Washington and Lee Law Review

Volume 37 | Issue 2 Article 18

Spring 3-1-1980

XIII. Labor Law

raised was consistent with the prevailing philosophy of upholding the EPA's technical pollution control regulations to the maximum extent possible.[157]

Even though courts generally handle environmental regulations with a degree of respect, the EPA is not exempt from the requirements of the APA. The administrative issues raised in *Consolidation Coal* were not untried in the Fourth Circuit,[158] or in other circuits.[159] The Fourth Circuit's construction of the APA notice and comment provisions confirmed the EPA's duty to adhere to established administrative procedures in issuing the complex standards for water pollution control.

Circuit courts have often considered the question of extension of the 1977 statutory deadline for compliance with BPT standards. The Fourth Circuit had traditionally defended the statutory deadline for BPT compliance[160] and in *Consolidation Coal* it declined to set aside the regulations solely on the basis of late issuance.[161] Other circuits similarly have held that the compliance deadline is not subject to judicial nullification.[162] Both the Sixth and the Fourth Circuits have recognized that the Clean Water Act resolves the issue of extension.[163]

SUZANNE M. BARNETT

XIII. LABOR LAW

A. *Relegating Arbitration to a Secondary Role in Labor Disputes*

Section 301(a) of the Labor Management Relations Act (LMRA)[1]

Circuit determined from a study of FWPCA legislative history that exemption of any polluter from the regulations is impermissible, but the court did acknowledge the need for flexibility in applying FWPCA standards. The Third Circuit left open the question decided in *Consolidation Coal* of whether location of facilities could be the basis for flexibility. *Id.; see* text accompanying notes 122-30 & 148-53 *supra.*

[157] *See, e.g.*, FMC Corp. v. Train, 539 F.2d 973, 979 (4th Cir. 1976); Portland Cement Ass'n v. Ruckelshaus, 486 F.2d 375, 402 (D.C. Cir. 1973).

[158] *See, e.g.*, National Crushed Stone Ass'n v. EPA, 601 F.2d at 119; text accompanying notes 33-51 *supra.*

[159] *See, e.g.*, American Iron & Steel Inst. v. EPA, 568 F.2d at 291.

[160] In Monongahela Power Co. v. EPA, 586 F.2d 318, 319 (4th Cir. 1978), the Fourth Circuit acknowledged a split of authority on whether the 1977 deadline could be extended, but relied on the Clean Water Act amendments to the FWPCA to resolve the controversy in favor of discretionary extensions under prescribed circumstances. *Id. See also* State Water Control Bd. v. Train, 559 F.2d 921 (4th Cir. 1977). In *State Water Control Bd.*, the court denied relief to a municipal petitioner that complained of a tight compliance deadline, noting that the EPA has prosecutorial discretion under the FWPCA, and that courts retain equitable discretion to determine whether to impose fines in cases of good faith inability to comply with the deadline. *Id.* at 927-28.

[161] 604 F.2d at 246.

[162] *See* United States Steel Corp. v. Train, 556 F.2d 822, 854 (7th Cir. 1977); Bethlehem Steel Corp. v. Train, 544 F.2d 657, 662 (3d Cir. 1976).

[163] Monogahela Power Co. v. EPA, 586 F.2d at 319; Republic Steel Corp. v. Costle, 581 F.2d 1228, 1232 (6th Cir. 1978).

---

[1] 29 U.S.C. § 185(a)(1976). Section 301(a) permits suits for violation of contracts be-

authorizes federal courts to develop substantive law to aid in the enforcement of collective bargaining agreements between employers and labor unions.[2] The federal courts exercise the power in accordance with section 203(d) of the LMRA,[3] which states that the desirable method for settlement of disputes between management and labor is the method agreed upon by the parties.[4] The arbitration process often is incorporated into collective bargaining agreements as a means of solving unforeseeable disputes without interrupting business operations.[5] To assure that production is not interrupted, the employer bargains for a no-strike clause in the collective bargaining agreement.[6] The union's quid pro quo

---

tween an employer and a labor organization to be brought in any district court of the United States having jurisdiction over the parties, without respect to amount in controversy or diversity of citizenship.

[2] In the landmark decision Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957), the Supreme Court construed § 301(a) to authorize federal courts to develop substantive federal law to enforce collective bargaining agreements, and to include within the federal law specific performance of promises to arbitrate grievances under collective bargaining agreements. *Id.* at 451. Some courts previously adopted the interpretation that 301(a) was merely a jurisdictional grant to the federal courts to enforce the procedural rules under § 301(b), 29 U.S.C. § 185(b)(1976). *See* United Steelworkers v. Galland-Henning Mfg. Co., 241 F.2d 323, 325 (7th Cir.), *rev'd per curiam*, 354 U.S. 906 (1957)(reversed on authority of *Lincoln Mills*); International Ladies' Garment Workers' Union v. Jay-Ann Co., 228 F.2d 632, 634 (5th Cir. 1956); Mercury Oil Ref. Co. v. Oil Workers Union, 187 F.2d 980, 983 (10th Cir. 1951). The Court in *Lincoln Mills* rejected the limited interpretation. 353 U.S. at 150-51. As a result of the decision in *Lincoln Mills*, the courts are recognized as the primary tribunal for developing a meaningful body of law to govern the interpretation and enforcement of collective bargaining agreements. *See* Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1482-89 (1959) [hereinafter cited as Cox]; Note, *Arbitrability of No-Strike Clauses*, 14 SYRACUSE L. REV. 659, 659 (1963); Comment, *The* Lincoln Mills *Case and Specific Enforcement of No-Strike Clauses In The Federal Courts*, 25 U. CHI. L. REV. 496, 499-508 (1958).

[3] 29 U.S.C. § 173(d)(1976).

[4] In addition to § 203(d), § 201(b) of LMRA, 29 U.S.C. § 171(b) (1976), also supports the policy of recognizing the parties' preferences for dispute reconcilation. Section 201(b) states that federal policy encourages settlement of differences by mutual agreement reached through collective bargaining or by any method provided for in any applicable agreement for settlement of disputes. *Id.*

[5] *See generally* Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235, 252-53 (1970); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 596 (1960). The Supreme Court, describing the importance of arbitration in United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), stated that the grievance machinery contained in the collective bargaining agreement is the "very heart of the system of industrial self-government." *Id.* at 581. Arbitration is the means of "solving the unforeseeable" by framing a system of private laws to remedy disputes that may arise in a manner which reconciles the variant needs and desires of the parties. *Id.; see* Cox, *supra* note 2, at 1490-1507; Note, *Labor Injunctions,* Boys Markets, *and the Presumption of Arbitrability*, 85 HARV. L. REV. 636, 636-42 (1972).

[6] *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 407 (1976). In discussing the power of the federal courts, the Supreme Court in *Buffalo Forge* stated that the employer would be deprived of his bargain and the benefits of the national labor policy to implement private resolution of disputes if the federal courts could not issue injunctions to enforce implied no-strike clauses. *Id.* However, in *Buffalo Forge*, the Court would not imply a no-strike clause and therefore did not enjoin a sympathy strike. *Id.* at 412. Since the

for conceding a no-strike clause to the employer is the right to submit employee grievances to arbitration.[7] The viability of the arbitration process as a method for resolving disputes has prompted industry and labor to incorporate broadly drawn grievance arbitration provisions and no-strike agreements into collective bargaining contracts.[8] The courts have responded to the widespread use of the arbitration process by adopting a presumption in favor of arbitration[9] to expedite grievance disputes.[10]

---

agreement to arbitrate grievances and the duty not to strike usually are viewed as having coterminous application, the principle to quid pro quo only permits the courts to imply no-strike clauses where the dispute is covered by the arbitration provision. *Id.* at 407-08. The Court could not imply a no-strike clause in *Buffalo Forge* because the underlying grievance causing the union to engage in a sympathy strike was not arbitrable. *Id.*

[7] *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567 (1960). In *American Mfg.*, the Supreme Court found that a dispute was arbitrable and therefore compelled arbitration over the objections of the company. *Id.* at 569. The Court reasoned that there were no exceptions to the no-strike clause and, therefore, none should be read into the arbitration provision, since one is the quid pro for the other. *Id.* at 567.

[8] *See* Gateway Coal Co. v. UMW, 414 U.S. 368, 378-80 (1974). *See also* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 755-60 (1973). A good example of a broad arbitration clause is found in the National Bituminous Coal Wage Agreement of 1968, the clause of issue in *Gateway*. The section describing the applicability at the arbitration process states:

> The United Mine Workers of America and operators agree and affirm that they will maintain the integrity of this contract and that all disputes and claims which are not settled by agreement shall be settled by the machinery provided in the Settlement of Local and District Disputes' section of this agreement, . . . it being the purpose of this provision to provide for the settlement of all such disputes and claims through the machinery in this contract provided and by collective bargaining without recourse to the courts.

National Bituminous Coal Wage Agreement of 1968, *quoted in* Gateway Coal Co. v. UMW, 414 U.S. at 375 n.7.

[9] *See* Gateway Coal Co. v. UMW, 414 U.S. at 368, 377-80 (1974); John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964); Pilot Freight Carriers Inc. v. International Bhd. of Teamsters, 497 F.2d 311, 313 (4th Cir. 1974); Sam-Kane Packing Co. v. Amalgamated Meat Cutters, 477 F.2d 1128, 1134 (5th Cir.), *cert. denied*, 414 U.S. 1001 (1973). The Supreme Court first articulated the presumption of arbitrability in United States Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960). In *Warrior*, the Court concluded that the "particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Id.* at 582-83. The Third Circuit in Avco Corp. v. Local 787, UAW, 459 F.2d 968 (3d Cir. 1972), stated the fundamental reasons supporting the federal policy in favor of arbitration. First, arbitrators are more competent than the courts to interpret labor contracts and resolve the problems of labor management relations. Secondly, the process of arbitration contributes to the maintenance of industrial peace. In addition, ordering arbitration is essential in effectuating the parties' contractual intent to settle disputes through arbitration. Fourth, a suit for damages rather than an injunction ordering arbitration might not repair the harm done by the strike, and might exacerbate labor-management strife. *Id.* at 973.

[10] *See* Boys Mkts. Inc. v. Retail Clerks Local 770, 398 U.S. 235, 247-48 (1970). Much of the success of the arbitration process depends on the court's role in enforcing reciprocal agreements between employer and union. *See id;* text accompanying notes 41-45 *infra*. With the advent of the presumption of arbitrability, the court's role in enforcing arbitration

Although the courts are inclined to require arbitration where the terms of the grievance procedure permit such an interpretation, a party cannot be required to submit to arbitration any dispute absent such an agreement in the contract.[11] The most frequently litigated issue in interpreting an arbitration clause is whether the subject matter of the dispute is an arbitrable matter within the meaning of the provision.[12] The judicial function under section 301(a) is to determine whether the party seeking arbitration is making a claim which on its face is governed by the arbitration clause.[13] Accordingly, the language of the particular arbitration provision is closely scrutinized by the court and is crucial to the enforcement of the role of arbitration contemplated by the parties.

Another inquiry necessary to the proper functioning of the arbitration process in the collective bargaining agreement concerns the determination of the party responsible for invoking the process.[14] Although most arbitration clauses permit both parties to initiate arbitration,[15] some agreements vest the option of invoking the arbitration process in only one party, depending on the subject matter of the dispute.[16] The Fourth Circuit, in *Lynchburg Foundry Co. v. Patternmakers League,*[17] recently interpreted an arbitration provision where the employer was responsible for initiating arbitration for violations of a no-strike agreement and where

---

clauses has expanded and thereby encouraged the quick resolution of industrial disputes through peaceful means. *See* Cox, *supra* note 2, at 1482-89.

[11] *See* John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 547 (1964); Boeing Co. v. Internatonal Union, UAW, 370 F.2d 969, 970 (3d Cir. 1967); Proctor & Gamble Independent Union v. Proctor & Gamble Mfg. Co., 312 F.2d 181, 184-86 (2d Cir. 1962), *cert. denied,* 374 U.S. 830 (1963).

[12] *See* Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 407-10 (1976); Gateway Coal Co. v. UMW, 414 U.S. 368, 376 (1974); Consolidation Coal Co. v. International Union, UAW, 537 F.2d 1226, 1231 (4th Cir. 1976); Controlled Sanitation Corp. v. District 128, Int'l Ass'n of Machinists, 524 F.2d 1324, 1328 (3d Cir. 1975), *cert. denied,* 424 U.S. 915 (1976); Howard Elec. Co. v. IBEW Local 570, 423 F.2d 164, 166-67 (9th Cir. 1970); ITT World Communications, Inc. v. Communication Workers, 422 F.2d 77, 78-81 (2d Cir. 1970). In *Gateway,* the Supreme Court held that the presumption of arbitrability brought safety disputes within the broad language of the arbitration provision at issue and therefore gave rise to an implied no-strike clause supporting the issuance of an injunction to prevent work stoppage. 414 U.S. at 376. The Forth Circuit, in *Consolidation Coal* ruled that a dispute between an employer and members of a union who were not employees was not arbitrable and therefore would not support the issuance of an injunction to prevent a work stoppage of the employer's own employees. 537 F.2d at 1231.

[13] *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960).

[14] *See* Avco Corp. v. Local 787, UAW, 459 F.2d 968, 972-73 (3d Cir. 1972).

[15] *See, e.g.,* Drake Bakeries Inc. v. Local 50, American Bakery Workers, 370 U.S. 254, 258 (1962); Independent Oil Workers v. Mobil Oil Co., 441 F.2d 651, 652-54 (3d Cir. 1971).

[16] *See* Teledyne Wis. Motor v. Local 283, UAW, 530 F.2d 727, 732-33 (7th Cir. 1976); Local 721 United Packinghouse Workers v. Needham Packing Co., 376 U.S. 247, 250 (1964); *cf.* Black & Clawson Co. v. International Ass'n of Machinists Lodge 355, 313 F.2d 179, 183-84 (2d Cir. 1962)(union or employer may submit dispute to arbitration however employee may not).

[17] 597 F.2d 384 (4th Cir. 1979).

the union was responsible for initiating arbitration of employee grievance disputes.[18]

The collective bargaining agreement between the company and the union included both a no-strike provision and a grievance procedure for processing employee complaints.[19] The anti-strike provision provided that in the event of a claim by the company of a violation of the anti-strike provision, the company "may", after notice to the union, submit the claim to arbitration.[20] The grievance provision stated that upon completion of the last step of the grievance procedure, the union "may" invoke arbitration.[21] The collective bargaining agreement did not contain the usual broad provision for arbitration which permits arbitration for all disputes as to the meaning and application of the provisions of the agreement.[22]

As a result of a strike by the union employees in alleged violation of the anti-strike provision,[23] the company brought an action seeking damages against the national union and its local division under section 301(a).[24] The union, however, argued that the terms of the collective

---

[18] *Id.* at 387.

[19] *Id.* at 386. The no-strike clause stated, "[T]here will be no strikes of any kind during this agreement. 'Strikes' includes any work stoppage, slowdown, picketing, honoring a picketing line or any other concerted activity." The arbitration clause within the no-strike provision provided, "In the event of a claim by the Company of a violation of this section, written or telegraphic notice shall be given to the Union. The Company may thereupon request the American Arbitration Association to appoint an arbitrator to hear and decide the claim on an emergency basis." *See* Brief for Appellee at 3, Lynchburg Foundry Co. v. Patternmakers League, 597 F.2d 384 (4th Cir. 1979); *cf.* note 8 *supra* (National Bituminous Coal Wage Agreement of 1968).

[20] 597 F.2d at 386.

[21] *Id.*

[22] *Id.; see* note 8 *supra* (example of the normally broad arbitration provision).

[23] 597 F.2d at 385-86; *see* note 19 *supra.*

[24] 597 F.2d at 385-86. Generally, the company, if awarded damages, would be entitled to all expenses and losses occasioned by the violation of the no-strike clause. *See* Note, *Employer Remedies For Breach of No-Strike Clause,* 39 IND. L. J. 387, 398-402 (1964). Specifically, the damages have been measured in terms of loss of net profit, *see* Regent Quality Furniture, Inc., 32 Lab. Arb. Rep. 553, 557-59 (1959), constant and increased overhead costs, *see* Canadian Gen. Elec. Co., 18 Lab. Arb. Rep. 925, 927-29 (1952), and loss of good will, *see* Oregonian Publishing Co., 33 Lab. Arb. Rep. 574, 585-87 (1959). Damages for recovery of increased direct labor costs and losses resulting from inefficient operation caused by the strike also have been awarded by the courts. *See* Operating Eng'rs Local 653 v. Bay City Erection Co., 300 F.2d 270, 272-73 (5th Cir. 1962) (awarding losses resulting from specific inefficient operation); A.I. Gage Plumbing Supply Co. v. Local 300, Hod Carriers, 202 Cal. App. 2d 197, _, 20 Cal. Rptr. 860, 866 (Dist. Ct. App. 1962) (awarding damages for increased labor costs). If possible, employers are required to mitigate damages. *See* Brynmore Press, Inc., 7 Lab. Arb. Rep. 648, 657 (1947). Damage awards will sometimes be reduced if the union acted in good faith reliance on the language of the contract in cases where the language is suspectible to more than one reasonable interpretation. *See* Internatonal Harvester Co., 14 Lab. Arb. Rep. 302, 306 (1950). Also, if the employer provoked the strike in violation of the contract, the damages will be reduced to reflect degree of employer's responsibility for losses occasioned by the strike. *See* Speer Carbon Co., 16 Lab. Arb. Rep. 247, 251 (1951). Punitive damages generally are not available in § 301(a) actions

bargaining agreement required the employer to submit his claim to arbitration.[25] The presumption of arbitrability, contended the union, created a reciprocal mandatory obligation to arbitrate all alleged violations of the no-strike provision or any other provision of the agreement.[26] In addition, the union argued that the term "may" created only the option in the employer to abandon its claim rather than submit it to arbitration. As a result of the agreement, the union asserted that the employer would have to submit the claim to arbitration to obtain a resolution of its claim.[27] The district court found in favor of the union and struck the case from the docket without prejudice to reinstatement after completion of the arbitration process.[28]

The Fourth Circuit reversed the district court's ruling and remanded the case for trial on the breach of contract issue, finding the company's option exclusive and that the company decided not to exercise its option to submit the violation of the no-strike clause to arbitration.[29] The court held that the union did not have the power to initiate arbitration to resolve the employer's claim and that there was no obligation upon the company to request arbitration.[30] The *Lynchburg Foundry* court rejected the union's argument that there was a reciprocal mandatory obligation to arbitrate by distinguishing the collective bargaining agreement at issue from one which contains a broad provision for arbitration.[31] Assuming that labor agreements are usually drafted very carefully, the Fourth Circuit concluded that the general obligation probably was purposely omitted, and therefore the presumption of arbitrability was inapplicable.[32]

In support of its findings, the Fourth Circuit compared the wording of the arbitration provision in the Supreme Court decision *Drake Bakeries, Inc. v. Local 50, Bakery Workers*[33] with the contract provision the Court analyzed in *Atkinson v. Sinclair Refining Co.*[34] In the two Supreme Court cases, the employers had brought suit to collect damages for violation of a no-strike agreement.[35] The union responded that their respective

---

brought in federal court. *See* Local 127 United Shoe Workers v. Brooks Shoe Mfg. Co., 298 F.2d 277, 278 (3d Cir. 1962).

[25] 597 F.2d at 387.

[26] *Id.; see* text accompanying notes 9 & 10 *supra.*

[27] 597 F.2d at 388.

[28] *Id.*

[29] *Id.*

[30] *Id.; see* text accompanying notes 19-21 *supra.*

[31] 597 F.2d at 387; *see* note 8 *supra.*

[32] 597 F.2d at 387; *but see,* text accompanying note 80 *infra.*

[33] 370 U.S. 254 (1962).

[34] 370 U.S. 238 (1962).

[35] Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. at 258; Atkinson v. Sinclair Ref. Co., 370 U.S. at 240. In *Drake,* the dispute arose over the company's attempt to reschedule employees' work over Christmas holidays which the union claimed violated the collective bargaining agreement. 370 U.S. at 256. The union allegedly encouraged employees not to report for work because a compromise between the union and employer could not be

collective bargaining agreements required that the employer's claims be submitted to arbitration rather than settled by the judicial system.[36] While finding the broadly framed arbitration clause in *Drake* to encompass the disputed matter,[37] the Supreme Court denied access to arbitration in *Atkinson* because the narrowly drawn arbitration clause expressly limited arbitration to employee grievance claims.[38] The Fourth Circuit concluded that the arbitration provision in *Lynchburg Foundry* more closely resembled that of the *Atkinson* case.[39]

The Fourth Circuit acknowledged that even if the court applied the presumption of arbitrability to the *Lynchburg Foundry* agreement, the presumption would not operate to imply an agreement to arbitrate from the existence of an obligation not to strike.[40] In *Local 174, Teamsters v. Lucas Flour Co.*,[41] the Supreme Court held that a contractual commitment to submit disagreements to final and binding arbitration gives rise to an implied obligation not to strike.[42] Application of this judically created obligation protects the arbitration process because enforcement of the implied no-strike clause forces the union to utilize the arbitration process as the means to obtain a resolution of its grievance.[43] Although permitting the court to imply an agreement to arbitrate from an agreement not to strike would encourage peaceful settlement of disputes, a party cannot be compelled to submit to arbitration, unless he has contracted to do so.[44] Finding the language of the agreement plain and

---

reached. *Id.* In *Atkinson,* the dispute arose because the employer docked the pay of three employees. 370 U.S. at 239. The union claimed that the action violated the collective bargaining agreement and ordered its employees to strike. *Id.*

[36] Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. at 258; Atkinson v. Sinclair Ref. Co., 370 U.S. at 240.

[37] Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. at 258. The arbitration clause at issue in *Drake* contained a provision which stated, "The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or any act or conduct or relation between the parties, hereto, directly or indirectly." *Id.* at 257.

[38] Atkinson v. Sinclair Ref. Co., 370 U.S. at 241. The critical limitation imposed by the arbitration clause at issue in *Atkinson* stated that local arbitration boards "shall consider only individual or local employee or local committee grievances arising under the application of the currently existing agreement." *Id.* at 243. The broad language and procedure in the *Drake* clause, *see* note 37 *supra,* did not exclude submission of grievances by the company, as it did in *Atkinson.* Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. at 257. Therefore, in *Drake,* the employer's claim for damages was stayed pending arbitration of the dispute, and, in *Atkinson,* the employer's claim for damages was remanded to the district court to be litigated because the arbitration clause did not require the employer to submit his claim to arbitration. *Id.* at 267; Atkinson v. Sinclair Ref. Co., 370 U.S. at 249.

[39] 597 F.2d at 387 n.6; *see* note 38 *supra.*

[40] 597 F.2d at 387.

[41] 369 U.S. 95 (1962).

[42] *Id.* at 104-06; *accord,* Gateway Coal Co. v. UMW, 414 U.S. 368, 376 (1974).

[43] *See* Boys Mkts., Inc. v. Retail Clerks Local 770, 398 U.S. 235, 244-48 (1970); Avco Corp. v. Local 787, UAW, 459 F.2d 968, 972 (3d Cir. 1972).

[44] *See* Gateway Coal Co. v. UMW, 414 U.S. 368, 374 (1974). The implied no-strike

unambiguous, the Fourth Circuit construed the narrowly drawn arbitration provisions as creating in each party an option to initiate arbitration with respect to a particular subject matter.[45] The *Lynchburg Foundry* court stated the mere existence of the independent provisions could not be the basis for inferring a reciprocal mandatory obligation to arbitrate without destroying the intent of the parties.[46]

Additionally, the Fourth Circuit rejected the union's argument that the word "may" only gave the aggrieved party the option of abandoning his complaint or submitting a grievance to arbitration.[47] The court stated that the union's argument was valid where both parties are bound to accept arbitration in all disputes, but was inappropriate where the option is vested in one party.[48] The agreement in *Lynchburg Foundry* granted the company the unilateral option of either submitting its claim of alleged no-strike clause violatons to arbitration or bringing a suit for damages in federal district court.[49] The Fourth Circuit reasoned that the discretion granted by the agreement to the company could not be obliterated by disregarding the distinction between a mutual mandatory obligation and a unilateral option.[50] Since the company did not elect to exercise its unilateral option to submit the claim to arbitration, the court concluded that the district court erred in striking the claim from the docket.[51]

The Fourth Circuit first utilized the *Drake-Atkinson* comparison to emphasize the importance of the arbitration clause language in determining whether the claim was an arbitrable matter within the meaning of the arbitration provision.[52] Prior to *Lynchburg Foundry,* the Fourth Circuit had not construed an arbitration clause which vested the power to invoke arbitration in the employer. The Fourth Circuit had been confronted on several occasions, however, with the issue of whether the express contract language creating the power to initiate arbitration in the union prevented an employer from submitting his claim to arbitration.[53]

---

agreement does not compel arbitration. Instead, the agreement expedites the peaceful resolution of a grievance by leaving the union with the choice of abandoning its claim or submitting it to arbitration. *See* Avco Corp. v. Local 787, UAW, 459 F.2d 968, 972-73 (3d Cir. 1972); J.C. Bonnot v. Congress of Indep. Unions Local 14, 331 F.2d 355, 359 (8th Cir. 1964).

[45] 597 F.2d at 387.

[46] *Id.*

[47] *Id.* at 388.

[48] *Id.*

[49] *Id., see* text accompanying notes 19-21 *supra.*

[50] *See id.*

[51] *Id.*

[52] *See* United Textile Workers Local 120 v. Newberry Mills, Inc., 315 F.2d 217, 219 (4th Cir. 1963).

[53] *See, e.g.,* Carbon Fuel Co. v. UMW, 582 F.2d 1346, 1349 (4th Cir. 1978); Armco Steel Co. v. UMW, 505 F.2d 1129, 1134 (4th Cir. 1974), *cert. denied,* 423 U.S. 877 (1975); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209, 1214 (4th Cir. 1973); H.K. Porter Co. v. Local 37, United Steel Workers, 400 F.2d 691, 694 (4th Cir. 1968). In *Monongahela,* the Fourth Circuit enjoined a work stoppage which violated the no-strike clause and ordered that the dispute be submitted to arbitration, even though the grievance procedure was employee-oriented. 484 F.2d at 1215.

Although a grievance procedure is employee-oriented, the Fourth Circuit has issued an injunction, at the company's request, to enjoin strikes and to force unions to submit grievances to arbitration.[54] The Fourth Circuit's emphasis on interpreting the specific language of the arbitration provision in *Lynchburg Foundry* is contrary to previous Fourth Circuit reasoning. In earlier cases, the Fourth Circuit relied heavily on the presumption of arbitrability in conjunction with the quid pro quo principle[55] to establish the reciprocal mandatory obligation to arbitrate.[56]

The Fourth Circuit's interpretation of the company's arbitration provision in *Lynchburg Foundry* is contrary to the Supreme Court's interpretation of other arbitration provisions using similar language.[57] Reasoning that the word "may" has a meaning distinct from shall, must, or will,[58] the Fourth Circuit interpreted the phrase, "the company may request arbitration for violations of the no-strike clause," to provide the company with the option of submitting the grievance to arbitration or litigating the issue in court.[59] However, the Supreme Court consistently

---

[54] *See* Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209, 1215 (4th Cir. 1973).

[55] *See* text accompanying notes 6 & 7 *supra.*

[56] *See* Armco Steel Co. v. UMW, 505 F.2d 1129, 1133 (4th Cir. 1974); Monongahela Power Co. v. Local 2332, IBEW, 484 F.2d 1209, 1214 (4th Cir. 1973). In explaining the operation of an implied no-strike clause, the Fourth Circuit in *Armco* stated that when the subject of the dispute is not cognizable under the grievance arbitration provision, the quid pro quo for the no-strike clause is no longer present and the no-strike clause does not apply. 505 F.2d at 1133. Although the Supreme Court in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976) repudiated the Fourth Circuit's assumption in *Armco* that a mandatory arbitration clause implies a commitment not to engage in sympathy strikes, the court's approach in *Armco* was consistent with Supreme Court dictates. *Id.* at 408 n.10; *see* Gateway Coal Co. v. UMW, 414 U.S. 368, 381 (1974); Local 174, Teamsters v. Lucas Flour Co., 369 U.S. 95, 104-06 (1962).

[57] *See generally* text accompanying notes 59 & 60 *infra.*

[58] 597 F.2d at 387; *see* text accompanying notes 47 & 48 *supra.* To support the meaning attributed to the word "may", the Fourth Circuit relied on the literal construction given to the word by the governor of Pennsylvania in 1806 when interpreting the Pennsylvania Constitution. *Id.* at 387 n.7. Considering that the Fourth Circuit's finding on this issue is crucial to the outcome of the case, and that the court adopted a construction that is contrary to the traditional modes of interpretation employed in deciphering the intent of the parties to a collective bargaining agreement, the Fourth Circuit's assertion is, at best, inadequately supported.

[59] The Fourth Circuit cited Teledyne Wis. Motor v. Local 283, UAW, 386 F. Supp. 1231 (E.D. Wisc. 1975), *aff'd.*, 530 F.2d 727 (7th Cir. 1976) to support the construction of the arbitration provision that followed from the court's interpretation of the word "may." 597 F.2d at 389 n.7. In *Teledyne,* the district court found that a clause providing that the union may refer grievances to arbitration would not support the company's request for an injunction to enjoin a strike because the collective bargaining agreement did not contain an express no-strike provision. 386 F. Supp. at 1234. The court stated that the union was not under an obligation to refrain from striking, and therefore a corresponding obligation to arbitrate the grievance did not arise. *Id.* at 1235. However, the collective bargaining agreement in *Lynchburg Foundry* did contain an express no-strike clause. *See* 597 F.2d at 386. Therefore, the Fourth Circuit's reliance on *Teledyne* to support the construction of the *Lynchburg Foundry* agreement is misplaced.

has interpreted the word "may" to mean shall or will, and, therefore, has required arbitration when a party agrees to the obligation to arbitrate grievances and seeks to resolve a dispute.[60] Since the company had the

---

The Fourth Circuit should have relied on Avco Corp. v. Local 787, UAW, 459 F.2d 968 (3d Cir. 1972), which the *Teledyne* court distinguished because the collective bargaining agreement in *Avco* contained an express no-strike clause. 459 F.2d at 969 n.3. In *Avco*, the arbitration clause stated that the union "may" refer employee grievances to arbitration. *Id.* at 970. Although the arbitration provision in *Avco* only permitted the union to initiate arbitration, the Third Circuit, ruled that the company's request to issue an injunction should be granted to enjoin a strike in alleged violation of the express no-strike clause. *Id.* at 972. The court reasoned that the express no-strike clause, the union's quid pro quo for the right to submit grievances to arbitration, created a mandatory obligation to arbitrate. *Id.* To uphold the efficacy of the collective bargaining process, the *Avco* court would not permit the union to abandon its remedy of arbitration to disregard the no-strike clause. *Id.* Applying the reasoning of *Avco* to *Lynchburg Foundry*, the Fourth Circuit should have found the use of the word "may" irrelevant to the determination of whether the company was required to submit the alleged no-strike clause violation to arbitration. *See* text accompanying note 61 & 62 *infra;* Amrco Steel Co. v. UMW, 505 F.2d 1129, 1132 (4th Cir. 1974).

[60] *See* Nolde Bros. v. Local 358, Bakery Workers, 430 U.S. 243, 245 n.1, 250 (1977); Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397, 400, 405 (1976); United Steelworkers v. American Mfg. Co., 363 U.S. 564, 565 n.1, 569 (1960). In *Nolde Bros.*, the arbitration provision stated either party "may" demand arbitration for the resolution of any grievance arising between the parties. 430 U.S. at 245 n.1. The Supreme Court held, over the objection of the company, that a claim for severance pay under an expired contract was subject to arbitration. *Id.* at 255. In *American Mfg.*, the Supreme Court compelled arbitration of a grievance, over the objection of the company, where the arbitration provision stated all disputes as to the meaning and application of the collective bargaining agreement "may" be submitted to arbitration. 363 U.S. at 569.

The Fourth Circuit distinguished the arbitration provision in *Lynchburg Foundry*, where the responsibility for invoking arbitration was divided between the union and the company depending on the subject matter of the grievance, from arbitration provisions which stated either party "may" invoke arbitration for a grievance. 597 F.2d 388. Implicit in the Fourth Circuit's distinction is that where either party may initiate arbitration, a dispute will be settled through arbitration, even though the aggrieved party attempts to resolve the claim in court, because the unaggrieved party may and will request arbitration. However, the Fourth Circuit's reasoning is faulty because the unaggrieved party will seek to avoid both arbitration or a judicial resolution of the aggrieved party's claim since the continuation of the status quo will most likely benefit the unaggrieved party. Therefore, unless the court dismisses the aggrieved party's claim, the aggrieved party will be able to avoid its contractual obligation to submit grievances to arbitration. The court's asserted distinction between the *Lynchburg Foundry* provision and one in which either party may request arbitration is without merit because in both cases the aggrieved party has the option of litigation or arbitration. *See* 597 F.2d at 387. However, the Fourth Circuit stated, in accord with the weight of authority, that a clause which gives either party the option to initiate arbitration gives the aggrieved party the choice of submitting a grievance to arbitration or dropping the claim. *See id.* at 388; Avco Corp. v. Local 787, UAW, 459 F.2d 968, 972 (3d Cir. 1972); J.C. Bonnot v. Congress of Indep. Unions, 331 F.2d 355, 357 (8th Cir. 1964). To preclude the aggrieved party's access to the court under an arbitration provision stating either party may request arbitration, the provision must create an independent contractual obligation on the aggrieved party to submit to arbitration. *See* note 59 *supra.* When the word "may" is interpreted to mean "shall," each party will be under an obligation to submit to arbitration where the arbitration provision states either party may request arbitration. *See* 430 U.S. at 252; 428 U.S. at 405; 363 U.S. at 569. Therefore, the Fourth Circuit should have equated the word "may" with "shall" in *Lynchburg Foundry* to hold that the arbitration provision stat-

exclusive power to initiate arbitration for violations of the no-strike clause in *Lynchburg Foundry*,[61] the court should have forced the company to initiate arbitration, or drop the claim, by dismissing the company's suit for breach of contract, thereby precluding the company's access to the judicial system.[62]

The Fourth Circuit's reliance on the Supreme Court's holding in *Atkinson*,[63] was incorrect because the arbitration agreement at issue is more analogous to the provision in *Drake* than its counterpart in *Atkinson*.[64] The union agreed to a no-strike clause in *Atkinson*, and the employer agreed to permit the union to submit employee grievances to arbitration.[65] The employer, in *Atkinson*, did not agree to become obligated to submit company grievances to arbitration,[66] and therefore retained the right to have company grievances litigated in court.[67]

In *Drake*, however, the union agreed not to strike, and the employer contracted to submit both employee and employer grievances to arbitration.[68] Since the parties agreed upon arbitration as the method to resolve all disputes,[69] the company had an obligation to submit the claim arising from the union's violation of the no-strike clause to arbitration, if the claim was going to be pursued.[70] By dismissing the suit, the Supreme Court precluded the employer's access to the courts, thereby leaving the employer with the option of submitting the claim to arbitration or dropping the claim.[71] If the Fourth Circuit had properly interpreted the arbitration provision's language in *Lynchburg Foundry*, the company's options would have been similarly limited.[72]

In *Lynchburg Foundry*, the union agreed to an express no-strike clause and also agreed to permit the company to submit alleged no-strike

---

ing the company may request arbitration created an independent obligation on the company to submit the no-strike violation to arbitration.

[61] 597 F.2d at 386.

[62] *See, e.g.*, note 38 *supra;* text accompanying note 43 *supra; cf.*, Avco Corp. v. Local 787, UAW, 459 F.2d 968, 972-73 (3d Cir. 1972)(granting injunction would not order arbitration to occur, but would force union not strike and submit dispute to arbitration or drop it).

[63] *See* text accompany notes 38 & 39 *supra.*

[64] 597 F.2d at 387 n.6; *see* text accompanying notes 37 & 38 *supra.*

[65] Atkinson v. Sinclair Ref. Co., 370 U.S. at 241 n.1. *see* text accompanying note 38 *supra.*

[66] Atkinson v. Sinclair Ref. Co., 370 U.S. at 241.

[67] *Id.* at 244; *see* text accompanying note 38 *supra.*

[68] Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. at 257 n.2; *see* text accompanying note 37 *supra.*

[69] *See* text accompanying notes 3 & 4 *supra.*

[70] *See* text accompanying note 37 *supra.* The Supreme Court in *Drake* found that the company had an obligation to submit to arbitration where the arbitration provision stated either party had the right to refer matters to arbitration. 370 U.S. at 261-62. Despite the permissive connotation of the word "right," which the Fourth Circuit attached to "may," the Supreme Court did not consider the issue and interpreted the phrase as if the word "shall" or "must" was used. *See id.* at 265-66.

[71] *See* Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. at 265-66.

[72] *See* note 60 *supra.*

violations to arbitration.[73] The company contracted to permit the union to submit employee grievances to arbitration.[74] In *Drake,* the arbitration provision contained the general language that all disputes involving the interpretation of the collective bargaining agreement may be submitted to arbitration[75] and, thereby, implicitly included alleged violations of the no-strike clause. In *Lynchburg Foundry,* however, the company's obligation to submit grievances, arising from violations of the no-strike clause, was explicitly stated in a separate provision of the collective bargaining agreement.[76] In addition, the arbitration provision explicitly stated that the issue of damages for violations of the no-strike clause should be resolved through arbitration.[77] Therefore, the company was contractually bound to arbitrate no-strike clause grievances when the overall structure of the arbitration agreement is considered.

By overemphasizing the precise meaning of the provision's language, the Fourth Circuit misinterpreted the intent of the parties.[78] Even though the union had struck in apparent contravention of the no-strike clause in *Lynchburg Foundry,*[79] the Fourth Circuit should not have litigated the merits of the company's grievance where the collective bargaining agreement contained an arbitration clause which on its face may have subjected the alleged no-strike violation to arbitration.[80] By not

---

[73] 597 F.2d at 386; *see* text accompanying notes 19 & 20 *supra.*

[74] 597 F.2d at 386; *see* text accompanying note 21 *supra.*

[75] Drake Bakeries, Inc. v. Local 50, Bakery Workers, 370 U.S. at 258; *see* text accompanying note 37 *supra.*

[76] 597 F.2d at 386; *see* text accompanying notes 19 & 20 *supra.*

[77] 597 F.2d at 386, *see* text accompanying notes 19 & 20 *supra.*

[78] *See* 597 F.2d at 387; text accompanying notes 45-48 *supra.* The Fourth Circuit in *Lynchburg Foundry* noted that labor agreements are generally drafted with extreme attention to detail. 597 F.2d at 386. The parties to the collective bargaining agreement would have clearly prescribed their intention to make arbitration the compulsory and exclusive remedy, asserted the court in *Lynchburg Foundry,* if the parties intended such a result. *Id.* at 388 n.10. The Fourth Circuit's opinion is contrary to the Supreme Court's description of collective bargaining agreements. *See* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 578-81 (1960). In *Warrior,* the Court stated that a collective bargaining agreement is a generalized code to govern a myriad of cases which draftsmen cannot wholly anticipate and that there are too many unforeseeable contingencies to make the words of the contract the exclusive source of the rights and duties. *Id.* at 578-79.

[79] The Supreme Court in *Drake* rejected the argument that the union's violation of the no-strike provision constitutes a waiver of the employer's duty to arbitrate. 370 U.S. at 262. Since the parties agreed by contract to arbitrate all claims arising under the collective bargaining agreement, the Court stated that the parties negatived any intention to condition the duty to arbitrate upon the absence of strikes. *Id.* at 262.

[80] *See* text accompanying note 13 *supra.* The Supreme Court in United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960) emphasized that the courts have no business weighing the merits of the grievance, or determining whether there is particular language in the written instrument that will support the claim. *Id.* at 568. The Fourth Circuit did not appy the presumption of arbitrability because the collective bargaining agreement in *Lynchburg Foundry* did not include the standard broad arbitration clause. *See* text accompanying notes 8 & 22 *supra.* The court's reasoning was inaccurate because the broad language of the *Lynchburg Foundry* arbitration clause, which requires that all disputes and claims not settled by the agreement will be settled by arbitration, is only relevant to determining the

employing the presumption of arbitrability to enforce the company's contractual obligation to submit alleged no-strike clause violations to arbitration,[81] the Fourth Circuit endangers the efficacy of the collective bargaining process.[82] As a result, unions will more frequently resort to strikes as an economic means of resolving disputes,[83] which our national labor policy seeks to prevent.[84]

NICHOLAS H. HANTZES

B. *Pain and Suffering Damages Not Available Under ADEA*

Congress enacted the Age Discrimination in Employment Act of 1967 (ADEA)[1] to promote the employment of persons over forty years old and to prohibit arbitrary age discrimination in the employment context.[2] To

scope of arbitrable matters and not the issue in *Lynchburg Foundry* of which party is responsible for initiating arbitration. *See* text accompanying note 12 *supra*.

[81] *See* text accompanying note 9 *supra*.

[82] *See* note 10 *supra*.

[83] The Lynchburg Foundry company brought suit for damages and has not obtained relief through an injunction. The decision of the Supreme Court in Buffalo Forge Co. v. United Steelworkers, 428 U.S. 397 (1976) narrowed the circumstances upon which an injunction can be issued. The Supreme Court held that the strike will only be enjoined if the underlying dispute is over an arbitrable issue within the parameters of the grievance provision of the collective bargaining agreement. *Id.* at 412-13; *see* note 6 *supra*. As a consequence of the *Buffalo Forge* decision, damages are the major tool available to the courts to enforce violations of the no-strike agreements. The Supreme Court, in Boys Mkt's. Inc. Retail Clerks Local 770, 398 U.S. 235 (1970), indicated, however, that the damage remedy may not be an adequate device for enforcing no-strike agreements because "employer's looses are often hard to calculate and because the employer may hesitate to exacerbate relations with the union by bringing a damage action." *Id.* at 248 n.17. The arbitration scheme adopted by the parties in *Lynchburg Foundry* may be a reflection of the influence of the *Buffalo Forge* decision. The expedited arbitration provision in *Lynchburg Foundry* permitted the company to obtain an arbitrator's ruling within 48 hours on whether the union's strike was over an arbitrable matter. *See* Brief for Appellee at 3, Lynchburg Foundry Co. v. Patternmakers League, 57 F.2d 384 (4th Cir. 1979). Therefore, the company could have limited the economic loss caused by a strike. The company would have been able to obtain an injunction within two days under *Buffalo Forge*, if the dispute was arbitrable. *See* 428 U.S. at 412-13. If the dispute was found not to be over an arbitrable matter, the company could have conceded the issue causing the dispute, depending on its ability to withstand the economic pressure created by the strike. *See* Lowden & Flaherty, *Sympathy Strikes, Arbitration Policy, and the Enforceability of No-Strike Agreement — An Analysis of* Buffalo Forge, 45 GEO. WASH. 633, 654 (1977); *see generally* Gould, *On Labor Injunctions Pending Arbitration Recasting* Buffalo Forge, 30 STAN. L. REV. 533, 546-48 (1978).

[84] *See* text accompanying note 4 & 5 *supra*.

[1] 29 U.S.C.A. §§ 621-634 (1976 & Supp. 1979).

[2] The purpose of the ADEA is to alleviate serious economic and psychological suffering of persons within the ages of 40 and 70 caused by unreasonable prejudice and job discrimination. *See* H.R. REP. No. 805, 90th Cong., 1st Sess. _, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2214. The remarks of Representative Eilberg provide a further illumination of the evils the ADEA is designed to remedy. *See* 113 CONG. REC. 31248 (1967). According to Eilberg, the cost in terms of human suffering and welfare which result from age em-

aid in the enforcement of the ADEA, Congress granted to any person aggrieved by age discrimination the right to bring a private civil suit for legal or equitable relief.[3] The broad language of the civil enforcement provision of the ADEA, however, does not define the scope of the legal or equitable relief available.[4]

Due to the lack of statutory guidance from the ADEA, courts have relied on other sources, such as analysis of Congressional intent,[5] to determine the extent of the ADEA enforcement remedies.[6] In addition, because the general enforcement provision of the ADEA incorporates en-

---

ployment discrimination are the primary concern of the Act, not the financial and social cost. *Id.* Eilberg stated that the denial of the opportunity for a person to compete for jobs on the basis of ability and desire solely because of age prejudice, is a most vicious, cruel and disastrous form of inhumanity. *Id.* The ADEA represents congressional recognition of the often incorrect assumptions and common misconceptions concerning the relationship of production to age. *See* 113 CONG. REC. 31254, 34742, 34752 (1967). The comments of then Secretary of Labor Wirtz illustrate the origin of age discrimination as distinct from other forms of discrimination. Wirtz stated that age discrimination develops because of oversight, lack of common sense and lack of recognition given to the capacity of an older person, whereas racial discrimination is rooted in pure bigotry. *See Hearings on the Age Discrimination in Employment Act of 1967 Before the Subcommittee on Labor of the House Committee on Education and Labor,* 90th Cong., 1st Sess. __, (1967) (statement of Willard Wirtz). Courts have held that the ADEA is remedial legislation and thus should be interpreted liberally to effectuate the congressional purpose of ending age discrimination in employment. *See* Dartt v. Shell Oil Co., 539 F.2d 1256, 1260 (10th Cir. 1976), *aff'd.*, 434 U.S. 99 (1977) (equally divided court).

[3] 29 U.S.C.A. § 626(c)(1) (Supp. 1979). Section 7(c) of the ADEA states: "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter . . . ."

[4] *See* 29 U.S.C. § 626(b) (1976). Section 7(b) of the ADEA states in part:

> In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section.

[5] *See, e.g.,* Walker v. Pettit Const. Co., 605 F.2d 128, 130 (4th Cir. 1979) (defendants petition for rehearing granted); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038-40 (5th Cir. 1977), *cert. denied,* 434 U.S. 1066 (1978); Looney v. Commercial Union Assur. Cos., 428 F. Supp. 533, 537 (E.D. Mich. 1977). In *Walker,* the Fourth Circuit utilized congressional intent as the basis for denying the award of punitive damages. The court concluded that Congress, by providing in § 7(b), 29 U.S.C. § 626(b) (1976) for recovery of liquidated damages only in the cases of willful violations, evidenced an intent not to permit additional recovery as liquidated damages. 605 F.2d 130; *see* Richards, *Monetary Awards for Age Discrimination in Employment,* 30 ARK. L. REV. 305, 327-36 (1976); Note, *Rogers v. Exxon Research & Engineering Co: Validity of Pain and Suffering Damages Award Under The Age Discrimination In Employment Act of 1967,* 26 BUFFALO L. REV. 159, 165 (1977).

[6] *See* Vazquez v. Eastern Air Lines Inc., 579 F.2d 107, 110-11 (1st Cir. 1978); Crispen v. Southern Cross Indus., 15 Fair Empl. Prac. Cas. 405, 406-07 (N.D. Ga. 1977); Looney v. Commercial Union Assur. Cos., 428 F. Supp. 533, 537 (E.D. Mich. 1977); Note, *Age Discrimination Monetary Damages Under the Federal Age Discrimination In Employment Act,* 58 NEB. L. REV. 214, 215 (1978) [hereinafter cited as *Monetary Damages*]; Note, *Employment Discrimination-Damages-Awarding Compensatory Damages for Pain and Suffering In Age Discrimination Cases: A Proper Reading of the Statute,* 29 S. C. L. REV. 705, 714-18 (1979).

forcement provisions of the Fair Labor Standards Act (FLSA),[7] the judiciary has sought guidance from FLSA case law.[8] The similarity of the substantive provisions of the ADEA and Title VII of the Civil Rights Act of 1964 (Title VII)[9] also has prompted the courts to obtain direction from Title VII case law.[10] Additionally, courts have analyzed the general struc-

[7] The pertinent enforcement provision of the FLSA, 29 U.S.C.A. § 216(b) (Supp. 1979), provides that employers who violate the minimum wage or maximum hour provisions of the FLSA are liable to the employee affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation and in an additional equal amount as liquidated damages. *Id.* The FLSA provision for injunctive relief, 29 U.S.C. § 217 (1976), also is incorporated into the enforcement provisions of the ADEA. *Id.* § 626(b). The congressional findings and declaration of policy for the FLSA are stated in § 7(a), 29 U.S.C. § 202 (1976). The purpose of the FLSA is to eliminate the labor conditions detrimental to the maintenance of a minimum standard of living, necessary for the health, efficiency, and general welfare of workers. *Id.* Section 7(a) also lists the vices associated with sub-standard conditions, such as unfair methods of competition in commerce, which the Act seeks to eliminate. *Id.* In enacting the FLSA, Congress intended to protect certain groups of the population from sub-standard wages and excessive hours. *See* H.R. REP. No. 2738, 75th Cong., 2d Sess. 1, 13, 21, 28 (1938). Congress sought to adjust the unequal bargaining relationship between employer and employee by preventing unconscionable private contracts between employers and the unprotected, unorganized and lowest paid of the nation's working population. *See* 81 CONG. REC. 7652, 7672, 7885 (1938); 82 CONG. REC. 1386, 1395, 1491, 1505 (1938); 83 CONG. REC. 7298, 7823, 9260, 9265 (1938).

The amendments to the FLSA implement the congressional purpose by (1) providing an increase in the minimum wage rate, and (2) extending the benefits and protection of the Act to workers engaged in commerce, or employed in enterprises engaged in commerce or in the production of goods for commerce. *See* H.R. REP. No. 913, 93d Cong., 2d Sess. —, *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 2811, 2812.

[8] *See, e.g.*, Hays v. Republic Steel Corp., 531 F.2d 1307, 1311 (5th Cir. 1976); Rogers v. Exxon Research & Eng'r. Co., 404 F. Supp. 324, 334 (D.N.J. 1975), *rev'd on other grounds*, 550 F.2d 834 (3d Cir. 1977), *cert. denied*, 434 U.S. 1022 (1978); Hodgson v. Ideal Corr. Box Co., 8 Empl. Prac. Dec. ¶ 9,805 at 6371 (N.D. W.Va. 1974). In *Rogers*, the court explained that the definition of the term "willful" for purposes of awarding liquidated damages under the ADEA enforcement provisions is incorporated from the FLSA case United States v. Illinois Central R.R., 303 U.S. 239, 242-43 (1938); 404 F. Supp. at 334. *See generally* Levien, *The Age Discrimination In Employment Act: Statutory Requirements and Recent Developments*, 13 DUQ. L. REV. 227, 248-49 (1974); Note, *Civil Procedure - Right To A Jury Trial - Congress Intended To Grant a Jury Trial In Actions Under The ADEA* Lorillard v. Pons, 62 MARQ. L. REV. 270, 273-76 (1978).

[9] 42 U.S.C. § 2000e (1976). Title VII guarantees all persons freedom from the refusal by potential employers to hire them on account of race, color, religion, or national origin. 42 U.S.C. § 2000e-2 (1976). The purpose of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1976), is to achieve a peaceful and voluntary settlement of unlawful discrimination in the employment sector. *See* [1964] U.S. CODE CONG. & AD. NEWS 2355. Although the Act places primary reliance on voluntary and local solutions to claims of employment discrimination, the aggrieved party has the choice of filing civil suit on his own behalf or may file a complaint with the Equal Employment Opportunity Commission. See 42 U.S.C. § 2000e-5 (1976) (enforcement provisions of the Act), [1964] U.S. CODE CONG. & AD. NEWS 2355, 2356. The remedies available include injunctions to enjoin unlawful employment practices, or such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, or any other equitable relief as the court may deem appropriate. 42 U.S.C. § 2000e-5(g) (1976).

[10] *See, e.g.*, Coates v. National Cash Register Co., 433 F. Supp. 655, 662 (W.D. Va. 1977). In *Coates*, the court, analogizing the ADEA to Title VII, found that damages for back

ture of the ADEA enforcement provisions againsst the general principles of damages.[11] Although these tools have been helpful in determining the extent of ADEA enforcement provisions, the courts are in conflict on the issue of whether pain and suffering damages may be awarded to remedy a violation of the ADEA.[12]

The Fourth Circuit recently addressed the ADEA damage issue in *Slatin v. Stanford Research Institute.*[13] The court also considered whether a litigant under the ADEA is entitled to a jury trial in an action for recovery of lost wages.[14] Plaintiff Slatin was hired by the defendant, Stanford Research Institute (SRI), on a temporary, hourly-rated basis.[15] The plaintiff was not given permanent status, nor a regular salary due to uncertainities concerning his qualifications and inability to meet the requirements of the position.[16] The defendant terminated the plaintiff less than two months after he was hired, claiming that he could not adequately perform the job.[17]

Slatin brought suit against SRI, alleging age discrimination in violation of section 2 of the ADEA.[18] The plaintiff's complaint requested varied relief, including an injunction compelling reinstatement, back pay,

---

pay under the ADEA would have to be mitigated. *Id.* at 661-62. The court stated that although the express language was not carried over from Title VII to the ADEA, plaintiffs victimized by age discrimination should be treated no differently with regard to the requirement to mitigate damages. *Id.* at 662. Courts also have held that decisions interpreting the state deference provision of Title VII, 42 U.S.C. 2000e-5(c) (1976), generally are applicable for purposes of interpreting the state deference provision in the ADEA, 29 U.S.C. § 633(b) (1976), because of their virtually identical wording. *See* Curry v. Continental Airlines, 513 F.2d 691, 693 (9th Cir. 1975); Vaughn v. Chrysler Corp., 382 F. Supp. 143, 146 (E.D. Mich. 1974). *But see* Laughesen v. Anaconda Co., 510 F.2d 307, 312 (6th Cir.), *cert. denied,* 422 U.S. 1045 (1975) (court stated law embodied in Title VII is separate and distinct from ADEA); Vazquez v. Eastern Air Lines, Inc., 405 F. Supp. 1353, 1355 (D.P.R. 1975), *rev'd on other grounds,* 579 F.2d 107 (1st Cir. 1978) (enforcement procedures of title VII and section 633(b) not analogous).

[11] *See, e.g.,* Rogers v. Exxon Research & Eng'r Co., 404 F. Supp. 324, 335 (D.N.J. 1975). In *Rogers,* the court cited the language of the Supreme Court in Brooklyn Sav. Bank v. O'Neil, 324 U.S. 697, 707 (1945), as the basis for awarding an amount equal to back pay as liquidated damages for willful violations of the ADEA. The *Brooklyn Savings Bank* Court concluded that the award constitutes a congressional recognition that failure to make timely payment of the statutory minimum is detrimental to the maintenance of a minimum standard of living and the free flow of commerce. 324 F.2d at 707. Therefore, double payment must be made in the event of delay to restore the worker to that minimum standard of well-being. 404 F. Supp. 335; *see* RESTATEMENT (SECOND) OF CONTRACTS § 339(2) (Tent. Draft No. 12, 1977); note 79 *infra.*

[12] *See* text accompanying notes 51 & 52 *infra.*

[13] 590 F.2d 1292 (4th Cir. 1979).

[14] *Id.* at 1293.

[15] Brief for Appellant at 2, Slatin v. Stanford Research Inst., 590 F.2d 1292 (4th Cir. 1979).

[16] *Id.*

[17] *Id.*

[18] 590 F.2d at 1293. Under § 4 of the ADEA, 29 U.S.C.A. § 623 (1976 & Supp. 1979), it is unlawful for an employer to fail or refuse to hire or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment, on

liquidated damages, interest, attorney's fees, court costs and pain and suffering damages.[19] Slatin also requested a jury trial.[20] SRI moved to strike the request for damages for pain and suffering, on the ground that such relief was not available under the ADEA enforcement provisions,[21] and also moved to strike Slatin's request for a jury trial.[22] Although the district court denied both of defendant's motions, the court certified the issues for interlocutory appeal.[23] The Fourth Circuit subsequently granted SRI's petition for leave to appeal.[24]

The Fourth Circuit reversed the denial of the motion to strike the demand for pain and suffering damages, holding that such damages are outside the scope of ADEA remedies.[25] The specific language of section 7(b) of the ADEA provides equitable relief in the form of judgments compelling employment, reinstatement, or promotion.[26] Since the legal remedies provided in the ADEA enforcement provisions are back pay and liquidated damages,[27] the court reasoned that Congress intended to limit remedies for a violation of the ADEA to those specifically enumerated in the enforcement provision of the Act.[28]

In reaching its decision, the Fourth Circuit analyzed the legislative history of the ADEA and concluded that Congress rejected other avenues of enforcement in favor of the selective adoption of FLSA provisions.[29] Reasoning that Congress must have been aware of the construction of the

---

the basis of age. Slatin claimed that he was hired on terms that discriminated against him on the basis of age and also was discharged unjustifibly due to his age. *See* Brief for Appellant at 2, Slatin v. Stanford Research Inst., 590 F.2d 1292 (4th Cir. 1979).

[19] 590 F.2d at 1293.

[20] *Id.*

[21] *Id.; see* note 4 *supra.*

[22] 590 F.2d at 1293.

[23] *Id.* Under 28 U.S.C. § 1292(b) (1976), the court of appeals may, in its discretion, review a district court determination of a question, which the district court judge determines is a controlling question of law, to which there is substantial ground for difference of opinion, and the immediate appeal from the order may materially advance the ultimate termination of the litigation. See *id.*

[24] 590 F.2d at 1293.

[25] *Id.* at 1296; *see* text accompanying note 4 *supra.*

[26] *See* 29 U.S.C. § 626(b) (1976).

[27] *See id.*

[28] 590 F.2d at 1295-96.

[29] *Id.; see* H.R. REP. No. 805, 90th Cong. 1st Sess. 9, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218. Congress stated that the enforcement provisions of the amended ADEA bill follow those of the FLSA and that they replace those in the original ADEA bill similar to the approach in the National Labor Relations Act. *Id.* at 9, [1967] U.S. CODE CONG. & AD. NEWS 2218. Under the original bill, the Secretary of Labor would have been granted the power to issue cease-and-desist orders enforceable in the courts of appeals but no private right of action would have been available. *See* S. 830, H. R. 4221, 90th Cong., 1st Sess. _, (1967); H.R. REP. No. 805, 90th Cong. 1st Sess. 5, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218. Thus, the enforcement provisions would have been modeled after §§ 10(c) & (e) of the National Labor Relations Act, 29 U.S.C. §§ 160(c), (e) (1976). Another alternative considered by Congress adopted the statutory pattern of § 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1976) and authorized the Equal

FLSA enforcement provisions incorporated into the ADEA, the court determined that cases construing the FLSA have limited damages recoverable to those specifically enumerated therein.[30] The court noted that pain and suffering damages are not available under the FLSA enforcement provisions.[31] In addition, the Fourth Circuit relied on the Supreme Court decision in *Lorillard v. Pons*,[32] which stated that remedies under the ADEA are limited to those identified in existing interpretations for violations of the FLSA.[33] Consequently, the Fourth Circuit construed the general structure of the ADEA enforcement scheme to provide adequate means to alleviate mental anguish by allowing reimbursement and reinstatement.[34]

The Fourth Circuit also observed that awarding damages for pain and suffering would be inconsistent with the administration of the ADEA enforcement scheme.[35] Adopting reasoning developed by the Third Circuit,[36] the Fourth Circuit explained that the potential for large awards for pain and suffering would induce a plaintiff to reject a reasonable settlement that might be agreed upon in a conciliatory proceeding.[37]

In addition, the award of pain and suffering damages would negate the strong emphasis the ADEA places on resolving age discrimination claims

---

Employment Opportunity Commission to prosecute violations of the ADEA. *See* note 10 *supra*.

The Fourth Circuit adopted the First Circuit's reasoning that the ADEA's legislative history reveals that Congress intentionally eschewed other avenues of enforcement in favor of the selective adoption of FLSA provisions. *See* Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 110 (1st Cir. 1978). In *Vazquez*, the court found that the statutory language coupled with the congressional purpose of the ADEA, supported the correctness of limiting damages to those provided by the FLSA. Therefore, the First Circuit held that pain and suffering damages were not available under the Act. *Id.* at 112. Both circuits relied on the remarks of Senator Javits, a major proponent of the Act, made during the floor debate on the bill. 590 F.2d at 1295; 579 F.2d at 110. Senator Javits stated that the enforcement techniques of the ADEA are directly analogous and incorporate by reference those available under the FLSA to the greatest extent possible. *See* 113 CONG. REC. 7076, 31254 (1967).

[30] 590 F.2d at 1295; *see* Vazquez v. Eastern Air Lines Inc., 579 F.2d 107, 112 (1st Cir. 1978); Martinez v. Behring's Bearings Service, Inc., 501 F.2d 104, 105 (5th Cir. 1974); Powell v. Washington Post Co., 267 F.2d 651, 652 (D.C. Cir.), *cert. denied*, 360 U.S. 930 (1959).

[31] 590 F.2d at 1295; *see* Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 110-12 (1st Cir. 1978); Altman v. Stevens Fashion Fabrics, 441 F. Supp. 1318, 1320 (N.D. Cal. 1977) (compensatory damages not recoverable under FLSA).

[32] 434 U.S. 575 (1978); *see* note 44 *infra*.

[33] *See* 434 U.S. at 578-81; note 44 *infra*.

[34] 590 F.2d at 1295; *see* Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 112 (1st Cir. 1978); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977); Rogers v. Exxon Research & Eng'r. Co., 550 F.2d 834, 840 (3d Cir. 1977).

[35] 590 F.2d at 1296; *accord*, Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 111-112 (1st Cir. 1978); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038-39 (5th Cir. 1977); Rogers v. Exxon Research & Eng'r. Co., 550 F.2d 834, 841 (3d Cir. 1977); *see* text accompanying note 28 *supra*.

[36] *See* Rogers v. Exxon Research & Eng'r. Co., 550 F.2d 834, 841 (3d Cir. 1977).

[37] 590 F.2d at 1296; *see* text accompanying notes 72-76 *infra*. *But see* text accompanying notes 63 & 64 *infra*.

through administrative proceedings.[38] The Fourth Circuit acknowledged that the enforcement provisions do not indicate any standard for awarding damages in the administrative proceeding, which requires an evaluation of subjective considerations.[39] Rather, the ADEA provides an objective test as the basis for computing damages to avoid the uncertainties inherent in calculating subjective damages.[40] Since the problem of obtaining the parties' agreement to an exact figure in calculating objective damages is familiar to administrative proceedings, the Fourth Circuit realized that the infusion of subjective considerations would interfere with the established viability of ADEA administrative procedures.[41]

Addressing the second issue in the interlocutory appeal, the Fourth Circuit affirmed the district court's denial of the motion to strike the demand for a jury trial.[42] The court noted that subsequent to certification for appeal, the Supreme Court, in *Lorillard v. Pons*,[43] affirmed the right to a jury in an action under the ADEA for recovery of lost wages.[44] Additionally, Congress amended the ADEA in 1978 to provide expressly for a

---

[38] 590 F.2d at 1296; *see* Dean v. American Security Ins. Co., 559 F.2d 1036, 1038-39 (5th Cir. 1977); Rogers v. Exxon Research & Eng'r. Co., 550 F.2d 834, 841 (3d Cir. 1977); H.R. REP. No. 805, 90th Cong., 1st Sess. 5-6, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218. The House Report expresses the congressional intent that the responsibility for enforcement, vested in the Secretary of Labor by § 7 of the ADEA, be directed initially and exclusively through informal methods of conciliation, conference and persuasion. *Id.; see* Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977). The Report stated that the Secretary must have 60 days notice of a party's intention to bring a civil suit as a condition precedent to bringing such an action. H.R. REP. No. 805, 90th Cong., 1st Sess. 5, *reprinted in* [1967] U.S. CODE CONG. & AD. NEWS 2213, 2218; *see* 559 F.2d at 1038. During the 60 days the Secretary will attempt to mediate the grievance. 559 F.2d at 1038. Additionally, the Report stated that the enforcement power vested in the Secretary by § 7 initially will be directed through informal methods of conciliation and, if voluntary compliance cannot be obtained, formal methods may be applied. *Id.; accord,* Rogers v. Exxon Research & Eng'r Co., 550 F.2d 834, 841 (3d Cir. 1977); Platt v. Burroughs Corp., 424 F. Supp. 1329, 1337 (E.D. Pa. 1976); Sant v. Mack Trucks, Inc., 424 F. Supp. 621, 622 (N.D. Cal. 1976). *But see* text accompanying notes 63 & 64 *supra.*

[39] 590 F.2d at 1296.

[40] *Id.*

[41] *Id.*

[42] *Id.* at 1293.

[43] 434 U.S. 575 (1978).

[44] 590 F.2d at 1293. In Lorillard v. Pons, 434 U.S. 575 (1978), the Supreme Court affirmed the Fourth Circuit's ruling that the ADEA and the seventh amendment afforded respondent the right to a jury trial on a claim for lost wages. *Id.* at 576-77. The Fourth Circuit applied the three-pronged test to determine whether a suit for lost wages under the ADEA was recognized "at common law" as a cause of action which entitled the parties to a jury trial under the seventh amendment. *See* Pons v. Lorillard, 549 F.2d 950, 953 (4th Cir. 1977). The questions considered in the three-pronged test of Ross v. Bernhard, 396 U.S. 531 (1970) are whether the issue is legal rather than equitable under the custom of the courts of law, whether there is a legal remedy, and whether the issue is triable to a jury given jurors' practical abilities and limitations. *Id.* at 538 n.10. The court found that claims of employment discrimination, coupled with a request for lost wages, were analogous to the common law action for breach of contract by wrongful discharge or an action in tort based on the legal duty created by the ADEA. Pons v. Lorillard, 549 F.2d at 954. Therefore, the claims

jury trial on any issue of fact concerning the recovery of amounts owning under section 7(b)[45] as a result of violations of the ADEA.[46]

The Fourth Circuit's decision in *Slatin* resolves a conflict among the district courts in the Fourth Circuit concerning whether pain and suffering damages were available as a remedy for violations of the ADEA.[47] The lower courts denying pain and suffering damages have relied on an analysis of congressional intent to support their reasoning that the ADEA enforcement provision is derived from selected provisions of the FLSA and, therefore, is limited to the remedies provided in the FLSA.[48] This reasoning reflects a preference for examining the overall effectiveness of the ADEA enforcement scheme, rather than attaching significance to the particular language of the individual provisions.[49]

By relying on the case law surrounding the application of the FLSA enforcement provisions, the Fourth Circuit's reasoning in *Slatin* is consistent with the Supreme Court's interpretation of the legislative history of the ADEA expressed in *Pons*. In *Pons*, the Court held that the ADEA fully incorporates the remedies and procedures of the FLSA, with the exception of selective changes made by Congress in the ADEA provisions.[50] Additionally, the Fourth Circuit's decision to deny pain and suffering damages in *Slatin* is in agreement with other circuit courts of appeal which have decided the issue.[51]

---

satisfied the first requirement of the test. *See id.* The Fourth Circuit also found that the claim satisfied the second and third requirements of the test and, accordingly, granted the request for a jury trial. *Id.* In *Pons*, the Supreme Court did not use a seventh amendment analysis, basing its decision instead on the resolution of the statutory issue of whether the structure of the Act demonstrates a congressional intent to grant a right to a jury trial. 434 U.S. at 577. Since the procedural provisions and the legislative history of the ADEA indicate Congress's intent that the Act be enforced in accordance with the FLSA, the Court found the right to a jury trial existed under the ADEA because the right to a jury trial was well established for private actions pursuant to the FLSA. *Id.* at 580-81. *See generally* Wirtz v. Jones, 340 F.2d 901, 904 (5th Cir. 1965); Olearchick v. American Steel Foundries, 73 F. Supp. 273, 279 (W.D. Pa. 1947).

[45] 29 U.S.C. § 626(b) (1976).

[46] 29 U.S.C.A. § 626(c)(2) (Supp. 1979); *see* H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 13, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 535.

[47] *Compare* Mader v. Control Data Corp., 19 Fair Empl. Prac. Cas. 1192, 1194 (D. Md. 1978) (denying pain and suffering damages under ADEA); Covey v. Robert A. Johnson Co., 19 Fair Empl. Prac. Cas. 1189, 1191 (D. Md. 1977) (same) *with* Coates v. National Cash Reg. Co., 433 F. Supp. 655, 664 (N.D. Va. 1977) (permitting award of pain and suffering damages).

[48] *See* Mader v. Control Data Corp., 19 Fair Empl. Prac. Cas. 1192, 1193-94 (D. Md. 1978); Covey v. Robert A. Johnson Co., 19 Fair Empl. Prac. Cas. 1188, 1189-90 (D. Md. 1977).

[49] *See* Mader v. Control Data Corp., 19 Fair Empl. Prac. Cas. 1192, 1193-94 (D. Md. 1978); Covey v. Robert A. Johnson Co., 19 Fair Empl. Prac. Cas. 1188, 1189 (D. Md. 1977).

[50] 434 U.S. at 582.

[51] *See* Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 110-12 (1st Cir. 1978); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977); Rogers v. Exxon Research & Eng'r. Co., 550 F.2d 834, 839 (3d Cir. 1977). *See generally* O'Donnell, Lasser, Bailor, *The Federal Age Discrimination Statute: Basic Law, Areas of Controversy, and Suggestions for Compliance*, 15 WAKE FOREST L. REV. 1 (1979) (discussion of *Rogers* decision).

Several district courts in other circuits, however, have awarded pain and suffering damages.[52] The Fourth Circuit recognized that some district courts have based the award of pain and suffering damages on the proposition that the ADEA creates a new statutory tort and that the existence of such a statutory right implies the existence of necessary and appropriate remedies.[53] The courts have adopted the statutory language of section 7(b) as another basis to justify their broad remedial powers under the ADEA.[54] Interpreting section 7(b) to provide that courts may award such legal or equitable relief as is appropriate to effectuate the purpose of the ADEA without limitation, courts have awarded pain and suffering damages, reasoning that the broad language of the statute expresses Congress's intent to permit such legal relief.[55]

In addition, the district courts have contrasted the language of the ADEA to that of Title VII, which permits only the award of equitable relief, to illustrate the comprehensiveness of the ADEA's language.[56] The only limitation which the statutory language of section 7(b) places on the forms of relief available under the ADEA is that the award of damages may not be inconsistent with the purposes of the Act.[57] Although the

---

[52] *See, e.g.*, Flynn v. Morgan Guaranty Trust Co., 463 F. Supp. 676, 679 (E.D.N.Y. 1979); Gifford v. B. D. Diagnostics, 458 F. Supp. 462, 464 (N.D. Ohio 1978); Bertrand v. Orkin Ext. Co., 432 F. Supp. 952, 956 (N.D. Ill. 1977). *But see* Carter v. Marshall, 17 Fair Empl. Prac. Cas. 1182, 1184 (D. D.C. 1978); Hannon v. Continental Nat. Bank, 427 F. Supp. 215, 217 (D. Colo. 1977); Sant v. Mack Trucks, Inc., 424 F. Supp. 621, 622 (N.D. Cal. 1976).

[53] *See* Coates v. National Cash Reg. Co., 433 F. Supp. 655, 664 (W.D. Va. 1977); Rogers v. Exxon Research & Eng'r. Co., 404 F. Supp. 324, 330 (D. N.J. 1975). In *Rogers*, the district court relied on Curtis v. Loether, 415 U.S. 189, 195 (1974), where the Court analogized a claim of racial discrimination in the sale of housing under Title VII of the Civil Rights Act of 1968, 42 U.S.C. § 3612 (1976), to tort actions recognized at common law. 404 F. Supp. at 327. The Supreme Court in *Loether* held that the statute defined a new legal duty which authorized the Court to compensate a plaintiff for injury caused by a defendant's wrongful breach. 415 U.S. at 195. The *Rogers* court relied on Sullivan v. Little Hunting. Park, Inc., 396 U.S. 229, 239 (1969), to support the proposition that the existence of the new legal duty sanctioned the court's broad discretion to award any necessary remedy. 404 F. Supp. at 328.

[54] *See* Gifford v. B.D. Diagnostics, 458 F. Supp. 462, 464 (N.D. Ohio 1978); Bertrand v. Orkin Ext. Co., 432 F. Supp. 952, 953 (N.D. Ill. 1977); 29 U.S.C. § 626(b) (1976).

[55] *See* Gifford v. B.D. Diagnostics, 458 F. Supp. at 464; Bertrand v. Orkin Ext. Co., 432 F. Supp. at 953-54. *But see* Hassan v. Delta Orth. Medical Group, Inc., 48 U.S.L.W. 2293, 2293 (E.D. Cal. 1979). In *Hassan*, the court focused on § 7(c), *see* note 3 *supra*, rather than § 7(b), because § 7(c) is directed solely at civil actions. 48 U.S.L.W. at 2293. The court reasoned that § 7(b) is directed to administrative and legal actions conducted by the Secretary of Labor and that any limitations on the relief available under § 7(b) did not apply to the broad language of § 7(c). *Id.* Pain and suffering damages were awarded by the court because § 7(c) permits the award of any form of legal relief in civil actions. *Id.*

[56] *Compare* Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5 (1976), *with* § 7(b) of the ADEA, 29 U.S.C. § 626(b) (1976). *See* Coates v. National Cash Reg. Co., 433 F. Supp. at 664; Rogers v. Exxon Research & Eng'r. Co., 404 F. Supp. at 328; notes 4 & 9 *supra*. Pain and suffering damages are a form of legal relief and, therefore, have not been awarded by the courts in Title VII actions. *See* 433 F. Supp. at 664. However, since § 7(b) of the ADEA specifically states both equitable and legal relief are available, pain and suffering damages should be awarded in ADEA actions. *See* 404 F. Supp. at 327.

[57] *See* Bertrand v. Orkin Exter. Co., 432 F. Supp. at 953; note 2 *supra*.

statutory language of Title VII is not analogous to the language of the ADEA enforcement provisions, the district courts have noted that the ADEA substantive provisions share the make-whole purpose of Title VII.[58] Since Congress exhibited concern for emotional and psychological losses caused by age discrimination[59] and courts have awarded pain and suffering damages in other discrimination contexts,[60] courts have argued that the award of pain and suffering damages is necessary to fulfill the make-whole purpose of the ADEA.[61]

Courts have emphasized the integral part the award of pain and suffering damages plays in the enforcement scheme by noting the inadequacy of the expressly enumerated reinstatement and back pay relief in compensating the victim for emotional trauma.[62] Courts also have rejected the argument that the award of pain and suffering damages will interfere with conciliatory proceedings authorized by section 7(b).[63] Where pain and suffering damages are not available, the employer might be less likely to compromise the claim short of a lawsuit, because he may realize that the most he may lose in a private suit is lost wages, possibly doubled for willful violations.[64]

---

[58] *See* Rogers v. Exxon Research & Eng'r. Co., 404 F. Supp. at 327. The Supreme Court in Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) held that Congress's intent in formulating the Title VII remedies, was to make persons whole for injuries sustained by unlawful employment discrimination. *Id.* at 418. The Supreme Court articulated the principle for awarding relief under the make-whole purpose in Louisiana v. United States, 380 U.S. 145, 154 (1965). The injured party should be placed as near as possible, in the situation he would have occupied if the wrong had not been committed. *Id.* at 154.

[59] *See* Flynn v. Morgan Guaranty Trust Co., 463 F. Supp. at 676, 678 (E.D. N.Y. 1979); note 2 *supra.*

[60] *See* Rogers v. Exxon Research & Eng'r. Co., 404 F. Supp. at 330. In Humphrey v. Southwestern Portland Cement Co., 369 F. Supp. 832 (W.D. Tex. 1973) the court awarded damages for psychic injuries under Title VII. *Id.* at 835. Several circuits have awarded compensatory damages for emotional distress and humiliation for discrimination in housing in violation of Title VIII of the Civil Rights Act of 1968, 42 U.S.C. § 3601-3619 (1976 & Supp. 1979). *See* Williams v. Matthews Co., 499 F.2d 819, 829 (8th Cir.), *cert. denied,* 419 U.S. 1021 (1974); Jeanty v. McKey & Poague, Inc., 496 F.2d 1119, 1121 (7th Cir. 1974); Steele v. Title Realty Co., 478 F.2d 380, 384 (10th Cir. 1973).

[61] *See* Flynn v. Morgan Guaranty Trust Co., 463 F. Supp. at 678-79; Gifford v. B.D. Diagnostics, 458 F. Supp. at 464.

[62] *See* Bertrand v. Orkin Exter. Co., 432 F. Supp. at 954. In *Bertrand,* the court recognized that the enumerated remedies under § 7(b) of reinstatement and promotion serve primarily to put a temporal end to the illegal conduct and an award of back pay makes a victim financially whole. *Id.* at 954. Punitive damages were not recoverable under the ADEA, according to the court, because § 7(b) provides for awarding an additional amount equal to back pay as liquidated damages in the case of willful violations and, therefore, fulfills the punitive function. See *id.* at 954-55. The court found, however, that the enumerated relief did not compensate the victim for previously undergone mental trauma and somatic effects of the prohibited discharge. *Id.* at 954. *But see* text accompanying notes 78-86 *infra.*

[63] *See* Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 111-12 (1st Cir. 1978); Flynn v. Morgan Guaranty Trust Co., 463 F. Supp. at 679; Bertrand v. Orkin Exter. Co., 432 F. Supp. at 955. *But see* text accompanying notes 35-41 *supra.*

[64] *See* 579 F.2d at 111-12. The First Circuit in *Vazquez* found statistical support for the position that employee remedies should not be limited to promote conciliation in an annual

The 1978 ADEA Amendment Conference Committee Report[65] clarified the language of section 7(b) of the ADEA enforcement provision[66] and thereby strengthened the Fourth Circuit's position that Congress did not intend to provide pain and suffering damages for violations of the ADEA. The Committee Report states that the term "amounts owing" under the general enforcement provision is limited to items of economic loss and liquidated damages arising out of willful violations.[67] When the broad language of the civil enforcement provision is considered in light of the committee report's refinement of section 7(b),[68] courts will be permitted only to award relief for economic loss that will effectuate the purposes of the Act under section 7(c). Since pain and suffering damages are not

report prepared pursuit to 29 U.S.C. § 632 (1976). 579 F.2d at 111; ADEA ANN. REP. 11 (1977). The figures indicated that attempted conciliation did not resolve the great majority of cases brought by the Secretary of Labor and that most individuals must resort to a civil suit to obtain relief. *See* 579 F.2d at 111. Although the First Circuit questioned the efficacy of the conciliatory proceedings, the court held pain and suffering damages should not be awarded. *Id.* The *Vazquez* court recognized the valid statutory purpose of the ADEA, to remove employer's ignorance with respect to age discrimination prejudices, and concluded that the enumerated remedies would fulfill this purpose. *Id.* at 111-12; *see* text accompanying notes 71-76 *infra.*

[65] H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 1, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 528. The primary purpose for the 1978 legislative amendments to the ADEA was to raise the current upper age limit of 65 in the ADEA to age 70, and protect other workers from mandatory retirement at 65. *See* S. REP. No. 493, 95th Cong., 2d Sess. 1, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 504.

[66] 29 U.S.C. § 626(b) (1976); *see* note 4 *supra.*

[67] *See* H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 13, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 535. Section 7(c), 29 U.S.C. § 626(c)(1) (Supp. 1979) establishes the types of damages available in a civil suit for violations of the ADEA and should be read in conjunction with § 7(b), 29 U.S.C. § 626(b) (1976), the general enforcement provision of the ADEA.

Section 7(b), 29 U.S.C. § 626(b) (1976), states that "[a]mounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation . . ." *Id.* Section 7(b), however, states that the court has jurisdiction to grant such legal or equitable relief as will effectuate the purposes of the Act. *Id.* Prior to the Committee Report, courts had focused on the term "legal relief" in § 7(b), *see* note 4 *supra,* and held that punitive and pain and suffering damages were available because they were a form of legal relief. *See* Gifford v. B.D. Diagnostics, 458 F. Supp. 462, 464 (N.D. Ohio 1978); Kennedy v. Mountain States Tel. & Tel. Co., 449 F. Supp. 1008, 1011 (D. Colo. 1978); Bertrand v. Orkin Exter. Co., 432 F. Supp. 952, 956 (N.D. Ill. 1977); Williams v. General Motors Corp., 15 Fair Empl. Prac. Cas. 411, 412 (N.D. Ga. 1977). Several courts, however, denied pain and suffering damages prior to the Committee Report. *See* text accompanying notes 47 & 51 *supra.* The Committee Report clarified the above language by stating that only economic loss could be included in determining the form of legal relief available within the meaning of the term "amounts owing." *See* H.R. CONF. REP. No. 950, 95th Cong., 2d Sess. 13-14, *reprinted in* [1978] U.S. CODE CONG. & AD. NEWS 504, 535. The report elaborated further, stating that the ADEA does not provide remedies of a punitive nature and that liquidated damages are not a penalty but are designed to provide full compensatory relief. *Id.* The Committee Report thus negates the reasoning of the courts that have awarded punitive and pain and suffering damages because such damages are not items of economic loss but are exemplary, in the case of punitive damages, and relief for psychological suffering, in the case of pain and suffering damages.

[68] *See* note 67 *supra.*

awarded as relief from economic losses, the Fourth Circuit's decision in *Slatin* to deny an award of pain and suffering damages is in accord with the Committee Report.[69]

The Fourth Circuit's holding in *Slatin* reinforces the legislative purpose of the ADEA.[70] Although the award of pain and suffering damages would be an effective and powerful tool for enforcing the remedial aspects of the ADEA, courts which overemphasize the remedial goal when awarding damages act inconsistently with the expressed congressional purpose of the Act. The legislative purpose of the ADEA is to educate the employer as to the arbitrariness of age discrimination and to discourage the practice of age discrimination.[71] Prior to the commencement of a private civil suit, the claimant must give the Secretary of Labor sixty days notice of his intent to file such action.[72] During this time period the Secretary is directed to attempt to eliminate any alleged unlawful practice by informal methods of conciliation, conference and persuasion.[73] At this stage of an ADEA action, the Secretary has the best opportunity to educate the employer as to the needs and abilities of older workers,[74] and thereby fulfill the purpose of the Act.[75] Since the Fourth Circuit's holding in *Slatin* is designed to protect conciliatory proceedings,[76] the decision advances the legislative purpose of the ADEA.

An evaluation of the overall effectiveness of the remedies specifically enumerated in section 7 of the ADEA[77] substantiates the Fourth Circuit's conclusion that victims of age discrimination are provided with both compensation for economic losses and relief from psychological suffering.[78]

---

[69] *See* 590 F.2d at 1296. Although the Fourth Circuit in *Slatin* did not refer to the Committee Report, a district court in the Fourth Circuit utilized the Committee Report as a basis for denying punitive damages under the ADEA. Jaffee v. Plough Broad. Co., 19 Fair Empl. Prac. Cas. 1194, 1195 (D. Md. 1979). Several district courts have relied on the Report to deny pain and suffering damages. *See, e.g.*, Brin v. Bigsby and Kruthers, 19 Fair Empl. Prac. Cas. 415, 416 (N.D. Ill. 1979); Riddle v. Getty Refining & Marketing Co., 18 Fair Empl. Prac. Cas. 1072, 1073 (N.D. Okla. 1978).

[70] *See* text accompanying notes 2 *supra* & 72 *infra*.

[71] *See* 29 U.S.C. § 621 (1976) (congressional statement of findings and purpose); note 2 *supra*.

[72] *See* 29 U.S.C.A. § 626(d) (Supp. 1979); note 38 *supra*.

[73] *See* 29 U.S.C. 626(b) (1976).

[74] *See* 29 U.S.C. § 622 (1976).

[75] *See* note 71 *supra*.

[76] 590 F.2d at 1296; *see* Rogers v. Exxon Research & Eng'r. Co., 550 F.2d 834, 840 (3d Cir. 1977). In *Rogers*, the court indicated that the educational goals of the ADEA most likely would be obtained during the conciliatory proceedings. *See id.* at 841.

[77] 29 U.S.C.A. § 626 (1976 & Supp. 1979).

[78] *See* Vazquez v. Eastern Air Lines, Inc., 579 F.2d 107, 112 (1st Cir. 1978); Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038-39 (5th Cir. 1977). In *Vazquez*, the First Circuit stated that Congress provided adequate means to effectuate the goal of promoting the employment of the older worker by adopting the remedies of the FLSA in § 7(b) of the ADEA, 29 U.S.C. 626(b) (1976). 579 F.2d at 112. *See generally* Richards, *Monetary Awards for Age Discrimination In Employment*, 30 ARK. L. REV. 305, 339, 340 (1976); Note, *Damage Remedies Under the Age Discrimination In Employment Act*, 43 BROOKLYN L. REV. 47, 70-1 (1976).

Since the courts have developed a broad principle to establish the elements of earnings that should be included in back pay,[79] a victim is assured restoration of economic security when entitled to such an award.[80] The equitable remedies of reinstatement and promotion serve to reduce psychological suffering by removing the source of anxiety.[81] Additionally, victims of age discrimination are provided with relief from the economic cost incurred through litigation expenses.[82] Section 7(b) of the ADEA[83] specifically incorporates section 216(b) of the FLSA,[84] providing for reasonable attorney's fees.[85] Any intangible damages beyond the actual financial damages resulting from an employer illegally withholding wages are implicitly accounted for through the operation of the liquidated damages provision.[86] When the overall effectiveness of the statutory scheme is considered, the Fourth Circuit's assertion that reliance on the specifically enumerated remedies would provide adequate relief is correct.

NICHOLAS H. HANTZES

C. *Statute of Limitations and the Duty of Fair Representation*

A union has a judicially created obligation to fairly represent its members in executing its statutory authorization to act as an exclusive bargaining agent.[1] A union breaches the duty of fair representation when a union's conduct toward a member of the collective bargaining unit is arbi-

---

One commentator has urged that a person responsible for discriminatory acts should be liable in tort in addition to the independent statutory violation. *See* Duba, *Damages for Mental Suffering in Discrimination Cases*, 15 CLEV.-MAR. L. REV. 1, 3-6 (1966). Duba argues that a cause of action arises in tort where the wrongdoers' conduct is sufficiently offensive to societal norms and injurious to the victim, and that judicial notions of vindication and making the victim whole dictate liability in the form of an intentional tort. *Id.*

[79] *See* Monroe v. Penn-Dixie Cement Corp., 335 F. Supp. 231, 234-35 (N.D. Ga. 1971). In *Monroe*, the court announced the standard for measuring back pay under the ADEA. *Id.* The standard requires that damages should equal the difference between the value of the compensation by way of salary plus other specific monetary benefits to which the plaintiff would have been entitled had he remained employed by defendant until trial date, and the value of his total benefits and earnings at other jobs from his discharge until trial date. *Id.*

[80] *See* Rogers v. Exxon Research & Eng'r. Co., 404 F. Supp. 324, 330 (D. N.J. 1975); *Monetary Damages*, note 6 *supra*, at 216-224.

[81] *See* Dean v. American Sec. Ins. Co., 559 F.2d 1036, 1038 (5th Cir. 1977).

[82] *See* Brennan v. Ace Hardware Corp., 495 F.2d 368, 374 (8th Cir. 1974).

[83] 29 U.S.C.A. § 626(b) (Supp. 1979).

[84] 29 U.S.C. § 216(b) (1976).

[85] *Id.*

[86] *See* 29 U.S.C. § 626(b) (1976); Buchholz v. Symons Mfg. Co., 445 F. Supp. 706, 713 (E.D. Wisc. 1978); Hannon v. Continental Nat'l. Bank, 427 F. Supp. 215, 218 (D. Colo. 1977); note 11 *supra*.

---

[1] Section 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a) (1976), states that the union shall act as the exclusive bargaining representative. The Supreme Court first articulated the duty of fair representation in Steele v. Louisville & N.R.R., 323 U.S. 192

trary, discriminatory or in bad faith.[2] The federal courts have jurisdiction under section 301(a) of the Labor Management Relations Act to hear suits for the breach of the duty of fair representation.[3] Since section 301(a) does not designate a federal limitations period, the timeliness of an action is determined, as a matter of federal law, by reference to the ap-

---

(1944). The *Steele* Court held that the language of the Railway Labor Act expressed Congress's aim to impose on the bargaining representative the duty to exercise fairly its authority on behalf of the bargaining unit for which it acts without discrimination against any member of the unit. *Id.* at 202-03. In Ford Motor Co. v. Huffman, 345 U.S. 330 (1953), the Supreme Court extended the duty of fair representation to § 9(a) of the National Labor Relations Act. *Id.* at 337. The Supreme Court held that although a union is permitted a wide range of reasonableness in representing its members, the exercise of its discretion is always subject to complete good faith and honesty in purpose. *Id.* at 337, 338. In *Steele,* the Supreme Court announced the fair representation standard, requiring that the union exercise its obligation "without hostile discrimination" against its members, and applied the standard in the context of a racial discrimination suit. *Id.* at 202-03. The duty of fair representation now is applied in a broad range of circumstances. *See, e.g.,* Humphrey v. Moore, 375 U.S. 335, 350 (1964) (union has duty to fairly represent employees in collective bargaining session involving merger of two union represented companies). *See generally* Clark, *The Duty of Fair Representation: A Theoretical Structure,* 51 TEX. L. REV. 1119, 1119-26 (1973) [hereinafter cited as Clark]; Summers, *The Individual Employee's Rights Under The Collective Agreement: What Constitutes Fair Representation?,* 126 U. PA. L. REV. 251, 258-63 (1977) [hereinafter cited as Summers].

[2] Vaca v. Sipes, 386 U.S. 171, 190 (1967). In *Vaca,* the Supreme Court examined the duty of fair representation where a union had decided not to arbitrate an employee grievance. Rejecting the proposition that an individual employee has an absolute right to have his grievance taken to arbitration, *Id.* at 195, the *Vaca* Court did not uphold the jury's award against the union, because the plaintiff failed to prove bad faith or arbitrary conduct on the part of the union in processing his grievance. *Id.* at 193. In further developing the duty of fair representation, the Court separated the arbitrary standard from bad faith and held that arbitrary conduct alone by a union constituted a breach. *Id.* at 190.

[3] Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1976), states that employees may bring a suit for breach of contract between an employer and the union in any district court of the United States having jurisdiction over the parties. Congress originally enacted § 301(a) to permit unions to sue employers for breach of collective bargaining agreements. *See* Textile Wkr's Union v. Lincoln Mills, 353 U.S. 448, 453 (1957). Individual employees can also bring an action against an employer for breach of contract under § 301(a). *See* Smith v. Evening News Ass'n, 371 U.S. 195, 199 (1962). Additionally, the Supreme Court, in Humphrey v. Moore, 375 U.S. 335 (1964), held that a fair representation action against a union, brought in conjunction with a contract action for breach of a collective bargaining agreement against an employer, was within the federal court's jurisdiction under § 301(a). *Id.* at 344. Although the language of § 301 does not provide jurisdiction for suits against the union for breach of the duty of fair representation, lower courts have interpreted *Humphrey* to permit such actions. *See, e.g.,* Bieski v. Eastern Automobile Forwarding Co., 396 F.2d 32, 34 (3d Cir. 1968). *See also* Bryant v. International Union, 367 F.2d 1 (6th Cir. 1972) (implicitly recognizing jurisdiction). These courts have allowed separate fair representation actions against the union under § 301(a), by holding that rights vested in the collective bargaining agreement underlie the claims. 396 F.2d at 34. By forcing employees to press grievances through unfair representation suits, strong federal policy favors judicial enforcement of collective bargaining agreements. *See* Textile Wkr's Union v. Lincoln Mills, 353 U.S. at 453-54; Note, *Fair Representation and Breach of Contract in Section 301 Employer-Union Suits; Who's Watching the Back Door?,* 122 U. PA. L. REV. 714, 716-20 (1973).

propriate state statute of limitations.[4] When selecting the appropriate state statute of limitations, federal courts should consider both the character of the claim involved, and the nature and purpose of the federal act from which the claim originates.[5]

Federal courts have applied the state contract statutes of limitations when an employee joins an unfair representation claim against a union with a suit for breach of contract against an employer.[6] When faced with a separate unfair representation action against a union, however, courts do not have the tangible collective bargaining agreement on which to rely. Rather, the plaintiff's unfair representation claim is based on the conceptual nature of the duty of fair representation. Since the union's obligation

---

[4] *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05 (1966). Rejecting the opportunity to provide a uniform limitations provision, the Supreme Court in *Hoosier* reasoned that the absence of a uniform time limitation for § 301(a) actions was not a basis for inferring a congressional expectation that courts would invent one. *Id.* at 703. By following the long-standing policy of permitting state statutes of limitations to govern the timeliness of a federal cause of action, *see, e.g.,* Chattanooga Foundry & Pipe Works v. City of Atlanta, 203 U.S. 390, 397 (1906); McClaine v. Rankin, 197 U.S. 154, 158 (1905), the *Hoosier* Court left to Congress the task of establishing a uniform limitation period. 383 U.S. at 704.

The six-month statute of limitations, which governs unfair labor practice actions brought under § 9 of the National Labor Relations Act, 29 U.S.C. § 160(b) (1976), has been rejected as the governing limitation for § 301(a). *See* De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281, 287 (1st Cir.), *cert. denied sub nom.* De Arroyo v. Puerto Rico Tel. Co., 400 U.S. 877 (1970); Buchholtz v. Swift & Co., 62 F.R.D. 581, 601 (D.C. Minn. 1973). The court in *De Arroyo* suggested that since a breach of fair representation could constitute an unfair labor practice, courts could conceivably deem applicable the six-month period. 425 F.2d at 287. The short limitation period was rejected, however, because federal labor policy does not require the NLRB to preempt all individual suits that might be prosecuted under the NLRA, and the court saw no reason for limiting private litigation by the NLRA limitation period. *Id.*

[5] *See* UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 706-07 (1966). *See also* Barnes Coal Corp. v. Retail Coal Merchants Ass'n, 128 F.2d 645, 647 (4th Cir. 1942) (determination of applicable state statute of limitations in antitrust action made in light of federal act). Where no statute is prescribed, the federal courts formulated the issue to contain both a federal question, characterizing a cause of action, and a state question, fitting the action so characterized into the state statutory scheme. *See* Mishkin, *The Variousness of "Federal Law": Competence and Discretion In The Choice of National and State Rules For Decision,* 105 U. PA. L. REV. 797, 810-14 (1957) (discussing factors relevant to federal courts' selection of state laws into federal statutes); Note, *Federal Statutes Without Limitation Provisions,* 53 COLUM. L. REV. 68, 69-72 (1953).

[6] *See* Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 448 (8th Cir.), *cert. denied,* 423 U.S. 924 (1975); Abrams v. Carrier Corp., 434 F.2d 1234, 1252 (2d Cir. 1970), *cert. denied sub nom.* United Steelworkers v. Abrams, 401 U.S. 1009 (1971); Grant v. Mulvihill Bros. Motor Servide Inc., 428 F. Supp. 45, 48 (N.D. Ill. 1976); Buchholtz v. Swift & Co., 62 F.R.D. 581, 604 (D. Minn. 1973). Fair representation suits often arise in conjunction with an employee's action against an employer for breach of his employment contract. The dependence of the employee on the union and the contractual relationship between the union and the employer make it difficult for an employee to assess responsibility for his unfair treatment. *See* Vaca v. Sipes, 386 U.S. 171, 195-98 (1967). Thus, the aggrieved employee is assured of redress when he joins the employer in an action for breach of the collective bargaining agreement with a suit against the union for breach of the duty of fair representation. *See, e.g.,* Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d at 447; Abrams v. Carrier

to fairly represent members is derived wholly from judicial construction, the nature of the duty is open to diverse interpretations among the circuits.[7]

The Fourth Circuit recently confronted a claim for the breach of the duty of fair representation in *Howard v. Aluminum Workers International.*[8] The court was required to characterize the claim for the purpose of selecting the appropriate statute of limitations.[9] The plaintiff and thirty-three of his co-workers alleged that the union had failed to protect their rights during collective bargaining sessions.[10] The complaint also stated that the union acted arbitrarily, discriminatorily and in bad faith in dealing with their employer in the administration of the collective bargaining agreement.[11] In addition, the union members charged the union with acting in bad faith and in an arbitrary manner in refusing to process employee grievances.[12]

In the same action, the plaintiffs also brought a claim for the denial of free speech rights under the Labor Management Reporting and Disclo-

---

Corp., 434 F.2d at 1252. The primary reason for employing a contract limitation in a joint action is that the claim against the union and employer stem from the same events and involve the same contractual provision. 62 F.R.D. at 604. In *Buchholtz,* the employee asserted that the union's alleged improper handling of a grievance accompanied the company's refusal to pay earned vacation wages. The court held that the contract limitation applied because the action consisted of one gravemen grounded in the collective bargaining agreement. *Id.*

The *Butler* court enumerated additional reasons for applying the written contract limitations period to an unfair representation action brought in conjunction with a contract action against the employer. 514 F.2d at 447-48. First, the Supreme Court in *Vaca* required that an employee must establish that the union has breached its duty of fair representation before he can recover from his employer. Vaca v. Sipes, 386 U.S. at 186. Therefore, the traditional argument that the claim would be based on stale evidence if not brought within a short period of time is not applicable. *See* Abrams v. Carrier Corp., 434 F.2d at 1252; Buchholtz v. Swift & Co., 62 F.R.D. at 603. A second reason advanced by the *Butler* court is that damages against the union are tied inextricably to the breach of contract. In the event the employer has not breached the contract but the union has breached its duty of fair representation, the possibility arises that, if a separate limitation was applied to unfair representation actions, the employee would not be able to collect union damages flowing from the contract breach. *See* Vaca v. Sipes, 386 U.S. at 198. A third reason for applying a uniform limitation period is to enable courts to fashion a remedy which properly apportions damages to correspond to the contributory fault of the employer and union. *Id.* at 187.

[7] *See* text accompanying notes 40-47 *infra.*

[8] 589 F.2d 771 (4th Cir. 1978).

[9] *Id.* at 773-74.

[10] *Id.* at 772.

[11] 589 F.2d at 772. Most courts require a showing of invidious discrimination or factual malice to support a claimed breach of the duty of fair representation by a union engaged in collective bargaining. *See* Jackson v. Trans World Airlines, Inc., 457 F.2d 202, 204 (2d Cir. 1972) (requiring factual malice); Hiatt v. New York C.R.R., 444 F.2d 1397, 1398 (7th Cir. 1971) (something akin to factual malice); Wheeler v. Brotherhood of Loco. Firemen, 324 F. Supp. 818, 819 (D. S.C. 1971) (requiring hostile or invidious discrimination). *See generally* Clark, *supra* note 1. Clark suggests that courts are reluctant to limit the union's discretion in bargaining sessions because the bargaining must involve frank trading to obtain realistic terms of agreement. *Id.* at 1156.

[12] 589 F.2d at 772. The Supreme Court in Vaca v. Sipes, 386 U.S. 171 (1967), stated that evidence of arbitrary, discriminatory or bad faith handling of grievances is enough to

sure Act (LMRDA).[13] Since the LMRDA does not supply a statute of limitations, the Fourth Circuit was required to select the most analogous state limitations period by inquiring into the nature of the free speech claim.[14] The employee's second charge was based on the actions of union officials in preventing plaintiffs from speaking at a union meeting.[15]

At trial, the union moved for summary judgment, claiming that Virginia's two-year statute of limitations applicable to personal injury actions barred the claims.[16] Since the employees filed suit on May 12, 1976, the union asserted that employee claims which arose before May 12, 1974 were barred by the two-year statute of limitations.[17] Alternatively, the union argued that the three-year limitations period for oral contracts applied and operated to bar the claims arising before May 12, 1973.[18] Contending that Virginia's five-year limitation for actions based on written contracts was appropriate,[19] the employees asserted that their action was enforceable because the claim arose after May 12, 1971.[20] In the alternative, the union members urged the court to adopt the Virginia five-year limitation period governing personal actions which survive the plaintiff's

---

establish a breach of the duty of fair representation. *Id.* at 190. Most circuits have interpreted *Vaca* to hold that bad faith is not required to establish a breach in processing grievances. *See, e.g.*, Jones v. Trans World Airlines, Inc., 73 Lab. Cas. ¶ 14,455 at 4671 (2d Cir. 1974) (allegation based on arbitrary conduct or not based on some rational consideration will support claims against the union); Smith v. Pittsburgh Gage & Supply Co., 464 F.2d 870, 875 (3d Cir. 1972) (perfunctory or arbitrary handling of grievance might be sufficient basis for breach). *See* text accompanying note 49 *infra*.

[13] *Id.* at 772; *see* 29 U.S.C. § 411(a)(2) (1976). Congress enacted the LMRDA to guard the union members from the tyranny of the "all-powerful labor boss." *See* 105 CONG. REC. 6472 (1959) (remarks of Senator McClellan). The Act seeks to provide union members with the right to participate effectively in the internal affairs of their union. *See* Aaron, *Labor Management Reporting and Disclosure Act of 1959*, 73 HARV. L. REV. 851, 855-66 (1960) [hereinafter cited as Aaron]; Cox, *Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 819-23 (1960) [hereinafter cited as *Internal Affairs*].

Title I of the LMRDA § 101(a)(1-5), 29 U.S.C. § 411(a)(1-5) enumerates specific guarantees to all union members: equal rights and privileges in the nomination and election of union officers, freedom of speech and assembly, freedom from arbitrary increases in dues, fees and assessments, free access to judicial administrative and legislative processes, and procedural due process in internal union disciplinary proceedings. The right to free speech is articulated in § 101(a)(2) of the LMRDA, which states that members of a union shall have the right to meet and assemble freely with other members, to express any views, and to express his views at union meetings concerning candidates in an election of the labor organization or upon any business properly before the meeting. *Id.*

[14] 589 F.2d at 774; *see* text accompanying notes 4 & 5 *supra* & 52 *infra*.

[15] 589 F.2d at 773.

[16] *Id.; see* VA. CODE § 8.01-243(A) (1977). Prior to recodification in 1977, the above section appeared as VA. CODE § 8-24 (1950).

[17] Brief for Appellees at 2, Howard v. Aluminum Wkrs, 589 F.2d 771 (4th Cir. 1978).

[18] *Id.; see* VA. CODE § 8.01-246(4) (1977). Prior to recodification in 1977, the above section appeared as VA. CODE § 8-13 (1950).

[19] Brief for Appellants at 4, Howard v. Aluminum Wkrs, 589 F.2d 771 (4th Cir. 1978); *see* VA. CODE § 8.01-246(2) (1977). Prior to recodification in 1977, the above section appeared as VA. CODE § 8-13 (1950).

[20] Brief for Appellants at 2, Howard v. Aluminum Wkrs, 589 F.2d 771 (4th Cir. 1978).

death.[21] The district court granted the union's motion for summary judgment, holding that a breach of the duty of fair representation constituted a personal injury and, therefore, the two-year limitations period governed the action.[22] In addition, the court found the two-year limitations period operated to bar the plaintiff's free speech claim.[23]

The Fourth Circuit affirmed the district court's findings, holding that the two-year tort limitation barred both claims.[24] In affirming the lower court's decision with respect to the unfair representation claim, the Fourth Circuit distinguished the *Howard* case from its previous decision, *Kennedy v. Wheeling-Pittsburgh Steel Corp.*[25] In *Kennedy,* the Fourth Circuit held West Virginia's oral contract statute of limitations applied to bar an unfair representation claim against a union when joined with a contract claim against the employer.[26] The *Kennedy* court reasoned that the limitations period governing the timeliness of the claim against the union could not be longer than the period governing the claim against the employer.[27] The Fourth Circuit, in *Howard,* noted that other circuits also have held that where plaintiff's bring a fair representation suit in conjunction with a contract claim against the employer, substantial reasons arise for concluding that the same contract limitations period should apply to both claims.[28] The circuit court reasoned that the same limitations period should apply to both claims because the claims may be closely entwined.[29] In addition, courts have concluded that damages against the union are tied inextricably to the breach of contract.[30]

The Fourth Circuit emphasized that no valid contract rights existed between the employees and the union.[31] Rather, the duty of the union to fairly represent its members is implied in the statutory grant of exclusive bargaining authority and is independent of the union's contractual duty with the employer.[32] The court rejected the proposition that the fiduciary nature of the relationship between the union and its members converted

---

[21] *Id.* at 4; *see* VA. CODE § 8.01-243(B) (1977). Prior to recodification in 1977, the above section appeared as VA. CODE § 8-24 (1950).

[22] 589 F.2d at 773.

[23] *Id.*

[24] *Id.* at 774.

[25] 81 L.R.R.M. 2349 (4th Cir. 1972).

[26] *Id.* at 2350. Even though the controversy involved rights stemming from a written bargaining contract, the court applied the state's oral statute of limitations. The Fourth Circuit reasoned that the action usually will involve oral individual employment contracts and matters of proof comparable to claims on oral contracts. *Id.*

[27] *Id.*

[28] 589 F.2d at 773; *see, e.g.,* Butler v. Local 823, Int'l. Bhd. of Teamsters, 514 F.2d 442, 447-48 (8th Cir. 1975); Abrams v. Carrier Corp., 434 F.2d 1234, 1252 (2d Cir. 1970); *see* text accompanying note 6 *supra.*

[29] 589 F.2d at 773; *see* text accompanying note 6 *supra.*

[30] *See, e.g.,* Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 447 (8th Cir. 1975); Buchholtz v. Swift & Co., 62 F.R.D. 581, 604 (D. Minn. 1973); note 6 *supra.*

[31] 589 F.2d at 774. *But see* text accompanying note 63 *infra.*

[32] *Id.; see* text accompanying note 1 *supra.*

the statutorily based action into a contract action.[33] Additionally, the Fourth Circuit reasoned that the union could not bargain away the duty because it runs to union non-members as well as members, and, therefore, contract principles could not govern its operation.[34] The court concluded that the alleged charges were not based upon a failure to perform a contractual duty, but were grounded on the union's bad faith and arbitrary manner of performance.[35] The Fourth Circuit found that the district

---

[33] *Id.* Some courts view the relationship between the union, as exclusive bargaining agent, and the employees the union represents, as that of trustee and beneficiary. *See* Brotherhood of R.R. Trainmen v. Howard, 343 U.S. 768, 774 (1952); Trailmobile Co. v. Whirls, 331 U.S. 40, 68 (1947) (Jackson, J., dissenting). The courts deem the bargaining representative to hold the promises stated in the collective bargaining agreement as a fiduciary in trust for the benefit of the union members. To enforce the provisions of the collective bargaining agreement held in trust, the employee must prove that the union official's challenged conduct failed to comply with that required of a fiduciary. *See* Cox, *Individual Enforcement of Collective Bargaining Agreements*, 8 LAB. L. J. 850, 853-54 (1957).

The collective bargaining agreement is not an ordinary contract but is a code to govern the relationship between those functioning in the capacity of employer and employee. *See* John Wiley & Sons Inc. v. Livingston, 376 U.S. 543, 550 (1964). Although general areas of agreement are delineated, it is not practicable to make the contract the exclusive source of rights, remedies and duties. *See* Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 32 (1958). Therefore, particularly in the case of employment and labor contracts, the existence of union duties arising outside the contract are necessary to assure the employee adequate protection of his employment rights. *See* Vaca v. Sipes, 386 U.S. 171, 185-86 (1967).

[34] 589 F.2d at 774; *see* De Arroyo v. Sindicato De Trabujadores Packinghouse, AFL-CIO, 425 F.2d 281, 286 (1st Cir. 1970). The court in *De Arroyo* observed that an inequity would result between members and non-members if the longer contract limitation was applied to unfair representation suits brought by members and the shorter tort statute of limitations applied to the suits by non-members. *Id. See also* Cox, *The Duty of Fair Representation*, 2 VILL. L. REV. 151, 157 (1957).

[35] 589 F.2d at 774. One test used to distinguish between contract liability and tort liability is whether the action arises as a result of misfeasance or non-feasance on the part of the defendant. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 92, at 613-18 (4th ed. 1971) [hereinafter cited as PROSSER]. Misfeasance, doing an act improperly, is usually the basis for liability in tort. *Id.* § 92, at 617. Non-feasance, the failure to perform an agreed-upon act, is usually the basis for contractual liability. *Id.* § 92, at 614. In *Howard*, the Fourth Circuit concluded that the acts the plaintiff claimed caused the breach of the duty of fair representation indicate misfeasance due to bad faith or arbitrary manner of performance. 589 F.2d at 774.

The fundamental difference between tort and contract lies in the nature of the interests protected. PROSSER, *supra*, § 92, at 613. Courts impose contract obligation because the conduct of the parties manifests consent, and the parties owe a duty only to specific persons named in the contract. *Id.* Duties regulating conduct which give rise to tort actions are imposed by law on a large class of parties and not necessarily based on the will of the parties. *Id.* Often courts will find tortious conduct gives rise to a tort action despite the fact that the relationship giving rise to the duty was one established by contract. *See* Note, *The Elastic Concept of Tort and Contract As Applied by the Courts of New York*, 14 BROOKLYN L. REV. 196, 201 (1948). To determine whether the acts of the defendant in the performance of his contractual duties give rise to an action in tort, the inquiry is whether the defendant has gone so far in the performance of the contract that his affirmative conduct has begun to affect the interests of the plaintiff beyond the terms of the contract. *See* H.R. Mock Co. v. Rensselear Water Co., 247 N.Y. 160, __, 159 N.E. 896, 897 (1928); W. PROSSER, *The Border-*

court appropriately applied the two-year tort statute of limitations because the union's conduct gave rise to a claim analogous to an action in tort.[36]

The Fourth Circuit also affirmed the district court's dismissal of the free speech claim under section 101(a)(2) of LMRDA.[37] Inquiring into the nature of the free speech claim, the Fourth Circuit noted that other courts have found the denial of section 101(a)(2) rights similar to a personal injury under state law and have applied the tort statute of limitations.[38] The court, in *Howard,* agreed with the lower court and found the nature of the free speech claim to be closely akin to a personal injury claim under Virginia law.[39]

Several circuits are in accord with the Fourth Circuit's decision in

---

land Between Tort and Contract, in SELECTED TOPICS ON THE LAW OF TORTS 380, 380 (1953).

To the extent that a breach of the duty of fair representation can occur from arbitrary or negligent conduct of the union, *see* text accompanying note 49 *infra,* the courts use an objective reasonable man standard to determine the care with which union officials must proceed in representing employee interests. *See* PROSSER, *supra* § 132, at 150-52. The torts that arise from the violation of a negligence standard should be distinguished from intentional torts, which require a degree of subjective intent to bring about a result which will invade the interests of another. *See id.* § 8, at 31. If courts required bad faith to breach the duty of fair representation, as opposed to arbitrary conduct, a finding of subjective intent would be necessary and therefore the duty would be more akin to an intentional tort. *See* Comment, *Labor Law-Negligent Failure to File a Grievance Breaches Union's Duty of Fair Representation,* 10 SUFFOLK L. REV. 642, 649 (1976).

[36] The court in *Howard,* specifically identified the similarity of the unfair representation claim to actions brought under § 1983 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1976). The court noted that the Fourth Circuit has applied the Virginia two-year tort statute of limitations to § 1983 actions. 589 F.2d at 774. *See* Almond v. Kent, 459 F.2d 200, 203 (4th Cir. 1972). Allegations of discriminatory treatment in an employment setting demonstrate the similarity of unfair representation claims to § 1983 claims. Employment discrimination is actionable under the equal protection clause or the due process clause of the fourteenth amendment and therefore gives rise to a claim under § 1983. *See* Bireline v. Seagondollar, 567 F.2d 260, 262-63 (4th Cir. 1977); Wilkinson v. Hamel, 381 F. Supp. 768, 769 (W.D. Va. 1974). Where a union does not protect an employee from an employer's discriminatory treatment, the employee will have a claim for the breach of the duty of fair representation. *See* Griffin v. UAW, 469 F.2d at 181-83 (4th Cir. 1972); Wheeler v. Brotherhood of Loco. Firemen, 324 F. Supp. 818, 820 (D. S.C. 1971). *See also* Allen v. Gifford, 462 F.2d 615, 615 (4th Cir.), *cert. denied,* 409 U.S. 876 (1972) (applying two-year Virginia tort statute of limitation to a § 1982 action).

[37] 589 F.2d at 774; *see* note 10 *supra.*

[38] 589 F.2d at 774; *see, e.g.,* Sewell v. IAM, 445 F.2d 545, 550 (5th Cir. 1971), *cert. denied,* 404 U.S. 1024 (1972); Woods v. Local 613, IBEW, 404 F. Supp. 110, 113 (N.D. Ga. 1975). Since the basis of Sewell's grievance was the claimed denial of a right under the LMRDA, the court concluded that the right arose from federal law rather than from a contract, and therefore was a claim in the nature of tort. *Id.* Although the court in *Sewell* found that the denial of the right to free speech under the LMRDA gives rise to liability analogous to tort liability, the Fifth Circuit in Dantagnan v. ILA Local 1418, 496 F.2d 400 (5th Cir. 1974), limited the application of the tort limitations period to where the plaintiff sues to restore benefits of which he was unlawfully deprived, rather than to collect damages incurred from the wrongful act. *Id.* at 403.

[39] 589 F.2d at 774.

Howard characterizing the breach of the duty of fair representation as a personal injury tort action.[40] Although the tort statutes of limitations differ between the states, circuit courts have held that their respective tort limitations periods are appropriate for an unfair representation action against the union based on an arbitrary disposition of employee grievances, even though joined with a contract action against an employer.[41] Another court has held that the tort two-year statute of limitations governs an action for breach of the duty of fair representation where physical injury resulted from the breach.[42] Two other circuits have demonstrated an inclination to utilize the tort limitation period when adjudicating a separate unfair representation action.[43] Both courts dealt only with fair representation suits brought in conjunction with contract actions against the employer and applied the contract limitation.[44] The courts stated, however, that where an employee brings a single action for the breach of the duty of fair representation, the courts must characterize the explicit nature of the alleged wrong.[45] The circuit courts have stressed that their application of the contract limitation does not apply to all fair representation suits and that, in other contexts, the tort characterization or some other characterization might be appropriate.[46] Courts have applied statutes of limitations for actions based upon liability created by statute where the plaintiff's brought an unfair representation action against a union in conjunction with a contract action against the employer.[47]

The Fourth Circuit's decision in *Howard* to characterize unfair representation as a tort also is in accord with the Fourth Circuit's analysis of the duty of fair representation outside the statute of limitations context. The union's duty originates independently of the contractual duties arising from the collective bargaining agreement.[48] The Fourth Circuit ad-

---

[40] *See, e.g.*, Read v. Local 1284, IAM, 528 F.2d 823, 825 (3d Cir. 1975); Sanderson v. Ford Motor Co., 483 F.2d 102, 114 (5th Cir. 1973); De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 287 (1st Cir. 1970). The district courts in the Fourth Circuit which have been confronted with separate actions against the union for breach of the duty of fair representation follow the reasoning and outcome of the *Howard* decision. *See, e.g.*, Jamison v. Olga Coal Co., 335 F. Supp. 454, 463 (S.D. W.Va. 1971); Tippett v. Liggett & Myers Tobacco Co., 316 F. Supp. 292, 297 (M.D. N.C. 1970).

[41] *See, e.g.*, Sanderson v. Ford Motor Co., 483 F.2d 102, 114 (5th Cir. 1973); De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 287 (1st Cir. 1970). In declining to characterize the action for unfair representation as a contract action, the court in *De Arroyo* stated, "[T]he union's duty seems more akin to, though less rigorous than, the duty of care normally associated with tort actions." *Id.*

[42] *See* Read v. Local 1284, IAM, 528 F.2d 823, 825 (3d Cir. 1973).

[43] *See* Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 448 (8th Cir. 1975); Abrams v. Carrier Corp., 434 F.2d 1234, 1252 (2d Cir. 1970).

[44] *See* 514 F.2d at 445; 434 F.2d at 1239.

[45] *See* 514 F.2d at 448; 434 F.2d at 1248.

[46] 514 F.2d at 448; 434 F.2d at 1248.

[47] *See* Price v. Southern Pac. Trans. Co., 100 L.R.R.M. 2671, 2674 (9th Cir. 1978); Gray v. International Ass'n of Heat & Frost Insulators, 416 F.2d 313, 316 (6th Cir. 1969).

[48] *See* Griffin v. UAW, 469 F.2d 181, 184 (4th Cir. 1972). *See also* Hines v. Anchor Motor Freight, Inc. 424 U.S. 554, 571 (1975). The Supreme Court in *Hines* addressed a

heres to the view that negligence alone constitutes a violation of the duty of fair representation.[49] By adopting the position that arbitrary conduct alone can constitute a violation of the duty, apart from a showing of bad faith,[50] the Fourth Circuit implicitly recognizes fair representation as an affirmative duty on the part of the union to advance the interests of each employee consistent with a reasonable standard of care.[51] Since the duty of fair representation arises from a voluntary relationship between a union and its employees, is imposed by law, and prohibits negligent conduct by the union toward any one of a large class of employees, the Fourth Circuit's analysis of the duty incorporates the elements of an obligation classified within tort law.[52]

---

factual situation which demonstrates the existence of the duty of fair representation apart from the duties imposed by the collective agreement. The Supreme Court ruled in *Hines* that "[t]he union's breach of [the] duty relieves the employee of an expressed or implied requirement that disputes be settled through contractual grievance procedures. . . ." *Id.* at 567. Therefore, the union may be liable for a breach of fair representation independently of a breach of the collective bargaining agreement. *See id.* at 571. By employing a procedural due process argument, the *Hines* court illustrated that the nature of the duty of fair representation requires the consideration of factors distinct from the terms of the collective agreement, which merely requires compliance with the stated provisions to secure the performance of contractual remedies. *See* Vaca v. Sipes, 386 U.S. 171, 185 (1967).

The Fourth Circuit in *Griffin* evidenced support for the view that a breach of the duty of fair representation is separate from the question of employer liability by holding a union liable for breach where the union handled a grievance in an arbitrary manner. *Id.* at 184. The employer was not joined because the contractual provisions were adhered to that regulated the operation of the grievance process. *Id. See* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 807 (1973); Ratner, *Some Contemporary Observations on Section 301*, 52 GEO. L. REV. 260, 263-66 (1964); text accompanying note 35 *supra*.

[49] *See* Griffin v. UAW, 469 F.2d 181, 183 (4th Cir. 1972). After the Supreme Court's decision in Vaca v. Sipes, 386 U.S. 171 (1967), *see* text accompanying note 2 *supra*, the circuits were divided on the issue of whether *Vaca* required bad faith conduct on the part of the union in every case, or whether discriminatory, bad faith or arbitrary conduct alone would suffice to constitute a breach of duty. Several circuit courts insisted upon a showing of bad faith in every case. *See, e.g.*, Local 13 ILWU v. Pacific Maritime Ass'n, 441 F.2d 1061, 1067 (9th Cir. 1971), *cert. denied*, 404 U.S. 1016 (1972); Freeman v. Grant Int'l Bhd. Loco. Eng'rs, 375 F. Supp. 81, 93 (S.D. Ga. 1974), *aff'd per curiam*, 493 F.2d 628 (5th Cir. 1974). Other circuit courts require a violation of just one of the three standards: bad faith, arbitrary or discriminatory conduct. *See, e.g.*, Ruzicka v. General Motors Corp., 523 F.2d 306, 309 (6th Cir. 1975); De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 282, 284 (1st Cir. 1970). The Fourth Circuit, in *Griffin* expressly rejected the opportunity to base its finding of breach on bad faith and adopted the arbitrariness standard as the basis for its finding. *Id.* at 183. Many commentators have noted that the facts in *Griffin* reveal nothing more serious than negligent handling of an employee grievance. *See* Clark, *supra* note 1, at 1133-34; Comment, *The Union's Duty of Fair Representation - Fact or Fiction*, 60 MARQ. L. REV. 1116, 1130 (1977).

[50] The Fourth Circuit, in Griffin v. UAW, 469 F.2d 181 (4th Cir. 1972), held that "[w]ithout any hostile motive of discrimination and complete good faith . . .," a union may nevertheless pursue a course of action or inaction that is so unreasonable and arbitrary as to constitute a violation of the duty of fair representation. *Id.* at 183.

[51] *See* text accompanying notes 2 & 35 *supra*.

[52] *See* text accompanying note 34 *supra; Developments In Law, Statutes of Limitations*, 63 HARV. L. REV. 1177, 1192-98 (1950) (discussing principles used by courts to select

Additionally, the Fourth Circuit's decision in *Howard* is consistent with Virginia courts' interpretations of that state statute of limitations. Federal courts defer to state law to aid in the characterization of a cause of action, unless the state characterization is inconsistent with federal law.[53] The general principles followed by Virginia courts require that the wrong alleged, and not the form of the action, control the selection of the limitation period.[54] In Virginia, a personal injury action is governed by the two-year tort statute of limitations,[55] regardless of whether it is based upon an alleged breach of contract or an alleged tort.[56] The five-year written contract statute of limitations[57] applies where "but for" the contract, no duty between the parties would have existed.[58] Considering the choice confronting the *Howard* court, between contract limitations periods and tort limitations periods, the decision was proper in light of the general principles used by the Virginia courts for applying statutes of limitations.[59]

The Fourth Circuit's characterization of the free speech claim under section 101(a)(2) of the LMRDA as sounding in tort is consistent with the development, from common law to its present statutory form, of the pro-

---

statutes of limitations for various causes of actions); Note, *A Limitation On Actions For Deprivation of Federal Rights*, 68 COLUM. L. REV. 763, 764-68 (1968) (analyzing approaches to selection of limitations period where federal statute does not prescribe a limitation period).

[53] *See* text accompanying note 5 *supra*.

[54] *See* Carva Food Corp. v. Dawley, 202 Va. 543, 546, 118 S.E.2d 664, 667 (1961); Birmingham v. Chesapeake & Ohio R.C., 98 Va. 547, 548, 37 S.E. 17, 17 (1900).

[55] *See* VA. CODE § 8.01-243(A) (1977).

[56] *See* Tyler v. R.R. Street Co., 322 F. Supp. 541, 543 (E.D. Va. 1971); Insurance Co. of North America v. General Elec. Co., 376 F. Supp. 638, 641 (W.D. Va. 1972); Friedman v. Peoples Serv. Drug Stores, Inc., 208 Va. 700, 703-04, 160 S.E.2d 563, 566 (1968).

[57] *See* VA. CODE § 8.01-246(2) (1977).

[58] *See* Comptroller of Virginia *ex rel.* Va. Mil. Inst. v. King, 217 Va. 751, 758-59, 232 S.E.2d 895, 899-900 (1977); Oleyar v. Keer, 217 Va. 88, 90, 225 S.E.2d 398, 402 (1976). The Virginia Supreme Court in *Keer* set forth the principle which controls the selection of contract statutes of limitations. The action is founded in contract rather than tort if the cause of action is for an act of omission or non-feasance which, without the contract to establish what is left undone, would not give rise to any cause of action. If, on the other hand, the relation between the parties is that a duty of care arises from that relationship, irrespective of contract, then the action is one in tort. *Id.* at 90; 225 S.E.2d at 399-400 (*citing* BURK, PLEADINGS AND PRACTICE § 234 (4th ed. 1952)).

[59] Concurring only in the result in *Howard*, Judge Widener concluded that the timeliness of the action would be governed by the one-year limitation for personal property actions that do not survive the death of the injured party. 589 F.2d at 774. When the Virginia Code was revised in 1977, the one-year limitations period for property damage was eliminated. The revised Virginia statute for survival of actions states that every legal and equitable cause of action survives the death of the injured party or the defendant. *See* VA. CODE § 8.01-25 (1977). The revised statute of limitations provisions for personal action for injury to property provides only a five-year limitation for such actions. *See* VA. CODE § 8.01-243(B) (1977). However, the revised Virginia Code provides a general one-year limitation period for all personal actions for which no limitation is otherwise prescribed. *See* VA. CODE § 8.01-248 (1977). Consequently, this catch-all provision arguably could be applied to unfair representation actions. 589 F.2d at 775 (Widener, J., concurring).

tections afforded to union members to assure participation in union operations.[60] At common law, courts equated the constitution and by-laws of the union with terms of a contract which members accepted upon joining the organization.[61] Therefore, the union's obligation to protect members' free speech rights arose from the contract and thus the contract statutes of limitations governed.[62] Inequities resulted from courts' strict adherence to the union's by-laws causing the courts to recognize the public posture of a labor union and the concomitant inherent constitutional rights that extended to union members.[63] By relying on protections arising outside the contractual obligations, the federal courts reasoned that the union's violation of the members' free speech rights sounded in tort.[64]

Congress enacted section 101(a)(2) of the LMRDA to reinforce the external standards of conduct imposed on union officials in the performance

---

An obstacle to the application of the one-year limitations period is Van Horn v. Lukhard, 392 F. Supp. 384 (E.D. Va. 1975), which was the basis for repealing the Virginia one-year limitation applicable to property tort actions. *Id.* at 388. The *Van Horn* court held that the one-year property tort limitation was unconstitutional when applied to civil rights cases under 42 U.S.C. § 1983 (1976). *Id.* at 388. The court found the one-year limitation unconstitutional because it burdened the assertion of a federally created right of substantial importance. *Id.* at 389. The *Van Horn* court, reimposed the prior rule of the Fourth Circuit that the two-year limitation applicable to personal injury torts applies to civil rights claims. *Id.* at 391.

The district court in *Van Horn* reasoned that the determination of whether the one-year limitation period impermissibly burdened a federally created right demanded an assessment of the relative importance of policies underlying § 1983. *Id.* at 389. The court found the one-year limitation emasculated the broad, comprehensive and remedial protections envisioned by the Act. *Id.* at 390. Other federal rights that are of "substantial importance" include the right to vote, the right to free speech and the right to be free from invidious discrimination. *Id.* In Brown v. Blake & Bane, Inc., 409 F. Supp. 1246 (E.D. Va. 1976), the court, relying on *Van Horn,* held the one-year limitation an impermissible burden on the enforcement of § 1982 rights. 409 F. Supp. at 1248. Applying the reasoning of the *Van Horn* decision to an unfair representation suit, the argument clearly could be made that the right to fair representation is of "substantial importance" and the application of a one-year limitation would burden the assertion of a federally created right. The duty of fair representation is of equal importance to other paramount federal rights because it protects individuals' economic livelihood.

[60] *See generally* Beaird & Player, *Free Speech and the Landrum-Griffin Act,* 25 ALA. L. REV. 577, 581-93 (1973) [hereinafter cited as Beard & Player]; Summers, *Legal Limitations On Union Discipline,* 64 HARV. L. REV. 1049, 1050-59 (1951).

[61] *See* Porth v. Carpenters Local 201, 171 Kan. 177, _; 231 P.2d 252, 254 (1951); De Mille v. American Fed'n of Radio Artists, 31 Cal. 2d 139, _, 187 P.2d 769, 774 (1947); Polin v. Kaplan, 257 N.Y. 277, 281, 177 N.E. 833, 834 (1931).

[62] *See* text accompanying note 58 *supra.*

[63] *See* Crossen v. Duffy, 90 Ohio App. 252, _, 103 N.E.2d 769, 777 (1951). In *Duffy,* the court stated that union members retain their constitutional right to freedom of speech within a union because unions play a pivotal role in special relation to their members and to the state. *Id.; see* Madden v. Atkins, 4 N.Y.2d 283, 293, 151 N.E.2d 73, 78 (1958). *But see* Winter v. Local 1639, Int'l. Bhd. of Teamsters, 569 F.2d 146, 149 (D.C. Cir. 1977) (by-laws and constitution create a contract even after enactment of LRMDA); Orphan v. Furnco Construction Corp., 466 F.2d 795, 801 (7th Cir. 1972) (same).

[64] *See* text accompanying notes 26, 35 & 58 *supra.*

of the organization's administrative affairs.[65] To the extent that courts place exclusive reliance on the federal statute and not the implied contract created by the union by-laws, the denial of the section 101(a)(2) right is analogous to tort liability, and therefore the two-year tort statute of limitations should govern.

Constitutional considerations provide additional support for the Fourth Circuit's decision to apply the two-year statute of limitations rather than the one-year limitation for personal actions which do not survive the plaintiff's death. If the court applied a one-year limitation to the free speech claim, an impermissible burden would be placed on a federal right of substantial importance.[66] Not only is the substantial importance of the right to free speech in union affairs confirmed by its origin in the first amendment of the Constitution,[67] but the courts have given broader protection to section 101(a)(2) rights than the first amendment rights. Consequently, a court's finding that a member's rights would be unduly burdened by a short limitations period[68] would be substantially supported.

The duty of fair representation and the right to free speech under the LMRDA are judicially enforced safeguards designed to protect individual employees from abuse of a union's power.[69] However, excessive judicial intervention on behalf of individuals can weaken the union's institutional strength.[70] The Fourth Circuit's decision in *Howard* to apply the tort two-year statute of limitations to claims brought separately against unions for unfair representation,[71] and to claims for the denial of free speech rights

---

[65] *See Internal Affairs, supra* note 10, at 831. Cox noted the important role of the government in enforcing democratic procedures in internal union affairs. He stated that the task of assuring workers the ultimate control of the union affairs should be undertaken by the law because the law gives a union the quasi-legislative power to bind employees in the bargaining court without their consent. *Id.* at 30; Aaron, *supra* note 10, at 855.

[66] *See* note 54 *supra.*

[67] U.S. CONST. *amend. I; see* note 59 *supra.*

[68] The only potential limitation on union members' otherwise absolute right to free speech is the proviso to section 101(a)(2) of the LMRDA. The proviso states that the exercise of the freedom of speech cannot impair the right of a labor organization to enforce reasonable rules as to the responsibility of every member toward the organization as an institution. Also, the exercise of free speech cannot impair the union's right to require members to refrain from conduct that would interfere with the performance of its legal or contractual obligations. 29 U.S.C. 411(a)(2) (1976). But the courts have been reluctant to deny free speech rights in favor or upholding the institutional strength of the union. *See, e.g.,* Salzhandler v. Caputo, 316 F.2d 445, 451 (2d Cir.), *cert. denied,* 375 U.S. 946 (1963). *See also,* Fulton Lodge 2, IAM v. Nix, 415 F.2d 212, 217-18 (5th Cir. 1969), *cert. denied,* 406 U.S. 946 (1972); International Bhd. of Boilermakers v. Rafferty, 348 F.2d 307, 311-14 (9th Cir. 1965). The only limitation on the exercise of section 101(a)(2) free speech rights recognized by the courts is that a president of a union can summarily discharge for disloyalty, appointed union officials who are responsible for implementing presidential policy. *See* Newman v. Local 1101, Communications Wkrs, 570 F.2d 439, 444-45 (2d Cir. 1978); Wambles v. International Bhd. of Teamsters, 488 F.2d 888, 890 (5th Cir. 1974). *But see,* Bradford v. Textile Wkrs, 563 F.2d 1138, 1141-42 (4th Cir. 1977).

[69] *See* text accompanying notes 1 & 10 *supra.*

[70] *See* Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 563-64 (1976); Clark, *supra* note 2, at 1120-21; Beaird & Player, *supra* note 59, at 579-81.

[71] 589 F.2d at 774.

under the LMRDA,[72] preserves a delicate balance between union strength and individual employee rights.

As a result of the *Howard* decision, the Fourth Circuit will apply a different statute of limitations to a claim for unfair representation depending on whether the employee alleges a contract claim against the employer in the same suit.[73] By acknowledging the substantial reasons for applying the contract limitations period uniformly to the claim against the employer in a joint action,[74] the Fourth Circuit demands the parties' adherence to the collective bargaining agreement, and thereby protects individual employee rights.[75] The susceptibility of the union to liability for five years rather than two years in a joint action does not jeopardize the union's institutional strength, because the union assumes the responsibility for administering the collective bargaining agreement when it negotiates with the employer on behalf of the employees.[76] The members' claim in a separate action for the breach of the duty of fair representation usually is unrelated to the collective bargaining agreement.[77]

Although the Fourth Circuit did not rely on the labor contract in *Howard,* the application of the two-year tort statute of limitations will provide an equitable balance between union strength and individual employee rights. The two-year statute of limitations will limit the potential for excessive union liability posed by the Fourth Circuit's application of the negligence standard to violations of the duty of fair representation.[78] By applying the two-year tort statute of limitations rather than a five-year contract limitations period to the free speech claim under the LMRDA, the Fourth Circuit has provided a procedural limitation on the union's liability which compensates for the inadequate restriction the proviso in section 101(a)(2) is supposed to impose substantively.[79]

NICHOLAS H. HANTZES

---

[72] *Id.*

[73] *See* text accompanying note 26 *supra.*

[74] 589 F.2d at 773, *see* text accompanying note 6 *supra.*

[75] An employee's claim for unfair representation based on the union's failure to administer the collective bargaining agreement in good faith arises because the union is compromising the rights guaranteed to employees in the labor agreement. *See* Vaca v. Sipes, 386 U.S. 171, 184-87 (1967); Humphrey v. Moore, 375 U.S. 335, 342 (1964). Assuming the collective bargaining agreement accepted by the employees reflects an equitable balancing of competing employee interests, judicial enforcement of the agreement will preserve the balance between individual rights and union strength. *See* Summers, *Individual Rights In Collective Agreements and Arbitration,* 37 N.Y.U. L. REV. 362, 389-90 (1962); Dunau, *Employee Participation In the Grievance Aspect of Collective Bargaining,* 50 COLUM. L. REV. 731, 747-51 (1950).

[76] *See* § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(A) (1976). *See also,* Summers, *supra* note 1, at 254-57.

[77] *See* Hill v. Iron Wkr's., Local 125, 520 F.2d 40, 41 (6th Cir. 1975); Adamszewski v. Local 1487 IAM, 496 F.2d 777, 780 (7th Cir.), *cert. denied,* 419 U.S. 997 (1974); Nedd v. UMW, 400 F.2d 103, 105-06 (3d Cir. 1968).

[78] *See* text accompanying note 49 *supra.*

[79] *See* note 68 *supra.*