IN THE SUPREME COURT
STATE OF FLORIDA

CASE NO. 65,888

JOELLA DEGRIO.

Petitioner/Cross-Respondent,

vs.

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,

Respondent/Cross Petitioner.

BRIEF OF RESPONDENT/CROSS-PETITIONER

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EXPLANATION OF REFERENCES

The following abbreviations will be used throughout this brief:

Def. Exh.	Defendant's trial exhibits.
Pl. Exh.	Plaintiff's trial exhibits.
Tr.	Pages of hearing and trial transcript on appeal (relevant page numbers appear in lower right-hand corner).
O. Tr.	Pages of the original trial transcript later filed relevant page number appear in upper right-hand corner).
R.	Pages of the court file, other than the transcript, on appeal (relevant page numbers appear in lower right hand corner).
G.E.F.	Pages of the Government Employment File entered into the record on supplemental notice (relevant page numbers appear in lower left-hand corner).
O.	Opinion of district court of appeal, followed by page number.

PRELIMINARY STATEMENT

In a review proceeding based on a certified question, the scope of review extends to the full decision of the district court, and not just the question certified. Hillsborough Ass'n of Retarded Citizens, Inc. v. City of Temple Terrace, 332 So.2d 610, 612 n.1 (Fla. 1976). Due to the pre-eminence of the impact rule in this case, the district court never evaluated the union's challenge to the lack of record support for the trial court's findings of negligence, proximate cause, compensatory damages and punitive damages.

In the interests of justice and the elimination of continuous and protracted litigation, this court should dispose of all contested issues, and has said that it has a duty to do so. Kennedy v. Kennedy, 303 So.2d 629 (Fla. 1974). The union respectfully requests that the Court at least address the legal issues of subject matter jurisdiction, proximate cause and entitlement to punitive damages, should it become relevant to do so after answering the certified question. Each of these issues were contested below, were cross-noticed for review, and are here briefed. Should it become necessary after these determinations to reach a review of the record for competent substantial evidence, which no appellate court has yet done, the case can appropriately be remanded to the district court for that purpose.

Respondent, American Federation of Government Employees ("the union") accepts the Statement of the Case as set forth in the initial brief filed by Joella DeGrio ("DeGrio").* The union does not accept DeGrio's Statement of the Facts, however.

DeGrio has presented a rambling statement of select facts from a lengthy trial, which neither reflects the record accurately nor aids the court in understanding the context for the district court's certified question. By omitting the dates on which various events occurred, and by describing irrelevant post-injury events outside the scope of her Complaint, DeGrio presents a Statement of the Facts which grossly distorts the record on review. DeGrio's Statement also leaves out facts relevant to the union's cross-petition for review. For these reasons, the union finds it necessary to restate in full, in historical sequence, and with references to the record, the evidence which was in fact adduced at trial on the issues tried.

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*DeGrio's Statement of the Case is basically accurate. There are, however, two extra words in line 13 on page 10, an error in the quotation of the certified question on page 6, and a line apparently omitted in the paragraph immediately after that quotation. Additionally, DeGrio's Statement on page 6 that the district court overruled the trial court's "factual finding" of malice is mistaken. The district court expressly held that the union's acts do not "as a matter of law" justify the imputation of malice. See opinion, in petitioner's appendix, at page 8.

STATEMENT OF THE FACTS

The record in this proceeding is voluminous. Record references are confusing, due in part to the disjointed process of trial below, and in part to changes in federal law which renamed agencies and proceedings. Nonetheless, the facts of the case can be conveniently synthesized by presenting them in four separate sections.

The first section relates to DeGrio's employment history with the United States government. The second describes the relationship between the local and federal union to which DeGrio belonged. The third describes the administrative process by which DeGrio's job termination was appealed through an adverse action proceeding to the Civil Service Commission. A fourth section sets forth the facts developed at trial on the issues of negligence, proximate cause and damages.[1]

1. DeGrio's employment history.

Joella DeGrio was rehired by the United States government

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[1]Facts relevant to the first three sections are essentially uncontroverted. Facts as to the union's negligence and DeGrio's damages are similarly free from contradiction, but have been obfuscated by inferences which the record does not reflect. These have been identified where appropriate.

in 1961 as a civilian clerk to the United States Army.[2] In 1974 she began to amass a progressive disciplinary record which reflected submarginal and unsatisfactory performance of her duties, repeated violations of orders prescribed by competent authorities, making malicious statements against fellow employees, and creating disturbances among fellow employees and with her supervisor.[3]

For the years immediately preceding her discharge in 1976, DeGrio's work was centered in Coral Gables, Florida at the Armed Forces Entrance and Examination Station (her "duty station"). On April 8, 1976, DeGrio's immediate supervisor at her duty station, Captain P.J. Bernstein, advised DeGrio in writing that he intended to terminate her employment.[4] DeGrio's employment was then formally terminated effective on June 25, 1976.[5]

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[2]Pl. Exh. 27, pp. 6-7, 15 entered at Tr. 351; Tr. 365-66.

[3]Def. Exh. G, Pt. I, pp. 61-135, entered at O.Tr. 471, Tr. 608.

[4]Def. Exh. G, Pt. I, pp. 14-22, entered at O.Tr. 471, Tr. 608.

[5]Pl. Exh. 5, entered at Tr. 125-26.

2. DeGrio's affiliation with the national and local unions.

DeGrio was a dues-paying member of Local 2447, one of numerous, autonomous, local affiliates of the national union named as a defendant in this proceeding, the American Federation of Government Employees.[6] Dues to the union were withheld from her wages under the traditional "check-off" system.[7] As a member of the Local Union and as a federal employee, DeGrio was entitled, along with other local members[8] and federal employees, to request representation in a so-called "adverse action" proceeding regarding a termination of employment.[9] Of course, she had the absolute right to appeal her formal job termination under the rules of the Civil Service Commission (the "Commission") in the same manner as all federal employees, whether union members or

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[6]Tr. 197, 219, 292-93, 318-20, 394: Def. Exh. I, 11/11/80 depo., p. 107, entered at Tr. 633.

[7]Tr. 219.

[8]There is considerable discussion in the record, and confusion in the trial court's final judgment, regarding DeGrio's status as a union member. She was not, apparently, a member of a "certified bargaining unit". The legal relevance of that fact is discussed in detail in a later section of this brief.

[9]5 C.F.R. § 772.307(c)(1976); Executive Order No. 11491 § 7(d), as amended; Tr. 198, 294-95, 326, 394-95, 587.

not. 5 C.F.R. §§ 752(B), 772 (1976). Section 22 of Executive Order No. 11491, as amended, extends the appellate rights of Title 5, § 7701, to all employees in federal service. See Federal Personnel Manual §3-1(c) (12/17/76).

Prior to 1962, the federal government had little in the way of a formal policy concerning the relationship between federal management and employee organizations. On January 17, 1962, President Kennedy issued an Executive Order affording formal recognition to union representation of public employees.[10] For simplicity, this source document for the organizational rights of federal, public-sector employees is referred to in this brief as "the Executive Order".

The national union, chartered by the AFL-CIO, affiliates local unions who then operate autonomously within guidelines prescribed by the national union.[11] DeGrio's Local Union 2447 was one of the national union's affiliates.

As both a federal civilian employee and a dues-paying member of the Local Union, DeGrio had two sets of rights when she was terminated from her job. Under federal law and Commission regulations, she was eligible along with all federal civilian employees to appeal her job termination to the

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[10]Exec. Order No. 10988; 5 U.S.C. § 7301, was replaced by Exec. Order No. 11491 on October 29, 1969, 5 U.S.C. §§ 3301, 7301, and was subsequently amended (in ways not material to this proceeding) by Exec. Orders Nos. 11616; 11636; and 11838.

[11]Def. Exh. H, entered at Tr. 592-95.

Commission. The termination of her employment is termed "adverse action" and, as such, was reviewable by a hearing officer who would make a recommendation to the Commission itself.[12] The rights which flow from her federal employment, of course, are in relationship to her employer, the federal government, and are shared in common with all union and non-union, civilian federal employees.

As a dues paying member of the union, DeGrio was extended the same representational rights as all other employees covered by the collective bargaining agreement.[13] As a dues paying member of the union, DeGrio was also entitled to the benefits of union status conferred by the Executive Order, which directs the Assistant Secretary of Labor to prescribe regulations for labor relations matters affecting federal employees.[14] The rights which flow from DeGrio's union status are in relationship to the organization and procedures of her union, including any available procedure for representation in the event of adverse action with respect to her job. Because not all federal agencies are obligated to allow union personnel to represent employees in every type of labor controversy, and because federal law governs the process for review proceedings, union status itself conferred

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[12] 5 C.F.R. §§ 752, 772; Exec. Order No. 11491 § 22.

[13] Tr. 194, 198, 220.

[14] See 29 C.F.R. §§ 201, 203.

on DeGrio only the right to request union representation on matters such as adverse action.[15] A public-sector union governed by the Executive Order has no duty to appear or represent a union member in an adverse action proceeding in the absence of an express request for representation.

3. DeGrio's administrative review of her job termination.

Under procedures established by the Commission, any federal employee who appeals adverse action to the Commission is entitled to a hearing at which he or she may personally appear or be represented by a person of his or her own choosing. 5 C.F.R. §§ 772.307(b), (c)(1976); Executive Order No. 11491, § 7(d). On her own initiative, DeGrio indicated an interest in the right to obtain a review of her job termination by a letter dated July 7, 1976. In that letter she said:

> I name the American Federation Government Employees as my Representative. The specific name of the National Representative will be forthcoming from the Union's Fifth District Vice-President.[16]

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[15]Tr. 197; Monograph, Labor-Management Relation in the Federal Service, Answers to Questions About Executive Order 11491 (U.S. Civil Service Comm'n publication), questions 9, 48-52, 81-82. A copy of this monograph was appended to union's brief in district court.

[16]Def. Exh. F, entered at Tr. 492.

A copy of this letter found its way to the national union's fifth district vice president, Kenneth T. Blaylock. On July 12, Blaylock wrote to William Mudgett, a so-called "national representative" in the national union who services locals in southern Florida. Blaylock told Mudgett that Local Union president Joseph Albanese had requested that a national representative be assigned to assist the local in representing DeGrio. By copy of his letter to both Albanese and DeGrio, Blaylock advised the Local Union to coordinate proposed hearing dates directly with Mudgett to avoid any conflict in his commitments.[17]

Mudgett had been scheduled for vacation during August and knew he would not return to his office until after Labor Day. Therefore, prior to leaving for vacation, he advised local president Albanese that DeGrio should notify the Commission that he, Mudgett, would be DeGrio's representative, in order to insure he would receive correspondence directly from the Commission.[18] As was standard practice in these matters, a national representative does not prepare for adverse action hearings before the national union is formally designated by the employee to represent him or her, and until

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[17]Pl. Exh. 7, entered at Tr. 125-26. DeGrio received a copy of this letter. Def. Exh. I, 11/11/80 depo., p. 14, entered at Tr. 633; Def. Exh. M, entered at Tr. 637-38.

[18]O. Tr. 456-57; Tr. 562, 588; Pl. Exh. 18, pp. 19-20, 39, entered at Tr. 349.

the representative has been notified of a proposed hearing date.[19]

One week after Blaylock wrote Mudgett and Albanese, DeGrio wrote to Mudgett transmitting certain documents regarding her job termination.[20] DeGrio's letter, of course, did not advise Mudgett of any hearing date since none had yet been set. This was DeGrio's last communication with Mudgett, oral or written, before or after the hearing.

On July 29, the Commission sent DeGrio a copy of her complete file for the appeal, advising her to review the file carefully and, if she desired a hearing, to complete a form which would supply the names of witnesses she intended to call.[21] DeGrio did not advise Mudgett about the Commission's transmittal, and she did not pass along to Mudgett any information in the July 29 package.[22] The documents contained in that package constitute the file upon which the hearing officer eventually concluded that DeGrio's employer, the Government of the United States, was justified in

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[19]O. Tr. 458, 460; Pl. Exh. 18, pp. 22-23, entered at Tr. 349.

[20]Pl. Exh. 6, entered at Tr. 125-26.

[21]Def. Exh. A, entered at Tr. 484-85.

[22]Tr. 484-86; O.Tr. 462.

terminating her employment for cause.[23]

On August 7, DeGrio signed and returned to the Commission the appropriate form on which she elected to have a hearing before a representative of the Commission, and on which she identified both the proposed witnesses she intended to call and a summary of their expected testimony.[24] Mudgett was not named in this form, and he was not sent a copy. Since DeGrio did not then (or at any time later) "designate" Mudgett as her representative before the Commission, despite the requirement of federal regulations that a precise name and address be submitted in writing,[25] the Commission's records reflected that DeGrio had chosen to represent herself at the hearing she had requested.

In due course DeGrio's case was assigned to hearing officer Kenneth Friedman,[26] and on August 26, 1976, Friedman notified DeGrio that a hearing was set for September 9, 1976.[27] Friedman, of course, was unaware of Mudgett's

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[23]Pl. Exh. 19, pp. 28-29, 35, entered at Tr. 349; Def. Exh. G, Pt. I, entered at O.Tr. 471, Tr. 608.

[24]Def. Exh. B, entered at Tr. 486, 488.

[25]Pl. Exh. 19, pp. 3-4, 6-7, 11-12, entered at Tr. 349.

[26]Pl. Exh. 19, pp. 16-17, entered at Tr. 349.

[27]Def. Exh. D, entered at Tr. 488-90; Def. Exh. I, 11/11/80 depo., pp. 29-31, entered at Tr. 633.

availability to assist DeGrio if she requested his help. In his August 26 letter, Friedman once again advised DeGrio that she could represent herself at the hearing (as seemed to be her choice from his records), or that she could be represented by a person of her choosing. DeGrio did nothing to change her election of self-representation before hearing officer Friedman or the Commission.[28] In fact, on August 31 she corroborated that impression by writing hearing officer Friedman that she would attend the September 9 hearing.[29]

There was no document in the Commission's file before the hearing, and there is none there now, which suggests that DeGrio ever designated the union to act on her behalf as the representative with whom the Commission or the hearing officer could have communicated.[30] Of course, neither Mudgett

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[28]Tr. 203-04, 427; Pl. Exh. 19, pp. 5-6, 13, entered at Tr. 349; Def. Exh.I, 11/1//80 depo., pp. 93-94, entered at Tr. 633.

[29]Her letter to Friedman contained the letters "AFGE" at the bottom, but DeGrio testified that she never sent a copy of that letter to Mudgett. Def. Exh. E, entered at Tr. 488-90; Tr. 490-91; Def. Exh. I, 11/11/80 depo., pp. 38-40, entered at Tr. 633. From Friedman's and the Commission's official point of view, the "AFGE" notation could only mean that she was keeping her union informed but had not elected to use their services at the hearing.

[30]Pl. Exh. 19, pp. 5-6, 15, entered at Tr. 349.

nor any other person in the national union received a copy of hearing officer Friedman's letter, or any other communication setting a date for the hearing.[31]

On September 9, DeGrio and her general character witnesses appeared before hearing officer Friedman, along with Thomas Hartman, vice president of the local union. Hartman, who had no experience in these matters, came as an observer simply to learn what he could about adverse action proceedings.

DeGrio advised Friedman that she did not wish to proceed without her national union representative. Friedman stated to those present that he could decide her case on the record before him, but that he could not determine whether another hearing would be granted until he received an explanation from Mudgett regarding his failure to appear. He directed DeGrio or Hartman to contact Mudgett, and to ask Mudgett to provide an explanation of his unavailability at the hearing.[32] Neither DeGrio nor Hartman endeavored to contact Mudgett, however, and hearing officer Friedman did not himself undertake to do so.[33]

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[31]O. Tr. 455-56, 459; Pl. Exh. 19, pp. 6-7, entered at Tr. 349; Pl. Exh. 20, p. 47, entered at Tr. 349.

[32]Pl. Exh. 1, entered at Tr. 125-26; Pl. Exh. 20, p. 15, 43, entered at Tr. 349; Def. Exh. G. Pt. I, p. 150, entered at O. Tr. 471, Tr. 608; Pl. Exh. 19, pp. 9-10, entered at Tr. 349.

[33]Tr. 513-15; O. Tr. 467, 472; Tr. 589; Pl. Exh. 20, pp. 42-44, entered at Tr. 349; Def. Exh. I, 9/10/80 depo., pp 52-53, entered at Tr. 633; Def. Exh. M, entered at Tr. 637-38.

On September 20, hearing officer Friedman wrote DeGrio to say that he had received no communication from Mudgett.[34] DeGrio nonetheless did nothing. In due course, Friedman made his decision on DeGrio's job termination solely on the basis of her employment file and the limited discussion on September 9.[35]

The foregoing facts from the trial provide the entire basis of proof adduced to support the allegations of DeGrio's complaint regarding the union's non-appearance and later failure to explain.[36]

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[34]Pl. Exh. 19, p. 28, entered at Tr. 349.

[35]Pl. Exh. 19, pp. 28-29, 35, entered at Tr. 349.

[36]Adverse factual inferences relative to the union's liability were adopted by the trial judge based on events which occurred after the September 9 hearing. DeGrio's brief emphasizes those irrelevant post-hearing events, without identifying them as such. One such inference relates to Mudgett's post-hearing attempts to contact hearing officer Friedman by telephone. Pl. Exh. 19, pp. 26-27, entered at Tr. 349. Another relates to efforts later exerted by another national representative of the union, and by the union's headquarters' staff, to reopen DeGrio's case. Def. Exh. G, Pt. I, pp. 159-61, 179-80, entered at O. Tr. 471, Tr. 608. None of these post-hearing events fall within the ambit of DeGrio's Complaint, which asserted liability based solely on Mudgett's non-appearance and later non-communication. The trial court erred in finding that these post-hearing acts, undertaken gratuitously on DeGrio's behalf, either relate to the allegations of the complaint or weigh against the union.

Friedman's decision was reduced to writing on December 9, upholding DeGrio's employment termination on the basis of her employment file.[37] That December 9 administrative recommendation concluded DeGrio's efforts to obtain an administrative review of her job termination, as the hearing officer's recommendation went up to the full Commission without challenge and was there adopted without change.[38]

Under Section 4 and 6 of the Executive Order, if DeGrio was not satisfied with the union's handling of her affairs she had the privilege of presenting her complaint in the form of an unfair labor practice to the Assistant Secretary of Labor. If the Assistant Secretary's decision was not to her liking, she had the right to obtain a further review of his decision from the Federal Labor Relations Council. Executive Order No. 11491, § 4(c)(1). She did neither. Long after the time for these actions had expired, she brought this suit in state court asserting the union's negligence.

Independent of her job termination proceeding, DeGrio on her own processed a request for an award of full disability

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[37]Pl. Exh. 4, entered at Tr. 125-26; Pl. Exh. 19, pp. 29, 35, entered at Tr. 349; Def. Exh. G. Pt. I, pp. 149-58, entered at O.Tr. 471, Tr. 608.

[38]Def. Exh. G. Pt. I, pp. 168-70, entered at O.Tr. 471, Tr. 608.

from the Commission.[39] In due course, an award of full permanent disability was granted, retroactive to the date her employment with the federal government was terminated.[40]

4. DeGrio's proof of the union's alleged negligence, proximate cause, and damages.

At the trial below, DeGrio testified personally, and she presented as her main witness on the issue of her job termination Mary Eloise Gallaway, a person for whom she had worked on temporary assignment, away from her duty station, for approximately two months.[41] She also presented Local Union officials, her husband, and a vocational consultant. Deposition testimony was introduced for general character support and to explain her medical problems.

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[39]G.E.F. 21-23, 116-18, 145, entered at Tr. 641-42, R. 685-86.

[40]Def. Exh. I, 11/11/80 depo., pp. 81-83, entered at Tr. 633.

[41]An inference from this testimony was that her job termination was not justified. This evidence was never adduced before hearing officer Friedman, however, where the main witness, Gallaway, was expressly excluded from testifying because she had not supervised DeGrio or worked with her at her duty station. No witness or deposition testimony introduced by DeGrio contradicted DeGrio's progressive disciplinary record as a civilian employee with the military.

DeGrio's medical history was developed at trial. She was a person who has suffered from many illnesses over the past 20 years[42] including seizures of an epileptic nature since early childhood.[43] She had two convulsive-like seizures while at work on October 19, 1961, and another seizure after being taken home. She fainted while at work in 1962[44], and right after her divorce in 1949.[45]

DeGrio has been using Dilantin since 12 years of age.[46] While her seizures were controlled by taking Dilantin and Phenobarbital[47], they recurred during

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[42]Pl, Exh. 29, entered at Tr. 352; Def. Exh. L, entered at Tr. 637; Pl. Exh. 35, entered at Tr. 431, 642.

[43]Pl. Exh, 29, p. 6, entered at Tr. 352; G.E.F. 170, 181, entered at Tr. 641-42, R. 685-86.

[44]Tr. 500-01; Def. Exh. I, 9/10/80 depo., pp. 14-15, entered at Tr. 633; G.E.F. 168, entered at Tr. 641-42, R. 685-86.

[45]Tr. 500-01; Def. Exh.I, 9/10/80 depo., p. 19, entered at Tr. 633; G.E.F. 181, entered at Tr. 641-42, R. 685-86; Pl. Exh. 31, 11/14/80 depo./, p. 15, entered at Tr. 352.

[46]Pl. Exh. 29, p.6, entered at Tr. 352.

[47]Pl. exh. 29, p. 6, entered at Tr. 352; G.E.F. 170, entered at Tr. 641-42, R. 685-86; Def. Exh. L. entered at Tr. 637.

periods when her anti-seizure medication was withdrawn.[48]

In 1962, DeGrio was hospitalized for a thorough examinaton and observation in connection with her employer's initiation of a request that she be placed on disability retirement. Upon admission to the hospital she was taken off her seizure medication and had at least four observed seizures. When her medication was resumed, the seizures ended.[49]

Just prior to DeGrio's job termination, she experienced medical problems connected with a blood disorder. She was taken off Dilantin on May 3, 1976.[50] A doctor board certified in internal medicine and hematology treated DeGrio for low blood platelets beginning on June 8, 1976, being fully aware that Dilantin had been discontinued about four weeks before.[51]

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[48]Def. Exh. L, p.2, entered at Tr. 637 ("During the admission to the VA Hospital . . . the medication Dilantin and Phenobarbital were removed . . . after which she had some seizures . . ."); G.E.F. 170, 182, entered at Tr. 641-42, R. 685-86 ("On admission the patient was taken off the Phenobarbital and Dilantin . . . . She had at least four observed seizures during her hospital stay . . . .").

[49]Def. Exh. L, entered at Tr. 637; G.E.F. 170, 181-83, entered at Tr. 641-42, R. 685-86.

[50]Pl. Exh. 29, p. 21, entered at Tr. 352.

[51]Pl. Exh. 32, pp. 3-6, entered at Tr. 352.

That doctor's testimony concerning the cause of DeGrio's September seizure is revealing:

> Q. Doctor, with respect to the removal of Dilantin, could that factor cause a seizure?
>
> A. Could the removal of Dilantin?
>
> Well, in someone who has an active seizure, tendency towards having seizures, and in whom the Dilantin has been successfully suppressing the seizures, there is no question that the removal could cause a seizure to occur.
>
> That's not quite accurate. The truth of the matter is that the seizure focus which had been suppressed by the Dilantin would then become unsuppressed and could therefore do it.[52]

DeGrio was in the hospital with her blood platelet problem from June 8 through 17, 1976 (prior to employment termination on June 25). On her admission to the hospital DeGrio had been bleeding from the rectum and vagina, and the "severity of [her] illness" was explained to her.[53] Her behavior in the hospital demonstrated severe stress, showing that on June 13 DeGrio was hyperactive, and that on June 16 she was depressed, stated she was having problems at work, was very

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[52]Pl. Exh. 32, p. 23, entered at Tr. 352.

[53]Pl. Exh. 35, Env. 1, 6/8/76 handwritten "Progress Notes", entered at Tr. 431, 642.

nervous and upset, and could not sleep.[54]

The records of the doctor who treated DeGrio upon her admission to the hospital following her seizure and fall on September 17 state:

> The thrombocytopenia [low blood platelets] was thought to be possibly due to Dilantin and/or phenobarbital both. The anti-epileptics were discontinued about 3 mos. ago, and since that time the patient has had two or three seizures that her family relates. In any case, yesterday [sic] morning at 7:30 a.m. (9/17/76) the patient called her mother and told her that she had fallen on the way out to get her newspaper, and was bleeding from the head.[55]

While in the hospital for treatment, DeGrio was first placed on Dilantin but on discharge was taken off that medication in favor of Tegretol.[56] DeGrio was again admitted to the hospital in a serious seizure state on October 8, 1976.[57] During that hospitalization, DeGrio complained to her nurses that this seizure wouldn't have occurred if

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[54]Pl. Exh. 35, Env. 1, handwritten "Nurses Bed Side Notes", entered at Tr. 431, 642.

[55]Pl. Exh. 35, Env. 1, typewritten "Progress Notes," dated 9/17/76-10/3/76, entered at TR. 431, 642.

[56]Id.

[57]Pl. Exh. 35, Env. 2, Doctors' Hospital Admission form, entered at Tr. 431, 642.

Dilantin had been given.[58]

The record is replete with hard evidence that DeGrio had a long history of job dissatisfaction and paranoia about being fired. As space does not permit its elaboration here, the Court is directed first to the testimony of DeGrio's daughter as authority for the length and extremes of DeGrio's prior conditions and concerns.[59] Next, the Court will find documentation of the stress produced by her job termination and by the fight she had with her daughter the night before her seizure, as well as the notable lack of any change in her behavior between the September 9 hearing and her September 17 seizure.[60]

Certain witnesses testified to their observance of DeGrio's physical and emotional condition before and after the head injury that she suffered in a fall that allegedly took place at DeGrio's home on September 17, eight days after the scheduled hearing. Other evidence was presented that her emotional distress had been persistent from the date of her job termination (June 25) and had heightened in a fight with her

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[58]Pl. Exh. 35, handwritten "Intensive Care Nurses Notes," dated 10/9/76, entered at Tr. 431, 642.

[59]Pl. Exh. 26, pp. 6, 8, 11-12, 14, 23, 24, 29 entered at Tr. 350.

[60]Pl. Exh. 26, pp. 4-26, 29-30, entered at Tr. 350.

daughter the day before the September 17 seizure.[61]. It is undisputed, in any event, that DeGrio had stopped taking her seizure medicine (Dilantin) on doctor's order several weeks before the September 17 seizure, and that on prior and subsequent occasions when she discontinued its use she suffered seizures.[62]

Finally, the Court is directed to medical evidence, including the testimony of DeGrio's experts, regarding the absence of any relationship between the hearing and DeGrio's seizure and fall eight days later.[63] A court appointed psychiatrist testified, from a review of all other medical evidence, that DeGrio probably did not even have a seizure on

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[61]Tr. 332-33 ("She was very distraught by the dismissal in June, completely distraught, entirely different person."); Pl. Exh. 28, pp. 32-36, entered at Tr. 352; Pl. Exh. 31, p. 46, entered at Tr. 352; Pl. Exh. 26, pp. 11-12 (according to DeGrio's daughter, she "became nervous and bitchy. . . ."), 14, 16, 24, 29-30 ("Me and my mother had a fight the day before.").

[62]Tr. 499-501, 508-09, 532; Pl. Exh. 28, pp. 11, 15-16, 18-19, 24-25, 31, entered at Tr. 352; Pl. Exh. 29, p. 21, entered at Tr. 352; Pl. Exh. 30, p. 7, entered at Tr. 352; Pl. Exh. 32, pp. 5-6, entered at Tr. 352; Def. Exh. L., p. 2, entered at Tr. 637; G.E.F. 170, 182, entered at Tr. 641-42, R. 685-86.

[63]Pl. Exh. 28, pp. 17-24, entered at Tr. 352; Pl. Exh. 29, pp. 5-24, entered at Tr. 352; Pl. Exh. 30, pp. 8,12, 17, 27-29, entered at Tr. 352; Pl. Exh. 31, pp. 25, 30-31, 46, entered at Tr. 352.

September 17.[64]

As a final matter regarding negligence issues, DeGrio's entire Civil Service Commission file, upon which Friedman relied in determining that DeGrio was terminated for just cause, was introduced.[65]

The evidence of DeGrio's damages came from medical bills and records as to out-of-pocket expenditures, [66] and from vocational consultants.[67]

Both sides went to trial under the belief that DeGrio was not entitled to punitive damages, inasmuch as the trial court had stricken that claim before the trial commenced. As a consequence, of course, no proof was offered as to the national union's financial status, as is required for any award of punitive damages under Florida law.

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[64]Def. Exh. J, pp. 6-12, entered at Tr. 634.

[65]The Civil Service Commission file (Def. Exh. G), identified formally on its jacket as the Merit Systems Protection Board File, is referred to in the brief as the Commission file. The change in terminology results from the Civil Service Reform Act of 1978, which became effective after DeGrio initiated this court action. That act placed the responsibility for processing adverse actions under the Merit Systems Protection Board. Defendant's Exhibit G is the file on which hearing officer Friedman relied in considering the merits of DeGrio's employment termination, and which he had with him when his deposition was taken.

[66]Pl. Exh. 35, entered at Tr. 431, 642.

[67]Tr. 434-73; 443-44; 546-48.

ARGUMENT

1. Florida should not modify the "impact rule" to allow recovery for damages claimed by DeGrio in this case.

The district court certified the following question with reference to the "impact rule":

> Should Florida abrogate the "impact rule" and allow recovery for the physical consequences resulting from mental or emotional stress caused by a negligent omission on the part of a defendant in the absence of both physical impact upon the plaintiff and malicious conduct by the defendant?

The district court made two very important observations regarding the certified question. In footnote 2 of its opinion, the court stated:

> We note that this case is factually distinguishable from those in which the courts have previously seen fit to certify questions to the supreme court concerning the impact rule. These other cases have involved automobile accidents resulting in deaths to close relatives of the plaintiffs; the seeing of these deaths allegedly causing injuries to the plaintiffs. [See Cadillac Motor Car Div. Gen. Motors Corp. v. Brown, 428 So.2d 301 (Fla. 3d DCA 1983); Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 982)].

The court also observed that:

> The circumstances of the present case may well illustrate an area where the impact

> rule, even if modified by the supreme court, should retain some vitality.

These comments by the district court point to the reasons why any abrogation of the impact rule should not allow recovery for the damages claimed by DeGrio in this case.

With Champion v. Gray, 420 So.2d 348 (Fla. 5th DCA 1982), and Cadillac Motor Car Div. Gen. Motors Corp. v. Brown, 428 So.2d 301 (Fla. 3d DCA 1983), pending before the Court, the Court is obviously familiar with the history of the impact rule and the various arguments for and against maintaining it in effect. The union will not repeat those arguments here. Should the Court decide to modify the impact rule in either Champion or Brown, however, no application of the rule should extend to this case. DeGrio's unique situation is unlike any other fact pattern in the decided, emotional distress cases, and the effect of allowing DeGrio to recover is to place no limitation whatsoever on whatever new doctrine the Court chooses to substitute for the impact rule.

There is a large body of case law on this subject, and there are numerous law review articles and commentaries which go into detail as to the development of the impact rule and its modification over the years. No commentator has suggested that a complete abrogation of the impact rule has occurred, or should occur. See, for example, Note, Tort Law - Negligent Infliction of Emotional Distress - Should the Florida Supreme Court Replace the Impact Rule With a Foreseeability Analysis?

11 Fla.St.U.L.Rev. 229 (1983). Case law is even more conservative and circumspect. In jurisdictions where the rule has been modified, various standards or limitations have been adopted to prevent the liability of potential defendants from being wholly open-ended.

DeGrio offers a summary of the history of the impact rule on pages 20-21 of her brief. This summary describes a judicial progression from early adoption of the impact rule to its partial abrogation in favor of so-called "substitutes." DeGrio suggests these include a "zone of danger" test, a "reasonable foreseeability" standard, and a simultaneous physical injury test. Although legal scholars might disagree with DeGrio's succession analysis in some particulars (and the union does to some extent), it really is not necessary to quibble over refinements of the legal principles for purposes of this case. Nowhere does DeGrio bring herself within any of the substitute doctrines which she herself identified.

DeGrio does not and can not claim to have been in a zone of danger, and she does not and can not claim to have suffered a physical injury simultaneously with Mudgett's failure to appear at her hearing. Her claim for an emotional distress recovery exists, if at all, only if her injury-producing epileptic seizure was reasonably foreseeable by the allegedly negligent defendant, American Federation of Government Employees. It wasn't, of course, by any stretch of

the facts, or by any standard applied in those courts which have adopted the foreseeability standard.

On the facts, neither the union nor Mudgett could have possibly known that DeGrio was under medical care for a blood platelet problem, that she harbored paranoia about her job, that she was an epileptic, that her doctors had discontinued the use of her lifelong anti-seizure medication, and that she had been hospitalized for various of these problems just prior to her job termination. DeGrio has never suggested that knowledge of her condition was, or could have been, attributed to Mudgett before the hearing. In fact, DeGrio's brief recognizes the union's lack of any information about her unique physical and emotional problems. As a matter of law, therefore, a stress-induced epileptic seizure should be held not to be foreseeable by an epileptic employee's union which volunteers to provide representation in a civil service hearing.

On the law, any "reasonably foreseeable" test which the Court might adopt for emotional trauma cases should have application only to normal persons, unless the peculiar condition of health was actually known to the defendant. Courts which have adopted a foreseeability test have specifically articulated this necessary refinement. Hunsley v. Giard, 553 P.2d 1096 (Wash. 1976), exemplifies this modern trend.

In that case, involving (as here) merely negligent conduct, the court abandoned impact, the zone of danger and

related limitations for emotional distress cases. After an exhaustive analysis of history and methodologies, the court concluded "that the wisest approach is to return to the traditional principles, theories, and standards of tort law. . . . [D]uty, breach, proximate cause and damage or injury." 553 P.2d at 1102. (This Court similarly returned to traditional principles when the law of res ipsa loquitor became too complex and untenable. Goodyear Tire & Rubber Co. v. Hughes Supply, Inc., 358 So.2d 1339 (Fla. 1978).) In analyzing those traditional principles, the court then identified what, for DeGrio, is the critical defect in her claim for recovery:

> The element of foreseeability plays a large part in determining the scope of defendant's duty. . . . Inherent in the formula is the principle that the plaintiff's mental distress must be the reaction of a normally constituted person, absent defendant's knowledge of some peculiar characteristic or condition of plaintiff.

553 P.2d at 1103 (emphasis added). Other cases are to the same effect.

Caputzal v. The Lindsay Co., 222 A.2d 513, 517 (N.J. 1966), quoting with approval from 2 Harper & James, The Law of Torts 1035 (1956), states that "generally defendant's standard of conduct is measured by the reactions to be expected of normal persons." Hughes v. Moore, 197 S.E.2d 214, 219 (Va. 1973), adopts a rule ". . . subject to familiar limitations. A

defendant's standard of conduct is generally measured by the reaction to be expected of a normal person." See Daley v. LaCroix, 179 N.W.2d 390 (Mich. 1970); Payton v. Abbott Labs, 437 N.E.2d 171 (Mass. 1982). Rodrigues v. State, 472 P.2d 509, 520 (Hawaii 1970), holds ". . . that serious mental distress may be found where a reasonable man, normally constituted, would be unable to adequately cope with the mental stress engendered by the circumstances of the case." Paugh v. Hanks, 451 N.E.2d 759, 765 (Ohio 1983), adopts the formulation in Rodrigues, supra. Finally, the Restatement (Second) of Torts, §313(1), comment c, (1965), describes liability for the negligent or unintentional causing of emotional distress with the caveat that this class of defendant "does not take the risk of any exceptional physical sensitivity to emotion which the other may have."

When the impact rule was last before the Court Justice Adkins proposed a normalcy standard:

> "[I]n the absence of a defendant's specific knowledge of a plaintiff's unusual sensitivity, no recovery should be allowed for hypersensitive mental disturbance where a normal person would not have been so affected under the circumstances.[68]

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[68]Gilliam v. Stewart, 291 So.2d 593, 603 (Fla. 1974)(Adkins, J., dissenting).

The logic behind a "normal person" standard of foreseeability is compelling in this case. No reasonable union representative who handles hearings for innumerable union members can be expected to foresee that a mere failure to appear at an administrative hearing could result in an epileptic seizure some eight days later. Obviously, any doctrine which would treat as predictable the special injuries which result from unique health problems would be far-reaching and unwieldy. In this class of case, such a doctrine would serve to deter union officials from volunteering to handle any labor grievances.

2. No proximate cause

There is no record foundation for a finding of proximate cause between Mudgett's alleged failure to appear at the September 9 hearing and DeGrio's subsequent, alleged epileptic seizure and fall on September 17. The necessary nexus is not remotely present. The facts speak for themselves, saying loudly and clearly that Mudgett's non-appearance at the September 9 hearing could not possibly have been the proximate cause of DeGrio's stress-induced seizure.

Before that event, DeGrio had already lost her job, been advised when hospitalized that her blood illness was "severe", shown acute agitation about her work and her health, and had been taken off her lifetime, anti-seizure medicine. It was sheer speculation on the judge's part, which no doctor

confirmed, that Mudgett's non-appearance was the proximate cause of her later seizure and fall.

Nor is there the slightest proof of foreseeability that the national union would be expected to know that one of its local's members was epileptic, so that a failure to represent her would cause a stress-induced seizure. As to the requirements for proximate cause and foreseeability, see generally, Prosser, Law of Torts §41 (4th Ed. 1971); Firestone Tire & Rubber Co. v. Lippincott, 383 So.2d 1181 (Fla. 5th DCA), petition denied, 392 So.2d 1376 (Fla. 1980); Kwoka v. Campbell, 296 So.2d 629 (Fla. 3d DCA), cert. denied, 304 So.2d 450 (Fla. 1974).

3. Subject matter jurisdiction

The district court never should have reached the impact rule in this case. It erred on the threshold question of whether the trial court had subject matter jurisdiction in this case.

The union asserts that any duty owed was one of fair representation, and that the district court's decision treating the duty as one of common law negligence is so unique as to set a precedent never before recognized in either federal or state courts for public sector labor cases. The court's decision on subject matter jurisdiction should be reversed, for several reasons.

The court determined that union members who are not in an exclusive bargaining unit can have common law rights

different from the rights which flow from a duty of fair representation. That notion is inherently absurd, and misunderstands the distinctive area of law surrounding the public labor sector.

The duty of fair representation certainly had its genesis in the exclusivity principle of representation, but exclusivity has never been a prerequisite to the imposition of a duty in all cases. In Nedd v. United Mine Workers of America, 556 F.2d 190 (3rd Cir. 1977), cert. denied, 434 U.S. 1013 (1978), the court applied the duty of fair representation to cases where the union took it upon itself to act for persons not members of the bargaining unit. The court cited Railroad Trainmen v. Howard, 343 U.S. 768, 72 S.Ct. 1022, 96 L.Ed. 1283 (1942), where the Supreme Court held:

> [T]hat the duty of fair representation prevented a union from discriminating on the basis of race in the collective bargaining process against the employees who were not members of the bargaining unit the union represented.

556 F.2d at 199.

In Toensing v. Brown, 528 F.2d 69 (9th Cir. 1975), the court held that the duty of fair representation is applicable within the range of representation of retirees who are not members of the bargaining unit if a union undertakes to represent them.

Logic dictates that if the union had any duty at all to DeGrio, that duty can only be, and can be no greater than, the duty of fair representation which applies to all other

members of the union. This principle was followed in Gerace v. Johns-Manville Corp., 95 LRRM 3282 (Comm. Pleas Pa. 1977), where employees alleged tort injuries from working with asbestos. When the national and local unions were joined as defendants by the manufacturer, for their alleged negligence in failing to take proper steps to protect the health of their members, the unions sought dismissal for lack of subject matter jurisdiction. The manufacturer argued that the long-standing doctrine of federal preemption does not preclude the existence of a common law duty of due care founded on principles of state tort law. The court held otherwise:

> [T]he duty of fair representation... has been recognized as the only duty which a union has to its members.... Despite [the manufacturer's] importuning to the contrary, we strongly believe that it is not the responsibility of a nisi prius state judge to propose the imposition on a union of a duty in addition to that prescribed by the federal courts premised on undefined concepts of the common law.

See, also, Franklin Central School v. Franklin Teachers Association, 414 N.E.2d 685 (Ct. App. N.Y. 1980).

There is not a single court decision in the land on which to base a claim that this action can be characterized as common law negligence. Indeed, at the outset of the trial, DeGrio's counsel stated as much. (Tr. 141).

More importantly, DeGrio was treated in all respects like other members of the exclusive bargaining unit, and the

record fully supports the union's contention that DeGrio is not entitled to greater rights than other union members.[69]

The district court also erred in suggesting that DeGrio would be entitled to maintain this suit even it were one based on a duty of fair representation. In footnote 1 of its opinion, the court stated that:

> [E]ven if [the duty of fair representation] were involved, this would not necessarily have divested the trial court of jurisdiction. See Vaca [v. Sipes, 386 U.S. 171 (1967)]; cf. Farmer v. United Bhd. of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 97 S. Ct. 1056, 51 L. Ed.2d 338 (1977) (state court had jurisdiction over case involving intentional infliction of emotional distress despite some overlap with federal labor policy).

The court overlooked the critical distinction between the Vaca and Farmer cases, both of which involved private sector labor law, and DeGrio's case which involves federal public sector labor law. The publicsector has its own body of case law, with administrative procedures to handle labor matters that are unique to federal public sector policies. See Marlow v. Department of Defense, No. C-2-83-2010 (D.C. S.D. Ohio Nov. 16, 1984), citing other recent district court cases ruling on the

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[69]See pages 194, 198 and 220 of the trial transcript. The employer included DeGrio in the union dues check-off system, which had to be agreed to by management and the union. Section 21(a) of Executive Order 11491 provides for the agency employer to deduct union dues (check-off) "....from the pay of members of the organization in the unit of recognition..." Dues check-off is authorized under this section "....when a labor organization holds exclusive recognition, and the agency and the organization agree..." Executive Order No. 11491, 5 U.S.C. § 3301, 7301 (Oct. 29, 1969).

same jurisdictional issue. A copy of the Marlow decision is appended to this brief.

Up until the time Congress enacted the Civil Service Reform Act after this case was initiated, no courts, federal or state, had subject matter jurisdiction over issues involving federal public sector unions. Civil Service Reform Act of 1978, 5 U.S.C. §7101 et seq. Prior to the Act, it was uniformly held that the Executive Order expressly provided administrative remedies under the Assistant Secretary of Labor for resolving disputes involving federal public sector unions, and that those procedures were exclusive. Thus, neither state nor federal courts have jurisdiction over DeGrio's complaint, even if it could be construed to meet the requirements of the Farmer exception which, based on the district court's correct law determination that Mudgett's conduct does not impute malice, it quite clearly did not.

The South Carolina Supreme Court recently reaffirmed that state trial courts do not have subject matter jurisdiction over an action against a union for an alleged failure to timely prosecute a claim through the civil service administrative appeal procedure. Wood v. American Federation of Government Employees, AFL-CIO, 318 S.E.2d 568, (S.C. 1984). A copy of the court's opinion is appended to this brief. The Wood decision reflects standard preemption principles which have been applied throughout the land by federal and state courts, including this court. Indeed, decisions of the United States' federal courts

and state court decisions cited herein unerringly hold that disputes between federal public-sector employees and their unions are exclusively within the province of federal administrative and judicial tribunals.

There should be no misunderstanding regarding the conduct of which DeGrio complained, as set forth in DeGrio's first amended complaint. DeGrio obtained in the trial court a judgment against a national labor union of which she is a dues-paying member, for the union's failure to appear and represent her at a federal, administrative proceeding which she initiated in order to review the termination of her federal job. Mudgett, the union's representative, was dismissed as a party defendant before trial.

If DeGrio's claim against the union has any legal justification at all, it necessarily results from the union's alleged breach of duty to appear and represent her at the administrative hearing, and if the union had any duty at all to DeGrio, it could only have arisen from the Executive Order or from her membership in this public-sector union.

The threshold issue in this proceeding was the state trial court's lack of subject matter jurisdiction to adjudicate an alleged breach of duty, based on union membership, arising from a federal, public-sector union's failure to provide representation in a federal administrative proceeding. The universal and unanimous authority is that subject matter jurisdiction does not lie in the state court system. Degrio's

complaint asserted that the union owed her a duty of representation which they breached, and that the sole foundation for recovering damages from that breach was "negligence."

Negligence, of course, always and invariably flows from a "duty." The particular duty which the union allegedly breached "negligently" was the duty to appear and represent DeGrio at her termination hearing. In this lawsuit, there can be no predicate for negligent behavior other than the union's alleged "duty" to appear for DeGrio, and conversely only that failure of conduct can be the "duty" which the union has been held to have breached.

All this sounds repetitive and circuitous, and it is, because the duty which the national union necessarily breached in order to be found liable in negligence is none other than the duty it had, by reason of acting under the Executive Order or DeGrio's union membership, to represent a dues-paying member who has requested representation in a proceeding convened under federal directives to review adverse action relating to federal employment. No matter how one restates, rephrases and recharacterizes the duty or the doctrine which it implicates, the duty of fair representation (a federal labor concept), and the duty which was allegedly breached to support DeGrio's negligence action, continue to be one and the same. DeGrio's lawsuit can only be bottomed on a failure of the union to represent her before the federal forum.

More precisely to this issue of subject matter jurisdiction, there are three independent doctrines of law which take this case from the jurisdiction of the state judicial system: primary jurisdiction; federal preemption; and exhaustion of administrative remedies.

(a) Primary jurisdiction

This controversy is notable for its permeation of federalism and its absence of statism. First, we have a federal employee who has sued a federal, public-sector union for its failure to represent her. Second, her need for representation emerged from her employment by the federal government. Third, the forum before which the union allegedly let her down was the federal Civil Service Commission. Fourth, her right to appeal the termination of her job at all, and the rules for doing so, are created by federal Executive Order and law. Fifth, a federal Executive Order provides the federal forum for a union member to complain against a federal union for an alleged breach of its duty.

In short, everything concerning this case involves the federal, public-sector labor relations system. While it is sometimes possible for state courts to host federal controversies, nothing is more certain in federal-state jurisprudence than that this area is not one of those situations.

Jurisdiction is a question of law that depends upon "the characterization which best effectuates the federal policy at issue." Butler v. Local 823, Int'l Bhd. of Teamsters, 514 F.2d 442, 446 (8th Cir.), cert. denied, 423 U.S. 924 (1975). Federal labor policy in the public sector is the policy at issue here, since DeGrio's status as a union member and her right to request representation by the union in an adverse action appeal all derive from Section 7(d)(1) of the Executive Order.

The most succinct statement of the principle of primary jurisdiction comes from Local 100 of the United Ass'n. of Journeymen and Apprentices v. Borden, 373 U.S. 690, 698, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963):

> It is not the label affixed to the cause of action under state law that controls the determination of the relationship between state and federal jurisdiction. Rather, as stated in Garmon, supra [359 U.S. at 246] '[O]ur concern is with delimiting areas of conduct which must be free from state regulation if national policy is to be left unhampered.' (Emphasis added).

The conduct at stake here is self-evidently a national union's alleged failure to represent a constituent. The subject is specifically within the ambit of "national policy" regarding federal, public-sector labor relations, as defined in the Executive Order, federal laws, regulations and cases. When a union handles a member's grievance in a neglectful way, it is

deemed to violate its duty of fair representation. Ruzicka v. General Motors Corp., 523 F.2d 306 (6th Cir. 1975), and 649 F.2d 1207 (6th Cir. 1981); Robesky v. Qantas Empire Airways Ltd., 573 F.2d 1082 (9th Cir. 1978). That duty of fair representation is what this case is all about. The effect of opening state courts simply by labeling a complaint as an action for "common law negligence" would eviscerate the harmonious federal labor policy which has been created in federal forums over the years, from which the elements necessary to establish an action for breach of duty of fair representation have been established.

> The Executive Order is plainly a reasonable exercise of the President's responsibility for the efficient operation of the Executive Branch . . . . In view of the substantial federal interests in effective management of the business of the National Government and exclusive control over the conduct of federal employees. . . we have no difficulty concluding that the Executive Order is valid and may create rights protected against inconsistent state laws through the Supremacy Clause.

Old Dominion Branch No. 496, Nat'l Ass'n. of Letter Carriers v. Austin, 418 U.S. 264, 273 n.5, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974).

The policy at issue is so fundamental that it seems fair to ask how the lower courts got so far off track. Apparently both were led to believe that DeGrio's case did not involve a duty of fair representation because her job was not

included in a certified bargaining unit. The authorities presented to the trial court for that proposition emerge from the private sector of labor relations, however, which does not have the various statutory procedures available, such as the adverse action appeal available to public-sector employees. For public-sector employees, inclusion in a certified bargaining unit is really a matter of no consequence in determining the characterization of this action.

The primary jurisdiction doctrine applicable here is most clearly illustrated by the routine, rather than by reference to case law from the private sector of labor relations. Allegations that a union has breached its duty to represent a member are regularly processed through administrative tribunals concerned with whether the union's conduct constitutes an unfair labor practice, in violation of Section 19(b)(1) of the Executive Order. The Assistant Secretary of Labor routinely considers and decides cases involving these allegations pursuant to Section 6(d). His decisions are even compiled and published by the U.S. Department of Labor-Management Services Administration in a bound publication entitled "Decisions and Reports on Rulings of the Assistant Secretary of Labor for Labor-Management Relations Pursuant to Executive Order 11491 as amended." Random titles from that compilation illustrate how routine these matters have been over the years.

Anthan v. Professional Air Traffic Controllers Organization MEBA AFL-CIO (PATCO), A/SLMR No. 878 (1977).

Frealy v. American Fed'n. of Gov't. Employees, A/SLMR No. 838 (1977).

Quilco v. National Ass'n. of Gov't. Employees, Local R7-51 (NAGE), A/SLMR No. 896 (1977).

Reynolds v. American Fed'n of Gov't. Employees, Local 1858, Assistant Secretary Case No. 40-6700 (CO), appealed to Federal Labor Relations Council and reported at 4 FLRC 466-89.

Wiest v. Professional Air Traffic Controller Organization, A/SLMR No. 918 (1977).

Willis and Wright v. National Ass'n of Gov't Employees, Local R14-32 (NAGE), A/SLMR No. 469 (1974).

DeGrio's case is no aberration. Her complaint against her union was properly presentable only to a forum and through a process which she chose, for whatever reason, not to use. [70]

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[70]Under parallel labor law principles, Florida's Public Employees Relations Commission also holds that an allegation of a union's breach of its duty of fair representation is an allegation that the union has committed an unfair labor practice. Gow v. American Fed'n. of State, County and Municipal Employees, Local 1363, 4 FPER 4168 (1978); Turner v. Laborers' Int'l. Union of North America, Local No. 666, 4 FPER 4180 (1978).

In discharge cases similar to DeGrio's, where a union member alleged that the union had acted negligently in failing to provide proper representation following an employment discharge, other courts have held that a complaint such as DeGrio's alleges an unfair labor practice and that subject matter jurisdiction lies only in a federal administrative forum.[71] Butler v. AFGE Local No. 2089, No. 81-482 (N.D. Ohio 1982) (a copy of which is attached to this brief); Savva v. Royal Industrial Union Local 937, 138 A.2d 799 (Conn. Super. Ct. 1958). See also Wood v. AFGE, supra.

(b) Federal preemption

State courts have historically been preempted by federal law and tribunals as regards unfair labor practices disputes. The seminal case expounding the doctrine of federal preemption is San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 2d 775 (1959), a case involving

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[71]DeGrio argued in the trial court that two cases authorize subject matter jurisdiction in state court. Canada v. United Parcel Service, Inc., 446 F. Supp. 1048 (N.D. Ill. 1978), and De Arroyo v. Sindicato De Trabajadores Packinghouse, AFL-CIO, 425 F.2d 281 (1st Cir.), cert. denied, 400 U.S. 877 (1970). Neither, of course, was a state court action, and in neither was a challenge raised to the trial court's subject matter jurisdiction. Both cases revolved around the applicable statute of limitations, for which a "tort" or "contract" characterization was necessary. Discussions concerning those characterizations, for that purpose, are irrelevant to the threshold issue here.

activities (peaceful picketing) characterized as tort in a state court proceeding. A few extracts from Garmon lucidly explain the doctrine:

> In determining the extent to which state regulation must yield to subordinating federal authority, we have been concerned with delimiting areas of potential conflict; potential conflict of rules of law, of remedy, and of administration.
>
> . . . .
>
> But the unifying consideration of our decisions has been regard to the fact that Congress has entrusted administration of the labor policy for the Nation to a centralized administrative agency, armed with its own procedures, and equipped with its specialized knowledge and cumulative experience.[72]
>
> . . . .
>
> When it is clear or may fairly be assumed that the activities which a State purports to regulate . . . constitute an unfair labor practice . . . due regard for the federal enactment requires that state jurisdiction must yield.
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> . . . .
>
> It is true that we have allowed the States to grant compensation for the consequences . . . of conduct marked by violence and

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[72]The same principle applies in the federal public sector. See, 5 U.S.C. § 7101 et seq., where Congress sets forth its endorsement of labor organizations in the federal public sector. In § 7135(b), Congress specifically provided for continuation of policies, regulations and procedures established under the Executive Order. Administration of labor policy for the federal public sector was entrusted to the Assistant Secretary of Labor and the Federal Labor Relations Council, pursuant to 5 U.S.C. § 7301. The Executive Order is controlling in DeGrio's case. See also Wood v. AFGE, supra.

> imminent threats to the public order . . . because the compelling state interest, in the scheme of our federalism, in the maintenance of domestic peace is not overridden in the absence of clearly expressed congressional direction.

359 U.S. at 241-242, 244, 247.

While Garmon involved a controversy between a union and an employer, the doctrine of preemption has been applied to disputes brought by union members against their unions which directly or even arguably involve unfair labor practices, such as a failure to represent.

It is really unnecessary to trace in detail the history of Garmon in these areas, since a recent decision of the United States Supreme Court re-affirmed and re-emphasized the Garmon doctrine in precisely the same setting as in this case -- a union member's attempt to enter state court for relief against the union based on conduct "arguably" within the competence and jurisdiction of a federal administrative tribunal. Local 926, Int'l Union of Operating Engineers v. Jones, 460 U.S. 669, 103 S.Ct. 1453, 75 L.Ed.2d 368 (1983). Describing the issue of preemption as a persistent variant of a familiar theme, as to which the court has often heard the same tune, 75 L.Ed.2d at 376, the Court reiterated its refusal to allow abridgements of national policy by state law characterizations of what is clearly or arguably an unfair

labor practice charge. See also Wood, supra, and Olguin v. Inspiration Consolidated Copper Co., 740 F.2d 1468, 2139 (9th Cir. 1984).

Garmon, Wood, Local 926, and Olguin should be dispositive of this proceeding. None of the recognized but limited exceptions to preemption, for compelling state interests, are remotely implicated by the facts here. DeGrio did not suffer malicious libel.[73] She was not the target of intentional and outrageous conduct, of threats, or of intimidation such that "no reasonable man in a civilized society should be expected to endure it."[74] The union's conduct obviously posed no threat of imminent violence.[75]

This Court has acknowledged the federal preemption doctrine and has narrowly construed its few exceptions. The opinion under review expressly and directly conflicts with the following decisions of this court and other Florida district court decisions, regarding federal preemption. Sheetmetal Workers Int'l. Ass'n., Local Union 223 v. Florida Heat and

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[73]Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53 (1966).

[74]Farmer v. United Bhd. of Carpenters and Joiners of America, Local 25, 430 U.S. 290, 302 (1977).

[75]Sears, Roebuck & Co. v. San Diego County District Council of Carpenters, 436 U.S. 180 (1978), cert. denied, 447 U.S. 935 (1980).

Power, Inc., 230 So.2d 154 (Fla. 1970); Teamsters Local Union No. 769 v. Fountainbleau Hotel Corp., 239 So.2d 255 (Fla. 1970). See also, Local Union No. 2135, Int'l. Ass'n. of Firefighters v. City of Ocala, 371 So.2d 583 (Fla. 1st DCA 1979) (state court preempted in dispute arguably covered by state statute creating state labor tribunal); Maxwell v. School Board of Broward County, 330 So.2d 177, 179 (Fla. 4th DCA 1976) (relying on Sheetmetal Workers' and the "marked similarity" between the functioning of state and federal administrative labor tribunals). See also Bebensee v. Ross Pierce Elec. Corp., 253 N.W. 2d 633 (1977).

In sum, federal preemption is the rule with respect to charges that a union has behaved negligently toward one of its members. DeGrio has not even alleged, let alone proved, that her case falls within the recognized exception for compelling state interests so as to supply state court jurisdiction. It is conduct, not the label, which governs the question of preemption.

The federal courts have been careful not to set too high a standard for union representational conduct, out of concern not to create untenable burdens on unions which are, by and large, run by lay people. The courts have determined this to be a natural product of federal labor policy. It would completely defeat this policy to allow the state courts to impose this higher burden, which is why the issue has been determined to be preempted.

Of course, it is no suprise that DeGrio filed suit for negligence in the state court, since she let lapse the six month statute of limitations for filing unfair labor practice charges with the Assistant Secretary of Labor. See, Executive Order No. 11491, § 19(b)(1). But the reason does not supply the jurisdiction. The only proper forum in which DeGrio could have initiated her claim was the Assistant Secretary of Labor.

(c) Exhaustion of administrative remedies

The district court's decision ignores the requirement of exhaustion of administrative remedies. See, Pushkin v. Lombard, 279 So.2d 79 (Fla. 3d DCA), cert. denied, 284 So.2d 396 (Fla. 1973); City of Miami v. Fraternal Order of Police, 378 So.2d 20 (Fla. 3d DCA 1979), cert. denied, 388 So.2d 1113 (Fla. 1980).

The leading case on this subject is similar to this case, involving members of a local union who attempted to sue this same national union for alleged violations of fiduciary duties. Local 1498, American Fed'n of Gov't Employees v. American Fed'n of Gov't Employees, AFL-CIO, 522 F.2d 486 (3d Cir. 1975). After holding that federal government unions are different in character from private sector unions, and that distinctive policies are applicable to unions created by presidential decree, the court held:

> The Executive Order expressly provides an administrative remedy for complaints alleging violations of fiduciary obligations . . . . The implementation of federal government personnel policies does not contemplate enforcement of Executive Orders by private civil actions . . . .

522 F.2d at 492

> Pursuant to this Executive Order an administrative regulation . . . was promulgated . . . . Accordingly, any allegation that officers of a government union breached their fiduciary duties constitutes an allegation that the Executive Order . . . was violated. As such, a union member's remedy must invoke the administrative procedures established pursuant to Executive Order No. 11491.

522 F.2d at 491.

The reasoning of Local 1498 applies with greater force to a state court action. "[W]hat is outside the scope of [the federal court's] authority cannot remain within a State's power. . . ." Garmon, 359 U.S. at 245.

4. The district court did not err in denying damages to DeGrio.

In her motion for rehearing, and now in her initial brief, DeGrio argues that the district court should have remanded to the trial court the issue of damages, to allow the court to apportion damages for loss of job. This is an appellate position which DeGrio herself resisted at trial.

The district court rejected DeGrio's apportionment request on rehearing. The court was aware that Degrio's

counsel drafted the final judgment that was adopted in toto by the trial court by simply filling in the blanks for damages. Compare DeGrio's proposed final judgment, which appears at pages 821-40 of the record on appeal, with the final judgment, appearing at pages 882-95. In point of fact, the union had filed a post-trial motion for rehearing, specifically requesting that the court itemize the damages and set forth the value for each category. (R. 841-864) The trial court dismissed this motion without comment. (R. 874)

In short, the district court quite properly left DeGrio where she placed herself -- with damages not apportioned at the trial level. The court should not allow this belated attempt to avoid the "impact rule" by labeling damages as flowing from the loss of her job.

In any event, the district court may well have recognized that there could be no damages flowing from loss of DeGrio's job. DeGrio had applied for and been granted total and permanent disability, retroactive to the date of her termination.

5. Punitive damage award should be stricken.

The district court's decision that, as a matter of law, Mudgett's actions did not justify the imputation of malice, is dispositive of the punitive damage issue. That award must be stricken for two additional reasons as well.

The trial court had struck DeGrio's claim for punitive damages long before the trial began, after counsel for both

sides had argued the issue and presented memoranda of law. DeGrio never challenged the court's pre-trial ruling by appeal or by motion. In fact, DeGrio's counsel acknowledged its having been stricken during DeGrio's deposition on November 11, 1980. Needless to say, no evidence was presented at trial on the issue of punitive damages, whatsoever. Out of the proverbial "blue," the trial court inserted on DeGrio's proposed final judgment an award of punitive damages amounting to $150,000. As a matter of due process, the trial court must be held bound by its pre-trial ruling which was accepted by the parties. Since no evidence was offered on the issue at trial, obviously no prerequisite was laid for any punitive damage award by evidence of the financial condition of the defendant, or otherwise. See, Wackenhut Corp. v. Canty, 359 So.2d 430, 436 (Fla. 1978).

The court's post-trial reversal of its own ruling is fundamentally wrong in its legal predicate, moreover. The principle underlying the United States Supreme Court's decision in International Bhd. of Electrical Workers v. Foust, 442 U.S. 42, 99 S.Ct. 2121, 60 L.Ed. 2d 698, (1979), is that punitive damage judgments against unions can produce disastrous economic consequences to those who fund a union's treasury. This policy pertains whether the action claiming those damages is characterized as a duty of fair representation or common law negligence. Cf., City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). The Foust

doctrine was recently restated with approval in a public-sector labor case involving breach of a union's duty of fair representation. Bowen v. United States Postal Service, 459 U.S. 212, 103 S.Ct. 588, 74 L.Ed.2d 402, 416 n.17 (1983). In sum, the trial court's original ruling, striking DeGrio's count for punitive damages, was correct.

CONCLUSION

The question certified by the district court should be answered in the negative as it pertains to this case. It is equally important that the Court declare that the state's courts lack subject matter jurisdiction over public sector labor law disputes, however characterized.

For the several reasons set forth in this brief, the Court should affirm the district court's reversal of the trial court's damage awards.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of this brief was mailed to counsel of record for DeGrio on December 26, 1984.

By: _____

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