National CLE Conference

Traditional Labor Law Track

Labor Law for the Employment Lawyer

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TABLE OF CONTENTS

	PAGE
INTRODUCTION	1
A. History of the National Labor Relations Act	1
B. Process Of The NLRB	3
C. Glossary Of Terms	4
D. Jurisdiction In Labor Matters	7
1. NLRB	7
2. Federal Courts	7
3. Preemption	7
E. Concerted Protected Activity	8
1. Concerted Activity	9
2. Protected Activities	12
3. Right to Witness or Assistance at an Investigatory Interview	14
F. Duty Of Fair Representation	15
1. Definition	15
2. Statute of Limitations	16
3. Interplay of Discrimination Statutes	17
4. Remedies	18
G. The Pitfalls of Employer Established Committees	
H. Technology in the Workplace: Use of Employer Electronic Mail Systems and the Rights of Employees	

INTRODUCTION[1]

In *The Ages of American Law*, Grant Gilmore observed that:

> Law reflects, but in no sense determines the moral worth of a society. . . . The better the society, the less law there will be. In Heaven, there will be no law, and the lion will lie down with the lamb. . . . The worse the society, the more law there will be. ***In Hell, there will be nothing but law, and due process will be meticulously observed.*** [**Grant Gilmore**, *The Ages of American Law* (New Haven: Yale University Press, 1977), pp. 110-111; emphasis added.]

To those employment lawyers unfamiliar with the maze of labor law, the seemingly mysterious rules may well seem like purgatory. Those who fail to recognize substantial rights owned by employees in both unionized and non-unionized companies risk the potential hell of serious embarrassment, if not malpractice claims. This paper is designed to help you avoid these pitfalls by providing a primer on the rights and obligations of employees, unions and employees.

A. History of the National Labor Relations Act

The National Labor Relations Act ("NLRA"), signed into law in 1935 by President Roosevelt, is often referred to as the "Wagner Act", in recognition of Senator Robert Wagner of New York. The original bills were introduced by Senator Wagner in 1934 and 1935 to provide federal support for employee organizations in collective bargaining.

A driving motivation of the NLRA was to provide a mechanism for enforcing labor laws. Previous labor legislation such as the National Industrial Relations Act, 38 Stat. 198 (1933), set forth the rights of employees, unions, and employers, but contained no enforcement mechanisms. The NLRA contained enforcement mechanisms. The purpose of the NLRA as set forth in 29 U.S.C. § 151 is to promote employees joining labor organizations and for the labor organizations to engage in collective bargaining with the employers.

[1] This paper was written by W.V. Bernie Siebert and Jules Smith of Blitman & King LLP, Ste. 207, 16 W. Main St., Rochester, NY 14614, (585)-232-5600 who have graciously given their consent to use the paper in this presentation.

The Wagner Act established the National Labor Relations Board, ("NLRB" or "Board"), and consisted of three members appointed by the President and confirmed by the Senate. That Act provided and guaranteed employees the right to:

> [F]orm, join or assist labor organizations, to bargain collectively through representatives of their own choosing.

The Wagner Act also defined "unfair labor practices", certain acts of employers (but not unions) that were declared illegal under the law. The Board was empowered to issue complaints against employers, hold hearings and issue orders which required persons to cease and desist from engaging in unfair labor practices and to take affirmative action to remedy those illegal acts, including reinstatement of employees with or without back pay. The Wagner Act did not, however, restrict union activities: there were no union "unfair labor practices" defined under the Act.

In 1947, Congress passed the Labor Management Relations Act. That law was not a separate piece of labor legislation, but rather consisted of amendments to the NLRA. These amendments are often referred to as the "Taft-Hartley Amendments." The Taft-Hartley Amendments increased the membership of the Board from three to five and established the position of the general counsel, who also is appointed by the President and confirmed by the Senate. The General Counsel has the authority to investigate charges of unfair labor practices and to prosecute those charges for the Board. Among other changes, the Taft-Hartley Act amended Section 7 of the NLRA to provide:

> Employees shall have the right of self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any and all such activities except to the extent that such right may be affected by an agreement requiring members in a labor organization as a condition of employment as authorized in Section 8(a)(3).

The NLRA was amended once again in 1959 with passage of the Labor-Management Reporting and Disclosure Act of 1959. The only other amendment to the National Labor Relations Act occurred in 1974 which required notification of intent to strike a health care institution and excluding employees with religious convictions from mandatory union membership. The latter provision, however, was ruled to be unconstitutional.

B. Processes of the NLRB

The Board has two basic functions: it processes petitions for elections either to certify or decertify representatives of groups of employees; and it processes unfair labor practice charges. It is the processing of unfair labor practice charges that is most germane to the employment lawyer.

As noted above, the Act contains provisions to address both employer and labor organization (Union) unfair labor practice charges. The process is commenced by the filing of an unfair labor practice charge ("charge"). A copy of a charge form is attached to this paper as exhibit "A". A charge can be filed by any "person" as that term is broadly defined in the Act. Once filed a charge is assigned to a Board Agent, i.e., field examiner or attorney. The agent collects evidence, documents and statements in affidavit form from charging party and any witnesses whose names are provided by the charging party. Once the evidence in support of the charge is obtained from the charging party, the "respondent" is notified by the Board agent and generally advised of the evidence that has been collected by the Board. The identity of specific witnesses and the contents of their statements, however, are confidential until the investigation is complete. The agent invites the respondent to provide evidence or witnesses that can support respondent's position. Once the agent has gathered all of the information and evidence concerning the charge, a meeting or "agenda" is held which includes among others the

regional director, the regional attorney, the supervisor of the investigating agent and the agent. At the agenda, all of the information and evidence concerning the charge is reviewed and a decision is made whether to dismiss the charge, or issue a complaint and notice of hearing. If the charge is dismissed, the charging party may file an appeal of the dismissal with the Office of Appeals in Washington, D.C. However, only approximately 1-2% of such appeals are granted. If the appeal is denied, there is no further appeal.

If a complaint is issued, a hearing is held before an Administrative Law Judge ("ALJ") who issues findings of fact, conclusions of law and sets forth a recommended order. The unsuccessful party may appeal the ruling of the ALJ to the Board in Washington, D.C. The Board can adopt the findings of fact and conclusions of law of the ALJ and the recommended order; it can overrule the decision, or remand the case to the ALJ for additional proceedings. A party dissatisfied with the ruling of the Board may appeal the case to the United States Court of Appeals for the District of Columbia Circuit where the Board is headquartered, the Circuit where the alleged unfair labor practice took place, or in the case of an employer, any Circuit where the Respondent (employer) operates its business. Obviously, a party unhappy with the decision of the Court of Appeals can seek a writ of certiorari in the Supreme Court.

C. Glossary of Terms

The Board

1. Is the quasi-judicial body composed of five Members appointed by the President and confirmed by the Senate. No more than three Members can be from the political party of the President. The term of each Member is five years. Normally, decisions are made by panels consisting of three Members.

2. The Executive Secretary is the chief administrative officer at the Board who is responsible for assigning and monitoring cases, docketing documents and other administrative duties.

3. Information Division is responsible for press releases, public announcements and the publication of a weekly summary of Board Decisions.

4. The Solicitor is the chief legal officer to the Board.

5. The Division of Judges are the triers of fact in unfair labor practice proceedings, the Administrative Law Judges render Decisions containing findings of fact, conclusions of law and recommended disposition of the case. Board Orders are not self enforcing.

The General Counsel

1. The General Counsel exercises general supervision over all attorneys employed by the Board (except ALJs and staff to the Board Members), and all officers and employees in the Regional Offices, has final authority on behalf of the Board to investigate charges, issue and prosecute complaints, handle appeals, seek 10(j) injunctions, the supervision of all activities concerning representation petitions and other duties prescribed by the Board. The term of the General Counsel is four years.

2. Division of Advice gives advice to the Regional offices concerning new or novel issues of law.

3. Division of Enforcement Litigation is responsible for litigation to enforce or defend orders of the NLRB.

4. Division of Operations Management is responsible for supervising the field operations.

5. Regional Offices have a Regional Director, Regional Attorney, field attorneys, field examiners and other personnel.

Person is defined in Section 2(1) to include any individual, labor organization, partnership, associations, corporations, legal representative, trustees or receivers.

Employer is defined in Section 2(2) to include any person acting as an agent of an employer, directly or indirectly, but does not include the U.S. government, or any state or political subdivision thereof, any person subject to the Railway Labor Act or any labor organization (other than when acting as an employer) or anyone acting as an officer or agent of such labor organization.

Employee is defined to include any employee not limited to any employees of a particular employer, unless the Act explicitly states otherwise and shall include any individual whose work has ceased as a consequence of, or in conjunction with any labor dispute or because of any unfair labor practice and who has not obtained substantially equivalent employment, but does not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or individual employed by his parent or spouse, or any individual having the status of independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, or by any person who is not an employer as herein defined.

Representative is defined in Section 2(4) to include any individual or labor organization.

Labor Organization is defined in Section 2(5) to mean any organization of any kind, or agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, in dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

Commerce is defined in Section 2(6) to mean trade, traffic, commerce, transportation or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory or within the District of Columbia, or within the District of Columbia or any Territory or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Affecting Commerce is defined in Section 2(7) to mean commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

Supervisor is defined in Section 2(11) to mean any individual having authority in the interest of the employer to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of merely routine or clerical nature, but requires the use of independent judgment.

D. Jurisdiction in Labor Matters

1. NLRB

The National Labor Relations Board has jurisdiction to resolve questions concerning representation and unfair labor practice charges, seek injunctions for unfair labor practice charges and secondary activities. The NLRB does not have jurisdiction over religious institutions. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979). Nor, does the NLRB have jurisdiction over employees in a foreign country even if they were hired in the U.S., paid from the U.S. and returned to the U.S. at the end of their employment. *RCA Oms*, 202 NLRB 228 (1973). The NLRB chooses to exercise its jurisdiction, however, only with respect to enterprises it deems to have a sufficient effect on interstate commerce.

2. Federal Courts

The Federal Courts do not have jurisdiction and cannot interfere with lawful primary labor disputes, they can entertain injunctive actions and claims for damages arising out of secondary boycotts. Claims concerning violation of a collective bargaining agreement, or to enforce the terms of a collective bargaining agreement are exclusively within the jurisdiction of the federal courts. *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962); *Charles Dowd Box v. Courtney*, 368 U.S. 502 (1962). Federal Courts can issue injunctions sought by the NLRB in cases of unfair labor practices, secondary activities, or where a labor organization is picketing for

recognition beyond the permissible thirty days. (Sections 10(j) and 10(l)). (Injunctions can only be sought by the NLRB in such cases). Persons affected by the secondary activities can themselves make claims for damages.

3. Preemption

Many claims sought to be made by employees against the employer or the union may be pre-empted by federal labor law. In those situations, state law cannot be applied to determine the claim or provide a remedy.

One of the lead cases in the area of preemption is *Building Trades Council (San Diego) v. Garmon*, 359 U.S. 236 (1959). There, the Court held that states are preempted by the NLRA from exercising jurisdiction in cases where the activity is regulated by the NLRA. States may exercise jurisdiction only where the activity complained of is merely of peripheral concern of the NLRA, or the conduct touches interests "deeply rooted in local feeling." Claims that are arguably protected or prohibited by the NLRA are preempted. *Id.* Thus, claims for damages arising out of unlawful peaceful activity are preempted by Section 303 that provides for damage actions. However, claims concerning violence or mass picketing may be prosecuted under state law.

A second test was added by the Supreme Court in *Machinists Lodge 76 v. Wisconsin Employment Relations Comm.*, 427 U.S. 132 (1976). The additional test was whether the conduct was left unregulated so that it may be "controlled by the free play of economic forces." *Id.* at 140. This test has been utilized in cases involving the award of unemployment compensation to strikers, misrepresentation and breach of contract as applied to striker replacements and where a state has attempted to prevent state monies paid on a contract to a private employer from being used to engage in a campaign against union organizing.

E. Concerted Protected Activity

As noted above, Section 7 of the NLRA provides that employees not only have the right to join a labor organization and bargain through representatives of their choosing, but employees also have the right to engage in "other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . ." Concerted protected activities can occur in the absence of any labor organization. In order to obtain the protections of the NLRA, the employee's act must be both concerted and protected.

1. Concerted Activity

Generally, to find an employee's activity to be "concerted," it must be engaged in, with or on the authority of other employees and not solely by and on behalf of the employee himself. *Meyers Industries*, 268 N.L.R.B. 493, 497 (1984) (Meyers I). The definition of concerted activity includes those circumstances where an individual employee seeks to initiate or to induce or to prepare for group action as well as individual employees taking group complaints to management. *Meyers Industries*, 281 N.L.R.B. 882, 887 (Meyers II). See also *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3rd Cir. 1964). For example, if an employee approaches his or her supervisor with a complaint concerning wages, hours or other terms and conditions of employment on behalf of him or herself, and other employees, that employee is engaging in concerted protected activity. Thus, if the employees discuss at lunch the fact that they are unhappy with their wage rate, and following lunch one of the employees who had been in the discussion approaches management about the fact that he or she, as well as other employees are unhappy with the wage rate, that employee although acting alone is engaging in concerted protected activity.

Concerted activity also includes concerns that are expressed by an individual which are a "logical outgrowth" of concerns that had been expressed by a group. *Mike Yurosek & Son, Inc.*,

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306 N.L.R.B. 1037, 1038 (1992) (four employees who individually refuse to work overtime were found to have engaged in concerted activities as their refusal was a logical outgrowth of a prior concerted protest regarding a reduction in schedule); *Salisbury Hotel*, 283 N.L.R.B. 685, 687 (1987) (an employee who contacted the Department of Labor regarding her employer's lunch time policy was engaged in concerted activity as the call was a continuation of efforts initiated by a group of employees, despite the fact that there was no evidence that the employees agreed to act together; however, they agreed they had a grievance that they should take up with management); *see also Amelio's*, 307 N.L.R.B. 182, n.4 (1991) and *Compuware Corporation*, 320 N.L.R.B. 101 (1995). In order to constitute concerted activity, other employees do not have to accept the "invitation" to participate in the activity. *Whittaker Corp.*, 289 N.L.R.B. 933, 934 (1988). The standard for judging whether an activity is concerted is objective, not subjective. Thus, employee opinions concerning another employee's motives have little bearing on whether the conduct was in fact concerted. *Circle K Corp.*, 305 N.L.R.B. 932, 933 (1962); *Aroostik County Regional Ophthalmology Center*, 317 N.L.R.B. 218, 219 (1995). Additionally, there can be an implied consent to engage in concerted activity. An employee engaged in concerted activity when she circulated a petition among employees seeking the termination of two managers for misuse of funds. *FiveCAP, Inc. v NLRB*, 294 F.3d 768 (6th Cir. 2002). Several factors were used by the Sixth Circuit in determining that an employee was involved in concerted activity when that employee was terminated after being overheard saying that if the employee had a union he would be treated better. The employer argued that the employee's statement was a matter of a personal dispute and therefore not concerted activity. In holding there was concerted activity, the Sixth Circuit considered the facts that the employee was making the statement to another employee, there was no personal dispute and the employee had engaged

in concerted activity in the past. *NLRB v. Main St. Terrace Care Center*, 218 F.3d 531 (6th Cir. 2000). In *Georgia Farm Bureau Mutual Ins. Co.*, 333 NLRB 850 (2001), four insurance agents notified the claims department and the state insurance commissioner that their manager had fraudulently handled claims. The Board found concerted activity as the four employees sought to address a serious work concern and thus their activity was protected by Section 7. An employee who on his own, wrote a letter to the local newspaper criticizing the employer was found to be engaging in concerted activity because the letter was intended to elicit community support for a strike. *Alaska Pulp Corp.*, 296 N.L.R.B. 1260 (1989). An employee's action in aid of a fellow employee's attempt to obtain unemployment compensation benefits is concerted activity. *S&R Sundries, Inc.*, 272 N.L.R.B. 1352 (1984). An employee was found to have engaged in concerted activities when the employee distributed a flyer urging a consumer boycott of a hospital by patrons and its employees because the hospital's electrical subcontractor did not provide health care benefits for its employees' families.

The NLRB has failed to find concerted activity in a case where an employee who had been placed on probation asked a co-worker if that person had ever been placed on probation. The first employee was not engaged in concerted activity as the employee did not seek to initiate, induce or prepare for group action. The employee was solely concerned with his own situation of being place on probation. *Adelphi Inst.*, 287 N.L.R.B. 1073 (1988). Filing an individual unemployment compensation claim is not concerted activity. *Bearden & Co.*, 272 N.L.R.B. 931 (1984). An employee cannot engage in concerted activity with a supervisor or other non-employee. *Capital Times Co.*, 234 N.L.R.B. 309 (1978). An employee's refusal to perform an assignment based on his belief that the equipment was unsafe is not concerted activity where the employee acted alone and no other employee had complained. *Goodyear Tire & Rubber Co.*,

269 N.L.R.B. 881 (1984). An interesting case is *Williams v. Watkins Motor Lines*, 310 F.3d 1070 (8th Cir. 2002). In that case, the husband of a husband-wife driving team refused to make a delivery that he claimed exceeded the Missouri weight limit. The employer sought to have the lawsuit dismissed claiming that the wife had given "implicit approval" thus making the actions of the husband concerted activity. The court disagreed, holding that there was no concerted activity as the husband and wife operated as a single unit for purposes of their employment.

2. Protected Activities

In order to obtain the protections of the NLRA, an activity, in addition to being concerted, must be "protected." Protected activities are those where employees seek to improve their terms and conditions of employment or otherwise improve their lot as employees by using means other than immediate employer-employee relationship.

Examples of protected activity include the right to express sympathy for striking employees of another employer, *NLRB v. J.G. Boswell Co.*, 136 F.2d 585 (9th Cir. 1943); the right to publish support for cooperative association of dairy farmers that had called a milk strike, *NLRB v. Peter Cailler Kohler Swiss Chocolate Co.*, 130 F.2d 503 (2d Cir. 1942); the right to assist in organizing another employer's employees, *Fort Wayne Corrugated Paper Co. v. NLRB*, 111 F.2d 869 (7th Cir. 1940); wearing T-shirt with statement "Just Say No to Drug Testing," *NLRB v. Motorola, Inc.*, 991 F.2d 278 (5th Cir. 1993). Thus, if an employee delivery driver refuses to make a delivery where he would have to cross a picket line, he is engaging in a protected activity and may not be discharged in the absence of "legitimate business considerations of an overriding nature." *Cooper Thermometer*, 154 N.L.R.B. 502, 506 (1965). In *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26 (D.C. Cir. 2001), the Court held that the actions of unions in objecting to construction permits sought by non-union contractors and developers were concerted protected activities. The unions sought to have permitting agencies

require the employer to provide employees with a living wage including health insurance and other benefits, and to "meet their responsibilities to the communities and the environment." When contractors refused to use the employer subject to the protests, the employer filed a lawsuit against the unions that it was the subject of an unlawful boycott. The employer argued that the unions did not have the protections of the NLRA including Section 7 rights. The Court held that it would be a "curious and myopic" reading of the NLRA to hold that although employees are free to join unions so as to engage in activities for mutual aid and protection, the unions they join and who represent them should not enjoy these same rights.

Examples where protected activity was not found would be where employees contacted the state department of health to report excessive heat in the employer's nursing home as the nurses were concerned about patients, not employment conditions, *Waters of Orchard Park*, 341 N.L.R.B. No. 93 (2004); an employee's solicitation of a co-worker to be a witness in support of her sex harassment claim that had been filed with the state agency was not protected as it was done solely to advance the employee's own cause, *Holling Press*, 343 N.L.R.B. No. 45 (2004). Similarly, in *Tradesmen International, Inc. v. NLRB*, 275 F.3d 1137 (D.C. Cir. 2002), the court held that a union organizer who appeared before a city agency and unsuccessfully lobbied to require an employer to have to file a bond for work performed by the employer for the city was not engaged in concerted protected activity. The holding was based on the fact that the union organizer (who the employer refused to hire) was not trying to improve the terms and conditions of employees of the employer.

Even where protected concerted activity is found, there are limits to what activities are protected by the safe harbor of Section 7.

See, for example a case where on a television news program, a nurse claimed that her employer hospital was jeopardizing the health of newborns by changing the schedules of nurses working in the labor and delivery area. While the Board found the conduct to be protected, the court did not. According to the court, the statements of the nurse were materially false and thus not protected. The court held that when an employee falsely and publicly disparages her employer or its products or services, the employee loses the protections of the Act. In *North American Refractories Co.*, 331 NLRB 1640 (2000), the Board ruled that an employee who protested working conditions to his supervisor using vulgar and profane language, lost the protections of the Act. The lead case in this area is *NLRB v. Electrical Workers (IBEW) Local 1229 (Jefferson Standard Broadcasting Co.)*, 346 U.S. 464 (1953). In that case, the Court held that an employee's disloyalty to the employer by disparaging his product or service was unprotected activity for which the employee could lawfully be terminated.

Abell Engineering & Mfg.,Inc., 338 NLRB 434 (2002) is an interesting case. There an employee solicited a co-worker to leave his employment and go to work for a unionized employer. When the co-worker declined, the employee kept talking to the co-worker about unions. The co-worker employee reported the matter to his supervisor and the employee who had been soliciting was terminated for "disloyalty". The NLRB found the termination lawful as the employee exceeded the protections of the Act when he attempted to get his co-worker to go to work for another employer. Highlighting the lack of protections for other than "employees", the NLRB in *Waters of Orchard Park*, 341 NLRB No. 93 (2004), upheld the termination of a supervisor who had circulated a petition protesting working conditions as lawful. A supervisor is not an employee and therefore, is not entitled to the protections of the Act.

3. Right to Witness or Assistance at an Investigatory Interview.

In *NLRB v J. Weingarten*, 420 U.S. 251 (1975), the Supreme Court held that an employee's insistence on union representation at an investigatory interview that the employee reasonably believed might lead to discipline was protected concerted activity. Thus, the discipline or discharge of an employee for refusing to engage in an investigatory interview without the presence of a union representative when such has been requested is unlawful.

In *Materials Research Corp.*, 262 NLRB 1010 (1982), the Board ruled that in the case of an unrepresented employee, there was a right to the presence of a co-employee in the investigatory interview. In *Sears Roebuck & Co.*, 274 NLRB 230 (1985) the Board ruled that unrepresented employees were not entitled to the presence of a co-worker at an investigatory interview. The Board reversed itself in *Epilepsy Foundation of Northeast Ohio*, 331 NLRB 676 (2000) returning to its view in *Materials Research*. However, in *IBM Corp.*, 341 NLRB No. 148 (2004), the Board returned to its holding in *Sears Roebuck*, once again ruling that unrepresented employees are not entitled to the presence of a co-worker at an investigatory interview. These decisional swings by the NLRB are a result of the Board being comprised of political appointees.

F. Duty of Fair Representation

1. Definition

Because a union has an exclusive duty to represent all members of the bargaining unit, the Supreme Court held in *Humphrey v. Moore*, 375 US 335 (1964) that the National Labor Relations Act includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct. More recently, in *Vaca v. Sipes*, 386 US 171, 190 (1967) the Supreme Court articulated the general standard as follows:

> A breach of the statutory duty of fair representation occurs only when a Union's conduct toward a member of the collective unit is arbitrary, discriminatory, or in bad faith.

Breach of the duty may arise in two basic contexts: processing of grievances/contract administration; and, negotiation of the basic collective bargaining agreement. In order to prove breach of the duty in grievance/contract administration it must be proven that the collective bargaining agreement was breached as well as that the Union acted arbitrarily, discriminatorily, or in bad faith. Thus, in *Vaca v. Sipes, supra*, the Court observed that a bargaining unit member does not have an absolute right to have his grievance taken to arbitration. A Union does not breach its duty of fair representation merely because it settles a grievance short of arbitration. Nevertheless, the Union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion.

In negotiating a collective bargaining agreement, of course, there is no agreement yet to breach. The duty in the negotiating process is only breached when the Union's conduct is "so far outside a 'wide range of reasonableness' . . . that it is wholly 'irrational' or 'arbitrary.'" *Air Line Pilots v. O'Neill*, 499 US 65 (1991). Thus, the end-tailing of seniority lists—providing lower seniority for all pilots of the acquired airline than those of the original airline regardless of years of service—is not in itself violative of the duty of fair representation. The courts will review the Union's actions with a high degree of deference because negotiators need broad latitude to perform their bargaining responsibilities.

2. Statute of Limitations

In *DelCostello v. Teamsters*, 462 US 151 (1983) the Supreme Court held that the 6-month statute of limitations contained in Section 10(b) of the National Labor Relations Act applies to "hybrid" Section 301/fair representation suits by employees against their employers and Unions.

A "hybrid" suit is one where the employee sues the employer for breach of the collective bargaining agreement, which must necessarily be brought under Section 301 of the Labor Management Relations Act, and against the Union for breach of the duty of fair representation. Such an action must be brought within six months of the accrual of the cause of action.

The general rule is that the 6-month statute of limitations cannot be avoided by only suing the employer or only suing the Union. See, *Smith v. Masters, Mates & Pilots*, 296 F.3d 380 (5th Cir. 2002), *cert. denied*, 123 S.Ct. 691 (2002); but compare *White v. White Rose Food*, 237 F.3d 174 (2nd Cir. 2001), where it was held that the fact that suit was time-barred against the Union did not mean that suit against the employer in a separate 301 action could not be maintained. Nevertheless, the employees still had to prove both a breach of the collective bargaining agreement and of the Union's duty of fair representation.

The various Circuit Courts of Appeal vary on when the cause of action accrues. Some hold that the action accrues when actual injury occurred. See, *Barrett v. Ebasco Contractors, Inc.* 868 F.2d 170 (5th cir. 1989). Some have held that the action accrues on the date of the last action by the Union or the date on which damages become fixed and relatively certain. See, *Archer v. Airline Pilots Ass'n.*, 609 F.2d 934 (9th cir. 1979, *cert. denied,* 466 US 953 (1980). In the Seventh Circuit and Third Circuit, however, it has been held that the action accrues at the time the Union makes its decision on the grievance or when the plaintiff discovers or "in the exercise of reasonable diligence should have discovered" that no further action would be taken. *Martin v. Youngstown Sheet & Tube Co.*, 911 F.2d 1239 (7th Cir. 1990); *Vadino v. A.Valet/Eng'rs*, 903 F.2d 253 (3d Cir. 1990).

Generally, the continuing violation theory is not available in duty of fair representation cases. See, e.g., *Strassberg v. New York Hotel & Motel Trades Council Local 6*, 31 Fed Appx.

15, 17 (2nd Cir. 2002), *cert. denied*, 123 S.Ct. 193 (2002); *Devitt v. Potter*, 234 F.Supp.2d 1034 (D.N.D. 2002). However, the 6-month period may be tolled: pending exhaustion of internal union remedies, see *Galindo v. Stoody Co.*, 793 F.2d 1502 (9th Cir. 1986); for fraud, see *Franco v. American Gas Ass'n,* 135 LRRM 2612 (C.D. Cal. 1987) *aff'd,* 902 F.2d 39 (9th Cir. 1990), *cert. denied,* 498 US 897 (1990); where the Union kept open the possibility of going to arbitration, *Andrews v. Children's Hosp. of Philadelphia*, 147 LRRM 2572 (E.D. Pa. 1994); and for service in the armed forces, NLRA § 10(b).

3. Interplay of Discrimination Statutes

i. As part of DFR

Since the duty of fair representation is breached when a union acts in an "arbitrary, discriminatory [manner] or in bad faith," the duty is breached when the union treats members differently due to race. See, *Steele v. Louisville & Nashville Railroad*, 323 US 192 (1944) where an African American employee sued to overturn a seniority system that discriminated against African American bargaining unit members. Thus, members of the bargaining unit may sue for a breach of the duty of fair representation because they were discriminated against due to their age, race, national origin, gender, etc. They may bring such an action without exhausting Title VII agency filing requisites.

ii. Waiver of Discrimination Claims - Arbitration

In *Alexander v. Gardner-Denver Co.*, 415 US 36, 48-52 (1974) the Supreme Court held that a grievant that lost his collectively bargained arbitration may still file a discrimination lawsuit under Title VII. This was because, said the Court, a union cannot waive the rights of an individual to bring a lawsuit under Title VII. Compare the Court's subsequent decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 US 20 (1991), where it was held that

discrimination claims arising under federal statutes may be resolved in private arbitration even over the objection of the employee.

This apparent conflict was addressed, but not finally resolved, by the Supreme Court in *Wright v. Universal Maritime Service Corp.*, 525 US 70 (1998). There, it was held that because the particular collective bargaining agreement did not contain a "clear and unmistakable waiver" of the right to judicial resolution of federal discrimination claims the employee could pursue his discrimination lawsuit. In the wake of *Wright* the courts have uniformly held that unless the collective bargaining agreement explicitly provides that a bargaining unit member's discrimination claims must be arbitrated he will not be barred from suing in federal court.

4. Remedies

The Supreme Court has held that the "fundamental purpose of fair representation suits is to compensate for injuries caused by violation of employee rights." *Electrical Workers v. Foust*, 442 US 42 (1979). Thus, courts have issued damage awards including: back pay (see, *Central of G. Ry. V. Jones,* 229 F.2d 648 (5th Cir.) *cert. denied,* 352 US 848 (1956)(Railway Labor Act); see, also, *Higdon v. Entenmann's Sales Co.*, 170 LRRM 3234 (ND ILL. 2002); front pay (*Smith v. Hussmann Refrigerator Co.*, 619 F.2d 1229 (8th Cir.), *cert. denied sub nom. Steelworkers Local 13889 v. Smith*, 449 US 839 (1980); *Higdon v. Entenmann's Sales Co., supra;* intentional infliction of emotional distress (*Baskin v. Hawley*, 807 F.2d 1120); and, attorneys' fees (*Emmanuel v. Omaha Carpenters*, 560 F.2d 382 (8th Cir. 1977) (disapproved on other grounds); *Steelworkers Local 15063*, 281 NLRB 1275 (1986); *Bennett v. Glass & Pottery Workers Local 66*, 958 F.2d 1429 (7th Cir. 1992); but see, *Aguinaga v. Food & Commercial Workers*, 993 F.2d 1480 (10th Cir. 1993), *cert. denied*, 510 US 1072 (1994), where it was held

that attorneys fees were not available where the benefits obtained by the plaintiff did not also benefit the union membership.

Courts have also approved equitable relief, such as injunctions requiring arbitration (*Vaca v. Sipes*, 386 US 171 (1967) and staying arbitration pending resolution of a fair representation lawsuit over the Union's pre-arbitration conduct (*Melanson v. John J. Duane Co.*, 605 F.2d 31 (1st Cir. 1979). Courts have also ordered that a grievant be allowed to be represented by an attorney of his or her own choosing at a subsequent arbitration hearing and requiring the Union to bear the expenses involved.

More complex issues exist concerning the apportionment of damages when it has been found that a Union has violated its duty of fair representation and the Employer has breached the collective bargaining agreement. Thus, in *Vaca v. Sipes*, 386 US 171, 197-98 (1967) the Court held that:

> [D]amages attributable solely to the employer's breach of contract should not be charged to the union, but increases if any in those damages caused by the union's refusal to process the grievance should not be charged to the employer.

One method of apportioning such damages is for a jury to determine the hypothetical date when the discharged employee would have been reinstated to his employment, but for the union's breach (e.g., refusal to arbitrate the grievance). The damages (lost earnings) up to that hypothetical date are the responsibility of the employer; any lost earnings that accrued after that date would be the responsibility of the union. See, *Camacho v. Ritz-Carlton Water Tower*, 786 F.2d 242 (7th Cir.), *cert. denied*, 477 US 908 (1986); and *Platemakers' Union No. 4 v. NLRB*, 794 F.2d 420 (9th Cir. 1986).

At least one court has found that the more appropriate method of apportionment is to hold the employer solely liable "until such time as the union's breach can be said to have affected

damages." Once that date is determined, the damages that accrue thereafter are split evenly between the union and the employer. *Byrne v. Buffalo Creek R.R.*, 123 LRRM 2431, 2436-37 (WDNY 1985). See, also, *Aguinaga v. Food & Commercial Workers*, 993 F.2d 1480 (10th Cir. 1993), *cert. denied*, 510 US 1072 (1994), where the Tenth Circuit held that the hypothetical date method was too speculative and would cause the union to bear a majority of the back pay award, when it was the employer who was the primary cause of the damages.

Finally, the Supreme Court has held that punitive damages are not available for a union's breach of the duty of fair representation, at least under the similar Railway Labor Act. The Court in *Electrical Workers v. Foust*, 442 US 42 (1969) stated:

> Because general labor policy disfavors punishment, and the adverse consequences of punitive damage awards could be substantial, we hold that such damages may not be assessed against a union that breaches the duty of fair representation by failing to properly pursue a grievance.

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