

University of Michigan Journal of Law Reform

Volume 10

1977

Punitive Damages Under Section 102 of the Labor-Management Reporting and Disclosure Act

S. Thomas Wiener

University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mjlr>



Part of the [Labor and Employment Law Commons](#), [Legal Remedies Commons](#), [Legislation Commons](#), and the [Torts Commons](#)

Recommended Citation

S. T. Wiener, *Punitive Damages Under Section 102 of the Labor-Management Reporting and Disclosure Act*, 10 U. MICH. J. L. REFORM 529 (1977).

Available at: <https://repository.law.umich.edu/mjlr/vol10/iss3/8>

This Note is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mLaw.repository@umich.edu.

PUNITIVE DAMAGES UNDER SECTION 102 OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT

Title I of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA)¹ secures to members of labor unions certain fundamental rights.² Section 609³ of the LMRDA makes it unlawful for a union to discipline its members for exercising rights guaranteed by any provision of the Act. In order to vindicate the rights secured by Title I, or to obtain the protection afforded by section 609, a union member may, pursuant to section 102⁴ of the LMRDA, bring an action in federal district court against his union or its officers.

It is firmly established that in a suit brought under section 102, a union member may ordinarily recover compensatory damages for any injury proximately caused by a violation of Title I or section 609.⁵ The courts are divided,⁶ however, on the question of whether a plaintiff may be awarded punitive damages⁷ under section 102. This article will address that question by discussing the language and the legislative history of section 102, the conflicting decisions of the federal courts, and the relevant policy considerations.

¹ 29 U.S.C. §§ 401-531 (1970).

² Subsections 101(a)(1)-(5) of the LMRDA provide that union members shall have equal rights and privileges, freedom of speech and assembly, freedom from arbitrary increases in dues and assessments, freedom to sue, and certain procedural safeguards against discipline by their unions. 29 U.S.C. § 411(a)(1)-(5) (1970).

³ 29 U.S.C. § 529 (1970).

⁴ 29 U.S.C. § 412 (1970).

⁵ See *Simmons v. Avisco, Local 713, Textile Workers*, 350 F.2d 1012, 1018-19 (4th Cir. 1965); *McCraw v. Plumbers*, 341 F.2d 705, 710 (6th Cir. 1965); *Vars v. International Bhd. of Boilermakers*, 215 F. Supp. 943, 952 (D. Conn. 1963), *aff'd on other grounds*, 320 F.2d 576 (2d Cir. 1963). Damages may be awarded, for example, to compensate a plaintiff for wages lost as a result of his wrongful expulsion from the union, for strike benefits not received during an unlawful suspension, or for medical expenses incurred on account of a physical injury caused by a violation of the plaintiff's rights. See *McCraw v. Plumbers*, 341 F.2d 705, 710 (6th Cir. 1965) (by implication); *Vars v. International Bhd. of Boilermakers*, 215 F. Supp. 943, 952 (D. Conn. 1963) (by implication), *aff'd on other grounds*, 320 F.2d 576 (2d Cir. 1963). Some courts have held, however, that damages for mental suffering are not recoverable under § 102 in the absence of a concomitant physical injury. See note 59 *infra*.

⁶ See notes 29-31 and accompanying text *infra*.

⁷ Punitive damages are an element of recovery over and above full compensation of the plaintiff for any injury he has sustained. RESTATEMENT (SECOND) OF TORTS § 908(1) (Tent. Draft No. 19, 1973) [hereinafter cited as RESTATEMENT (SECOND) OF TORTS]; W. PROSSER, THE LAW OF TORTS § 2, at 9 (4th ed. 1971) [hereinafter cited as W. PROSSER]. They commonly are awarded in tort actions where the defendant has acted with malice, an evil or outrageous motive, or a conscious disregard of the rights and interests of others. RESTATE-

I. STATUTORY LANGUAGE AND LEGISLATIVE HISTORY

Section 102 provides that a union member may bring suit for "such relief (including injunctions) as may be appropriate."⁸ This provision was introduced as an amendment on the floor of the Senate,⁹ and as part of a substitute bill on the floor of the House of Representatives.¹⁰ Like many other sections of the LMRDA which were written on the floor of Congress, section 102 is ambiguous.¹¹ Both its language and its legislative history are inconclusive on the issue of whether a plaintiff may be awarded punitive damages.

Several arguments have been advanced that the language of section 102 rules out the availability of exemplary damages. The absence of an express provision for punitive damages may indicate a congressional intent that they not be recoverable under section 102.¹² Furthermore, because punitive damages are more in the nature of punishment and restraint than of relief, the use of the word "relief" in section 102 might indicate that these damages may not be awarded.¹³ Finally, the insertion into section 102 of the parenthetical phrase, "including injunctions," may have been intended to limit plaintiffs solely to equitable remedies.¹⁴

None of these arguments, however, is conclusive. Since section 102 is a catchall provision which does not purport to list exhaustively appropriate forms of relief, the absence of an explicit authorization of punitive damages is not necessarily probative of congressional intent.¹⁵ Neither should much reliance be placed

MENT (SECOND) OF TORTS § 908(2); C. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 79, at 280 (1935) [hereinafter cited as C. McCORMICK]; W. PROSSER, § 2, at 9-10; *see, e.g.*, *Fittipaldi v. Legassie*, 18 A.D.2d 331, 239 N.Y.S.2d 792 (1963) (common law action by union members against union).

⁸ 29 U.S.C. § 412 (1970).

⁹ 105 CONG. REC. 6694 (1959), *reprinted in* II NLRB, LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT, 1959, at 1221 (1959) [hereinafter cited as LEG. HIS. LMRDA].

¹⁰ 105 CONG. REC. 14345 (1959), *reprinted in* II LEG. HIS. LMRDA, *supra* note 9, at 1520.

¹¹ *See Cox, Internal Affairs of Labor Unions Under the Labor Reform Act of 1959*, 58 MICH. L. REV. 819, 852 (1960).

¹² *Burris v. International Bhd. of Teamsters*, 224 F. Supp. 277, 280-81 (W.D.N.C. 1963); *see also McCraw v. Plumbers*, 341 F.2d 705, 710 (6th Cir. 1965) (The absence of a provision for attorney's fees indicates that such fees may not be awarded under § 102.).

¹³ *Cole v. Hall*, 35 F.R.D. 4, 8 (E.D.N.Y. 1964); *see also International Bhd. of Boilermakers v. Rafferty*, 348 F.2d 307, 315 (9th Cir. 1965) ("Relief" may be an inappropriate word to describe money damages of any kind.).

¹⁴ This argument was made by the defendants in *Simmons v. Avisco, Local 713, Textile Workers*, 350 F.2d 1012, 1019 (4th Cir. 1965), and *Farowitz v. Associated Musicians Local 802*, 241 F. Supp. 895, 909 (S.D.N.Y. 1965). In both cases the argument was rejected by the courts.

¹⁵ *See Hall v. Cole*, 412 U.S. 1, 10 (1973) (Section 102 does not "meticulously detail" forms of relief, so attorney's fees may be recovered despite the absence of an express provision.).

upon the technical meaning of the word "relief," since it is commonly used in a comprehensive manner.¹⁶ Finally, it does not appear that the cause of action created by section 102 is exclusively equitable.¹⁷ Indeed, the phrase, "including injunctions," was probably added in order to broaden the relief available under section 102, not to narrow it.¹⁸

The legislative history of the LMRDA is silent on the specific question of whether punitive damages may be awarded under section 102.¹⁹ It has been argued that the absence of any consideration of this issue indicates a congressional intent that exemplary damages should not be recoverable.²⁰ The lack of any directly relevant legislative history, however, may indicate an assumption on the part of Congress that punitive damages would be awarded in appropriate cases.

The legislative history of the LMRDA does contain statements by members of Congress concerning the availability under section 102 of monetary damages in general. Senator Goldwater declared that section 102 would not provide sufficient incentive for union members to sue, because the availability of damages was extremely limited.²¹ Representative Elliott stated, however, that the federal courts would have "wide latitude to grant relief according to the necessities of the case."²² Since Representative Elliott was a sponsor of section 102,²³ his statement is entitled to greater weight than Senator Goldwater's comment.²⁴ Both statements are incon-

¹⁶ See *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193, 200 (5th Cir. 1968), *cert. denied*, 391 U.S. 935 (1968).

¹⁷ *Simmons v. Avisco, Local 713, Textile Workers*, 350 F.2d 1012, 1019 (4th Cir. 1965); *Farowitz v. Associated Musicians Local 802*, 241 F. Supp. 895, 909 (S.D.N.Y. 1965).

¹⁸ *Gartner v. Soloner*, 384 F.2d 348, 354 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968); *Simmons v. Avisco, Local 713, Textile Workers*, 350 F.2d 1012, 1019 (4th Cir. 1965). The parenthetical phrase may have been designed to negative any inference that injunctive relief should not be available under § 102; this inference might have been drawn from the Norris-La Guardia Act, 29 U.S.C. §§ 101-115 (1970), which provides that no federal court may issue an injunction in a case involving a labor dispute, except as specifically permitted by that Act.

¹⁹ *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193, 200 (5th Cir. 1968), *cert. denied*, 391 U.S. 935 (1968).

²⁰ See *Burris v. International Bhd. of Teamsters*, 224 F. Supp. 227, 280 (W.D.N.C. 1963).

²¹ 105 CONG. REC. 10095 (1959), *reprinted in II LEG. HIS. LMRDA*, *supra* note 9, at 1281. Senator Goldwater stated that § 102 would offer the successful plaintiff "little in the way of monetary damages except in the rare case where the plaintiff's job rights or job tenure have been adversely affected." *Id. But see* 105 CONG. REC. 15689 (1959), *reprinted in II LEG. HIS. LMRDA*, *supra* note 9, at 1632 (Rep. O'Hara) (Monetary damages would be widely available under § 102.).

²² 105 CONG. REC. 15548 (1959), *reprinted in II LEG. HIS. LMRDA*, *supra* note 9, at 1584. See also *Hall v. Cole*, 412 U.S. 1, 13 (1973); *Gartner v. Soloner*, 384 F.2d 348, 353, 354 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968).

²³ Representative Elliott introduced H.R. 8342, 86th Cong., 1st Sess. (1959), *reprinted in I LEG. HIS. LMRDA*, *supra* note 9, at 687-758, which contained the original version of § 102. 105 CONG. REC. 14177 (1959), *reprinted in II LEG. HIS. LMRDA*, *supra* note 9, at 1517.

²⁴ In construing a statute, primary attention should be given to the views expressed by its legislative sponsors. *Gartner v. Soloner*, 384 F.2d 348, 353 (3d Cir. 1967), *cert. denied*, 390

clusive, however, since they do not deal directly with the question of punitive damages.

Also inconclusive is the presence in the LMRDA of section 103,²⁵ which preserves the rights and remedies of union members under state law. Since state courts have commonly sustained the availability of punitive damages in member-union litigation,²⁶ it can be argued that Congress impliedly placed its imprimatur on punitive damages when it enacted section 103.²⁷ Congress may have decided, however, that exemplary damages were unnecessary under section 102, because they are available under state law.²⁸

II. THE CASE LAW

The three circuit courts which have considered the issue have held that punitive damages may be awarded under section 102.²⁹ Although the district courts have been divided on this question,³⁰

U.S. 1040 (1968). See also *Hall v. Cole*, 412 U.S. 1, 11-12 (1973), where the Supreme Court explicitly repudiated Senator Goldwater's accompanying statement that attorney's fees would not be available under § 102, 105 CONG. REC. 10095 (1959), reprinted in II LEG. HIS. LMRDA, *supra* note 9, at 1281.

²⁵ 29 U.S.C. § 413 (1970).

²⁶ *Brandwen, Punitive-Exemplary Damages in Labor Relations Litigation*, 29 U. CHI. L. REV. 460 (1962); see, e.g., *Fittipaldi v. Legassie*, 18 A.D.2d 331, 239 N.Y.S.2d 792 (1963).

²⁷ Moreover, it would be desirable to coordinate the LMRDA with state law, so as to avoid a clash of remedies. *Summers, Pre-emption and the Labor Reform Act—Dual Rights and Remedies*, 22 OHIO STATE L.J. 119, 122-23, 145 (1961).

²⁸ Since § 103 was designed to avoid federal preemption of state rights and remedies, state law may in some ways provide greater protection to union members than the LMRDA. *Id.*, at 124-25; see also *Summers, The Law of Union Discipline: What the Courts Do In Fact*, 70 YALE L.J. 175, 176 (1960).

²⁹ *Morrissey v. National Maritime Union*, 544 F.2d 19 (2d Cir. 1976); *Cooke v. Orange Belt Dist. Council of Painters No. 48*, 529 F.2d 815 (9th Cir. 1976); *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193 (5th Cir. 1968), *cert. denied*, 391 U.S. 935 (1968).

³⁰ The following cases have held that punitive damages are available under § 102: *Berg v. Watson*, 417 F. Supp. 806 (S.D.N.Y. 1976); *Woods v. Local 613, Int'l Bhd. of Elec. Workers*, 404 F. Supp. 110 (N.D. Ga. 1975); *Sipe v. Local 191, United Bhd. of Carpenters*, 393 F. Supp. 865 (M.D. Pa. 1975); *Yablonski v. United Mine Workers*, 80 L.R.R.M. 3435, (D.D.C. 1972); *Robins v. Schonfeld*, 326 F. Supp. 525 (S.D.N.Y. 1971); *Cole v. Hall*, 80 L.R.R.M. 2267 (E.D.N.Y. 1971), *aff'd on other grounds*, 462 F.2d 777 (2d Cir. 1972), *aff'd*, 412 U.S. 1 (1973) (rejecting a prior preliminary holding in the same case, reported in 35 F.R.D. 4 (E.D.N.Y. 1964), that punitive damages may not be awarded under § 102); *Patrick v. I.D. Packing Co.*, 308 F. Supp. 821 (S.D. Iowa 1969); *Sands v. Abelli*, 290 F. Supp. 677 (S.D.N.Y. 1968); *Barbour v. Sheet Metal Workers Int'l Ass'n*, 263 F. Supp. 724 (E.D. Mich. 1966), *rev'd on other grounds*, 401 F.2d 152 (6th Cir. 1968); *Farowitz v. Associated Musicians Local 802*, 241 F. Supp. 895 (S.D.N.Y. 1965).

The following cases have held that exemplary damages may not be awarded under § 102: *Magelssen v. Local 518, Operative Plasterers*, 240 F. Supp. 259 (W.D. Mo. 1965) (alternative holding); *Keenan v. District Council, United Bhd. of Carpenters*, 59 L.R.R.M. 2510 (E.D. Pa. 1965); *Burris v. International Bhd. of Teamsters*, 224 F. Supp. 277 (W.D.N.C. 1963).

the trend is clearly in favor of allowing the recovery of exemplary damages.³¹

The conflicting decisions cannot be reconciled on the basis of any relevant factor. The recoverability of punitive damages under section 102 has been unaffected by the provision of Title I under which the cause of action arose.³² Moreover, the decisions have not been influenced by whether the alleged violation of Title I was committed by an individual union officer, a union disciplinary tribunal, or a vote of the union membership.³³ Neither have the courts used the recoverability of punitive damages and the availability of either attorney's fees³⁴ or compensatory damages for mental suffering³⁵ as substitutes for each other.

³¹ A clear majority of the decisions, including every decision since 1965, have held that punitive damages are allowable under § 102. See notes 29-30 *supra*.

³² The decisions holding that punitive damages may not be awarded under § 102 involved alleged violations of § 101(a)(1), (2), or (5) of the LMRDA, 29 U.S.C. § 411(a)(1), (2), (5) (1970). For a description of these provisions, see note 2 *supra*. *Magelssen v. Local 518, Operative Plasterers*, 240 F. Supp. 259 (W.D. Mo. 1965) (§ 101(a)(5)); *Keenan v. District Council, United Bhd. of Carpenters*, 59 L.R.R.M. 2510 (E.D. Pa. 1965) (§ 101(a)(2), (5)); *Burris v. International Bhd. of Teamsters*, 224 F. Supp. 277 (W.D.N.C. 1963) (§ 101(a)(1), (2), (5)).

Many of the cases holding that exemplary damages are allowable involved the same provisions. *Morrissey v. National Maritime Union*, 544 F.2d 19 (2d Cir. 1976) (§ 101(a)(2)); *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193 (5th Cir. 1968), *cert. denied*, 391 U.S. 935 (1968) (§ 101(a)(5)); *Berg v. Watson*, 417 F. Supp. 806 (S.D.N.Y. 1976) (§ 101(a)(5)); *Woods v. Local 613, Int'l Bhd. of Elec. Workers*, 404 F. Supp. 110 (N.D. Ga. 1975) (§ 101(a)(1)); *Barbour v. Sheet Metal Workers Int'l Ass'n*, 263 F. Supp. 724 (E.D. Mich. 1966), *rev'd on other grounds*, 401 F. 2d 152 (6th Cir. 1968) (§ 101(a)(2), (5)); *Farowitz v. Associated Musicians Local 802*, 241 F. Supp. 895 (S.D.N.Y. 1965) (§ 101(a)(2)).

³³ The cases holding that punitive damages are unavailable under § 102 concerned an alleged violation of Title I by individual union officers, *Burris v. International Bhd. of Teamsters*, 224 F. Supp. 277 (W.D.N.C. 1963); by a trial committee of the union's district council, *Keenan v. District Council, United Bhd. of Carpenters*, 59 L.R.R.M. 2510 (E.D. Pa. 1965); and by a vote of the entire local membership, *Magelssen v. Local 518, Operative Plasterers*, 240 F. Supp. 259 (W.D. Mo. 1965).

Title I violations at all three of these organizational levels may also be found among the cases sustaining the recoverability of exemplary damages. *Cooke v. Orange Belt Dist. Council of Painters No. 48*, 529 F. 2d 815 (9th Cir. 1976) (district council); *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193 (5th Cir. 1968), *cert. denied*, 391 U.S. 935 (1968) (vote of membership); *Berg v. Watson*, 417 F. Supp. 806 (S.D.N.Y. 1976) (individual officers); *Yablonski v. United Mine Workers*, 80 L.R.R.M. 3435 (D.D.C 1972) (individual officer); *Cole v. Hall*, 80 L.R.R.M. 2267 (E.D.N.Y. 1971), *aff'd on other grounds*, 462 F.2d 777 (2d Cir. 1972), *aff'd*, 412 U.S. 1 (1973) (vote of membership); *Barbour v. Sheet Metal Workers Int'l Ass'n*, 263 F. Supp. 724 (E.D. Mich. 1966), *rev'd on other grounds*, 401 F.2d 152 (6th Cir. 1968) (international association trial committee).

³⁴ Two decisions have held that awards of both punitive damages and counsel fees may be made under § 102. *Berg v. Watson*, 417 F. Supp. 806 (S.D.N.Y. 1976); *Sands v. Abelli*, 290 F. Supp. 677 (S.D.N.Y. 1968). Conversely, in *Magelssen v. Local 518, Operative Plasterers*, 240 F. Supp. 259 (W.D. Mo. 1965), the court held that neither remedy may be given.

Moreover, if punitive damages were being used in place of attorney's fees, then one would expect the trend in favor of the recoverability of exemplary damages to have been halted by the Supreme Court's holding in *Hall v. Cole*, 412 U.S. 1 (1973), that counsel fees may be awarded to a successful plaintiff under § 102. Since *Hall* was decided in 1973, however, numerous decisions have held that punitive damages are available under § 102, while no case has held to the contrary. See notes 29-31 and accompanying text *supra*.

³⁵ In *Cooke v. Orange Belt Dist. Council of Painters No. 48*, 529 F. 2d 815, 820 (9th Cir. 1976), the Ninth Circuit referred to its prior holding in *International Bhd. of Boilermakers v.*

Finally, decisions sustaining the recoverability of punitive damages under section 102 have not always involved more outrageous behavior by the defendant than cases to the contrary. Thus, in *Burriss v. International Brotherhood of Teamsters*,³⁶ the plaintiffs alleged that they were induced to withdraw from the union by misrepresentations of union officers, and were subsequently blacklisted, because they had accused the officers of failing to bring timely unfair labor practice charges against their employer. Despite the outrageous nature of the alleged Title I violation, the court held that punitive damages may not be awarded under section 102.³⁷

In contrast, the outrageousness of the defendant's conduct is much less striking in two cases where the plaintiffs were awarded exemplary damages. During a dispute about the union business manager's allegedly discriminatory assignment of jobs, the plaintiff in *International Brotherhood of Boilermakers v. Braswell*³⁸ struck the business manager in the face. A union trial committee convicted the plaintiff, *inter alia*, of violating a provision of the union constitution, which prohibited a member from using force with the purpose of preventing a union officer from discharging his duties. This conviction was ratified by a vote of the membership, whereupon the plaintiff was expelled from the union. The court found that, when he struck the business manager, the plaintiff did not intend to prevent the officer from discharging his duties, and thus held that the plaintiff's conduct was not proscribed by the union constitution. The court further held that the union was not entitled to discipline a member for conduct not expressly forbidden by its constitution or bylaws.³⁹ Although the plaintiff was awarded punitive damages, the union's action was not an obvious violation of his rights. Indeed, the Supreme Court subsequently held that unions may discipline their members for implied offenses, and that federal courts have no authority to interpret union regulations in order to determine the scope of offenses for which members may be

Rafferty, 348 F.2d 307 (9th Cir. 1965), that damages for emotional distress may not be recovered under § 102 absent an accompanying physical injury, and proceeded to hold that punitive damages are allowable. Two courts have held, however, that both exemplary and mental suffering damages are available under § 102. *Yablonski v. United Mine Workers*, 80 L.R.R.M. 3435 (D.D.C. 1972); *Sands v. Abelli*, 290 F. Supp. 677 (S.D.N.Y. 1968). Conversely, one court, in separate proceedings of the same case, held that neither type of damages may be awarded under § 102. *Keenan v. District Council, United Bhd. of Carpenters*, 266 F. Supp. 497 (E.D. Pa. 1966) (damages for mental suffering); 59 L.R.R.M. 2510 (E.D. Pa. 1965) (punitive damages).

³⁶ 224 F. Supp. 277 (W.D.N.C. 1963).

³⁷ *Id.* at 280-81.

³⁸ 388 F.2d 193 (5th Cir. 1968), *cert. denied*, 391 U.S. 935 (1968).

³⁹ *Id.* at 198-99.

punished.⁴⁰ Consequently, today the union's action would be held not to violate Title I at all.

Similarly, in *Farowitz v. Associated Musicians Local 802*,⁴¹ the plaintiff was expelled from his union for advocating the nonpayment of union dues. Finding that the plaintiff's advocacy of nonpayment was based upon a good faith belief that the dues were illegally imposed, the court held that his expulsion violated the free speech provision of section 101(a)(2).⁴² Although the plaintiff's activities posed a threat to the financial survival of the union, the court found that the conduct of the officers responsible for the plaintiff's expulsion was sufficiently outrageous to justify an award of punitive damages.⁴³

In both *Robins v. Schonfeld*⁴⁴ and *Cole v. Hall*,⁴⁵ it was held that although punitive damages are available under section 102, the plaintiffs were not entitled to recover these damages on the facts of the cases. Yet each case involved considerably more outrageous conduct by the defendant than either *Braswell* or *Farowitz*, in which exemplary damages were awarded. In *Robins*, the plaintiff was officially suspended from union activities and unofficially blacklisted, because he criticized the procedures used in two union elections in which he had been an unsuccessful candidate. The union lifted his suspension after two weeks pending the outcome of the litigation, but its blacklisting of the plaintiff remained in effect for three years. Nevertheless, the court refused to grant the plaintiff punitive damages.⁴⁶ Similarly, in *Cole*, the plaintiff was expelled for introducing at a union meeting a series of resolutions which were critical of the union's policies on hiring and working conditions. Although the plaintiff and the defendant union officer had previously run against each other in a bitterly contested union election, the court found that the plaintiff was expelled in good faith, and thus was not entitled to punitive damages.⁴⁷

In accordance with the practice at common law,⁴⁸ all of the decisions sustaining the availability of punitive damages under

⁴⁰ *International Bhd. of Boilermakers v. Hardeman*, 401 U.S. 233 (1971). See Beaird & Player, *Union Discipline of Its Membership Under Section 101(a)(5) of Landrum-Griffin: What Is "Discipline" and How Much Process is Due?*, 9 GA. L. REV. 383, 400-01 (1975).

⁴¹ 241 F. Supp. 895 (S.D.N.Y. 1965).

⁴² 29 U.S.C. § 411(a)(2) (1970).

⁴³ 241 F. Supp. at 909.

⁴⁴ 326 F. Supp. 525 (S.D.N.Y. 1971).

⁴⁵ 80 L.R.R.M. 2267 (E.D.N.Y. 1971), *aff'd on other grounds*, 462 F.2d 777 (2d Cir. 1972), *aff'd*, 412 U.S. 1 (1973).

⁴⁶ *Robins v. Schonfeld*, 326 F. Supp. 525, 531 (S.D.N.Y. 1971).

⁴⁷ *Cole v. Hall*, 80 L.R.R.M. 2267, 2271 (E.D.N.Y. 1971), *aff'd on other grounds*, 462 F.2d 777 (2d Cir. 1972), *aff'd*, 412 U.S. 1 (1973).

⁴⁸ See note 7 *supra*.

section 102 have held that these damages may be awarded only where the defendant has acted with malice or with a reckless indifference to the plaintiff's rights.⁴⁹ This standard, however, has been extremely difficult to administer. When contrasted with *Braswell* and *Farowitz*, *Robins* and *Cole* evince a significant risk that the application of the standard of malice or reckless indifference will lead to arbitrary or capricious results in litigation arising under section 102.

III. POLICY CONSIDERATIONS

Since the language and the legislative history of section 102 are ambiguous,⁵⁰ the determination of whether punitive damages are an appropriate form of relief under that provision must ultimately rest upon an analysis of the competing policy considerations.⁵¹ One of the principal purposes of the LMRDA was to deter improper union conduct.⁵² Accordingly, it has been argued that awarding punitive damages under section 102 would serve to deter unions from infringing upon the Title I rights of their members.⁵³ This argument is consistent with the traditional common law theory that exemplary damages deter objectionable conduct by threatening to make it costly.⁵⁴

As several commentators have observed, however, there is no objective evidence indicating either that punitive damages actually

⁴⁹ See, e.g., *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193, 199 (5th Cir. 1968), cert. denied, 391 U.S. 935 (1968); *Robins v. Schonfeld*, 326 F. Supp. 525, 531 (S.D.N.Y. 1971); *Cole v. Hall*, 80 L.R.R.M. 2267, 2271 (E.D.N.Y. 1971), aff'd on other grounds, 462 F.2d 777 (2d Cir. 1972), aff'd, 412 U.S. 1 (1973); *Farowitz v. Associated Musicians Local 802*, 241 F. Supp. 895, 909 (S.D.N.Y. 1965).

⁵⁰ See notes 8-28 and accompanying text *supra*.

⁵¹ See Cox, *supra* note 11, at 852. Noting that much of the LMRDA was hastily written and that it contains many deliberate ambiguities and political compromises, Professor Cox counseled that "courts would be well advised to seek out the underlying rationale without placing great emphasis upon close construction of the words." *Id.*

⁵² Section 2(c) of the LMRDA states in part: "The Congress . . . finds and declares that the enactment of this chapter is necessary to eliminate or prevent improper practices on the part of labor organizations . . ." 29 U.S.C. § 401(c) (1970). See also *Sands v. Abelli*, 290 F. Supp. 677, 681 (S.D.N.Y. 1968).

⁵³ See, e.g., *Cooke v. Orange Belt Dist. Council of Painters No. 48*, 529 F.2d 815, 820 (9th Cir. 1976); *International Bhd. of Boilermakers v. Braswell*, 388 F.2d 193, 200 (5th Cir. 1968), cert. denied, 391 U.S. 935 (1968); *Woods v. Local 613, Int'l Bhd. of Elec. Workers*, 404 F. Supp. 110, 118 (N.D. Ga. 1975); *Sipe v. Local 191, United Bhd. of Carpenters*, 393 F. Supp. 865, 871 (M.D. Pa. 1975); *Sands v. Abelli*, 290 F. Supp. 677, 685 (S.D.N.Y. 1968).

⁵⁴ RESTATEMENT (SECOND) OF TORTS, *supra* note 7, at § 908(1), comment a; C. McCORMICK, *supra* note 7, § 77, at 275; W. PROSSER, *supra* note 7, § 2, at 9, 11; Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1183 (1931); Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. REV. 1158, 1162 (1966).

deter undesirable behavior, or that they do so more effectively than compensatory damages.⁵⁵ This lack of evidence may imply more about the difficulty of garnering proof than about the efficacy of punitive damages. Nevertheless, there is reason to doubt that the threat of exemplary damages would actually deter unions from infringing upon the rights of their members. The application of the malice or reckless indifference standard has often led to decisions under section 102 which are unpredictable, if not arbitrary or capricious.⁵⁶ Lacking a clear understanding of the kind of behavior which would subject them to liability for punitive damages, unions would find it extremely difficult to conduct their affairs so as to avoid such liability.⁵⁷

Moreover, the liability of unions for compensatory damages under section 102 may already sufficiently deter conduct which violates members' rights.⁵⁸ The possibility that a plaintiff will recover for mental suffering, even in the absence of a concomitant physical injury,⁵⁹ makes the threat of compensatory damages a particularly effective deterrent. Damages for emotional distress are likely to be generously assessed by a jury sympathetic to the plaintiff.⁶⁰

The efficacy of Title I and section 609 of the LMRDA depends upon the willingness of union members to vindicate their rights by bringing actions under section 102.⁶¹ At common law, the availabil-

⁵⁵ See Brandwen, *supra* note 26, at 465-66; Duffy, *Punitive Damages: A Doctrine Which Should Be Abolished*, in *THE CASE AGAINST PUNITIVE DAMAGES* 4, 11 (1969); Ghiardi, *Should Punitive Damages Be Abolished?, A Statement for the Affirmative*, in *ABA SEC. OF INS., NEG. & COMP. LAW* 282, 288 (1965).

⁵⁶ See notes 38-49 and accompanying text *supra*.

⁵⁷ Cf. *Furman v. Georgia*, 408 U.S. 238, 302 (Brennan, J., concurring), 311-12 (White, J., concurring), 354 n.124 (Marshall, J., concurring) (1972) (infrequency and arbitrariness of infliction of death penalty suggests that it is not an effective deterrent).

⁵⁸ Compensatory damages are recoverable under § 102. See note 5 and accompanying text *supra*. The threat of such damages may deter undesirable conduct. Brandwen, *supra* note 26, at 465-66; Duffy, *supra* note 55, at 11; Ford, *The Constitutionality of Punitive Damages*, in *THE CASE AGAINST PUNITIVE DAMAGES* 15 (1969); Ghiardi, *supra* note 55, at 288.

⁵⁹ The courts are divided over the question of whether mental suffering is compensable under § 102 in the absence of an accompanying physical injury. Decisions holding that mental suffering alone is compensable include: *Simmons v. Avisco, Local 713, Textile Workers*, 350 F.2d 1012, 1018-19 (4th Cir. 1965); *Yablonski v. United Mine Workers*, 81 L.R.R.M. 2592, 2593-94 (D.D.C. 1972); *Sands v. Abelli*, 290 F. Supp. 677, 684 (S.D.N.Y. 1968). Decisions holding that mental suffering is not compensable in the absence of a physical injury include: *International Bhd. of Boilermakers v. Rafferty*, 348 F.2d 307, 315 (9th Cir. 1965); *Talavera v. Teamsters Local 85*, 351 F. Supp. 155, 158-59 (N.D. Cal. 1972); *Archibald v. Local 57, Int'l Union of Operating Engineers*, 276 F. Supp. 326, 333 (D.R.I. 1967); *Keenan v. District Council, United Bhd. of Carpenters*, 266 F. Supp. 497, 500 (E.D. Pa. 1966).

⁶⁰ See *RESTATEMENT (SECOND) OF TORTS*, *supra* note 7, at § 908, comment c.

⁶¹ See *Hall v. Cole*, 412 U.S. 1, 13-14 (1973); *Cox*, *supra* note 11, at 852. The original Senate version of § 102 provided exclusively for enforcement by the Secretary of Labor. In an effort to avoid overburdening the Labor Department, however, the Senate amended this provision to authorize suits only by union members. 105 CONG. REC. 6476, 6486, 6487, 6491

ity of punitive damages has been defended on the ground that it induces injured persons to sue, despite the attendant trouble and expense.⁶² Accordingly, it can be argued that exemplary damages should be recoverable under section 102, in order to give union members, whose rights have been infringed, an incentive to litigate their claims.

Some such incentive may be necessary, because significant obstacles stand in the way of suits by members against their unions. Since many union members lack extensive financial resources, the cost of litigation may constitute a barrier to actions under section 102.⁶³ Additionally, where unions violate the rights of their members without inflicting any tangible damage,⁶⁴ many members may be discouraged from bringing suit because, even if successful, they would obtain only a negligible financial recovery. These members might decide that it is not worth shouldering the substantial burdens of litigation merely to vindicate intangible rights.⁶⁵

Although some inducement to litigation under section 102 may be necessary in order to overcome these obstacles, it is highly questionable whether punitive damages are needed to serve this purpose. In *Hall v. Cole*,⁶⁶ the Supreme Court held that a successful plaintiff may be awarded attorney's fees under section 102.

(1959), reprinted in II LEG. HIS. LMRDA, *supra* note 9, at 1102, 1113, 1114, 1117. See also *Gartner v. Soloner*, 384 F.2d 348, 349-50 (3d Cir. 1967), *cert. denied*, 390 U.S. 1040 (1968); Comment, *Labor Law—Mandatory Attorney's Fees—Section 102 Labor-Management Reporting and Disclosure Act*, 51 DEN. L.J. 169, 174 (1974).

⁶² C. McCORMICK, *supra* note 7, § 77, at 276-77; W. PROSSER, *supra* note 7, § 2, at 11; Corboy, *Should Punitive Damages Be Abolished? A Statement for the Negative*, in ABA SEC. OF INS., NEG. & COMP. LAW 292, 294 (1965); Morris, *supra* note 54, at 1183; Note, *supra* note 54, at 1162.

⁶³ Cox, *supra* note 11, at 853. See also Comment, *Title I of the LMRDA: Rights and Remedies of Union Members With Respect to Their Unions*, 11 WILLAMETTE L.J. 258, 261 (1975). Union members may also be deterred from bringing § 102 suits by their unfamiliarity with the law and their hesitancy to become involved with the law, as well as by a fear of union reprisals. Cox, *supra* note 11, at 853. See also Comment, at 261. Although any retributive action by the union would likely constitute a fresh violation of the LMRDA or of some other statute, the fear of reprisals may nevertheless exist among many union members.

⁶⁴ Such circumstances are not uncommon. See Comment, *supra* note 61, at 175.

⁶⁵ See Cox, *supra* note 11, at 853; Comment, *supra* note 63, at 261. It can be argued that punitive damages should be recoverable under § 102 not as a means of encouraging litigation by union members who sustain no concrete damage from infringements upon their rights, but as a means of affording union members full compensation for injuries which are difficult to prove. In some jurisdictions, however, it has been held that a plaintiff may recover damages for mental suffering under § 102, even in the absence of a concomitant physical injury. See note 59 *supra*. At least in those jurisdictions, the allowance of exemplary damages would seem entirely unnecessary to ensure the full compensation of the plaintiff. In practice, damages for emotional distress are frequently assessed in an amount greater than is required to make the plaintiff whole. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, at § 908, comment c. An additional award of punitive damages would constitute a pure windfall to the plaintiff, unjustly enriching him at the defendant's expense. See Duffy, *supra* note 55, at 7, 8; Ghiardi, *supra* note 55, at 286.

⁶⁶ 412 U.S. 1 (1973).

Now that *Hall* has made fee-shifting widely available,⁶⁷ the expenses of litigation may no longer pose a serious impediment to suits by members against their unions. Moreover, the availability of damages for mental suffering may provide whatever additional incentive is required for litigation by union members who sustain little or no tangible loss from violations of their rights. Since such damages are often assessed generously, and in amounts larger than are needed to reimburse plaintiffs for out-of-pocket expenses,⁶⁸ their recoverability may significantly stimulate member-union litigation. Admittedly, it has been held in some jurisdictions that damages for emotional distress may not be awarded under section 102 in the absence of concomitant physical injury.⁶⁹ It would be preferable to make mental suffering fully compensable, however, rather than to permit the recovery of punitive damages.⁷⁰

Since sufficient incentives may already exist to stimulate litigation under section 102, it is likely that, if the availability of punitive damages did indeed induce more lawsuits, such actions would more often consist of private feuding than of the vindication of important rights.⁷¹ It has been argued that the value of assuring every union member his day in court is worth the risk of insignificant litigation.⁷² To invite such litigation unnecessarily, however, would simply place an unwarranted load on the already overburdened federal courts. Furthermore, these insignificant actions would impose a considerable burden on labor unions.⁷³ If the lawsuits were merely frivolous, they would waste union resources and hamper ordinary union activities.⁷⁴ Moreover, if the suits were used as a weapon by one union faction against another, the federal courts would inexorably be drawn into intra-union political battles. Such involvement by the courts in internal union affairs is undesirable, for it ultimately tends to undermine union self-government.⁷⁵

⁶⁷ See Comment, *supra* note 61; Comment, *supra* note 63, at 282-83.

⁶⁸ See RESTATEMENT (SECOND) OF TORTS, *supra* note 7, at § 908, comment c.

⁶⁹ See note 59 *supra*.

⁷⁰ The availability of damages for mental suffering, even in the absence of a physical injury, would not only stimulate meritorious litigation under § 102, but would also serve to deter union conduct proscribed by Title I and § 609, and to ensure the full compensation of union members whose rights are violated. See notes 59-60 and accompanying text *supra*; note 65 *supra*. Moreover, this solution would avoid the serious adverse consequences of awarding exemplary damages under § 102. For a discussion of those consequences, see notes 71-80 and accompanying text *infra*.

⁷¹ Cf. *Hall v. Cole*, 412 U.S. 1, 16 (1973) (White, J., dissenting) (The availability of attorney's fees under § 102 will incite many insignificant lawsuits.). *But see Cox, supra* note 11, at 852-53.

⁷² Cox, *supra* note 11, at 853.

⁷³ Since there is a strong public interest in maintaining viable labor unions, see § 1 of the National Labor Relations Act, 29 U.S.C. § 151 (1970); § 2(a) of the LMRDA, 29 U.S.C. § 401(a) (1970), the imposition of this burden on unions may be contrary to the interests of the general public.

⁷⁴ See Cox, *supra* note 11, at 852-53.

⁷⁵ See generally A. COX, LAW AND THE NATIONAL LABOR POLICY 87-88 (1960); Leslie, *Federal Courts and Union Fiduciaries*, 76 COLUM. L. REV. 1314 (1976).

Even if the allowance of punitive damages under section 102 did not provoke unwarranted litigation, it might nevertheless diminish the strength and stability of labor organizations. The payment of exemplary damage awards out of union treasuries, and indirectly out of the wages of union members, would tend to undermine the stability of unions by fomenting discord within their ranks.⁷⁶ Additionally, the satisfaction of extravagant awards of punitive damages could financially cripple some unions. Since the wealth of the defendant is commonly considered in assessing exemplary damages,⁷⁷ the depletion of union treasuries could be minimized by the observance of discretionary limitations on the amounts of punitive awards.⁷⁸ Common law decisions afford little basis for optimism, however, that the size of exemplary awards would be effectively limited in this way.⁷⁹

The danger that allowing exemplary damages under section 102 would undermine union strength is aggravated by the strong possibility that such damages would be awarded in inappropriate cases. It has been extremely difficult to administer the standard that punitive damages may be recovered only where the defendant has acted with malice or with a reckless indifference to the plaintiff's rights.⁸⁰ The substantial likelihood of arbitrary or capricious results is a significant disadvantage of allowing punitive damages under section 102.

Exemplary damages at common law have sometimes been defended on the ground that they inflict a well-deserved punishment on the defendant.⁸¹ Whether or not punishment is in itself a legitimate end, however, it is unpersuasive to argue that exemplary damages should be awarded under section 102 in order to punish unions for maliciously infringing upon the rights of their members. Since the availability of exemplary damages would have a potentially severe impact upon union strength and stability, it would

⁷⁶ See Brandwen, *supra* note 26, at 477. Any suit by a member against his union, of course, would be likely to provoke some disharmony among the membership. Such bitterness could be expected to be particularly intense, however, where the plaintiff was awarded punitive damages. Exemplary damages essentially constitute a windfall to the plaintiff. See note 65 *supra*. Union members may be more resentful of giving a windfall to one of their co-workers than of adequately compensating him for a tangible injury.

⁷⁷ W. PROSSER, *supra* note 7, § 2, at 14; see, e.g., *Yablonski v. United Mine Workers*, 81 L.R.R.M. 2592, 2594 (D.D.C. 1972); cf. RESTATEMENT (SECOND) OF TORTS, *supra* note 7, at § 908(2) (The defendant's wealth is one of several factors to be considered in assessing punitive damages.).

⁷⁸ Cf. *Hall v. Cole*, 412 U.S. 1, 9 n.13 (1973) (Financial crippling of unions may be avoided by limiting the size of awards of attorney's fees.).

⁷⁹ Brandwen, *supra* note 26, at 466-68.

⁸⁰ See notes 38-49 and accompanying text *supra*.

⁸¹ RESTATEMENT (SECOND) OF TORTS, *supra* note 7, at § 908(1), comment b; C. MCCORMICK, *supra* note 7, § 77, at 275, 276; W. PROSSER, *supra* note 7, § 2, at 9; Corboy, *supra* note 62, at 293.

seriously impair the effectiveness of unions as collective bargaining agents. As a result, the successful plaintiff under section 102, together with all other union members, and indeed with the public generally,⁸² would ultimately suffer.

Furthermore, it can be argued that if exemplary damages are appropriate to punish unions, they should be awarded only within the confines of procedural safeguards such as proof beyond a reasonable doubt, the privilege against self-incrimination, and the right to trial by jury. Indeed, punitive damages have been widely condemned as anomalous and perhaps unconstitutional in that they amount essentially to criminal penalties, but are imposed without the protection afforded by the procedural safeguards which surround the criminal law.⁸³ A criminal defendant may be entitled to more stringent procedural safeguards than a civil defendant exposed to liability for punitive damages, however, because of the greater severity of the punishment to which the former is typically subject. Even a convicted criminal who is not imprisoned is likely to be more harshly stigmatized by society than a civil defendant against whom punitive damages are assessed.⁸⁴

At common law, nearly every state fully recognizes the doctrine of exemplary damages.⁸⁵ Although the House of Lords has narrowly limited the recoverability of punitive damages in England,⁸⁶ no American state has restricted the doctrine in recent years. Since

⁸² See note 73 *supra*.

⁸³ See, e.g., Brandwen, *supra* note 26, at 467-68; Duffy, *supra* note 55, at 7; Ford, *supra* note 58; Ghiardi, *supra* note 55, at 287-88.

⁸⁴ See Note, *supra* note 54, at 1180-81; Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. CHI. L. REV. 408, 408-12 (1967).

⁸⁵ Forty states which accept the doctrine of punitive damages without qualification are listed in C. McCORMICK, *supra* note 7, § 78, at 278 n.2. Since this list was compiled, Alaska and Hawaii have also fully accepted the doctrine of exemplary damages. *Bridges v. Alaska Hous. Auth.*, 375 P.2d 696 (Alaska 1962); *Howell v. Associated Hotels, Ltd.*, 40 Hawaii 492 (1954).

Four states (Louisiana, Massachusetts, Nebraska, and Washington) entirely reject punitive damages. *Vincent v. Morgan's La. & Tex. R.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 (1917); *Boott Mills v. Boston & Maine R.R.*, 218 Mass. 582, 106 N.E. 680 (1914); *Riewe v. McCormick*, 11 Neb. 261, 9 N.W. 88 (1881); *Wilson v. Sun Pub. Co.*, 85 Wash. 503, 148 P. 774 (1915).

Indiana permits exemplary damages only in cases in which the defendant's conduct is not also punishable criminally. *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96 (1854). Connecticut allows punitive damages, but limits them to the amount of the plaintiff's litigation expenses. *Craney v. Donovan*, 92 Conn. 236, 102 A. 640 (1917). Michigan and New Hampshire award exemplary damages not as a punishment, but rather on the theory that they constitute extra compensation of the plaintiff for wounded feelings or a sense of outrage. *Hasted v. Van Wagnen*, 243 Mich. 350, 220 N.W. 762 (1928); *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746 (1922); *Bixby v. Dunlap*, 56 N.H. 456, 22 Am. Rep. 475 (1876).

⁸⁶ *Rookes v. Barnard*, [1964] A.C. 1129, 1220-33, held that punitive damages may only be awarded in cases in which (1) they are expressly authorized by statute, (2) government servants have acted oppressively or arbitrarily, or (3) the defendant's conduct was calculated to make a profit for himself which might well exceed the compensation payable to the plaintiff.

it has been subjected to severe and prevalent criticism,⁸⁷ however, it may not be advisable to extend the doctrine of punitive damages to a class of cases like those arising under section 102 of the LMRDA, where its value is highly questionable.

IV. CONCLUSION

Both the language and the legislative history of section 102 of the LMRDA leave unsettled the question of whether a plaintiff may be awarded punitive damages. The case law on this issue is likewise inconclusive; the conflicting decisions of the courts cannot be reconciled on the basis of any relevant factor. An analysis of the decisions reveals that, in jurisdictions which sustain the availability of exemplary damages under section 102, determining when these damages should actually be awarded has been extremely difficult. Frequently, the results of the cases have been unpredictable, if not arbitrary or capricious.

The risk that such results will be reached cannot be justified by any countervailing benefit of awarding punitive damages under section 102. The availability of exemplary damages is unnecessary either to deter unions from infringing upon the rights of their members, or to induce injured members to sue to vindicate their rights. If the lure of punitive damages did increase the volume of litigation under section 102, moreover, many of the new lawsuits would likely be groundless. As a result, the proper functioning of both labor unions and the federal courts would be impaired.

Even if awards of punitive damages under section 102 did not provoke unwarranted litigation, they would nevertheless tend to undermine the strength and stability of unions by creating disharmony among their members, and by seriously threatening to deplete union treasuries. Ultimately, all union members, together with the public, would suffer the consequences. Under these circumstances, it seems highly inappropriate to extend the doctrine of punitive damages to cases arising under section 102 of the LMRDA.

—S. Thomas Wiener

⁸⁷ See, e.g., Brandwen, *supra* note 26; Duffy, *supra* note 55; Ford, *supra* note 58; Ghiardi, *supra* note 55.