CHAPTER I

THE PRESIDENTIAL ADDRESS: SEX AND THE SINGLE ARBITRATOR *

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For a number of years members of the National Academy of Arbitrators, in both their annual and their regional meetings, have been engaged in a running appraisal of their role as administrators or guardians of public policy. While this examination has concentrated primarily on the respective roles of the arbitrator, the National Labor Relations Board, and the courts, it is but part of a larger issue which was posed by Bernard Meltzer at the 20th Annual Meeting in San Francisco in 1967:

> ". . . what is the proper role of the arbitrator with respect to statutory or policy issues that are enmeshed with issues concerning the interpretation of the collective bargaining agreement?" [1]

Meltzer's own answer to this question was blunt and succinct: Where there is an irrepressible conflict between the agreement and the law, the arbitrator "should respect the agreement and ignore the law." [2]

At the same annual meeting, Arnold Ordman and Robert Howlett espoused a contrary position, urging arbitrators to accept the responsibility of considering and deciding questions arising under the National Labor Relations Act where these were intertwined with issues of contract interpretation.[3]

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[1] B. Meltzer, "Ruminations About Ideology, Law, and Labor Arbitration," in *The Arbitrator, the NLRB, and the Courts*, Proceedings of the 20th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1967), 1.

[2] *Id.* at 16.

[3] *Id.* at 47-110.

At the four workshop sessions which followed, the majority of those who spoke supported Meltzer's position that the arbitrator's job is to adjudicate the contract, allowing those with statutory responsibility to administer the Act.[4] One of the panelists, who essayed the role of mediator, offered this bit of sage advice to the combatants. He referred to a friend who recently had learned of the death of his mother-in-law. When asked by the undertaker, "Shall we embalm or cremate?" he replied, "Do both. Take no chances." [5]

Since no consensus emerged from these sessions, the Academy continued the debate at its next annual meeting in Cleveland. Seeking to occupy a middle ground between the polar positions advocated by Meltzer, on the one hand, and Howlett, on the other, Richard Mittenthal proposed that while the arbitrator might "*permit* conduct forbidden by law but sanctioned by contract," he should not "*require* conduct forbidden by law even though sanctioned by contract." [6] Neither Meltzer nor Howlett, however, yielded ground from their original positions, [7] while Theodore J. St. Antoine, who joined the fray, repudiated the mediatory efforts of Mittenthal, aligned himself with Meltzer, and delivered this final message:

> "Do the job for which you are best fitted—reading and applying contracts—and leave the statutes to the Board and the courts. If you find no value in my prescription, you can at least treat it as a health measure. Who, after all, has ever heard of an underworked member of this Academy?" [8]

Although the issue was laid to rest for a year, the matter was revived at the annual meeting in Montreal in 1970. In still another attempt to answer the question: When should arbitrators follow the federal law?, Michael Sovern joined the debate. After noting the range of positions explored at prior meetings, Sovern expressed his surprise at discovering that he "disagreed

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[4] *Id.* at 111-228.

[5] *Id.* at 119. Another panelist commented: "I'm surprised to hear that the majority of you are opposed to arbitrators deciding legal questions or noncontract questions," *id.* at 193.

[6] "The Role of Law in Arbitration," in *Developments in American and Foreign Arbitration,* Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Charles M. Rehmus (Washington: BNA Books, 1968), 50.

[7] B. Meltzer, "A Rejoinder," *id.* at 58; R. Howlett, "A Reprise," *id.* at 64.

[8] T. J. St. Antoine, "Discussion," *id.* at 75, 82.

in important ways with all of the positions advanced." [9] Sovern's formulation of his own position was as follows:

> "I believe that an arbitrator may follow federal law rather than the contract when the following conditions are met:
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> "1. The arbitrator is qualified.
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> "2. The question of law is implicated in a dispute over the application or interpretation of a contract that is also before him.
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> "3. The question of law is raised by a contention that, if the conduct complained of does violate the contract, the law nevertheless immunizes or even requires it.
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> "4. The courts lack primary jurisdiction to adjudicate the question of law." [10]

With the advent of major new types of federal regulation of conditions of employment, in particular the ban on sex discrimination contained in Title VII of the Civil Rights Act of 1964, a similar dilemma confronts the arbitrator. Should he confine his judgment within the four corners of the collective bargaining agreement, or should he expand his jurisdiction to encompass the law as well? Are arbitrators applying the same standards as they do in NLRB situations—that is, do the majority of arbitrators espouse the conventional wisdom that their function is solely that of contract interpretation? Do a minority follow Howlett's injunction to consider the law as part of the contract? Do some follow Mittenthal's formulation? To what extent do Sovern's four criteria, or conditions, apply in Title VII cases? In other words: (1) How do arbitrators decide cases in which there may be a conflict between the contract and the law in the area of sex discrimination? (2) How do the administrative agencies and the courts regard arbitration decisions in this area? And (3), are we now on the threshold of developing a *Spielberg*-type doctrine for this area? [11] Finally, there is the whole question of election of remedies to be explored. Will resort to arbitration in a case alleging sex discrimination foreclose the charging party from resort to the courts?

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[9] Sovern, "When Should Arbitrators Follow Federal Law?" in *Arbitration and the Expanding Role of Neutrals*, Proceedings of the 23rd Annual Meeting, National Academy of Arbitrators, ed. Gerald G. Somers and Barbara D. Dennis (Washington: BNA Books, 1970), 28.

[10] *Id.* at 38.

[11] The *Spielberg* doctrine emerged from a landmark decision of the NLRB defining the conditions under which the Board would honor an arbitration award rather than assert its own exclusive jurisdiction to decide an unfair labor practice charge. In the *Spielberg Mfg. Co.* case (112 NLRB 1080, 36 LRRM 1152

How Arbitrators Decide Cases Involving Alleged Sex Discrimination

Although the decade of the 1960s witnessed the most dramatic changes in the evolution of legal sanctions against discrimination in employment, arbitrators were faced with numerous cases involving alleged sex discrimination in the reconversion period following World War II. These arose for the most part when employers sought to replace the female employees they had hired during the war with male employees who traditionally had performed certain jobs in the prewar period. One of the first arbitrators to deal with this problem was Charles C. Killingsworth, who decided 63 grievances between Bethlehem Steel Co. and the United Steelworkers of America involving a common charge that the company had improperly discharged female employees in violation of the agreement. The company's defense to these actions has a now-familiar ring: The women were temporary employees hired only for the duration of the war; they lacked the ability and physical fitness to perform the jobs as well as male employees could perform them; the Maryland laws regulating the employment of women made it uneconomical for a steel plant to employ them in most of its operations; a morals problem arises when a few women are employed on operations conducted almost exclusively by men; and the necessity of providing separate rest and welfare facilities for women creates an onerous and undue burden on the employer.

Arbitrator Killingsworth dealt with these contentions as follows: Although an employer was not required to continue to employ those who could not meet prewar standards of production, minor differences in efficiency did not warrant the

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(1955)), an unfair labor practice charge had been filed with the Board, following an arbitration award upholding the discharge of certain striking union members. The Board declined to accept jurisdiction over the matter on the grounds that "the [arbitration] proceedings appear to have been fair and regular, all parties had agreed to be bound by the award, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." The Board later added the requirement that the arbitrator also should have considered the issue involved in the unfair labor practice in making his award. For further discussion of the implications of the *Spielberg* doctrine for arbitration, see Robert Howlett, "The Arbitrator, the NLRB, and the Courts," in *The Arbitrator, the NLRB, and the Courts* at 67-110; and Gerald A. Brown, "The National Labor Policy, the NLRB, and Arbitration," in *Developments in American and Foreign Arbitration* at 83-93.

replacement of females with males of lesser seniority. The statutory requirement that female workers be provided a 30-minute lunch and rest period did not justify the discharge of females where it could be shown that women matched male performance on an overall daily basis. As far as the alleged social and moral problem of permitting females to work in male company was concerned, the arbitrator noted that "industrial experience has generally been that men and women can work side by side without disrupting production." Inasmuch as separate facilities already had been provided for women, no weight could be given to this complaint of the company. Killingsworth then concluded that "the only important criterion to be applied in disposing of these grievances is whether or not the women were able to perform all of the regular and normal duties of their jobs." [12]

Most of the published decisions of this period indicate that arbitrators would not uphold a woman's right to a job if the consequence would entail a violation of state protective legislation by the employer. In fact, the dean of the arbitration profession, the late Harry Shulman, ruled that the existence of legal limitations on the work which women could do created a legal class disability which was not discriminatory because it was dependent "entirely on objective, indisputable tests of sex and weight, and is not subject to personal idiosyncrasy, differences of opinion as to physical capacity, or malingering for the purpose of securing a better job." [13]

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[12] *Bethlehem Steel Co.*, 7 LA 163 (1947). Similar decisions rejecting the stereotyped concept of general female incapacity were issued by David A. Wolff in *Chrysler Corp.*, 7 LA 380 and 386 (1947). On the other hand, in a case involving the transfer of female quotation clerks from the floor of the New York Stock Exchange and their replacement by boys after the war, Israel Ben Scheiber upheld the employer's action as neither arbitrary nor capricious because he found that the atmosphere of noise, activity, nervous strain, and tension which prevailed on the floor was more distracting to female than to male employees. *New York Stock Exchange*, 7 LA 602 (1947).

[13] *Ford Motor Co.*, 1 LA 462 (1945); *Manion Steel Barrel Co.*, 6 LA 164 (1947), Robert J. Wagner; *Pittsburgh Corning Corp.*, 3 LA 364 (1946), C. W. Lillibridge; *U.S. Rubber Co.*, 3 LA 555 (1946), George Cheney. *See Republic Steel Corp.*, 1 LA 244 (1945), in which Harry Platt ruled that the company had no right to lay off employees with greater seniority than those who were retained merely because they were women so long as their ability and physical capacity were equal to that of junior males. In *Ohio Steel Foundry Co.*, 5 LA 12 (1946), Arbitrator Charles G. Hampton ruled that two women welders hired during the war were entitled to be recalled despite the company's reliance on the Ohio labor

In thus refusing to order employers to violate the mandates of state protective labor legislation, arbitrators were following the well-established legal doctrine that sex is a valid basis for classification.[14] They also were developing the principle which Mittenthal later formulated, namely, that the arbitrator should not require conduct forbidden by law even though sanctioned by contract.

If arbitrators experienced little trouble in dealing with cases of alleged sex discrimination where there was an apparent conflict between the contract and the mandates of constitutionally valid state protective labor legislation in the two decades following World War II (that is, where the law served as a defense against alleged breaches of the seniority provisions of the agreement, in particular), their real problems of accommodation began with the sweeping changes in federal public law affecting sex discrimination in the 1960s, especially Title VII of the Civil Rights Act of 1964.

The law itself was new, evolving, and unclear. The top administrative agency charged with its enforcement, the Equal Employment Opportunity Commission (EEOC), unlike the NLRB, had no enforcement powers, its role being limited to that of persuasion and conciliation. Enforcement as a matter of primary jurisdiction was entrusted to the federal judiciary. Finally, and most important for the arbitration profession, the validity of state protective legislation was now subject to challenge by state human rights commissions, by the EEOC, and, more significantly, by certain federal courts applying the doctrine of preemption.

What had been a relatively clear path for arbitral deference to the mandates of state legislation now became a thicket of state commission rulings, EEOC guidelines, and diverse and contradictory federal court decisions which arbitrators, for the most part, found impenetrable—a legal jungle to trap the unwary. Small wonder, then, that the dominant theme to be sounded

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law, since no order to discharge female workers had yet been made by the state inspector.

[14] For an excellent treatment of this subject, see Leo Kanowitz, "Constitutional Aspects of Sex-Based Discrimination in American Law," 48 *Neb. L. Rev.* 131 (1968). See also Raymond Munts and David C. Rice, "Women Workers: Protection or Equality?" 24 *Ind. & Lab. Rels. Rev.* 3-13 (1970).

in arbitral decisions on sex discrimination was one of simple, harmonic contract construction, leaving any discordancies to the public authority virtuosos. No longer did arbitrators confront the simple dilemma of whether to apply the contract or the law. The real problem was discovering which law or laws to follow, should the arbitrator accept the view that the contract impliedly embodied the law.

Sex Discrimination in Employment

The inclusion of the prohibition against sex discrimination in employment in Title VII [15] was largely an historical accident resulting from a calculated effort by the opponents of Title VII to defeat its passage. As a result, there was scant legislative history to guide those entrusted with the enforcement of this provision of the statute.[16] In particular, the uncertainty as to how Title VII, state fair employment practice laws, and state laws protecting the employment of women were to interact or relate to each other created a situation which one commentator described as "colossally puzzling" to the employer, union, or employment agency,[17] and, one might add, to the arbitrator as well.

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[15] 78 Stat. 253; 42 U.S.C. 2000(*e*) (1964). This law (which covers employers in industries affecting commerce, employment agencies serving such employers, and labor organizations engaged in such industries) declares that it shall be "an unlawful employment practice" because of race, color, religion, sex, or national origin for those covered.

"(1) to fail or refuse to hire or to discharge any individual or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment . . . or

"(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee. . . ."

[16] "The sex amendment can best be described as an orphan, since neither the proponents nor the opponents of Title VII seem to have felt any responsibility for its presence in the Bill." Richard K. Berg, "Equal Opportunity under the Civil Rights Act of 1964," 31 *Brooklyn L. Rev.* 79 (1964). For an account of the legislative history of Title VII, see Anthony R. Mansfield, "Sex Discrimination in Employment under Title VII of the Civil Rights Act of 1964," 21 *Vanderbilt L. Rev.* 484-501. This note also contains a good account of the interaction of the Equal Pay Act of 1963 (77 Stat. 56 (1963), 29 U.S.C. 206(*d*) (1964)) and Title VII. See also Daniel Steiner, "Discrimination and Title VII of the Civil Rights Act," in *Collective Bargaining Today: Proceedings of the Collective Bargaining Forum—1969* (Washington: BNA, 1970), 450-459. Because of limitations of space this article cannot deal either with the Equal Pay Act of 1963 or with Executive Order 11246 barring discrimination (including sex) by federal contractors.

[17] Mansfield, "Sex Discrimination in Employment . . .," at 501. Mansfield also

Central to the creation of the puzzle is, of course, the provision of the act which *permits* discrimination "in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. . . ." [18] Adding to its complexity in the matter of sex discrimination is the question whether state protective laws governing the employment of women constitute a bona fide occupational qualification (BFOQ) exception immunizing conduct which might otherwise constitute a violation of Title VII.[19]

The EEOC Guidelines

In approaching this problem of accommodating state protective labor legislation [20] and Title VII, the EEOC has issued a series of guidelines for compliance with Title VII.[21] At the outset, on December 2, 1965, the EEOC, in the belief that Congress had failed to overrule state protective laws, took the position that state laws constituted a legitimate BFOQ exception unless their clear effect was not to protect women but to discriminate against them.[22] A year later, on August 19, 1966, the Commission retreated, announcing that as a matter of policy it would pass no judgment on these laws but would advise complainants to litigate the matter in the courts.[23] Two years

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notes that sex discrimination is "far more pervasive in our laws and customs than any form of racial discrimination. . . ." (p. 499). This same opinion is shared by M. O. Murray and P. Eastwood, "Jane Crow and the Law: Sex Discrimination and Title VII," 34 *Geo. Wash. L. Rev.* 232-256 (1965). See also Gunnar Myrdal, *An American Dilemma: The Negro Problem and Modern Democracy* (New York: Harper & Row, 1944), App. 5, "A Parallel to the Negro Problem," 1073-1078, for what has become the classic comparison between the social and economic status of Negroes and women.

[18] 42 U.S.C. § 2000 e-2 (*e*). Note that this section omits mention of race or color.

[19] Here again the legislative history affords no clue. The debate in the House of Representatives was inconclusive on the point of whether state laws were to be preempted by Title VII. See 110 *Congressional Record* 2580 and ff. (1964).

[20] These laws in general prohibited the employment of women in certain occupations, established maximum hours and minimum wages for their employment, contained prohibitions against employment during certain night hours, set weight-lifting and carrying limitations, required special facilities for women such as rest rooms and seats, and specified lunch and rest periods. See Gola E. Waters, "Sex, State Protective Laws and the Civil Rights Act of 1964," 18 *Lab. L.J.* 344-352 (1967).

[21] See Robert J. Affeldt, "Title VII in the Federal Courts—Private or Public Law" (Pt. II), 15 *Villanova L. Rev.* 1-31 (1969).

[22] 30 *Fed. Reg.* 14926-28 (1965).

[23] *CCH Empl. Prac. Guide*, ¶ 16,900.001 n. 2 (1968).

later in 1968, the Commission rescinded its 1966 policy statement and reaffirmed its original 1965 guidelines.[24] In August 1969, however, the Commission announced that it would no longer consider state laws regulating hours and weight lifting as BFOQ exceptions:

> "The Commission has found that such laws and regulations do not take into account the capacities, preferences and abilities of individual females and tend to discriminate rather than protect."

Finding that these laws and regulations conflicted with Title VII, the Commission announced that they would no longer be considered "a defense to an otherwise established unlawful employment practice or as a basis for the application of the bona fide occupational qualification exception." [25]

Because of these shifts in the EEOC guidelines, at least one of the commentators suggested that the Commission look to arbitration decisions as a compass in this uncharted wilderness:

> ". . . arbitrators have already met and fashioned solutions for many of the programs [*sic*] which arise under Title VII. . . . It would seem that the large number of these arbitration decisions might well provide guidelines for the EEOC to consider in the solution of its problems." [26]

Not surprisingly, these guidelines furnished by the sample arbitration awards reviewed by the commentator upheld the denial of recall, promotion, or bumping rights to women as not discriminatory when state laws set statutory limits on the weights that could be lifted by female employees.[27] In almost all the

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[24] 33 *Fed. Reg.* § 3344 (1968). The guidelines also had provided that "an employer may not refuse to hire women because state law requires that certain conditions of employment such as minimum wages, overtime pay, rest periods, or physical facilities be provided." Where state laws provided for administrative exemptions, the Commission stated its expectation that the employer would make a good-faith effort to obtain such exceptions.

[25] 1969 EEOC Guidelines on Discrimination Because of Sex, 34 *Fed. Reg.* 13367, §1604.1 b(2). See also Decision No. 70382, Dec. 16, 1969, dealing with a District of Columbia law limiting the hours which females might work. The EEOC, finding probable cause of violation of Title VII by an employer, stated that the later statute had impliedly repealed the District of Columbia law which clearly was repugnant to and inconsistent with Title VII, 2 FEP Cases 338. An excellent recent compilation of the statutes, guidelines, and executive orders dealing with sex discrimination has been published by the Women's Bureau of the U.S. Department of Labor, *Laws on Sex Discrimination in Employment* (1970.).

[26] Mansfield, "Sex Discrimination in Employment . . .," at 491.

[27] *Id.* Among the cases cited were *Lockheed Georgia Co.*, 46 LA 931 (1966), H. Ellsworth Steele; and *Apex Machine and Tool Co.*, 45 LA 417 (1965), Arthur E. Layman.

cases cited, the contract also contained a clause barring discrimination for reasons of sex, but this clause generally was interpreted as modified by state protective labor legislation where such existed.

This writer's research into the published arbitration awards in the period following the enactment of Title VII supports the conclusion that arbitrators in general have held that state laws act as a defense not only against a charge of violating contract bars on sex discrimination but also against the allegation that Title VII has been violated likewise.

Thus, Joseph Shister held that a female employee was properly denied a leadman's job because of safety and health considerations related to the requirement that an average weight of 40 to 45 pounds be lifted for 10 to 20 percent of each day. Here the parties had abandoned a separate listing of male and female jobs in conformance with Title VII. Moreover, the state in question, Pennsylvania, had no weight-lifting restrictions, but the arbitrator accepted the company's argument that such restrictions could be implied from International Labour Organisation and U.S. Department of Labor standards. The arbitrator also was impressed with the testimony of the company physician that females as a class should not be assigned to jobs involving heavy lifting because

> "(a) females are more prone to low back pain due to their anatomy; (b) intra-abdominal pressure can lead to the displacement of the pelvic organs; (c) weakness and fatigue during the menstrual period can be aggravated by lifting; (d) there is the danger of miscarriage during pregnancy."[28]

Prevailing Opinion

Perhaps the clearest (and certainly the best researched) statement of the prevailing view of the arbitration profession was that of Edwin Teple in a 1967 case.[29] Here, under a contract

[28] *Robertshaw Controls Co.*, 48 LA 101 (1967). See a pre-Title VII award by Joseph Klamon stating that despite the fact that Mississippi had no statute limiting weights for females, it was the duty of the company to protect the health and safety of its employees even though they were willing to perform the jobs. *Mengel Co.*, 18 LA 392 (1952).

[29] *General Fireproofing Co.*, 48 LA 819 (1967). See also *Capital Mfg. Co.*, 50 LA 669 (1968), Harry Dworkin.

barring sex discrimination and providing for recall from layoff on the basis of seniority and physical fitness to perform the work, the arbitrator held that the employer's determination that females were not physically fit to perform many of the jobs was reasonable under the Ohio law which barred women from jobs requiring the regular or frequent lifting of weights in excess of 25 pounds. The arbitrator also expressed the view—then shared by the EEOC—that Title VII's reference to sex was not intended to wipe out state protective labor laws. He felt that medical opinion favors lighter work for females "because of the physical nature and function of their bodies." [30]

These candid arbitral views that females as a class are to be regarded as "the weaker sex" were given most eloquent and definitive expression by Arbitrator Peter Seitz:

> "Anti-discrimination provisions do not, however, abolish or eliminate biological differences between people. The recognition of differences between the sexes, I am confident, will survive anti-discrimination provisions, not only in labor contracts, but in Federal and State laws. There is no basis on which it would seem sound to deny to the Company the right to indulge the assumption made in most of the States in this nation that females, *as a class,* and because of their biological structure and function, require more protective regulation as a part of the labor force than males." [31]

A few arbitrators, however, have rejected the assumption that women workers should be protected as a class. One of these is Ralph Roger Williams who held, under a contract barring sex discrimination, that a company could not lay off five senior females as a class, instead of five junior males, despite the company's contention that the jobs required undue muscle power and physical strength not normally possessed by women. Observing that "some women are stronger than some men," the arbitrator held that the company must make its determination "on the basis of the individual employee's qualifications, skill

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[30] Edwin Teple cited a long list of other published awards holding similarly. In addition to *Robertshaw Controls Co., supra* note 28, he gave *Marathon Electric Mfg. Corp.,* 31 LA 656 (1958), Fidelis O'Rourke; *Rheem Mfg. Co.,* 32 LA 147 (1959), Paul Prasow; *National Gypsum Co.,* 34 LA 41 (1959), Paul M. Hebert; *Electrical Engineering and Mfg. Co.,* 35 LA 657 (1960), Thomas T. Roberts; *Three Boys Food Mart,* 38 LA 817 (1962), Paul L. Kleinsorge; *Advanced Structures,* 39 LA 1094 (1963), Thomas T. Roberts et al.; *Minute Maid Co.,* 40 LA 920 (1963), Alfred J. Goodman; and *Sperry-Rand Corp.,* 46 LA 961 (1966), Peter Seitz.

[31] *Sperry Rand Corp.,* 46 LA 961 (1966) (emphasis added).

and ability, including *his* or *her* physical ability to do the work." [32]

Another is E. J. Forsythe who, in a 1966 case, rejected the company's contention that the merger of male and female seniority lists "could not of itself eliminate the differences in the physical capacity between male and female employees," and ruled that the female employee who was denied a job as material handler should be given the work because of her demonstrated ability to perform it.[33]

Between the purveyors of the conventional wisdom and the minority who regard women as individuals rather than as a class, there are some who express their views in the form of dicta. One of these is Walter Seinsheimer. Although he upheld management's right to determine that female employees did not possess the physical ability necessary to perform jobs to which their seniority would otherwise have entitled them in the face of a layoff, he expressed some reservations about the "weaker sex" presumption:

> "I am well aware that there are some women who are as physically able as most men to do what is considered men's work. All one has to do is travel to the rural areas of this country to see women doing heavy farm work, lifting loads far beyond what was usually required in the work in question. And all of us have seen pictures of women in foreign countries doing heavy physical labor—from digging ditches to hod carrying to operating heavy equipment." [34]

Another, David C. Altrock, sought to solve the conflict between the no-discrimination clause of the agreement and the Ohio laws regulating the employment of women by ordering the company to request the state to evaluate all the jobs that had been filled by junior males instead of senior females during a layoff in order to determine their suitability for women. Although the arbitrator did not feel free to ignore state law or regula-

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[32] *International Paper Co.*, 47 LA 896 (1966) (emphasis added). The arbitrator also stated that the BFOQ exemption of Title VII had no application to the case and that the mandate of the Title was as clear in barring sex discrimination as was the similar contract clause. See also *Paterson Parchment Co.*, 47 LA 260 (1966), W. Roy Buckwalter.

[33] *Buco Products, Inc.*, 48 LA 17 (1966).

[34] *Pitman-Moore Division*, 49 LA 709 (1967). The arbitrator went on to say, however, that his decision was influenced strongly by the fact that the women and their union had accepted and agreed to their "weaker sex" role in the plant!

tions, he could not resist the temptation to express his opinion that they were outmoded or archaic. Referring to the state's administrative opinion that lifting 25 pounds once an hour or longer could be termed frequent and repeated, Altrock snapped:

> "So be it, although I cannot avoid saying that that seems to me to be ridiculous on its face. Women daily lift grocery bags, laundry bundles, and children that weigh more than twenty-five pounds. It is a part of the way of life of any healthy woman during normal working years." [35]

Other Interpretations

Still another arbitrator who sought an accommodation between contract and law was A. Dale Allen, Jr., who ruled on the general question whether the company could select only males for credit trainee jobs because certain features of the job such as extensive travel, geographic relocations, long hours, and occasional abusive language made it in the company's view unsuitable for females. Allen held that he could not view the contract in a legal vacuum. Although recognizing limits on his jurisdiction since he was not the Missouri Commission on Human Rights, Allen directed the company to request that commission to evaluate its selection practices and determine whether they were in fact discriminatory.[36]

In *Weirton Steel Co.,* a 1968 case, Samuel Kates also referred to both Title VII and state weight restrictions in interpreting a contract provision barring sex discrimination. Holding that the law need not be applied literally, but in the "light of reason and practicality," Kates upheld the company's refusal to assign women to jobs outside the assorting room because to do so would require the company to provide seats and separate rest-room facilities. Although the arbitrator conceded that there might be a few women "of rare strength and endurance" capable of performing the jobs in question, it was not reasonable

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[35] *Alsco, Inc.,* 48 LA 1244 (1967).

[36] *Phillips Petroleum Co.,* 50 LA 522 (1968). Since the contract contained a no-discrimination clause, it is not clear why the arbitrator could not have made this determination. For comment on this case and on the subsequent noneffectuation of the remedy, see William G. Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," 24 *Arb. J.* 226 (1969).

in his judgment to require the company to provide separate facilities for "these especially endowed women." [37]

In one case where three female employees sought to be removed from a particular job because they were "nervous wrecks" and suffered pain in their arms, necks, chests, and backs, the arbitrator, John A. Hogan, citing the contract clause against sex discrimination and Title VII, refused their plea, holding that it would be discriminatory to reserve the job for men alone.[38] And in a case where men sought to bump into a shade department, hitherto the private preserve of women workers, the arbitrator, Walter J. Gershenfeld, upheld their right to a trial period despite the company's contention that the work in question required skills of dexterity in handling delicate fabrics "not possessed by men in general." [39] One could, perhaps, classify this particular arbitrator as a "male liberationist"!

On the whole, however, most of the arbitrators generally interpreted contract provisions in cases involving alleged sex discrimination in the light of the restrictions imposed by state protective labor laws governing the employment of women.[40] On this point, arbitrators were in accord with the EEOC, at least until 1969.

At this time, however, a new problem arose. As the EEOC, state commissions, and, most significantly, some of the federal courts began to interpret Title VII as repealing state protective legislation, arbitrators were faced with the argument that a new accommodation should be made in harmonizing contractual provisions with the more sophisticated doctrine that the capacities of female workers should be judged individually, not as a class. For the most part, arbitrators in general now retreated to familiar ground, holding that their assignment was only to interpret the contract, *not* the law.

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[37] *Weirton Steel Co.*, 50 LA 795 (1968).

[38] *Allen Mfg. Co.*, 49 LA 199 (1967). See also *Owens-Illinois Inc.*, 50 LA 871 (1968), Joseph Klamon.

[39] *Creative Industries, Inc.*, 49 LA 140 (1967).

[40] A similar conclusion, based on a somewhat different sample of cases, has been reached by A. Dale Allen, Jr., in his article "What To Do About Sex Discrimination," 21 *Lab. L. J.* 563-576 (1970).

Before "Women's Lib"

Even before the new "doctrine" of women's liberation began to be enunciated by administrative agencies and the courts, a sizable number of arbitrators rejected contentions that Title VII was being violated as outside the scope of their authority or jurisdiction.[41]

In the airline marriage-rule cases, however, the arbitration fraternity split apart, exhibiting no consensus on the propriety of using legal rules as an aid to contract construction. In *Braniff Airways,* Walter Gray, as chairman of the System Board, held that the airline was not justified in discharging married stewardesses despite the fact that the airline had individual agreements with each stewardess that she would resign upon marriage and that the company had for 25 years maintained a policy of using only unmarried stewardesses. In its decision the board stated that it was "impressed with the language of the Civil Rights Act which also expressed, on a wider basis, the modern trend of thought concerning discrimination based upon sex." [42] Just a year later, in a memorable and often-quoted decision, Saul Wallen similarly denied the right of Southern Airways to "ditch" its married stewardesses, stating:

> "In our opinion, while management may indubitably establish initial employment standards for stewardesses and thus hire anyone it chooses, once such a person is hired and acquires seniority pursuant to the contract's terms, that seniority may be terminated only in accordance with the contract's terms. And this, in turn is permitted only if the original or altered rule is a reasonable one.
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> "That the rule in question is not a reasonable one has already been shown. Its justification as a safety measure is minimal. . . . Its value as a sales promotion device is doubtful. While it has been upheld in arbitration as reasonable in several prior cases, all these decisions were made in the context of a universal application of such a rule in the industry. *Now times have changed and views have been altered by experience.*" [43]

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[41] In *Pitman Moore Division, supra* note 34, Seinsheimer disposed of a Title VII contention by saying the company action "may well have been, or may be in violation of the Civil Rights Act, but it is my opinion that it is not up to an Arbitrator to interpret the Federal Law." See also *Great Atlantic and Pacific Tea Co.,* 49 LA 1186 (1967), Clair Duff; and *Studebaker Corp.,* 49 LA 105 (1967), Harold W. Davey. Davey commented that he wished "to make clear in unmistakable terms that he is not commissioned to interpret Title VII of the Civil Rights Act of 1964."

[42] *Braniff Airways, Inc.,* 48 LA 769 (1965).

[43] *Southern Airways, Inc.,* 47 LA 1135, 1141 (1967) (emphasis added).

The fact that some of the stewardesses might be married and therefore unalluring to the passengers was answered by Wallen in an oft-quoted riposte that this would merely add "zest to the hunt." [44]

This same line of thinking was followed in the *Allegheny Airlines* case by Peter M. Kelliher in 1967, when, although saying that he was following only the contract and not Title VII, he commented that "unreasonable restrictions upon marriage are against public policy." [45]

The day after Wallen's award was handed down, Peter Seitz, in an equally memorable opinion in the *American Airlines* case, reached the opposite conclusion as to the reasonableness of the no-marriage rule and the responsibility of the arbitrator to consider questions of public policy.

> "I do not think that an arbitrator should second-guess the employer on such a matter as the kind, quality, and character of stewardess performance it requires on its planes. This is as much a matter of managerial and entrepreneurial prerogative as the determination of the kind of equipment that should be run and the kinds of services to be made available to customers by the stewardesses and others. . . .
>
> "I am not called upon to agree or disagree with the Company's belief that marriage disqualifies stewardesses from performing efficiently. In fact, I entertain very serious doubts that the generalization is entirely valid to the extent claimed. The question, however, is, rather, whether on the record of this case the Company has presented sufficient facts to justify its decision as a rational one. I believe that it has done so. . . .
>
> "This Board has no franchise to administer the penal laws or governmental statutes such as the Civil Rights Act. . . . Only

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[44] Wallen's more extended comments on the airline's argument that it sold "atmosphere" in addition to transportation are worth repeating: "The logic on which this proposition is based is dubious. An attractive girl loses none of her charm when she marries; in fact, it may be enhanced. While something might be said for the argument that a small segment of the traveling public may be influenced in its choice of a carrier (where it has a choice) by the fact that its stewardesses are attractive, it is highly doubtful that any but the most predatory of males bother to consider whether they are 'encumbered.' Moreover the predatory ones are not likely to be deterred if they are 'encumbered.' . . . For the passenger lured on board by the prospect of the chase, the presence of a few 'encumbered' ones among the quarry is likely to be an obstacle which merely adds zest to the hunt." *Id.* at 1140.

[45] *Allegheny Airlines, Inc.*, 48 LA 734 (1967). This comment provoked a strong dissent from the company members of the board who held that alleged violations of public policy were beyond the scope of the arbitrator's authority. *Id.* at 742.

mischief can result from this Board acting as though it were an agency of government with the power and authority to fulfill public policy." [46]

Arbitrators Are Not Legal Administrators

In the *United Air Lines* case in 1967, Mark Kahn, after making an agonizing appraisal of these various marriage decisions, lined himself up on the side of Seitz. Finding that in the *United* case the rule against marriage had been a long-established and consistently administered past practice, surviving 10 or more collective agreements since its initiation, Kahn upheld the policy. Stating that the merits or wisdom of the policy were not matters for the arbitrator to decide, Kahn commented, "The jurisdiction of this System Board does not extend to interpreting and applying the Civil Rights Act." [47]

Almost three years later the U.S. District Court, Northern District of Illinois, found United's policy unlawful and held that discharges of married stewardesses violated Title VII of the Civil Rights Act of 1964.[48]

One final statement of the prevailing arbitral view of the need for separation of powers should suffice. In a 1966 case Lou Yagoda, as chairman of a board of arbitration, confronted the issue of determining whether separate seniority lists based on sex and negotiated before Title VII became law were still valid. Dismissing the union's claim that the seniority clauses

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[46] *American Airlines, Inc.* (Sept. 15, 1966) grievance of Shirley Weiss, Case No. SS-465, unpublished decision. The following year, after the parties had negotiated a new clause stating that the company at its option may "release from employment a married stewardess at any time following the expiration of six (6) months after marriage or on pregnancy," Seitz was called upon to determine whether this gave the company a blanket option to terminate *all* married stewardesses six months after marriage. Reflecting the impact of what might be called "creeping liberation," Seitz held that the company was obligated to exercise its option *only* on an individual case-by-case base. *American Airlines, Inc.*, 48 LA 705 (1967).

[47] *United Air Lines, Inc.* 48 LA 727 (1967).

[48] *Sprogis* v. *United Air Lines*, 308 F.Supp. 959, 2 FEP Cases 385 (D.C. Ill. 1970). The court held that sex or single status did not constitute a BFOQ exception. United hired both male and female flight attendants but did not apply its ban on marriage to the males. On the other hand, in *Cooper* v. *Delta Air Lines, Inc.*, 274 F.Supp. 781, 1 FEP Cases 241 (E.D. La. 1967) where the airline hired only female flight attendants, the court found the nonmarriage rule was not sex-based discrimination but only discrimination based on marital status and therefore not unlawful.

were now illegal, the board stated that it must act on the presumption that the agreement is valid:

> "It is true that the arbitrators may and should, if contract provisos are patently and unambiguously in violation of the law, take cognizance of clear public policy and resist the upholding of illegal contract provisions. But whenever they do so, they should take great care that (a) the violation is unmistakably apparent; (b) they are not substituting themselves for the authority, expertise and procedures which have been established by and are responsive to the statute in implementing the law.
>
> "We are not the Equal Employment Opportunity Commission and should not put ourselves in its place in terms of our rights and ability to enforce the law which they administer."

Arbitrators, the board concluded, should not engage in the futile act of trying to preempt the authority of a legal body.[49]

An exception to the general arbitral reluctance to resolve questions of law which are intermingled with questions of contract interpretation is to be found in a recent decision by Arnold Zack. Pursuant to a Pennsylvania rule requiring that female employees were entitled to a 30-minute rest period after five continuous hours of work as well as two rest periods of at least 10 minutes "to eat and rest at such intervals as shall preserve their physical well-being," the Weyerhaeuser Company had for eight years granted an unpaid 30-minute lunch period and a paid 15-minute relief break to its female employees, who thus were paid for 7½ hours instead of for the 7¼ hours actually worked. Male employees who worked and were paid on the basis of an eight-hour day had no scheduled breaks.

After the Pennsylvania Human Relations Act was amended in 1969 to bar discrimination on the basis of sex, the attorney general advised the commonwealth's secretary of labor that any preferential laws according disparate treatment on the basis of sex were impliedly repealed. Accordingly, the company by notice eliminated the scheduled breaks for its female employees. When the matter came to arbitration, the company defended its action on the ground that the contract contained a clause stating that hours of work and premium pay were subject to change by federal or state laws and directives and additionally

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[49] *The Ingraham Co.*, 48 LA 884 (1966).

that for it to perpetuate different hours of work for its female employees would be violative of Title VII.

Although conceding that law enforcement and interpretation are the primary responsibilities of government agencies and the courts, Zack stated that the arbitrator "must certainly be mindful of the law, particularly when the parties' Agreement stipulates compliance with it." In upholding the company's action, he stated:

> ". . . we are mindful of the public policy of equality of treatment in employment for females as expressed in both Federal and Pennsylvania statutes. This policy is continually and even more vocally being reinforced by the protests of the woman's 'lib' movement." [50]

In the recent *Simoniz Company* case, Robert Howlett ruled against a company that refused to consider the bid of a senior woman worker for promotion to a job which required overtime. The company defended its refusal on the basis of an Illinois statute forbidding women to work over 48 hours a week. After reviewing the various attitudes which arbitrators have held on their role, Howlett, as might be expected, reiterated his own view that the arbitrator should apply the law to each collective bargaining agreement. He therefore stated:

> "The Illinois statute is in conflict with the Civil Rights Act of 1964. . . . Management's refusal, relying on the Illinois statute, to recognize grievant's bid deprives grievant of an employment opportunity in direct contravention of the Civil Rights Act of 1964." [51]

Not only may an employer find himself on the horns of a legal dilemma after receiving such an award, but also the arbitrator may risk a reversal at the hands of a court. In one case involving state restrictions on weight lifting by female employees, the arbitrator's decision ordering the company to give senior women a trial period was denied enforcement by the

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[50] *Weyerhaeuser Co.*, 54 LA 857 (1970). To the best of my knowledge this marks the first appearance of the woman's "lib" movement in an arbitration award! Ironically, of course, the women lost 15 minutes' pay—but this is the price of equality!

[51] 70-1 ARB ¶ 8024. See *Dayton Tire and Rubber Co.*, 55 LA 357 (1970), in which Samuel Kates held that the new EEOC guidelines did not automatically invalidate state hours' laws.

federal district court on the ground that the award was contrary to public policy.[52]

Court Decisions

Like the arbitrators and the EEOC, the courts also have found themselves in a quandary in determining the impact of Title VII on state protective labor legislation, although there now seems to be a clear trend toward preemption.

In *Rosenfeld* v. *Southern Pacific Co.* a California district court held in 1968 that a plaintiff who had been denied a promotion because this would violate California's hours and weight-lifting legislation governing the employment of women had been discriminated against. The court decided that the California laws did not create a BFOQ exception and that they were void and of no effect because of the supremacy clause (Article XI, Clause 2) of the U.S. Constitution. This decision was somewhat blunted, however, by the court's finding that the laws were discriminatory because the standards they established were "unreasonably low." [53]

A stronger stand was taken by the district court in Oregon in 1969.[54] A female employee had been denied promotion to the job of press operator because the collective agreement required that all females receive rest periods, and the Wage and Hour Commission of Oregon, under its Order No. 8, prohibited women from lifting over 30 pounds. The court granted relief to the plaintiff, holding that

> "Individuals must be judged as individuals and not on the basis of characteristics generally attributed to . . . sexual groups. The particular classification in Order No. 8 may be reasonable under the Equal Protection Clause, but it is no longer permitted under the Supremacy Clause and the Equal Employment Opportunity Act. . . ." [55]

In two cases district courts which have upheld state protective labor laws as constituting a BFOQ exception to Title VII have

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[52] *W. M. Chace Co.*, 48 LA 231 (1966), Erwin Ellman. Reversed in *UAW Local 985* v. *W. M. Chace Co.*, 262 F.Supp. 114, 64 LRRM 2098 (D.C. Mich. 1966).

[53] 293 F.Supp. 1219, 69 LRRM 2826 (C.D. Cal. 1968).

[54] *Richards* v. *Griffith Rubber Mills*, 300 F.Supp. 338, 1 FEP Cases 837 (D. Ore. 1969).

[55] *Id.* at 340.

been overruled by their circuits. In *Weeks* v. *Southern Bell Telephone and Telegraph Co.*,[56] the plaintiff, Mrs. Lorena Weeks, who had 19 years of seniority, applied for the open position of switchman and was denied it on the ground that Georgia had a regulation restricting weights which women could lift to 30 pounds. The Fifth Circuit, showing deference to the EEOC's now-narrow construction of the BFOQ exemption, found that the Georgia regulation had since been withdrawn and replaced by one prohibiting any employee, male or female, from lifting weights that caused undue strain or fatigue. In any event, the court rejected the use of class stereotypes as applied to women, such as the notion that few women are able to lift over 30 pounds or that a job requiring late-hour calls was too dangerous for women, stating that

> ". . . Title VII rejects . . . romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring, or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing. We cannot conclude that by including the bona fide occupational qualification exception Congress intended to renege on that promise." [57]

The second case, *Bowe* v. *Colgate-Palmolive Company,* involved a Title VII action brought by a group of female employees against both the company and the union. Their complaint was directed against a rather unusual seniority system in which employees each week completed a job preference sheet for the following week because available jobs fluctuated from week to week. Separate seniority lists restricted women from bidding for jobs which required lifting over 35 pounds. The lower court found this restriction a reasonable BFOQ exemption (based on an analysis of state weight-restriction laws in general)

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[56] 408 F.2d 228, 1 FEP 656 (5th Cir. 1969).

[57] It should be noted that this is the same court which shortly thereafter itself appeared to renege on that promise in the *Phillips* v. *Martin Marietta Corp.* case (411 F.2d 1, 1 FEP Cases 746 (5th Cir. 1969)) by upholding an employer's rule that it would not hire women with preschool children. This decision was vacated by the Supreme Court on Jan. 25, 1971, and remanded to the lower courts for further evidentiary findings on whether the existence of conflicting family obligations is "demonstrably more relevant to job performance for a woman than for a man."

since Indiana, where the Colgate plant in question was located, had no such restriction. The Seventh Circuit, however, disagreed, commenting:

> "If anything is certain in this controversial area, it is that there is no general agreement as to what is a maximum permissible weight which can be safely lifted by women in the course of their employment. . . . Most of the state limits were enacted many years ago and most, if not all, would be considered clearly unreasonable in light of the average physical development, strength and stamina of most modern American women who participate in the industrial work force." [58]

The court went on to advocate the consideration of individual physiological qualifications as well as technological conditions. Although it ruled that Colgate might retain its 35-pound limit "as a general guideline for all its employees, male and female," it directed the company to permit any employee who desired to demonstrate *his* or *her* ability to perform strenuous jobs and to permit those who so demonstrated to bid on jobs according to their seniority.[59]

Although one cannot predict with certainty what the ultimate resolution of this question will be, it seems safe to conclude that Title VII will be interpreted as superseding state protective laws unless they apply to males and females alike.[60] It also seems clear that the elimination of sex discrimination in employment will be achieved by judicial decision rather than by arbitration. There remains the question whether aggrieved employees may pursue their claims both in arbitration and in law or whether they must choose between one forum or the other. Here the courts have spoken in a multitude of tongues.

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[58] 416 F.2d 711, 2 FEP Cases 121 (7th Cir. 1969), reversing 272 F.Supp. 332, 1 FEP Cases 201 (S.D. Ind. 1967). See *Cheatwood* v. *South Central Bell Telephone,* 303 F.Supp. 754, 1 FEP Cases 644 (M.D. Ala. 1969).

[59] The suit against the union was dismissed by the court for failure of the plaintiffs to comply with the jurisdictional requisites for filing a suit against the union.

[60] See Donald A. Garcia, "Sex Discrimination in Employment or Can Nettie Play Professional Football?" 4 *U. San Francisco L. Rev.* 323-352 (1970). A federal district court has recently held that the Illinois Female Employment Act is unenforceable insofar as it restricts the hours which female employees may work, because the state law conflicts with Title VII and in addition sets unreasonably low standards for the employment of women. *Caterpillar Tractor Co.* v. *Grabiec,* 317 F.Supp. 1304, 2 FEP Cases 945 (D.C. Ill. 1970). Administrative or judicial officers of the District of Columbia, Ohio, Oklahoma, Michigan, and Pennsylvania also have held that their statutes are preempted by Title VII.

The Problem of Election of Remedies [61]

In the *Bowe* case, discussed earlier, the trial court had ruled that the plaintiffs had to choose whether they would pursue their action in court or in arbitration, since they could not elect both. The court of appeals, however, found it was "error not to permit the plaintiffs to utilize dual or parallel prosecution both in court and through arbitration," with an election of remedy proper only after adjudication to prevent duplicate relief which might result in unjust enrichment or a windfall to the plaintiffs. According to the appellate court, "the analogy to labor disputes involving concurrent jurisdiction of the N.L.R.B. and the arbitration process is not merely compelling, we hold it conclusive." [62]

The Fifth Circuit agrees with the Seventh. In a recent Title VII case, *Hutchings* v. *U.S. Industries*,[63] the plaintiff, a Negro, alleged that he had twice been denied a leadman's job solely because of his race. He already had taken his grievance to arbitration under an antidiscrimination clause in the contract and had lost. The court held that he had not thereby forfeited his right to relitigate the matter in court:

> "An arbitration award, whether adverse or favorable to the employee, is not per se conclusive of the determination of Title VII rights by the federal courts, nor is an internal grievance determination deemed 'settled' under the bargaining [*sic*] contract to be given this effect."

Judge Ainsworth noted that Title VII was entirely silent on the role that private grievance arbitration was to play in the resolution of disputes involving discrimination in employment. Moreover, picking up a cue from Harry Platt,[64] he stressed the point that grievance arbitration involves rights and remedies

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[61] Since this problem is not confined to sex discrimination alone, as was true in the case of the BFOQ exemption, we shall be dealing here with decisions involving race, religion, and sex discrimination.

[62] Case cited *supra* note 58.

[63] 428 F.Supp. 303, 2 FEP Cases 725 (5th Cir. 1970), *rev'g and reman'g* 309 F.Supp. 691, 2 FEP Cases 599 (D.C. Tex. 1969). On the threshold question of the statute of limitations, the circuit court held, in accordance with its decision in *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 2 FEP Cases 506 (5th Cir. 1970), that the statute is tolled once an employee invokes the grievance procedure to seek a private resolution of his complaint.

[64] Harry H. Platt, "The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964," 3 *Georgia L. Rev.* 398-410 (1969).

different from those involved in judicial proceedings under Title VII.

> "The trial judge in a Title VII case bears a special responsibility in the public interest to resolve the employment dispute, for once the judicial machinery has been set in train, the proceedings takes on a public character in which remedies are devised to vindicate the policies of the Act, not merely to afford private relief to the employee." [65]

But having thus confined the arbitrator and the judge each to his separate sphere, Judge Ainsworth, essaying the peacemaker's role, dropped hints for bringing them together in a kind of mutual-assistance pact. Thus, on the one hand, he suggested that the arbitrator, consistent with the scope of his authority, might (like the EEOC) encourage and effect voluntary compliance with Title VII. On the other hand, he suggested (in a footnote, to be sure) that arbitration awards and grievance settlements properly might be considered as evidence and evaluated by the courts in deciding issues of violation and relief in Title VII cases.

Finally, he suggested the possibility of evolving a *Spielberg* [66] approach to the question:

> ". . . we leave for the future the question whether a procedure similar to that applied by the Labor Board in deferring to arbitration awards when certain standards are met might properly be adopted in Title VII cases."

Two weeks before the Fifth Circuit's decision in *Hutchings* was handed down, the Sixth Circuit reached a contrary conclusion in *Dewey* v. *Reynolds Metals Co.* concerning the election-of-remedies problem. The *Dewey* case involved a complaint of religious discrimination. The plaintiff, who was a member of Faith Reformed Church, had refused to work Sundays as scheduled overtime because of his religious beliefs. Dewey processed his complaint through his union to arbitration and simultaneously began proceedings before the Michigan Civil Rights Commission. In June 1967 the arbitrator denied the grievance. Ultimately, Dewey prevailed before the EEOC and

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[65] Here he cited the *Enterprise* decision (363 U.S. 593, 46 LRRM 2423 (1969)) that an award based "solely upon the arbitrator's view of the requirements of enacted legislation exceeds the scope of the submission" (at 597).

[66] *Supra* note 11.

the Federal District Court for the Western District of Michigan, which found that the employer had violated Title VII. This judgment was reversed by the Sixth Circuit on the ground, among others, that Dewey had made a binding election of arbitration and once an award had been made he was thereby foreclosed from a lawsuit.

Any other construction would be unfair, the court held, since the employer but not the employee would be bound by the arbitration. "This result could sound the death knell to arbitration of labor disputes which has been so usefully employed in their settlement." The court went on to point out that the great increase in civil rights litigation probably would increase resort to the act in labor disputes. "Such use," said the court, "ought not to destroy the efficacy of arbitration." [67]

A similar view of the finality of arbitration awards in the area of civil rights was expressed by the Connecticut superior court in *Corey* v. *Avco Corp.*, another case involving alleged discrimination for religious beliefs. Here, too, the matter had been submitted both to arbitration and to the Connecticut Commission on Human Rights and Opportunities. The arbitration award which upheld the company also was confirmed in court. After losing in arbitration, the complainant prevailed before the Connecticut commission. The superior court, however, found that the commission had erred by reason of failure to give effect to the findings and award of the arbitration tribunal and by permitting the relitigation of the same facts and issues. Such an approach, the court held, "would serve to render

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[67] *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 2 FEP Cases 687 (6th Cir. 1970). It is interesting to note the court's reference to this bit of legislative history (citing 1964 *U.S. Code Cong. and A News*, at 2516): ". . . management prerogatives and union freedoms are to be left undisturbed to the greatest extent possible. Internal affairs of employers and labor organizations must not be interfered with except to the limited extent that correction is required in discrimination practices." Some two months later the court denied a petition for rehearing based on the *Hutchings* decision. In the Sixth Circuit's opinion, *Hutchings* was not correctly decided in the light of *Boys Markets, Inc.*, 398 U.S. 235, 74 LRRM 2257 (1970). Moreover, "our case [Dewey] is even stronger than *Boys Markets* because the grievance here was submitted to arbitration and the arbitrator made an award which was final, binding and conclusive on the parties. It is as binding as a judgment." *Dewey* v. *Reynolds Metals Co.*, 429 F.2d 324, 2 FEP Cases 869 (612 Cir. 1970). In January 1971 the Supreme Court granted *certiorari* in the *Dewey* case.

nugatory the policy of this State and the United States which clearly favors such agreements for arbitration." [68]

Commentaries

So much, then, for arbitration opinions, EEOC guidelines, and court decisions in this area. What do the commentators say as to the respective roles of arbitrators and the courts with respect to the problem of jurisdiction?

Three members of the National Academy of Arbitrators—Harry Platt, Alfred W. Blumrosen, and William B. Gould—have contributed to the literature in this field.[69]

Platt believes that arbitrators should move cautiously in this area, especially where questions of public policy are concerned. Sensitive to the possibility that arbitral upholding of discriminatory contractual provisions may "engender minority group allegations of conspiracies between the arbitrators and the parties," he suggests that in this type of case the arbitrator "bow out" and refuse to make a decision.[70]

Blumrosen, who has had experience both as an arbitrator and as a staff member and consultant to the EEOC, likewise has expressed skepticism as to the ability or inclination of arbitrators to decide questions of public policy in the area of employment discrimination.

> "The instinct, self-interest and the training of the arbitrator as well as the body of law surrounding his work, all call out for him to accept that position which will secure the assent of both of [*sic*] union and management. Union and management want him to operate within the framework of contractual principles which *they* have established, rather than range over their relationship with a roving commission to implement federal legislative policy." [71]

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[68] *Corey* v. *Avco Corp.*, No. 137-318, May 28, 1970, Conn. Super. Court, Fairfield County, 2 FEP Cases 738.

[69] Platt, "The Relationship Between Arbitration and Title VII . . . ," at 398; Alfred W. Blumrosen, "Labor Arbitration, EEOC Conciliation, and Discrimination in Employment," 24 *Arb. J.* 88 (1969); and Gould, "Labor Arbitration of Grievances . . . ," at 197.

[70] Platt cites *Hotel Employers Ass'n of San Francisco,* 47 LA 873 (1966) as an egregious example of arbitral mischief and meddling in the civil rights area.

[71] Blumrosen, "Labor Arbitration, EEOC Conciliation . . . ," at 94. Blumrosen's criticism is based on the *Local 12, Rubber Workers* case (45 LA 240 (1965)), especially on the action of the NLRB in referring the issue of racially segregated

Arbitrators in situations involving third-party interests cannot be neutral, according to Blumrosen, because in fact and in law they are the agents of the parties who are alleged to have discriminated.

The EEOC, in Blumrosen's view at the time he was writing, likewise lacked experience in handling such issues, although he noted that unlike arbitration it provided a multilateral forum for the resolution of controversies involving discrimination in employment. Therefore, only the courts can provide the answers.

> "Administrative abdication and narrow arbitration interpretations seem the order of the day. At the root of this phenomenon lies the fact that there is only one institution in our society capable of the difficult tasks of articulating the meaning of modern antidiscriminatory statutes in the complex setting of labor relations. The courts must speak before the less formal processes can operate effectively." [72]

Once the courts decide the questions of substantive law, then arbitrators and administrators might move back into the arena of shared decision-making.

The institutional deficiencies of arbitration as a forum for the just resolution of grievances alleging racial discrimination (and one infers sex discrimination as well) also have been explored by William Gould, who has made a number of suggestions for procedural and other remedial reforms of arbitration. Many of these, as Gould concludes, would modify "the voluntary and private nature of labor arbitration." Whether "the leaky ship" of arbitration is worth patching, or whether it would be "better to build a new ship constructed in the form of government labor courts more responsive to public law" is a question that Gould raises but does not answer.[73]

Conclusions

Certain generalizations can be made at this point in time on

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jobs to an arbitrator who was not in a position to handle it as a contractual issue. See 150 NLRB 312, 57 LRRM 1535 (1964); confirmed 368 F.2d 12, 63 LRRM 2395 (5th Cir. 1966), *cert. denied.* 389 U.S. 837, 66 LRRM 2306 (1967). Like Platt, he also is critical of the *San Francisco Hotel Association* award.

[72] Blumrosen, *id.* at 105.

[73] Gould, "Labor Arbitration of Grievances . . . ," at 227.

the basis of the foregoing review of arbitral and judicial decisions in the area of employment discrimination.

1. Arbitrators in general, in this field perhaps more than in others, are reluctant to administer public policy. They adhere to the Meltzer doctrine of the separation between contract and law, and they likewise follow in practice the Sovern command to stay out of an area where the courts have primary jurisdiction.

2. The courts for the most part adhere to the same principle, refusing to cede jurisdiction to arbitrators, although some have expressed a preference for arbitration rather than the courts as the forum for resolving these disputes.

3. There are signs of the emergence of a new *Spielberg* doctrine of deference to arbitral awards which meet criteria still to be established.

Should this latter development occur, what response may be expected from the profession? If past discussions of arbitration, the NLRB, and the courts are any guide, this writer anticipates that most arbitrators will continue to refuse the responsibility of deciding issues of public policy.

This negative attitude is alarming. It seems outmoded and irresponsible. As more and more contract issues—once regarded purely as matters of consensual law—become subject to overriding public regulation and control, the once-tight little ship of private adjudication is indeed becoming a leaky vessel. More and more we are witnessing challenges to vested institutional arrangements. Not only the civil rights movement but also the youth movement and the women's "lib" organizations are "pressing the industrial relations system to accommodate to [their] demands." [74] If the institution of arbitration is to survive and to be "relevant" to the emerging needs of a new social and economic order, it cannot afford simply to remain as a part of "the Establishment."

As court decisions in the area of civil rights evolve and the law of employment discrimination becomes more settled, there should be no irreconcilable or irrepressible conflict between the

[74] Blumrosen, "Labor Arbitration, EEOC Conciliation . . . ," at 88.

law and collective bargaining agreements, most of which contain little Title VII antidiscrimination provisions of their own. Once the question of federal preemption of state protective laws is answered in the affirmative (as this writer thinks it will be), there will be less reason for arbitrators to use the contract as a shield against public policy.

There remains the question of expertise or competence. Here the profession has either been unduly modest—or to put it more starkly—too specialized. Many who are experts in the law of the shop shy away from the notion of learning more about the law of the land. But this merely means that like every profession, arbitrators are in need of continuing education. In addition to worrying about the training of new arbitrators, perhaps arbitrators should be concerned about retraining themselves to face the challenge of accommodating an old and valuable institution to the new movements of social change. In other words they would mind their BFOQ's!