an employee voluntarily terminated his employment for a personal reason. But, as noted, the Unemployment Compensation Act no longer recognizes a "compelling personal reason" as an exemption to the voluntary termination disqualification. The *Nottelson* majority, however, attached a different and crucial significance to this "reason." The majority held that the religious nature of the refusal to pay dues triggered the involvement of the federal Civil Rights Act. And once this federal legislation was called into play, it could, under the right fact situation, relieve an employee of the obligation to pay dues. The majority held that the instant case presented such a fact situation — that there was a reasonable basis to believe that Nottelson need not pay dues; that he had not acted inconsistently with the employment relationship; and that he had not, therefore, voluntarily terminated.

The problem this decision presents for DILHR is manifest. Read narrowly, the decision requires the department to inquire into the meritoriousness of an employee's excuse for particular conduct in light of federal legislation and its judicial interpretation when there is a conflict between Title VII and a union security clause. Read broadly, however, the decision requires DILHR to develop an expertise in (and to consider in future decisions) all federal legislation relating to employment discrimination and its rapidly developing interpretation in federal case law.[102] So broad a mandate could easily require funding for additional personnel. That, in turn, would involve the legislature. In view of the closeness of the decision, it seems likely that the department may wait for further direction from the court or the legislature before undertaking such an expanded role.

KATHLEEN A. GRAY

LABOR LAW—Fair Representation—Punitive Damages in Fair Representation Actions. *IBEW v. Foust*, 442 U.S. 42 (1979). Nearly forty years ago, in *Steele v. Louisville & Nashville R.R.*,[1] the United States Supreme

102. *See* notes 68, 85 & 88 *supra*.

1. 323 U.S. 192 (1944).

Court first recognized that the Railway Labor Act[2] imposed upon unions, certified as the exclusive bargaining representative of employes within a bargaining unit, the duty to fairly represent the interests of all members of the unit during the negotiation, administration and enforcement of collective bargaining agreements. Further, the Court in *Steele* determined that courts had the authority to issue appropriate remedies for any breach of this duty of fair representation.[3] Since that time, federal courts have been unable to reach a consensus concerning the circumstances under which punitive damages may properly be assessed against a union which breaches the duty of fair representation. In the recent decision of *IBEW v. Foust*,[4] the Court held that the Railway Labor Act did not permit an employe to recover punitive damages against a union which had breached the duty of fair representation by improperly pursuing a grievance.[5] While some have read the *Foust* opinion as formulating a per se prohibition against awarding punitive damages in all fair representation cases,[6] it would appear, from a careful examination of the language used by the *Foust* majority, that the prohibition is limited to cases in which the union's breach results from a failure to properly pursue a grievance. Even given a narrower reading, the Court has taken a valuable and effective tool away from courts seeking to remedy, deter and punish extreme and outrageous union conduct which violates the right of an individual employe to be fairly represented in pursuance of a grievance. It would seem that the rationale offered by the Court in *Foust* falls short of justifying this prohibition of punitive damage awards.

I. Historical Background

Before addressing the *Foust* opinion directly, it is necessary to understand the nature and scope of the duty of fair representation, as well as the manner in which federal courts

2. 45 U.S.C. § 151 (1934).
3. 323 U.S. at 199.
4. 442 U.S. 42 (1979).
5. *Id.* at 52.
6. *Id.* at 52-53 (Blackmun, J., concurring).

have attempted to remedy breaches of the duty.

A. *The Duty of Fair Representation*

The duty of fair representation was first enunciated by the Court in *Steele v. Louisville & Nashville R.R.*,[7] when it held that a union which had been granted the power under the Railway Labor Act to be the exclusive bargaining representative for employes in a particular bargaining unit had the obligation to fairly represent all employes without regard to the employe's race or union membership.[8] Similarly, in *Vaca v. Sipes*,[9] the Court stated that "the exclusive agent's statutory authority to represent all members of a designated unit 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."[10] The *Vaca* Court further defined this statutory obligation of unions by holding that "[a] breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith."[11]

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7. 323 U.S. 192 (1944).

8. *Id.* at 199.

9. 386 U.S. 171 (1967).

10. *Id.* at 177.

11. *Id.* at 190. Courts and the NLRB have imposed a number of standards, and various applications of those standards, on unions in regard to the duty of fair representation. In Steele v. Louisville & Nashville R.R., 323 U.S. 192, 204 (1944), the Court said that a union must represent employes fairly, impartially, in good faith, and without hostile discrimination. Later, the Court added honesty of purpose to the good faith requirement. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). Subsequently, the Court said that the duty of fair representation would be breached if fraud, deceitful action or dishonest conduct were present. Humphrey v. Moore, 375 U.S. 335, 348 (1964). The Court in *Vaca* cited the NLRB decision in Miranda Fuel Co., 140 N.L.R.B. 181, 51 L.R.R.M. 1584 (1962), in which the terms unfair, irrelevant and invidious were used. Vaca v. Sipes, 386 U.S. at 177-78.

The application of the various standards has led some courts and the NLRB to place limitations on what constitutes a breach of the duty of fair representation. For instance, the fact that a union is inept, negligent, ineffectual, insensitive or unwise will not, by itself, establish a breach of duty. Washington-Baltimore Newspaper Guild, 239 N.L.R.B. 1321, 100 L.R.R.M. 1179 (1979); Pacific Coast Utilities Service, Inc., 238 N.L.R.B. No. 82, 99 L.R.R.M. 1619 (1978); Great Western Unfreight System, 209 N.L.R.B. 446, 85 L.R.R.M. 1385 (1974). In fraud and in improper motive cases, intentional conduct must be proved. Humphrey v. Moore, 375 U.S. 335 (1964). Also, in grievance cases, unions are not required to investigate the grievance with the exhaustiveness in which a skilled investigator would research the disputed incident.

The statutory duty of fair representation, while originally developed through judicial interpretation of the Railway Labor Act in the *Steele* case, now clearly extends to all unions certified under the National Labor Relations Act.[12] An aggrieved employe may therefore bring a suit against an exclusive bargaining representative, for a breach of the duty of fair representation, under the Railway Labor Act and the National Labor Relations Act, including the Labor-Management Reporting and Disclosure Act of 1959,[13] and the Labor Management Relations Act of 1947.[14]

The duty of fair representation, as defined by the Court, is rather broad in scope. The duty exists when the union is negotiating a new agreement, amending or modifying an existing agreement, or processing (or failing to process) grievances initiated by the union itself or by an individual member of the bargaining unit.[15] The duty extends to employment referrals made by the union[16] and to virtually any act or omission that relates to an employe's wages, hours or working conditions. The Court, however, recognized in *Ford Motor Co. v. Huffman,*[17] that a union must be allowed some flexibility in its actions, stating that a "wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion."[18]

Plumbers Local 195, 240 N.L.R.B. No. 61, 100 L.R.R.M. 1460 (1979); Jelco Inc., 238 N.L.R.B. No. 202, 99 L.R.R.M. 1375 (1978).

12. *See* Syres v. Oil Workers Local 23, 350 U.S. 892 (1955); Ford Motor Co. v. Huffman, 345 U.S. 330 (1953); Vaca v. Sipes, 386 U.S. 171 (1967). The Court in footnote 8 of *Foust* recognizes that "[t]he duty of fair representation is also implicit in the NLRA . . . . " 442 U.S. 42, 46 n.8 (1979).

13. 29 U.S.C. §§ 401-531 (1959). The Court in Murphy v. Operating Engineers, Local 118, 99 L.R.R.M. 2074 (N.D. Ohio 1978), allowed suit for breach of the duty of fair representation under the Landrum-Griffin Act.

14. 29 U.S.C. §§ 141-197 (1947). The Court in Humphrey v. Moore, 375 U.S. 335, 343 (1964), allowed an employe to raise such action under § 301 of the LMRA, 29 U.S.C. § 185 (1947). *See* Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976).

15. R. GORMAN, BASIC TEXT ON LABOR LAW § 4 at 705 (1st ed. 1976). *See* Vaca v. Sipes, 386 U.S. at 177.

16. Murphy v. Operating Engineers, Local 118, 99 L.R.R.M. 2074 (N.D. Ohio 1978).

17. 345 U.S. 330 (1953).

18. *Id.* at 338.

B. *Remedies for Breach of the Duty of Fair Representation*

The breach of the duty of fair representation has traditionally been characterized as a tort, since an action for such a breach arises when there has been malicious, arbitrary or fraudulent conduct resulting in an injury to an employe.[19] The primary remedies for tortious conduct have been compensatory damages and, when the defendant's wrongdoing has been intentional, deliberate and outrageous, punitive damages as well.[20] In both the *Steele* and *Vaca* cases the Supreme Court held that the federal courts were free to fashion appropriate remedies for a union's breach of the duty of fair representation.[21] Since then, courts have used a wide variety of remedies in fair representation cases, including injunctive relief, compensatory damages, damages for mental distress, allowing recovery of reasonable attorney's fees, issuing orders to bargain with respect to certain issues and punitive damages.[22]

Most controversial among the different types of remedies granted are punitive damages. Prior to the Supreme Court's decision in *Foust*, the federal circuits had been split on the question of whether, and under what circumstances, punitive damages could properly be granted in fair representation cases. Several circuits stressed the need to protect individual employes from malicious, intentional and outrageous union conduct, and therefore encouraged the use of punitive damages where such conduct is present.[23] Other circuits stressed the importance of maintaining the strength of unions as a whole, as opposed to individual employe rights, and expressed a desire to achieve industrial harmony without the use of punitive damages.[24]

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19. De Arroyo v. Sindicato de Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 286-87 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970).

20. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 at 9 (4th ed. 1971).

21. Steele v. Louisville & Nashville R.R., 323 U.S. at 204; Vaca v. Sipes, 386 U.S. at 177.

22. R. GORMAN, BASIC TEXT ON LABOR LAW § 8 at 721-25 (1st ed. 1976).

23. *See, e.g.*, Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir.), *cert. denied*, 425 U.S. 958 (1976); Bond v. Local 823, Int'l Bhd. of Teamsters, 521 F.2d 5 (8th Cir. 1975); Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir. 1975).

24. *See, e.g.*, Deboles v. Trans World Airlines, Inc., 552 F.2d 1005 (3d Cir.), *cert. denied*, 434 U.S. 837 (1977); Atwood v. Pacific Maritime Ass'n, 432 F. Supp. 491 (D. Or. 1977).

In *Butler v. Local 823, International Brotherhood of Teamsters,*[25] the United States Court of Appeals for the Eighth Circuit held that punitive damages could be awarded only when a union acted with malice directed specifically at an employe.[26] More recently, the Eighth Circuit has acknowledged that punitive damages are properly awarded when union conduct is the type of outrageous or extraordinary conduct for which extraordinary remedies are needed.[27] Similarly, the Sixth Circuit has found that punitive damages are recoverable when a union has acted in bad faith or maliciously in its representation of an employe.[28]

In *Harrison v. United Transportation Union,*[29] the Fourth Circuit Court of Appeals ruled that punitive damages were essential in protecting an individual employe's rights, noting that "[u]nless punitive damages are available, an employe may lack the strong legal remedy necessary to protect his right against a union which has either maliciously or in utter disregard of his rights denied him fair representation."[30] The Second Circuit, in an action arising under the Landrum-Griffin Act,[31] flatly stated that "[i]f punitive damages can be awarded against other defendants, they can be awarded against unions as well."[32]

Among those courts which have denied awards of punitive damages in fair representation cases are the Third and Ninth Circuit Courts of Appeals. In *Deboles v. Trans World Airlines, Inc.,*[33] several employes had asserted that certain false statements made by union officials to the employes regarding the union's failure to secure equal system seniority rights violated the union's duty of fair representation. The Third Cir-

25. 514 F.2d 442 (8th Cir. 1975).

26. *Id.* at 454.

27. *Id.* at 454. *But see* Bond v. Local 823, Int'l Bhd. of Teamsters, 521 F.2d 5 (8th Cir. 1975); Cronin v. Sears, Roebuck and Co., 588 F.2d 616 (8th Cir. 1978); Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382 (8th Cir. 1977).

28. Farmer v. Hotel Workers, Local 1064, 99 L.R.R.M. 2166 (E.D. Mich. 1978); Ruzicka v. General Motors Corp., 96 L.R.R.M. 2822 (E.D. Mich. 1977).

29. 530 F.2d 558 (4th Cir.), *cert. denied,* 425 U.S. 958 (1976).

30. *Id.* at 563.

31. Landrum-Griffin Act and LMRDA are one and the same.

32. Morrissey v. National Maritime Union of America, 544 F.2d 1925 (2d Cir. 1976).

33. 552 F.2d 1005 (3d Cir.), *cert. denied,* 434 U.S. 837 (1977).

cuit Court of Appeals held that "[i]n the absence of actual injury occasioned by the union's wrongful misstatements, imposing liability in the instant case would be punitive and discordant with the limited remedies available under the [Railway Labor] Act."[34] Similarly, the Ninth Circuit, in *Williams v. Pacific Maritime Association*,[35] ruled that punitive damages were not an appropriate remedy in unfair representation-breach of contract actions.[36]

The United States Supreme Court cast some doubt upon the authority of the National Labor Relations Board to grant punitive damages to remedy employer unfair labor practices in *Republic Steel Corp. v. NLRB*.[37] There, the Court stated with respect to the National Labor Relations Act:

> The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes. . . . Had Congress been intent upon such a program, we cannot doubt that Congress would have expressed its intent and would itself have defined its retributive scheme.
>
> The remedial purposes of the Act are quite clear. It is aimed, as the Act says (Section 1) at encouraging the practice and procedure of collective bargaining and at protecting the exercise by workers of full freedom of association, of self-organization and of negotiating the terms and conditions of their employment or other mutual aid or protection through their freely chosen representatives.[38]

Although the *Republic Steel* case dealt with unfair conduct on the part of employers, the Court's rationale has been used to justify the denial of punitive damages in fair representation cases. In *Crawford v. Pittsburgh-Des Moines Steel Co.*,[39] for

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34. *Id.* at 1019.

35. 421 F.2d 1287 (9th Cir. 1970).

36. *Id.* at 1289. *See also* Atwood v. Pacific Maritime Ass'n, 432 F. Supp. 491 (D. Or. 1977); Crawford v. Pittsburgh-Des Moines Steel Co., 386 F. Supp. 290 (D. Wyo. 1974).

37. 311 U.S. 7 (1940).

38. *Id.* at 10. *See also* UAW v. Russell, 356 U.S. 634 (1958), which found the award of punitive damages to be beyond the authority of the NLRB due to its penal nature. *See also* Vaca v. Sipes, 386 U.S. at 182, which emphasized that federal labor laws seek to promote industrial peace and the improvement of wages and working conditions by fostering a system of employe organization and collective bargaining.

39. 386 F. Supp. 290 (D. Wyo. 1974).

example, a federal district court in Wyoming held that because the general purpose of the federal labor laws is to supply remedies rather than punishment, a claim for punitive damages for a union's failure to fairly represent an employe could not be allowed.[40]

The apparent split between the federal courts, with respect to whether punitive damages are appropriate in fair representation cases, formed the basis for the Supreme Court's decision in *Foust*.

II. THE *Foust* OPINION

The *Foust* case involved an action for the breach of the duty of fair representation brought by Leroy Foust against the International Brotherhood of Electrical Workers. Foust, a member of the IBEW and an employe of the Union Pacific Railroad Company, was injured in March of 1970, and received a medical leave of absence until December 22, 1970. His employment was terminated on February 3, 1971, while he was in the process of attempting to comply with procedures to extend the leave of absence.[41]

Foust's attorney contacted the union concerning the initiation of grievance proceedings, but despite the fact that the time limit for filing the grievance—sixty days from the date of discharge—was only eight days from expiring, as the union well knew, union officials insisted that Foust himself make the request of the union. The letter notifying Foust of the necessity to make a formal request was not mailed until sixty-one days after Foust's discharge. Even though the union eventually filed the grievance without waiting for a request from Foust, it did not do so until two days after the sixty day period during which grievances could properly be filed under the terms of the collective bargaining agreement.

Since the union had failed to file the grievance before the deadline, both Union Pacific and the National Railroad Adjustment Board denied Foust's claim.[42] Foust thereafter brought suit against the union and several union officers claiming they had breached the duty of fair representation. A

40. *Id.* at 295.
41. 442 U.S. at 43-44.
42. *Id.* at 44.

jury awarded Foust $40,000 in actual damages and $75,000 in punitive damages,[43] and the Federal District Court for Wyoming affirmed the award.[44] The Tenth Circuit Court of Appeals remanded the case, ruling that punitive damages are properly awardable only if a union has acted wantonly or in reckless disregard of an employe's rights.[45]

The United States Supreme Court granted certiorari to resolve the conflict among the circuits with respect to the propriety of awarding punitive damages in fair representation cases.[46] Mr. Justice Marshall delivered the opinion of the Court, stating in part:

> Because general labor policy disfavors punishment, and the adverse consequences of punitive damages awards could be substantial, we hold that such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance. Accordingly, we reverse the judgment below insofar as it upheld the award of punitive damages.[47]

The Court offered four reasons for its ruling. First, citing *Steele* and *Vaca*, the Court emphasized that damages in fair representation suits are designed to make the injured employe whole. They are compensatory, not punitive.[48] Second, the Court recognized that the financial burden imposed upon unions by punitive damage awards could operate to deplete union treasuries, thereby impairing the effectiveness of unions as collective bargaining agents and jeopardizing the welfare of all employes.[49] Third, the Court noted that the *Vaca* case had given unions broad discretion in handling grievances, and that the threat of punitive damages could "disrupt the responsible decisionmaking essential to peaceful labor relations."[50] Unions might feel obligated to pursue frivolous grievance claims in order to avoid an award of punitive damages. Finally, the Court held that the objectives of the National Labor Relations Act

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43. *Id.* at 45.
44. *Id.*
45. 572 F.2d 710 (10th Cir. 1978).
46. IBEW v. Foust, 439 U.S. 892 (1978).
47. 442 U.S. at 52.
48. *Id.* at 48-49.
49. *Id.* at 49.
50. *Id.* at 52.

and the Railway Labor Act were essentially remedial, noting that general labor policy did not favor punitive measures and that punitive sanctions had, in the past, been prohibited in certain unfair labor practice cases.[51]

The two major questions left in the wake of the *Foust* decision appear to be: (1) whether the Court's prohibition on punitive damage awards extends beyond those cases involving a failure to properly pursue a grievance so as to constitute a per se rule against punitive damages in all fair representation cases; and (2) whether the rationale offered by the Court justifies a prohibition of punitive damages.

III. Scope of the *Foust* Rule

A concurring opinion, authored by Mr. Justice Blackmun, and joined by the Chief Justice and Justices Rehnquist and Stevens, characterized the rule adopted by the *Foust* majority as "a per se rule that a union's breach of its duty of fair representation can never render it liable for punitive damages, no matter how egregious its breach may be."[52] Thus, the concurring Justices read the majority opinion as prohibiting punitive awards not only when a union had failed to properly pursue a grievance, but upon *any* breach of the duty of fair representation. This same approach has been taken in several lower federal court cases decided subsequent to *Foust*.[53] The United States District Court for the Southern District of New York recently held that *Foust* prevented a punitive damage award in a fair representation action brought by a member of a plumbing union seeking declaration of entitlement to pension benefits under a trust agreement between the union and the employer.[54] The District Court for the Eastern District of Pennsylvania, in *Dian v. United Steelworkers of America*,[55] found no merit in the contention that *Foust*, decided under the Railway Labor Act, did not apply to an action under the

51. *Id.*

52. *Id.* at 52-53.

53. *See, e.g.*, Wells v. Southern Airways, Inc., 616 F.2d 107 (5th Cir. 1980); Harris v. Joint Plumbing Industry Board, 474 F. Supp. 1284 (S.D.N.Y. 1979); Dian v. United Steelworkers of America, 486 F. Supp. 700 (E.D. Pa. 1980).

54. Harris v. Joint Plumbing Industry Board, 474 F. Supp. 1284 (S.D.N.Y. 1979).

55. 486 F. Supp. 700 (E.D. Pa. 1980).

Labor Management Relations Act,[56] and therefore denied punitive damages for a breach of the duty of fair representation in violation of that Act.[57] Most recently, in *Wells v. Southern Airways, Inc.*,[58] the Fifth Circuit Court of Appeals apparently agreed with the view of the concurring Justices when it cited to the *Foust* case and held that "[a]n award for punitive damages against a union for breach of the duty of fair representation is *per se* invalid."[59]

Not all courts, however, have interpreted the *Foust* opinion as prohibiting punitive damages in all fair representation actions. The Ninth Circuit Court of Appeals held that under the Landrum-Griffin Act, "[p]unitive damages are proper where the plaintiff can establish actual malice or reckless or wanton indifference to his rights. . . . [P]unitive damages are permissible to vindicate the invasion of those protected rights and as a deterrence against future violations by over-zealous unions and their officers."[60] Similarly, in *Anderson v. United Paperworkers International Union*,[61] a Minnesota District Court held that *Foust* was intended to prohibit punitive damages only when a union has failed to properly pursue a grievance. The court stated:

> It would appear that even if the Court intended to create a *per se* rule in *Foust*, it would apply only where a Union failed to properly pursue a grievance. . . . In this case, the Union breached its [duty of fair representation] by misrepresenting to its rank and file members the true effect of their severance pay provision; based upon such misrepresentations, the employees consistently ratified successive collective bargaining agreements with the understanding that, under any circumstances, they would receive their severance pay. They would not have ratified the agreements had the true nature of the severance pay provision been revealed.
>
> Since this case does not involve a failure to pursue an employee's grievance, this Court finds the ruling in *Foust* instructive, but not specifically controlling.[62]

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56. *Id.* at 703-06.

57. *Id.* at 707.

58. 616 F.2d 107 (5th Cir. 1980).

59. *Id.* at 109 n.1.

60. Bise v. International B'hd of Electrical Workers, Local 1969, 618 F.2d 1299, 1305-06 (9th Cir. 1979).

61. 484 F. Supp. 76 (D. Minn. 1980).

62. *Id.* at 85.

This latter view appears to be a more reasonable interpretation of the *Foust* rule than that adopted by the concurring Justices in *Foust* and by the Fifth Circuit in *Wells*.[63] First, the majority in *Foust* specifically stated that it meant to "express no view on the propriety of punitive awards in suits under the Landrum-Griffin Act."[64] Thus, to the extent that fair representation actions may be commenced under the provisions of the Landrum-Griffin Act, the scope of the *Foust* rule is not as far-reaching as the concurring Justices appear to assume. Second, the rule announced in the majority opinion is carefully worded to encompass only those breaches of the duty of fair representation which occur by virtue of a union's failure to properly pursue an employe's grievance.[65] As the *Anderson* court so clearly pointed out, it was the concurring opinion of Justice Blackmun that labeled the majority's opinion as formulating a per se rule against the rendering of punitive damages for any and all breaches of the duty of fair representation.[66] The concurring opinion, however, cannot modify or broaden the majority's rule beyond its explicit terms. Therefore, as the court in *Anderson* observed, when a breach of the duty of fair representation consists of some act other than improper pursuance of a grievance, the *Foust* rule, while providing some guidance in assessing the propriety of punitive damages, does not prohibit such awards.[67]

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63. 616 F.2d 107 (5th Cir. 1980).

64. 442 U.S. at 47 n.9.

65. Justice Marshall, writing for the Court, limited the holding only to cases involving a breach of the duty of fair representation in failing to properly pursue a grievance. He did so on two occasions, most notably in the holding itself, in which he said, "we hold that such damages may not be assessed against a union that breaches its duty of fair representation by failing properly to pursue a grievance." 442 U.S. at 52. Earlier, in stating the issue, Justice Marshall had noted that the case involved the improper processing of a grievance, and said, "The question presented is whether the Railway Labor Act permits an employee to recover punitive damages for such a breach of a union's duty of fair representation." *Id.* at 43. (footnote omitted).

66. 484 F. Supp. 76, 85 (D. Minn. 1980); 442 U.S. at 52-53 (Blackmun, J., concurring).

67. *See* note 62, *supra.*

IV. THE *Foust* RULE: IS A PROSCRIPTION OF PUNITIVE DAMAGES JUSTIFIED?

While the scope of the *Foust* rule may not be entirely clear, there is no doubt that the majority intended to outlaw punitive awards, at least when a union had failed to properly pursue a grievance.[68] It was precisely on this point that the concurring opinion took issue with the majority.[69] The concurring Justices favored overturning the punitive damages awarded in *Foust* on the grounds that the plaintiff had failed to show anything more than negligent conduct on the part of the union, thereby rendering the case an improper one in which to take punitive measures.[70] In their view, the majority's apparent per se prohibition of punitive awards was, at best, unnecessary and, at worst, unwise.[71] In order to determine whether the majority was justified in prohibiting punitive awards, it is necessary to evaluate the reasons given for the formulation of the *Foust* rule, and weigh them against whatever advantages there may be to punitive damage awards in fair representation cases.

The first reason the majority gave for denying the punitive damage award in *Foust* was that it read the *Steele* and *Vaca* opinions as adopting a "compensation principle" under which a union's liability could extend no further than necessary to render the injured employe whole.[72] The Court stated that *Steele* had approved only the " 'resort to the *usual* judicial remedies of injunction and award of damages,' "[73] while *Vaca* refused to hold unions liable for damages attributable solely to the conduct of the employer in order to "avoid burdening unions beyond the extent necessary to compensate employees for their injuries . . . ."[74] Mr. Justice Blackmun, however, found the majority's reading of *Steele* and *Vaca* somewhat strained, and argued that the cases do no more than "stand for the proposition that a worker injured by his union's breach

68. 442 U.S. at 52.
69. *Id.* at 53 (Blackmun, J., concurring).
70. *Id.*
71. *Id.*
72. *Id.* at 49.
73. *Id.* (quoting Steele v. Louisville & Nashville R.R., 323 U.S. at 207) (emphasis added by *Foust* Court).
74. *Id.* at 50.

of duty must *at least* be made whole."[75] Upon careful analysis, the latter appears to be a somewhat more plausible characterization of the *Steele* and *Vaca* holdings.

Although the *Steele* opinion did refer to usual remedies, there is no indication that the Court meant to exclude damages to the extent they rise above full compensation. As previously noted, a breach of the duty of fair representation has generally been characterized as tortious conduct.[76] When tortious conduct is intentional, deliberate and outrageous, all but a few courts have permitted juries to award punitive or exemplary damages as a means of punishing the wrongdoer and deterring others from engaging in similar conduct.[77] As at least one federal court has noted:

> [U]nfair representation suits are in the nature of tort. Elements necessary to prove unfair representation — subjective bad faith or arbitrary conduct — are elements normally considered when punitive damages are awarded in the ordinary tort action. Since bad faith and arbitrariness exist in varying degrees, it is conceivable that in cases of extreme conduct punitive damages should be considered in fashioning an appropriate remedy.[78]

Thus, punitive damages are not at all an "unusual" remedy when tortious conduct is of an intentional and malicious nature. Moreover, almost every federal court[79] to have considered the propriety of punitive damages in fair representation cases prior to the *Foust* decision recognized the appropriateness of such awards when union conduct had been outrageous, extreme, extraordinary, malicious, wanton, willful, reckless or in bad faith.[80]

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75. *Id.* at 54 (Blackmun, J., concurring) (emphasis in original).

76. De Arroyo v. Sindicato de Trabajadores Packinghouse, 425 F.2d 281, 287 (1st Cir.), *cert. denied*, 400 U.S. 877 (1970); Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 447 (8th Cir. 1975).

77. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 at 9 (4th ed. 1971).

78. Tippett v. Ligget & Meyers Tobacco Co., 316 F. Supp. 292, 298 (M.D.N.C. 1970).

79. It should be noted that extensive research showed no state cases on the issue at hand. This is due to the fact that almost all cases are either initiated in federal court or removed to federal court.

80. *See* Cronin v. Sears, Roebuck & Co., 588 F.2d 616 (8th Cir. 1978); Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382, 386 (8th Cir. 1977); Harrison v. United Transp. Union, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976);

Likewise, there seems little reason to believe that the *Vaca* opinion was intended to proscribe the use of punitive awards in the event of intentional and outrageous union conduct. In *Vaca*, the Court overturned a jury award of both compensatory and punitive damages on the grounds that "all or almost all" of the employe's damages were attributable to the employer and not the union.[81] Therefore, the Court held only that a union may not be charged with punitive damages if not liable for compensatory damages. It may reasonably be inferred from this ruling that when a union is held liable for compensatory damages in a fair representation action, it may be taxed with punitive damages as well.[82] Thus, the *Foust* majority's first reason for prohibiting punitive damages is not entirely persuasive.

The second rationale advanced in support of the holding in *Foust* was that punitive awards could do great financial damage to unions, thereby impairing their effectiveness as collective bargaining agents.[83] Once again citing to *Vaca*, the majority noted that the Court there had been concerned with the "hardship" imposed upon the union by the jury's award of damages.[84] As Mr. Justice Blackmun pointed out, however, the hardship referred to by the *Vaca* Court was not the spector of financial ruin, but rather, the injustice which inevitably results when a defendant is held liable for damages attributable solely to the conduct of another.[85] The opinion makes no mention of fiscal soundness, depletion of union treasuries, or impairment of union effectiveness in collective bargaining.[86]

Bond v. Local 823, Int'l Bhd. of Teamsters, 521 F.2d 5 (8th Cir. 1975); Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 454 (8th Cir. 1975); Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970); Farmer v. Hotel Workers, Local 1064, 99 L.R.R.M. 2166 (E.D. Mich. 1978); Murphy v. Operating Engineers, Local 18, 99 L.R.R.M. 2074 (N.D. Ohio 1978); Scott v. Teamsters, Local 377, 96 L.R.R.M. 2902 (N.D. Ohio 1977); Woods v. Local 613, IBEW, 404 F. Supp. 110 (N.D. Ga. 1975); Tedford v. Peabody Coal Co., 383 F. Supp. 787 (N.D. Ala. 1974).

81. 386 U.S. at 198.

82. *See* 442 U.S. at 55 (Blackmun, J., concurring).

83. *Id.* at 50-51.

84. *Id.* at 50.

85. *Id.* at 56-57. (Blackmun, J., concurring).

86. The majority in *Foust* stated that *Vaca* found "considerations of deterrence insufficient to risk endangering the financial stability of such institutions." *Id.* at 50. The majority cited page 198 of the *Vaca* opinion for that proposition, but no refer-

Even if the financial stability of unions was a legitimate concern of the Court, the propriety of a ban on punitive damages must be questioned. The *Foust* majority recognized that under the damage apportionment formula enunciated in *Vaca*, unions would seldom be liable for more than nominal damages.[87] Thus, were the Court to allow punitive awards in fair representation cases, only in those rare instances when union conduct had been extreme and outrageous will damages of any magnitude be awarded. Even then, there is little reason to worry about a union's financial stability. It is a well accepted proposition that a defendant's wealth is a relevant factor in determining the amount of a punitive damage award.[88] Further, courts have generally been mindful of the fact that "punitive damages must serve to deter, not to destroy, and must be imposed in a rationale [sic] manner, bearing in mind the particularities of each defendant."[89] Obviously, a punitive damage award imposes some hardship on a union. But presumably, this is the purpose of punitive damages — without some degree of hardship, no punishment or deterrent effect can be achieved. Therefore, it would appear that the Court could have best protected both the financial stability of unions, and the rights of individual employes, simply by admonishing lower courts to avoid excessive damage awards, rather than prohibiting such awards altogether.

The Court's third reason for denying punitive damages in *Foust* was that such a remedy could upset the careful and responsible decision-making process, essential to labor relations, by limiting the broad discretion currently afforded unions in handling grievances.[90] In *Vaca*, the Court had rejected the notion that employes could force a union to process claims irre-

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ence to "financial stability" could be found there.

87. *Id.* at 48. Under the damage apportionment formula of *Vaca*, a union will be liable in a fair representation action only for its breach, and not for damages that arise solely from the fault of the employer. 386 U.S. at 197. It is also interesting that the Sixth Circuit Court of Appeals ruled that if an employer has not acted wrongfully, a union will not be held liable for breach of its duty of fair representation, because the employe suffered no damage. St. Clair v. Local 515, Int'l Bhd. of Teamsters, 442 F.2d 128 (6th Cir. 1969).

88. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 2 at 14 (4th ed. 1971).

89. Murphy v. Operating Engineers, Local 18, 99 L.R.R.M. 2074, 2133 (N.D. Ohio 1978).

90. 442 U.S. at 51.

spective of the terms of the collective bargaining agreement, and ruled that a union satisfied its obligation to fairly represent employes if it did not "arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion . . . ."[91] The *Foust* Court, drawing from this rationale, concluded that punitive damages could impinge on unions' discretion, since "[i]n order to protect against a future punitive award of unforeseeable magnitude, unions might feel compelled to process frivolous claims or resist fair settlements."[92] However, it would appear that the availability of punitive damages has little to do with union discretion. The basic duty of fair representation remains the same, with or without punitive damages; so long as a union does not act in an arbitrary or perfunctory manner, it will not be liable for a breach of its duty to fairly represent employes. Moreover, "[n]ot every default by the union that constitutes a breach of its duty of fair representation necessarily amounts to that aggravated conduct for which . . . punitive damages may be awarded."[93] A "wide range of reasonableness"[94] must still be applied when examining and evaluating a union's conduct. Punitive damage awards are inappropriate unless extreme and outrageous conduct on the part of the union can be shown.[95] As Mr. Justice Blackmun opined, "[a] little chilling of union 'discretion' in *those* cases would not bother me."[96]

The majority's final reason for rejecting the punitive damage award in *Foust* was that the federal labor policy was essentially remedial in nature, thereby rendering punitive sanctions inappropriate.[97] The Court relied, in part, on *Republic Steel Corp. v. NLRB*[98] in coming to this conclusion. The *Republic* case, however, held only that Congress had not con-

91. 386 U.S. at 191.

92. 442 U.S. at 52.

93. Segarra v. Sea-Land Service, Inc., 581 F.2d 291, 298 (1st Cir. 1978) (footnote omitted).

94. Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953).

95. *See* Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382 (8th Cir. 1977); Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442 (8th Cir. 1975); Bond v. Local 823, Int'l Bhd. of Teamsters, 521 F.2d 5 (8th Cir. 1975); Dill v. Greyhound Corp., 435 F.2d 231 (6th Cir. 1970).

96. 442 U.S. at 58 (Blackmun, J., concurring).

97. 442 U.S. at 52.

98. 311 U.S. 7 (1940).

ferred the power upon the National Labor Relations Board to impose punitive damages against an employer who had committed an unfair labor practice.[99] Unlike the laws involved in *Republic*, the duty of fair representation is a judicially created doctrine,[100] and the Court, in both the *Steele* and *Vaca* cases, recognized the authority of federal courts to furnish appropriate relief upon a union's breach of the duty.[101] The Fifth Circuit Court of Appeals had advocated the use of exemplary damages, stating:

> "The very basis for the existence of unionism in our society today is the promise of employment to those who desire to associate freely in order to obtain it. The right of the working man to the benefits of collective bargaining is too essential and valuable to be hindered, impeded and seriously damaged by irresponsible and dictatorial leaders whose dominance in any given situation does great disservice to the purpose and principles of unionism. When that right of free association is usurped by a concerted, malicious effort to deprive the individual of the safeguards built into the organization, it cannot be condoned. . . . Imposition of exemplary damages, when the requisite elements of malice, gross fraud, wanton or wicked conduct, violence or oppression are present, serves to achieve the deterrence they were designed to effect."[102]

Given the strong need to protect individual employes from extreme and outrageous union conduct, it would seem that punitive damages would be consonant with, rather than antithetical to, national labor policy.

V. CONCLUSION

In *IBEW v. Foust*, the United States Supreme Court held that punitive damages were not available in fair representation cases in which a union had failed to properly pursue a grievance. While the *Foust* opinion has been read as placing a

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99. *Id.* at 10.

100. 442 U.S. at 47.

101. *See* Vaca v. Sipes, 386 U.S. 171, 195 (1967); Steele v. Louisville & Nashville R.R., 323 U.S. 192, 207 (1944).

102. International Bhd. of Boilermakers v. Braswell, 388 F.2d 193, 200 (5th Cir. 1968) (quoting Fittipaldi v. Legassie, 18 A.D.2d 331, 334-35, 239 N.Y.S.2d 792, 796 (1963)).

per se prohibition on punitive awards in all fair representation actions, it would appear that Mr. Justice Marshall, writing for the majority, was careful to apply the proscription on punitive damages only when a union had improperly pursued a grievance. The rationale of the Court, however, should be instructive to lower courts seeking to remedy other kinds of breaches of the duty of fair representation.

Irrespective of the intended scope of the *Foust* rule, any prohibition of punitive damages in cases in which employe rights may have been violated by extreme and outrageous union conduct seems unjustified. Since the Court probably could have achieved its objectives without banning punitive damages altogether, there would seem to be no reason for disallowing such an effective vehicle for deterring extreme and outrageous union conduct and protecting the rights of individual employes.

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