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## **Midgett v. Sackett-Chicago, Inc.: The Short-Sighted Use of State Remedies to Protect Union Employees from Retaliatory Discharge, 18 J. Marshall L. Rev. 565 (1985)**

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## ARTICLES

### *MIDGETT v. SACKETT-CHICAGO, INC.*:\* THE SHORT-SIGHTED USE OF STATE REMEDIES TO PROTECT UNION EMPLOYEES FROM RETALIATORY DISCHARGE

BENJAMIN P. HYINK\*\* & LAWRENCE M. LIEBMAN\*\*\*

#### INTRODUCTION

For over fifty years,<sup>1</sup> collective bargaining agreements,<sup>2</sup> arbi-

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\* 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).

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1. With the emergence of the railroad industry in the United States, the need for legislative involvement in labor/management relations became fully manifest. In 1926, Congress responded by enacting the Railway Labor Act, which has served as the progenitor of the labor legislation which was to follow. 45 U.S.C. §§ 151-163 (1982).

Early congressional labor policy in other areas of industry can best be described as a leap from one act to another, whereby each new enactment was an attempt to fill the gaps of its predecessor. See B. MELTZER, *LABOR LAW* 29-36 (1977). The end result of this legislative evolution is the Labor Management Relations Act, 29 U.S.C. §§ 141-187 (1982). The Labor Management Relations Act has had two significant effects on federal labor policy. First, the Act has substantially limited the workers' right to strike. Second, the Act strongly encourages binding arbitration as the preferred method by which to resolve labor disputes. Note, *Carbon Fuel Co. v. United Mine Workers of America—An Unfortunate Departure of the Proarbitration Policy of the Labor Management Relations Act*, 6 J. CORP. L. 195, 198 (1980).

2. Collective bargaining agreements are agreements between employers and unions which regulate the terms and conditions of employment. Such agreements are enforceable by and against the union in matters which affect either all union members alike or large classes of members. *Bogue Elec. Co. v. Board of Review*, 21 N.J. 431, 435, 122 A.2d 615, 618 (1956).

tration rulings,<sup>3</sup> and decisions of federal agencies,<sup>4</sup> such as the National Labor Relations Board,<sup>5</sup> have governed the resolution of labor/management disputes regarding unjustified employment dismissals. In the past, the doctrine of federal preemption<sup>6</sup> of union employee dismissal law has been eroded where the existing administrative agencies have failed to afford the type of relief sought by the plaintiff employee under state law.<sup>7</sup> More recently, state courts have challenged the application of the federal preemption doctrine in cases where important local policies may be promoted by either the establishment of civil actions predicated upon state statutes<sup>8</sup> or

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3. Arbitration rulings are decisions rendered by a private and disinterested person or panel of persons, chosen by the parties to a disputed question for the purpose of hearing their contentions and rendering a judgment to which the litigants voluntarily submit themselves. See *Wauregan Mills, Inc. v. Textile Workers Union of Am.*, 21 Conn. Supp. 134, 137, 146 A.2d 592, 595 (1958).

4. Where Congress has delegated the administration of a broad statutory mandate to an agency, the courts are required to defer to the agency judgment. *Gray v. Powell*, 314 U.S. 402, 412 (1941); *International Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 991 (D.C. Cir. 1976). The courts violate such deference only when the agency decision is clearly erroneous and unwarranted. *Cosgrove v. Wickard*, 49 F. Supp. 232, 238 (D. Mass. 1943). Therefore, courts have held that if there exists any rational basis for an agency ruling, it will be upheld. *Kerr-McGee Corp. v. Watt*, 517 F. Supp. 1209, 1211 (D.C. 1981).

What is necessary under a given case to effectuate the policies promoted by the National Labor Relations Act is to be determined by the National Labor Relations Board and not the courts. *Standard Generator Serv. Co. v. NLRB*, 186 F.2d 606, 607 (8th Cir. 1951); *NLRB v. West Ky. Coal Co.*, 116 F.2d 816, 821 (6th Cir. 1940). Consequently, National Labor Relations Board findings which are supported by evidence are conclusive upon the courts. *Standard Generator Serv. Co.*, 186 F.2d at 607. Therefore, administrative decisions, such as those rendered by the National Labor Relations Board, hold great precedential value and most often will be respected by the courts.

5. Section 153 of the National Labor Relations Act provides for a National Labor Relations Board and specifies its powers and duties. 29 U.S.C. § 153 (1982).

6. The doctrine of federal preemption holds that certain matters are of such national, as opposed to local, character that federal laws take precedence over state laws, thereby barring the states from asserting jurisdiction. *State v. McHorse*, 85 N.M. 753, 757, 517 P.2d 75, 79 (1973). For a more detailed treatment of the doctrine of federal preemption, see *infra* note 70.

7. See, e.g., *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983); *J & J Enter. v. Martignetti*, 369 Mass. 535, 341 N.E.2d 645 (1976) (action seeking damages for past conduct should not be dismissed simply because a similar charge is pending before an administrative agency); *Texas State Fed'n of Labor v. Brown & Root, Inc.*, 246 S.W.2d 938 (Tex. 1952) (employer not required to pursue action for damages through National Labor Relations Board).

8. See, e.g., *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981) (Oklahoma statute prohibiting discharge of workers' compensation claimants for exercising statutory rights); *Judson Steel Corp. v. Workers' Comp. Appeals Bd.*, 22 Cal. 3d 58, 586 P.2d 564, 150 Cal. Rptr. 250 (1978) (California statute prohibiting employer discrimination against workers' compensation claimants); *Puchert v. Agsalud*, 677 P.2d 449 (Hawaii 1984) (Hawaiian statute prohibiting wrongful discharge of workers' compensation claimants), *petition for cert. filed*, (No. 83-1952); *Vaughn v. Pacific N.W. Bell Tel. Co.*, 289 Or. 611 P.2d 281 (1980) (Oregon statute prohibiting employer discrimination against workers' compensation claimants); *Carnation Co. v. Borner*, 610 S.W.2d 450 (Tex. 1980)

tort remedies<sup>9</sup> which seek to deter<sup>10</sup> the wrongful discharge of union employees.<sup>11</sup>

Unfortunately, none of the court opinions regarding state remedies for retaliatory discharge<sup>12</sup> has balanced the public interests favoring federal preemption of employee dismissal law with the public interests supporting state remedies coincident to those under federal labor law. While state courts increasingly are focusing attention upon the need to protect union employees from wrongful discharge,<sup>13</sup> the rights of employers subject to collective bargaining agreements are being disregarded.<sup>14</sup> The unravelling of the federal labor law fabric<sup>15</sup> and the consequent disruption of interstate commerce and predictable labor/management relations<sup>16</sup> are foresee-

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(Texas workers' compensation statute provides for an action to recover damages for wrongful discharge). See also *infra* note 70 (federal jurisdictional preemption analysis).

9. *Midgett v. Sackett-Chicago, Inc.*, 105 Ill.2d 143, 473 N.E.2d 1280 (1984) (court-created wrongful discharge tort action maintainable by union employees).

10. Deterrence, as distinguished from the creation of a remedy to obtain compensatory relief, is the primary objective of state statutes and tort remedies for the wrongful discharge of workers' compensation claimants. Ultimately, the United States Supreme Court will have to address the states' desire to employ deterrent-oriented civil actions and criminal sanctions to support important local public policies when such remedies undermine the collective bargaining process.

11. See *infra* note 63.

12. See *supra* note 8.

13. The five cases cited in footnote eight illustrate the recent development of state efforts to challenge the federal preemption doctrine when important state public policies can be furthered by such action. See *supra* note 8 and accompanying text. It is interesting to note that all five cases arose from late 1970's to the present. Furthermore, four of these five cases were decided in the 1980's. Therefore, it appears that state challenge to federal preemption, while in its incipient stage, is becoming more frequent.

14. In any collective bargaining agreement, employees and employers must offer valuable consideration. The recent trend toward the development of state deterrent-oriented civil actions treats the reasonable expectations of employers too lightly with respect to the employees' promise not to litigate employment-related disputes outside of the arbitration process. Certainly, the law would not permit employers to renege on their promises to provide employees with the extraordinary benefits set forth in collective bargaining agreements. Yet, the opposite holds true for those obligations entertained by employees under these same agreements.

15. Contracting parties must be able to rely upon their bargaining partners to honor the commitments contained in their agreements. However, the employees' promise to forego litigation in favor of arbitration proceedings is made with the express understanding that the union shall be the advocate of the employees. *Bowen v. United States Postal Serv.*, 459 U.S. 212, 226 (1983). Employers rely on unions to screen grievances which are frivolous, factually unfounded, or malicious. The states' encouragement of employee civil actions in lieu of arbitration proceedings heightens the potential for employee abuse of procedural remedies.

16. In *Midgett*, the court justified its action by the need to support a strong public policy in favor of workers' compensation protection. *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 147, 473 N.E.2d 1280, 1283 (1984). Other public

able products of the expansion of state remedies for allegedly wrongful dismissals.

The failure to balance the problems inherent in state remedies for wrongful discharge with the benefits obtained by affording opportunities for the private enforcement of state public policies is apparent in the recent Illinois Supreme Court holding in *Midgett v. Sackett-Chicago, Inc.*<sup>17</sup> In *Midgett*, a union employee alleged that he had been discharged in retaliation for filing a workers' compensation claim.<sup>18</sup> The court held that a union employee who is wrongfully discharged and protected by a collective bargaining agreement may bypass the contract remedies provided by the agreement and, instead, directly pursue an action in tort for retaliatory discharge.<sup>19</sup> The court emphasized<sup>20</sup> the strong public policy in favor of protecting the rights of employees under the Workers' Compensation Act.<sup>21</sup> The court had previously held that a recovery of punitive damages<sup>22</sup> was necessary in at-will<sup>23</sup> employment termination cases

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policies, such as the one in favor of free speech, are currently being presented to the Illinois Supreme Court as a basis for independent civil actions in Illinois. *E.g.*, *Price v. Carmack Datsun, Inc.*, 124 Ill. App. 3d 979, 469 N.E.2d 1245 (1984) (Ill. Sup. Ct. appeal filed, No. 60446); *Kelso-Burnett Co. v. Barr*, Ill. App. Ct. appeal dismissed, June 13, 1984 (Ill. Sup. Ct. appeal filed, No. 60426); *Mein v. Masonite Corp.*, 124 Ill. App. 3d 617, 464 N.E.2d 1127 (1984) (Ill. Sup. Ct. appeal filed, No. 60422); *Wheeler v. Caterpillar Tractor Co.*, 123 Ill. App. 3d 539, 462 N.E.2d 1262 (1984) (Ill. Sup. Ct. appeal filed, No. 60181). If states are permitted to create civil actions for employees merely on the basis of a state public policy being adversely affected by the alleged actions of an employer, employees will foreseeably bring actions as diverse as the creativity of the common law lawyer's mind. Such a development would render completely ineffectual the arbitration provisions of existing collective bargaining agreements.

17. 105 Ill. 2d 143, 473 N.E.2d 1280 (1984).

18. *Id.*

19. *Id.* at 145, 473 N.E.2d at 1282. Justice Moran, dissenting, recognized the ill effects that the majority opinion could have on federal labor policy by stating that he could not "agree that the expectations created by the collective-bargaining agreement should be entirely overlooked by allowing the union employee to completely circumvent the mutually agreed upon grievance procedure." *Id.* at 152, 473 N.E.2d at 1287 (Moran, J., dissenting). Justice Moran suggested that the retaliatory discharge tort action was intended to be merely "a narrow exception" to the termination-at-will rule and was created solely for the purpose of providing a remedy to the wrongfully discharged at-will employee. *Id.*

20. *Midgett*, 105 Ill. 2d at 145, 473 N.E.2d at 1282.

21. ILL. REV. STAT. ch. 48, §§ 138.1-138.30 (1983).

22. The emergence of punitive damages in the common law has been traced to Eighteenth Century England. Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 518 (1957); Note, *Mattyasovszky v. West Towns Bus Co.—Punitive Damages Nonrecoverable Under the Illinois Survival Act*, 7 LOY. U. CHI. L.J. 811, 812 (1976). They were then employed to justify jury verdicts in excess of the plaintiff's actual harm, thereby enabling the plaintiff to obtain compensation for intangible elements of damage which were not recoverable at early common law. McKillip, *Punitive Damages in Illinois: Review and Reappraisal*, 27 DE PAUL L. REV. 571, 572 (1978). As the law progressed, however, civil damage recoveries were expanded to include intangibles, satisfying the need for which the doctrine of punitive damages was intended. *Id.* Today, puni-

to deter employers from interfering with the filing of workers' compensation claims.<sup>24</sup> Therefore, to uniformly protect the right of all

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tive damages are employed for the purpose of punishment and deterrence. See *infra* text accompanying note 110.

23. Unlike the discharge rights provided to organized employees, at-will employees are without contractual job protection. In an at-will employment setting, the employee or employer may terminate employment at any time, without notice and "for a good cause, for no cause, or even for cause morally wrong." *Payne v. Western & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884), *overruled on other grounds*, *Hutton v. Watters*, 132 Tenn. 527, 179 S.W. 134 (1915). *Accord* *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 128, 421 N.E.2d 876, 878 (1981). In contrast, an employment contract which provides for a fixed term may be terminated only for justifiable cause.

The termination-at-will doctrine has been a part of American labor law since the days of the Industrial Revolution. An employer's unrestricted right to fire employees was an important component of the prevailing laissez-fair economic philosophy during that era. One commentator has noted the importance of the termination-at-will doctrine to the rapid industrial development of Nineteenth Century America:

The rule was adopted in a milieu of an emerging industrial society. The latter part of the nineteenth century was a period of tremendous economic development . . . in which entrepreneurs ran heavy risks . . . [avoidable] only by great skill and good fortune. So that these risks might be minimized and industry encouraged to expand, courts created a legal framework to protect the employer.

Comment, *A Common Law Action for the Abusively Discharged Employee*, 26 HASTINGS L.J. 1435, 1440 (1975). See, e.g., *Phillips v. Goodyear Tire & Rubber Co.*, 651 F.2d 1051, 1054-55 (5th Cir. 1981) (under Georgia and Texas law, dismissal in retaliation for refusing to commit perjury in deposition not actionable absent contract provisions to the contrary); *Hoopas v. Equifax, Inc.*, 611 F.2d 134, 135 (6th Cir. 1979) (Ohio permits parties to terminate oral contract not containing duration provision at any time); see generally Note, *Implied Contract Rights to Job Security*, 26 STAN. L. REV. 335 (1974) (detailing historical development of at-will doctrine).

24. In 1978, the tort of retaliatory discharge was recognized as a cause of action in Illinois for the first time. In *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978), the Illinois Supreme Court allowed an at-will employee to recover damages against an employer who had discharged her in retaliation for filing a workers' compensation claim. The court reasoned that an "employer's otherwise absolute power to terminate an employee at will should [not] prevail when that power is exercised to prevent the employee from asserting his statutory rights under the Workers' Compensation Act." *Id.* at 181, 384 N.E.2d at 357. The court found the need to create the cause of action for retaliatory discharge because without such an action, there would be no insurance that at-will employees would be able to freely exercise their rights under the Workers' Compensation Act without the risk of a retaliatory discharge by an employer against whom the employees had no protection. *Id.* at 182, 384 N.E.2d at 357.

Furthermore, it was held that such a recovery may include both compensatory and punitive damages. *Id.* at 186, 384 N.E.2d at 359. In the absence of other effective means of deterrence, the court found it necessary to permit the recovery of punitive damages to prevent the discharge of at-will employees for exercising their statutory rights. *Id.* Although punitive damages are generally not recoverable in wrongful discharge actions, because such actions have traditionally been based upon contract theory and actions sounding in contract normally do not give rise to claims for punitive damages, in *Kelsay*, the newly-created retaliatory discharge cause of action was premised upon a separate and in-

private<sup>25</sup> employees to file workers' compensation claims, the court concluded that the tort action of retaliatory discharge and the availability of punitive damages must be extended to union employees.<sup>26</sup>

Concern regarding the protection of workers' compensation claimants is shared by other courts.<sup>27</sup> These jurisdictions, however, have only recognized a remedy based upon state statute.<sup>28</sup> Until *Midgett*,<sup>29</sup> no jurisdiction had held that the common law of the state permitted a punitive damages award to deter wrongful conduct by a private employer of union members. This article will criticize *Midgett*'s radical departure from established labor law.

Initially, an examination of the availability of adequate remedies for the wrongful discharge of union employees who are protected by collective bargaining agreements will be presented. Thereafter, the article will examine the detrimental effects resulting from the creation of state statutory and common law civil actions which seek to deter wrongful conduct by employers. Finally, a proposal which protects union employees subject to collective bargaining agreements and which accommodates valid state concerns regarding the enforcement of local public policies is offered. The proposal advocates that the present system of arbitration and administrative appeal predicated upon collective bargaining agreements is the proper remedy for discharged employees.

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dependent tort, and therefore, the proper context for a recovery of punitive damages existed. *Id.* at 187, 384 N.E.2d at 359-60.

In 1981, the retaliatory discharge cause of action was extended one step further. In *Palmateer v. International Harvester Co.*, 85 Ill. 2d 124, 421 N.E.2d 876 (1981), an at-will employee was discharged for supplying local law enforcement officials with information indicating criminal activity on the part of a fellow employee. The court held that when an at-will employee's discharge contravenes clearly mandated policy, a tort cause of action for retaliatory discharge may be maintained. *Id.* at 129-32, 421 N.E.2d at 878-79. Therefore, *Palmateer* established a non-statutory court-implied public policy exception to the termination-at-will doctrine.

*Kelsay* and *Palmateer* provided a tort cause of action for retaliatory discharge which could only be maintained by the at-will employee. This limitation on the class of plaintiffs who could maintain retaliatory discharge actions was fully upheld until the court's decision in *Midgett*.

25. This article concerns exclusively wrongful dismissal law as it pertains to the private sector employee. Section 152(2) of the National Labor Relations Act provides that "the United States . . . [and] any State or political subdivision thereof" are not "employers" under the Act and therefore, pursuant to § 152(3), individuals who are employed by such entities are not "employees." 29 U.S.C. §§ 152(2)-152(3) (1982). Consequently, the wrongful dismissal law which applies to public employees is distinguishable from that of private employees and therefore, is beyond the scope of this article.

26. *Midgett*, 105 Ill. 2d at 146, 473 N.E.2d at 1283.

27. *See supra* note 8.

28. *See supra* note 8.

29. 105 Ill. 2d at 144, 473 N.E.2d at 1281.

## REMEDIES AVAILABLE TO UNION EMPLOYEES FOR WRONGFUL CONDUCT OF EMPLOYERS AND UNION REPRESENTATIVES

The general rule<sup>30</sup> under federal labor law policy compels the resolution of labor/management dismissal disputes through the available arbitration and administrative review process, thereby making the employee whole.<sup>31</sup> This rule is predicated upon the doctrine of preemption.<sup>32</sup> The rule<sup>33</sup> has not been employed where the particular type of relief sought by the employee may not be obtained under the enforcement of existing collective bargaining agreements or by the enforcement of federal labor laws.<sup>34</sup>

Each exception to federal preemption erodes employers' adherence to the arbitration and administrative review processes causing an unforeseeable burden of litigation costs and delays.<sup>35</sup> As collective bargaining agreements, negotiated in good faith, become more onerous for employers, these employers will become less willing to afford employees higher wages and other comprehensive employment benefits generally not made available to at-will employees.<sup>36</sup>

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30. The United States Supreme Court has noted that an employee who wishes to assert a contract grievance against his employer "must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652 (1965) (emphasis in original) (footnote omitted).

31. *Bowen v. United States Postal Serv.*, 459 U.S. 212, 222 (1983).

32. Under the supremacy clause of the United States Constitution, Congress may designate certain areas of human activity as exclusively the domain of the federal government. U.S. CONST. art. VI, § 2. Accordingly, Congress has designated the area of federal labor law generally and unfair labor practices, in particular, as the exclusive jurisdiction of the National Labor Relations Board. Basically, states are not permitted to create alternative and substantial remedies to those provided to employees protected by collective bargaining agreements.

33. See *supra* note 30.

34. See *Belknap, Inc. v. Hale*, 463 U.S. 491 (1983). For a thorough discussion of *Belknap*, see Anderson, "Permanent" Replacements of Strikers After *Belknap: The Employer's Quandary*, 18 J. MAR. L. REV. 321 (1985).

35. See *infra* notes 150-54 and accompanying text.

36. Through the collective bargaining process, union employees obtain substantial benefits rarely provided to at-will employees. By providing additional financial benefits and other work incentives, employers hope to obtain a dispute resolution process which is rapid and cost-efficient. In exchange, union employees may obtain wages and fringe benefits above those provided to at-will employees. Collective bargaining agreements may include such commonplace benefits as higher wages, additional paid holiday vacations, layoff compensation, and protection against dismissal without just cause, as well as more special benefits such as technical displacement provisions and supplemental employment compensation benefits. For an exhaustive list of the special benefits contained in a collective bargaining agreement, see THE BUREAU OF NATIONAL AFFAIRS, INC., BASIC PATTERNS IN UNION CONTRACTS (10th ed. 1983). For a general review of collective bargaining issues, see G. BERENDT, COLLECTIVE BARGAINING (1984).



While union employees have the right to strike,<sup>37</sup> management in recent years has gravitated toward jurisdictions with "right to work" legislation.<sup>38</sup> Therefore, the ultimate viability of unions rests upon the willingness of employers to engage in the collective bargaining process.<sup>39</sup> Consequently, the superior compensation afforded to union employees is dependent upon the limitation of exceptions to the scheme of grievance and arbitration procedures. Such exceptions should only be recognized where the employee can not be made whole.

### *Available Remedies for Retaliatory Discharge*

The primary shortcoming of the *Midgett* decision is the court's failure to address the issue of federal preemption.<sup>40</sup> Collective bar-

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37. Section 157 of the National Labor Relations Act states in part: "Employees shall have the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157 (1982). Strikes are included among the concerted activities protected for employees by this section. Section 163 also concerns the right to strike. 29 U.S.C. § 163. It reads as follows: "Nothing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right." *Id.* It is clear from a reading of these two provisions that the law guarantees the right of employees to strike.

38. To date, eighteen states have enacted "right to work" laws: *See* ALA. CODE §§ 25-7-30 - 27-7-37 (1984); ARIZ. CONST. art. 2, § 35; ARK. STAT. ANN. §§ 81-201 - 81-205; FLA. CONST. art. 2, § 6; GA. CODE §§ 34-6-20 - 34-6-28 (1984); IOWA CODE §§ 736A.1-736A.8 (1984); KAN. CONST. art. 15, § 12; KAN. STAT. ANN. § 44-831 (1984); LA. REV. STAT. ANN. §§ 981-987 (1984); MISS. CONST. art. 7, § 198-A; MISS. CODE ANN. § 71-1-47 (1983); NEB. CONST. art. 15, §§ 13-15; NEB. REV. STAT. §§ 48-217 - 48-219 (1984); NEV. REV. STAT. §§ 613.230-613.300 (1984); N.C. GEN. STAT. §§ 95-78 - 95-84 (1984); S.C. CODE ANN. §§ 41-7-10 - 41-7-90 (1984); S.D. COMP. LAWS ANN. §§ 60-8-3 - 60-8-8 (1984); TENN. CODE ANN. §§ 50-1-201 - 50-1-204 (1984); TEX. STAT. ANN. art. 5207A (Vernon 1984); UTAH CODE ANN. §§ 34-34-2 - 34-34-17 (1984); VA. CODE §§ 40.1-58 - 40.1-69 (1984); WYO. STAT. §§ 27-245.1 - 27-245.8 (1984).

39. Apparently unions are becoming less inclined to seek a redress of members' grievances through the National Labor Relations Board. A recent analysis of the records of the National Labor Relations Board indicates a drop in the number of new cases filed on an annual basis of 21% between fiscal year 1980 and fiscal year 1983 which ended on September 30, 1984. In the last year, the number of new cases filed dropped by 13%. Wall St. J., Feb. 12, 1985, at 1.

If union grievances are increasingly presented in state trial courts instead of in arbitration proceedings, the litigation costs for employers will dramatically rise. Employers will become less willing to enter agreements which are unilaterally enforceable. When the costs of doing business with unions exceeds the cost of seeking available alternatives to union representation, employers will become more likely to move their businesses to other locations where unions are less prevalent. *See infra* note 149.

40. Although counsel for Sackett-Chicago raised the issue that Mr. Midgett failed to exhaust his administrative remedies under the collective bargaining agreement, the lack of subject matter jurisdiction was not specifically raised until the present counsel for Sackett-Chicago presented this issue in support of its petition for rehearing. Counsel for Mr. Midgett successfully moved to strike the federal preemption argument from the brief of Sackett-Chicago on the the-

gaining agreements protecting union employees from dismissal for other than just cause<sup>41</sup> allow a discharged employee to obtain reinstatement with full backpay,<sup>42</sup> interest from the date of discharge until the date of reinstatement,<sup>43</sup> and attorneys' fees.<sup>44</sup> Because such employees are entitled to be made whole under federal labor law,<sup>45</sup> the doctrine of preemption should have barred the Illinois Supreme Court from exercising jurisdiction to extend a tort remedy to union employees.

Concern regarding the ability of union employees to be made whole through federal labor law was openly expressed in the Illinois appellate court's opinion in *Midgett*<sup>46</sup> and during the subsequent oral arguments<sup>47</sup> conducted before the Illinois Supreme Court. Specifically, the court focused upon the likelihood of union employees in small shops and factories having to confront barriers to the legitimate enforcement of their rights under the Illinois Workers' Compensation Act because of the intimacy between management and labor in such a working environment.<sup>48</sup> This intimacy

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ory that the argument had been waived in the lower courts. As a result, the majority opinion neglected to comment upon the jurisdictional support for the creation of a new tort remedy for union employees protected by a collective bargaining agreement.

41. In a recent analysis of over four hundred collective bargaining agreements, grounds for discharge were set forth in 94% of the contracts. Approximately 83% of the agreements contained "cause" or "just cause" provisions. In essence, employees who may be discharged for less than just cause are at-will employees even though the collective bargaining agreement sets forth certain conditions of their employment. See BUREAU OF NATIONAL AFFAIRS, BASIC PATTERNS IN UNION CONTRACTS 6-11 (10th ed. 1983).

42. 29 U.S.C. § 160(c) (1982).

43. Recently, the NLRB raised back pay interest rates from 11% to 13%. *NLRB Raises Back Pay Interest Rate*, Chicago Daily L. Bull., Feb. 6, 1985, at 1.

44. Litigation costs and attorneys' fees ordinarily are not recoverable under the National Labor Relations Act. C. MORRIS, DEVELOPING LABOR LAW 1680 (1983). However, an award of attorneys' fees and the reimbursement of court costs may be awarded by the Board in cases of frivolous employer defenses or outrageous employer conduct. *Id.*

45. See *supra* note 31.

46. 118 Ill. App. 3d 7, 454 N.E.2d 1092 (1983).

47. The *Midgett* case was consolidated with a case entitled *Gonzalez v. Prestress Eng'g Corp.*, No. 59350 (Ill. Sup. Ct. filed Oct. 19, 1984), which itself was consolidated with *Repyak v. Prestress Eng'g Corp.* Counsel for those plaintiffs told the court during oral argument that retaliatory discharges are tantamount to the employer practices that touched off the Chicago Haymarket Square Riot in 1884. Chicago Daily L. Bull., June 27, 1984, at 1. Furthermore, counsel argued that employers effectively discourage the filing of workers' compensation claims by this termination practice. *Id.*

48. Apparently, the Illinois Supreme Court was persuaded by the argument that unions were incapable of effectively protecting employees from the coercive influence of employers who seek to prevent the filing of workers' compensation claims. The court chose to quote that portion of the Illinois Appellate Court decision which provided:

The recognition of a cause of action in tort merely allows an employee an additional remedy in areas where strong public policies, as opposed to

can potentially impair the willingness of union representatives to fulfill their responsibilities to the worker.<sup>49</sup> Therefore, it is apparent that the Illinois Supreme Court, like other state courts and legislatures,<sup>50</sup> has concluded that the state must seek its own means to deter wrongful discharges by employers in contravention of state public policy.<sup>51</sup> Certainly, the threat of protracted litigation with a former employee will deter the employer from abusing his position of power over an employee who seeks to lawfully exercise rights guaranteed by state law. The additional threat of a punitive damages award far in excess of the actual injury to the employee will further advance the deterrence goal sought by the state.

On the other hand, such state civil actions have a chilling effect upon the exercise of the employers' right to discharge incompetent or otherwise inappropriate employees for just cause. Under federal labor law, an extensive built-in filtering process exists.<sup>52</sup> Through arbitration,<sup>53</sup> administrative review,<sup>54</sup> or direct action in the United States district courts,<sup>55</sup> an employee discharged for other than just cause can have his claim fully adjudicated. However, state deterrent-oriented causes of action open the door for angry and disgruntled former employees to harass their ex-employers with unsubstantiated wrongful discharge claims.<sup>56</sup> At the very least,

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purely private interests, are involved. Such an alternative is especially necessary and desirable in a case such as this where there has been an allegation of collusion between the union and the employer.

*Midgett v. Sackett-Chicago, Inc.*, 118 Ill. App. 3d 7, 9, 454 N.E.2d 1092, 1094 (1983).

49. See *infra* notes 60-104 and accompanying text.

50. See *supra* notes 8 & 9 and accompanying text.

51. *Midgett*, 105 Ill. 2d at 146, 473 N.E.2d at 1283.

52. Unions are able to refuse to represent employees with frivolous or unjustified claims. See *infra* note 72. Arguably valid claims may be more closely examined during an arbitration proceeding when the employee has an opportunity to present evidence in support of his position. Such a two-step filtering process is much less expensive than routine trial court litigation where contested issues of fact must be fully presented before claims without merit can be dismissed.

53. Arbitration proceedings routinely offer employees a greater opportunity to present all potentially related facts which might otherwise be inadmissible in a trial court.

54. Administrative agencies or boards, such as the National Labor Relations Board, may elect to rehear the evidence presented to the arbitrator or may rely upon the transcript of the proceedings conducted before the arbitrator. National Labor Relations Act, 29 U.S.C. § 160(e) (1982).

55. Section 301(a) of the Labor Management Relations Act provides for the jurisdiction of the United States district courts to adjudicate actions "for violation of contracts between an employer and a labor organization in an industry affecting commerce." 29 U.S.C. § 185(a) (1982).

56. The Illinois Code of Civil Procedure provides that a party may present a motion within thirty (30) days of the entry of a judgment or the dismissal of a cause of action for reasonable attorneys' fees incurred by reason of untrue pleadings presented by an opposing litigant. ILL. REV. STAT. ch. 110, § 2-611 (1983). However, unemployed former employees are often, for all practical pur-

such litigants will obtain the revenge they seek and, in some instances, unearned severance pay in the form of a nuisance suit settlement.<sup>57</sup>

Because the *Midgett* court was so intent on deterring wrongful discharges of workers' compensation claimants, the court failed to address any rational reason to afford the extraordinary relief of punitive damages to at-will employees, while denying the opportunity for a windfall to union members.<sup>58</sup> A careful consideration of the federal remedies available to union members, even if inadequately represented by the union,<sup>59</sup> would have led the court to the conclusion that union employees will be hurt, more than helped, by the tort remedy of retaliatory discharge.

*Available Federal Remedies for Breach of a Union's Duty of Fair Representation*

Where an adequate federal remedy exists against a union conspiring with an employer contrary to the interests of a wrongfully discharged union employee, the federal preemption doctrine supports reliance on established statutory remedies to the exclusion of state law actions.<sup>60</sup> When Congress enacted the Labor Management Relations Act,<sup>61</sup> it stated its preference for employing contractual grievance procedures to settle disputes arising in the organized workplace.<sup>62</sup> Therefore, where a union acts as an exclusive bargaining agent for a group of employees,<sup>63</sup> it is obligated to represent those employees with "complete good faith and honesty of purpose."<sup>64</sup> The United States Supreme Court has held that this

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poses, judgment proof because they lack the income or assets necessary to satisfy an award of attorneys' fees obtained under § 2-611. *Id.*

57. Employers are faced with the difficult decision of offering irresponsible litigants several hundred dollars to dismiss their complaint, or pay legal fees of hundreds, or even thousands, of dollars to ultimately obtain the dismissal of frivolous litigation.

58. 105 Ill. 2d at 147, 473 N.E.2d at 1284.

59. *See infra* note 78.

60. *See infra* note 70.

61. 29 U.S.C. §§ 141-187 (1982).

62. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965). *See supra* notes 30-31 and accompanying text.

63. Employees who are not members of the union, but are subject to the collective bargaining agreement and pay dues under the "agency shop clause," are entitled to the same union representation as employees who are members. *Nikiel v. Buffalo*, 75 A.D.2d 1017, 429 N.Y.S.2d 332 (1980). *Accord* *Port Drum Co.*, 170 N.L.R.B. 555 (1968).

64. *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953). In *Huffman*, the employee plaintiff brought a class action against his employer and union claiming that the plaintiff class had been lowered in seniority status due to provisions in the collective bargaining agreement giving veterans seniority credit for service in the armed forces prior to their employment. *Id.* at 333-35. While the named plaintiff was a veteran, he had been working for the defendant employer

duty arises from statutory enactment,<sup>65</sup> and courts have often stated that the union's duty is fiduciary in nature.<sup>66</sup>

When a union employee feels that his discharge was wrongful, three modes of redress under the federal system are available. Generally, the employee must attempt<sup>67</sup> to utilize available grievance procedures<sup>68</sup> under the applicable collective bargaining agreement. However, where the collective bargaining agreement does not provide that the grievance procedures stated therein are exclusive, the employee may present the grievance to the employer directly.<sup>69</sup> If the discharge can arguably be characterized as an unfair labor prac-

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prior to his military service, while other employees had been given the same credit for military service undergone prior to their employment with the defendant employer. *Id.* at 335. The plaintiff contended that his union had no authority to enter into a collective bargaining agreement which provided employees with seniority credit for military service performed prior to employment. *Id.* at 336. The United States Supreme Court disagreed. *Id.* at 334.

The Court noted that unions have a duty, based on sections seven and nine of the National Labor Relations Act, to "make an honest effort to serve the interests" of all members of the bargaining unit. *Id.* at 337. The Court held that since the union represented all of the employees at the plant in question, it did have the authority to agree to the contested contract provisions because such provisions were reasonable. *Id.* at 342.

65. *Id.* at 337.

66. *E.g.*, *Falsetti v. Local Union No. 2206, United Mine Workers*, 400 Pa. 145, 169, 161 A.2d 882, 895 (1960) (union is trustee of employees' grievance rights).

67. *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653 (1965). Generally, the issue concerning the attempt to utilize available grievance procedures arises in tandem with a defense that the employee failed to exhaust all available administrative remedies. However, numerous exceptions to the exhaustion requirement abound. In *Vaca v. Sipes*, 386 U.S. 171, 185 (1967), the Supreme Court noted that there is no need for prior exhaustion where the employer's conduct amounted to a repudiation of the collective bargaining agreement altogether. Similarly, in suits between the employee and the union, the union is estopped from defending on the ground of failure to exhaust agreement grievance procedures where the union wrongfully refuses to process the grievance. *Id.*

In a number of cases where the employee brought suit against the union, the union interposed the defense of failure to exhaust intraunion remedies. However, where those procedures could not reactivate a grievance that had expired as a result of the union's wrongful activity or could not award the employee the complete relief sought, no exhaustion need be shown. *Clayton v. United Auto Workers*, 451 U.S. 679, 693 (1981). *Accord* *Rupe v. Spector Freight Sys., Inc.*, 679 F.2d 685 (7th Cir. 1982). Other courts have carved out additional exceptions. *See, e.g.*, *Martin v. Kansas City S.R. Co.*, 197 F. Supp. 188 (D. La. 1961) (futility, unfairness, and hostile discrimination); *Neider v. J.G. Van Holten & Son*, 41 Wis. 2d 602, 165 N.W.2d 113 (1969) (inordinate delay).

68. Where internal union procedures do not provide redress for the particular grievance, there is no requirement imposed on the employee to exhaust procedures. *Varra v. Dillon Cos.*, 615 F.2d 1315, 1317 (10th Cir. 1980).

69. National Labor Relations Act, 29 U.S.C. § 159(a) (1982). This right is subject to the proviso that "the bargaining representative has been given the opportunity to be present at the adjustment." *Id.*

A similar provision applies to employer/employee relationships governed by the Railway Labor Act. 45 U.S.C. § 153 First (i) (1982). In this context, however, a railroad employee need not exhaust the statutory right before bringing an action against his union. *Czosek v. O'Mara*, 397 U.S. 25, 28 (1970).

tice,<sup>70</sup> the employee may also seek redress before the National La-

70. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). In *Garmon*, unions picketed an employer's store for the purpose of exerting pressure on the employer's customers and suppliers not to deal with the employer until the employer agreed to only hire union employees. *Id.* at 237. The employer petitioned a California state court for an injunction and damages and concurrently began proceedings before the National Labor Relations Board. *Id.* at 237-238. While the NLRB declined to exercise jurisdiction, due to failure of the amount of money at issue to reach the Board's minimum jurisdictional amount, the California court entered an injunction against the unions and awarded the employer \$1000 in damages. *Id.* The California Supreme Court affirmed on the ground that failure of the NLRB to assert jurisdiction, gave the state power to resolve the dispute. *Garmon v. San Diego Bldg. Trades Council*, 45 Cal. 2d 657, 663, 291 P.2d 1, 5 (1955). The United States Supreme Court reversed, holding that failure of the NLRB to exercise jurisdiction did not give state courts power to adjudicate over activities they otherwise would be preempted from regulating. *San Diego Bldg. Trades Council v. Garmon*, 353 U.S. 26 (1957). The Supreme Court remanded the case for a determination as to whether California law alone could support the award of damages. On remand, the California Supreme Court dissolved the injunction, but held that the award of damages was based on California tort law as the union activity was an unfair labor practice under state tort law. *Garmon v. San Diego Bldg. Trades Council*, 49 Cal. 2d 595, 320 P.2d 473 (1958).

The United States Supreme Court reversed. *Garmon*, 359 U.S. at 236. The Court held that since the union picketing was arguably prohibited by sections seven and eight of the National Labor Relations Act, neither state nor federal courts have jurisdiction to resolve the dispute. *Id.* at 245. The Court concisely stated its reasoning as follows:

Our concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered. Such regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy. Even the States' salutary effort to redress private wrongs or grant compensation for past harm cannot be exerted to regulate activities that are potentially subject to the exclusive federal regulatory scheme. It may be that an award of damages in a particular situation will not, in fact, conflict with the active assertion of federal authority. The same may be true of the incidence of a particular state injunction. To sanction either involves a conflict with federal policy in that it involves allowing two law-making sources to govern.

*Id.* at 246-47 (citation omitted).

The United States Supreme Court clarified the *Garmon* rule in *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978). In deciding whether the *Garmon* rule preempted an employer's civil action to enjoin union picketing on employer property, the Court stated:

The critical inquiry, therefore, is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board.

*Id.* at 197.

In its modified opinion in *Midgett*, the Illinois Supreme Court placed reliance on one federal and four state cases in support of its position that union employees may bypass grievance and arbitration procedures and proceed directly to state court to maintain a retaliatory discharge action against the employer. 105 Ill. 2d at 148, 473 N.E.2d at 1285. Namely, the court placed reliance on *Peabody Galion v. Dollar*, 666 F.2d 1309 (10th Cir. 1981); *Judson Steel Corp. v. Workers' Comp. Appeals Bd.*, 22 Cal. 3d 58, 586 P.2d 564, 150 Cal. Rptr. 250

(1978); *Puchert v. Aagsalud*, 677 P.2d 449 (Hawaii 1984); *Vaughn v. Pacific N.W. Bell Tel. Co.*, 289 Or. 73, 611 P.2d 281 (1980); and *Carnation Co. v. Borner*, 610 S.W.2d 450 (Tex. 1980). A closer examination of these cases reveals, however, that the *Midgett* court's reliance on these cases was misplaced.

Neither the *Judson Steel Corp.* nor the *Borner* courts addressed the *Garmon* rule or any other matter of federal labor policy. However, the *Peabody Galion*, *Puchert* and *Vaughn* courts did address the *Garmon* preemption rule.

The *Vaughn* case dealt with Oregon statutes barring discrimination against workers' compensation claimants and barring refusal to reinstate injured employees. *Vaughn*, 289 Or. at 73, 611 P.2d at 281. See OR. REV. STAT. §§ 659.410 and 659.415 (1979). Further, the aggrieved employee was given the right to seek an order of reinstatement and an award of back pay. *Id.* See OR. REV. STAT. § 659.121(1) (1979).

In *Puchert*, Hawaiian statutes barred discrimination against workers injured on the job and provided for hearing before the department of labor which could order reinstatement with an award of back pay. *Puchert*, 677 P.2d at 449. See HAWAII REV. STAT. §§ 378-32, 378-33, 378-35 (1976). The *Peabody Galion* case involved Oklahoma statutes barring discharge of workers' compensation claimants and allowing civil actions for violations where the aggrieved employee could obtain reinstatement and an award of "reasonable damages." *Peabody Galion*, 666 F.2d at 1309. See OKLA. STAT. tit. 85, §§ 5-7 (Supp. 1980).

In each of these cases, the respective courts held that the *Garmon* preemption rule was inapplicable. *Vaughn*, 289 Or. at 82, 611 P.2d at 287 ("such a claim does not disserve the interests promoted by federal labor relations law"); *Puchert*, 677 P.2d at 456 ("such regulation by the state does not interfere with the scheme and purpose of the RLA"); *Peabody Galion*, 666 F.2d at 1319 ("statute is not facially preempted by any of the federal labor laws"). All the courts claimed that the respective statutes fell within an exception to the rule, announced in *Garmon*, which allows states to regulate activity which is a "peripheral concern" of the L.M.R.A., or where the regulated conduct touches interests "deeply rooted in local feeling and responsibility." *Garmon*, 359 U.S. at 243-44.

What each of these courts failed to realize is that the state statutory remedies could potentially conflict with the remedies available from the NLRB. As the NLRB has power to order reinstatement and award back pay, it does not take much imagination to foresee instances where an aggrieved employee maintains actions before a state tribunal and the NLRB with differing results. See 28 U.S.C. § 160(c) (1982). Further, this potential of conflict ignores the Supreme Court's primary concern of having "two law-making sources" governing the same fact setting.

Further, these courts ignored the *Sears* holding. In each case the Labor Board and the court would have had to adjudicate the exact same issue, to wit, whether the employee was discharged for "just cause" or whether the employee was discharged for filing for worker's compensation benefits. The NLRB has determined that discharge of an employee for such a claim is an unfair labor practice under 29 U.S.C. § 158(a). *Krispy Kreme Doughnut Corp.*, 245 N.L.R.B. 1053 (1979), *enforcement denied*, 635 F.2d 304 (4th Cir. 1980). Recently, the Court has noted that "defining the scope of [29 U.S.C. § 157] is for the Board to perform in the first instance as it considers the wide variety of cases that come before it." *NLRB v. City Disposal Systems, Inc.*, 104 S. Ct. 1510 (1984).

Additionally, all three cases and the Illinois Supreme Court in *Midgett*, attempted to rely on the case of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). In *Alexander*, the United States Supreme Court held that a union employee, who was protected by a collective bargaining agreement with grievance procedures and who had alleged racial discrimination in his discharge grievance, was not precluded from maintaining an action under the Civil Rights Act. *Id.* at 60. The Court reasoned that "a contractual right to submit a claim to

bor Relations Board.<sup>71</sup>

When presented with a meritorious<sup>72</sup> employee grievance under the terms of the collective bargaining agreement,<sup>73</sup> the union must, pursuant to its duty to fairly represent the employee,<sup>74</sup> process the grievance in good faith.<sup>75</sup> If the union fails to properly process the grievance, then the employee may seek a judicial remedy and maintain an action against both his employer<sup>76</sup> for breach of the collective bargaining agreement and against his union<sup>77</sup> for its breach of the duty of fair representation.<sup>78</sup> Even if the union's

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arbitration is not displaced simply because Congress also has provided a statutory right against discrimination." *Id.* at 52.

There can be no doubt that Congress can create exceptions to rules of law which are solely within its power to legislate upon. For the *Vaughn, Puchert* and *Peabody Galion* courts to equate state statutory exceptions to federal law with those created by Congress, is to allow state legislatures power to invalidate the supremacy clause at will. See *supra* note 32 and *infra* note 158.

71. Section eight of the National Labor Relations Act defines employer and union unfair labor practices. 29 U.S.C. § 158 (1982). Section nine of the Act provides procedures for filing a complaint before the National Labor Relations Board. 29 U.S.C. § 159 (1982).

72. The general rule is that a grievance must be meritorious before the union has a duty to process it pursuant to the collective bargaining agreement. *NLRB v. Eldorado Mfg. Corp.*, 660 F.2d 1207, 1214 (7th Cir. 1981). Furthermore, unions are entitled to make a good faith determination of the likelihood of success on the merits and may consider the costs and benefits of processing a grievance to arbitration. *Higdon v. United Steelworkers of Am.*, 537 F. Supp. 653 (S.D. Ga. 1982), *aff'd*, 706 F.2d 1561 (11th Cir. 1983). Certainly, this process eliminates many frivolous and unsubstantial claims which might otherwise congest the state and federal court system.

73. Where the particular grievance involved is excluded by the terms of the collective bargaining agreement, the union is not under a duty to process the grievance. *Kaplan v. Ruggieri*, 547 F. Supp. 707, 712 (E.D. N.Y. 1982), *aff'd*, 722 F.2d 728 (2d Cir. 1983).

74. See *supra* note 63.

75. Mere negligence in handling a grievance does not constitute a lack of good faith on the union's part. *Wyatt v. Interstate Ocean Transp. Co.*, 623 F.2d 888 (4th Cir. 1980); *Foster v. Bowman Transp. Co.*, 562 F. Supp. 806 (N.D. Ala. 1983). *Contra* *Fray v. Amalgamated Meat Cutters*, 9 Wis. 2d 631, 101 N.W.2d 782 (1960).

76. 29 U.S.C. § 185 (1982).

77. Today, there is no question of an employee's standing to bring suit against his union in a proper case. *Vaca v. Sipes*, 386 U.S. 171 (1967). However, prior to *Vaca*, some courts barred such suits. *Kordewick v. Brotherhood of R.R. Trainmen*, 181 F.2d 963 (7th Cir. 1950); *Martin v. Kansas City S. Ry. Co.*, 197 F. Supp. 188 (W.D. La. 1961); *McClees v. Grand Int'l Bhd. of Locomotive Eng'rs*, 59 Ohio App. 477, 18 N.E.2d 812 (1938). The asserted argument was that a union is merely an unincorporated association and therefore, applying the common law rule, the member/employee could not sue the association for the actions of its agents as the member/employee would, in effect, be suing himself.

78. Generally, the duty of fair representation is deemed to be breached when the union acts with gross nonfeasance, hostile discrimination, arbitrariness or capriciousness. *Czosek v. O'Mara*, 397 U.S. 25, 26 (1970). It has been held that this requires the union to act with some degree of conscious misfeasance or dereliction. *Lewis v. American Postal Workers Union*, 561 F. Supp. 1141, 1148 (W.D. Va. 1983). Furthermore, the employee must prove that the union hostility is intentionally directed at the complaining employee in particu-



failure to process the grievance is deemed to be an unfair labor practice,<sup>79</sup> the jurisdiction of the National Labor Relations Board does not preempt the courts from adjudicating the employee's rights.<sup>80</sup>

Among the remedies which can be granted to the aggrieved employee are an order requiring arbitration of the grievance<sup>81</sup> and an award of damages against the union. The measure of the award would equal the increase in damages suffered by the employee resulting from the union's breach of its duty of fair representation to the extent that its failure to process the grievance added to the employee's damages.<sup>82</sup> While it had been previously thought that such damages would be *de minimis*,<sup>83</sup> the United States Supreme Court recently held that such damages could be quite substantial.<sup>84</sup>

In *Bowen v. United States Postal Service*,<sup>85</sup> an employee had been suspended without pay and was then permanently discharged for fighting with a co-employee.<sup>86</sup> The employee brought suit against the Postal Service for breach of the collective bargaining agreement and against his union for breach of the duty of fair rep-

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lar. *Superczynski v. P.T.O. Servs. Inc.*, 706 F.2d 200, 203 (7th Cir. 1983). Therefore, for example, when a union representative fails to adequately prepare for an arbitration hearing and fails to notify the employee of that hearing, the union's duty to fairly represent the employee is deemed to have been breached. *Thompson v. International Ass'n of Machinists*, 258 F. Supp. 235 (E.D. Va. 1966).

There are numerous other situations that have been held to constitute a breach of the union's duty of fair representation. See, e.g., *Hoffman v. Lonza*, 658 F.2d 519 (7th Cir. 1981) (failure to timely file grievance); *Harrison v. United Transp. Union*, 530 F.2d 558 (4th Cir. 1975) ("trading" employee's grievance for favorable result in another employee's grievance); *United Rubber, Cork, Linoleum & Plastic Workers of Am. v. NLRB*, 368 F.2d 12 (5th Cir. 1966) (racial discrimination), *cert. denied*, 389 U.S. 837 (1967); *Thompson v. Brotherhood of Sleeping Car Porters*, 316 F.2d 191 (4th Cir. 1963) (failure to represent employee because he was only an occasional member of union); *NLRB v. Die & Tool Makers Lodge*, 231 F.2d 298, 299 (7th Cir. 1956) (refusal to process grievance until employees pay "voluntary weekly donation" to union strike fund), *cert. denied*, 352 U.S. 833 (1956); *Glass Bottle Blowers Assoc.*, 210 N.L.R.B. 943 (1974) (sex discrimination), *enforced*, 520 F.2d 693 (6th Cir. 1975).

Generally, the union can defend on the ground that the decision not to process the grievance was based on rational consideration of all available facts, including the consideration of the interests of all employees in the bargaining unit. *Tedford v. Peabody Coal Co.*, 533 F.2d 952 (5th Cir. 1976). For a more detailed discussion of this subject, see generally Annot., 5 A.L.R. FED. 372 (1970) and Annot., 34 A.L.R.3d 884 (1970).

79. *Miranda Fuel Co.*, 140 N.L.R.B. 181 (1962), *enforcement denied*, NLRB v. *Miranda Fuel Co.*, 326 F.2d 172 (2d Cir. 1963).

80. *Vaca*, 386 U.S. 171 (1967).

81. *Id.* at 196.

82. *Id.* at 197-98.

83. *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979).

84. *Bowen v. United States Postal Serv.*, 459 U.S. 212 (1983).

85. *Id.*

86. *Id.* at 214.

resentation for failure to take his grievance to arbitration.<sup>87</sup> In instructing an advisory jury on the *Vaca v. Sipes*<sup>88</sup> rule concerning apportionment of damages,<sup>89</sup> the trial court instructed the jury to select a hypothetical date on which the employee would have been reinstated had the union properly handled the grievance.<sup>90</sup> Pursuant to the trial court's instructions, the jury was to determine the total damage, if any, suffered by the employee as a result of the alleged wrongful discharge.<sup>91</sup> The court then suggested that the Postal Service would be liable for damages up to the hypothetical date of reinstatement<sup>92</sup> and the union would be liable for any damages incurred thereafter.<sup>93</sup> Over a vigorous dissent,<sup>94</sup> the United States Supreme Court, in effect, approved this apportionment rule.<sup>95</sup>

As a result of *Bowen*, unions are now subject to heavy potential liability for breach of the duty of fair representation. Under *Bowen*, all damages accruing after the "hypothetical reinstatement date"<sup>96</sup> are the union's primary responsibility.<sup>97</sup> By the time a *Bowen*-type case comes to trial in any of our country's more congested court systems, the union can be held liable for several years of backpay, as well as attorneys' fees and litigation costs for the employee plaintiff.<sup>98</sup>

Under *Midgett*,<sup>99</sup> despite the availability of federal remedies to make the aggrieved employee whole,<sup>100</sup> an Illinois employee does

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87. *Id.*

88. 386 U.S. 171 (1967).

89. *Bowen*, 459 U.S. at 215.

90. *Id.* at 214-15.

91. *Id.* at 215.

92. *Id.*

93. *Id.*

94. *Id.* at 230 (White, J., dissenting).

95. The Court stated that: "When the union, as the exclusive agent of the employee, waives arbitration or fails to seek review of an adverse decision, the employer should be in substantially the same position as if the employee had had the right to act on his own behalf and had done so." *Id.* at 226.

The Court reasoned that, in effect, but for the union's failure to handle the grievance the employer's liability for damages would have been fixed as of the date an arbitrator should have ruled in the employee's favor. *Id.* The dissent disagreed and stated that the employer could mitigate his liability for damages at any time by reinstating the discharged employee. *Id.* at 239 (White, J., dissenting). The majority rejected this argument on the theory that the employer could reasonably have assumed that the union's silence indicated its conclusion that the discharge was justified. *Id.* at 226-27 n.15.

96. *Id.*

97. The Court stated that if the employer is unable to collect damages from the union, the employer is secondarily responsible for the damages assessed against the union. *Id.* at 223 n.12.

98. *Id.* at 223.

99. See *supra* note 17.

100. *Bowen*, 459 U.S. at 222.

not have any logical reason to exercise his rights under federal labor law. The practical effect of the *Midgett* decision is to put Illinois unions on notice that they need not process grievances for wrongful discharge. The employee plaintiff can obtain a windfall punitive damages award against the employer under *Kelsay v. Motorola, Inc.*<sup>101</sup> and *Midgett*, but cannot recover such an award under the remedies provided by federal law.<sup>102</sup> Therefore, unless the employer defendant is insolvent, or nearly so, the aggrieved employee has absolutely no reason to pursue an action against the union.

The Illinois Supreme Court's decision in *Midgett* was unnecessary because of the existence of adequate remedies under federal law. The *Midgett* holding has unjustifiably undermined an entirely adequate network of federal labor law remedies for wrongful actions by employers and unions by removing any practical incentive a discharged union employee might have for utilizing these remedies. In fact, hostile former employees may often elect to cause employers the greatest possible difficulty by instituting civil actions which are burdensome and costly<sup>103</sup> for the employer and prone to settlement even if frivolous.<sup>104</sup>

#### THE *MIDGETT* PERVERSION OF THE DOCTRINE OF PUNITIVE DAMAGES

While it has been shown that the federal preemption doctrine should have been applied in *Midgett*, the Illinois Supreme Court nevertheless opted to focus its attention upon the need for uniform deterrence of employer conduct which impairs the exercise of employee rights under the Workers' Compensation Act.<sup>105</sup> Accordingly, the court extended the tort action of retaliatory discharge to union employees to effectuate the desired uniform deterrence.<sup>106</sup> In failing to adequately balance the public policy interest supported by such an extension with the policy interests undermined by the

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101. See *supra* note 24.

102. *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42 (1979). This decision was based on the provisions of the Railway Labor Act. The availability of punitive damages in the context of cases arising under the National Labor Relations Act has not been foreclosed by the United States Supreme Court. However, the Court, in *Bowen* noted that the *Foust* rule was consistent with the *Bowen* holding. *Bowen*, 459 U.S. at 237 n.7. Since a union's duty of fair representation arises under both of the acts, it is likely that the Court will bar punitive damages against a union under the NLRA when, and if, the issue is squarely presented.

103. See *infra* text accompanying note 153.

104. For a contrary opinion concerning the suitability of grievance and arbitration procedures for resolving a wrongful discharge when the union fails to process such grievance, see Tobias, *A Plea for the Wrongfully Discharged Employee Abandoned by His Union*, 41 U. CIN. L. REV. 55 (1972).

105. ILL. REV. STAT. ch. 48, §§ 138.1-138.30 (1983).

106. *Midgett*, 105 Ill. 2d at 147, 473 N.E.2d at 1284.

extension, the Illinois Supreme Court improperly employed the doctrine of punitive damages.

The doctrine of punitive damages is almost universally recognized in the United States.<sup>107</sup> Although punitive damages have been frequently criticized,<sup>108</sup> courts seem favorably disposed to award such damages in most common law actions involving intentional or wilful misconduct.<sup>109</sup> Punishment and deterrence are the objectives of punitive damages in the modern law.<sup>110</sup> Their function, therefore, is similar to that of a criminal penalty.<sup>111</sup>

Enforcement of public policy is most often stated as the basis for an award of punitive damages;<sup>112</sup> however, where a punitive

107. Only four states outrightly disallow the recovery of punitive damages: Louisiana, *Vincent v. Morgan's La. & Tex. R.R. Co.*, 140 La. 1027, 74 So. 541 (1917); Massachusetts, *Boott Mills v. Boston & Me. R.R.*, 218 Mass. 582, 106 N.E. 680 (1914); Nebraska, *Abel v. Conover*, 170 Neb. 926, 104 N.W.2d 684 (1960); Washington, *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 25 P. 1072 (1891).

108. See, e.g., K. REDDEN, PUNITIVE DAMAGES § 2.4(A) (1980); Willis, *Measure of Damages When Property is Wrongfully Taken by a Private Individual*, 22 HARV. L. REV. 419 (1909).

The doctrine has been termed "a pernicious doctrine," a "heresy" and a "deformity." *Fay v. Parker*, 53 N.H. 342, 397 (1873). See also *Murphy v. Hobbs*, 7 Colo. 541, 5 P. 119 (1884). It has also been termed an "incongruity" and "a sin against sound judicial principle." *Brown v. Swineford*, 44 Wis. 282, 286-88 (1878). The Illinois courts have also been critical of the doctrine of punitive damages. As early as 1872, the Illinois Supreme Court expressed serious doubt concerning the validity of the doctrine. *Holmes v. Holmes*, 64 Ill. 294, 298 (1872). The *Holmes* court stated that "damages should be precisely commensurate with the injury, neither more nor less." *Id.* at 297. The *Holmes* court voiced further concern about the inconsistency involved when the courts mix the interests of society with those of the individual plaintiff. *Id.* at 297-98.

109. See, e.g., *Rainbolt v. Johnson*, 669 F.2d 767, 769 (D.C. Cir. 1981); *Stowell v. Finkel Inv. Servs., Inc.*, 489 F. Supp. 1209, 1215 (S.D. Fla. 1980), *aff'd*, 641 F.2d 323 (5th Cir. 1981); *Sabath v. Mansfield*, 60 Ill. App. 3d 1008, 1015, 377 N.E.2d 161, 168 (1978); *Mattyasovszky v. West Town Bus Co.*, 21 Ill. App. 3d 46, 51, 313 N.E.2d 496, 499 (1974), *aff'd*, 61 Ill. 2d 509, 330 N.E.2d 509 (1975); K. REDDEN, PUNITIVE DAMAGES § 2.9 (1980).

110. E.g., *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 248 (1981); *International Bhd. of Elec. Workers v. Foust*, 442 U.S. 42, 48 (1979); *In re Air Crash Near Chicago, Illinois on May 24, 1979*, 644 F.2d 594, 613 (7th Cir. 1981), *cert. denied*, 454 U.S. 878 (1981); *Beaver v. Country Mut. Ins. Co.*, 95 Ill. App. 3d 1122, 1123, 420 N.E.2d 1058, 1059 (1981).

The punishment imposed by the court upon the wrongdoer satisfies, to an extent, the victim's and society's desire for revenge and therefore, renders self-help unnecessary. Note, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408 (1967). However, it has been argued that punishment and deterrence properly belong within the realm of criminal law, which has developed safeguards to insure that the punishment imposed will be fair. McKillip, *Punitive Damages in Illinois: Review and Reappraisal*, 27 DE PAUL L. REV. 571, 582 (1978).

111. *Holt v. Cross*, 121 Ill. App. 3d 695, 697, 460 N.E.2d 8, 9 (1983); *Cornell v. Langland*, 109 Ill. App. 3d 472, 474-75, 440 N.E.2d 985, 987 (1982).

112. See *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 186-87, 384 N.E.2d 353, 359 (1978). In *Kelsay* the Illinois Supreme Court held that "[t]he imposition on the employer of the small additional obligation to pay a wrongfully discharged employee compensation would do little to discourage the practice of retaliatory

damages award would frustrate more important public policy concerns, such an award will be denied.<sup>113</sup> The penal nature of punitive damages is not favored in the law<sup>114</sup> and therefore, courts have been cautioned to "exercise a high degree of watchfulness to prevent the doctrine from being perverted and extended beyond the principles upon which it is based."<sup>115</sup>

Despite the existence of a strong public policy favoring the unimpaired access to relief under the Workers' Compensation Act,<sup>116</sup> the employment of punitive damages in *Midgett* was inappropriate. In attempting to promote one important public policy,<sup>117</sup> the court effectively undermined several other state and federal public policy concerns.<sup>118</sup> To employ the doctrine of punitive damages in this manner is to pervert and extend it in such a way so as to defeat the very principles upon which it is based.

### *The Burden of Midgett on Federal Labor Policy and Commerce*

The modern history of congressional and judicial activity concerning labor/management relations can best be understood as a struggle to attain a delicate balance between the economic power of employers and the organized collective power of labor unions.<sup>119</sup> To achieve this desired end, Congress deemed it necessary to develop a strong federal policy to govern relations between labor and management.<sup>120</sup> In enacting the National Labor Relations Act,<sup>121</sup> Congress

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discharge, which mocks the public policy of this State." *Id.* Applying this reasoning, the *Kelsay* court determined that the imposition of punitive damages was necessary to enforce the state public policy. *Id.* See also *Midgett*, 105 Ill. 2d at 147, 473 N.E.2d at 1284 (punitive damages imposed to enforce state public policy).

113. See *Smith v. Hill*, 12 Ill. 2d 588, 598, 147 N.E.2d 321, 327 (1958).

114. *E.g.*, *Shimman v. Frank*, 625 F.2d 80, 102 (6th Cir. 1980); *Payne v. Government of D.C.*, 559 F.2d 809, 827 (D.C. Cir. 1977); *Hammond v. North Am. Asbestos Corp.*, 97 Ill. 2d 195, 211, 454 N.E.2d 210, 219 (1983).

115. See, *e.g.*, *Yearian v. Columbia Nat. Bank of Columbia*, 86 Ill. App. 3d 508, 514, 408 N.E.2d 63, 68 (1980).

116. ILL. REV. STAT. ch. 48, §§ 138.1-138.30 (1983). See *Midgett*, 105 Ill. 2d at 147, 473 N.E.2d at 1284.

117. The *Midgett* holding was a direct result of the court's intense desire to enforce the Illinois public policy in favor of protecting employees in the exercise of their rights under the Workers' Compensation Act. *Midgett*, 105 Ill. 2d at 147, 473 N.E.2d at 1284.

118. See *infra* notes 119-54 and accompanying text.

119. Note, *Carbon Fuel Co. v. United Mine Workers of America—An Unfortunate Departure From the Vigorous Enforcement of the Proarbitration Policy of the Labor Management Relations Act*, 6 J. CORP. L. 195 (1980).

120. See 29 U.S.C. § 151 (1982).

121. 29 U.S.C. §§ 151-169 (1982). The National Labor Relations Act was designed to eliminate unfair labor practices that impinge upon the employees' rights to associate and bargain collectively. See 29 U.S.C. § 151 (1982).

established an exclusive<sup>122</sup> system of rights and responsibilities controlling the employment relationship. Central to this system is the concept of collective bargaining with respect to the terms and conditions of employment.<sup>123</sup> Good faith negotiation between the employer and the union and the administration of the agreement reached between them are both encouraged and governed by the Act.<sup>124</sup> The National Labor Relations Act<sup>125</sup> clearly contemplates the establishment of a binding contractual relationship between these parties.<sup>126</sup>

Both the courts and the National Labor Relations Board<sup>127</sup> have long emphasized the process of collective bargaining and grievance arbitration as the appropriate and ideal method for resolving disputes between labor and management.<sup>128</sup> Indeed, the United States Supreme Court has consistently designated the collective bargaining agreement as the best means of avoiding industrial strife.<sup>129</sup> For this reason, in *Republic Steel Corp. v. Maddox*,<sup>130</sup> the Court held that an employee must *attempt* to utilize the griev-

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122. When the conduct at issue in the employment relationship is even arguably subject to the provisions of the National Labor Relations Act, the federal scheme of rights and remedies preclude any attempt to utilize state remedies. See *supra* note 70.

The United States Supreme Court has defined the scope of this federal scheme as being a "comprehensive amalgam of substantive law and regulatory arrangements that Congress set up in the NLRA to govern labor-management relations affecting interstate commerce." *International Union of Operating Eng'rs v. Jones*, 460 U.S. 669, 676 (1983).

123. See *infra* note 124 and accompanying text.

124. Section 151 of the National Labor Relations Act provides that:

It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. § 151 (1982).

Section 152(d) of the Act further provides that collective bargaining "is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment. . . ." 29 U.S.C. § 152(d) (1982).

125. 29 U.S.C. §§ 151-169 (1982).

126. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 236 (1938).

127. See *supra* note 5.

128. See *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *Combustion Eng'g, Inc.*, 272 N.L.R.B. No. 32 (1984); *General Dynamics Corp.*, 271 N.L.R.B. No. 27 (1984); *Olin Corp.*, 268 N.L.R.B. No. 86 (1984).

129. See *Gateway Coal Co. v. United Mine Workers of Am.*, 414 U.S. 368, 378 (1974); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

130. 379 U.S. 650 (1965).

ance procedures provided in the collective bargaining agreement before seeking redress in the courts under other theories of liability.<sup>131</sup> The Court established this rule to protect the integrity of the collective bargaining process and to promote that aspect of national labor policy which encourages private, rather than judicial, resolution of labor disputes.<sup>132</sup>

The Illinois Supreme Court's holding in *Midgett* drastically upsets the complex and interrelated scheme of employer/employee rights created by Congress in the National Labor Relations Act. Furthermore, the *Midgett* decision wholly undermines and ignores the national labor policy favoring collective bargaining and grievance arbitration, processes which have been openly encouraged by Congress,<sup>133</sup> the United States Supreme Court,<sup>134</sup> and the National Labor Relations Board.<sup>135</sup> Therefore, in attempting to promote the state public policy in favor of protecting the rights of employees under the Workers' Compensation Act, the *Midgett* court has undermined other public policy concerns of national magnitude.<sup>136</sup>

For example, the arbitration process is the primary mechanism for the resolution of disputes arising under collective bargaining

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131. *Id.* at 652. In *Maddox*, the United States Supreme Court reasoned that: A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a uniform and exclusive method for orderly settlement of employee grievances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements.

*Id.* at 653.

132. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-71 (1976). Many commentators have voiced concern about the courts' lack of expertise and familiarity with problems of the workplace. Such commentators suggest that these matters are better left to those more acquainted with labor and its problems. See, e.g., Hogler, *Employee Discipline and Due Process Rights: Is There An Appropriate Remedy?*, 33 LAB. L.J. 783 (1982); Minnemeier, *Protection From Unjust Discharges: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49 (1982).

133. Section 173(d) of the Labor Management Relations Act states:

Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement. The Service is directed to make its conciliation and mediation services available in the settlement of such grievance disputes only as a last resort and in exceptional cases.

29 U.S.C. § 173(d) (1982).

134. See *supra* note 129 and accompanying text.

135. See *supra* note 128 and accompanying text.

136. See *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 148, 473 N.E.2d 1280, 1285 (1984).

agreements in American labor law today.<sup>137</sup> The requirement that union employees utilize the grievance procedures provided in the collective bargaining agreement is one of the most valuable trade-offs such employees accept in exchange for the many benefits they receive to which they would otherwise not be legally entitled.<sup>138</sup>

Indeed, there is little doubt that certain benefits accrue only to employees who are represented by a union. The employees gain union representation at the bargaining table where wages, benefits, and other terms and conditions of employment are determined through negotiation.<sup>139</sup> Union employees benefit further from representation in the processing of any work-related grievance that may arise.<sup>140</sup> Most importantly, the employer is required by law to recognize and bargain in good faith with the union.<sup>141</sup> This aspect of the labor law fabric makes union representation and collective bargaining agreements both desirable and workable by disposing of the employers' heretofore unilateral management power over the employment relationship.

Illinois employers also benefit from the collective bargaining agreement. Such agreements provide predictability of results, speedy resolution of disputes, and known and agreed upon procedures, costs, and expenditures.<sup>142</sup> These advantages make doing business less burdensome and more profitable for employer and employee alike.<sup>143</sup>

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137. C. MORRIS, *THE DEVELOPING LABOR LAW* 914 (1978). The arbitration process has become so popular as a method for resolving disputes because it provides incentives to both the employer and employee regarding settlement of their differences. In *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 55 (1974), the United States Supreme Court recognized this by stating that:

Arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a lawsuit. For similar reasons, the employee also has a strong incentive to arbitrate grievances, and misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.

*Id.*

138. *Midgett*, 105 Ill. 2d at 151, 473 N.E.2d at 1289 (Moran, J., dissenting). For a general list of benefits provided to union employees see *supra* note 36 and accompanying text.

139. See *supra* note 36.

140. See *supra* text accompanying notes 72-75.

141. National Labor Relations Act, 29 U.S.C. § 158(a)(5) (1982).

142. Grievance and arbitration provisions are found in almost all formal collective bargaining agreements in the United States. Because these processes are determined in advance, they provide a predictable route to resolution.

143. The less capital that is required in the grievance resolution process, the more capital there will be available for business growth and employer benefits.



If *Midgett* is allowed to stand,<sup>144</sup> other policy concerns will also suffer irreparable harm. Employers, under *Midgett*, will be subject to civil litigation for wrongful discharge, both civil and criminal sanctions under the provisions of the Illinois Workers' Compensation Act,<sup>145</sup> as well as liability under the terms of the existing collective bargaining agreement protecting against termination without just cause.<sup>146</sup> Neither Congress nor the Illinois General Assembly intended for such a multiplicity of remedies to be afforded to an employee who has been wrongfully terminated. This would inevitably lead to multiple and duplicative litigation for single wrongs, creating a disfavorable business climate for Illinois employers and adding to the present Illinois court congestion and costs to taxpayers.<sup>147</sup>

The inescapable result of *Midgett* is the destruction of the Illinois business climate. The costs of doing business in Illinois will escalate as a result of this decision. Management may naturally opt

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144. *Midgett* was a four to three split decision. *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d at 143, 473 N.E.2d 1280 (1984). The attorneys for Sackett-Chicago, Inc. are currently in the process of preparing a petition for writ of certiorari, seeking review of the *Midgett* decision by the United States Supreme Court.

145. ILL. REV. STAT. ch. 48, §§ 138.1-138.30 (1983).

146. The *Midgett* decision permits the union employee to bypass contract remedies and pursue instead an independent action in tort. See *supra* text accompanying note 19. *Midgett*, however, does not remove from the employee the option to enforce the terms of the collective bargaining agreement through the grievance procedures provided by the agreement. The Illinois Supreme Court's decision in *Midgett* allows the employee to opt for the route to the remedy which is in his or her best interest, resulting in multiple paths to remedy for the employee and no similar selection process for the employer.

147. The *Midgett* decision, in effect, opens the courthouse doors to a swarm of various alternative public policy claims supporting a wrongful discharge tort action.

Indicative of this is the fact that in late January of 1985, the Illinois Supreme Court heard arguments in three cases where the plaintiffs brought retaliatory discharge actions against their former employers. Each case presented the court with a different public policy as the basis for the discharge being wrongful. In *Wheeler v. Caterpillar Tractor Co.*, the plaintiff alleged that he had been fired for refusing to work near a live source of radiation. 123 Ill. App. 3d 539, 462 N.E.2d 1262 (1984) (Ill. Sup. Ct. appeal filed, No. 60181). In *Kelso-Burnett Co. v. Barr*, the plaintiffs asserted that they had been fired in violation of their right to free speech. Ill. App. Ct. appeal dismissed, June 13, 1984 (Ill. Sup. Ct. appeal filed, No. 60426). Lastly, in *Price v. Carmack Datsun, Inc.*, No. 60446, the plaintiff alleged that he had been fired for filing a group health insurance claim. 124 Ill. App. 3d 979, 464 N.E.2d 1245 (1984) (Ill. Sup. Ct. appeal filed, No. 60446). For a discussion of these cases, see *Chicago Daily L. Bull.*, Jan. 31, 1985, at 1.

These three cases are but a few examples of the many which await court resolution in the future. Focusing just on cases which involved workers' compensation claims will reveal the vast potential litigation that may be brought to the Illinois courts. In December of 1983, the Illinois Industrial Commission reported its caseload volume for the previous two years as follows:

to locate their businesses in other states<sup>148</sup> that offer a more desirable business climate for them to prosper in, leaving Illinois and its working population idle.<sup>149</sup> Therefore, the *Midgett* holding may, through its resulting reduction of employment opportunities, injure the very union employees which it seeks to assist and cause unneeded financial and industrial turmoil in Illinois.

*The Burden of Midgett on the Illinois Court System and Taxpayers*

Congestion in the courts is a problem which spans the entire United States.<sup>150</sup> The potential number of retaliatory discharge claims are numerous and will contribute greatly to the workload of the courts.<sup>151</sup> The *Midgett* holding, without increased judicial resources and public expense, will only worsen this serious problem.<sup>152</sup>

While the grievance procedures provided in collective bargaining agreements can be costly, they are almost invariably less expensive than litigation.<sup>153</sup> At-will employees have no alternative to litigation and the public must provide a court system capable of

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	1982	1983
Total cases pending at end of period	74,334	70,312
Total cases to be processed	137,378	129,446
Total new cases filed	55,228	49,870
Total cases closed:		
(a) on arbitration	59,465	55,939
(b) on review	3,579	3,195
	63,044	59,134

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Industrial Commission of Illinois, *Report on the Disposition of Workers' Compensation and Occupational Diseases Claims*, Dec. 1983, at 1. These statistics illustrate the potential number of claims for retaliatory discharge. *Midgett* not only increases the number of these claims, but also removes them from the private dispute resolution processes and places them upon the shoulders of the court system.

148. See *supra* note 38 and accompanying text.

149. Governor James R. Thompson of Illinois has been exerting great efforts toward bringing more business to the State of Illinois. An example of these efforts is the Governor's recent attempt to persuade General Motors Corporation to locate its new Saturn Corporation subsidiary and the division's 6,000 jobs in Illinois. Chicago Sun-Times, Jan. 28, 1985, at 12. The *Midgett* decision clearly decreases the chances of such a result.

150. See T. CHURCH, JUSTICE DELAYED (1978).

151. See *supra* note 147 and accompanying text.

152. See *supra* note 147 and accompanying text.

153. Sandver, Blaine & Woyar, *Time and Cost Savings Through Expedited Arbitration Procedures*, 36 ARB. J. 11, 20 (1981).

Trial courts must provide court reporters, judges, clerks and bailiffs. Furthermore, when juries are added, the time required to complete a trial is dramatically increased. Arbitrators, on the other hand, need only a court reporter to hear the facts necessary to transcribe the hearing.

handling these cases. In contrast, union employees have available the less expensive arbitration alternative, which saves tax resources. Additionally, consumers benefit from the arbitration process because goods and services may be provided at a lower cost by employers who are unencumbered by litigation expenses. Therefore, the general public, as well as the parties to collective bargaining agreements, have a substantial financial stake in the adherence to the holding of *Republic Steel Corp. v. Maddox*.<sup>154</sup> Until it is clearly shown otherwise, grievance procedures should be endorsed by the courts as an adequate means for resolving the disputes which arise between labor and management. *Midgett*, in completely ignoring these concerns, adds to court congestion, while increasing the financial burden on Illinois consumers and taxpayers.

Therefore, the application of common law tort actions and punitive damages to deter wrongful employee discharges cannot be ultimately justified because such use will result in greater harm to employees and society. Less radical measures may be taken to achieve the deterrence objective sought by the Illinois Supreme Court in *Midgett*, which will maintain intact, the viability and utility of collective bargaining agreements.

#### A PROPOSED ALTERNATIVE APPROACH TO THE *MIDGETT*-TYPE CONTROVERSY

The federal preemption doctrine should be applied when adequate remedies are provided to the discharged union employee under collective bargaining agreements and the federal labor law. Therefore, state policies should not be enforced by the creation of deterrent-oriented common law actions justified by the need for punitive damages. Furthermore, state legislative remedies in support of local public policy should not be created when union employees can be made whole within the existing federal labor law network; namely, the remedies afforded through collective bargaining agreements.

The desire to increase deterrence of employer misconduct which violates state public policy can best be accomplished by amending the Labor Management Relations Act.<sup>155</sup> This amendment would permit arbitrators of grievances under collective bargaining agreements to hear state statutory claims for damages resulting from employer misconduct,<sup>156</sup> especially when such state

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154. 379 U.S. 650, 652 (1965). See *supra* note 30.

155. 29 U.S.C. §§ 141-187 (1982).

156. Arbitrators may only arbitrate disputes arising under provisions of collective bargaining agreements and may only interpret provisions of those agreements. *United Steel Workers of Am. v. Enterprise Wheel Car Corp.*, 363 U.S. 593 (1960). See also 51A C.J.S. *Labor Relations* § 429 (1967) (matters subject to

statutes are enacted after the execution of the particular collective bargaining agreement.<sup>157</sup> Any erroneous adjudications of state statutory claims made by arbitrators under this scheme can ultimately be resolved by an administrative appeal to the federal district courts.<sup>158</sup> Furthermore, states can limit this problem by guiding arbitrators in the interpretation of state statutes through the creation of statutory definitions and regulations. While this proposal does not entirely satisfy the deterrence objectives of state policymakers, it balances the various policy concerns without the detrimental consequences of deterrent-oriented state civil actions.

### CONCLUSION

This article has attempted to bring to light the foreseeable disruption of commercial activity and constructive labor/management

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arbitration). However, Congress could authorize arbitrators under collective bargaining agreements to hear state statutory claims which are deterrent-oriented. If an arbitrator has improperly applied the state law, such disputes could ultimately be resolved by the state court system. Furthermore, the interpretation of state statutory claims can be clarified by statutory regulations and definitions.

157. There are three basic options available to legislators and jurists with respect to the handling of deterrent-oriented state remedies. First, such remedies could be held to be outside the jurisdiction of the states when employees may obtain full compensation through their collective bargaining agreement and the federal labor law scheme. The second option would be to liberally construe the right of states to fashion deterrent-oriented remedies whenever state public policies may be undermined by employer misconduct. This approach will lead to litigation as the norm for labor management dispute resolution instead of arbitration proceedings.

The third option, and the one recommended, is to allow state deterrent-oriented remedies to be made uniformly available to employees covered by collective bargaining agreements as well as those not covered by such agreements. Certainly, arbitrators, as well as trial court fact finders, could award punitive damages authorized by state judicial or legislative remedies. By permitting the automatic amendment of collective bargaining agreements to include remedies set forth by state statute for wrongful employee dismissal, the law would effectively accommodate the legitimate concerns of employee and employer alike without undermining the collective bargaining process.

158. If such a case were to reach a United States district court, the court would have jurisdiction pursuant to 29 U.S.C. § 160(f) (1982).

The NLRB is empowered to cede its jurisdiction to an agency of a state or territory if the state or territory's statute regarding the labor dispute at issue is not inconsistent with the NLRA. 29 U.S.C. § 160(a) (1982). This cessation of jurisdiction may not be exercised where the labor dispute involves the mining, manufacturing, communication or transportation industries. *Id.* Further, the power to determine whether the state or territorial statute conflicts with the NLRA is vested with the NLRB. *Amalgamated Meat Cutters & Butcher Workmen v. Fairlawn Meats, Inc.*, 353 U.S. 20 (1957).

Therefore, primary determination of the state statutory action would either be heard by the NLRB or ceded to the appropriate state or territorial agency. If appropriated to a state or territorial agency, the parties would proceed on appeals pursuant to the local administrative appeal rules. If the NLRB decides to hear the case, an aggrieved party can petition for relief to the appropriate United States district court. 29 U.S.C. § 160(f) (1982).

relations resulting from the preoccupation of state legislative and judicial policymakers with enforcement of local policy concerns. Such interests will undoubtedly vary from state to state, ultimately leading to the balkanization of law governing the organized workplace. As a result, some states will be perceived as more favorable to employers, thereby leading to the unnecessary movement of employment opportunities and its related spin-off commercial activity. Prompt action coordinated between state and federal lawmakers is necessary to prevent this confusion and disruption of the economy.