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Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration

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DUTY OF FAIR REPRESENTATION JURISPRUDENTIAL REFORM: THE NEED TO ADJUDICATE DISPUTES IN INTERNAL UNION REVIEW TRIBUNALS AND THE FORGOTTEN REMEDY OF RE-ARBITRATION

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One of the best kept secrets in American labor law is that duty of fair representation jurisprudence simply does not work. It does not work for plaintiff union members because they must satisfy a close-to-impossible burden of proof and have a short statute of limitations window in which to assert their claim. It does not work for defendant unions because they are often forced to file pointless grievances in order to avoid the cost of litigation. It does not work for defendant employers because they are often brought into these lawsuits because they have the "deep pockets."

This Article makes two proposals to reform duty of fair representation jurisprudence. First, this Article posits that putative plaintiffs should be required to have their claims adjudicated before internal union review tribunals as opposed to courts. This internal tribunal system, if procedurally and substantively fair, would provide unions with a complete defense to duty of fair representation claims. This would move most duty of fair representation disputes from the ex-post stage (after a court dispute has arisen) to the ex-ante stage (before a court dispute has arisen) and reduce unnecessary litigation. Second, this Article argues that the current system needs to be "tweaked" to return to the original Vaca v. Sipes, *386 U.S. 171 (1967), intent of utilizing re-arbitration as a remedy, as distinguished from money damages, when a breach of the duty of fair representation is found.*

"Justice requires a fair tribunal, but not necessarily an 'optimal' one."

Justice Stephen Breyer
(Before his elevation to the U.S. Supreme Court)
Stanton v. Delta Airlines, 669 F.2d 833, 838 (1st Cir. 1982)

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"[A]n order compelling arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved."

Justice Byron White
Vaca v. Sipes, 386 U.S. 171, 196 (1967)

I. INTRODUCTION

A labor union's duty of fair representation is a staple part of labor law jurisprudence.[1] The duty has been well defined by a series of United States Supreme Court decisions.[2] Academic commentary has also been voluminous.[3] One of the best kept secrets in American labor law, however, is that duty of fair representation jurisprudence simply does not work. It does not work for plaintiff union members because they must satisfy a nearly impossible burden of proof[4] and have a very short statute of limitations window to assert their claim.[5] It does not work for defendant unions because they are often forced to file pointless grievances in order to avoid

1. The duty of fair representation has been taught for generations in law schools throughout the country. For extended discussion, see ARCHIBALD COX, DERRICK CURTIS BOK, ROBERT A. GORMAN & MATTHEW W. FINKIN, LABOR LAW: CASES AND MATERIALS 1107–59 (14th ed. 2006); MICHAEL C. HARPER, SAMUEL ESTREICHER & JOAN FLYNN, LABOR LAW: CASES, MATERIALS AND PROBLEMS 1019–63 (6th ed. 2007); THEODORE J. ST. ANTOINE, CHARLES B. CRAVER & MARION G. CRAIN, LABOR RELATIONS LAW: CASES AND MATERIALS 822–53 (11th ed. 2005). Additionally, the duty of fair representation is extensively discussed in the major treatises on labor law. 2 THE DEVELOPING LABOR LAW 1987–2095 (ch. 25) (John E. Higgins, Jr. et al. eds., 5th ed. 2006); ROBERT A. GORMAN & MATTHEW W. FINKIN, BASIC TEXT ON LABOR LAW: UNIONIZATION AND COLLECTIVE BARGAINING 981–1018 (ch. 30) (2d ed. 2004); LABOR UNION LAW AND REGULATION 277–420 (ch. 4) (William W. Osborne, Jr. et al. eds., 2003).

2. *See* Marquez v. Screen Actors Guild, Inc., 525 U.S. 33 (1996); Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65 (1991); United Steelworkers v. Rawson, 495 U.S. 362 (1990); Teamsters Local 391 v. Terry, 494 U.S. 558 (1990); Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67 (1989); DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151 (1983); Bowen v. United States Postal Serv., 459 U.S. 212 (1983); Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979); Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976); Vaca v. Sipes, 386 U.S. 171 (1967); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Tunstall v. Bhd. of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944); Steele v. Louisville & Nashville R.R. Co., 323 U.S. 192 (1944).

3. THE DEVELOPING LABOR LAW, *supra* note 1, at 1988 n.4 (citing numerous authorities). Interestingly, there has not been much recent scholarly commentary.

4. In order to prevail in a cause of action alleging a breach of the duty of fair representation, the putative plaintiff has a high wall to climb in that the mere failure to bring a meritorious grievance to arbitration does not establish a cause of action for the breach of a union's duty of fair representation. *Vaca*, 386 U.S. at 191; *Air Line Pilots*, 499 U.S. 65. For discussion of the applicable standard, see *infra* notes 68–78 and accompanying text (discussing heightened standard).

5. The statute of limitations to bring a duty of fair representation claim is six months. *DelCostello*, 462 U.S. at 169; Harris v. Kaydon Corp., No. 1:07-CV-514, 2008 U.S. Dist. LEXIS 259, at *7–8 (W.D. Mich. Jan. 2, 2008).

the cost of litigation.[6] It does not work for defendant employers because they are often brought into these lawsuits simply because they have the "deep pockets."[7] Additionally, under the current system, it is very easy for a putative plaintiff to assert his or her claim. However, plaintiffs rarely prevail. From a public policy standpoint, none of this makes much sense.[8]

In order to "fix" this system, this Article posits two proposals. First, it is submitted that duty of fair representation claims should be adjudicated in internal union review tribunals as opposed to courts. The internal union tribunal system, if procedurally and substantively fair, would provide unions with a complete defense to duty of fair representation claims. This would move most duty of fair representation disputes from the ex-post stage (after a court dispute has arisen) to the ex-ante stage (before a court dispute has arisen).[9]

Additionally, this Article asserts that the current system needs to be "tweaked" to return to the original intent of *Vaca v. Sipes*,[10] to utilize re-arbitration[11] as a remedy in duty of fair representation cases. Remarkably, though *Vaca* expressly stated that "arbitration should be viewed as one of the available remedies when a breach of the union's duty is proved,"[12] this aspect of the decision has been virtually ignored by commentators[13] and the

6. *See infra* notes 80–87 and accompanying text (discussing unions' fear of duty of fair representation litigation).

7. An aggrieved employee can sue his employer for breach of contract, his union for breach of the duty of fair representation, or both in a hybrid action commonly referred to as a suit for breach of the duty of fair representation. *See DelCostello*, 462 U.S. at 163–66 (discussing nature of cause of action).

8. An employee who feels that he has been treated unfairly by his union can file a charge with the National Labor Relations Board ("NLRB") or he can sue his union, his employer or both in federal or state court under 29 U.S.C. § 301 (2006). Journeyman Pipe Fitters Local 392 v. NLRB, 712 F.2d 225, 226 (6th Cir. 1983); *see also* Tand v. Solomon Schechter Day Sch., 324 F. Supp. 2d 379 (E.D.N.Y. 2004) (permitting state court duty of fair representation action to be removed to federal court).

9. *See infra* Part IV.A (discussing internal union tribunals in the context of duty of fair representation disputes).

10. 386 U.S. 171 (1967). *Vaca* is unquestionably the leading case in duty of fair representation jurisprudence.

11. Throughout this Article, the term "re-arbitration" is used in connection with duty of fair representation remedies where an unfairly represented employee would be entitled to present his or her case to a second arbitrator because the union breached its duty of fair representation in connection with the first arbitration. This term is also used to generically refer to arbitration as a remedy when a union unfairly refuses to arbitrate an employee's grievance in the first instance in violation of its duty of fair representation, thereby resulting in a need to arbitrate the dispute.

12. 386 U.S. at 196.

13. District of Columbia Senior Circuit Judge Harry T. Edwards, a former labor law professor and labor arbitrator, Professor Samuel Estreicher, Professor Martin H. Malin, and a handful of others, have recognized that routinely awarding unfairly represented

courts[14] who routinely seek to fashion a monetary damage remedy in order put the injured plaintiff in the position he or she would have been had the union not breached its duty of fair representation.

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employees monetary damages is not consistent with the principles underlying *Vaca*. *See* HARPER, ET AL., *supra* note 1, at 1050 (questioning whether unfairly represented employee should have a remedy (private damages) that a fairly represented employee does not enjoy); Stuart Bernstein, *Breach of the Duty of Fair Representation: The Appropriate Remedy*, 33 NAT'L ACAD. ARB. PROC. 88 (1980); Harry T. Edwards, *The Duty of Fair Representation: A View From The Bench*, *in* THE CHANGING LAW OF FAIR REPRESENTATION 93 (Jean T. McKelvey ed., 1985); Samuel Estreicher, Essay, *Freedom of Contract and Labor Law Reform: Opening Up the Possibilities For Value-Added Unionism*, 71 N.Y.U. L. REV. 827 (1996) [hereinafter Estreicher, *Freedom of Contract*]; Samuel Estreicher, *Win-Win Labor Law Reform*, 10 LAB. LAW. 667, 675 (1994) [hereinafter Estreicher, *Win-Win Labor Law Reform*]; Martin H. Malin, *The Supreme Court and the Duty of Fair Representation*, 27 HARV. C.R.-C.L. L. REV. 127, 182 n.240 (1992).

Indeed, most of the leading scholarly commentary concerning union liability for breach of the duty of fair representation does not even discuss re-arbitration as a potential remedy, but rather presumes the norm of monetary damages as a remedy. *See* Daniel J. Bussel, *Liability For Concurrent Breach of Contract*, 73 WASH. U. L.Q. 97 (1995); David L. Gregory, *Union Liability for Damages After* Bowen v. Postal Service*: The Incongruity Between Labor Law and Title VII Jurisprudence*, 35 BAYLOR L. REV. 237 (1983); Steven L. Murray, *Apportionment of Damages in Section 301 Duty of Fair Representation Actions: The Impact of* Bowen v. Postal Service, 32 DEPAUL L. REV. 743 (1983); Comment, *Union Liability in Fair Representation Suits*, 97 HARV. L. REV. 278 (1983); Jerald J. Director, Annotation, *Union's Liability in Damages for Refusal or Failure to Process Employee Grievance*, 34 A.L.R. 3D 884 (2005); *see also* Michael C. Harper & Ira C. Lupu, *Fair Representation as Equal Protection*, 98 HARV. L. REV. 1211 (1985) (criticizing duty of fair representation jurisprudence, but making no mention of the failure of courts to order re-arbitration as a remedy where a breach of the duty of fair representation is found).

14. In hybrid actions alleging the employer's breach of contract (the collective bargaining agreement) and the union's breach of the duty of fair representation, re-arbitration is often not even considered by courts as a remedy. Rather, such causes of action are routinely treated as actions for monetary damages. *See, e.g.*, Burger v. Int'l Union of Elevator Constructors Local 2, 498 F.3d 750 (7th Cir. 2007); Beck v. United Food & Commercial Workers Union Local 99, 506 F.3d 874 (9th Cir. 2007); Ramey v. Dist. 141, Int'l Ass'n of Machinists, 378 F.3d 269 (2d Cir. 2004); LaPerriere v. UAW, 348 F.3d 127 (6th Cir. 2003); Vencl v. Int'l Union of Operating Eng'rs Local 18, 137 F.3d 420 (6th Cir. 1998); Lampkin v. UAW, 154 F.3d 1136 (10th Cir. 1998); Webb v. ABF Freight Sys., Inc., 155 F.3d 1230 (10th Cir. 1998); Wilson v. Int'l Bhd. of Teamsters, 83 F.3d 747 (6th Cir. 1996); Sparks v. UAW, 99 F.3d 1140 (6th Cir. 1996); Aguinaga v. United Food & Commercial Workers, 58 F.3d 513 (10th Cir. 1995); Galindo v. Stoody Co., 793 F.2d 1502 (9th Cir. 1986); Ruzicka v. Gen. Motors Corp., 649 F.2d 1207 (6th Cir. 1981); Musto v. Transp. Workers Union, 339 F. Supp. 2d 456 (E.D.N.Y. 2004); Higdon v. Entenmann's Sales Co., 170 L.R.R.M 3234 (N.D. Ill. 2002); Vattiat v. U.S. West Commc'ns, Inc., 214 F. Supp. 2d 1091 (D. Or. 2001); Commodari v. Long Island Univ., 89 F. Supp. 2d 353 (E.D.N.Y. 2000), *aff'd*, 62 Fed. App'x 28 (2d Cir. 2003); *accord* Truck Drivers Local 807 v. Reg'l Import & Export Trucking Co., 944 F.2d 1037, 1045 (2d Cir. 1991) ("*Vaca* teaches that the employees would have the option to bypass the arbitration procedure and look to the court to enforce their contractual rights, were they to so choose."); *see also* Comment, *Employee Challenges to Arbitral Awards: A Model for Protecting Individual Rights Under the Bargaining Agreement*, 125 U. PA. L. REV. 1310, 1324 (1977) (noting that "[w]hen an individual has succeeded in proving that he was inadequately represented by the union, courts following *Vaca* have generally adjudicated the merits of the underlying grievance rather than ordering the dispute to arbitration"); LABOR UNION LAW AND REGULATION, *supra* note 1, at 396 ("[C]ourts have rarely directed the employer and union to arbitrate a grievance.").

The current practice of most courts in plenary actions—to simply award monetary damages when the duty of fair representation is breached—does not serve the public interest. Instead, it effectively feeds unions' fear of lawsuits by encouraging them to bring useless grievances in order to avoid the potential of a costly lawsuit. Litigation is particularly undesired by unions as well as by employers who, in the course of defending such lawsuits, are placed into a quasi-type of co-counsel arrangement to respond to the union member plaintiff's allegations.[15]

Although a breach of the duty of fair representation can occur in a variety of different factual situations, this Article focuses on the most common form—where the union refuses to take a grievance to arbitration or handles arbitration in a perfunctory manner. This Article primarily addresses court litigation and not duty of fair representation claims before the National Labor Relations Board.[16]

Part Two of this Article explores the development of the duty of fair representation and provides a synoptic review of current law. Part Three demonstrates the flawed nature of duty of fair representation jurisprudence. Part Four asserts that the adjudication of duty of fair representation claims needs to be moved from the ex-post stage to the ex-ante stage though the adjudication of such disputes in internal union review tribunals. Part Five then explains that re-arbitration should become a presumptive remedy in duty of fair representation cases. Finally, this Article concludes by summarizing the need for jurisprudential reform in duty of fair representation litigation and how this Article's modest proposals are consistent with existing labor policy.

15. In duty of fair representation cases, employer and union counsel may find themselves cooperating with one another in order to avoid any misunderstandings and to assert a uniform reading of the collective bargaining agreement. Ironically, on the surface this fosters the notion that the union is somehow "in bed" with the employer and not appropriately serving the employees' interests.

16. Duty of fair representation plenary actions can be filed directly in court pursuant to Section 301 of the National Labor Relations Act, as amended. 29 U.S.C. § 301 (2006). The filing of unfair labor practice charges with the NLRB alleging a breach of the duty of fair representation does not toll the statute of limitations with respect to a hybrid plenary action filed in court. Arriaga-Zayas v. Int'l Ladies' Garment Workers Union, 835 F.2d 11, 14 (1st Cir. 1987); Conley v. Int'l Bhd. of Electrical Workers Local 639, 810 F.2d 913, 916 (9th Cir. 1987); Cortes v. Airport Catering Servs. Corp., 386 F. Supp. 2d 14, 20 (D.P.R. 2005); *see also infra* notes 41–44 and accompanying text (discussing duty of fair representation cases filed with the NLRB as unfair labor practices).

II. THE DEVELOPMENT OF THE DUTY OF FAIR REPRESENTATION

At common law, there was no duty of fair representation doctrine.[17] Neither the Railway Labor Act[18] nor the National Labor Relations Act,[19] the two major labor relations statutes in this country, have an express provision requiring "fair representation."[20] However, under both of these statutes, unions act as the exclusive representative of their members for the purposes of collective bargaining.[21] That principle of exclusivity led to the recognition of the duty of fair representation.[22]

Today, this principle of exclusivity is what often leads to duty of fair representation litigation.[23] Union members generally do not have the right, without the support of their union, to bring their grievances to arbitration or even appeal an adverse arbitration decision. Stated another way, individuals generally do not have

17. Teamsters Local 391 v. Terry, 494 U.S. 558, 563 (1990).

18. 45 U.S.C. §§ 151–169 (2000). The Railway Labor Act of 1926, as amended, is one of the first federal statutes that recognized the obligation of certain private employers, called carriers in the railroad and airline industry, and their unions to collectively bargain. *See* Airline Pilots Ass'n v. Pan American Airways Corp., 405 F.3d 25, 33 n.4 (1st Cir. 2005) (discussing scope of Railway Labor Act).

19. 29 U.S.C. §§ 151–169 (2006). The National Labor Relations Act of 1935, as amended, regulates labor-management relations in most of the private-sector workforce. Among the important provisions of this statute, it created the National Labor Relations Board which recognized in 1962 that a breach of the duty of fair representation is an unfair labor practice. *See generally* THE DEVELOPING LABOR LAW, *supra* note 1, at 27–30 (discussing role of NLRB under the National Labor Relations Act, 29 U.S.C. §§ 151–169 (2006)).

20. THE DEVELOPING LABOR LAW *supra* note 1, at 1988. It should be noted that under several state law public sector labor statutes, a breach of the duty of fair representation is considered to be an improper practice which is the equivalent of an unfair labor practice in the private sector. *See, e.g.*, Mitchell H. Rubinstein, *Union Immunity From Suit in New York*, 2 N.Y.U. J.L. & BUS. 641, 671 n.118 (2006) (stating that New York law was amended to expressly make a breach of the duty of fair representation an improper practice).

21. Under Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159 and Section 2, ninth of the Railway Labor Act, 45 U.S.C. § 152, unions are the exclusive representative of certified labor organizations. Beck v. United Food & Commercial Workers Union Local 99, 506 F.3d 874 (9th Cir. 2007); Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985); *see also* Mitchell H. Rubinstein, *Is a Full Labor Relations Evidentiary Privilege Developing?*, 29 BERKELEY J. EMP. & LAB. L. 221, 237 (2008) ("Under the NLRA and analogous state public sector labor relations statutes, unions are the exclusive representatives of employees.").

22. The U.S. Supreme Court has stated that the principle of exclusive representation "underlies the National Labor Relations Act as well as the Railway Labor Act [and] is a central element in the congressional structuring of industrial relations." Abood v. Detroit Bd. of Educ., 431 U.S. 209, 220 (1977) (footnote omitted).

23. I have noted that duty of fair representation claims are the primary form of litigation that unions face. Mitchell H. Rubinstein, *Assignment of Labor Arbitration*, 81 ST. JOHN'S L. REV. 41, 50 (2007).

standing on their own to assert claims under a collective bargaining agreement because the union is their exclusive representative.[24]

The duty of fair representation has its genesis in this country's history of racial discrimination.[25] The Supreme Court first recognized the duty in 1944 in *Steele v. Louisville & Nashville Railroad Co.*,[26] a case which arose under the Railway Labor Act of 1926.[27] In *Steele*, a black employee sought to set aside a collectively bargained seniority system which overtly discriminated against black workers who were also union members. The Court found inherent in the Railway Labor Act a duty of bargaining representatives "to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them."[28]

There being no federal agency to enforce rights under the Railway Labor Act,[29] the Court concluded that this type of claim could be enforced in federal court by damages as well as by awarding appropriate

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24. I have also previously analyzed the lack of an individual right to pursue claims under a collective bargaining agreement and the issue of union member standing to assert a violation of the collective bargaining agreement. *Id.* at 50–57.

25. Clyde Summers, *The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?*, 126 U. PA. L. REV. 251 (1977) (discussing history of duty of fair representation); THE DEVELOPING LABOR LAW, *supra* note 1, at 1989 (discussing origins of duty of fair representation).

26. 323 U.S. 192 (1944).

27. 45 U.S.C. § 151–188 (2000).

28. 323 U.S. at 203. That inherent power existed because the union was the exclusive representative of the employees. The Court reasoned:

> Unless the labor union representing a craft owes some duty to represent non-union members of the craft, at least to the extent of not discriminating against them as such in the contracts which it makes as their representative, the minority would be left with no means of protecting their interests. . . . The fair interpretation of the statutory language is that the organization chosen to represent a craft is to represent all its members, the majority as well as the minority, and it is to act for and not against those whom it represents. It is a principle of general application that the exercise of a granted power to act in behalf of others involves the assumption toward them of a duty to exercise the power in their interest and behalf, and that such a grant of power will not be deemed to dispense with all duty toward those for whom it is exercised unless so expressed.

Id. at 201–02.

In recognizing what became known as the duty of fair representation, the Court also drew upon a constitutional law analogy. Specifically, the court reasoned that unions have "at least as exacting a duty to protect equally the interests of the members of the [unit] as the Constitution imposes upon a legislature to give equal protection to the interests of those for whom it legislates." *Id.* at 202; *see also* Harper & Lupu, *supra* note 13 (discussing development of the duty of fair representation and arguing that equal protection doctrine should provide the normative underpinnings for the duty of fair representation jurisprudence).

29. To this day, the Railway Labor Act does not contain any unfair labor practices or any administrative agency to adjudicate violations of law. The National Labor Relations Act, 29 U.S.C. § 158 (2006), of course, sets forth a series of unfair labor practices which are enforced by the NLRB. GORMAN & FINKIN, *supra* note 1, at 982.

injunctive relief.[30] At the time, the Court's recognition of the duty of fair representation was very progressive, considering that the decision preceded by two decades the passage of Title VII of the Civil Rights Act of 1964,[31] which outlawed employment discrimination and, in particular, discrimination on account of race.[32]

About a decade later, in *Ford Motor Co. v. Huffman*, the Supreme Court extended the duty of fair representation to private sector employers subject to the National Labor Relations Act.[33] In so doing, the Court recognized that unions have the right to make reasonable distinctions among employees that were "within reasonable bounds of relevancy"[34] and that unions must be afforded a "wide range of reasonableness . . . subject always to complete good faith and honesty of purpose in the exercise of its discretion."[35]

In 1967, the Supreme Court decided *Vaca v. Sipes*,[36] the most important case involving the duty of fair representation, and further clarified the nature of the duty. In *Vaca*, the Court recognized a cause of action for breach of the duty of fair representation because, like the Railway Labor Act, the National Labor Relations Act affords unions exclusive power to represent employees.[37] *Vaca*

30. Specifically, the Court stated that when a violation occurred, an injured employee may "resort to the usual judicial remedies of injunction and award damages when appropriate." 323 U.S. at 207.

31. 42 U.S.C. § 2000e–2 (2006). Interestingly, today, in order to prove that a union violated Title VII in its role as a representative of employees, a plaintiff must establish: 1) that the employer violated the collective bargaining agreement; 2) that the union breached its duty of fair representation by allowing that breach to go unrepaired; and 3) that the union member was treated less favorably on account of race or any other impermissible factor. Beck v. United Food & Commercial Workers Local 99, 506 F.3d 874 (9th Cir. 2007); Bugg v. Int'l Union of Allied Indus. Workers Local 507, 674 F.2d 595 (7th Cir. 1982). A discussion of union liability under Title VII is beyond the scope of this Article.

32. *See* HARPER ET AL., *supra* note 1 at 1022 (stating that *Steele*, 323 U.S. 192, was a landmark decision in the struggle against racial discrimination).

33. 345 U.S. 330, 337–38 (1953). Interestingly, this 1953 case did not concern discrimination on account of race or some other prohibited classification. Rather, certain employees complained that the seniority system was discriminatory because it gave seniority credit for military service. *Id.* at 334–35.

34. *Id.* at 342.

35. *Id.* at 338.

36. 386 U.S. 171 (1967).

37. *See id.* at 186. The holding that the duty of fair representation stems from a union's authorization to represent employees exclusively under Section 9(a) of the National Labor Relations Act, 29 U.S.C § 159(a) (2006), is an important concept because not all private employers are subject to the National Labor Relations Act or the Railway Labor Act. For example, under Section 14(c)(1) of the National Labor Relations Act, the Board has discretion to decline jurisdiction where the effect on commerce is not substantial. 29 U.S.C. § 164(c)(1) (2006). In those industries, there is some authority for the proposition that a union would not owe its employees any duty of fair representation under federal law. *See, e.g.*, Eatz v. DME Unit of Local Union No. 3, 973 F.2d 64 (2d Cir. 1992) (finding that the union of mutuel clerks in horseracing industry does not owe its members any duty of fair representation under federal law since NLRB has declined to exercise its jurisdiction in the

established that unions breach their duty of fair representation when their conduct is "arbitrary, discriminatory, or in bad faith."[38] That tripartite standard has been repeatedly endorsed by later Supreme Court decisions.[39] The *Vaca* Court also implied, but declined to hold, that a breach of the duty of fair representation constituted an unfair labor practice under the National Labor Relations Act.[40] The Court also declined to assume that the NLRB's tardy assumption of jurisdiction[41] indicated that Congress intended to oust courts of their traditional jurisdiction.[42] This allowed an employee to bring his or her claim before the NLRB or before a court.[43] *Vaca*

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horseracing and dogracing industries through its rulemaking authority set forth in 29 C.F.R. §103.3).

38. *Vaca*, 386 U.S. at 190.

39. *See, e.g.*, Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991); Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 44 (1996).

The *Vaca* tripartite standard of fair representation has also been adopted under many state public sector labor laws. *See, e.g.*, Logan v. S. Cal. Rapid Transit Dist., 185 Cal. Rptr. 878 (Cal. Ct. App. 1982) (California law); Hoff v. Amalgamated Transit Union, 758 P.2d 674 (Colo. Ct. App. 1987) (Colorado law); Stanley v. Am. Fed'n of State & Mun. Employees Local 553, 884 A.2d 724 (Md. Ct. Spec. App. 2005) (Maryland law); Weiner v. Beatty, 116 P.3d 829 (Nev. 2005) (Nevada law); Baker v. Bd. of Educ., 514 N.E.2d 1109 (N.Y. 1987) (New York Law); *see also* Rubinstein, *supra* note 20, at 673 ("New York has recognized a duty of fair representation for public sector unions almost identical to that which has been recognized in the private sector.").

40. 386 U.S. at 183.

41. It was not until 1962 that the NLRB recognized that a union's breach of its duty of fair representation was an unfair labor practice in violation of Section 8(b)(1)(A)of the National Labor Relations Act, 29 U.S.C. § 158(b)(1)(A) (2006). Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1962), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). The *Vaca* tripartite standard has also been recognized as the governing standard in duty of fair representation cases under the National Labor Relations Act, 29 U.S.C. §§ 151–169. Iron Workers Local Union 377, 326 N.L.R.B. 375, 387 (1998).

42. *Vaca*, 386 U.S. at 183. The Supreme Court has stated that the duty of fair representation in the unfair labor practice context resembles hybrid court actions "and indeed there is a substantial overlap." DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 170 (1983); *see also* Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67, 83–84 (1989) (discussing relationship between duty of fair representation unfair labor practices and plenary actions filed in court). The Board has also recognized the resemblance, but has indicated that NLRB proceedings are "not precisely parallel" to court proceedings. *Iron Workers*, 326 N.L.R.B. at 377 n.15. This is because the employer is not typically a party and the Board does not always have jurisdiction to decide the breach of contract issue. *Id.*; *cf.* Jacoby v. NLRB, 325 F.3d 301, 307–08 (D.C. Cir. 2003) (finding the court not required to give NLRB precedent any weight with respect to duty of fair representation claims initiated by a lawsuit).

43. At first blush, it may seem that permitting employees to file an unfair representation claim in court without at least first having to proceed before the Board is out of step with the movement in this country towards alternative forms of dispute resolution and the doctrine of primary jurisdiction. However, in other aspects of employment law it is common for putative plaintiffs to have multiple forums to choose from. For example, a plaintiff alleging racial discrimination can first proceed under Title VII administratively or he or she could choose to litigate that same issue under state law via an administrative agency or, in some cases, directly in state court. *See* Samuel Estreicher & Michael Harper, CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW 1052 (3d ed. 2008).

also held that state and federal courts have concurrent jurisdiction in duty of fair representation cases.[44]

Under *Vaca*, an individual employee does not have a right to present even a meritorious grievance to a labor arbitrator. Nonetheless, recognizing the wide latitude that unions have to enforce their collective bargaining agreements, the Court held that unions could not simply ignore meritorious grievances.[45] *Vaca* also indicated that a plaintiff must exhaust his administrative contractual remedies before proceeding with a claim in court that the union breached its duty of fair representation.[46]

Very significantly, *Vaca* also addressed remedies for a breach of the duty of fair representation. Specifically, the Court held:

> The appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach.
>
> . . . .
>
> Petitioners urge that an employee be restricted in such circumstances to a decree compelling the employer and the union to arbitrate the underlying grievance. It is true that the employee's action is based on the employer's alleged breach of contract plus the union's alleged wrongful failure to afford him his contractual remedy of arbitration. *For this reason, an order compelling arbitration should be viewed as one of the available remedies when a breach of duty is proved.* But we see no reason inflexibly to require arbitration in all cases. In some cases, for example, at least part of the employee's damages may be attributable to the union's breach of duty, and an arbitrator may have no power under the bargaining agreement to award such damages against the union. In other cases, the arbitrable issues may be substantially resolved in the course of trying the fair representation controversy. In such situations, the court should be free to decide the contractual claim and to award the employee appropriate damages or equitable relief.[47]

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44. 386 U.S. at 178–83. For early academic commentary on the ability of plaintiffs to proceed in federal or state court, see Archibald Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151 (1957).

45. *Vaca*, 386 U.S at 190–91.

46. *Id.* at 185.

47. *Vaca*, 386 U.S. at 195–96 (footnote omitted) (emphasis added). The remedies that the NLRB may award when it finds that a union committed an unfair labor practice by breaching its duty of fair representation are a bit different than court awards in plenary

The Supreme Court later held that a plaintiff could sue its employer for breach of contract, its union for breach of the duty of fair representation, or both;[48] that a plaintiff in such a suit has the right to a trial by jury;[49] that damages must be apportioned according to the degree of fault;[50] that punitive damages are not available;[51] that the applicable statute of limitations is six months;[52] that the NLRB did not have primary jurisdiction over duty of fair representation claims;[53] that the *Vaca* tripartite standard applies to all union activity;[54] that a union's mere negligence would not establish a breach of the duty;[55] and that a breach of the duty of fair representation would remove finality from any prior arbitration determination.[56]

In 1983, in *DelCostello v. Teamsters*, the Supreme Court further commented on the nature of duty of fair representation actions. Specifically, the Court stated that the employer's breach of the collective bargaining agreement and the union's breach of the duty of fair representation were two separate claims which were "inextricably

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hybrid actions. In cases where a union has unfairly refused to pursue a grievance or an arbitration, the Board issues a remedial order which mandates that the union request that the employer promptly consider the grievance, and if it agrees to do so, to process it and permit the unfairly represented employee to be represented by a private attorney, at the union's expense, in the grievance and/or arbitration hearing. In the event that it is not possible to pursue a grievance or arbitration and if the General Counsel is able to show that a timely pursed grievance would have been successful, then the union is responsible for any increases in damages suffered as a consequence of its refusal to process a grievance. *Iron Workers*, 326 N.L.R.B 375; Branch 3126, Nat'l Ass'n of Letter Carriers, 330 N.L.R.B. 587 (2000), *enforced*, 281 F.3d 235 (D.C. Cir. 2002); Warehouse Union Local 6, 336 N.L.R.B. 104 (2001).

Thus, the union is only responsible for its share of the damages. The unfairly represented member would have to sue the employer in court to obtain damages from the employer. *See Iron Workers*, 326 N.L.R.B at 379. This raises a whole host of issues concerning NLRB remedies in duty of fair representation cases which are left for another day.

48. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 165 (1983). As a practical matter, in hybrid duty of fair representation lawsuits, plaintiffs sue employers and unions simultaneously. Although an employee may have a claim against the union because of the way a grievance was handled, it is the employer who took the action against the employee in the first place. Additionally, if reinstatement is sought, unions obviously cannot award this remedy. *See* Comment, *Employee Challenges To Arbitral Awards*, *supra* note 14, at 1312–13 n.10; *accord* Breininger v. Sheet Metal Workers Local 6, 493 U.S. 69, 80 (1989) ("In *Vaca*, we identified an 'intensely practical consideratio[n]' of having the same entity adjudicate a joint claim against both the employer and the union . . . .") (citation omitted).

49. Teamsters Local 391 v. Terry, 494 U.S. 558, 561 (1990).

50. Bowen v. United States Postal Serv., 459 U.S. 212, 218 (1983) (citing *Vaca*, 386 U.S. at 197–98).

51. Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 51–52 (1979).

52. *DelCostello*, 462 U.S. at 169.

53. *Breininger*, 493 U.S. at 83–84.

54. Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991).

55. United Steelworkers v. Rawson, 495 U.S. 362, 372–73 (1990).

56. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 555 (1976).

interdependent."[57] The plaintiff employee files what is commonly referred to as a hybrid claim for breach of the duty of fair representation and breach of contract claim against the employer, the union, or both.[58] To prevail, however, a plaintiff must establish both a breach of the duty of fair representation by the union and a breach of contract by the employer.[59]

In order to determine if a breach of the duty of fair representation occurred, each part of the *Vaca* tripartite standard—breach requires that union action be arbitrary, discriminatory or in bad faith—must be analyzed separately.[60] Under *Vaca*, a union's actions are considered arbitrary if they are so far outside a wide range of reasonableness as to be considered irrational.[61] A union's actions are deemed arbitrary if they fail to take a basic and required step under the collective bargaining agreement.[62] Union action, or lack thereof, may also be "arbitrary" if it results in an "egregious disregard for the rights of union members."[63] The wide range of discretion conferred upon unions allows them to make discretionary decisions and choices even if those judgments are ultimately wrong.[64]

A showing of bad faith requires establishing fraudulent, deceitful or dishonest action.[65] Thus, if a union representative acts in his

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57. DelCostello v. Int'l Bhd. of Teamsters, 462 U.S. 151, 164 (1983).

58. *Id.* at 165. A plaintiff's failure to name both the union and the employer as parties may affect his remedy. The employer is not an indispensable party under FED. R. CIV. P. 19, but may be joined into the lawsuit under the Federal Rules of Civil Procedure. LABOR UNION LAW AND REGULATION *supra* note 1, at 390. An analysis of this important issue is beyond the scope of this Article.

59. *See* Aldred v. Avis Rent-A-Car, 247 Fed. App'x 167, 171 (11th Cir. 2007); Mitchell v. Cont'l Airlines, Inc., 481 F.3d 225, 232 (5th Cir. 2007) (quoting McNair v. United States Postal Serv., 768 F.2d 730, 735 (5th Cir. 1985)); *DelCostello*, 462 U.S. at 165; *cf.* Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 987 (9th Cir. 2007) (holding that plaintiff employee bears the burden of proving both a breach of the duty of fair representation and breach of contract).

60. LABOR UNION LAW AND REGULATION 139 n.1 (William W. Osborne, Jr. ed., 2007 Cumulative Supp.) (collecting cases).

61. Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991); Hinkley v. Roadway Express, Inc., 249 Fed. App'x. 13, 16 (10th Cir. 2007). Indeed, under this standard, all a union needs is a reasonable explanation for its actions. Beck v. United Food & Commercial Workers Union Local 99, 506 F.3d 874, 879 (9th Cir. 2007).

62. Vencl v. Int'l Union of Operating Eng'rs Local 18, 137 F.3d 420, 426 (6th Cir. 1998); Ruzicka v. Gen. Motors Corp., 649 F.2d 1207, 1209 (6th Cir. 1981).

63. Peters v. Burlington N. R.R. Co., 931 F.2d 534, 538 (9th Cir. 1991) (quoting Tenorio v. NLRB, 680 F.2d 598, 601 (9th Cir. 1982)) (collecting cases). Intentional misrepresentation by union officials is considered arbitrary conduct. *See* Ollman v. Special Bd. of Adjustment No. 1063, 527 F.3d 239, 249 (2d Cir. 2008) (stating that union misrepresentation before arbitration board is arbitrary conduct).

64. Marquez v. Screen Actors Guild, Inc., 525 U.S. 33, 45–46 (1998).

65. *Beck*, 506 F.3d at 880; *Hinkley*, 249 Fed. App'x. at 17; Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 531 (10th Cir. 1992); *see also* Thompson v. Aluminum Co., 276 F.3d 651, 658

own interest, rather than that of the union member, it is considered bad faith.[66] To establish discrimination, a plaintiff must show animus on behalf of the union and that the plaintiff was treated differently than others.[67]

Under the *Vaca* standard, courts do not second guess a union's decision not to pursue arbitration.[68] Stated another way, courts will not substitute their "judgment for that of the union, even [when] with the benefit of hindsight, it appears that the union could have made a better call."[69] A union's tactical decisions, therefore, are essentially immune from challenge unless they are "so egregious, so far short of minimum standards of fairness to the employee and so unrelated to legitimate union interests as to be arbitrary."[70] Quite simply, union representation does not have to be error free.[71]

Even where a plaintiff manages to meet this burden, a substantial body of case law requires that a plaintiff additionally establish that the breach "seriously undermined" the grievance process. The individual in question must also have suffered some type of injury.[72]

(4th Cir. 2002) (stating that issue of discrimination and bad faith focuses on subjective motivation of union).

66. Ooley v. Schwitzer Div., Household Mfg. Inc., 961 F.2d 1293, 1303 (7th Cir. 1992); *accord* Bianchi v. Roadway Express, Inc., 441 F.3d 1278, 1282 (11th Cir. 2006).

Additionally, if a union representative intentionally refuses to present relevant evidence, that can be evidence of bad faith. Achilli v. John J. Nissen Baking Co., 989 F.2d 561, 563 (1st Cir. 1993) (Breyer, C.J.).

67. *See, e.g.*, Spellacy v. Airline Pilots Ass'n, 156 F.3d 120, 130 (2d Cir 1998); *Thompson*, 276 F.3d at 658.

68. Vaca v. Sipes, 386 U.S. 171, 191 (1967); *cf. Hinkley*, 249 Fed. App'x at 17.

69. Matthews v. Milwaukee Area Local Postal Workers Union, 495 F.3d 438, 441 (7th Cir. 2007) (quoting McKelvin v. E.J. Brach Corp., 124 F.3d 864, 867 (7th Cir. 1997)).

70. Barr v. United Parcel Serv., Inc., 868 F.2d 36, 43 (2d Cir. 1989) (quoting NLRB v. Local 282, Int'l Bhd. of Teamsters, 740 F.2d 141, 147 (2d Cir. 1984)). Stated another way, the union's authority as the exclusive collective bargaining representative empowers it to act according to its own reasonable interpretation of the collective bargaining agreement. *See* Bache v. AT&T, 840 F.2d 283, 290 (5th Cir. 1988).

71. Peterson v. Kennedy, 771 F.2d 1244, 1253 (9th Cir. 1985).

72. Bishop v. Hotel & Allied Servs. Union Local 758, No. 04-Civ-10074, 2008 WL 136362, at *3 (S.D.N.Y. Jan. 14, 2008); Beck v. United Food & Commercial Workers Union Local 99, 506 F.3d 874, 880 (9th Cir. 2007); *Hinkley*, 249 Fed. App'x. at 17 (10th Cir. 2007); Mack v. Otis Elevator Co., 326 F.3d 116, 129 (2d Cir. 2003); Webb v. ABF Freight Sys. Inc., 155 F.3d 1230, 1242 (10th Cir. 1998); VanDerVeer v. United Parcel Serv., Inc., 25 F.3d 403, 405 (6th Cir. 1994). As the Seventh Circuit succinctly stated:

> In order to prevail on this claim, in addition to showing that the union acted arbitrarily, Matthews must also establish that he "was actually harmed by the union's actions" and that "the outcome of the [grievance] would probably have been different but for the union's activities."

Matthews, 495 F.3d at 441 (quoting Garcia v. Zenith Elecs. Corp., 58 F.3d 1171, 1176–77 (7th Cir. 1995)).

This level of judicial review of union decisions has been described by the Supreme Court as "highly deferential."[73] Indeed, a union only needs to have a colorable justification for its actions.[74] Under this standard, it is not enough to show that the union did not represent an employee as vigorously as it could have.[75]

The policy reasons underlying this heightened standard[76] are straightforward. As I have previously recognized, if a union were required to advocate an individual employee's view under the guise of fair representation, that would undermine the union's role as the exclusive representative of the collective majority.[77] No large organization, including unions, could possibly satisfy all of their members all of the time. Therefore, it is entirely predictable that unions may sometimes interpret the applicable collective bargain-

73. Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 66 (1991); *see also Hinkley*, 249 Fed. App'x at 17. Indeed the Seventh Circuit stated that a duty of fair representation plaintiff "does not get to first base unless the union has abandoned him to the wolves." Pease v. Prod. Workers Union of Chicago & Vicinity Local 707, 386 F.3d 819, 823 (7th Cir. 2004); *see also* Comment, *Employee Challenges to Arbitral Awards supra* note 14, at 1312 ("An individual generally faces grave difficulties in attacking an arbitral award when the union has failed to represent him adequately . . . ."); Mitchell H. Rubinstein, *Union Only Needs to Have Colorable Justification for its Actions to Defeat a Claim that Union Breached its Duty of Fair Representation*, ADJUNCT LAW PROFESSOR BLOG, http://www.lawprofessors.typepad.com/adjunctprofs/2007/08/union-only-need.html (Aug 2, 2007) (on file with the University of Michigan Journal of Law Reform) (noting that courts provide unions with a favorable standard of review of fair representation cases).

74. *Matthews*, 495 F.3d at 441 (stating that union only needs to have colorable justification for its actions to defeat a claim asserting breach of the duty of fair representation); McKelvin v. E.J. Brach Corp., 124 F.3d 864, 867–68 (7th Cir. 1997).

75. *See, e.g.*, *Hinkley*, 249 Fed. App'x at 17; Mock v. T.G. & Y. Stores Co., 971 F.2d 522, 531 (10th Cir. 1992).

76. Some litigants attempt to avoid facing this heightened standard by characterizing their allegations as something other than a duty of fair representation claim. However, that is putting form over substance, which courts, of course, do not allow nor look favorably upon. Courts are not bound to litigants', usually plaintiff's, characterization of the case. *See* Lewis v. UFCW Local 2, 243 Fed App'x 445 (10th Cir. 2007) (affirming district court's refusal to characterize duty of fair representation case as a tort claim or breach of contract claim); Smith v. Potter, No. H–06–3278, 2008 WL 154462, at *10 n.29 (S.D. Tex. Jan. 15, 2008) (breach of contract claim treated as duty of fair representation claim); Coleman v. City of New York, 165 L.R.R.M. 2059, 2062 (E.D.N.Y. 1999) (treating laundry list of allegations against union which included allegations of racial discrimination as a claim for breach of the duty of fair representation); Carroll v. Int'l Bhd. of Teamsters, No. 99–CV–1362, 1999 U.S. Dist. LEXIS 19332, at *4–5 (N.D.N.Y. Dec. 6, 1999) (same); Dolce v. Bayport-Blue Point Union Free Sch. Dist., 728 N.Y.S.2d 772, 773 (N.Y. App. Div. 2001) (treating laundry list of complaints against union as a cause of action for breach of the duty of fair representation under New York law); *accord* Adkins v. Mireles, 526 F.3d 531, 540 n.4 (9th Cir. 2008) (stating that appellants may not prevent state law claims from being preempted by the duty of fair representation by "artfully pleading" their claims).

77. Rubinstein, *supra* note 23, at 50 (citing Carrion v. Enterprise Ass'n, Metal Trades Branch Local Union 638, 227 F.3d 29 (2d Cir. 2000)); *see also* Thompson v. Alcoa, 276 F.3d 651, 658 (4th Cir. 2002) (stating that union may choose to proceed with grievances which justifies the time and expense in terms of benefiting the membership at large).

ing agreement differently from individual employees.[78] When this occurs, litigation may follow.

Significantly, however, duty of fair representation jurisprudence is a product of judge-made common law.[79] Therefore, this body of law is subject to change and revision, a subject to which this Article turns next.

III. THE FLAWED NATURE OF EXISTING DUTY OF FAIR REPRESENTATION JURISPRUDENCE

Notwithstanding the heightened standard of judicial deference in duty of fair representation cases, unions are often fearful of such suits.[80] That fear sometimes causes unions to file grievances which they know lack merit because they believe that it is simply easier to file the grievance than to deal with a potential plaintiff. After all, the employee is a union member who, in some cases, may have been supporting the union in other matters for years. Also, while

78. Rubinstein, *supra* note 23, at 50 (citing Commodari v. Long Island Univ., 89 F. Supp. 2d 353, 363 (E.D.N.Y. 2000), *aff'd*, 62 Fed. App'x 28 (2d Cir. 2003), where a union member read faculty tenure and review provisions differently from defendant union). Indeed, the First Circuit affirmed a lower court's statement that:

> [T]here's no duty of fair representation to go to bat for any particular pilot because that pilot is bellyaching about getting less pay. That's the contract. And the union is supposed to try and negotiate the best contract it can negotiate. So once the contract's negotiated the fact that this or that person doesn't like the way it works, thinks that their interests aren't adequately represented, there's no lawsuit. No lawsuit because that's worked out by the democracy within the union . . . .

Goulet v. New Penn Motor Express, Inc., 512 F.3d 34, 41 (1st Cir. 2008).

79. Several U.S. Supreme Court cases have stated that the duty of fair representation is a product of the common law. Teamsters Local 391 v. Terry, 494 U.S. 558, 562 (1990); Breininger v. Sheet Metal Workers Local 6, 493 U.S. 67, 87 (1989); Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 47 n.8 (1979).

80. There are no empirical studies concerning just how widespread this union fear is. As a practical matter, such a study may be impossible because researchers cannot quantify what the subjective term "fear" means. Parties may also be reluctant to admit that they are fearful of litigation. It has been well recognized, however, in the legal literature, that unions are fearful of duty of fair representation lawsuits and, as a result, often process unmeritorious grievances. *See* Note, *Union Liability in Fair Representation Suits*, 97 HARV. L. REV. 278, 282–83 (1983) ("Fear of unpredictable jury verdicts caused unions to send some unmeritorious claims to arbitration . . . ."); Lester Asher, Comment, 27 NAT'L ACAD. ARB. PROC. 31, 35–37 (1974) (stating fear of duty of fair representation claims causes unions to press unmeritorious claims). Other scholars have similarly recognized that the fear of potential back pay liability may cause unions to arbitrate grievances that they would not otherwise do. *See* Malin, *supra* note 13, at 183; Daniel Roy, *Mandatory Arbitration of Statutory Claims in the Union Workplace After* Wright v. Universal Maritime Service Corp., 74 IND. L.J. 1347, 1367 (1999); Bernard W. Rubenstein, Comment, 32 NAT'L ACAD. ARB. PROC. 47, 48 (1979).

arbitration does not come cheap,[81] it is considerably less costly than litigation.

While at first blush, such a practice seems at odds with traditional notions of modern day litigation and the ever present possibility of sanctions, that is not the case in labor law. A union acting in this manner would be consistent—or at least not inconsistent—with Supreme Court *dicta* which indicates that unions may process frivolous claims due to their potential "therapeutic value" in labor relations.[82] Sometimes unions must "fight the good fight" in order to try to do something to alleviate the problem at issue. It is no secret to labor relations professionals that unions have internal political needs. Of course, employers often have political agendas of their own.[83]

A union's fear is somewhat understandable given the fact that the plaintiff in a duty of fair representation suit is entitled to a jury trial.[84] Juries may not be familiar with labor management relations or worse yet, be outright hostile to unions. In a lawsuit, the union always faces the possibility of being found responsible for a portion of back pay, future loses, compensatory damages and/or attorneys' fees.[85] Some courts have also awarded damages for emotional dis-

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81. A 2004 survey indicated that per diem fees for arbitrators ranged from $350 to $2,400 per day. LAURA J. COOPER ET AL., ADR IN THE WORKPLACE 21 (2d ed. 2005). In addition to this per diem fee, on average each case decided by an arbitrator involves two days of study time for each day of hearing where arbitrators review the record, undertake research and draft a written arbitration opinion and award. *Id.*; *see also* Mitchell H. Rubinstein, *Advisory Arbitration Under New York Law: Does It Have a Place in Employment Law?* 79 ST. JOHN'S L. REV. 419, 436 n.83 (2005) (discussing costs of arbitration). Indeed, I regularly appear before arbitrators who charge $1,800 per day plus expenses and appear before some who charge considerably more. A full arbitrator's day is considered to be five hours of work—sometimes less. Unions and employers typically split these fees.

82. United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960) (Douglas, J.) ("The processing of even frivolous claims may have therapeutic values of which those who are not part of the plant environment may be quite unaware.").

Even fighting a losing war can have some benefit in labor relations. The fact that an employer knows that it will have a "fight" on its hands may cause it to stop and think before taking a similar type of action in the future. Additionally, the arbitral issue can become a "rallying cause" for the union and can eventually lead to certain modifications to the collective bargaining agreement.

The notion that arbitration can have a therapeutic value has received little scholarly attention. For a commentary on Justice Douglas' view about the therapeutic value of labor arbitration, see Roger I. Abrams, Frances E. Abrams & Dennis R. Nolan, *Arbitral Therapy*, 46 RUTGERS L. REV. 1751 (1994).

83. *See* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1490–93 (1959) (noting the political nature of collective bargaining).

84. Teamsters Local 391 v. Terry, 494 U.S. 558, 565–67 (1990).

85. THE DEVELOPING LABOR LAW, *supra* note 1, at 2083–95 (collecting cases concerning duty of fair representation damages); *see also* Jerald J. Director, Annotation, *Union's Liability in Damages for Refusal or Failure to Process Employee Grievance*, 34 A.L.R. 3D 884 (2005) (surveying cases involving union damages for breaching the duty of fair representation).

tress.[86] Even if the union ultimately prevails in the litigation, the attorneys' fees and other costs incurred in defending duty of fair representation claims can be substantial.[87]

Indeed, by way of example, in 1979 the Supreme Court upheld a claim that a union was liable for $40,000 in compensatory damages due to its failure to pursue a single grievance alleging wrongful discharge.[88] By contrast, in a 1993 class action, a union was held liable for almost fourteen million dollars as its share of liability for a breach of the duty of fair representation, although the case was eventually remitted to the lower court which issued a one million dollar damage award.[89] A 2003 case upheld $165,000 in damages against a union for a breach of the duty of fair representation involving the refusal to proceed with a discharge arbitration.[90] In 2007, the Ninth Circuit upheld a total damage award of $191,304.[91] In none of these cases was the possibility of re-arbitration considered as a remedy or as part of a remedy.[92]

Under the current system, plaintiffs also have a choice of forum. They can litigate in court or can file an administrative charge with the NLRB, with or without an attorney.[93] The fact that there are two routes compounds the fear in the system because laymen may not understand the difference between these two forums.

In plenary actions, few plaintiffs would be satisfied by merely filing a lawsuit seeking re-arbitration. If they are going to go through the time, expense and trouble of litigation, they are going to shoot for the stars and seek a large damage award. Of course, plaintiffs will need to pay their lawyer, who may or may not have been retained on a contingency fee basis.

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86. THE DEVELOPING LABOR LAW, *supra* note 1, at 2083–85 (collecting cases and noting that courts are in conflict with respect to awarding damages for emotional distress).

87. Ann C. Hodges, *Mediation and Transformation of American Labor Unions*, 69 MO. L. REV. 365, 432 (2004). Duty of fair representation hybrid claims are usually filed in federal court and the parties have the same litigation costs as in any other federal lawsuit.

88. Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42 (1979).

89. Aguinaga v. United Food & Commercial Workers, 58 F.3d 513 (10th Cir. 1995).

90. LaPerriere v. UAW, 348 F.3d 127 (6th Cir. 2003).

91. Beck v. United Food & Commercial Workers Union Local 99, 506 F.3d 874, 878 (9th Cir. 2007). *Beck* also involved a violation of Title VII. *Id.* The damages were broken up as including $125,000 in compensatory damages, $16,034 in lost wages and $50,000 in punitive damages. *Id.* Punitive damages are not available in pure duty of fair representation cases. Int'l Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 52 (1979).

92. There are, of course, many other examples. In 1998, a union was held responsible for more than $22,000 as its share of responsibility due to the perfunctory processing of a discharge arbitration. Webb v. ABF Freight Sys., Inc., 155 F.3d 1230, 1237 n.9 (10th Cir. 1998). A union was found responsible for $26,000 in 1996 due to its failure to properly present a grievance. Galindo v. Stoody Co., 793 F.2d 1502, 1508 (9th Cir. 1986).

93. *See supra* notes 40–44 and accompanying text (discussing duty of fair representation claims under the NLRA).

The practice of most plaintiffs of simply filing actions for monetary damages is understandable in that *Vaca* did not mandate that re-arbitration be the only remedy. What was not predictable, however, was that the courts and the defendant union bar would entirely overlook re-arbitration as a potential remedy. The *Vaca* decision is now over forty years old and part of settled law.[94] However, due to the lack of consideration paid to re-arbitration as a remedy, one must question how many litigators and jurists have actually read the *Vaca* decision since law school.

As discussed in Part Five of this Article, re-arbitration should be a presumptive remedy where a breach of the duty of fair representation is found due to the failure of a union to pursue a grievance. However, it is first necessary to explain how and why duty of fair representation complaints should and could be moved out of the court system.

IV. THE ADJUDICATION OF DUTY OF FAIR REPRESENTATION DISPUTES NEEDS TO BE MOVED FROM THE EX-POST STAGE (AFTER A COURT DISPUTE HAS ARISEN) TO THE EX-ANTE STATE (BEFORE A COURT DISPUTE HAS ARISEN)

Duty of fair representation litigation often arises because individual union members have no right to arbitrate grievances under a collective bargaining agreement between the union and the employer.[95] If a union refuses to arbitrate or advocate a certain position that a bargaining unit member wants to advocate, hostility can develop. Hostility, in turn, breeds litigation. Therefore, any reform of duty of fair representation jurisprudence needs to recognize this inherent conflict.

Any proposal to modify duty of fair representation jurisprudence also needs to be realistic. Labor law issues are often highly political and emotional. It is not always only about the money; sometimes, one side or the other really wants to make a point.

Unfortunately, it is no secret to most labor law practitioners and labor law scholars that American labor law is badly in need of reform.[96] However, there are not currently any serious legislative

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

95. United Steelworkers v. Rawson, 495 U.S. 362, 374 (1990) ("The pertinent part of the collective-bargaining agreement, Article IX, consists entirely of an agreement between the union and the employer and enforceable only by them."); *cf.* Rubinstein, *supra* note 23, at 52–56 (discussing various exceptions to this general principle of labor law).

96. Indeed, U.S. Senator Arlen Spector and Eric S. Nguyen recently published a law review article where their first sentence recognized that "American labor law has failed to make good on its promise to employees that they are free to embrace collective bargaining if

proposals to modify duty of fair representation jurisprudence.[97] As a result, an examination or re-examination of the case law is necessary. Significantly, the duty of fair representation was judicially created and therefore, it can be judicially modified and extended.

Like most litigation, duty of fair representation jurisprudence has been driven by ex-post disputes. However, it can literally take years for a court to decide a dispute. Time is of critical importance in labor law. The employee may be out of a job and emotions run high. At that point, the unfairly represented employee is likely to seek all that he can in the form of monetary damages. As a result, waiting for a court award is not necessarily in the best interest of any party, the process, or public policy. If the dispute can be resolved quicker and in a less costly manner outside the formal court system, all parties may be better off.

A. Union Internal Review Tribunals As a Defense In Duty of Fair Representation Litigation

Current law requires that union members exhaust internal union procedures before they are permitted to bring a duty of fair representation action in court. As explained below, such internal

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they choose." Arlen Specter & Eric S. Nguyen, *Representation Without Intimidation: Securing Workers' Right to Choose Under the National Labor Relations Act*, 45 HARV. J. ON LEGIS. 311, 311 (2008) (quoting Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769, 1770 (1983)).

Other scholars and I have recognized the need for labor law reform. Rubinstein, *supra* note 21, at 263; *see also* Estreicher, *Freedom of Contract*, *supra* note 13, at 827 (noting that "[o]ur labor laws are badly in need of reexaminiation and reform [and] . . . . reform of the labor laws, however is not in the offing"); Estreicher, *Win-Win Labor Law Reform*, *supra* note 13 (discussing specific reforms that are needed to U.S. labor law); Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527, 1527 (2002) (stating that "the basic text [of the NLRA] has been practically unamendable for a half-century . . . .").

97. As this Article goes to print, there appears to be some growing support for labor law reform. In 2007, the U.S. House of Representatives approved the Employee Free Choice Act, H.R. 800, 110th Cong. (2007), but that bill was filibustered in the U.S. Senate. That bill was recently re-introduced into Congress. H.R. 1409, 111th Cong. (2009); S. 560, 111th Cong. (2009). As I have recently stated, the Employee Free Choice Act is likely to be enacted into law as a result of the 2008 presidential and congressional elections. Additionally, the current economic recession and financial crisis makes passage more likely due to the need to increase the purchasing power of workers through higher wages. While the Employee Free Choice Act would result in a significant amendment to the NLRA with respect to representation elections, collective bargaining of first contract disputes and unfair labor practice remedies, it would not affect duty of fair representation jurisprudence. *See* Mitchell H. Rubinstein, *Obama's Big Deal: The 2009 Federal Stimulus—Labor and Employment Law At the Crossroads*, 33 Rutgers L. Rec. 1 (forthcoming 2009) (discussing Employee Free Choice Act in light of current economic and political climate). *See also* Wilma B. Liebman, Essay, *Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board*, 28 BERKELEY J. EMP. & LAB. L. 569, 589 (2007).

union procedures could constitute a complete defense to duty of fair representation complaints, provided that the system adopted is fair and regular. To be effective, this tribunal review system must also have the authority to award a plaintiff full relief.

Many unions[98] have employed various types of internal review processes[99] which provide disgruntled union members with an opportunity to challenge union decisions, such as the decision not to file a grievance or demand arbitration. As a result, a significant body of law related to internal union tribunals has developed.

The Supreme Court ruled that before an employee can bring an action against an employer for an alleged breach of a collective bargaining contract, he or she must first exhaust any grievance and arbitration procedure set forth in the collective bargaining agreement.[100] In *Clayton v. UAW*,[101] the Supreme Court extended this exhaustion principle to duty of fair representation claims.[102]

In *Clayton*, after an employee was dismissed he asked his union to file a grievance, which it initially did, but the union ultimately refused to proceed to arbitration. Plaintiff was notified of this deci-

98. The UAW has had an internal procedure since 1957 which allows union members to appeal grievances which the union has denied and additionally has successfully negotiated into many collective bargaining agreements the ability to revive grievances where a breach of duty is found. Malin, *supra* note 13, at 180 n.230; *see e.g.*, Clayton v. UAW, 451 U.S. 679, 682–83 (1981) (discussing UAW process); DeMott v. UAW, No. 07–12648, 2007 U.S. Dist. LEXIS 89649, at *8–9 (E.D. Mich. Dec. 6, 2007) (same).

Other unions have developed similar processes. *See, e.g.*, Maddalone v. Local 17, United Bhd. of Carpenters, 152 F.3d 178, 186–87 (2d. Cir. 1998) (discussing the review process utilized by the Carpenters union); Repstine v. Burlington N. Inc., 149 F.3d 1068, 1073 n.7 (10th Cir. 1998) (discussing review processes utilized by United Transportation Union); *cf.* Tinsley v. United Parcel Serv., Inc., 665 F.2d 778, 779–80 (7th Cir. 1981) (dismissing duty of fair representation case due to failure to exhaust Teamster internal union appeal process).

99. Peer review and other types of internal review systems are, of course, not unique to labor law. Corporations have been utilizing such systems for years. These internal steps "perform critical filtering functions" which gives the parties the opportunity to examine the case and explore early settlement before litigation. David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing The Case For Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1565 (2005); *see, e.g.*, Hightower v. GMRI, Inc., 272 F.3d 239 (4th Cir. 2001); Baldeo v. Darden Rests., Inc., 2005 WL 447033 (E.D.N.Y. Jan. 11, 2005); Quinney v. Gen. Elec. Polymershapes, No. 304–CV–1058, 2004 WL 1782554 (N.D. Tex. July 30, 2004).

100. Republic Steel Corp. v. Maddox, 379 U.S. 650, 652–53 (1965). Interestingly, the requirement that plaintiffs must exhaust internal review processes has been extended to the non-union workplace where a plaintiff was subject to a grievance procedure contained in an employee handbook. *See* Neiman v. Yale Univ., 851 A.2d 1165 (Conn. 2004).

101. 451 U.S. 679, 692–93 (1981); *see also* Clarke v. Commc'ns Workers, 318 F. Supp. 2d 48, 55 (E.D.N.Y. 2004) (collecting cases).

102. The exhaustion requirement has deep-seated roots in other areas of labor law not involving the duty of fair representation. For example, under the Labor-Management Reporting Disclosure Act of 1959, 29 U.S.C. §§ 401–531 (2006) ("LMRDA"), courts generally require exhaustion of internal union remedies provided for in a local or international union constitution prior to bringing suit. MARTIN H. MALIN, INDIVIDUAL RIGHTS WITHIN THE UNION 28–29 (1988) (collecting LMRDA case law).

sion after the time for demanding arbitration had expired. The United Auto Workers constitution mandated that members first exhaust internal union appeal procedures before seeking redress in court.[103] Plaintiff Clayton did not timely file an internal appeal from the local union's decision not to arbitrate. Instead, plaintiff filed a hybrid action in federal court under Section 301 of the National Labor Relations Act, as amended,[104] alleging that the employer breached the collective bargaining agreement by discharging him without just cause and that the union violated its duty of fair representation by arbitrarily refusing to arbitrate.

The Court approved of lower courts exercising their discretion to require exhaustion where employees could get full relief. As the Court stated:

> In exercising this discretion, at least three factors should be relevant: first, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second, whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under § 301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim. If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust.
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> * * *
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> Where internal union appeals procedures can result in either complete relief to an aggrieved employee or reactivation of his grievance, exhaustion would advance the national labor policy of encouraging private resolution of contractual labor disputes.[105]

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103. These internal procedures required that the member first seek relief from the membership of his or her local and if the member was not satisfied, he or she could further appeal to the International Executive Board, and finally, to either the Constitutional Convention Appeals Committee or to a Public Review Board composed of "impartial persons of good public repute" who were not members of the UAW. *Clayton*, 451 U.S. at 683.

104. 29 U.S.C. § 185(a) (2006).

105. *Clayton*, 451 U.S. at 689, 692. This test has been described by later courts as a balance between the "the right of union members to institute suit against the policy of judicial noninterference in union affairs." Lazzaro v. UAW, No. 5:02–CV–01452, 2005 WL 1147797, at *3 (N.D.N.Y. May 16, 2005) (quoting Johnson v. Gen. Motors, 641 F.2d 1075, 1079 (2d Cir. 1981).

Ultimately, the Court held that the plaintiff did not have to exhaust his administrative remedies by going through the UAW's internal appeal process because the relief available under that process was inadequate. Specifically, the UAW appeal process did not include the authority to award reinstatement, which was one of the remedies plaintiff was seeking.[106]

In a footnote, the Court also recognized that if the collective bargaining agreement permitted an untimely grievance to go forward, the plaintiff would have the duty to exhaust internal union remedies.[107] In another footnote, the Court recognized that if such cases could go forward, a union might be able to rectify the very wrong that the employee complained about—the failure to file a grievance.[108]

The UAW later took advantage of the language in the Court's footnotes. Shortly after *Clayton* was decided, the UAW was able to correct the deficiencies with its internal review process. The union secured agreements from a number of employers that permitted the reactivation of otherwise time-barred grievances where the UAW internal tribunal determined whether the union breached its duty of fair representation.[109]

If the employer is unwilling to let an otherwise time-barred grievance go forward, existing law permits an unfairly represented employee to have his grievance or arbitration processed if the plaintiff has established a breach of the duty of fair representation, irrespective of the time limits set forth in the collective bargaining

106. This decision would not be remarkable except for the fact that the UAW's appeal process also included the ability to award back pay. *Clayton*, 451 U.S. at 690. If this case were brought today with a plaintiff only seeking monetary damages, the result may have been different because the union's internal tribunal would have the authority to award the full relief requested. *See supra* notes 11–15 and accompanying text (discussing how most plaintiffs today only seek money damages as a remedy for a breach of the duty of fair representation).

107. As the Court stated:

> If a provision in the collective-bargaining agreement also permits reactivation of a grievance after an internal union appeal, an employer or union should also be able to rely on that provision and thus defend the § 301 suit on the ground that the employee failed to exhaust internal union procedures.

Clayton, 451 U.S. at 692 n.20.

108. *Id.* at 693 n.21.

109. ST. ANTOINE ET AL., *supra* note 1, at 846; *see, e.g.*, Monroe v. UAW, 723 F.2d 22, 24 (6th Cir. 1983). Union review of internal decisions not to arbitrate relate to internal union affairs, and as such, are not mandatory subjects of collective bargaining. THE DEVELOPING LABOR LAW, *supra* note 1, at 1383–85 (internal union affairs are permissive subjects of bargaining). Therefore, an employer cannot compel a union to adopt an internal tribunal review process. *See* HARPER ET AL., *supra* note 1, at 511–46 (distinguishing between mandatory, permissive and illegal subjects of collective bargaining).

agreement.[110] In *Hines v. Anchor Motor Freight, Inc.*,[111] the Court held that a union's breach of its duty of fair representation removed the finality from any prior arbitration award. As the Court reasoned:

> [I]t is urged that when the procedures have been followed and a decision favorable to the employer announced, the employer must be protected from relitigation by the express contractual provision declaring a decision to be final and binding. We disagree. The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; 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.[112]

Later in the opinion, the Court also stated that it made no difference at which point of the grievance procedure the union breached its duty of fair representation.[113]

Thus, *Clayton* and *Hines*, read together, reasonably stand for the propositions that: 1) an aggrieved union member must exhaust any internal review processes employed by the union if complete relief could be obtained; and 2) if a court finds a breach of the duty of fair representation, time limits contained in the collective bargaining agreement may be set aside. In that way, a case could be arbitrated notwithstanding the nominal contractual time limits contained in the collective bargaining agreement.

If this result could be compelled where internal union review tribunals are utilized, it would move the resolution of duty of fair representation disputes from the ex-post stage (after a court dispute has arisen) to the ex-ante stage (before a court dispute has arisen) and further public policy aims by removing such disputes from the court system. Removing these claims from the courts would also relieve tension between employees and their union as

110. *See, e.g.*, Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 986 (9th Cir. 2007) (citing Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 567 (1976) (discussing remedies for breach of the duty of fair representation in the context of a time-barred grievance)).

111. 424 U.S. 554, 567 (1976).

112. *Id.*

113. As the Court stated:

> To us it makes little difference whether the union subverts the arbitration process by refusing to proceed as in *Vaca* or follows the arbitration trail to the end, but in so doing subverts the arbitration process by failing to fairly represent the employee. In neither case, does the employee receive fair representation.

Id. at 572 (quoting Margetta v. Pam Pam Corp., 501 F.2d 179, 180 (9th Cir. 1974)).

union members would have an opportunity to be heard without having to file a lawsuit.

However, there are at least four significant and inter-related issues that accompany mandating the use of internal union review tribunals. First, significant issues may arise concerning the appropriate standards that these internal union tribunals must follow. Second, legal issues may arise because unlike existing jurisprudence, there would be no adjudication by a court. Third, there may be timing problems as the statute of limitations to file a grievance may expire before the internal union review process is complete. Finally, employers may find permitting union officials to apportion damages problematic.

1. Union Internal Review Tribunal Standards

Undoubtedly, having union tribunals determine whether the union has breached its duty of fair representation is somewhat awkward. Nevertheless, existing duty of fair representation jurisprudence provides support for this concept and is instructive for determining how internal union tribunals should be constituted. For example, if the union member were able to show extreme hostility at the local and international level, exhaustion of the union's internal appeal process would not be required.[114] Additionally, the standards outlined in *Clayton* provide useful criteria to determine whether or not the union tribunal internal review system is valid.[115] Thus, if the internal union tribunal system is a sham or procedurally irregular, a duty of fair representation lawsuit would be permitted to proceed in court.

The concept of allowing unions to establish internal review tribunals has precedence in labor law beyond just the NLRA. Under the Labor Management Reporting and Disclosure Act ("LMRDA"),[116] union members are entitled to a trial before an in-

114. *See, e.g.*, LaPerriere v. UAW, 348 F.3d 127, 131 (6th Cir. 2003) (upholding $165,000 damage action against union for failing to grieve discharge and rejecting defense that plaintiff failed to exhaust his internal union remedies because plaintiff established hostility on the part of his local union as well as the international union). Hostility at the local union level does not excuse the failure to exhaust if a further appeal can be heard at the international union level. *Id.*; *see also* Lazzaro v. UAW, No. 5:02-CV-01452, 2005 U.S. Dist. LEXIS 9065, at *10 (N.D.N.Y. May 16, 2005) (same); Austin v. Gen. Motors Corp., 94-CV-832A(H), 1995 U.S. Dist. LEXIS 20990, at *19 (W.D.N.Y. July 17, 1995) (same); *cf.* DeMott v. UAW, 2007 U.S. Dist. LEXIS 89649, at *11 (E.D.M.I. Dec 6, 2007) ("Plaintiffs are required to demonstrate hostility or bias at every level of a union's appeal process.").

115. *See supra* notes 101-109 and accompanying text (discussing *Clayton*).

116. 29 U.S.C. §§ 401-531 (2006).

ternal union trial board if they contest the imposition of internal union discipline, such as a fine for crossing a picket line.

Some of the lessons learned from those hearing tribunals can be applied to union internal duty of fair representation tribunals. The LMRDA requires that employees have the opportunity to be heard. LMRDA decisions from the internal union tribunal do not have to be made by an independent outside decision maker.[117] While the trial board which hears and decides such cases cannot be biased, the tribunal does not have to be entirely composed of neutrals—in the classic sense of an outside arbitrator, or professor who acts as a quasi-judge. The decision-makers must merely be neutral in the sense that they are not involved in the dispute. Decision-makers may, however, be union officials.[118]

Of course, it might be in the union's interest to retain professional neutrals such as arbitrators or professors who review these types of cases to avoid any claim of collusion. Additionally, review by a professional neutral may help insulate the union against claims of discrimination or other types of litigation it may face. Use of a neutral may also facilitate employer cooperation. This is because employers are more likely to have confidence in a system where neutrals make determinations that can affect them. Whether the union decides to retain such a neutral is simply an internal business decision.

As maintained by this Article, both the use of a valid internal union tribunal or the failure of a union member to utilize such a review system should constitute a complete defense to duty of fair representation claims. The review system adopted by the union, however, must be legitimate.[119] At a minimum, the Union should

117. Maddalone v. Local 17, United Bhd. of Carpenters, 152 F.3d 178, 186 (2d Cir. 1998) (appeal to General President of carpenters' union); Arnold v. United Mine Workers, 293 F.3d 977, 979 (7th Cir. 2002) (appeal to internal union executive board with a further appeal to union convention committee). *But see* Monroe v. UAW, 723 F.2d 22, 24 n.3 (6th Cir. 1983) (internal review process includes possible appeal to independent academic and social agency personnel who have no UAW affiliation).

118. *See* Cornelio v. Metro. Dist. Council, 243 F. Supp. 126, 129 (E.D. Pa. 1965), *aff'd per curiam*, 358 F.2d 728 (3d Cir. 1966) (describing legislative scheme for the protection of individual union members of labor unions under the LMRDA as "a 'within the family' procedure for resolving intra-union conflicts"); J. Ralph Beaird & Mack A. Player, *Union Discipline of Its Membership Under Section 101(a)(5) of Landrum-Griffin: What is "Discipline" and How Much Process is Due?*, 9 GA. L. REV. 383, 411 (1975) (noting that statute will not tolerate "kangaroo courts," but absolute neutrality by an outside third party is not required); MALIN, *supra* note 102, at 104–05 (discussing procedural rights under LMRDA); HARPER ET AL., *supra* note 1, at 1083–89 (same); *see generally* Curtis v. Theatrical Stage Employees, 687 F.2d 1024, 1028 (7th Cir. 1982) (upholding impartial hearing held by union officer with no legal training).

119. Where a union subverts an arbitration to such an extent that the process is a sham, it will be found to have breached its duty of fair representation. Margetta v. Pam Pam Corp.,

have the obligation to inform the member about the internal tribunal review process so that he or she has the opportunity to utilize it.[120] Union members should also have the right to appear with counsel or with another employee. This will contribute to the legitimacy of the tribunal and provide the employee with an opportunity to be heard while expressing his or her arguments in an organized and professional manner. Preferably, two levels of internal appeal could be instituted as in *Clayton.*

Of course, as under existing law, an employee would retain the right to appeal from the decision of the union internal tribunal. However, the scope of judicial review would be very narrow. A court would only examine whether or not the tribunal followed its own rules and procedures and provided a fair and regular process. Otherwise, if a more searching review were provided, court's would become entangled in something akin to an arbitral dispute because the court would be put in the position of reviewing the merits of the dispute in question.

2. The Problems Caused Because There Will Be No Court Adjudication of Liability

Significantly, in both *Clayton* and *Hines* there was a court determination of liability. If union internal review tribunals are to be mandated, as argued in this Article, there would be no judicial determination. *Clayton* and *Hines* would have to be extended to provide a complete defense to the duty of fair representation if the tribunal, as opposed to a court, decides whether the union breached its duty of fair representation.

This issue has not been be litigated. However, in labor law, it is appropriate to look to other similar statutes for guidance.[121]

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501 F.2d 179, 180 (9th Cir. 1974); Bianchi v. Roadway Express, Inc., 441 F.3d 1278, 1282 (11th Cir. 2006). The same standard should apply to any internal review system that a union may adopt.

120. Remarkably, under the Labor-Management Reporting and Disclosure Act of 1959, 29 U.S.C. § 401, many courts have held that unions do not have an affirmative duty to inform members of internal union appeal processes reasoning that it is the employee's affirmative duty to inquire about such processes and ignorance of the law, so to speak, is no defense. Hammer v. UAW, 178 F.3d 856, 858 (7th Cir. 1999); Edwards v. Ford Motor Co., 179 F. Supp. 2d 714, 723 (W.D. Ky. 2001) (same); LABOR UNION LAW AND REGULATION, *supra* note 1, at 336 (collecting authorities holding same).

The better reasoned view, however, is that unions must inform employees of the process, if the union is going to rely on this process as an affirmative defense to any fair representation claim. *See, e.g., Maddalone,* 152 F.3d at 186.

121. As I have previously recognized, courts adjudicating labor and employment claims under various labor and employment statutes often look to other employment cases for

Fortunately, present day employment discrimination jurisprudence supports the extension of *Clayton* and *Hines* in a manner which provides such tribunals with the authority to determine whether a breach of the duty of fair representation occurred.

In *Burlington Industries, Inc. v. Ellerth*,[122] and *Faragher v. City of Boca Raton*,[123] the Court held that an employer may have an affirmative defense to a claim of hostile environment sexual harassment[124] by one of its supervisors if the employer had in place a reasonable system where the aggrieved employee could complain and seek relief.[125] Thus, the Supreme Court has approved of internal grievance type systems as a defense to liability in certain employment cases without a judicial determination of liability. In so doing, the Court recognized that employers may be able to remedy certain complaints of sexual harassment without court intervention. Of course, no unions were involved in either of those Title VII cases. However, it is submitted that the lack of union presence in those

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guidance. Rubinstein, *supra* note 81, at 437; Mitchell H. Rubinstein, *The Use of Predischarge Misconduct Discovered After an Employees' Termination as a Defense in Employment Litigation*, 24 SUFFOLK U. L. REV. 1, 12 (1990) (stating that National Labor Relations Act is grandfather of most labor laws).

122. 524 U.S. 742 (1998).

123. 524 U.S. 775 (1998). *Ellerth* was decided by the Supreme Court the same day as *Faragher*. In *Ellerth*, the Court adopted the same standard of employer vicarious liability as in *Faragher*. 524 U.S. at 765.

124. Sexual harassment is a pervasive problem in the American workforce and is, of course, unlawful under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e–2(a)(1) (2006). *See* Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986) (discussing nature of sexual harassment).

125. Specifically, the Supreme Court explained an employer's responsibility for sexual harassment as follows:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see Fed. Rule Civ. Proc. 8(c). The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing any unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer's burden under the second element of the defense.

Ellerth, 524 U.S. at 765.

cases is irrelevant and therefore, this would not be a basis to distinguish those cases.

Ellerth and *Faragher* together with *Clayton* and *Hines* support the proposition that union internal review tribunals should be able to make a binding determination with respect to whether a breach of the duty of fair representation occurred notwithstanding the lack of court review. Certainly, no provision of law prevents authorizing union internal review tribunals with the authority to make such determinations. If union internal review tribunals are given this authority, resort to that process could be compelled and this process would constitute a complete defense to any duty of fair representation claim filed later in court by an employee who failed to exhaust this remedy.

3. The Statute of Limitations Problem

Even if a court judgment of liability is not necessary, the use of internal union review tribunals may present statute of limitations issues with respect to the processing of what would otherwise likely be an untimely grievance. By the time the internal union tribunal would have made its decision, the time frame to file a grievance under the collective bargaining agreement would likely have expired.[126] Without cooperation from the employer, an untimely grievance will be barred. Therefore, this Article also proposes that union internal review tribunals be given the authority to set aside the time limits of the collective bargaining agreement when they find that the union breached its duty of fair representation.

While existing law does not *require* that the collective bargaining grievance time limits be set aside, it is submitted that nothing in existing law prohibits this proposal from being adopted. This approach is simply an extension of *Clayton* and *Hines* and must necessarily be super-imposed in order to afford union members complete relief. From a policy perspective, it appears to be an unfair burden to require that union members litigate claims in court simply because an arbitrary grievance and arbitration timetable was negotiated. After all, collective bargaining agreements are not statutes. They are contracts, to which the individual employee is not even a party.

Authorizing these internal union tribunals to set aside statutes of limitations that may be nominally included in a collective bargain-

126. A typical collective bargaining agreement contains a 30 day period to file a grievance. I refer to this period as a statute of limitation.

ing agreement is entirely consistent with the notion that these tribunals be given the authority to decide the dispute in the first instance. Indeed, the authority to set aside arbitral time limits must go hand and hand with mandating an extension of *Clayton* and *Hines* to require duty of fair representation plaintiffs to utilize union internal review tribunals.[127] Unions and employers may voluntarily choose to include language in their collective bargaining agreements permitting such nominally untimely grievances to go forward, and thereby make litigation less likely.[128] Absent agreement, *Hines* would have to be extended to grant internal union tribunals the power to ignore collective bargaining agreement statute of limitations where a breach of the duty of fair representation is found. This is similar to removing the finality from an arbitration decision due to a duty of fair representation breach as was done in *Hines*.

4.The Problem With Apportionment of Damages

As noted, plaintiffs routinely seek monetary damages in duty of fair representation cases.[129] Therefore, to be successful, internal review tribunals should have the authority to award plaintiffs monetary relief. Though uncommon, some union tribunals already have this authority.[130] Existing law only requires court apportionment of damages after a court determines that a union has breached its duty of fair representation. Again, having the union decide such issues may appear awkward to some. Significantly, however, nothing in existing law prevents unions from granting internal tribunals the authority to apportion liability according to the degree of fault just as a court would.[131] Again, courts could simply extend existing jurisprudence to validate this authority. The *Faragher/Ellerth* line of cases, which authorizes employers to remedy sexual harassment complaints without court intervention, supports

127. *See supra* notes 121–125 and accompanying text (discussing extending existing law to mandate the use of union internal review tribunals).

128. The UAW as well as other unions have successfully negotiated such agreements with several different employers. *See supra* note 98.

129. *See supra* note 14 and accompanying text.

130. Support for this concept can be found in *Hammer v. UAW*, 178 F.3d 856, 856 (7th Cir. 1999), where a disgruntled union member's duty of fair representation claim was dismissed due to the plaintiff's failure to exhaust internal union remedies. His fair representation claim sought money damages which the union internal review process had the authority to award.

131. When a breach of the duty of fair representation is found, damages are apportioned between the employer and the union according to the degree of fault. Bowen v. United States Postal Serv., 459 U.S. 212, 218–19 (1983).

the argument that a judicially found breach of the duty of fair representation is not necessary.

The system would work more smoothly if employers and unions could agree to be bound by such decisions. However, obtaining the employers' consent to be bound by the decision of a union internal tribunal may be difficult. Employers may fear that unions would place excessive liability on them. However, it is in the union's interest to administer these tribunals fairly. The goal would be to obtain employer cooperation. Nonetheless, it is recognized that some employers may refuse to cooperate if these tribunals have the authority to award monetary damages.

At the very least, suspicious employers should give this proposal a chance to work. The upside potential is the virtual elimination of duty of fair representation litigation. The downside, of course, is that unions may impose an unfair degree of blame on the employer. The internal union tribunal decision would still be binding if it fully compensates the plaintiff. There is, however, a practical solution to this problem. If re-arbitration becomes a presumptive remedy as is argued next, then the issue of the award of monetary damages is no longer so problematic. With re-arbitration, neither the employer nor the union face the specter of a monetary damage award from the union internal review tribunal.

V. RE-ARBITRATION AS A PRESUMPTIVE REMEDY

Not all unions are going to adopt internal review tribunals. Thus, a class of duty of fair representation cases may remain before the courts to adjudicate in the first instance. In those cases, and even if none of the proposals outlined in Part Four are adopted, re-arbitration should be the presumptive remedy where a breach of the duty of fair representation is found due to a union's failure to arbitrate.

In *Vaca*, the Supreme Court held that "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach" and that "an order compelling arbitration should be viewed as one of the available remedies when a breach of duty is proved."[132] Professor Martin H. Malin, a well known labor law scholar, has described this part of duty of fair representation jurisprudence as "*Vaca's* forgotten alter-

132. Vaca v. Sipes, 386 U.S. 171, 195-96 (1967).

native."[133] Nevertheless, re-arbitration remains a viable remedy which courts should adopt.[134]

The practice of courts in simply awarding monetary damages when a breach of the duty of fair representation is found does not comport with labor law principles which have followed a "hands off" approach to the decisions of labor arbitrators who are charged with the responsibility to determine whether a collective bargaining agreement has been violated and issuing an appropriate remedy in the form of an arbitration award.[135] The whole idea of labor arbitration is that courts should stay out of labor disputes and that disputes under collective bargaining agreements are to be resolved by arbitrators who, as described by Professor Theodore St. Antoine in his classic work more than three decades ago, function as readers of collective bargaining agreements for the parties.[136] Arbitration has a rich history in this county as being considered

133. Malin, *supra* note 13, at 182.

134. *But see* LABOR UNION LAW AND REGULATION, *supra* note 1, at 396 (describing remand to arbitration as a "theoretical remedy" because courts have only rarely directed re-arbitration).

135. The U.S. Supreme Court has repeatedly recognized a presumption in favor of arbitrability, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); AT&T Technologies, Inc. v. Commc'ns Workers, 475 U.S. 643 (1986); Litton Financial Printing Div. v. NLRB, 501 U.S. 190 (1991), that courts employ an extremely narrow scope of judicial review and that reviewing courts may not weigh the merits of any particular dispute. United Paperworkers v. Misco, Inc., 484 U.S. 29 (1987); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). In one of the Court's more recent decisions on labor arbitration, the Court went so far as to state that "[w]hen an arbitrator resolves disputes . . . and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding,' does not provide a basis for a reviewing court to refuse to enforce the award." Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 509 (2001).

The Supreme Court has also held that a labor arbitration award can be vacated if it violates public policy. The award must, however, contravene "some explicit public policy" that is "well defined and dominant" which is to be ascertained by reference to laws and legal precedents and not from general considerations of the public interest. United Paperworkers v. Misco, Inc., 484 U.S. 29, 43 (1987).

136. Professor Theodore St. Antoine is perhaps best known for arguing that labor arbitrators are the designated reader of the collective bargaining agreement and his or her reading of the collective bargaining agreement is considered to be the same as the parties reading of the contract. Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and its Progeny*, 75 MICH. L. REV. 1137, 1140 (1977); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look At Enterprise Wheel And Its Progeny in Arbitration*, 30 NAT'L ACAD. ARB. PROC. 29 (1977); *see also* David E. Feller, *Remedies in Arbitration: Old Problems Revisited*, 34 NAT'L ACAD. ARB. PROC. 109, 110 (1981) (concurring with Professor St. Antoine's belief that a labor arbitrator functions as the parties "contract reader").

Professor St. Antoine views have been judicially accepted. *See* Stead Motors v. Auto Machinists Lodge No. 1173, 886 F.2d 1200 (9th Cir. 1989)(en banc) (quoting extensively from St. Antoine, *Judicial Review of Labor Arbitration Awards, supra*); Haw. Teamsters Local 996 v. United Parcel Serv., 241 F.3d 1177 (9th Cir. 2001) (quoting same). *See also* Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465, 1475 (D.C. Cir. 1997) (Edwards, J.) (stating that St. Antoine article is widely recognized as almost a gospel statement).

part and parcel of the collective bargaining process itself.[137] Yet, if an unfairly represented employee is permitted to side-step arbitration and receive monetary damages, the collective bargaining grievance and arbitration process is not being fully respected.

As Senior D.C. Circuit Judge Harry T. Edwards, a former accomplished labor arbitrator and full time law professor, has stated with regard to duty of fair representation jurisprudence:

> [I]t seems that the courts have ignored the federal labor policy of nonintervention in the arbitral process and have proceeded wholesale to decide the merits of the underlying grievances rather than returning the cases to arbitration. I am of the view that this practice not only alters the parties' bargain but threatens havoc with labor contract administration.[138]

Judge Edwards asserts that the remedy for a violation of employer and employee collectively bargained rules must be provided by the collective agreement itself, not notions of public law or policy that courts administer because those principles are external to the collective bargaining process. Judge Edwards maintains that it is the function of the labor arbitrator and not a judge to say what a labor contract means.[139]

Professor Martin H. Malin's views are largely in accord with those of Judge Edwards.[140] The failure of courts to recognize re-arbitration as a remedy has the potential to undermine labor policy because courts are being placed in the position of having to interpret a collective bargaining agreement. As Professor Malin states:

> Today, if a court finds a DFR breach, the underlying breach of contract claim will be heard by a jury if the plaintiff demanded a jury trial, and there will be a judicial apportionment of back pay damages between employer and union. The employer, no matter how blameless, cannot rely on the grievance procedure to avoid judicial determination of the grievance, even if the employer already has succeeded in arbitration.

137. St. Antoine, *supra* note 136; *accord* Malin, *supra* note 13 at 174 (stating that "[a]rbitration, however, is a continuation of the collective bargaining process.").

138. Edwards, *supra* note 13, at 101.

139. *Id.* at 102.

140. *See generally* Malin, *supra* note 13.

> The typical DFR case arising out of a union's handling of a discharge grievance illustrates the potential for undermining labor policy regarding grievance arbitration. When an employer agrees that it will only discharge for just cause, it does so recognizing that just cause in any particular case will ultimately be defined by an arbitrator. The parties have agreed that just cause means whatever the arbitrator interprets it to mean . . . . When because of a DFR breach, a judge or a jury defines just cause, the parties are held to a bargain markedly different from the one to which they originally agreed. Courts should be reluctant to change the basis of the parties' bargain. Under the current state of the law, limiting the DFR's level of accountability also limits judicial rewriting of the parties' bargain.[141]

Judge Edwards and Professor Malin are not alone. A decade and a half ago, another well-known labor scholar, Professor Samuel Estreicher, argued that duty of fair representation jurisprudence should be changed to trigger re-arbitration as a remedy.[142] Professor Estreicher additionally recognized that there are limitations with respect to the use of re-arbitration as a remedy. With respect to any interim period where there is a hiatus because of the union's breach of duty, according to Estreicher, the union should be responsible for back pay.

It is submitted that most unions and employers would probably accept such a result. This is because if the matter was litigated, damages would be apportioned under *Bowen v. United States Postal Service*[143] and the union would undoubtedly be responsible for any additional damages caused by the hiatus.[144]

Re-arbitration as a remedy has not gone completely unnoticed. In fact, support for the use of re-arbitration as a remedy in duty of

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141. *Id.*

142. Estreicher, *Win-Win Labor Law Reform*, *supra* note 13, at 675.

143. 459 U.S. 212 (1983).

144. At one time, another very well known labor law scholar, the late Professor David Feller, went so far as to argue that the *only* remedy in hybrid Section 301 duty of fair representation actions should be re-arbitration. Professor Feller argued that this was necessary to keep courts out of the business of interpreting labor agreements. David Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 774 (1973). Professor David Feller later acknowledged that his view was not likely to ultimately prevail. David E. Feller, *The Coming End of Arbitration's Golden Age*, 29 NAT'L ACAD. ARB. PROC. 97, 102, 107–08 (1976); *see also* Lea S. VanderVelde, *Making Good on* Vaca*'s Promise: Apportioning Back Pay to Achieve Remedial Goals*, 32 UCLA L. REV. 302, 341 (1984) (discussing Professor Feller's views).

This Article does not go so far as the late Professor Feller and only asserts that re-arbitration should be the presumptive remedy in duty of fair representation cases where a breach is found due to the union's failure to arbitrate.

fair representation cases can be found under Pennsylvania state labor law applicable to public sector employees and employers,[145] which provides that re-arbitration is generally the *only* remedy available to an unfairly represented employee.[146] Specifically, the Pennsylvania Supreme Court recognized that *Vaca* permitted courts in the private sector to order re-arbitration, and reasoned that this is the only remedy available to an unfairly represented employee in the public sector out of a concern with making sure that an unfairly represented employee be given the same treatment as a fairly represented employee. Fairly represented employees, of course, only have the opportunity to have their claim adjudicated before labor arbitrators.[147] Thus, Pennsylvania incorporates some of the concerns with existing duty of fair representation jurisprudence that had been raised earlier by Professors Malin, Estreicher and Judge Edwards.[148]

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145. Penn. Public Employe [sic] Relations Act, 43 PA. STAT. ANN. 1101 (1991).

Courts in the private sector have looked to public-sector employment cases for guidance. *See generally* Rubinstein, *supra* note 81, at 437. However, it is recognized that most of the time it is courts in the public sector which are looking to private sector cases for guidance. In most jurisdictions, in the public sector, the duty of fair representation is virtually identical to the private sector. *See e.g.*, Rubinstein, *supra* note 20, at 673 (discussing duty of fair representation under New York public sector labor law). Therefore, it is appropriate for courts in the private sector to look to state public sector duty of fair representation law for guidance.

146. Dubose v. Dist. 1199C, 105 F. Supp. 2d 403, 416 (E.D. Pa. 2000) (applying Pennsylvania law); Martino v. Transp. Workers' Union Local 234, 480 A.2d 242, 243–44 (Pa. 1984); John Kimpflen, *Remedy of Order to Compel Arbitration; Damages*, 20 SUMM. PA. JUR. 2D EMPLOYMENT & LABOR RELATIONS § 9:115 (collecting authorities). Under Pennsylvania law, there is an exception to this general rule which allows an employee to file an action for damages if he can establish that the employer actively participated in the union's bad faith or otherwise conspired with the union to deny the employee rights under the collective bargaining agreement. *Dubose*, 105 F. Supp. 2d at 416; Kimpflen, *supra*.

147. As the Court stated:

> Our holding that the chancellor lacks authority to resolve the underlying grievance is consistent with . . . the strong policy favoring arbitration of public sector grievances. . . . Moreover, our holding that the Chancellor may, if the employee establishes the union's breach of its duty of fair representation, order arbitration of the underlying grievance *nunc pro tunc* provides the employee with a complete and adequate legal remedy. . . .
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> . . . .
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> Under this procedure, a wrongfully discharged employee receives precisely the treatment all the employees in the unit are entitled to under the collective bargaining agreement.

Martino v. Transp. Workers' Union Local 234, 480 A.2d 242, 251–52 (Pa. 1984).

148. *See supra* notes 138–144 and accompanying text. Indeed, this statute has been interpreted by courts in a manner which is consistent with the late Professor David Feller's original view that re-arbitration was the only appropriate remedy where a union refuses to

Re-arbitration as a remedy is also supported by existing empirical data which indicates that it does not make much difference whether employees have their cases heard by courts or by arbitrators. The empirical research indicates that plaintiffs do not fare significantly better in arbitration as opposed to litigation. However, it should be noted that the data does not indicate whether the damage amounts are fairer under one system or the other.[149]

Re-arbitration, though a rare bird in modern-day private-sector duty of fair representation jurisprudence, has been ordered as a remedy.[150] In *Stanton v. Delta Airlines*,[151] for example, the First Circuit ordered re-arbitration in an opinion written by then First Circuit Chief Judge Stephen Breyer. On appeal, the plaintiff asserted that the lower court erred by ordering re-arbitration because the court should have decided the issue in the first instance. Judge Breyer, writing for a unanimous First Circuit panel, rejected this argument and cited *Vaca* for the proposition that an order compelling arbitration is one of the available remedies courts may order.[152] The First Circuit held that arbitration was an appropriate remedy because "[t]he courts have consistently favored grievance arbitration as a decentralized, informal method of settling industrial disputes."[153] As Judge Breyer recognized, "[j]ustice requires a fair tribunal, but not necessarily an 'optimal' one."[154]

Indeed, Judge Breyer rejected the argument that where a breach of duty of fair representation was found, re-arbitration should not be ordered because the union panel members might be hostile toward the union member by virtue of the fact that the individual

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arbitrate in breach of its duty of fair representation. *See supra* note 144 (discussing the late Professor Feller's scholarship).

149. *See* Samuel Estreicher & Kristina Yost, *Measuring the Value of Class and Collective Action Employment Settlements: A Preliminary Assessment* (N.Y.U. Law Sch., Pub. Law Res. Paper No. 08-03, 2009) *available at* http://ssrn.com/abstract=1080567 (citing Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405 (2007)); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44; Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998); Sherwyn, et al., *supra* note 99, at 1564).

One fact is fairly clear from the data—arbitration is faster. Sherwyn, *supra* note 99, at 1578.

150. *See* Miner v. Local 373, Int'l Bhd. of Teamsters, 513 F.3d 854, 864 (8th Cir. 2008); Stanton v. Delta Airlines, 669 F.2d 833, 838 (1st Cir. 1982); Williams v. Teamsters Local Union 484, 625 F.2d 138, 139 (6th Cir. 1980); *see also* Abrams v. Commc'ns Workers, No. 99-7095, 2000 U.S. App. LEXIS 7106 (D.C. Cir. Mar. 20, 2000); UAW v. NLRB, 168 F.3d 509, 515 (D.C. Cir. 1999) (stating that court may order arbitration as a remedy if a breach of duty of fair representation is found).

151. 669 F.2d 833, 836–37 (1st Cir. 1982).

152. *Id.*

153. *Id.*

154. *Id.* at 838.

prevailed in suit against the union.[155] Significantly, Judge Breyer went so far as to hold that there was a presumption in favor of re-arbitration as a remedy, by stating: "the burden here rests on those opposed to arbitration as a remedy to demonstrate why it is unsuitable."[156]

Stanton has not been widely cited. It remains largely forgotten just as the portion of *Vaca* which states that re-arbitration should be one of the available remedies remains largely, but not completely, overlooked. However, *Vaca* and *Stanton* remain good law, and the principal that they stand for is occasionally recognized.[157] Judge Breyer's decision should become the norm in duty of fair representation cases today.

The presumption recognized by Judge Breyer makes sense. Re-arbitration simply places the injured employee in the same position he or she would have been had there been no breach of the duty of fair representation. This presumption should be rebuttable. As the Supreme Court in *Vaca* stated, "[t]he appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach."[158]

Exceptions to re-arbitration as a remedy should be rare. One such exception might be where reinstatement of the employee through arbitration would poison the workplace to such a point that the employee could not interact or properly perform his job. An analogy could be drawn to employment discrimination cases where courts order "front pay" in lieu of reinstatement as a remedy where reinstatement is not practically possible.[159]

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155. *Id.* at 837–39.

156. *Stanton*, 559 F.2d at 836–37. This case arose under the Railway Labor Act. Under the Railway Labor Act, certain minor disputes are heard by a system board of adjustment which is an arbitration panel with both union and employer panel representatives. Steward v. Mann, 351 F.3d 1338, 1348 (11th Cir. 2003) (citing Consol. Rail Corp. v. Ry. Labor Executives' Ass'n, 491 U.S. 299, 303–04 (1989); Pyles v. United Air Lines, Inc., 79 F.3d 1046, 1050 (11th Cir. 1996).

157. For example, in 1980 the Sixth Circuit ordered re-arbitration as a remedy where a breach of the duty of fair representation was found. Williams v. Teamsters Local Union 484, 625 F.2d 138, 138 (6th Cir. 1980). In 2008, the Eighth Circuit also stated that a proper remedy for a breach of the duty of fair representation would be arbitration (the parties had not arbitrated the dispute in the first instance), if after remand a valid collective bargaining agreement was found to exist. *Miner*, 513 F.3d at 864.

158. Vaca v. Sipes, 386 U.S. 171, 195 (1967).

159. In employment discrimination, reinstatement is the preferred remedy. However, where reinstatement is impossible or impracticable courts have awarded front pay for lost future remuneration. Merrick T. Rossein, EMPLOYMENT DISCRIMINATION: LAW AND LITIGATION § 22:46 (2008) (extensively discussing front pay in lieu of damages). As Professor Merrick T. Rossein has explained:

> The *most common reason* for the award of front pay is that there is *no current vacancy* in the position at issue. Another common reason for not ordering reinstatement is *dem-*

If, as recognized by Judge Breyer and advocated here, courts conclude that re-arbitration is the presumptive remedy where a breach of the duty of fair representation is found, courts would be going a bit beyond the language in *Vaca*, which only held that re-arbitration should be one of the available remedies. However, in the forty-two plus years since *Vaca* was decided, arbitration has become a common staple of labor law jurisprudence. Today, arbitration is widely used even outside of labor-management relations and is an accepted form of alternative dispute resolution.[160]

Finally, if re-arbitration were adopted as a remedy, employees would not be giving up much, as plaintiffs do not generally fare well in duty of fair representation litigation. Such a system would serve employer and union interests as well as the public interest by decreasing unnecessary litigation. This system would be consistent with our national labor policy which favors private, non-judicial resolution of labor disputes.[161]

VI. CONCLUSION

The duty of fair representation is an important check on the power of unions. By being the exclusive representative of employees, unions have the power to control which grievances go to arbitration and even which grievance are filed. Under our system of labor law, individual employees and employers cannot bypass the union in order to reach some type of private arrangement which may be satisfactory.[162] Like any grant of power, however, it can be abused.

Unfortunately, however, present day duty of fair representation jurisprudence simply does not work. The bar is set very high for

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onstrated, long-standing hostility between the employee and his or her former superiors... The higher the position at issue in the corporate hierarchy increases the chances for front pay, especially if the duties entail trust, confidence and sensitive managerial decisions.

Id.; *see also* Harold S. Lewis, Jr. & Elizabeth J. Norman, EMPLOYMENT DISCRIMINATION LAW AND PRACTICE § 4.25 at 337 (2d ed. 2004) (further discussing front pay and noting that it is a discretionary remedy).

160. *See* Ariana R. Levinson, *Lawyering Skills, Principles and Methods Offer Insight as to Best Practices for Arbitration*, 60 BAYLOR L. REV. 1, 7 (2008) (stating that there has been an explosive use of arbitration in this country).

161. MALIN, *supra* note 102, at 442.

162. *See* Malin, *supra* note 13 (discussing principle of exclusivity and duty of fair representation jurisprudence as a process of holding the union accountable for the exercise of that grant of exclusive power). Indeed, under our current system of labor law, unions cannot even assign their right to arbitrate to individual union members. *See* Rubinstein, *supra* note 23, at 44–45.

liability. Such a high bar can leave individuals vulnerable to the exercise of virtually unchecked union power.[163] Nevertheless, the current system often instills fear in unions which causes them to file grievances which lack merit. Employers who are routinely named as parties in duty of fair representation lawsuits are required to respond to such claims, which often causes them to incur legal expenses and potential liability. As a result, current law does not serve the interests of employees, employers or unions.

This Article's two basic proposals—namely that a union internal tribunal review process is the only process that union members are due and where a breach of duty is found, re-arbitration should be the presumptive remedy—are workable concepts that can be adopted by courts. These proposals also comport with notions of justice by allowing affected employees with "an opportunity to be heard," albeit outside the courtroom, where most labor disputes belong. This should also cut down the hostility between disgruntled union members and their union who may not see eye-to-eye with respect to the collective bargaining agreement. If the internal tribunal review process is a sham, the employee can still turn to the court system for review.

If the proposals contained in this Article are adopted, resulting in a virtual elimination of duty of fair representation litigation, individual union members would retain whatever statutory and other rights they may have. Therefore, these proposals do not alter the entire employment law landscape.[164]

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163. Harper & Lupu, *supra* note 13, at 1216.

164. With the decline of unionization in the United States, *see* Liebman, *supra* note 97, at 570 n.2 (stating that organized labor as a percentage of the workforce in the private sector is at an historic low), individual employment rights have come into their own being with the passage of such recent statutes in the last twenty plus years as the Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2001 (2006), Worker Adjustment and Retraining Notification Act of 1988, 29 U.S.C. § 2102 (2006), Americans with Disabilities Act, 42 U.S.C. § 12101 (2006), and the Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2006). During this period of time, the various states have also enacted important employment laws. *See* Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687 (1997). As Professor Bales has recognized:

> The American model of workplace governance has shifted from a paradigm centered on collective bargaining to one centered on individual employment rights. Though the paradigms are not necessarily mutually exclusive, the trend toward individual rights clearly has come at the expense of collective bargaining.

Id. at 759.

On the other hand, there is some evidence that the transformation from a collective to individual statutory right regime recognized by Professor Bales, is undergoing another change; an emphasis on contractual rights through alternative dispute resolution processes. *See* Hodges, *supra* note 87, at 375.

Although labor law issues are highly political,[165] these proposals are all realistic and fit into existing case law without the need for any additional legislation. If courts approve of these modest proposals, unions would be less fearful of duty of fair representation lawsuits and, in turn, they would resist filing meritless grievances. This would serve the public interest by cutting down on court congestion while providing the injured employee with a real and effective remedy. Employers would also not have to defend these suits in court.

165. Liebman, *supra* note 97 at 580–83 (comparing and contrasting decisions by NLRB appointed by Democrat President Clinton and Republican President Bush).