount of compensatory damages to which [Bowen] is entitled."

Question 8 stated: "If compensatory damages are awarded by your answer to Question 3, state the amount, if any, that should be attributable to the defendant Union and the amount, if any, that should be attributable to the defendant Postal Service." 103 S. Ct. at 591 n.2.

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

171. 642 F.2d at 82, *citing* Vaca v. Sipes, 386 U.S. 171 (1967).

apportionment of fault for Bowen's loss of income. After denying both defendants' petitions for rehearing, the court *sua sponte* explained that it would not modify the judgment against the Postal Service to include the full amount of the district court's back-pay award.[172]

Plaintiff sought rehearing and rehearing en banc contending that the circuit court should have assessed entire liability to the Postal Service or, alternatively, that the original apportionment of damages by the district court should be reinstated.[173] After rehearing was denied by the Fourth Circuit, the Supreme Court granted plaintiff's petition for certiorari concerning the apportionment of back-pay liability between employer and union and the circuit court's refusal to assess entire liability to the employer.[174] The second issue was never reached because the Court held that the district court properly apportioned back-pay liability between employer and union on the basis of relative fault in causing Bowen's loss of income.[175]

Writing for the majority of five,[176] Justice Powell found that the union's role in enforcing a collective bargaining agreement provided a sufficient basis for assessing back-pay liability:

> The difficulty with this argument [that a union is not subject to back-pay liability] is that it treats the relationship between the employer and the employee, created by the collective-bargaining agreement, as if it were a simple contract of hire governed by traditional common law principles. This reading of *Vaca* fails to recognize that a collective-bargaining agreement is much more than traditional common law employment terminable at will. Rather, it is an agreement creating relationships and interests under the federal common law of labor policy.[177]

This comment, in contrast to the majority of lower court decisions,[178] recognizes that in a unionized plant, discipline and discharge decisions by an employer "cannot be viewed independently of the [grievance] system that interprets [the labor contract]."[179] The *Bowen* Court further recognized that sheltering unions from back-pay liability under

172. 642 F.2d at 82, n.6.

173. Brief of the Federal Respondent, On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit, No. 81-525, at 8, Bowen v. United States Postal Serv., 642 F.2d 79 (4th Cir. 1981).

174. Bowen v. United States Postal Serv., 103 S. Ct. 588 (1981).

175. *Id.* at 599.

176. See *supra* note 32.

177. 103 S. Ct. at 594.

178. See *supra* notes 132-152 and accompanying text.

179. *See* Comment, *Apportionment of Damages and DFR/Contracts Suits; Who pays for the Union's Breach*?, 1981 WIS. L. REV. 115.

section 301 was inconsistent with long-established federal labor policy. First, the Court reasoned that exclusion of unions from back-pay liability would frustrate the policy of encouraging private resolution of labor disputes[180] by removing a union incentive to pursue the grievance procedure.[181] Second, because unfair representation is an element of proof in individual section 301 actions, it would be unfair to saddle the employer with entire liability:

> Were it not for the union's failure to represent the employee fairly, the employer's breach "could [have been] remedied through the grievance process to the employee-plaintiff's benefit." The fault that justifies dropping the bar to the employee's suit for damages also requires the union to bear some responsibility for increases in the employee's damages resulting from its breach. To hold otherwise would make the employer alone liable for the consequences of the union's breach of duty.[182]

Finally, the Powell majority stated that imposing entire liability on employers would frustrate federal labor policy by discouraging employers from negotiating grievance procedures into collective bargaining agreements.[183]

By analyzing union back-pay liability under section 301 in terms of the union's role in enforcing the labor contract and the employer's reliance on the union's fulfillment of representation obligations toward employees, the Supreme Court appears to embrace the district court's chronological apportionment of back-pay liability with the hypothetical arbitration dates serving as a fulcrum separating employer liability and union liability.[184] Unfortunately, the Court disclaimed approval or disapproval of the district court's apportionment formula on the ground that the union objected to the district court decision solely on the theory that unions are altogether exempt from back-pay liability under section 301.[185] Moreover, the Court

180. *Bowen*, 103 S. Ct. at 596, *citing* John Wiley & Sons v. Livingston, 376 U.S. 543 (1964); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960).

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

182. *Id.* at 595, *quoting* Vaca v. Sipes, 386 U.S. 171, 186 (1967). The Court further stated:

> The union's breach of its duty of fair representation, however, caused the grievance procedure to malfunction resulting in an increase in the employee's damages. Even though both the employer and the union have caused the damages suffered by the employee, the union is responsible for the increases in damages and, as between the two wrongdoers, should bear its portion of the damages.

*Id.*

183. *Id.*

184. See *supra* note 169 and accompanying text.

185. 103 S. Ct. at 599 n.19. The *Bowen* minority believed that the majority held the district court's apportionment formula to be valid:

> The Court holds that an employer who wrongfully discharges an employee pro-

pointed out that, although back-pay liability under section 301 may be apportioned according to fault, the employee will be entitled to collect the full back-pay award from the employer.[186] The plaintiff's right to hold the employer entirely liable for back pay reinforces the compensatory purpose of section 301,[187] but it may require an employer to pay a disproportionate share of a back-pay award.[188] In Part III, the potential inequities inherent in the assessment of entire liability when there is mutual fault for wrongdoing against an employee is discussed in connection with the availability of contribution under section 301.

*Apportionment of Back-Pay Liability Under Title VII and § 1981*

As seen above, section 301 case law is characterized by difficulty in determining the role of causation in apportioning damages between employer and union in individual actions to enforce contractual rights. The role of causation as a basis for apportioning damages between employer and union in employee actions to enforce rights created by federal antidiscrimination laws is even more troublesome. Whereas section 301 liability can arise only from breach of the duty of fair representation by the union during administration and enforcement of the labor contract,[189] union and employer liability for violation of the antidiscrimination laws can arise both before and after a collective bargaining agreement is signed.[190] Moreover, union liability under Title VII and section 1981 is not tied into a specific procedural mechanism as in section 301; rather, union involvement in unlawful discrimination may arise in many contexts, including unfair representation in processing a grievance.[191]

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> tected by a collective bargaining agreement with an arbitration clause is only responsible for backpay that accrues prior to the hypothetical date upon which an arbitrator would have issued an award had the employee's union taken the matter to arbitration. All backpay damages that accrue after this time are the sole responsibility of the union, even where, as here, the union is in no way responsible for the employer's decision to terminate the employee.

*Id.* at 599 (White, J., concurring in part, dissenting in part).

186. *Id.* at 595 n.12. Footnote 12 in *Bowen* notes several questions that the Court did not address. First, could an employee collect 100% back pay from the union when liability has been apportioned between union and employer? Second, will an employee be required to prove inability to collect from a union before proceeding to collect full back pay from the employer? Third, will an employer have a right to contribution from the union after paying the entire back-pay award? The availability of contribution under § 301 is discussed *infra* in note 235.

187. "Of paramount importance is the right of the employee, who has been injured by both employer's and the union's breach, to be made whole." *Id.*

188. See *infra* note 239 and accompanying text for a discussion concerning the availability of contribution under § 301.

189. See *supra* notes 110-117 and accompanying text.

190. As has been previously discussed, unions are clearly subject to back-pay liability for violation of Title VII or § 1981. See *supra* notes 38-57 and accompanying text.

191. For a summary of union activity commonly giving rise to liability for unlawful discrimi-

*Discrimination During Negotiation of Labor Contract*

Regardless of the degree of union responsibility for a discriminatory contract provision,[192] the courts have shown great reluctance to apply any mechanistic formula to apportionment of back-pay liability under Title VII. If a union is strictly liable for negotiating a discriminatory contract provision, and both parties possess equal bargaining power, it could be appropriate simply to assign 50% liability each to employer and union. Mere acquiescence to a discriminatory contract provision is probably not a sufficient basis for union liability under Title VII,[193] however, and the uniform assessment of equal liability ignores the actual responsibility of a union or employer for inclusion of the unlawful provision. Therefore, if causation is considered relevant to the proper apportionment of back-pay liability in actions under Title VII, as the *Bowen* Court held it to be under section 301, courts must closely examine the bargaining process and relationship culminating in inclusion of a discriminatory provision in the labor contract.[194]

Despite recognition that signatories to a collective bargaining agreement often share different degrees of culpability for discriminatory

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nation, see *supra* notes 41-44 and accompanying text. The standards of union liability for unlawful discrimination are succinctly stated in Note, *Union Liability for Employer Discrimination*, 93 HARV. L. REV. 702 (1980).

192. As explained by one commentator:

> A court confronted with a discriminatory provision in a collective bargaining agreement could analyze union liability under Title VII in two ways. The court could confine its inquiry to *results* of the collective bargaining process and hold the union liable per se for signing a contract that violates Title VII. Alternatively, the court could attempt to analyze the pre-contract negotiations between union and the company to determine whether one party lacked responsibility for inclusion of the offending clause. A union would be excused from liability if it could show that it made sufficient efforts to *exclude* the unlawful provision from the contract.

Note, *Union Liability For Employer Discrimination*, 93 HARV. L. REV. 702, 703-04 (1980) (emphasis in original), *citing* Comment, *The Union as Title VII Plaintiff: Affirmative Obligation To Litigate?*, 126 U. PA. L. REV. 1388, 1405-13 (1978).

193. *See, e.g.*, Terrel v. United States Pipe & Foundry, 644 F.2d 1122 (5th Cir. 1981) (union not liable for discriminatory seniority system when it had actively taken steps to minimize discriminatory effect of provision); EEOC v. Detroit-Edison Co., 515 F.2d 301 (6th Cir. 1975) (union liable under Title VII for role in negotiating unlawful seniority system but not liable as party to labor contract for discriminatory hiring or testing practices), *vacated and remanded*, 431 U.S. 951 (1977) (remanded for further consideration in light of Supreme Court's decision in *International Bhd. of Teamsters v. United States*); Sears v. Atchison, T. & S.F. Ry., 454 F. Supp. 158 (D. Kan. 1978) (district court must analyze union role in negotiating discriminatory seniority system before assessing Title VII liability). *But cf.* Johnson v. Goodyear Tire & Rubber Co., 491 U.S. 1364 (5th Cir. 1974) (language indicating that signatories to discriminatory labor contract are per se liable); Myers v. Gilman Paper Co., 544 F.2d 837 (5th Cir.), *modified on reh.*, 556 F.2d 758 (5th Cir.), *cert. dismissed*, 434 U.S. 801 (1977) (same); Cox v. Allied Chem. Corp., 382 F. Supp. 309 (M.D. La. 1974), *modified on other grounds*, 538 F.2d 1094 (5th Cir. 1979), *cert. denied sub nom.* Allied Chem. Corp. v. White, 434 U.S. 1051 (1977) (same).

194. Note that the standard for union liability is "cause or attempt to cause" discrimination by the employer. 42 U.S.C. § 2000e-2(c) (1982). See *supra* note 46.

contract provisions,[195] lower courts have been uniformly reluctant to apportion Title VII liability between employer and union on the basis of fault. Typically, after determining that a particular contract provision is discriminatory, the courts have held that the parties are equally liable for the employee's resulting loss of income.[196] A recent Eleventh Circuit decision, *Jackson v. Seaboard Coast Line Railroad Co.*,[197] exemplifies the unwillingness to allocate Title VII liability on the basis of fault. The plaintiffs in *Seaboard* contended that as a result of an unlawful collective bargaining agreement provision, they had been locked into a low-paying job classification that was disproportionately filled by black employees.[198] After determining that the railroad had historically discriminated in hiring by segregating black applicants in lower-paying job categories and that the collective bargaining agreement perpetuated the discriminatory hiring practice by limiting promotional opportunities of employees in the lower-paying job classifications,[199] the district court entered judgment against the union.[200] On appeal, the union argued that it should not be fully responsible for back pay because (1) the railroad company was responsible for hiring and promotion of employees, and (2) the labor contract was originally negotiated on a nationwide basis and did not have a discriminatory effect in the majority of bargaining units.[201] The appellate court agreed

195. *Compare* Tooley v. Martin-Marietta Corp., 648 F.2d 1239 (9th Cir. 1981) (inclusion of union shop clause in labor contract discriminated toward employees with religious-based objection to payment of union dues) *and* Sears v. Atchison, T. & S.F. Ry., 645 F.2d 1365 (10th Cir. 1981) (union pressure on employer to accept discriminatory contract provision) *with* Bennett v. Central Tel. Co., 545 F. Supp. 893 (N.D. Ill. 1982) (employer primarily responsible for inclusion of discriminatory job bidding procedure in labor contract).

196. There is a handful of cases indicating that the party primarily responsible for inclusion of a discriminatory contract provision is exclusively liable for back pay. However, only one of the signatory parties was found to have violated Title VII in these cases. *See, e.g.*, EEOC v. Enterprise Ass'n, Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976) (union exclusively liable); Bennett v. Central Tel. Co., 545 F. Supp. 893 (N.D. Ill. 1982) (employer exclusively liable).

197. 678 F.2d 992 (11th Cir. 1982).

198. The bargaining unit involved in *Seaboard* was composed of employees in four job categories: carmen, carmen apprentices, helper apprentices, and carmen helpers. Carmen were the highest-paid employees in the bargaining unit and the positions of carmen apprentice and helper apprentice enabled employees to automatically progress to the carmen position. By contrast, the carmen helper's position, which was composed entirely of black employees, did not provide for automatic progression and effectively restricted black employees to lower-paying positions. *Id.* at 997-98.

199. Jackson v. Brotherhood of Ry. Carmen, No. 576-54, slip op. at 1 (S.D. Ga. May 15, 1980).

200. The employer was originally joined as a party defendant, but plaintiffs dropped their charges of discrimination against the railroad company in an amended complaint. Subsequently, the court ordered the employer reinstated as party defendant for the limited purpose of providing employees full relief in the form of reinstatement with full seniority. 678 F.2d at 999.

201. *Id.* at 1016-17. Additionally, the union contended on appeal that plaintiffs did not prove that they were qualified for promotions. The Eleventh Circuit rejected this argument because there was sufficient evidence to support the district court's finding that plaintiffs were qualified.

with the union's contention that the employer was primarily responsible for the discriminatory practices, but it nevertheless held that the union was liable for full back pay:

> [T]he promotion system attacked by appellees is contained in the collective bargaining agreement negotiated in 1967, and, therefore, the Brotherhood as well as the Railroad can be held liable for its discriminatory impact. "A union is *jointly liable* with the employer for discrimination caused in whole or in part by the provisions of a collective bargaining agreement. As the representative of the black employees, the union is charged with the duty of protecting them from invidious treatment."[202]

Since the employer in *Seaboard* was solely responsible for the initial hiring discrimination resulting in the contractual promotion system's discriminatory impact, assessment of entire back-pay liability to the union is excessive. Nevertheless, there is no indication that the court considered, or the union requested, apportionment of liability on the basis of actual fault.

This curious failure to consider apportionment of back-pay liability is also evident in *Farmer v. ARA Services, Inc.*[203] The plaintiffs in *Farmer* were four female employees of a vending machine company who claimed they had been discriminated against in initial placement, promotional opportunities, seniority, and compensation. The alleged discriminatory acts of the employer included initial promulgation of the discriminatory hiring and promotion policies, as well as negotiation of sex-based wage differentials and job classifications.[204] The union was alleged to have discriminated by participating in collective bargaining and failing to provide fair representation to plaintiffs in processing several grievances about the employer's actions.[205] Plaintiffs' allegations concerning union involvement in negotiating discriminatory contract provisions centered on the designation of separate job classifications for vending machine "servicemen" and vending machine "attendants." Female employees of ARA Services were concentrated in the lower-paying attendant classification, which the trial court found to involve work comparable to that performed by servicemen, but with little opportunity for advancement or promotion.[206] The Eighth Circuit accepted district court findings that the union unlawfully discriminated against female employees in contract negotiations by

202. *Id.* at 1016 (emphasis supplied) [citation deleted], *quoting* Parson v. Kaiser Aluminum & Chem. Corp., 575 F.2d 1374, 1389 (5th Cir. 1978).

203. 660 F.2d 1096 (8th Cir. 1981).

204. *Id.* at 1099.

205. *Id.* After *settling* with the employees, ARA Services was dismissed from the suit.

206. *Id.* at 1100.

(1) negotiating transfer and promotion provisions that perpetuated the employer's discriminatory hiring and placement practices, and (2) negotiating discriminatory wage differentials and compensation packages.[207] Upon these findings, the Eighth Circuit affirmed the lower court decision holding that the union was "jointly and severally liable under Title VII for acquiescing in the discriminatory practices of the employer."[208]

By assessing the union back-pay liability under Title VII, the appellate court circumvented the issue of apportionment of damages for the union's unfair representation in processing plaintiffs' grievances. Nevertheless, the court explained:

> [W]here, as in the present case, the union's breach of its statutory duty (of fair representation) results also from its wrongful participation in the breach of the contract or from the negotiation of discriminatory contract provisions, then the union may be held jointly and severally liable with the employer or its liability for damages may be apportioned to the extent that it shares responsibility for the damages.[209]

This passage indicates that the Eighth Circuit considered apportionment of back-pay liability on the basis of fault appropriate in Title VII cases and in hybrid section 301 cases when there is mutual participation in the underlying breach of contract,[210] but the court clearly did not analyze the scope of back-pay liability in terms of actual fault. The court simply reduced the amount of union back-pay liability by the amount of plaintiff's settlement with the employer without discussing the relative degrees of responsibility shared by employer and union for the discriminatory hiring, promotion, and compensation practices.[211]

The inequity in imposing entire back-pay liability for discrimination resulting from unlawful contract provisions is evident because the collective bargaining relationship involves competing employer and union interests and differing capabilities to negotiate inclusion of a desired provision in the labor contract. Just as the unions in *Seaboard*[212] and

207. *Id.* at 1103-04. The district court also held, and the Eighth Circuit affirmed, that the union breached its duty of fair representation to female employees by failing to properly explain the contract to union membership before submitting the proposed contract for employee ratification and by failing to fairly represent the plaintiffs during the grievance procedure. *Id.*

208. *Id.* at 1104, *citing* McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 284-85 (1976) and EEOC v. Detroit-Edison Co., 515 F.2d 301, 314 (6th Cir. 1975), *vacated and remanded on other grounds sub nom.* Utility Workers Union v. EEOC, 431 U.S. 951 (1977).

209. *Farmer*, 606 F.2d at 1107.

210. *But cf.* Milstead v. International Bhd. of Teamsters, 649 F.2d 395 (6th Cir. 1981). *Milstead* is discussed *supra* at notes 139-142 and accompanying text.

211. *Farmer*, 660 F.2d at 1107.

212. Jackson v. Seaboard Coast Line R.R., 678 F.2d 992 (11th Cir. 1982).

*Farmer*[213] were held liable for back pay without a reduction for the employer's initial hiring discrimination,[214] so an employer's proscribed conduct may be primarily attributable to wrongdoing by the union. For example, in *Brotherhood of Railroad Trainmen v. Howard*,[215] the employer reluctantly discharged a group of black trainmen in response to the union's threat of a strike unless the employer transferred all of the black employees' work to an all-white bargaining unit.[216] Although an employer is not excused from Title VII liability for its acquiescence to a union demand,[217] imposing entire liability for back pay on the employer does not take into account that its comparative fault for the employees' loss of income is far outweighed by conduct of the union. Similarly, when discrimination by an employer results from its bargaining obligations with a union that maintains discriminatory membership, hiring halls, or referral practices,[218] assessment of entire back-pay liability to the employer exceeds any realistic degree of fault.

The same criticism made of the courts' approach to apportionment of damages in hybrid section 301 actions may be made here: the refusal to apportion back-pay liability according to fault ignores the realities of the collective bargaining relationship. Although parties to a collective bargaining agreement may be strictly liable for negotiating a discriminatory contract provision,[219] it does not follow that one particular party must be liable for the entire amount of any resulting back-pay award. A more equitable approach would require scrutiny of the collective bargaining relationship and apportionment of liability based on the parties' relative degrees of culpability for inclusion of the discriminatory provision in the labor contract.[220]

213. Farmer v. ARA Serv., 660 F.2d 1096 (8th Cir. 1981).

214. See *supra* notes 197-208 and accompanying text.

215. 343 U.S. 768 (1952).

216. *Id.* at 771. *See also* Sears v. Atchison, T. & S.F. Ry., 645 F.2d 1365 (10th Cir. 1980).

217. *See, e.g.*, Sears v. Atchison, T. & S.F. Ry., 645 F.2d 1365 (10th Cir. 1980); Gilmore v. Kansas City Terminal Ry., 509 F.2d 48 (8th Cir. 1975).

218. *See, e.g.*, EEOC v. Enterprise Ass'n, Steamfitters Local 638, 542 F.2d 579 (2d Cir. 1976) (discriminatory work referral and membership practices), *cert. denied*, 430 U.S. 911 (1977); Evans v. Sheraton Park Hotel, 503 F.2d 177 (D.C. Cir. 1974) (same); Gilmore v. Kansas City Terminal Ry., 509 F.2d 48 (8th Cir. 1975) (discriminatory union membership and qualification policy).

219. See *supra* note 44 and accompanying text.

220. Some courts have recognized the inequity of imposing entire liability on an employer or union when there is mutual fault for the wrongdoing, but they have not apportioned back-pay liability on the basis of fault. *See* Glus v. G.C. Murphy Co., 629 F.2d 248 (3d Cir. 1980), *vacated and remanded on other grounds sub nom.* Retail, Wholesale & Dep't Store Union v. G.C. Murphy Co., 451 U.S. 935 (1981); Bush v. Lone Star Steel Co., 373 F. Supp. 526 (E.D. Tex. 1974).

*Discrimination in Contract Administration*

The strongest argument for apportionment of Title VII back-pay liability can be made when an employee files a grievance alleging unfair practices by the employer and in processing or refusing to process the grievance, the union discriminatorily breaches its duty of fair representation. In *McDonald v. Santa Fe Trail Transportation Co.*,[221] the Supreme Court made it clear that a union's failure to fairly represent an employee in a disciplinary grievance is actionable under Title VII if the union's breach of duty is attributable to unlawful motives.[222] Thus, an employee who has been unfairly represented in a grievance because of discriminatory considerations may seek relief under Title VII or under section 301 of the LMRA.[223] Under section 301, apportionment of back-pay liability is mandated by the Supreme Court's recent decision in *Bowen v. United States Postal Service*,[224] yet in a Title VII action involving identical injuries and wrongdoing, existing case law indicates that the employer and the union would be jointly liable for the entire amount of damages.[225]

The extensive overlap between hybrid section 301 cases and Title VII contract administration cases is particularly evident in *Farmer v. ARA Services, Inc.*[226] Over a period of several years, the plaintiffs in *Farmer* filed several grievances challenging employer conduct that allegedly disadvantaged female employees. The objectionable practices included the employer's improper consolidation of job functions, discriminatory job assignments, and improper application of the contractual job-bidding procedure.[227] Plaintiffs' grievances repeatedly proved unsuc-

221. 427 U.S. 273 (1976).

222. *Id.* at 284-85.

223. To date, there have been no reported allegations of a Title VII violation by an employer as a result of an employer's nondiscriminatory contract violation and a union's subsequent discriminatory breach of duty. This circumstance should not present adequate grounds to hold the employer liable for a Title VII violation, but it may be argued that the employment practice in question did not become final until conclusion of the grievance procedure and therefore the employer's initial conduct is tainted by unlawful discrimination.

224. 103 S. Ct. 588 (1983).

225. An examination of the circumstances giving rise to plaintiffs' respective causes of action in *Santa Fe Trail* and *Bowen* demonstrates the parallel between hybrid § 301 actions and Title VII actions against employer and union based upon discriminatory contract administration. The plaintiffs in both cases had been discharged by their employers and initially sought relief through the contractual grievance procedure. After the grievance procedure proved unavailing, the plaintiff in each case sued both employer and union, contending that the latter had breached its duty of fair representation in processing the discharge grievance. In *Bowen*, the plaintiff sued under § 301, while the plaintiff in *Santa Fe Trail* sued under Title VII and § 1981.

226. 660 F.2d 1096 (6th Cir. 1981). *Farmer* is discussed in connection with contract negotiation cases under Title VII *supra* at notes 202-210 and accompanying text.

227. *Id.* at 1101-02.

cessful and eventually they filed suit in federal court alleging (1) Title VII violations by the employer and the union in negotiating the collective bargaining agreement; (2) discriminatory treatment of female employees by the employer; and (3) breach of the duty of fair representation by the union, both as a violation of Title VII and as an element of a section 301 action for employer breach of contract.

The union contended that plaintiffs' section 301 action was barred for failure to exhaust contractual remedies, but the appellate court affirmed the lower court determination that plaintiffs were excused from exhausting all steps of the grievance procedure on the ground of futility.[228] The union further contested substantive jurisdiction of the federal court on the ground that plaintiffs' allegations of unfair representation were not properly asserted under section 301. Rejecting this argument, the Sixth Circuit simply stated that the union's duty of fair representation is owed both before and after a labor contract is executed.[229] This statement is most properly interpreted as indicating that unfair representation in contract negotiation gives rise to a cause of action under Title VII, but the court's language can also be construed as allowing section 301 actions for unfair representation in contract negotiation.[230] Whether this is what the Sixth Circuit intended is not certain because the court did not explain whether the assessment of back pay against the union was for violation of Title VII or of section 301.

The overlap between a union's duty of fair representation in section 301 cases and under Title VII, so evident in *Farmer*,[231] was succinctly explained by Judge Griffin Bell in *Causey v. Ford Motor Co.*[232]:

> The union's duty of fair representation as to the processing of grievances arises within the context of the Labor Management Relations Act, and must be distinguished from the union's duty to employees covered by Title VII not "otherwise to discriminate" against members in processing grievances. The fair representation duty under the LMRA, as enumerated in *Vaca*, overlaps with Title VII protection, and the *Vaca* standards apply in Title VII cases.[233]

228. *Id.* at 1106. The district court found, and the Sixth Circuit agreed, that the futility of resort to the grievance machinery was demonstrated by plaintiffs' unsuccessful filing of grievances on prior occasions and the fact that the grievances at issue would to some extent involve charges of misconduct against the union. *Id.*

229. *Id.*

230. Because § 301 creates a remedy for breach of contract, no § 301 liability may attach until a collective bargaining agreement is entered into. See *supra* note 108 and accompanying text.

231. Farmer v. ARA Serv., 660 F.2d 1096 (8th Cir. 1981), discussed *supra* in text accompanying notes 203-211.

232. 516 F.2d 416 (5th Cir. 1975).

233. *Id.* at 425 n.12 [citations omitted].

Given this substantial overlap between union liability under section 301 and Title VII in contract administration matters, the *Farmer* court's failure to identify the statutory basis for the award of back pay against the union is understandable. After *Bowen*,[234] union back-pay liability under both section 301 and Title VII depends on a showing by the employee that the union was at least in part responsible for the employee's loss of income, and a persuasive argument can be made for apportioning damages in Title VII contract administration cases in the same fashion as in hybrid section 301 cases. Moreover, because degrees of fault for discrimination against employees in contract administration cases vary, just as in contract negotiation cases,[235] the assessment of entire liability to both union and employer is fundamentally inequitable.

## III. *The Role of Contribution*

Apportionment of liability between employer and union according to their respective degrees of fault is necessary to minimize the possibility of an excessive award against either defendant, but will not, in itself, adequately protect an employer or union from paying damages in excess of actual fault. Apportionment of liability simply refers to the allocation of fault between union and employer, but does not necessarily reduce either defendant's ultimate liability to the employee. Therefore, if apportionment of liability in hybrid section 301 cases or Title VII actions involving mutual union/employer culpability is to reduce significantly the danger that a union or an employer will be forced to pay back pay in an amount exceeding actual fault, there must be recourse against the other defendant. Alternatively, the courts could limit the percentage of a back-pay award a plaintiff could collect from each defendant.[236]

The latter approach was rejected in the section 301 context by the Court in *Bowen*:

> Although the union remains primarily responsible for the portion of damages resulting from its default, *Vaca* made clear that the union's breach does not absolve the employer of liability. Thus, if

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

235. See *supra* notes 195-209 and accompanying text.

236. An extrajudicial approach to minimizing the risk that an employer or a union will have to pay back pay in excess of actual fault is negotiation of an indemnity clause into the labor contract. One commentator has suggested that this is the "only meaningful defense" an employer can raise to avoid excessive liability for the union's breach of its duty of fair representation. Edwards, *Employers' Liability for Union Unfair Representation: Fiduciary Duty or Bargaining Reality?*, 27 LAB. L.J. 686, 690-91 (1976).

> the petitioner in this case does not collect the damages apportioned against the union, the Service remains secondarily liable for the full loss of backpay.[237]

Unfortunately, the Court did not state whether an employer who pays the union's share of back pay has a right of contribution against the union.[238] This right must be presumed, however, in order to give meaning to the Court's apportionment of back-pay liability between employer and union on the basis of fault.[239]

In contrast, the Supreme Court affirmatively rejected any right to contribution in Title VII actions when there is mutual employer and

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237. Bowen v. United States Postal Serv., 103 S. Ct. 588, 595 n.12 (1983).

238. Because unions have historically been spared back-pay liability in § 301 cases, there is very little case law elaborating on the availability of contribution under § 301.

239. In addition, analysis of the LMRA supports the existence of an implied right to contribution in hybrid § 301 actions. In Northwest Airlines v. Transport Workers Union, 451 U.S. 77 (1981), the Supreme Court set forth a two-tiered approach to determining when an implied right to contribution exists in private causes of action under a particular federal statute. First, the court must analyze the statutory language and the legislative history to determine whether a right to contribution was within the scope of legislative intent. If so, the court must determine whether the elements of a typical contribution claim are present in the statutory scheme.

The first question, whether a right of contribution was within the scope of legislative intent, can be answered in the affirmative. In *Northwest Airlines*, the Court emphasized the importance of determining the class for whose benefit the statute was enacted. *Id.* at 91-92. If the party seeking contribution is within the benefited class, presumably Congress would extend a right to contribution to that party. Section 301 provides a cause of action for breach of a collective bargaining agreement and was clearly intended for the benefit of employers and unions. Moreover, the union's breach of duty to the employee constitutes a separate wrong against the employer in the sense that the contractual grievance procedure is undermined. *See* Bowen v. United States Postal Serv., 103 S. Ct. 588, 595 (1983). In the absence of any expression of intent in the LMRA or its legislative history to the contrary, the fact that § 301 was created for the benefit of signatories to a labor contract strongly suggests that a right of contribution is within the scope of legislative intent.

The second stage of analysis, whether the elements of a typical contribution claim are present, also supports the existence of a right to contribution in hybrid § 301 actions. First, in light of *Bowen*, an employee may clearly recover from the union and employer in § 301 actions. Second, there must be a finding of wrongdoing by both employer and union for § 301 liability to attach in favor of an employee and thus there will in all cases be mutual employer and union responsibility for the employee's loss of income. Third, an employer is aggrieved by the union's wrongdoing in § 301 actions because the union's conduct removes a bar to the employee's lawsuit and the union's breach caused the grievance process to malfunction. Whether the union in a hybrid § 301 action is an aggrieved party is unclear because the employer's breach of contract theoretically affects only the employee, while the union's breach of its duty of fair representation affects the employer by undermining the grievance procedure. Finally, there are no meaningful policy considerations militating against a right to contribution under § 301. Since the prevailing employee will be entitled to compensation for the entire amount of lost income in all cases, the policies of equity and deterrence strongly suggest that the unions and employers should only be required to pay the amount of damages attributable to their wrongdoing. For a general discussion of the elements of a right to contribution, *see* RESTATEMENT (SECOND) OF TORTS § 886(A) (1979). *See also* Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 87-91 (1981).

union fault in *Northwest Airlines v. Transport Workers Union*.[240] Northwest Airlines' claim for contribution arose out of a 1973 judgment against the airline for the maintenance of sex-biased wage differentials.[241] Since the wage differentials were fixed by collective bargaining agreements with the Transport Workers Union and the Air Line Pilots Association, Northwest filed motions asserting claims for contribution and indemnity against the unions after the entry of judgment.[242] These motions were denied as untimely,[243] and subsequently Northwest commenced a separate action against the unions praying that the unions be required to pay a portion of the $20 million plus judgment against the airline.

In its complaint, Northwest claimed a common law right to contribution against the unions under Title VII for causing it to discriminate against the class of female employees.[244] The unions moved to dismiss Northwest's complaint for failure to state a cause of action, but their motion was denied. In determining that a federal right to contribution existed in Title VII actions, the district court noted:

(1) The airline had alleged common liability;

(2) Northwest had alleged it had been required to pay more than its just share of an award;

(3) There was a trend in federal law favoring contribution; and

(4) The policies of Title VII would be served by allowing contribution.[245]

An interlocutory appeal was taken by the unions, but the Eighth Circuit declined to reach the Title VII issue on the ground that it could be rendered moot by resolving the union's defense of laches asserted for the first time on appeal.[246]

Rather than returning to the district court for a decision on the laches issue, however, Northwest Airlines filed a petition for writ of certiorari requesting the Supreme Court to resolve the underlying legal

240. 451 U.S. 77 (1981). See *supra* note 239 for a discussion of the *Northwest Airlines'* approach to determining whether there is an implied right to contribution under a particular federal statute.

241. Laffey v. Northwest Airlines, Inc., 366 F. Supp. 763 (D.D.C. 1973), *aff'd*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

242. The ALPA was a defendent in *Laffey* solely to assure that plaintiffs would receive full relief. No allegations of discriminatory conduct were made against the union. *See* Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978).

243. 567 F.2d at 476-78.

244. Northwest also claimed both a federal common law and implied statutory right of contribution under the Equal Pay Act. As previously discussed, Northwest was wholly unsuccessful in its claim for contribution under the EPA. See *supra* notes 65-70 and accompanying text.

245. *See* Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 80-81 (1981).

246. Northwest Airlines v. Transport Workers Union, 606 F.2d 1350, 1356 (D.C. Cir. 1980).

issues. The Supreme Court granted certiorari,[247] and, in its decision on the merits, explained that its consideration of a right to contribution under Title VII would encompass the federal common law theory asserted by Northwest, as well as an implied statutory theory that had not been raised by Northwest in connection with its Title VII claim.[248] In a unanimous decision,[249] the Court held that neither theory supported the existence of a right to contribution in Title VII actions.

According to the Court, a cause of action for contribution could not be derived from the statute because Congress did not intend to protect employer concerns. Rather, by enacting Title VII, Congress intended to regulate the conduct of employers solely for the benefit of employees.[250] Section 703(c)(3) of Title VII,[251] proscribing union efforts to cause employer discrimination, was rejected as evincing congressional intent to create a right to contribution because this section was designed for the exclusive protection of employees.[252] By holding that contribution was not within the realm of legislative intent in enacting Title VII, the Court did not need to determine whether the traditional elements of a claim to contribution were present.[253]

Northwest's claim that contribution exists as a matter of federal common law was rejected on more general grounds. In light of Title VII's "comprehensive legislative scheme," the Court reasoned that it would be inappropriate for the judiciary to fashion a remedy not expressly provided by statute.[254] The Court acknowledged that equitable considerations supported Northwest's claim to contribution, but deferred to Congress as the proper authority for expanding Title VII's remedial scheme.[255]

Since the decision in *Northwest Airlines*, there has been no movement in Congress to establish an express right of contribution under Title VII. Unless this gap in Title VII is filled, however, there will remain a significant danger in all Title VII actions when there is mutual liability that the employer or the union will pay a disproportionate

247. Northwest Airlines v. Transport Workers Union, 445 U.S. 902 (1980).

248. The Supreme Court explained its ability to go beyond plaintiff's pleadings at note 15, 451 U.S. at 86.

249. Justice Blackmun did not participate in the decision.

250. *Northwest Airlines*, 451 U.S. at 92.

251. 42 U.S.C. § 2000e-2(c)(3) (1982).

252. 451 U.S. at 92-93.

253. For a discussion of the elements of a typical claim to contribution, see *supra* note 239.

254. *Northwest Airlines*, 451 U.S. at 97-98.

255. *Id.* at 98. In an analogous 1981 case, the Supreme Court found no common law or implied statutory right to contribution in private antitrust actions. Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981).

share of the back-pay award.[256] The courts could avoid this inequity by limiting each defendant's total exposure to its proportionate share of liability, but this would conflict with the compensatory purpose of Title VII.[257] Another means of limiting the inequities engendered by *Northwest Airlines* is the negotiation of indemnity clauses into collective bargaining agreements.[258] There is little incentive for unions to agree to the inclusion of an indemnity clause in the contract,[259] however, and in no circumstances could the employer insist that indemnity be made part of the contract.[260] Accordingly, in the absence of congressional action, employers and unions will in all probability remain vulnerable to back-pay liability primarily or partially attributable to discriminatory conduct by the other party to the labor contract.[261]

### *Conclusion*

In *Bowen v. United States Postal Service*,[262] the Supreme Court held that back-pay liability in actions under section 301 is apportionable between unions and employers according to fault. The same principles of

256. In most cases, the employer will face the greater risk of paying an excessive share of damages because the employer is usually more liquid than the union and employees are understandably reluctant to seek damages from their own union.

257. The Court's refusal in *Bowen* to limit an employee's right to collect damages from a defendant to an amount representing that defendant's relative fault in section 301 actions indicates that a Title VII plaintiff could also collect damages from a defendant union or employer in excess of actual fault. The unavailability of contribution in Title VII actions probably would not be considered a meaningful distinction since the ultimate concern in both statutes is to afford employees full relief.

258. *See* Edwards, *Employers' Liability For Union Unfair Representation: Fiduciary Duty or Bargaining Reality?*, 27 LAB. L.J. 686 (1976).

259. As discussed *supra* note 256, more often than not employees pursue the right to back pay only against the employer. This, coupled with limited financial resources of local unions, provides a strong disincentive for unions to assent to an indemnity clause. Another reason for unions to resist inclusion of an indemnity clause in the contract is that such clauses do little to improve working conditions for union members. On the other hand, if the union believes that an unrelated contract provision by the employer could result in Title VII liability, it might be interested in including an indemnity clause in the contract.

260. Under § 8(a)(5) of the National Labor Relations Act, an employer commits an unfair labor practice by insisting on inclusion of a contract provision that is not related to "wages, terms or conditions of employment." Unions are also proscribed from insisting on these "nonmandatory" provisions by § 8(b)(3) of the Act. *See generally* GORMAN, BASIC TEXT ON LABOR LAW 498-529 (1976).

261. In the antitrust context, the Supreme Court's decision in Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630 (1981) (holding that there is no federal common law or implied statutory right to contribution in private antitrust actions) sparked immediate action in Congress. Currently, S.B. 380, authored by Senators Laxalt and De Concini and sponsored by Senators Hatch and Thurmond, is pending before the Senate Judiciary Committee. If enacted into law, S.B. 380 would permit contribution and claims reduction among codefendants in civil actions for violation of federal antitrust laws.

262. 103 S. Ct. 388 (1983).

equity warranting apportionment of back-pay liability under section 301 are present in cases under the federal antidiscrimination laws when employers and unions are mutually at fault. Therefore, federal courts hearing employment discrimination cases involving both union and employer liability should follow *Bowen* and apportion back-pay liability on the basis of fault. Moreover, to effectuate the purposes of apportionment and to preserve the goal of full compensation to victims of wrongful discrimination, Congress should overrule *Northwest Airlines v. Transport Workers Union*[263] and create an express statutory right to contribution under the federal antidiscrimination laws.

263. 451 U.S. 77 (1981).