Washington and Lee Law Review

Volume 39 | Issue 1 Article 11

Winter 1-1-1982

The Duty Of Fair Representation In Grievance Administration: A Specific Test Modeled On Judge Bazelon'S Dissent In United States V. Decoster

THE DUTY OF FAIR REPRESENTATION IN GRIEVANCE ADMINISTRATION: A SPECIFIC TEST MODELED ON JUDGE BAZELON'S DISSENT IN *UNITED STATES V. DECOSTER*

The current test for evaluating the adequacy of a union's representation of an employee in grievance proceedings is imprecise and general.[1] In most jurisdictions, the test for evaluating the adequacy of an attorney's representation of a criminal defendant is similarly lacking in specific descriptive content.[2] Judge Bazelon, dissenting in *United States v. Decoster*,[3] advocated a test that sets forth specific duties to give courts clear guidance in determining the effectiveness of an attorney's representation of a criminal defendant.[4] Incorporating the existing case law on the union's duty of fair representation into Judge Bazelon's analytic framework will provide courts and juries clearer guidance in determining the adequacy of a union's representation of an employee in grievance proceedings.

The duty of fair representation is a judicially created doctrine developed to ensure that unions do not abuse the right of exclusive representation of employees.[5] Federal labor law establishes the union elected by a majority of employees in a bargaining unit[6] as the exclusive representative of all bargaining unit employees in negotiating the terms

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[1] *See* text accompanying notes 13-23 *infra*. The vagueness of the test for evaluating union representation in grievance proceedings has led to many attempts at clarification. *See generally* Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973) [hereinafter cited as Feller]; Flynn & Higgins, *Fair Representation: A Survey of the Contemporary Framework and a Proposed Change in the Duty Owed to the Employee*, 8 SUFFOLK U.L. REV. 1096 (1974) [hereinafter cited as Flynn & Higgins]; Leffler, *Piercing the Duty of Fair Representation: The Dichotomy Between Negotiations and Grievance Handling* 1979 U. OF ILL. L. FOR. 35 [hereinafter cited as Leffler]; Steinhauer, IBEW v. Foust: *A Hint of Negligence in the Duty of Fair Representation*, 32 HASTINGS L.J. 1041 (1981) [hereinafter cited as Steinhauer]; Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55 (1972) [hereinafter cited as Tobias]; Note, *The Duty of Fair Representation: The Emerging Standard of the Union's Duty in the Context of Negligent Arbitrary or Perfuctory Grievance Administration*, 46 MO. L. REV. 142 (1981).

[2] *See* text accompanying notes 24-27 *infra*.

[3] 624 F.2d 196, 264 (D.C. Cir. 1976) (Bazelon, J., dissenting).

[4] *See* text accompanying note 31 *infra*.

[5] *See* Vaca v. Sipes, 386 U.S. 171, 181 (1967); Steele v. Louisville & N. R. Co., 323 U.S. 192, 203 (1944).

[6] A bargaining unit is a group of jobs or job classifications, sharing a common interest, which a union can represent effectively. *See* R. GORMAN, BASIC TEXT ON LABOR LAW, 66-74 (1976). Section 9(b) of the National Labor Relations Act (NLRA) grants the National Labor Relations Board (NLRB) the authority to determine whether the parameters of a particular bargaining unit are appropriate. *See* 29 U.S.C. § 159(b) (1976).

of a collective bargaining agreement with an employer.[7] Through the collective bargaining agreement, unions can establish themselves as the exclusive representative of employees in contractual grievance procedures, which provide employees with a remedy for an employer's breach of the collective bargaining agreement.[8] To avoid the expense of defending breach of contract suits in court, employers require that the collective bargaining agreement declare the grievance procedures to be the employee's exclusive and final remedy.[9] Courts will dismiss an employee's suit if the employee has not attempted to secure a contractual remedy[10] and will defer to the outcome of the grievance proce-

[7] *See* National Labor Relations Act (NLRA) § 9(a), 29 U.S.C. § 159(a) (1976).

[8] Section 9(a) of the NLRA permits the union to become the exclusive representative of the employee in grievance proceedings. *See* 29 U.S.C. § 159(a) (1976). Unions seek the right to exclusive representation to enhance their prestige among the employees and with the employer, and to stabilize the meaning of the collective agreement, which operates as the law of the plant. *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965); *Cox Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 625-26 (1956). The vast majority of collective bargaining agreements provide for a grievance procedure with union control. *See* E. ELKOURI & F. ELKOURI, HOW ARBITRATION WORKS, 7 (3d ed. 1973) [hereinafter cited as ELKOURI & ELKOURI]; Flynn & Higgins, *supra* note 1, at 1105 n.43.

The grievance procedures begin when a employee turns over a grievance slip to the shop steward, an employee who is also a union official, and the shop steward attempts to settle the grievance with the plant foreman. *See* Flynn & Higgins, *supra* note 1, at 1105 n.4; ELKOURI & ELKOURI, *supra*, at 125. If the shop steward is unsuccessful, a union business agent, a union professional who generally does not work for the employer, begins presenting the grievance to joint grievance committees composed of equal numbers of union and employer personnel. *See* Tobias, *supra* note 1, at 58-59; ELKOURI & ELKOURI, *supra*, at 120-21. The grievance committee then attempts resolution or settlement of the grievance. *See id.* at 120-21. If the committee does not reach a resolution or settlement, the grievance is appealed to higher stages of grievance committees composed of higher ranking management personnel and members of the national or international union. *Id.* At the higher levels of the grievance committees, the shop committeemen from the local union often present the grievance. *See* Feller, *supra* note 1, at 836. If the grievance is not resolved, most collective agreements provide for final and binding arbitration. *See* ELKOURI & ELKOURI, *supra*, at 120. The arbitrator, a neutral party, may decide the grievance not only on the basis of evidence presented but also on the basis of arbitration briefs. *See id.* at 230-32, 252. The cost of arbitration, shared by the union and employer, can vary according to the length of the hearing and the use of transcripts and briefs. *See id.* at 22, 218.

Important contractual rights are at stake in the grievance procedures. *See* Tobias, *supra* note 1, at 58. Wages fringe benefits, seniority protection against layoffs, and a retirement pension are some important rights, but the most important is the right to be free from discharge (the "capital punishment" of labor-management relations) except for just cause. *Id.* A discharged employee, who has been with an employer for a significant period, will lose seniority, chances for promotion, vacation benefits, pension rights, and, in general, economic security. *Id.*

[9] *See, e.g.*, Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1964); Feller, *supra* note 1, at 806; Tobias, *supra* note 1, at 63. Employers consider the grievance procedures as a quid pro quo for the employees "no-strike clause" in the contract, which provides that employees will not strike for the duration of the collective agreement. *See* BNA, THE DEVELOPING LABOR LAW 534-35 (Morris ed. 1971); Feller, *supra* note 1, at 817.

[10] *See* Republic Steel Corp. v. Maddox, 379 U.S. 650, 653 (1965) (employee must attempt to exhaust contractual procedures before bringing suit in court). Courts will excuse an employee's failure to exhaust contractual remedies if the employer repudiates the

dures.[11] If, however, a union inadequately represents an employee, courts will permit the employee to sue the union for breach of the duty of fair representation and then, if successful, the employer for breach of contract.[12]

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grievance procedures, if exhausting the procedures would be futile, or if the union has breached the duty of fair representation. *See, e.g.*, Glover v. St. Louis-S.F. Ry., 393 U.S. 324, 330-31 (1969) (failure to use grievance procedures excused because futile); Drake Bakeries, Inc. v. Local 50, Am. Bakery Workers, 370 U.S. 524, 262-63, 266-67 (1962) (employer repudiation of grievance procedures excused exhaustion); Kaylor v. Crown Zellerbach, Inc., 643 F.2d 1362, 1366 (9th Cir. 1981) (employee does not have to exhaust contractual remedies if employers conduct amounts to repudiation of collective agreement); Battle v. Clark Equip. Co., 579 F.2d 1338, 1344-46 (7th Cir. 1978) (exhaustion of grievance procedures excused where union would have to prove its own wrong); De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 285 (1st Cir.) (breach of the duty of fair representation excuses employee from exhausting contractual grievance procedures), *cert. denied*, 400 U.S. 877 (1970). *See generally*, Flynn & Higgins, *supra* note 1, at 1140-41; Simpson & Berwick, *Exhaustion of Grievance Procedures and the Individual Employee*, 51 TEX. L. REV. 1179, 1200-13 (1973); Tobias, *supra* note 1, at 67-70.

[11] *See* Hines v. Anchor Motor Freight Inc., 420 U.S. 554, 563 (1976). Federal labor law favors the private means of dispute resolution agreed upon by the parties to the collective agreement. *See* Labor Management Relations Act, § 203(d), 29 U.S.C. § 173(d) (1976). Courts are reluctant to interfere with the private resolution of grievances. *See* Imel v. Zohn Mfg. Co., 481 F.2d 181, 183-84 (10th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974). In the *Steelworker's Trilogy*, the Supreme Court established a judicial preference for the finality and jurisdictional scope of arbitration. *See* United Steelworkers v. American Mfg. Co., 363 U.S. 564, 567-68 (1960) (judiciary may not usurp function of arbitration by reviewing merits of dispute); United Steelworkers v. Warrior & Gulf Nav. Co., 363 U.S. 574, 583 (1960) (doubts as to applicability of arbitration should be resolved in favor of abitration); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960) (court affirmed district court order to employer to comply with arbitration award). *See* Note, *An Analysis of a Technique of Dispute Settlement: The Expanding Role of Arbitration*, 7 SUFFOLK L. REV. 618, 624-28 (1973). Courts however will not defer to the finality of abitration if an employee's federal statutory right, a right not confered by the collective agreement, is at stake. *See* Barrentine v. Arkansas-Best Freight Sys., Inc., 49 U.S.L.W. 4347 (April 6, 1981) (minimum wage under Fair Labor Standard Act); Alexander v. Gardner-Denver Co., 415 U.S. 36, 47-49 (1974) (right to be free from discrimination under Title VII of the Civil Rights Act of 1964). In addition, courts may vacate an arbitration award if there was fraud, misconduct on the part of the arbitrator, or if the award is against public policy or is based upon a manifest disregard of the law. Jensen v. Farrell Lines Inc., 477 F. Supp. 335, 348-49 (S.D.N.Y. 1979).

[12] *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976); Vaca v. Sipes, 386 U.S. 171, 186 (1967). Jurisdiction for an employee suit against the union and employer rests on the Labor Management Relations Act § 301(a), 29 U.S.C. § 185(a) (1976), which provides that suits for violation of a contract between an employer and a labor organization may be brought in any district court of the United States. Although § 301(a) does not refer to suits brought by individual employees against an employer or a labor organization, the Supreme Court in Smith v. Evening News Ass'n, 371 U.S. 195 (1962) granted an employee the right to sue an employer and a union under § 301(a). *Id.* at 200-01. The Court reasoned that an individual employee's interests are intertwined with the union's interests and that individual employee claims precipitate important questions concerning the interpretation and enforceability of the collective agreement. *Id.* Further, the need for a uniform body of federal substantive law requires that § 301(a) include individual employee claims. *Id.* Courts, however, should look to state law to determine the appropriate statute of limitations and may use a state law statute of limitations for an action to vacate or modify an arbitration award. *See* United Parcel Service v. Mitchell, 101 S. Ct. 1559, 1562 (1981).

If an employee chooses to bring suit only against the union, jurisdiction can be based on 28 U.S.C. § 1337 (1976), which grants federal jurisdiction over controversies arising under a law of the United States regulating commerce. *See* Mumford v. Glover, 503 F.2d 878, 883 (5th Cir. 1974); Retana v. Apartment, Motel, Hotel & Elevator Operators Union, Local 14, 453 F.2d 1018, 1021 n.3 (9th Cir. 1972).

A breach of the duty of fair representation may also constitute an unfair labor practice, violating § 8(b)(1)(A) of the NLRA, 29 U.S.C. 158(b)(1)(A) (1976). *See* Miranda Fuel Co., 140 N.L.R.B. 181, 185 (1967), *enforcement denied*, 326 F.2d 172 (2d Cir. 1963). In Vaca v. Sipes, 386 U.S. 171 (1967), the Supreme Court assumed, but did not hold, that a breach of the duty of fair representation is an unfair labor practice. *Id.* at 186. Circuit courts, however, have expressly held that a breach of the duty of fair representation is an unfair labor practice. *See, e.g.*, Newport News Shipbuilding and Drydock Co. v. NLRB, 631 F.2d 263, 269 (4th Cir. 1980); Abilene Sheet Metal Inc. v. NLRB, 619 F.2d 332, 347 (5th Cir. 1980); NLRB v. American Postal Workers Union, 618 F.2d 1249, 1254-55 (8th Cir. 1980); Kesner v. NLRB, 532 F.2d 1162, 1173-74 (7th Cir.), *cert. denied*, 429 U.S. 883 (1976). The NLRB does not have exclusive jurisdiction over an unfair representation suit, *see* Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971); Vaca v. Sipes, 386 U.S. at 186-87, and the primary responsibility for defining the duty of fair representation rests with the courts. *See* Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1245 (8th Cir.) (en banc), *cert. denied*, 101 S. Ct. 116 (1980).

An employee might prefer to bring an unfair representation suit in court rather than an unfair labor practice complaint with the NLRB, because the NLRB will only award back pay and not lost future wages. *See* Flynn & Higgins, *supra* note 1, at 1139. Also, the Board can assess damages only against the union and not against the employer. *Id.* An employee also may find that the General Counsel of the NLRB will not file a complaint with the NLRB, and the decision is unreviewable. *See* Flynn & Higgins, *supra* note 1, at 1139.

The remedies available to an employee in an unfair representation suit in court are reinstatement or lost future earnings if reinstatement is not feasible, back pay, and attorney's fees. *See* Comment, *Apportionment of Damages in DFR/Contract Suits: Who Pays for the Union's Breach*, 1981 WIS. L. REV. 155, 162-63 [hereinafter cited as *Apportionment of Damages*]. In International Bhd. of Electrical Workers v. Foust, 442 U.S. 42 (1979), the Supreme Court ruled that awarding punitive damages against a union is inappropriate. *Id.* at 48-52. The Court reasoned that federal labor law is remedial in purpose, that high jury awards might undermine union financial stability, and that fear of large damages might undermine union discretion in handling grievances. *Id.* Four Justices concurring, however, rejected a per se prohibition of punitive damages and would allow punitive damages in instances of personal animus or racial discrimination. *Id.* at 60 (Blackmun, J., concurring).

Courts disagree on the method of apportioning damages. *See Apportionment of Damages, supra*, at 166-83; *see generally* Linsey, *The Apportionment of Liability for Damages Between Employer and Union in § 301 Actions Involving a Union's Breach of Its Duty of Fair Representation*, 30 MERCER L. REV. 661 (1979). Under one approach, unless the union participated in the wrongful discharge, the union cannot be held liable for lost earnings. *See, e.g.*, Milstead v. Teamsters Local 957, 580 F.2d 232, 236 (6th Cir. 1978); Richardson v. Communication Workers, 443 F.2d 974, 981 (8th Cir.), *cert. denied*, 414 U.S. 818 (1971); De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 289 (1st Cir. 1970), *cert. denied*, 400 U.S. 877 (1970); *Apportionment of Damages, supra*, at 167-70. Under the second approach, the union is liable for lost earnings accruing only after the unfair hearing, a hearing that the employer relied upon as valid and binding. *See, e.g.*, Foust v. IBEW, 572 F.2d 710, 718 (10th Cir. 1978), *rev'd on other grounds*, 442 U.S. 42 (1979); Battle v. Clark Equip. Co., 579 F.2d 1338, 1349 (7th Cir. 1978); Harrison v. United Transp. Union, 530 F.2d 558, 562-63 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976); *Apportionment of Damages, supra*, at 170-75. Even if the employer did not breach the contract, the employee can recover attorney's fees, which constitute the expense of seeking a second hearing that is fair. *See* Milstead v. Teamsters Local 957, 580 F.2d 232, 237 (6th Cir. 1978); Soto Segarra v. Sea-Land Service, Inc., 581 F.2d 291, 298 (1st Cir. 1978); *Apportionment of Damages, supra*, at 162 n.46.

In *Vaca v. Sipes*,[13] the Supreme Court established the test for evaluating union compliance with the duty of fair representation.[14] In *Vaca*, the Supreme Court held that a breach of the duty of fair representation occurs when union conduct is "arbitrary, discriminatory or in bad faith."[15] Although the Court indicated that a union cannot ignore or perfunctorily process a meritorious grievance,[16] the Court did not clearly define the scope of the standard. Relying on dictum in a Supreme Court case subsequent to *Vaca*,[17] some courts initially viewed the standard as requiring proof of a mental element of bad faith to establish a breach of

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[13] 386 U.S. 171 (1967).

[14] *See id.* at 190.

[15] *Id.* The duty of fair representation first arose in the context of union representation in bargaining for job benefits. *See* Steele v. Louisville & N.R. Co., 323 U.S. 192 (1944). In *Steele* the union, having excluded black employees from union membership, negotiated a contract that gave preference to white employees in gaining seniority. *Id.* at 194-96. The court held that accompanying the right to exclusive representation was the duty of treating all employees "without hostile discrimination, fairly, impartially, and in good faith." *Id.* at 204. The *Steele* court held that distinctions based on skill, seniority and type of work performed are permissible, but that distinctions based on race are irrelevant and invidious. *Id.* at 203. In *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953), the Supreme Court did not find a breach of the duty of fair representation when the union gave preference in negotiating a contract to employees that had served in World War II. *See id.* at 334-35, 342-43. The court held that complete satisfaction of every employee subgroup was impossible. *Id.* at 338. The *Ford Motor Co.* Court further stated that in order to accommodate conflicting interests in contract negotiation, unions need a wide range of reasonableness in balancing employee demands. *Id.* The Court cautioned, however, that the union's discretion is subject to good faith and honesty of purpose. *Id.* The Supreme Court first examined the duty of fair representation in the context of grievance processing in *Humphrey v. Moore*, 375 U.S. 335 (1964). In *Humphrey*, the union decided to dovetail the seniority rights of two merging plants. *Id.* at 339. In the grievance proceedings the union sided against a group of employees whose seniority rights the decision to dovetail jeopardized. *See id.* A state court had enjoined the union from taking sides in the dispute against the interests of the group of employees. *Id.* at 341. The Supreme Court reversed, holding that the union had acted upon "wholly relevant considerations, not upon capricious or arbitrary factors." *Id.* at 350. In *Vaca v. Sipes*, the court drew together the various elements in *Steele*, *Humphrey*, and *Ford Motor Co.* and defined the duty of fair representation in terms of conduct that is "arbitrary, discriminatory or in bad faith." 386 U.S. at 190. *See generally* Leffler, *supra* note 1, at 37-47.

[16] 386 U.S. at 191.

[17] *See* Motor Coach Employees v. Lockridge, 403 U.S. 274, 298 (1971). In *Lockridge*, the Supreme Court stated that to prevail in an unfair representation suit, an employee would have to adduce "substantial evidence of fraud, deceitful action or dishonest conduct." *Id.* at 299, (quoting Humphrey v. Moore, 375 U.S. 335, 348 (1964)). The *Lockridge* Court seemed to construe a mere rejection of a plaintiff's allegation of fraud in *Humphrey* as the standard for determining whether a union has breached the duty of fair representation. *See* 403 U.S. at 299. The Court also declared that for an employee to prevail there must be evidence of "discrimination that is intentional, severe and unrelated to legitimate union objectives." *Id.* at 301. As one commentator has pointed out, the language in *Lockridge* regarding fraud, deceitful action and dishonest conduct can serve as a definition of bad faith. *See* Leffler, *supra* note 1, at 44-45. The term "bad faith" cannot be defined with precision, but is connotes an intentional and dishonest failure to protect the employee's rights out of an interested or an improper motive. *See* Mitchell v. Hercules Inc., 410 F. Supp. 560, 568 (S.D. Ga. 1976); BLACK'S LAW DICTIONARY 127 (5th ed. 1979).

duty.[18] The circuits gradually, however, have reached agreement that arbitrary conduct, without bad faith, can be a breach of the duty of fair representation.[19] Courts have defined the term "arbitrary" to mean unreasonable, holding that a union may not pursue an unreasonable course of conduct[20] or make an unreasonable decision[21] in handling a grievance. Absent bad faith or discrimination, which are more difficult to prove than arbitrariness,[22] courts and juries rely for guidance on the vague concept of arbitrariness in evaluating the adequacy of union representation.[23]

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[18] *See, e.g.*, Medlin v. Boeing Vertol Co., 620 F.2d 957, 961 (1980); Anderson v. United Transp. Union, 557 F.2d 165, 168 (8th Cir. 1977); Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 293 (7th Cir. 1975); Augspurger v. Brotherhood of Locomotive Eng'rs, 510 F.2d 853, 859 (8th Cir. 1975); Dente v. Masters Local 90, 492 F.2d 10, 12 n.3 (9th Cir. 1973), *cert. denied*, 417 U.S. 910 (1974); Reid v. UAW Dist. Lodge 1093, 479 F.2d 517, 520 (10th Cir.), *cert. denied*, 414 U.S. 1076 (1973); Bruno v. Steelworkers Local 3571, 456 F. Supp. 425, 428 (D. Conn. 1978). One court has recognized that in the context of bargaining for job benefits, where a union needs discretion to adjust conflicting interests, *see* note 15 *supra*, a union should be held liable only for bad faith conduct, but in the context of grievance administration, negligence should suffice to establish a breach of the duty of fair representation. *See* Brown v. International Union, UAW, 512 F. Supp. 1337, 1358 n.29, 1359-60 (W.D. Mich 1981).

[19] *See, e.g.*, Ruzicka v. General Motors Corp., 649 F.2d 1207, 1209, 1211 n.3 (6th Cir. 1981); Findley v. Jones Motor Freight, 639 F.2d 953, 958 (3d Cir. 1981); Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980); Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1237 (8th Cir. 1980); Miller v. Gateway Transp. Co., 616 F.2d 272, 277 n.11 (7th Cir. 1980); Freeman v. O'Neal Steel, Inc., 609 F.2d 1123, 1125 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980); Foust v. IBEW, 572 F.2d 710, 715 (10th Cir. 1978), *rev'd in part on other grounds*, 442 U.S. 42 (1979); Beriault v. Local 40, Super Cargoes and Checkers of IL&WU, 501 F.2d 258, 263-64 (9th Cir. 1974); Jones v. TWA, 495 F.2d 790, 798 (2d Cir. 1974); Griffin v. International Union, UAW, 469 F.2d 181, 183 (4th Cir. 1972); De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir.).

[20] *See, e.g.*, Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1237, 1239 (8th Cir. 1980) (union conduct exceed permissible range of reasonableness); King v. Space Carriers, Inc., 608 F.2d 283, 287 (8th Cir. 1979) (union action reasonable); Foust v. IBEW, 572 F.2d 710, 715 (10th Cir. 1978) (arbitrary conduct is conduct not done according to reason and judgment); Fountain v. Safeway Stores, Inc., 555 F.2d 753, 756-57 (9th Cir. 1977) (court considered reasonableness of union's action); Griffin v. International Union, UAW, 469 F.2d 181, 183 (4th Cir. 1972) (union may not pursue course of conduct that is unreasonable); Sarnelli v. Meat Cutters and Butcher Workmen, Local 33, 457 F.2d 807, 808 (1st Cir. 1972) (union action may not be unreasonable); Kowalski v. Wisconsin Steel Works of Int'l Harvester Co., 433 F. Supp. 314, 316-17 (N.D. Ill. 1977) (union pursued reasonable course of action and was not arbitrary).

[21] *See, e.g.*, Ruzicka v. General Motors Corp., 649 F.2d 1207, 1211 n.3 (6th Cir. 1981) (arbitrary decision one without reason); Kaylor v. Crown Zellerback, Inc., 643 F.2d 1362, 1369 (9th Cir. 1981) (union decision reasonable and not arbitrary); Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1243 (8th Cir. 1980) (jury could have viewed union decision as unreasonable); Freeman v. O'Neal Steel, Inc., 609 F.2d 1123, 1128 (5th Cir. 1980), *cert. denied*, 101 S. Ct. 104 (1981) (union decision not unreasonable); Griffin v. International Union, UAW, 469 F.2d 181, 183 (4th Cir. 1972) (union must have reason for making decision).

[22] Bad faith and discrimination require proof of a subjective intent, but arbitrariness is an objective standard and requires no proof of *scienter*. *See* Leffler, *supra* note 1, at 43; Miller v. Gateway Transp. Co., 616 F.2d 272, 277 n.11 (7th Cir. 1980).

[23] *See, e.g.*, Foust v. IBEW, 572 F.2d 710, 714 (10th Cir. 1978) (court defined arbitrary to jury as unreasonable or capricious); Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d

Most jurisdictions employ a general concept of reasonableness in the test for evaluating an attorney's compliance with the Sixth Amendment[24] guarantee of the effective assistance of counsel[25] to a criminal defendant.[26] Formulations of the test require an attorney to comply with some variation of the standard of "reasonably competent assistance of counsel."[27] In *United States v. Decoster*,[28] however, Judge Bazelon dissented to the formulation of a general reasonableness standard.[29] Judge Bazelon recognized that the phrase "reasonably effective assistance of counsel" is merely a shorthand phrase for a specific set of duties that counsel owes to a criminal defendant.[30] Judge Bazelon accordingly outlined a specific checklist of duties for courts to use in examining counsel's performance:

> . . . (1) Counsel should confer with his client without delay and as often as necessary to elicit matters of defense, or to ascertain that potential defenses are unavailable. Counsel should discuss fully potential strategies and tactical choices with his client. (2) Counsel should promptly advise his client of his rights and take all actions necessary to preserve them . . . (3) Counsel must con-

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442, 453 (8th Cir.), *cert. denied*, 423 U.S. 924 (1975) (lower court did not have to define term arbitrary to jury). An employee has a right to a jury trial in an unfair representation suit. *See* Cox v. C. H. Masland & Sons, Inc., 607 F.2d 138, 143 (5th Cir. 1979).

[24] U.S. CONST. amend VI. The Sixth Amendment provides in pertinent part "[i]n all criminal prosecutions, the accused shall enjoy the right to have the Assistance of Counsel for his defense." *Id.*

[25] In *McMann v. Richardson*, 397 U.S. 759 (1970), the Supreme Court indicated that the right to have the assistance of counsel means the right to have the effective assistance of counsel. 397 U.S. at 771. The Court held that counsel's advice must fall within the "range of competence demanded of attorneys in criminal cases. . ." *Id.*

[26] *See*, Cooper v. Fitzharris, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc) (reasonably competent attorney acting as diligent conscientious advocate), *cert. denied*, 440 U.S. 980 (1979); United States v. Gray, 565 F.2d 881, 887 (5th Cir. 1978) (reasonably effective assistance of counsel), *cert. denied*, 435 U.S. 955 (1979); Marzullo v. Maryland, 561 F.2d 540, 543 (4th Cir. 1977) (representation within range of competence demanded of attorneys in criminal cases, *cert. denied*, 435 U.S. 1011 (1978); United States v. Malone, 558 F.2d 435, 438 (8th Cir. 1977) (counsel must exercise customary skills and diligence that reasonably competent attorney would exercise under similar circumstances); United States v. Sielaff, 542 F.2d 377, 379 (7th Cir.) (counsel must meet minimum standard of professional representation); United States v. Toney, 527 F.2d 716, 720 (6th Cir. 1975) (attorney reasonably likely to render and rendering reasonably effective assistance, *cert. denied*, 429 U.S. 838 (1976). Other circuits require that counsel's dereliction shock the conscience of the court and make the proceedings a farce and a mockery of justice before reversing a conviction. *See, e.g.*, United States v. Ramiriz, 535 F.2d 125, 129-30 (1st Cir. 1976); United States v. Larsen, 525 F.2d 444, 449 (10th Cir. 1975), *cert. denied*, 423 U.S. 1075 (1976); United States v. Yanishefsky, 500 F.2d 1327, 1333 (2d Cir. 1974).

[27] *See* note 26 *supra.*

[28] 624 F.2d 196 (D.C. Cir. 1976).

[29] *See id.* at 264 (Bazelon, J., dissenting).

[30] *See* United States v. Decoster, 624 F.2d 196, 276 (D.C. Cir. 1976) (Bazelon, J., dissenting); United States v. DeCoster, 487 F.2d 1197, 1203 (D.C. Cir. 1973).

> duct appropriate investigations, both factual and legal, to determine what matters of defense can be developed. . . . The investigation should always include efforts to secure information in the possession of the prosecution and law enforcement authorities. And, of course, the duty to investigate also requires adequate legal research.[31]

Every slight deviation from the checklist would not amount to an automatic constitutional violation; rather, a criminal defendant would have to prove that a deviation was substantial.[32] Further, the duties were not to be inflexible, and a showing of a substantial violation would prompt a judicial inquiry into whether the deviation was justifiable or excusable under the circumstances.[33]

The specific duties Judge Bazelon enumerated suggest a similar checklist of duties that could define the union's duty of fair representation. The specific union duties would include the basic procedural step of timely filing the grievance,[34] making investigations into both the underlying facts and the contractual provisions that apply to those facts,[35] appraising the grievance honestly and reasonably,[36] informing the employee of rights and of union actions that affect those rights,[37] attempting settlement,[38] and presenting the basic issues of fact and every known defense in formal hearings.[39] These duties would not be ironclad or inflexible, and even if the employee were to establish inadequate performance or nonperformance of a duty, courts then could permit the union to justify or excuse the deviation.[40] Existing case law on the duty of fair representation readily fits into this analytic framework for determining whether a union has breached the duty of fair representation.

Courts have found a failure to file a grievance timely to be a breach of the duty of fair representation.[41] To promote quick settlement of

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[31] *See* United States v. Decoster, 624 F.2d 196, 276 n.63 (D.C. Cir. 1976) (Bazelon, J., dissenting) (quoting AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE DEFENSE FUNCTION (App. Draft 1971)).

[32] *See* 624 F.2d at 281.

[33] *See id.* at 282.

[34] *See* text accompanying notes 41-45 *infra.*

[35] *See* text accompanying notes 46-52 *infra,*

[36] *See* text accompanying notes 53-62 *infra.*

[37] *See* text accompanying notes 71-80 *infra.*

[38] *See* text accompanying notes 81-84 *infra.*

[39] *See* text accompanying notes 85-90 *infra.*

[40] *See* text accompanying notes 102-110 *infra.*

[41] *See* Foust v. IBEW, 572 F.2d 710, 715-16 (10th Cir. 1978),; Ruzicka v. General Motors Corp., 523 F.2d 306, 310 (6th Cir.), *rehearing denied,* 528 F.2d 912 (6th Cir. 1975), *rev'd and remanded,* 649 F.2d 1207 (6th Cir. 1981); Schum v. South Buffalo Ry., 496 F.2d 328, 331-32 (2d Cir. 1974); Dutrisac v. Caterpillar Tractor Co., 511 F. Supp. 719, 726-28 (N.D. Cal. 1981); Baker v. Unit Parts Co., 487 F. Supp. 1313, 1315-16 (W.D. Okla. 1980); Ruggirello v. Ford Motor Co., 411 F. Supp. 758, 759-60 (E.D. Mich. 1976).

grievances, the employer and the union impose time limits on filing a grievance or on filing an appeal of the outcome of a particular step in the grievance procedure.[42] Due to the union's status as exclusive representative of the employee, the union, and not the employee, must ensure that the grievance is filed timely.[43] If the union fails to file within the contractual deadline, the employer is not obligated to honor the grievance.[44] Since a failure to file timely can deprive an employee of an opportunity for a contractual remedy, at least one court has described the duty to file timely as a weighty obligation.[45]

The duty to investigate is an important element of fair representation.[46] Courts have held that a union representative should pursue potential witnesses,[47] secure relevant documents[48] and obtain necessary expert assistance in order to understand a complex issue.[49] Additionally, the union representative should inquire into mitigating factors that might lead to settlement with the employer, such as a favorable work record, length of service, or past employer lenience.[50] Not only must the

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[42] *See* ELKOURI & ELKOURI, *supra* note 8, at 146-54.

[43] *See* Dutrisac v. Caterpillar Tractor Co., 511 F. Supp. 719, 728 (N.D. Cal. 1981).

[44] *See id.*; ELKOURI & ELKOURI, *supra* note 8, at 148-49.

[45] *See* Dutrisac v. Caterpillar Tractor Co., 511 F. Supp. 719, 728 (N.D. Cal. 1981).

[46] *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 558-60 (1976); Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1240 (8th Cir. 1980); Miller v. Gateway Transp. Co., 616 F.2d 272, 277 (7th Cir. 1980); Lowe v. Pate Stevedoring Co., 558 F.2d 769, 770 n.2 (5th Cir. 1977); De Arroyo v. Sindicato De Trabajadores Packinghouse, 425 F.2d 281, 284 (1st Cir. 1970). In *Hines*, the Supreme Court reversed a summary judgment in favor of a union that had failed to investigate an employee's grievance. 424 U.S. at 561. The employer discharged the employees for falsifying motel receipts. *Id.* at 557-58. Had the union representative made inquiry at the motel, as the employees suggested, he might have discovered that a motel clerk in fact was responsible. *Id.* In *Smith*, the Eighth Circuit held that the union should have investigated the actual skill of certain employees, when skill was at issue in a promotion dispute. *See* 619 F.2d at 1240. In *Miller*, the employer discharged an employee for refusing to drive a truck, which the employee believed to be over the legal height limit. 616 F.2d at 274. The Seventh Circuit held that the union should have investigated more fully to determine if the employee was correct. *See id.* at 277. In *Lowe*, the Fifth Circuit held that a union should have investigated an employee's discharge when issues of fact existed in the case. 558 F.2d at 770 n.2, 773. In *De Arroyo*, the First Circuit upheld a jury's findng that a union was arbitrary for failing to investigate the nature of the employee's grievance. 425 F.2d at 284. The union incorrectly assumed that an NLRB proceeding already in progress would protect the employee's interests. *Id. See also* Freeman v. O'Neal Steel, Inc., 609 F.2d 1123, 1128 (5th Cir.), *cert. denied*, 101 S. Ct. 104 (1980) (court recognized that investigation is necessary for fair representation); Cox v. C. H. Masland & Sons, Inc., 607 F.2d 138, 145 (5th Cir. 1979) (court considered investigation as evidence of compliance with duty of fair representation); Turner v. Air Transp. Dispatchers Ass'n, 468 F.2d 297, 299 (5th Cir. 1972) (union discretion in handling grievance restricted by duty to investigate).

[47] *See* Hines v. Anchor Motor Freight Inc., 424 U.S. 554, 558-61, 571 (1976); Miller v. Gateway Transp. Co., 616 F.2d 272, 277 (7th Cir. 1980).

[48] *See* Miller v. Gateway Transp. Co., 616 F.2d 272, 277 (7th Cir. 1980).

[49] *See* Curtis v. United Transp. Union, 486 F. Supp. 966, 970-71 (E.D. Ark.), *rev'd on other grounds*, 648 F.2d 492 (1980).

[50] *See* Tobias, *supra* note 1, at 57.

union representative investigate facts, but the representative must also examine the collective bargaining agreement, which functions as the law of the plant.[51] The representative also should be aware of any past practice, custom or construction that has modified the meaning of the contractual provisions.[52]

Courts have held that a union must honestly and reasonably appraise the merits of an employee's grievance.[53] A union must appraise the merits of a grievance because a union is not obligated to arbitrate if a grievance lacks merit.[54] If a union had to arbitrate every grievance, no matter how frivolous, the constractual procedures would become clogged and prohibitively expensive.[55] Although the Supreme Court has not indicated that a union may base a decision to abandon a grievance on factors other than the grievance's actual merit, lower courts have permitted a union to abandon a grievance based upon other factors such as the grievance's chance of success,[56] the strain on the union treasury,[57] or the threat of creating discord with an employer.[58] Courts reason that the union represents all employees, and must often accommodate conflicting interests to the disadvantage of an individual employee.[59] Under this rationale, courts also have indicated that a union may refuse to advance a grievance to arbitration for fear that an arbitrator's interpretation of an

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[51] *See* Milstead v. Teamsters, Local 957, 580 F.2d 232, 235 (6th Cir. 1978).

[52] *See* Cronin v. Sears, Roebuck & Co., 588 F.2d 616, 618 (8th Cir. 1978) (court favorably viewed union representatives efforts at investigating modifications in meaning of contract).

[53] *See* Vaca v. Sipes, 386 U.S. 171, 192-93, 194 (1961); Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1240 (8th Cir.); Melendy v. United States Postal Serv., 589 F.2d 256, 259 (7th Cir. 1978); Baldini v. Local 1095, UAW, 581 F.2d 145, 151 (7th Cir. 1978).

[54] *See* note 53 *supra.*

[55] Vaca v. Sipes, 386 U.S. 171, 191-92 (1967).

[56] *See* Cox v. C. H. Masland & Sons, Inc., 607 F.2d 138, 145 (5th Cir. 1979); Cicirelli v. Lear Siegler Inc., 510 F. Supp. 1012, 1018 (E.D. Mich. 1981); Encina v. Tony Lama Co., 316 F. Supp. 239, 245 (W.D. Tex. 1970), *aff'd per curiam*, 448 F.2d 1264 (5th Cir. 1971).

[57] *See* Cox v. C. H. Masland & Sons, Inc., 607 F.2d 138,m 145 (5th Cir. 1979); Curth v. Faraday, Inc. 401 F. Supp. 678, 681 (E.D. Mich. 1978); Encina v. Tony Lama Co., 316 F. Supp. 239, 245 (W.D. Tex. 1970).

[58] *See* Buchanan v. NLRB, 597 F.2d 388, 395 (4th Cir. 1979) (union can abandon grievance if pursuit of grievance would create discord with employer); Stevens v. Teamsters Local 2707, 504 F. Supp. 332, 336 (W.D. Wash. 1980) (union can consider harm to bargaining position in deciding on course of action).

[59] *See* International Bhd. of Electrical Workers v. Foust, 442 U.S. 42, 47 (1979) (union must represent interests of all employees); Vaca v. Sipes, 386 U.S. 171, 191 (1967) (settlement of grievances allows union to protect meaning of collective agreement in representing interests of all employees); Humphrey v. Moore, 375 U.S. 335, 342, 349-50 (1964) (union can take sides in conflict among different groups to prevent weakening of bargaining and grievance process); Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1235, 1237-38 (8th Cir. 1980) (union may favor collective interests and act against employee only on basis of reasoned and informed judgment); Tedford v. Peabody Coal Co., 533 F.2d 952, 959 (5th Cir. 1976) (union must represent interests of all employees even if union actions are adverse to individual).

ambiguity in the contract will adversely affect the interest of other employees.[60] Nevertheless, a union may not fail to protect unambiguously vested rights even for the benefit of other employees,[61] and a union may not trade a possibly meritorious claim for a concession from an employer.[62]

To avoid discouraging a union from deciding against arbitration of a meritless grievance, courts emphasize that in making the decision whether or not to process to arbitration, a union has discretion.[63] A

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[60] *See* Milstead v. Teamsters Local 957, 580 F.2d 232, 236 (6th Cir. 1978).

[61] *See, e.g.*, Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1238 (8th Cir. 1980) (union has fiduciary duty to protect vested rights); Emmanuel v. Omaha Carpenters Dist. Council, 560 F.2d 382, 385 (8th Cir. 1977) (union cannot ignore vested rights even for legitimate purpose); Butler v. Local 823, International Bhd. of Teamsters, 514 F.2d 442, 451-54 (8th Cir.) (union may not ignore contract rights plainly vested in favor of employee), *cert. denied*, 423 U.S. 924 (1975). *But see* Sanderson v. Ford Motor Co., 483 F.2d 102, 111-12 (5th Cir. 1973) (union and employer may abrogate vested rights by modifying meaning of contract through custom and practice).

[62] *See, e.g.*, Emmanuel v. Omaha Carpenters Dist. Council, 535 F.2d 420, 423-24 (8th Cir. 1976) (union cannot trade vested rights for concession from employer); Harrison v. United Transp. Union, 530 F.2d 558, 561 (4th Cir. 1975) (jury could find breach in union's trading employee's grievance to favorably settle the grievance of another employee), *cert. denied*, 425 U.S. 958 (1976), Local 13, IL&WU v. Pacific Maritime Ass'n., 441 F.2d 1061, 1067 (9th Cir. 1971) (union may not trade a grievance in exchange for concession from employer unless there is attempt to resolve ambiguity in contract), *cert. denied*, 404 U.S. 1016 (1972).

[63] *See* Vaca v. Sipes, 386 U.S. 171, 191 (1967). In *Vaca*, the Supreme Court followed the position of professor Archibald Cox that courts should accord unions discretion and control in the processing of grievances. *See* 386 U.S. at 190-91; *see also*, Cox, *Rights Under a Labor Agreement*, 69 HARV. L. REV. 601, 625-26 (1956). Cox argued that union control is necessary for the union to deal with unforeseen problems in the collective agreement, to stabilize the meaning of the collective agreement determined in arbitration, and to prevent union rivalry relating to the processing grievances. *See id.* at 625-26. *Compare* Summers, *Individual Rights in Collective Agreements and Arbitration*, 37 N.Y.U. L. REV. 362, 381-88 (1962) (employee should have absolute right to arbitration, but should pay for arbitrating seemingly meritless claim, to be reimbursed if successful).

The concept of union discretion in representing an employee first arose in the context of bargaining for job benefits. *See* Ford Motor Co. v. Huffman, 345 U.S. 330, 338 (1953). In *Ford Motor Co.*, the Supreme Court held that a union needs a wide range of reasonableness in accommodating the conflicting interests of employee subgroups, each damanding more from the employer. *Id.* If a union had to justify the reasonableness of decisions made in negotiations, union flexibility necessary to strike an agreement would be severely hampered. *See* Hayden v. RCA Global Commun., Inc., 443 F. Supp. 396, 399 (N.D. Cal. 1978). Because the distinction between the duty of fair representation in the context of bargaining and in the context of grievance administration has not been clear, some courts have treated a union's discretion in the context of grievance administration as if equally wide as in the context of bargaining. *See* NLRB v. PPG Indus., Inc., 579 F.2d 1057, 1059 (7th Cir. 1978) (wide discretion). At least one court, however, has recognized the distinction between representation in bargaining and in grievance administration, and has stated that the need for discretion in grievance administration may not be as great as in bargaining. *See* Brown v. International Union, UAW, 512 F. Supp. 1337, 1355-60 (W.D. Mich. 1981).

To the extent that some grievances, such as seniority disputes, require accommodation of conflicting interests among employees, a union still needs wide discretion in resolving the inevitable conflict. *See, e.g.*, Humphrey v. Moore, 375 U.S. 335, 338 (1964). Some grievances,

jury's later belief that reasonable men would have done otherwise or that the grievance was in fact valid will not prove that the union acted dishonestly or unreasonably in deciding not to arbitrate.[64] Yet, courts do review a union's decision not to arbitrate a grievance,[65] and at least one court has stated that the apparent validity of the claim can be circumstantial evidence of a union's breach of the duty of fair representation.[66] Furthermore, courts have held that a union may not act without a reason in taking an action,[67] and in the context of deciding to arbitrate a grievance, one court has indicated that the reason not to arbitrate should be sound.[68] One court has held that once a union has admitted to an employee that a grievance has merit, a union may not abandon that grievance.[69]

Case law suggests that a union should be under a general duty to inform the employee of contractual rights and of union actions that affect those rights.[70] Several courts have held a union liable for failing to inform an employee of a union decision not to arbitrate a grievance.[71] The

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however, directly affect the interests of only an individual employee, and the individual's interests should weigh more heavily in a union decision whether to arbitrate. At least one court and one commentator have suggested that in a discharge case, the most critical of grievances, a union should have less freedom to sacrifice the individual for the good of the group. *See* Griffin v. International Union, UAW, 469 F.2d 181, 183 (4th Cir. 1972) (union must especially avoid arbitrary conduct in discharge case); Blumrosen, *Legal Protection for Critical Job Interest: Union Management Authority Versus Employee Autonomy*, 13 RUTGERS L. REV. 631, 646-47 (1959); Tobias, *supra* note 1, at 58-62.

[64] *See* Vaca v. Sipes, 386 U.S. 171, 192-93 (1967); Baldini v. Local 1095, International Union, UAW, 581 F.2d 145, 151 (7th Cir. 1978).

[65] *See* Janow v. Schweitzer Div. of Kimberly-Clark, 503 F. Supp. 973, 979 (D. N.J. 1980).

[66] Harrison v. United Transp. Union, 530 F.2d 558, 561 (4th Cir. 1975) (proof of grievance's merit is circumstantial evidence of breach of duty of fair representation), *cert. denied*, 425 U.S. 958 (1976); Robesky v. Quantas Empire Airways Ltd., 573 F.2d 1082, 1089 (9th Cir. 1978) (some circumstances may indicate that union's reasons are too insubstantial to support its action) (*quoting* Clark, THE DUTY OF FAIR REPRESENTATION: A THEORETICAL STRUCTURE, 51 TEX. L. REV. 1119, 1131, 1139 (1973)). *But see* Freeman v. O'Neal Steel Inc., 609 F.2d 1123, 1126 (1980) (court's view of grievance's probability of success cannot be basis for finding breach of duty of fair representation).

[67] *See* Griffin v. International Union, UAW, 469 F.2d 181, 183 (4th Cir. 1972).

[68] *See* Ruzicka v. General Motors Corp., 649 F.2d 1207, 1212 (6th Cir. 1981) (union must articulate sufficient rationale, must have a sound reason for not processing grievance to arbitration).

[69] *See* Ruggirello v. Ford Motor Co., 141 F. Supp. 758, 760 (E.D. Mich. 1976).

[70] *See* text accompanying notes 72-80 *infra*.

[71] *See, e.g.*, Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082, 1088-91 (9th Cir. 1978) (employee rejected employer's settlement because ignorant of decision to abandon grievance); Willetts v. Ford Motor Co., 583 F.2d 852, 855 (6th Cir. 1978) (union failed to inform employee of status of grievance); Minnis v. International Union, UAW, 531 F.2d 850, 854 (8th Cir. 1975) (union waited six months before informing employee that union decided not to take grievance to arbitration); Harrison v. United Transp. Union, 530 F.2d 558, 562-62 (4th Cir. 1975) (union did not notify employee that union had dropped grievance); Pratt v. United Air Lines, Inc., 468 F. Supp. 508, 509, 513 (N.D. Cal. 1978) (failure to notify employee

rationale is not clear, but an employee, relying on a false hope of vindication in the grievance procedures, might delay looking for another job or might refuse an employer's settlement offer.[72] Since the union, in appraising the employee's claim, acts as a judge and not as a advocate of the employee, the employee justifiably should want to know the reasons for the union's decision to abandon the grievance. If the reasons are specious or insubstantial, the employee then can seek relief in court by suing the union.[73] In addition to requiring the union to inform the employee of a decision not to arbitrate, courts have indicated that a union should inform an employee of the contractual right to file a grievance,[74] of hearings where the employee's testimony might be important in protecting his interests,[75] and in general of any union action that may adversely affect the employee.[76] Yet, courts have not required a union to inform an employee union member of rights under the union constitution to an intraunion appeal of a union decision not to process a

of abandoned grievance resulted in forfeiture of right to bring action with NLRB); Day v. UAW Local 36, 466 F.2d 83, 98 (6th Cir. 1972) (union withdrew grievance without notice to employee or opportunity to be heard on matter); Stevens v. Teamsters Local 2707, 504 F. Supp. 332, 336 (W.D. Wash. 1980) (union should have informed employee that union had dropped grievance because employee could have processed grievance personally by terms of collective agreement). *But see* Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970) (failure to inform employee that union had decided not to process grievance is not breach of duty, especially when failure does not prejudice employee); Welch v. Mason & Dixon Lines, 507 F. Supp. 1069, 1071 (E.D. Tenn. 1980) (failure to inform employee of status of grievance does not support claim of unfair representation).

[72] *See* Robesky v. Qantas Empire Airways, Ltd., 573 F.2d 1082, 1088 (9th Cir. 1978) (employee declined settlement offer).

[73] *See* text accompanying note 12 *supra*.

[74] *See* Williams v. Pacific Maritime Ass'n, 617 F.2d 1321, 1331 (9th Cir.) (union must explain to employees rights and duties under contract), *cert. denied*, 449 U.S. 1101 (1980); Retana v. Apartment, Motel, Hotel and Elevator Operators Union, Local 14, 453 F.2d 1018, 1023-24 (9th Cir. 1972) (union failure to inform Spanish speaking maids of right to file grievance status cause of action for breach of duty of fair representation).

[75] *See* Smith v. Hussmann Refrigerator Co., 619 F.2d 1229, 1241 (8th Cir. 1980) (jury could consider failure to notify employee to hearing where personal testimony important to be breach); Bond v. Local Union 823, Int'l Bhd. of Teamsters, 521 F.2d 5, 9 (8th Cir. 1975) (not giving employee notice of hearing or opportunity to attend hearing that may affect his rights can be breach). *See also* Humphrey v. Moore, 375 U.S. 335, 350-51 (1964). In *Humphrey*, the Supreme Court held that when an employee had notice of a hearing and cannot indicate what matters of defense the representatives omitted, then the employee cannot successfully attack the fairness of the hearing. *Id. Accord*, Crusco v. Fisher & Bro., 458 F. Supp. 413, 422 (S.D.N.Y. 1978).

[76] *See* American Postal Workers Union, 618 F.2d 1249, 1255 (8th Cir. 1980); Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1088 (9th Cir. 1978). In *American Postal Workers Union*, the union was held liable for unilaterally revoking an employee's shift change without communicating with the employee. 618 F.2d at 1253, 1256-57. In *Robesky*, the union decided not to take the grievance to arbitration, without informing the employee. 573 F.2d at 1088. The employee in *Robesky* might have accepted an employer's settlement offer if she had known of the union's decision to drop the grievance. *Id.* at 1089. Accordingly, the Ninth Circuit vacated and remanded a judgment in favor of the union on the issue of breach of the duty of fair representation. *Id.* at 1091.

grievance.[77] Courts reason that an employee who enters the contract of union membership has the responsibility of knowing the terms of that contract, the union constitution, which describes the right to an intraunion appeal.[78] One court, however, has recognized the possible merit in requiring unions to inform employees of the right to an intraunion appeal since the employee often may be incapable of understanding the constitution's complex and technical language.[79]

Only one court has expressly stated that a union must attempt settlement of an employee's grievance,[80] but several courts have viewed favorably a union's efforts at processing the grievance through joint grievance committees, where the union and employer representatives attempt settlement after hearing the merits of an employee's claim.[81]

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[77] *See, e.g.*, Fristoe v. Reynolds Metals Co., 615 F.2d 1209, 1214 (9th Cir. 1980); Newgent v. Modine Mfg. Co., 495 F.2d 919, 927-28 (7th Cir. 1974); Pawlak v. International Bhd. of Teamsters, 444 F. Supp. 807, 811 (M.D. Pa.), *aff'd*, 571 F.2d 572 (1977). *But see* Cammarata v. Ice Cream Drivers, Local 757, 441 F. Supp. 696, 701 (E.D. N.Y. 1977), *aff'd*, 591 F.2d 1329 (2d Cir. 1978) (if efficacy and availability of intraunion appeal is unclear, union should show that procedures are generally known to membership).

Informing the employee of the right to an intraunion appeal can be of consequence because courts may dismiss an employee's suit if the employee has not attempted to exhaust intraunion remedies. *See* Clayton v. International Union, UAW, 101 S. Ct. 2088, 2095 (1981). *See generally* Fox and Sorenthal, *Section 301 and Exhaustion of Intraunion Appeals: A Misbegotten Marriage*, 128 U. PA. L. REV. 989 (1980); Comment, *The Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Labor unions and Employers*, 1979 CHI-KENT L. REV. 259; Note, *Exhaustion of Internal Union Remedies as a Prerequisite to Section 301 Actions Against Employers*, 36 WASH. & LEE L. REV. 111 (1979).

Courts require a union member employee to exhaust intraunion appeals because the union member is contractually obligated to comply with the union constitution and bylaws that require such exhaustion. *See* Orphan v. Furnco Constr. Corp., 466 F.2d 795, 800-801 (7th Cir. 1972). Courts have discretion in determining whether to require that an employee exhaust intraunion remedies. *See* Clayton v. International Union, UAW, 101 S. Ct. 2088, 2095 (1981). Three factors should be relevant to the exercise of a court's discretion: first, whether the union officials were so hostile to the employee that he could not hope to receive a fair hearing; second, whether the internal union appeals procedures would be inadequate in reactivating the claim or providing the full relief that the employee might obtain under a § 301 suit; third, whether exhaustion of the internal union remedies would unreasonably delay the employee's opportunity to obtain a judicial hearing of the dispute. *Id.* An employer can assert the defense of failure to exhaust intraunion remedies if use of the remedies could have resulted in a reactivation of the grievance, so that the employee's claim against the employer would have been resolved by the grievance procedure. *See id.* at 2093.

[78] *See* Newgent v. Modine Mfg. Co., 495 F.2d 919, 928 (7th Cir. 1974).

[79] *See* Savel v. Detroit News, 435 F. Supp. 329, 333 (E.D. Mich. 1977).

[80] *See* Cammarata v. Ice Cream Drivers, Local 757, 441 F. Supp. 696, 701 (E.D.N.Y. 1977) (employees have right to have grievances presented for possible settlement).

[81] *See, e.g.*, Vaca v. Sipes, 386 U.S. 171, 193 (1967) (efforts at processing grievance through joint grievance committees showed compliance with duty of fair representation); Freeman v. O'Neal Steel, Inc., 609 F.2d 1123, 1128 (5th Cir. 1980) (processing of grievance through third step of grievance procedures indicated compliance with duty); Cox v. C. H. Masland & Sons, 607 F.2d 138, 145 (5th Cir. 1979) (processing grievance through joint com-

Moreover, one court has held the union liable for depriving an employee of an opportunity to settle a grievance, which the union in fact had taken to arbitration.[82] While a union may have many reasons for refusing to take grievance to arbitration, the union has a less compelling need to be able to refuse even minimal attempts at settling a grievance, even if the grievance is somewhat weak. Processing a grievance through joint grievance committees does not entail the expense of arbitration, and does not lead to discord, but to discussion and to cooperation with an employer.[83] The Supreme Court has implied that for a union to fail to process a grievance at all, the grievance must be wholly frivolous.[84] To deny an employee even a chance of obtaining a settlement of the grievance, the union should have a strong basis for believing that the grievance is entirely without merit.

Courts have suggested that the union should be under an obligation in formal hearings to present the basic issues of fact of a grievance and every known defense that is available.[85] In presenting the issues of fact

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mittee hearings and offer of settlement showed compliance with duty); Cicirelli v. Lear Siegler, Inc., 510 F. Supp. 1012, 1018 (E.D. Mich. 1981) (processing grievance up to stage 4½ and obtaining settlement showed compliance with duty); Kowalski v. Wisconsin Steel Works of Int'l Harvester Co., 433 F. Supp. 314, 317 (N.D. Ill. 1977) (processing grievance to fourth step of procedures and efforts at settlement showed compliance with duty).

[82] *See* Griffin v. International Union, UAW, 469 F.2d 181, 183 (4th Cir. 1972). In *Griffin*, the Fourth Circuit affirmed a district court's judgment against a union for attempting resolution of the grievance with a supervisor with whom the employee had fought. *Id.* at 184-85. The fight was the reason for the discharge. *Id.* at 184. Had the union presented the grievance to a more objective supervisor, the grievance might have been settled. *Id.* at 185.

[83] *See*, Stevens v. Teamsters Local 2707, 504 F. Supp. 332, 335 (W.D. Wash. 1980) (at higher levels, processing grievances becomes increasingly expensive); note 8 *supra*.

[84] *See* Humphrey v. Moore, 375 U.S. 335, 349 (1964). In *Humphrey*, the Supreme Court held that a union may take sides on questionably meritorious grievances to the same extent that it can sift out from the grievance procedures a wholly frivolous grievance. *See id.* The Court in Vaca v. Sipes, 386 U.S. 171 (1967), did not address the question of when a union may refuse to process a grievance at all, because in *Vaca* the union had processed the grievance up to the last stage before arbitration and had made a settlement offer to the employer. *See id.* at 193-94.

[85] *See* Findley v. Jones Motor Freight, 639 F.2d 953, 961 (3d Cir. 1981) (union must present basic issues of fact in understandable fashion); Miller v. Gateway Transp. Co., 616 F.2d 272, 277 (7th Cir. 1980) (union could be held liable for failing to raise the defense of the absence of a warning letter, a prerequisite to discharge of employee); Donahue v. L.C.L. Transit Co., 492 F. Supp. 288, 292-93 (W.D. Wis. 1980) (failure to raise available defense can be breach of duty of fair representation unless union makes reasonable decision not to raise defense); Crusco v. Fisher & Bro., 458 F. Supp. 413, 421 (S.D.N.Y. 1978) (employee must show that representative omitted evidence or legal theory to show breach). *But see* Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 293-94 (7th Cir. 1975) (failure to raise a defense mere negligence and not a breach of duty); Jensen v. Farrell Lines, Inc., 477 F. Supp. 335, 350 (S.D.N.Y. 1979) (failure of union to raise argument merely negligence and not a breach of duty), *rev'd on other grounds*, 625 F.2d 379 (2d Cir. 1980), *cert. denied*, 101 S. Ct. 1359 (1981); Bruno v. United Steelworkers Local 3571, 456 F. Supp. 425, 428 (D. Conn. 1978) (court found no breach when representative failed to rasie issue of more lenient treatment of other employees since failure not intentional).

and the defenses, however, the union representative need not possess a lawyer's sensitivity to subtle nuances in the presentation of evidence.[86] However, the union representative may not ignore obvious sources of proof.[87] In presenting grievances, union representatives have fallen below the requirement of presenting the basic issues of fact and every known defense. For example, union representatives, breaching the duty of fair representation, have openly admitted arbitration that a grievance is without merit,[88] have conceded that a vague and overbroad rule which the company had no right to promulgate was reasonable,[89] and have failed to present the merits of a complex medical issue by presenting it as if a routine claim.[90] By imposing the specific obligation on the union of presenting the basic issues of fact and every known defense, the adequacy of a union's presentation will be easily verifiable. Furthermore, compliance with these obligations will ensure a relatively full and fair hearing of the employee's claim.

Even if courts were to adopt a specific checklist of duties modelled on Judge Bazelon's analytic framework, courts still would have to define some minimum level of performance below which a union's efforts may not fall. A total failure to act, obviously, is inadequate representation.[91] Yet, a union does not have to exhaust every resource to satisfy completely an aggrieved employee.[92] The Supreme Court's indication that a union may not perfunctorily process a grievance,[93] could define the union's minimum level of competence. Perfunctory performance is superficial or cursory performance that derives from a lack of enthusiasm or concern.[94] One court has emphasized the subjective aspect of the word perfunctory, refusing to find perfunctoriness because the union representative,

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[86] *See* Findley v. Jones Motor Freight, 639 F.2d 953, 961 (3d Cir. 1981); Walden v. Local 71, International Bhd. of Teamsters, 468 F.2d 196, 197 (4th Cir. 1972).

[87] *See* Tatum v. Frisco Transp. Co., 626 F.2d 55, 59 (8th Cir. 1980).

[88] *See* Kesner v. NLRB, 532 F.2d 1169, 1175 (7th Cir.) (union representative admitted in a hearing that grievance was without merit), *cert. denied*, 429 U.S. 983 (1976). *See also* NLRB v. P.P.B. Indus., Inc., 579 F.2d 1057, 1059 (7th Cir. 1978) (if union decides to process grievance it must advocate employee's position).

[89] *See* Holodnak v. Avco Corp., 381 F. Supp. 191, 200 (D. Conn. 1974), *modified on other grounds*, 514 F.2d 285 (2d Cir.), *cert. denied*, 423 U.S. 892 (1975).

[90] *See* Curtis v. United Transp. Union, 486 F. Supp. 966, 970-71, 983 (E.D. Ark. 1980) (representative lacked assistance of an expert and failed to present merits of a defense due to lack of insight), *rev'd on other grounds*, 648 F.2d 492 (8th Cir. 1981).

[91] *See* Minnis v. International Union, UAW, 531 F.2d 850, 854 (8th Cir. 1975) (utter failure to investigate is breach of duty).

[92] *See* Freeman v. O'Neal Steel, Inc., 609 F.2d 1123, 1125 (5th Cir. 1980) (union does not have to perform ministerial duty of satisfying each employee demand at all costs).

[93] Vaca v. Sipes, 386 U.S. 171, 191 (1967).

[94] *See* THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 76 (unabridg. ed. 1966) (perfunctory conduct hasty, superficial, cursory, mechanical and lacking in interest or enthusiasm). *See also* Mitchel v. Hercules Inc., 410 F. Supp. 560, 568 (S.D. Ga. 1976) (perfunctory conduct routine and done merely to get through the matter) (*citing* THE OXFORD ENGLISH DICTIONARY).

though at fault for failing to file a grievance, was enthusiastic and zealous in fact.[95] Other courts have identified perfunctory conduct with a level of performance independent of a representative's subjective feelings.[96] Inept, incompetent or superficial performance thus will establish inadequate representation.[97] Since the Supreme Court has indicated that fair representation turns on the manner of representation,[98] and that a union's representation should fall within a range of acceptable performance,[99] courts should accordingly employ an objective rather than a subjective definition of the term "perfunctory". The Supreme Court has stated that a minimum level of integrity should be maintained in the grievance procedures,[100] and by defining that minimum level in terms of performance that is more than superficial or cursory, courts will provide an understandable definition. If a union's efforts are more than superficial and cursory, the efforts should provide a reasonably adequate defense. Whether conduct is superficial or cursory, of course, can vary with the complexity of the claim.[101]

Judge Bazelon's specific duties were not to be inflexible and ironclad.[102] Rather, Judge Bazelon recognized that a failure to comply with a certain duty might be justifiable or excusable under the circumstances.[103] To the same extent, the union's duties should not be absolute, and courts should permit a union to justify or excuse a failure to comply with a duty. One circuit has suggested an approach that permits a union to justify or excuse a failure to act in the interests of an employee.[104]

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[95] *See* Ethier v. United States Postal Serv., 590 F.2d 733, 736 (8th Cir.), *cert. denied*, 444 U.S. 826 (1979). *See also* Ruzicka v. General Motors Corp., 523 F.2d 306, 315 (6th Cir. 1975) (McCree, J., concurring) (perfunctory conduct intentional and superficial).

[96] *See, e.g.* Milstead v. Teamsters, Local 157, 580 F.2d 232, 235 (6th Cir. 1978).

[97] *See, e.g.*, Smith v Hussmann Refrigerator Co., 619 F.2d 1229, 1240 (8th Cir. 1980) (court referred to inadequate investigation into skill of employees as superficial review); Milstead v. Teamsters, Local 157, 580 F.2d 232, 235 (6th Cir. 1978) (court described inadequate union efforts as inept); Curtis v. United Transp. Union, 486 F. Supp. 966, 970-71 (E.D. Ark. 1980) (union held liable for handling claim in competently but union did not lack zeal or good will).

[98] Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 569 (1976).

[99] *Id.* at 568. Some courts make reference to a range of acceptable performance when discussing the nature of the duty of fair representation, but fail to define the extent of this range of acceptable performance. *See, e.g.*, Findley v. Jones Motor Frieght, 639 F.2d 953, 958 (3d Cir. 1981); Baldini v. Local U. 1095, 581 F.2d 145, 151 (7th Cir. 1978).

[100] *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 571 (1976).

[101] *See, e.g.*, Curtis v. United Transp. Union, 486 F. Supp. 966, 970-71 (E.D. Ark. 1980) (representative should not have processed complex claim with same efforts as in routine claim), *rev'd on other grounds*, 648 F.2d 492 (8th Cir. 1981).

[102] *See* text accompanying note 33 *supra.*

[103] *See* text accompanying note 33 *supra.*

[104] Ruzicka v. General Motors Corp., 649 F.2d 1207, 1211 (6th Cir. 1981) (absent justification or excuse, union can be liable for failure to file grievance). *See also* Christopher v. Safeway Stores Inc., 644 F.2d 467, 472 (5th Cir. 1981) (union unjustified in not taking grievance to arbitration); Baldini v. Local Union 1095, International Union, UAW, 581 F.2d 145, 151 (7th Cir. 1978) (if union had no legitimate reason for action, liability could follow);

A union could justify a failure to act by demonstrating that the failure was necessary to protect the interests of other employees in the bargaining unit.[105] To excuse a failure to comply with a specific duty the union could demonstrate that even a vigorous representative might have commited the same mistake[106] or that a mere error in judgment was the reason for noncompliance with a specific duty.[107] For example, courts have refused to hold a union liable for failing to file a grievance because the union representative accidentally misnumbered the grievance[108] or because the representative misunderstood a confusing contractual description of the filing deadline.[109] In addition, a union has excused a failure to file by demonstrating a complete absence of fault since the representative had relied on an employer's past disregard of untimely filings.[110] Permitting the union to justify or excuse a failure to comply with a certain duty ensures that the specific duties do not become rigid and unresponsive to unique factual circumstances or to the fallibility of even vigorous union representatives.

Many courts have employed a distinction between simple negligence

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Griffin v. International Union, UAW, 469 F.2d 181, 184-85 (4th Cir. 1972) (union could not justify failure to attempt settlement with objective plant supervisor); Dutrisac v. Caterpillar Tractor Co., 511 F. Supp. 719, 724 (N.D. Cal. 1981) (union may justify conduct by showing purpose of furthering legitimate union objectives); Stevens v. Teamsters Local 2707, 504 F. Supp. 332, 336 (W.D. Wash. 1980) (union failed to advance any reason for failure to notify employee of withdrawal of grievance); Bowe v. Pulitzer Publishing Co., 495 F. Supp. 120, 123 (E.D. Mo. 1980) (union justified in not taking grievance to arbitration); Boudreaux v. Vulcan Materials Co., 485 F. Supp. 347, 350 (E.D. Wis. 1980) (union justified in not processing grievance); Hershman v. Sierra Pac. Power Co., 434 F. Supp. 46, 49-50 (D. Nev. 1977) (union must have reason for failing to conduct comprehensive investigation).

[105] *See* Dutrisac v. Caterpillar Tractor Co., 511 F. Supp. 719, 724 (N.D. Cal. 1981) (union may justify conduct by showing purpose of furthering legitimate union objectives); text accompanying notes 59-60 *supra.*

[106] *See* Coe v. United Rubber Cork Linoleum & Plastic Workers, 571 F.2d 1349, 1351 (5th Cir. 1978). The court in *Coe*, citing Motor Coach Employees v. Lockridge, 403 U.S. 274, 301 (1971), emphasized that honest but mistaken conduct should not establish a breach of the duty of fair representation. *Id.* In *Coe*, the union representative caused a grievance to be untimely filed by misnumbering the grievance by one number. *Id.* at 1350-51. The court indicated that the failure was merely an understandable error. *Id.*

[107] *See, e.g.*, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570-71 (1976) (breach of duty of fair representation involves more than mere errors in judgment); Russom v. Sears, Roebuck & Co., 558 F.2d 434, 439, 442 (8th Cir.) (errors in judgment insufficient to establish breach), *cert. denied*, 434 U.S. 955 (1977); Cannon v. Consolidated Freightways Corp., 524 F.2d 290, 294 (7th Cir. 1974) (poor judgment will not establish breach); Whitten v. Anchor Motor Freight, Inc., 521 F.2d 1335, 1341 (6th Cir. 1975) (poor judgment not breach of duty), *cert. denied*, 425 U.S. 981 (1976); Steed v. United Parcel Serv., 512 F. Supp. 1088, 1092 (S.D. W.Va. 1981) (mistakes and errors in strategy did not indicate an unfair effort on part of union).

[108] *See* note 106 *supra.*

[109] *See* Ethier v. U.S. Postal Service, 590 F.2d 733, 736 (8th Cir. 1979).

[110] Ruzicka v. General Motors Corp., 649 F.2d 1207, 1210, 1212 (6th Cir. 1981) (union relied on employer's past practice of liberal extensions for grievance deadline; union not at fault for employer's refusal to honor untimely filed grievance).

and gross negligence to define conduct that is excusable.[111] Courts state that a union will be liable only for gross negligence.[112] Courts, however, have not articulated the difference between simple and gross negligence,[113] and by conclusorily asserting, without analysis, that certain conduct is only simple negligence and not gross negligence, courts give the appearance of applying the terminology to reach a predetermined result. Courts may really examine not so much the severity of the breach of duty as the severity of prejudice, resulting from the breach, to the fairness of the employee's hearing.[114] If courts base a decision as to whether conduct

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[111] *See* Ruzicka v. General Motors Corp., 649 F.2d 1207, 1210, 1212 (6th Cir. 1981) (ordinary negligence is not breach of duty); Findley v. Jones Motor Freight, 639 F.2d 953, 961 (3d Cir. 1981) (mere negligence is not breach of duty); Stephens v. Postmaster General, 623 F.2d 594, 596 (9th Cir. 1980) (negligence is not a breach of duty); Wyatt v. Interstate & Ocean Transp. Co., 623 F.2d 888, 891 (4th Cir. 1980) (negligence not a breach of duty); Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1089-90 (9th Cir. 1978) (reckless disregard of rights is breach of duty); Bazarte v. United Transp. Union, 429 F.2d 868, 872 (3d Cir. 1970) (negligence is not a breach of duty). The holding that negligence is not a breach of duty seems to have arisen with *Bazarte*. *See id.* The *Bazarte* court apparently reasoned that since the word arbitrary does not connote negligence, negligence is not an issue in an unfair representation case. *See id.* The Supreme Court has not ratified the use of the distinction between simple and gross negligence. Not only does the word "perfunctory," used in Vaca v. Sipes, 386 U.S. 171, 191 (1967), suggest the word negligence as a synonym, *see* THE RANDOM HOUSE DICTIONARY OF THE ENGLIGH LANGUAGE 1070 (unabr. ed. 1973), but also in *International Bhd. of Electrical Workers v. Foust*, 442 U.S. 42 (1979), Justice Blackmun, joined by three other Justices concurring in the majority's prohibition of punitive damages, noted that the union behavior was no more than negligence and could not support punitive damages. *Id.* at 53. If negligence could not support liability at all, the Justice Blackmun woud not have reached the question of whether negligence can support punitive damages. *See generally*, Steinhauer, *supra* note 1.

[112] *See* note 111 *supra.*

[113] *See* note 111 *supra.* The lack of a clear difference between the terms "negligence" and "gross negligence" is illustrated by cases subsequent to Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975). *Ruzicka* described a union's failure to file as negligence and imposed liability. *Id.* at 310. However, subsequent courts, possibly not wanting to upset the vague distinction between simple and gross negligence, have referred to the negligence in *Ruzicka* as gross negligence. *See* Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082, 1090 (9th Cir. 1978); Besedich v. Missile & Space Div. of LTV Aerospace Corp., 433 F. Supp. 954, 959 (E.D. Mich. 1977); Welch v. Mason and Dixon Lines, Inc., 507 F. Supp. 1069, 1075 (E.D. Tenn. 1980).

In 1979, John Irving, then General Counsel of the NLRB, issued a memorandum in which he proposed to delineate the difference between negligence and gross negligence. *See* Memorandum 79-55 of General Counsel John Irving to Regional Directors, Officers in Charge & Resident Officers (July 9, 1979), *reprinted in* DAILY LAB. REP (BNA), No. 137, July 16, 1979. (citing in Steinhauer, *supra* note 1, at 1047 n.42). General Counsel Irving, however, failed to articulate a difference and advised that Regional Directors bring a difficult case to the General Counsel. *See* Steinhauer, *supra* note 1, at 1047 n.42. Attempting to draw distinctions between degrees of negligence is equally imprecise and unworkable in tort law. *See id.* at 1047 n.42, (citing W. PROSSER, HANDBOOK ON THE LAW OF TORTS § 34, at 182 (4th ed. 1971)).

[114] *See, e.g.*, Findley v. Jones Motor Freight, 639 F.2d 953, 959 (3d Cir. 1981) (considered prejudice when determining that negligence was not gross negligence); Dutrisac v. Caterpillar Tractor Co., 511 F. Supp. 719, 727 (N.D. Cal. 1981) (failure to file causes so much pre-

is gross or simple negligence on the amount of prejudice that results from a breach of duty, then courts are not providing a clear and stable definition of the scope of the duty. Courts might isolate the issue of prejudice to the employee's claim, and base a decision to hear a suit in court not so much on the severity of the union's breach as on the severity of prejudice to the reliability and integrity of the grievance procedures. Rather than employing the vague terms of "simple negligence" and "gross negligence," courts could describe concretely the minimum level of satisfactory performance in terms of superficiality and cursoriness, and then could openly focus on the degree of prejudice to an employee's defense resulting from a breach of a specific duty.

In the context of the Sixth Amendment right to the effective assistance of counsel, a criminal defendant must show prejudice, that is, show that counsel's dereliction affected the outcome of the trial.[115] Although Judge Bazelon argued that requiring a criminal defendant to show the likelihood of his own acquittal is inconsistent with a criminal defendant's presumption of innocence,[116] Judge Bazelon indicated that counsel's breach of duty had to be consequential.[117] Upon a criminal defendant's showing that counsel's dereliction was substantial, the burden would then shift to the government to prove beyond a rasonable dout that counsel's dereliction was harmless error.[118]

In *Hines v. Anchor Motor Freight, Inc.*,[119] the Supreme Court did not expressly state that courts should add a prejudice requirement to an employee's claim in an unfair representation suit, but the Court used

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judice to employee that negligent failure to file is breach of duty of fair representation); Stevens v. Teamsters Local 27207, 504 F. Supp. 332, 335 (W.D. Wash. 1980) (egregious conduct is reckless and prejudicial); Kleban v. Hygrade Food Prod. Corp., 102 L.R.R.M. 2773, 2778 (E.D. Mich. 1979) (negligence can be arbitrary when it prevents grievance procedures from working and deprives employee of representation). Connally v. Transcon Lines, 583 F.2d 199, 203 (5th Cir. 1978) (negligent conduct can be breach if it deprives employee of fair hearing).

[115] *See, e.g.*, Word v. United States, 604 F.2d 1127, 1130 (8th Cir. 1979); Davis v. Alabama, 596 F.2d 1214, 1222-23 (5th Cir. 1979), *vacated on other grounds*, 446 U.S. 903 (1980); United States v. Ritch, 583 F.2d 1179, 1183 (1st Cir.), *cert. denied*, 439 U.S. 970 (1978); Cooper v. Fitzharris, 586 F.2d 1325, 1331 (9th Cir. 1978), *cert. denied*, 440 U.S. 974 (1979); United States v. Cooper, 580 F.2d 259, 263 n.8 (7th Cir. 1978); United States v. Williams, 575 F.2d 388, 393 (2d Cir.), *cert. denied*, 439 U.S. 842 (1978); United States *ex rel.* Green v. Rundle, 434 F.2d 1112, 1115 (3d Cir. 1970). *See also* Note, *A Functional Analysis of the Effective Assistance of Counsel*, 80 COLUM. L. REV. 1053, 1061-73 (1980).

[116] *See* United States v. Decoster, 624 F.2d 196, 291 (D.C. Cir. 1976) (Bazelon, J., dissenting).

[117] *See* United States v. Decoster (624 F.2d at 338-39), (Decoster II) (a substantial violation is consequential).

[118] *See* United States v. Decoster, 624 F.2d 196, 290-91 (D.C. Cir. 1976) (Bazelon, J., dissenting). Under Chapman v. California, 386 U.S. 18 (1967), courts may deem some constitutional errors to be harmless and not requiring reversal of a conviction. *Id.* at 21-22. The government, however, must prove beyond a reasonable doubt that an error was harmless. *Id.* at 23-24.

[119] 424 U.S. 554 (1976).

language suggesting the addition of a prejudice requirement.[120] The Court indicated that if "there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome,"[121] or if "the contractual processes have been seriously flawed"[122] or "tainted,"[123] or if the breach "seriously undermines the integrity of the arbitral process,"[124] then courts can overlook the finality of the grievance procedures and hear an employee's claim in court.[125] Since *Hines*, lower courts increasingly have added an express prejudice requirement to the employee's claim.[126]

A prejudice requirement is a necessary element in an employee's claim for relief. Only after an employee has shown specifically how a union breach affected the integrity of the grievance procedures can the trier of fact determine if a second hearing in court is necessary. The union breach may be egregious and totally unjustifiable, but if no difference in the outcome of the grievance procedures would have resulted, the outcome should remain final. If the finality of the grievance procedures diminishes, employers may become reluctant to finance grievance procedures that fail to prevent litigation in court.[127] Further, grievance procedures that are seldom final do not promote the rapid resolution of grievances,[128] which is necessary to reduce tension in labor-management relations. Requiring the employee to show that a union breach seriously undermined the integrity of the grievance procedures will further the policy of finality.

Modeling the test for determining a union's compliace with the duty of fair representation on Judge Bazelon's analytic framework will isolate important issues and provide ready guidance to courts and juries. The vague standard of "arbitrary, discriminatory or in bad faith," on the

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[120] *See* text accompanying notes 121-26 *infra*.

[121] *Id.* at 568.

[122] *Id.* at 570.

[123] *Id.* at 568.

[124] *Id.* at 567.

[125] *Id.*

[126] *See* Ruzicka v. General Motors Corp., 649 F.2d 1207, 1213 (6th Cir. 1981) (employee must show breach seriously undermined integrity of grievance procedure); Findley v. Jones Motor Freight, 639 F.2d 953, 958 (3d Cir. 1981) (did breach taint arbitral decision); Del Casal v. Eastern Airlines, Inc., 634 F.2d 295, 299 (5th Cir. 1981) (breach must seriously undermine integrity of arbitral process); Miller v. Gateway Transp. Co., Inc., 616 F.2d 272, 277 (7th Cir. 1980) (conduct seriously undermined integrity of arbitral process); King v. Space Carriers Inc., 608 F.2d 283, 289 (8th Cir. 1979) (conduct that seriously flaws contractual procedures removes bar of finality); Harrison v. Chrysler Corp., 558 F.2d 1273, 1277 (7th Cir. 1977) (finality of arbitral process removed by breach that seriously undermined integrity of arbitral process); Johnson v. AAA Trucking Co., 448 F. Supp. 1347, 1352 (E.D. Pa. 1978) (breach must undermine integrity of arbitration process).

[127] *See* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 574 (1976) (Rehnquist, J., dissenting) (undermining finality of grievance procedures will discourage use of procedures).

[128] *See* Findley v. Jones Motor Freight, 639 F.2d 953, 958 (3d Cir. 1981) (rapid resolution of grievances is policy of federal labor law).

other hand, neither isolates important issues nor offers a clear description of the elements of fair representation. Adopting a test based on Judge Bazelon's analytic framework will not result in disrupting change, for both the content and structure of the test derive from existing case law.

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