SAFETY IN THE WORKPLACE: EMPLOYEE REMEDIES AND UNION LIABILITY

INTRODUCTION

The safety of the workplace has long been an important concern in the field of labor law. The desire to ameliorate hazards was reflected in the early inclusion of safety as a mandatory subject of collective bargaining under the National Labor Relations Act\(^1\) and was reitterated by the enactment in 1970 of the Occupational Safety and Health Act.\(^2\) As a result of the NLRA, OSHA, and other legislation, workers have available a number of preinjury as well as post injury remedies aimed at encouraging a safer work environment.\(^3\) Additionally, some recent cases indicate that the worker may have a new party against whom he may seek redress—his union.\(^4\) It has become possible, on the basis of these cases, for an injured worker to end run the limited compensation schedules imposed under most workmen's compensation acts\(^5\) and recover more realistic compensatory damages. This situation, created by the presence of a union and a collective bargaining agreement,\(^6\) is fraught with significant questions about the interaction of national labor policy and state law.

This article will briefly present the preinjury remedies available under the NLRA and OSHA to familiarize the reader with the individual employee's ability to protect himself from unsafe working conditions and the effect of a union and a collective bargaining agreement on those remedies. Following this, a cause of action for personal injury arising from an unsafe working condition when a union and a collective bargaining agreement are in existence will be examined. Workmen's compensation will be discussed to the extent that it impacts on or possibly conflicts with NLRA policies.

\(^1\) NLRB v. Gulf Power Co., 384 F.2d 822, 825 (5th Cir. 1967) (construing sections 8(a)(5) and 8(d) of the NLRA).
\(^3\) See generally Ashford & Katz, Unsafe Working Conditions: Employee Rights Under the Labor Management Relations Act and the Occupational Safety & Health Act, 52 NOTRE DAME LAW. 802 (1977); Braid, OSHA and NLRA: New Wrinkles on Old Issues, 29 LAB. L.J. 755 (1978); Ferris, Resolving Safety Disputes: Work or Walk, 26 LAB. L.J. 695 (1975) (the articles deal extensively with the interrelationship of safety remedies under the NLRA and OSHA).
\(^6\) Helton v. Hake, 564 S.W.2d 313, 318 (Mo. App. 1978).
Finally, an analysis of the problems attending a suit for damages arising from personal injury brought under section 301 of the Taft-Hartley Amendments to the NLRA will be proffered.

PREINJURY REMEDIES

Under existing federal law both the NLRA and OSHA protect the worker's right to seek safer working conditions. The NLRA gives employees the power to dictate their own safety standards in two ways. Under section 8(d) of the NLRA the terms and conditions of employment are mandatory subjects of collective bargaining, and interpretive case law places safety matters among the conditions of employment. As a result, a union may bargain to impasse, strike, or bring to bear any other available economic pressure to gain desired safety provisions in the collective bargaining agreement. Both unionized and nonunionized employees are permitted to engage in safety walk-offs by virtue of the protection afforded concerted activity under section seven of the NLRA. Section seven protection is not without limitations however, and certain requirements must be met to avoid disciplinary action by the employer. Initially the activity must be pursued for the mutual benefit or protection of the group; it must be something more than an individualized protest seeking individual ends. Secondly, section seven affords little protection from the employer's legitimate economic responses, such as a lockout or hiring replacements. And, if there is a collective bargaining agreement containing a no-strike clause, the workers right to engage in the work stoppage may be pretermitted, unless protected on some other basis.

7. NLRB v. Gulf Power Co., 384 F.2d 822, 825 (5th Cir. 1967); see R. Gorman, Basic Text on Labor Law 503 (1976). In addition to the various mandatory subjects, id. 496-523, there are also permissive subjects which may be agreed upon but which neither party may insist upon to impasse, id. 523-29, and there are illegal topics which may not be insisted upon at all, id. 529-31.

8. For discussion of the available and unavailable economic pressure which may be used by the union, see R. Gorman, supra note 7, at 296-325.


10. NLRB v. C & L Air Conditioning, Inc., 486 F.2d 977, 980 (9th Cir. 1973). In addition to a group interest there must exist a work-related complaint, a specific result or remedy must be sought and the activity cannot be unlawful or improper. Shelly & Anderson Furniture Mgr. Co. v. NLRB, 497 F.2d 1200, 1202-03 (9th Cir. 1974). Simply put, there must be a bona-fide Labor dispute. Ashford & Katz, supra note 3, at 803-04.

11. For discussion of prohibited and nonprohibited employer countermeasure to concerted activity, see R. Gorman, supra note 7, at 326-66.

12. Braid, supra note 3, at 786. A no-strike obligation is also implied from the existence of a grievance procedure and has been extended to a safety dispute. Gateway Coal Corp. v. UMW, 414 U.S. 368, 380-87 (1974).
SAFETY IN THE WORKPLACE

The presence of no-strike clause does not necessarily extinguish the worker's safety remedies under the federal labor laws. Section 502 of the Taft-Hartley Act\(^1\) explicitly protects a work stoppage resulting from abnormally dangerous conditions, and prevents its characterization as a strike. As a result, the safety walk-out is preserved as a remedy notwithstanding a no-strike clause.\(^2\) Section 502 has also been applied to allow an individual the work stoppage right.\(^3\) But that right is dependant on an objective test of an abnormally dangerous condition.\(^4\) If the facts do not support a finding of abnormal danger in this objective sense, the individual could lose his job and the union may be liable to the employer for breach of the collective bargaining agreement.\(^5\) Further, to meet the abnormality test, an unreasonably dangerous condition cannot have persisted for any length of time. If it has, the condition is one that is normal in the particular work place and section 502 rights are not activated.\(^6\) If the circumstances do not warrant section 502 protection, the work stoppage may be enjoined and the employees required to return to work.\(^7\) Yet, there remains a possibility that a court could, in ordering the employees back to work, abate the hazard pending arbitration.\(^8\) However, it appears that the extent of the courts' power to abate the hazard is limited to administrative practices, such as the removal of an unacceptable supervisor, and does not extend to technical safety issues since federal health and safety regulations have preempted the determination of whether a hazard exists and hence whether the employer must abate it.\(^9\)

Workplace safety is given more specific and comprehensive coverage in the Occupational Safety and Health Act. OSHA grants employees the right to a safe and healthful workplace,\(^10\) requires employees to comply with specific safety standards promulgated by the Secretary of Labor pursuant to the Act,\(^11\) and provides en-

\(15\) Clark Eng'r and Const. Co. v. 4 Rivers Dist. Council, 510 F.2d 1075, 1079 (6th Cir. 1975).
\(16\) Gateway Coal Co. v. UMW, 414 U.S. 368, 386-87 (1974).
\(17\) Ashford & Katz, supra note 3, at 816.
\(20\) Id. at 387.
\(21\) Ashford & Katz, supra note 3, at 817 n.108.
\(22\) 29 U.S.C. § 651(b) (1976).
\(23\) Id. § 654(a) (1976); Ace Sheeteting & Repair Co. v. OSHRC, 555 F.2d 439, 440 (5th Cir. 1977).
To further the purposes of the Act, OSHA grants employees several specific rights intended to advance enforcement of federal safety standards. Among other rights, employees can, under the Act, request an OSHA inspection and accompany the OSHA inspector on his tour of the work place.

At present, a regulation promulgated by the Secretary of Labor gives individual employees the right to refuse, in good faith, to work under a condition that is reasonably believed to be hazardous when the condition cannot be abated in time to prevent serious physical injury. Recent litigation questioning the authority of the Secretary to issue such a regulation has culminated with the United States Supreme Court granting certiaori, in Marshall v. Whirlpool Corp., to resolve the conflicting positions which the Fifth and Sixth Circuit Courts of Appeals have taken on the issue. In Marshall v. Daniel Construction Co., the Court of Appeals for the Fifth Circuit, articulated two basis for holding that Regulation 1977.12(b) was beyond the power of the Secretary to issue. First, the court found that two sections of OSHA focused directly on imminently dangerous conditions and that these sections afforded the exclusive procedures that employees could follow and still

24. 29 U.S.C. § 659 (1976). The OSHA provides for the promulgation of specific regulations, and the basis for finding a violation absent a specific controlling regulation. Id. at § 654(a); Anning-Johnson Co. v. OSHRC, 516 F.2d 1081, 1086 (7th Cir. 1975). The Supreme Court has recently held that where an employer refuses to permit an inspector access to the working areas, the Secretary of Labor must secure a search warrant based upon "probable cause." Marshall v. Barlow's, Inc., 436 U.S. 307, 325 (1978). However, an employee may initiate administrative action by filing their own complaint. 29 U.S.C. § 657(f) (1976). The Act provides penalties if violation are found. Id. §§ 658, 666. The Act also provides for appeal from citation and for expedited procedures where a serious violation could result in death or serious harm before normal enforcement procedures can be exhausted. Id. §§ 659, 660, 662. The Act also prohibits discrimination by an employer against an employee for exercising the rights granted in the Act. Id. § 660(c)(2).


26. Id. § 657(e).

27. 29 C.F.R. 1977.12 (1978). The condition causing the employee's apprehension must be such that a reasonable person, under the circumstances, would conclude that there is a real danger of death or serious injury and an insufficient amount of time to eliminate the danger through the regular statutory channels. The employee must also, where possible, have sought and been unable to obtain a correction of the condition. Id.

28. 593 F.2d 715 (6th Cir.), cert. granted, 100 S. Ct. 43 (1979).


avail themselves of the Act's protection against dismissal. Second, the court examined the legislative history of the Act and, relying upon the Congress' rejection of "strike with pay" and "administrative shutdown" provisions contained in the original House bill, rejected the argument that the Act contains an implied right to walk off the job because of unsafe conditions.

The Sixth Circuit Court of Appeals took a contrary position in Marshall v. Whirlpool Corp. The court found that Regulation 1977.12(b) was consistent with the congressional purpose of the Act and its legislative history; and, hence, a valid exercise of the Secretary's rulemaking authority. The court, therefore, held that the remedial nature of the Act counseled deference to the Secretary's discretion in promulgating the regulation. On appeal, the Secretary may be expected to argue that the legislative history does not prohibit the right to refuse work since the regulation differs significantly from the "strike with pay" and "administrative shutdown" provisions rejected by Congress. However, if the Fifth Circuit Court of Appeals decision stands, it could support the argument that initial decisions concerning the existence of a hazardous condition are to be made by the agency and are not properly left to a union, its individual members, or an arbitrator.

REMEDIES UNDER STATE LAW

When an individual suffers an injury at his place of work, recovery of full damages is hampered in two ways. First, OSHA neither directly nor indirectly creates a private civil remedy for damages. A second limitation stems from long standing workmen's compensation acts which abrogate common-law tort actions arising from employer negligence and substitute a limited and scheduled system of recovery for specific types of injuries. Despite these limitations recent litigation has yielded a theory of re-

32. Id. at 711.
33. Id. at 712-715; Hazardous Conditions, supra note 30, at 577.
35. 593 F.2d 715 (6th Cir.), cert. granted, 100 S. Ct. 43 (1979).
36. Id. at 721-36.
38. See generally Hazardous Conditions, supra note 30, at 581-89.
39. See note 21 and accompanying text supra.
covery against the employee's collective bargaining representative based on the union's alleged failure to enforce safety provisions contained in collective bargaining agreements.\textsuperscript{42}

When presented with the issue of a union's liability for injuries sustained as a result of unsafe working conditions, the federal courts have uniformly held that no cause of action exists for the negligent failure to enforce safety provisions of a collective bargaining agreement.\textsuperscript{43} In reaching this conclusion, the courts have reasoned that such situations are governed by the union's duty of fair representation, a duty that is not breached absent arbitrary, discriminatory, or bad faith conduct on the part of the union.\textsuperscript{44}

One federal court, however, after determining that no federal claim was stated, remanded the action to the state court for trial of a state cause of action in tort based on the union's negligent failure to perform a duty assumed by contract.\textsuperscript{45} On remand the Missouri Court of Appeals held, in \textit{Helton v. Hake},\textsuperscript{46} the defendant union liable for negligence, rejecting the defense that the suit was actually a section 301 action for the enforcement of a collective bargaining agreement.\textsuperscript{47} The Missouri court, relying heavily on the federal district court's opinion, ruled that the central issue was not any wrongful act or failure to act on the part of the employer, but rather the union's negligent failure to act when it had assumed a specific duty in the collective bargaining agreement.\textsuperscript{48} The court further reasoned that merely because some interpretation of the collective bargaining agreement was necessary to determine the duty owed, that need for interpretation did not in and of itself categorize the suit as a section 301 breach of contract action.\textsuperscript{49}

The Missouri court went on to distinguish the suit from a typical fair representation action where federal law would otherwise dictate that fair representation is the exclusive duty owed to the employee by the union, and under which negligence is not actionable.\textsuperscript{50} In distinguishing other personal injury cases where the duty of fair representation was alleged to have caused the injury, the

\begin{itemize}
\item \textsuperscript{42} See note 4 and accompanying text \textit{supra}.
\item \textsuperscript{44} Bryant v. UMW, 467 F.2d 1, 5 (6th Cir.) \textit{cert. denied}, 410 U.S. 930 (1972); Helton v. Hake, 386 F. Supp. 1027, 1034 (W.D. Mo. 1974).
\item \textsuperscript{45} Helton v. Hake, 386 F. Supp. 1027, 1034 (W.D. Mo. 1974).
\item \textsuperscript{46} Helton v. Hake, 564 S.W.2d 313, 318-21 (Mo. App. 1978).
\item \textsuperscript{47} \textit{Id.} at 318-21.
\item \textsuperscript{48} \textit{Id.} at 318-19.
\item \textsuperscript{49} \textit{Id.} at 319.
\item \textsuperscript{50} \textit{Id.} at 318-20.
\end{itemize}
court noted that in those cases the actual enforcement of the safety provisions, was relegated to the grievance and arbitration process with the union acting in an advisory capacity only.\(^5\) In contrast, *Helton* involved the union's assumption of an affirmative duty to enforce the safety rules, an obligation which cut it in for more than an advisory role.\(^5\) The court held that since the union had taken over a managerial function of exercising the full and independent right to enforce safety requirements, it must also accept the concomitant responsibilities.\(^5\)

An important problem raised by *Helton* concerns the effect it has on collective bargaining itself:\(^5\) the more power granted employees to determine safety standards through the active bargaining of their union, the greater is the possibility that the union will be liable when an employee is injured.\(^5\) This has the effect of deterring collective bargaining on safety,\(^5\) a mandatory bargaining subject. As such, it runs contrary to the overarching legislative purpose behind national labor law—facilitating collective bargaining.\(^5\) In another sense, the assumption by the union of responsibility for enforcing safety rules would, under the state cause of action, have the effect of abrogating the legal obligation of the employer to provide a safe workplace,\(^5\) shifting the loss of injury due to unsafe working conditions to the employees through their union.\(^5\) Even though employees may be able to bargain for higher

\(^{51}\) Id. at 319-20.

\(^{52}\) Id. at 320-21.

\(^{53}\) Id. at 321.

\(^{54}\) See note 7 and accompanying text supra.

\(^{55}\) Compare Bryant v. UMW, 467 F.2d 1, 5 (6th Cir. 1972) with Helton v. Hake, 564 S.W.2d 313, 321 (Mo. App. 1978). In Bryant the collective bargaining agreement had left enforcement of the safety provisions to the normal grievance procedure. 467 F.2d at 4. In addition, the agreement only stated that the safety committee may inspect the mine. Id. at 5. The court held that this permissive language imposed no duty upon the union to inspect the mine. Id. Thus, the union was not held liable. Id. at 6.

In *Helton*, on the other hand, the union had bargained for the full power to enforce the safety rules. 564 S.W.2d at 320. The court thus held that such an assumption of power by the union imposed a concomitant responsibility of due care. Id. at 321. As a result, the union was held liable. Id.

\(^{56}\) See Bryant v. UMW, 467 F.2d 1, 5 (6th Cir. 1972).


\(^{59}\) Id. One method of loss shifting can be seen in the context of the subrogation rights of employers as against third parties under most workmans compensation statutes. Id. at 946 n.8. Under these schemes, once the employer had paid compensation to an employee he may recover the amount so expended from the tort-feasor in one of three ways: (1) bringing an action against him directly, (2) joining as a party plaintiff or intervening in an action brought by the employee, or (3) allow the employee to prosecute the action himself and subsequently applying
wages to cover this cost, they will, in the give and take process of collective bargaining, probably forego some other bargaining objective.\textsuperscript{60} This discourages bargaining on a mandatory subject since the more the union bargains for, the greater is its prospect of full liability,\textsuperscript{61} while the employer's liability remains limited to workmen's compensation\textsuperscript{62} or less if a subrogation right exists.\textsuperscript{63}

Another problem with the result suggested by \textit{Helton} is the potential multiplicity of individual state rules concerning not only the general theory of tort recovery but also the application of workmen's compensation law. In some states a union may be considered a co-employee of the injured worker for the purpose of workmen's compensation.\textsuperscript{64} If so denominated, a union's liability under the \textit{Helton} rationale will turn on whether co-employees are third parties under state workmen's compensation law. This is exemplified by an analysis of the liability of co-employees. If the co-employee is a third party under state law, he may be liable for damages notwithstanding the workmen's compensation schedule.\textsuperscript{65} If co-employees are not third parties, the workmen's compensation in those states is the exclusive remedy for the negligence of a co-employee.\textsuperscript{66} The effect of this is that in some states, a union will be liable despite workmen's compensation and in others will be absolved from liability,\textsuperscript{67} even though the collective bargaining agreements bear identical safety provisions. Therefore, the terms of the collective bargaining agreement might give rise to different substantive standards of liability from one state to another, contravening one of the basic policies behind na-

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\textsuperscript{60} See note 55 and accompanying text supra.


\textsuperscript{62} 2A A. Larson, supra note 5, § 76.21.

\textsuperscript{63} See note 59 supra.


\textsuperscript{65} Graven v. Oggero, 213 N.W.2d 678, 680 (Iowa 1973); Schumacher v. Leslie, 360 Mo. 1238, ——, 232 S.W.2d 913, 917 (1950); Hockett v. Chapman, 69 N.M. 324, ——, 366 P.2d 850, 854 (1961). In \textit{Graven} the court held that the immunity granted in the compensation act does not extend to co-employees, even if they have supervisory positions and are alleged to have administrative duties assigned to them in a representative capacity. 213 N.W.2d at 681.

\textsuperscript{66} White v. Ponozzo, 77 Idaho 276, ——, 291 P.2d 843, 845 (1955); Hayes v. Marshall Field & Co., 351 Ill. App. 329, ——, 115 N.W.2d 99, 102 (1953); Miller v. Scott, 339 S.W.2d 941, 943 (Ky. 1960). Some states such as California provide expressly by their statutes that an employee's right to recover workmen's compensation is the exclusive remedy for his injuries against the employer or against any other employee acting within the scope of his employment. \textit{Cal. Lab. Code} § 3601 (West 1979).

\textsuperscript{67} See notes 64-66 and accompanying text supra.
tional labor law—the need to avoid the application of inconsistent state law.\textsuperscript{68}

To avoid the potential inconsistency presented by *Helton*, two solutions are available. One is to allow the action in federal court for the negligent failure to perform a duty assumed under section 301. This has the overall effect of changing the duty of fair representation to a due care standard, an alternative which was rejected in *Vaca v. Sipes*.\textsuperscript{69} The second possible solution is to preempt the state cause of action since it effectively discourages collective bargaining on a mandatory subject and subjects labor-management relations to different standards of liability for the same contractual provisions. The problem with this, however, is in determining whether the federal labor policies can preempt the states' interest of insuring compensation for injured individuals through its wrongful death statutes, or through such common-law concepts as negligent performance of duties assumed.\textsuperscript{70}

Some arguments can be made as to the actual validity of the states' interest in the work-related area. For one thing, the state has already limited those interests in the field of work related injuries through its workmen's compensation statutes which insure recovery in more situations, yet limit the amount recoverable.\textsuperscript{71} Given this, the state's interest in preserving its common-law negligence action in the field can be questioned. Some states could avoid this argument by asserting that the workmen's compensation statutes do not exempt the fellow servant from liability, and therefore the state's interest in providing a remedy is not diminished.\textsuperscript{72} However, the reasoning which the Missouri court used in *Helton* to establish union liability—that the union had undertaken a managerial function which carries concomitant responsibilities—can be used to refute the interests of the state because it has, in relation to the managerial function of providing a safe workplace, reduced the employer's liability to providing workmen's compensation benefits.\textsuperscript{73} If the union is then taking upon itself the per-


\textsuperscript{69} 386 U.S. 171, 189-92 (1967); see notes 94 - 99 and accompanying text infra.

\textsuperscript{70} Cf. Cox, *supra* note 68, at 1355 (analyzing the development of the preemption doctrine under the NLRA).

\textsuperscript{71} *Economic Apple*, *supra* note 41, at 473. Recovery in insured in more situations since the only requirement for recovery is that the injury be work related while the employers common law defense of contributory negligence is abrogated. See, e.g., Neb. Rev. Stat. §§ 48-101 to -102 (Reissue 1978). The recoverable amounts, however, are limited to a specified schedule varied according to the different types of injuries. See, e.g., Neb. Rev. Stat. § 48-109, -110, -119 (Reissue 1978).

\textsuperscript{72} See note 65 and accompanying text *supra*.

\textsuperscript{73} 2A A. Larson, *supra* note 5, § 65.10, 12-1 to -3.
formance of a managerial function, should not its liability while performing that function be limited to scheduled recoveries outlined in the workmen's compensation statutes? Such an argument would not prevent liability but it would limit the union's liability to the schedule.

At this point these arguments are somewhat speculative, and other considerations of state and federal interests may arise in a particular case, necessitating a different approach. Even so, it should be apparent from the discussion of Helton that the state tort action raises serious questions about the impact of state common law on the federal interest in the bargaining process.\(^7\)

**FEDERAL SUIT FOR INJURIES UNDER SECTION 301**

**BASIS OF LIABILITY AND BASIC PROBLEMS**

The NLRA attempts to create a system of collective bargaining designed to govern the entire employment relationship.\(^7\) Section 301 of the Taft-Hartley Amendments seeks to stabilize the system by authorizing suits for breach of a collective bargaining agreement.\(^7\) The basic concept of section 301 is that the threat of liability will promote greater adherence to agreements arising from the course of bargaining, thus building stability from responsibility.\(^7\) The federal courts have seized upon section 301 as a vehicle to develop a body of federal labor law rooted in national labor policy and preemptive of inconsistent state laws.\(^7\)

Subject to certain limitations, individuals have the right to bring suit under section 301 against their employers and the union who represents them.\(^7\) The gravamen of the action against the

\(^{74}\) Cf. Brough v. United Steel Workers, 437 F.2d 748, 749-50 (1st Cir. 1971). In this case it was suggested that the New Hampshire common-law principle which subjects an employer's safety advisor to tort liability for negligent inspection regardless of a contractual relationship might be preempted by the NLRA as to the liability of the union. Id. at 749 n.1.

\(^{75}\) Winston-Salem Printing Pressmen and Assistant's Union No. 318, 398 F.2d 221, 225-26 (4th Cir. 1968).


\(^{78}\) The courts believed that labor relations peculiarly called for a body of uniform law which was preemptive of inconsistent state law. Smith v. Evening News Assoc., 317 U.S. 195, 200 (1962); Local 174, Teamsters v. Lucas Flour Co., 389 U.S. 95, 102 (1962); see Hospital Employees Labor Program v. Ridgeway Hosp., 570 F.2d 167, 168-69 (7th Cir. 1978) (discussing the development of exclusive federal common law under section 301). It should be noted, however, that section 301 jurisdiction is not exclusive and a state court may entertain a section 301 suit subject to the mandate that it apply federal law. Avco Corp. v. Aero Lodge No. 735, Int'l Assoc., 390 U.S. 557, 558 (1968).

\(^{79}\) For an employee to bring suit he must first exhaust his contractual reme-
employer is a breach of the collective bargaining agreement and is, therefore, contractually based. The action against the union is grounded on the union's complicity in the employer's breach and is denominated a breach of the union's duty of fair representation.

Since section 301 authorizes suit for breach of contract and not for torts, an immediate question is raised as to the propriety of an action to recover damages for personal injury resulting from unsafe working conditions governed by a collective bargaining agreement. While a claim for personal injury is essentially a tort action, a fact unalterable by a simple pleading device, there is authority for actions in contract for personal injuries, and for tort actions alleging breach of a duty of reasonable care assumed under the contract. An action under section 301 would appear to be within the scope of these cases.

Assuming the availability of a section 301 remedy, many complications arise. First, under the body of federal law fashioned under section 301, the union cannot be held to have breached its duty of fair representation unless it is guilty of bad faith, arbitrary,

dies. Baldini v. Local No. 1095, Int'l Union, 581 F.2d 145, 149 (7th Cir. 1978). As with any rule, there are a number of exceptions to the exhaustion requirement, one of which is a unions breach of the duty of fair representation. Keppard v. International Harvester Co., 581 F.2d 784, 786 (9th Cir. 1978). For an analysis of the exhaustion requirement, see Comment, The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor Unions and Employers, 55 Chi.-Kent L. Rev., 259 (1979).

80. Prerequisites to a section 301 suit, therefore, include the existence of a contract, a breach of which must be alleged. Berialt v. Local 40, Super Cargoes & Checkers, 501 F.2d 258, 261 (9th Cir. 1974); Smith v. Local No. 25, Sheet Metal Workers Int'l Assoc., 500 F.2d 741, 744 (5th Cir. 1974); Genesco, Inc. v. Joint Council 13, United Shoe Workers, 230 F. Supp. 923, 928 (S.D.N.Y. 1964). For an analysis of the application of section 301 to contracts other than collective bargaining agreements, see Epstein, The Expanding Coverage of Section 301 of the Labor-Management Relations Act, 26 Lab. L.J. 439 (1975).

81. Richardson v. Communications Workers, 443 F.2d 974, 981 (8th Cir. 1971). Suit against the union individually under section 301 would still require a contract and its alleged breach. Gonzalez v. International Longshoremen's Assoc., Local 1581, 498 F.2d 330, 331 (5th Cir. 1974). However, jurisdiction for a bare fair representation claim may be obtained under 29 U.S.C. § 1337, unencumbered by the requirement of a breach of contract. Mumford v. Glover, 505 F.2d 878, 883 (5th Cir. 1974); Smith v. Local No. 25, Sheet Metal Workers Int'l Assoc., 500 F.2d 741, 748 (5th Cir. 1974); Retana v. Apartment, Motel and Hotel Elevator Operators Union, Local No. 14, 453 F.2d 1018, 1021 (9th Cir. 1972).


85. See, e.g., Helton v. Hake, 564 S.W.2d 313, 319 (Mo. App. 1978).
or discriminatory conduct in its representation of individual members of the bargaining unit. Since due care is not part of the duty of fair representation, union laxity, poor judgment, or negligence will not support a section 301 action.

The circumstances under which the union might be liable for injuries arising from unsafe working conditions are fairly limited given the narrow scope of the duty of fair representation. Perhaps the union would be liable if a worker filed a grievance concerning safety conditions in the workplace and the union handled it perfunctorily or failed to investigate its merits, permitting the grievance to lapse. But the union is generally given broad discretion in determining the merits of a grievance because the collective bargaining process necessarily subordinates the interests of the individual to the collective interests of the group. As a result, no individual has an absolute right to have his grievance taken to ar-


87. Brough v. United Steelworkers, 437 F.2d 748, 750 (1st Cir. 1971); De Arroyo v. Sindicato De Trabajadores Packing House, 425 F.2d 281, 284 (1st Cir. 1970).

88. Vaca v. Sipes, 386 U.S. 171, 190 (1967); Dente v. Int'l Organ. Local 90, 492 F.2d 10, 12 (9th Cir. 1974); Vedda v. Avery Eng'r Co., 87 L.R.R.M. 2154, 2155 (N.D. Ohio 1974); see Beriault v. Local 40, Super Cargoes & Checkers, 501 F.2d 258, 253-64 (9th Cir. 1974).

89. Brough v. United Steelworkers 437 F.2d 748, 750 (1st Cir. 1971); House v. Mine Safety Appliance Co., 417 F. Supp. 939, 945 (D. Idaho 1976) (rejecting the claim for injuries on the basis that union negligence was not enough to impose liability); see notes 86-88 and accompanying text supra.


91. Minnis v. UAW, 531 F.2d 850, 854 (8th Cir. 1975); see Fordham L. Rev. 1062, 1067 (1976). Where the union's failure to timely file a grievance was characterized as a type of procedural negligence as opposed to the substantive negligence which may be involved in determining the merits of a grievance, there being no liability for substantive negligence. Id.; see Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir. 1975) (negligent failure to process grievance on time).

92. Hines v. Anchor Motor Freight, 424 U.S. 554, 563 (1976); Vaca v. Sipes, 386 U.S. 171, 182 (1967); Ford Motor Co. v. Hoffman, 345 U.S. 330, 338 (1953); Whitten v. Anchor Motor Freight Inc., 521 F.2d 1335, 1340 (6th Cir. 1975). Perhaps the most practical reason behind the wide range of discretion allowed a union was recently expressed by NLRB General Counsel, John S. Irving, in a memorandum expressing the NLRB's policy on Union's duty of fair representation. NLRB Policy on Union's Duty of Fair Representation, 101 Lab. Rel. Rep. (BNA) 224, 224 (1979). Mr. Irving noted that those responsible for determining the merits of a grievance are generally fellow employees who could hardly be expected to be labor law experts and, as such, it is unrealistic to expect that rank and file employees who voluntarily serve as stewards would be able to meet such exacting standards. Id. at 225.
bitration, and recovery for personal injury alleging a failure to process a grievance provides only a limited opportunity for individual recovery.

Conceivably, the union may be involved in a course of purposeful ignorance, seeking goals unrelated to representation and would thus be acting arbitrarily or in bad faith. But this too may be a very narrow toe-hold for recovery of damages for personal injury.

Once the basis for the section 301 suit against the employer and the union is established, the courts are free to fashion an appropriate remedy consistent with national labor policy, constrained only by the broad principle established in Vaca v. Sipes, that damages are to be apportioned between the employer and the union according to the fault of each. The Vaca apportionment rule is designed to prevent the undue economic strain on limited union resources which might result if the union was required to pay the employer's share even where the union had a right to indemnity.

The Vaca rule gives rise to a second problem when an injured employee seeks damages pursuant to section 301. Under state workmen's compensation statutes, the workmen's compensation
schedule is the employee’s exclusive remedy against the employer. To ensure this exclusivity, the employer cannot be joined by a third-party defendant who is seeking apportionment of damages. In contrast, to facilitate the apportionment process in a section 301 suit, Vaca suggests that the employer should be joined in the suit. The conflict between state and federal law in an action for personal injury arising from breach of a collective bargaining agreement is patent.

One possible solution to the conflict would be to preempt the exclusive remedy aspects of workmen’s compensation laws. This would permit joinder of the employer, facilitate one of the basic purposes of section 301—responsibility toward collective bargaining, and achieve the goal of Vaca by preventing the union’s payment of damages in excess of its proportionate fault. Preemption would also ensure substantive uniformity with respect to the meaning and import of the collective bargaining agreement. But preemption would also disrupt an area of state law affecting matters deeply rooted in local concern and would, for that reason, appear excessive in the absence of a clear congressional mandate for preemption.

Another possible solution to the problem is to consider the workmen’s compensation remedies as the employer’s share of the damages for his breach of contract. The applicable recovery schedules would provide predetermined amounts which could be used as a set-off against any amount recoverable from the union. In this manner, the union’s liability would be limited to the difference between the total judgment and the amount of workmen’s compensation paid. The employer’s right of subrogation might be eliminated by such an approach to damages since the right only exists to the extent that a third party and not the employer has caused the in-

100. 2A A. Larson, supra note 5, § 65.00 at 12-1.
101. Cf. Burrell v. Rodgers, 441 F. Supp. 275, 277 (D. Okla 1977); Vangreen v. Interstate Mach. & Supply Co., 197 Neb. 29, 33, 246 N.W.2d 652, 654 (1976); Williams v. Ashland Chem. Co., 52 Ohio App. 2d 81, —, 368 N.E.2d 304, 310 (1976). Workmen’s compensation denies a third party contribution from the employer. Thus, it may be reasoned that his joinder by the third party would also be denied. This was in fact an alternative reason for denying joinder of the employer in Wentz v. IBEW No. CV76-L-60 (D. Neb. Jan. 11, 1979) (order on motions regarding third-party complaint and counterclaim).
103. See notes 75-78 and accompanying text supra.
104. See notes 97-102 and accompanying text supra.
105. See notes 64-68 and accompanying text supra.
Although, the availability of a section 301 remedy for personal injuries against the employer remains uncertain, several courts have considered union liability for a breach of the duty of fair representation in the personal injury context. The prerequisites to such a suit include a collective bargaining agreement which confers a uniquely personal right, and arbitrary, discriminatory, or bad faith conduct on the part of the unions.

Remaining unresolved is the proper approach to damages.

The duty of fair representation has often been characterized as a type of tort, which logically implies that tort rules will be the reference point for the measurement of damages. Since the courts are free to fashion an appropriate remedy under section 301, the propriety of a tort as opposed to a contract measure of damages becomes a significant issue given potential differences in the purposes and principles underlying the two theories of recovery.

**DAMAGES: CONTRACT OR TORT?**

Determining whether to characterize a union's breach of its duty of fair representation as a contract or tort in an action for personal injury arising from that breach can make a critical difference on the issue of damages. In contract, under a corollary to the avoidable consequences doctrine, any benefits received by the plaintiff as a result of the breach are admissible evidence. Such benefits are credited to the defendant and operate to reduce the plaintiff's recovery. In contrast, the tort rule of collateral source

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108. See, e.g., House v. Mine Safety Appliance Co., 417 F. Supp. 939, 945 (D. Idaho 1976); Helton v. Hake, 386 F. Supp. 1027, 1030-31 (W.D. Mo. 1974). While summary judgement was granted to the union in each of these cases, the opinions indicated that the plaintiffs major problem was drafting his cause of action in negligence rather than in traditional fair representation form.
110. See note 96-98 and accompanying text supra.
111. See Howard v. Aluminum Workers Int'l Union and Local 400, 589 F.2d 771, 773-74 (4th Cir. 1978); Sanderson v. Ford Motor Co., 483 F.2d 102, 114 (5th Cir. 1973); De Arroyo v. Sindicato De Trabajadores, 425 F.2d 281, 287 (1st Cir. 1970), cert. denied, 400 U.S. 877 (1970); Richardson v. Communication Workers, 443 F.2d 974, 981 (8th Cir. 1974).
112. See note 96-98 and accompanying text supra.
114. It has been said that the defendant in a contract action should be permitted to show any facts in mitigation of damages. International Correspondence School, Inc. v. Crabtree, 162 Tenn. 70, 34 S.W.2d 447, 449 (1931). See generally 5 A.
ords that damages are not to be reduced on account of benefits received by the plaintiff from other sources, even though those benefits have partially or wholly mitigated the loss.\textsuperscript{115} Accordingly, in a personal injury action arising from negligence, no evidence of collateral benefits resulting from that breach of duty—insurance payments—is admissible by the defendant.\textsuperscript{116} Thus, characterization as tort or contract involves important considerations of policy regarding union liability for damages arising from its collective bargaining relationships.

Some guidance on the characterization issue is available from Supreme Court pronouncements regarding damages recoverable from the union under the NLRA. The Supreme Court made it clear in \textit{IBEW v. Foust}\textsuperscript{117} that the purpose of damages under the NLRA is remedial in nature and not punitive,\textsuperscript{118} and that the rule of apportionment laid down in \textit{Vaca} is intended as a limit to union liability for an employer's breach of a collective bargaining agreement.\textsuperscript{119}

Since the collateral source rule has a punitive flavor,\textsuperscript{120} justification is lent to abandoning it in a section 301 suit involving personal injuries resulting from unsafe working conditions. Further, to the extent that the contract scheme of remedies tends to cause a lower amount of recoverable damages than tort, this tends to be more consistent with the policy of limiting union liability. It is doubtful that the tort rule of collateral source should be applied in an action under section 301 in light of the principles enunciated in \textit{Foust} and \textit{Vaca}.

If the collateral source rule applied to an action against a union, then any amount which the plaintiff had received from the

\textsuperscript{115} Fleming, supra note 59 at 1478 (the article is an extensive treatment of the rule and how the double recovery effect should be limited); Note, \textit{Unreason in the Law of Damages: The Collateral Source Rule}, 77 HARV. L. REV. 741 (1963-64).

\textsuperscript{116} E.g., Roth v. Chatlos, 97 Conn. 282, —, 116 A. 332, 334 (1922); Cunnien v. Superior Iron Works Co., 175 Wis. 172, —, 184 N.W. 767, 772 (1921); see C. McCORMICK, \textit{supra} note 113, § 40 n.76; \textit{cf.} Jeffords v. Florence County, 165 S.C. 15, —, 162 S.E. 574, 576 (1932) (same rule applies to insurance benefits arising from injuries to property.)

\textsuperscript{117} 99 S. Ct. 2121 (1979). The Court granted certiorari in the case in order to determine whether punitive damage awards against unions for breach of the duty of fair representation would comport with the national labor policies of facilitating collective bargaining. \textit{Id.} at 2124-25.

\textsuperscript{118} \textit{Id.} at 2128.

\textsuperscript{119} \textit{Id.} at 2126.

\textsuperscript{120} United Protective Workers, Local 2 v. Ford Motor Co., 223 F.2d 49, 54 (7th Cir. 1955).
SAFETY IN THE WORKPLACE

employer, such as workmen's compensation or other medical or pension benefits, could not be applied to reduce the amount of damages assessed against the union.\textsuperscript{121} An argument can be raised that the rule would not exclude pension or medical benefits paid by the employer, if they were imposed as a result of the collective bargaining agreement, because such benefits are provided, in part, by the union through the pressure it successfully exerted in the bargaining process.\textsuperscript{122} On the other hand, the union has not paid the expense out of pocket; the funds have been provided by the party who actually paid the costs of the benefit plan—the employer.\textsuperscript{123}

An additional problem is raised by the workmen's compensation laws which generally provide for subrogation and reimbursement to the compensation carrier of benefits paid when any third party is found liable for the injury.\textsuperscript{124} Applying the subrogation rules to union liability under these circumstances might have the effect of forcing the union to pay its own, as well as the employer's, share of the damages.\textsuperscript{125} Also involved with a personal injury are tort notions of indemnity and contribution,\textsuperscript{126} as the employer and the union can be viewed as having engaged in a type of concerted activity from which the injury ultimately resulted. This is cognizable by realizing that an obligation is imposed on the employer to

\textsuperscript{121} Kistler v. Halsey, 173 Colo. 540, —, 481 P.2d 722, 724 (1971); Davidson v. Vogler, 507 S.W.2d 160, 164 (Ky. 1974); cf. D'Archangelo v. Loya, 125 Vt. 325, —, 215 A.2d 520, 522-23 (1965). The rule is applied to wages paid by the employer, and therefore, such payments may not be shown to mitigate or reduce plaintiff's damages. \textit{Id}.


\textsuperscript{123} Cf. Reeves v. Gulf States Util. Co., 327 So. 2d 671, 675-76 (La. App. 1976). The collateral source rule excludes payments received from a pension plan to which the defendant did not contribute. \textit{Id} at 676. However, a problem would arise in the argument that the pension benefits were provided by the union trading off some other benefit which it could have obtained through collective bargaining. As such, the pension benefits could be seen, at least partly, as provided for by a union.

\textsuperscript{124} 2A A. LARSON, \textit{supra} note 5, § 74.00 at 14-180.

\textsuperscript{125} See House v. Mine Safety Appliance Co., 417 F. Supp. 939, 946-47 (D. Idaho 1976). If an employee receives payments under workmen's compensation plan and subsequently obtains a judgment against the union, the subrogation right of the employer would refund to him the benefits paid from the judgment obtained against the union. \textit{See} note 59 \textit{supra}.

create safe conditions, and a secondary obligation is imposed on the union, through its duty of fair representation, to enforce the contract. Once a court applies a collateral source rule in a suit against the union individually, any right of indemnity or contribution from the employer is negated by the workmen's compensation subrogation situation. This right to contribution is further negated by the fact that most jurisdictions apply the contribution doctrine only to situations involving negligence. Thus, since the union's breach of duty is not negligence, but more akin to an intentional tort, the union would not be entitled to contribution from the employer. Any notion that the union should pay part of the damages attributable to the employer was explicitly rejected in Vaca and extends with equal force to situations where the union is entitled to indemnity.

Applying a contract approach toward mitigating damages in a fair representation action is more consistent with Vaca's apportionment rule. Where the employer is not sued under section 301 in an action against the union, the workmen's compensation paid by the employer would reduce the damages assessed against the union, since the apportionment rule first looks to the damages caused by the employer's breach of a collective bargaining agreement before damages can be assessed against the union.

129. See notes 124 & 125 and accompanying text supra.
131. Wentz v. IBEW, No. CV76-L-60 (D. Neb. Jan. 11, 1979) (order on motions regarding third-party complaint and counterclaim). This negates contribution as to the duty of fair representation since the duty is not breached by negligent acts on the part of the union it is therefore more akin to an intentional tort. This reasoning and the reasoning that workmen's compensation is the employer's exclusive responsibility to the injured was the basis for denying joinder of the employer by the union in a suit alleging injury occurring from the breach of the duty of fair representation. Id.
133. Czosek v. O'Mara, 397 U.S. 25, 30 (1970); see De Arroyo v. Sindicato De Trabajadores Packing House, 425 F.2d 281, 289 (1st Cir. 1970). Deriving the measure of damages from contract principles appears to be somewhat anamalous since the "fair representation" suit itself asserts rights that are derived not from private agreement, but from a judicially glossed statute. This anomaly is unavoidable, inhering in section 301 litigation generally. See Vaca v. Sipes, 386 U.S. 171, 201-02 (1967) (Fortas, J., concurring); Crawford v. Pittsburgh-Des Moines Steel Co., 386 F. Supp. 290, 295 (D. Wyo. 1974).
The actual damages recoverable should not be as hard to determine as one might think. The starting point of both systems is to reduce the harm done to the nearest economic equivalent so as to place the plaintiff in the same position that he would have held if the breach or the injury had not occurred. A contract approach to personal injury damages in this context, would be similar to a tort scheme, stripped of many aspects which allow it to be punitive in nature or to compensate an individual beyond his actual loss.

CONCLUSION

Given the limitations upon recovery from the employer that are imposed by workman's compensation, the fair representation suit to recover for workplace injuries is rapidly being discovered as a viable alternative for the injured worker. Consequently, it is critically important that the potential conflict between state and federal law be recognized and meticulously analyzed if a suitable degree of consistency and predictability is to be maintained in this area of the labor field.

Perhaps a large part of the problem arises by bringing together, in one suit, the personal injury attorney; presumably unfamiliar with and confused by the unique character of federal labor law; and the labor law specialist, disinterested in addressing the conventional tort aspects of the suit. One thing seems certain, personal injury attorneys will quickly learn how to plead and prove the fair representation suit. At that point the question of how to properly measure damages in a manner consistent with Vaca's apportionment principle must be addressed. The resolution of that problem will hinge upon how inclined the Courts are to utilize an often cited rule to fashion an appropriate remedy which will neither undermine federal labor principles nor intrude too far into preserved areas of state law.

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134. See C. McCormick, supra note 113, § 137 at 560.
135. This has already been partially obtained by the ruling in Foust which rejected the use of punitive damages in fair representation suits. See IBEW v. Foust, 99 S. Ct. 2121, 2128 (1979). In addition, recovery for mental distress under fair representation is limited to situations involving extremely outrageous conduct on the union's part. See De Arroyo v. De Arroyo v. Sindicato De Trabajadores Packing House, 425 F.2d 281, 286-87 (1st Cir. 1970); R. Gorman, supra note 7, at 723.