available as an integral part of their workplace the facilities for the prompt processing of all discrimination grievances to arbitration.

The courts have approved the NLRB's deferral policies,[57] and there is every reason to assume the courts will approve a similar deferral policy if adopted by the EEOC. Indeed, the Supreme Court's decision in *Gardner-Denver*, by suggesting the factors that will entitle an award to acceptance by the courts, affords the logical basis for deferral—for why should the EEOC spend its time and money if an acceptable award seems likely?

Conclusion

Robert Coulson, president of the American Arbitration Association, in his preface to the casebook, *Arbitration of Discrimination Grievances*, posed the alternatives as follows: "Labor arbitration can either be converted to a problem-solving tribunal by this explosive and potentially expensive conflict area, or it may wither away because individual complainants lack faith in its effectiveness." [58]

Converting labor arbitration into an effective and acceptable problem-solving tribunal in the revolution of race and sex now rising in American industry may be an impossible task. But the dangers of failing are ominous for the world of free labor. The challenge requires that arbitrators seek the approval of only those employers and unions who are willing to place the costs of achieving genuine equal opportunity for all ahead of immediate, selfish political and economic goals.

ARBITRATION OF EMPLOYMENT DISCRIMINATION CASES: AN EMPIRICAL STUDY

HARRY T. EDWARDS *

Probably the least surprising and best publicized employment discrimination case decided in 1974 was the Supreme Court ruling in *Alexander* v. *Gardner-Denver Co.*[1] The opinion finally re-

[57] *Enterprise Publishing Co.* v. *NLRB*, 493 F.2d 1024, 82 LRRM 1337 (1st Cir. 1973); *Nabisco v. NLRB*, 479 F.2d 770, 83 LRRM 2612 (2d Cir. 1973).

[58] Stone and Baderschneider, *supra* note 21, at 5.

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[1] 415 U.S. 36, 7 FEP Cases 81 (1974).

solved the long-raging debate concerning the effect of a prior arbitration decision on employment discrimination claims arising under Title VII.[2] *Gardner-Denver* is particularly noteworthy because the Supreme Court unhesitatingly rejected the contention that private arbitration may be used as a bar to individual employment discrimination claims brought pursuant to Title VII.

The facts in *Gardner-Denver* were relatively simple. A black employee was discharged by his employer for allegedly producing too much scrap. Following his dismissal, the employee filed a grievance under a collective bargaining agreement that had been executed by his employer and his union representative. Although the contract expressly prohibited employment discrimination "against any employee on account of race, color, religion, sex, national origin, or ancestry," no explicit charge of racial discrimination was made at the time when the employee initiated his grievance complaint. The grievance was processed under the applicable grievance procedure in the collective bargaining agreement, and the matter was eventually appealed to arbitration. At the final step in the grievance procedure, just prior to arbitration, the employee alleged, for the first time, that he had been discharged because of his race.

The contractual arbitration clause covered "differences arising between the Company and the Union as to the meaning and application of the provisions of [the] Agreement" and "any trouble arising in the plant." The agreement also provided for selection of an impartial arbitrator; it stated that "the decision of the arbitrator shall be final and binding upon the Company, the Union, and any employee or employees involved"; and it indicated that "the arbitrator shall not amend, take away, add to, or change any of the provisions of this Agreement, and the arbitrator's decision must be based solely upon an interpretation of the provisions of this Agreement."

During the time when the employee's grievance was being processed under the contractual grievance procedure but before the matter had been appealed to arbitration, the employee filed a charge of racial discrimination with the Colorado Civil Rights Commission. This charge was subsequently processed by the Equal Employment Opportunity Commission under Title VII.

[2] 42 U.S.C. §2000e *et seq.*

Thereafter, an arbitration hearing was held to consider the matter of the employee's contractual grievance dispute. At the arbitration hearing the employee testified that his discharge was the result of racial discrimination, and he stated that he "could not rely on the union." The union introduced a letter in which the employee had stated that he was "knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I . . . have been the target of preferential discriminatory treatment." The union representative also testified that the company's usual practice was to transfer unsatisfactory trainee drill operators back to their former positions. After considering this evidence, the arbitrator ruled that the black employee had been "discharged for just cause" under the collective bargaining agreement. He made no reference to the employee's claim of racial discrimination. The arbitrator also stated that the union had failed to produce any satisfactory evidence of any practice that required the company to transfer, rather than discharge, trainees who accumulated excessive scrap.

Seven months following the issuance of the arbitration award, the Equal Employment Opportunity Commission determined that there was no reasonable cause to believe that Title VII had been violated. The employee nevertheless brought an action in the U.S. District Court alleging that his discharge resulted from race discrimination. The district court granted the employer's motion for summary judgment and dismissed the case.[3] In reaching this decision, the district court relied on the fact that the employee's charge of race discrimination had been raised and resolved in arbitration and, therefore, since the employee had voluntarily elected to pursue his claim under the grievance-arbitration provision, he was thereby precluded from suing his employer under Title VII. The Court of Appeals for the Tenth Circuit affirmed *per curiam* and adopted the rationale stated in the district court opinion.[4]

Prior to the Tenth Circuit decision in *Gardner-Denver,* the Sixth Circuit, in *Dewey* v. *Reynolds Metals Co.,*[5] had ruled that once an employee has pursued a claim of discrimination in arbitration, he has made a final and binding election of remedies and may not subsequently relitigate the same claim in court under

[3] 346 F.Supp. 1012 (1971).
[4] 466 F.2d 1209, 4 FEP Cases 1210 (1972).
[5] 429 F.2d 324, 2 FEP Cases 687 (1970).

Title VII. The decision in *Dewey* was affirmed without opinion by an equally divided Supreme Court.[6] However, other courts of appeals, in the Fifth,[7] Seventh,[8] and Ninth[9] Circuits, had rejected the view stated in *Dewey* and had ruled that an arbitration award in a matter involving a claim of employment discrimination did not operate as a bar to a Title VII suit. Shortly after the decision in *Dewey,* the Sixth Circuit, in *Newman* v. *Avco Corp.,*[10] appeared to retreat from its initial position and suggested that there could be no preclusion of a federal remedy under Title VII when both arbitration and court or agency processes were pursued simultaneously. Thus, after the issuance of the Tenth Circuit opinion in *Gardner-Denver,* the Supreme Court had an ideal opportunity to resolve the conflict between the various circuits and to enunciate the applicable policies in cases of this type.

In reversing the two lower courts, and ruling against the employer's position, the Supreme Court in *Gardner-Denver* made it clear that the doctrine of "election of remedies" was inapplicable in cases where an employee pursues a Title VII remedy following an adverse opinion in arbitration. Rather, the Court observed that Title VII involved statutory rights that were distinctly separate from employees' contractual rights, even when the violation of both may have resulted from the same factual occurrence. In short, the Court made it clear that an employee is not foreclosed from pursuing a cause of action under Title VII by processing a grievance under a contract. This is so because the arbitrator's authority is confined to the resolution of questions of contractual rights, regardless of whether these rights resemble or duplicate Title VII rights.

The Supreme Court also plainly rejected the reasoning of the Sixth Circuit in *Dewey* v. *Reynolds Metals Co.* The Sixth Circuit in *Dewey* had relied on the doctrine of election of remedies. In its later decision, in *Newman* v. *Avco Corp.,* the Sixth Circuit had described *Dewey* as resting on the doctrine of equitable estoppel and on "themes of *res judicata* and collateral estoppel."

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[6] 402 U.S. 689, 3 FEP Cases 508 (1971).

[7] *Hutchings* v. *United States Industries Inc.,* 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970).

[8] *Bowe* v. *Colgate-Palmolive Co.,* 416 F.2d 711, 2 FEP Cases 121 (7th Cir. 1969).

[9] *Oubichon* v. *North American Rockwell Corp.,* 482 F.2d 569, 6 FEP Cases 171 (9th Cir. 1973).

[10] 451 F.2d 743 (6th Cir. 1971).

The Supreme Court in *Gardner-Denver* observed, however, that "the policy reasons for rejecting the doctrines of election of remedies and waiver in the context of Title VII are equally applicable to the doctrines of *res judicata* and collateral estoppel." The Court opinion stated further that Title VII vests the federal courts with "plenary powers to enforce statutory requirements" and that the law indicates "no suggestion . . . that a prior arbitral decision either forecloses an individual right to sue or divests federal courts of jurisdiction." Finally, the Court noted that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination" and that "submission of a claim to one forum does not preclude a later submission to another."

The Court also considered the employer's claim that the employee in *Gardner-Denver* had "waived" his right to bring a Title VII action. On this point, the Court declared that "there can be no prospective waiver of an employee's rights under Title VII." The Court recognized that certain statutory rights may occasionally be waived by a union bargaining agent, pursuant to the principle of exclusive representation; however, the Court made it clear that Title VII establishes rights to equal employment opportunity which "can form no part of the collective bargaining process since waiver of these rights would defeat the paramount Congressional purpose" underlying Title VII. The Court's opinion accepts the possibility that an employee may under certain circumstances voluntarily and knowingly agree to settle a claim of employment discrimination and thereby waive his right to pursue a Title VII action in federal court. However, the opinion makes it equally clear that: "In no event can the submission to arbitration of a claim under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII."

The decision in *Gardner-Denver* plainly does not forbid the arbitration of employment discrimination claims. However, the Supreme Court did reject the "deferral standard" which had been adopted by the Fifth Circuit in *Rios* v. *Reynolds Metals Co.*[11] On this point, the Court noted that:

> "We think . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment

[11] 467 F.2d 54, 5 FEP Cases 1 (5th Cir. 1972).

practices can be best accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate."

In dealing with this issue, the Court was persuaded by two important considerations. First, the Court dealt with the district court's assertion that it could not "accept a philosophy which gives the employee two strings to his bow when the employer has only one." On this point, the Court noted that:

"This argument mistakes the effect of Title VII. . . . In instituting an action under Title VII, the employee is not seeking review of the arbitrator's decision. Rather he is asserting a statutory right independent of the arbitration process. An employer does not have 'two strings to his bow' with respect to an arbitral decision for the simple reason that Title VII does not provide employers with a cause of action against employees. An employer cannot be the victim of discriminatory employment practices."

Second, the Court concluded that certain facts "render arbitral processes comparatively inferior to judicial processes in the protection of Title VII rights." On this score, the Court made the following significant observations:

"Parties usually choose an arbitrator because they trust his knowledge and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only with reference to public law concepts.

"Moreover, the fact-finding process in arbitration usually is not equivalent to judicial fact-finding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable."

Does the Decision in *Gardner-Denver* Raise Any Significant Problems for the Future?

The Supreme Court opinion in *Alexander* v. *Gardner-Denver* is a sound, well-reasoned resolution of the issues posed. However, the Court's handling of the deferral question leaves some room for doubt and, therefore, the issue may cause some serious problems

for Title VII litigants in the future. The Court initially declined to adopt any specific standards as to the weight, if any, to be accorded arbitration decisions in cases involving claims of employment discrimination. But at the end of the opinion the Court appeared to hedge on the question, in Footnote 21, with the following observation:

> "We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record."

This passing comment by the Court may raise some serious problems in the future. If federal district judges view this Supreme Court statement as a general license to defer to arbitration decisions, then the primary principle of *Gardner-Denver* could be severely diluted upon implementation. Even worse, the Court in *Gardner-Denver* suggested that the lower courts should consider "the special competence of particular arbitrators" in deciding whether to accord an arbitration decision "great weight." It certainly is not clear how the Court would propose that "special competence" should be judged.

The Supreme Court's limited statement in Footnote 21 in *Gardner-Denver* (concerning the weight to be accorded an arbitral decision) probably should not, without more, be read to be a significant defection from the more basic and overriding principles that are set out in the body of the opinion. However, several judicial decisions rendered since *Gardner-Denver* have made more likely the possibility that federal district courts will, with some frequency, and before too long, begin to "defer" to arbitrators' opinions in Title VII cases.

One such case is the recent Sixth Circuit decision in *EEOC* v. *Detroit Edison Co.*[12] The district court in *Detroit Edison* [13] had

[12] 10 FEP Cases 239 (6th Cir. 1975).
[13] 365 F.Supp. 87 (1973).

found that one of the union defendants violated Title VII by discouraging black employees from filing grievances under a collective bargaining grievance-arbitration procedure. In adopting this finding of discrimination, the Sixth Circuit rejected the union's argument that it should not be held responsible for any of the company's acts of discrimination because the union was not responsible for hiring, rejecting, testing, or promoting employees. Rather, the court noted that:

> "It has long been settled that a union must attempt to protect its minority members from discriminatory acts of an employer. This obligation requires a union to assert the rights of its minority members in collective bargaining sessions, and not passively accept practices which discriminate against them."

This decision, which relies on principles gleaned from Title VII, when coupled with the decisions that hold that a union may be found guilty of a breach of the duty of fair representation under the National Labor Relations Act if it fails to prosecute employees' legitimate claims of employment discrimination under a contractual grievance procedure, will probably cause union representatives to think twice before declining to process an employee's charge of discrimination in arbitration.

Another such case is the recent Supreme Court opinion in *Emporium Capwell Co.* v. *Western Addition Community Organization.*[14] In *Emporium,* the Court ruled that, although national labor policy accords the highest priority to nondiscriminatory employment practices, the National Labor Relations Act does not protect concerted activity by minority employees who seek to bypass their union representative and bargain directly with their employer over issues of employment discrimination. In reaching this result, the Court gave strong support to the principles of majority rule and exclusive representation; the Court also expressed great concern about minority action that might effectively erode the strength of the union bargaining agent:

> "The court below minimized the impact on the union in this case by noting that it was not working at cross-purposes with the dissidents [in opposing discrimination] and that indeed it could not do so consistent with its duty of fair representation and perhaps its obligations under Title VII. . . . This argument confuses the employees' substantive right to be free of racial discrimination with the procedures available under the NLRA for securing these rights.

[14] 43 L.W. 4214, 9 FEP Cases 195 (1975).

> Whether they are thought to depend upon Title VII or have an independent source in the NLRA, they cannot be pursued at the expense of orderly collective-bargaining processes contemplated by the NLRA. The elimination of discrimination and its vestiges is an appropriate subject of bargaining, and an employer may have no objection to incorporating into a collective agreement the substance of his obligation not to discriminate in personnel decisions; the Company here has done as much, making any claimed dereliction a matter subject to the grievance-arbitration machinery as well as to the processes of Title VII."

The *Emporium* decision is important because it may severely limit the rights of minority employees to take direct action against an employer who is perceived to be guilty of employment discrimination under Title VII. The Court in *Emporium* ruled in effect that even if the relief available under Title VII is inadequate because the legal procedures are too cumbersome or time-consuming, this fact will not justify dissident employee action taken against an employer to protest against alleged race discrimination. The Court thus concluded that employee interests (at least under the NLRA) may be adequately protected when a union is serving as the employees' exclusive bargaining agent and where a collective bargaining agreement adequately provides for nondiscrimination and makes available a grievance-arbitration procedure to redress employee complaints. Although a host of issues remains unresolved in the wake of *Emporium,* it is probably still fair to assume that one possible consequence of the opinion will be to encourage employers, unions, and employees to process employment discrimination claims under existing contractual grievance-arbitration procedures.

Another judicial opinion that will raise some difficulties in this area is the recent Supreme Court decision in *Arnett* v. *Kennedy.*[15] In 1972, the Supreme Court, in *Board of Regents* v. *Roth* [16] and *Perry* v. *Sindermann,*[17] ruled that a public employee is entitled to "procedural due process" before being denied employment rights if the employee has a "property interest" in continued employment. Two years later, in *Arnett* v. *Kennedy,* a majority of the Supreme Court decided that a public employee who was protected against dismissals except "for cause," pursuant to a substantive right given by statute, had a legitimate claim of

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[15] 94 S.Ct. 1633 (1974).
[16] 408 U.S. 564 (1972).
[17] 408 U.S. 593 (1972).

entitlement to a "property interest" under the Fifth or Fourteenth Amendments of the Constitution and, therefore, the employee's job could not be terminated without notice and full evidentiary hearing. Even though *Arnett* involved a grant of "for cause" protection under a statute, there is no reason to believe that the same ruling will not apply in cases involving public employees who are protected against dismissals except "for cause" under a collective bargaining agreement.

A majority of the Court in *Arnett* also ruled that a "property interest" may not be conditioned by procedural limitations which accompany the grant of the property interest. If this is so, then it may be legitimately argued that public employees covered by collective bargaining agreements that prohibit employers from dismissing them without cause will always be entitled to a hearing before an impartial tribunal before dismissal. It is not at all clear from the decision in *Arnett* whether it is necessary to conduct an arbitration hearing (or something like it) in order to satisfy the constitutional requirement of "procedural due process" when an employee has allegedly been discharged without cause; however, the opinions of several of the Justices in *Arnett* would certainly militate in favor of such a conclusion.

If *Arnett* can be read in this manner, then one possible result of the decision may be that unions will not have the option to refuse to go to arbitration in cases (1) involving public employees, (2) where the employee has allegedly been discharged without cause (including for discriminatory reasons), and (3) where there is a collective bargaining agreement in force that protects against such dismissals and makes arbitration available to handle such employee complaints. Such a ruling would, of course, seriously erode the long-recognized right of unions to decide when to appeal employee grievances to binding arbitration.[18]

It may be, however, that on a second look, the Supreme Court may decide against extending *Arnett* this far or it may decline to read the constitutional requirement of procedural due process so broadly.[19] This certainly would not be surprising, especially in cases involving claims of employment discrimination where the aggrieved employee has an alternative judicial forum which will

[18] See *Vaca* v. *Sipes*, 386 U.S. 171 (1967).
[19] *Cf.*, *Withrow* v. *Larkin*, 43 L.W. 4459 (U.S. Sup. Ct., April 15, 1975).

always afford procedural due process in resolving claims arising under Title VII, Section 1981 of the Civil Rights Act of 1866, or Section 1983 of the Civil Rights Act of 1871.

Whether or not *Roth, Sindermann,* and *Arnett* are ultimately limited so as to foreclose some of the possibilities here suggested, there is enough in these decisions to encourage employers, unions, and employees in the public sector to process employment discrimination claims under existing grievance-arbitration procedures.

The Nagging Issue of Deferral

Although the opinion in *Gardner-Denver* appears to make it plain that there is no legal requirement that employment discrimination claims must be processed under contract grievance-arbitration procedures, the continued likelihood of such occurring is greatly enhanced by the several opinions discussed above. It must also be recognized that it is very likely that employment discrimination cases will always be processed under grievance-arbitration procedures, unless expressly excluded, because arbitration is often the most convenient, inexpensive, and expeditious forum in which an aggrieved employee may pursue a charge of discrimination. The Supreme Court recognized this in *Gardner-Denver* when it pointed out the potential therapeutic effects of arbitration, as follows:

> "The grievance-arbitration machinery of the collective-bargaining agreement remains a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices. Where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. An employer thus has an incentive to make available the conciliatory and therapeutic processes of arbitration which may satisfy an employee's perceived need to resort to the judicial forum, thus saving the employer the expense and aggravation associated with a law suit. For similar reasons, the employee also has a strong incentive to arbitrate grievances, and arbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum."

In this same vein, it must also be recognized that employment discrimination cases frequently involve employee dismissals that are claimed to be without "just cause" and alleged violations of

contractual seniority provisions. Since "just cause" and seniority matters are routinely heard in arbitration, it is very likely that employment discrimination cases that touch these areas will frequently be heard in arbitration.

These facts, taken together, suggest that, unless employers and unions begin to adopt arbitration clauses that expressly exclude employment discrimination cases from arbitration,[20] it is likely that these cases will continue to be heard in arbitration in great numbers. If this is so, then it is not unreasonable to assume that the federal courts, which are already overburdened with heavy caseloads, will in time develop de facto schemes of deferral in order to give "great weight" to arbitration decisions pursuant to the suggestion made by the Supreme Court in Footnote 21 in the *Gardner-Denver* opinion. Although this may not prove to be a serious problem, it would appear that there are some reasons to be concerned about such a development.

Any rule of deferral must, by definition, be founded on the assumptions that the arbitration process is adequate to deal with "legal" issues arising under Title VII and that arbitrators are both competent and willing to decide such "legal" issues. However, the evidence is at best unclear on these points and, therefore, the assumptions should not be taken to be valid merely because they are asserted.

The Survey of Arbitrators

Since *Gardner-Denver* leaves open the issue as to how much weight, if any, should be accorded an arbitral decision, it is important to get more empirical evidence about the capacity of the arbitration process and arbitrators to deal with legal issues arising under Title VII. In an effort to do just this, this writer conducted a survey of all of the U.S. members of the National Academy of Arbitrators in February 1975. The survey questionnaire was sent to 409 persons; 200 arbitrators responded to the questionnaire. (See Appendixes A and B attached hereto.) The average age of the responding arbitrators was 49 years, and the range of ages was from 31 to 77 years. The average years of arbitration experience among the respondents was 21 years (with the range being from 4 to 40 years).

[20] See *Board of Higher Education of City of New York* v. *Professional Staff Congress/CUNY*, 362 N.Y.S.2d 985, 89 LRRM 2320 (N.Y. Sup. Ct. 1975).

The percentage of survey questionnaires returned from each region in the United States was approximately the same. (The lowest percentage was in the southeast region where 40 percent of the arbitrators returned their survey questionnaire; the highest percentage of returns came from the State of Michigan where nearly 63 percent of the arbitrators answered the survey questionnaire.)

The Capacity of Arbitrators to Decide "Legal" Issues in Cases Involving Claims of Employment Discrimination

One of the things that the survey attempted to determine was the extent to which arbitrators are competent to handle "legal" issues in employment discrimination cases. The findings on this score were most interesting.

One of the questions asked of the respondents was whether they had ever read any *judicial* opinions involving a claim of discrimination under Title VII. One respondent appeared to think that the question was incredulous, and he or she asked, "What kind of arbitrator does not" read judicial opinions? The survey results do not indicate what kind of an arbitrator does not read judicial opinions; however, it does indicate that 77 percent of the respondents had read judicial opinions involving claims of discrimination under Title VII at one time or another, 16 percent of the respondents indicated that they had never read any such judicial opinions, and 7 percent of the respondents declined to answer the question.

The arbitrators were also asked whether they regularly read labor advance sheets to keep abreast of current developments under Title VII. On this question, only 52 percent of the respondents indicated that they did read labor advance sheets, nearly 40 percent of the respondents answered that they did not, and 8 percent of the respondents declined to answer the question.

Another question asked the arbitrators was whether they could define "bona fide occupational qualification," "reasonable accommodation/undue hardship," and "preferential treatment" and accurately explain the current status of the law under Title VII with respect to each of these legal terms. It is significant that very few of the respondents felt that they could define these terms without first doing some legal research. Only 14 percent of the re-

spondents indicated that they felt confident that they could accurately define each of the terms and explain the relevant law, 30 percent of the respondents stated that they could make a good "educated guess" but would not certify their answers as being accurate, and nearly 50 percent of the respondents indicated that they would prefer to research the question before answering.

Finally, the arbitrators were asked whether they felt that they were professionally competent to decide "legal" issues in cases involving claims of race, sex, national origin, or religious discrimination. It is extremely noteworthy that, in answer to this question, only about 72 percent of the respondents indicated that they felt professionally competent to decide legal issues in cases involving claims of employment discrimination. Sixteen percent of the respondents answered that they did not feel professionally competent to handle such cases, and 12 percent of the respondents declined to answer the question.

While these statistics raise some troublesome questions about the capacity of arbitrators to decide legal issues in cases involving claims of employment discrimination, they surely do not, without more, prove that arbitrators are incapable of handling such legal matters. There are some additional data from the survey, however, that raise more serious questions with respect to the capacity of arbitrators to decide legal issues in cases involving claims of employment discrimination.

Most of the respondents (83 percent) who indicated that they had never read a judicial opinion involving a claim of employment discrimination also indicated that they did not regularly read labor advance sheets to keep abreast of current developments under Title VII. Yet, 50 percent of this group of respondents nevertheless answered that they felt professionally competent to decide "legal" issues in cases involving claims of race, sex, national origin, or religious discrimination. Similarly, 70 percent of the group of respondents who indicated that they did not regularly read labor advance sheets to keep abreast of current developments under Title VII nevertheless indicated that they felt professionally competent to decide legal questions in cases involving claims of employment discrimination. From these facts, it is obvious that many arbitrators do not believe that these factors are relevant measures of the professional competence of arbitrators to

decide legal issues in cases involving claims of employment discrimination.

However, it is interesting to note that 83 percent of the group of respondents who had never read a judicial opinion indicated that they could not define the three legal terms mentioned on the questionnaire without first doing some legal research. Only 13 percent of this group felt that they could make a good "educated guess" about the definition of the three legal terms, and only 3 percent of the group felt that they could do more than give an educated guess.

On this same score, 63 percent of the group of respondents who answered that they did not regularly read labor advance sheets also answered that they could not define the three legal terms without doing some research on the subject. Only 5 percent of this group indicated that they could do more than give an educated guess about the meaning of the legal terms in question.

Only 14 percent of the total group of respondents indicated that they felt that they were both (1) professionally competent to decide legal issues in cases involving claims of employment discrimination, and (2) able to define "bona fide occupational qualification," "reasonable accommodation/undue hardship," and "preferential treatment" without doing any research, and accurately explain the current status of the law with respect to each of these concepts. Of equal significance is the fact that only 18 percent of the group of respondents who felt that they were professionally competent to decide legal issues in employment discrimination cases stated that they could define the three legal terms with something more than a good "educated guess" and without doing any research on the subject. Finally, it is surprising to note that nearly 20 percent of the respondents who indicated that they *could* accurately define each of the three legal terms or make a good "educated guess" on the subject nevertheless indicated that they did *not* feel professionally competent to decide "legal" issues in cases involving claims of employment discrimination.

The question of professional competence would be of little interest if only qualified persons were being selected to hear and decide arbitration cases involving legal issues in connection with claims of employment discrimination. However, the survey data

indicate that one half of the respondents who answered that they did not feel professionally competent to decide legal issues in cases involving claims of employment discrimination also answered that they had heard and decided such cases during the past year. Thus, there is no reason to believe that the arbitration-selection processes, as they presently exist, are designed to screen out persons who are not professionally qualified to decide legal issues in cases involving claims of employment discrimination.

It is obvious from the above data that many arbitrators feel that they are competent to handle employment discrimination cases (and to decide related legal issues) even though they are not otherwise knowledgeable about current developments in the law under Title VII. This is shown by the fact that there is no strong statistical relationship between arbitrators' ability to define three oft-cited legal terms (pertaining to the law under Title VII) and arbitrators' personal perceptions about their professional competence to decide "legal" issues in cases involving claims of employment discrimination. In fairness, however, it must be conceded that a great many of the persons who are members of the National Academy of Arbitrators clearly possess the intellectual wherewithall, general expertise in the field of labor and industrial relations, and sufficient "judicial" experience to make them potentially well qualified and highly able to decide most employment discrimination cases (and most "legal" issues associated with such cases). Indeed, many arbitrators are well able to research a "legal" issue, discover the relevant law, and issue a sound decision on the matter. However, it must be recognized that the judgment as to "qualifications" may be viewed as an abstract possibility or as a current reality. The data from the survey would suggest that many arbitrators are potentially, but not actually, well qualified to decide *legal* issues in cases involving claims of employment discrimination at the present time.

The Capacity of the Arbitration Process to Handle Employment Discrimination Cases Involving Legal Issues Cognizable Under Title VII

The problem here is compounded by some additional considerations having to do with the nature of the arbitration process and with the arbitrators' perceptions about their roles in cases involv-

ing legal issues. Even if it may be assumed, *arguendo,* that many arbitrators are professionally competent to decide *legal* issues in cases involving claims of employment discrimination, the nature of the arbitration process will often make it impossible, or at best difficult, for such arbitrators to render opinions that effectively resolve legal issues in cases involving claims of employment discrimination. The following facts, based on the evidence from the survey, appear to support this conclusion.

In many cases, lawyers do not appear as advocates for the parties in arbitration proceedings involving claims of employment discrimination. This is not to say that only lawyers are qualified to serve as advocates in arbitration proceedings; quite the contrary, because it is clear that there are many outstanding arbitration advocates on both sides of the table who have never had any legal training. However, it must be assumed that lawyers, because of their professional training, should be better able than nonlawyers to identify and argue about "legal" issues that might be relevant in employment discrimination cases.

The survey results indicate that lawyers represented both the union and the company in only 173 out of 328 employment discrimination cases heard during the period from February 1974 until February 1975 (*i.e.,* 53 percent of all of the cases). Companies were represented by legal counsel in 76 percent of the cases; unions were represented by legal counsel in only 53 percent of the cases. On the basis of these data, and if it can be assumed that legal representation may be an advantage in an arbitration case involving claims of employment discrimination, then it may be concluded that employee-grievants are at least somewhat disadvantaged in approximately 25 percent of these cases where the company has legal representation and the union does not.

One way to overcome this problem might be to allow grievants to appear with their own legal counsel in arbitration cases involving claims of employment discrimination. However, the survey results indicate that this approach was followed in only 9 percent (30 out of 328) of the cases involving claims of employment discrimination heard in arbitration.

It also might be argued that, since employee-grievants are not foreclosed by arbitration from pursuing their legal remedies under Title VII, it should not matter whether they are given

legal representation in arbitration. However, the survey results suggest that many of the employment discrimination cases that are decided in arbitration do not subsequently get reheard by the EEOC or by the courts. The evidence received from the arbitrators who responded to the survey reveals that employment discrimination charges had been filed with the EEOC or the courts in only 25 percent (84 out of 328) of all of the employment discrimination cases that were heard in arbitration. This figure may be deceptively low, either because some of the arbitrator respondents were unaware of all of the cases in which grievants filed charges under Title VII or because such charges were filed subsequent to the conclusion of the arbitration proceeding. However, it is nevertheless noteworthy that the number of duplicate charges (involving complaints of employment discrimination which are heard in arbitration and in the courts) does not appear to be nearly as high as some persons have suggested. If these figures are accurate, then they certainly negate the argument advanced by those who oppose the decision in *Gardner-Denver* on the ground that an employee should not get "two bites at the same apple."

Several other important problems were raised in connection with the capacity of the arbitration process to deal with legal issues in employment discrimination cases. One such problem has to do with the nature of the substantive issue that is actually decided by an arbitrator in a case involving a claim of employment discrimination. On this score, it must be recognized that an arbitrator cannot resolve a legal issue, or give due consideration to the relevant law, if the matter is not raised as an issue in arbitration. On this point, the survey results indicate that the relevance of Title VII was raised in only 31 percent (103) of the employment discrimination cases heard in arbitration. Furthermore, company officials argued that the legal precedents under Title VII were relevant and should be considered by the arbitrator in only 12 percent of the cases, and union officials argued in favor of relevance in only 22 percent of all of the employment discrimination cases heard in arbitration.

Another like problem arises because arbitrators only infrequently rely on Title VII and other relevant legal precedents when deciding employment discrimination cases. The evidence from the survey reveals the following: The responding arbitrators

indicated that they had actually relied on Title VII legal precedents in only 12.5 percent of all of the employment discrimination cases heard in arbitration; and legal precedents were actually cited in these arbitrators' decisions in only 11 percent of all of the employment discrimination cases heard in arbitration.

Although the survey data indicate that the responding arbitrators ruled in favor of employee-grievants in 34 percent of the cases involving claims of employment discrimination, the arbitrators in these cases usually avoided "legal" issues. In instances in which the grievants won, the arbitrator found that the company or union was guilty of discrimination *under the contract* in only 48 percent of the cases and guilty of discrimination *under the law* in only 21 percent of the cases; no information was furnished with respect to the remaining 31 percent of the cases.

In Footnote 21 in the *Gardner-Denver* decision, the Supreme Court stated that "where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight." Two of the measures of "full consideration" identified by the Court were "degree of procedural fairness" and "adequacy of the record with respect to the issue of discrimination." Some of the data gleaned from the survey speak to these two considerations.

The evidence from the survey indicates that official transcripts were made in only 43 percent (140) of all of the employment discrimination cases heard in arbitration. Furthermore, the evidence reveals that prehearing and/or posthearing briefs were submitted by both parties in only 52 percent (172) of all of the employment discrimination cases heard in arbitration.

It is also noteworthy that most of the employment discrimination cases decided in arbitration were resolved on the merits. This is clear from the facts that show that in only 11 cases (3.3 percent) did the company or the union argue that the claim of discrimination was not arbitrable under the collective bargaining agreement and in only 16 (4.8 percent) of the cases did the parties' collective bargaining agreement explicitly exclude discrimination claims from arbitration. However, only 25 percent of the responding arbitrators who heard and decided employment discrimination cases last year indicated that they had advised grievants of their statutory rights pursuant to Title VII. While there

is no legal requirement that such advice be given by the arbitrator, it would be clear that many grievants who are not so advised, and who are otherwise not represented by counsel, may not realize that arbitration is not the forum of last resort for the resolution of employment discrimination cases.

Finally, and most significantly, it is somewhat amazing to note that many of the responding arbitrators suggested that the quality of the evidence given in employment discrimination cases heard in arbitration was deficient. On this point, the survey questionnaire asked the arbitrators: "In how many of these [employment discrimination] cases did you feel that the record was complete enough so that all of the legal issues under Title VII could have been resolved in a court of law?" In response to this question, the responding arbitrators indicated that the record was complete in only about 55 percent of all of the employment discrimination cases heard in arbitration. This fact alone would surely suggest that the courts ought to be very careful before they begin to accord great weight to arbitration opinions involving claims of employment discrimination. This is especially so in light of the evidence here, which indicates that (1) no transcript of the proceedings is made in more than half of the arbitration cases involving claims of employment discrimination, and (2) most of the arbitrators who have heard and decided these cases have admittedly declined to consider and resolve "legal" issues.

Arbitrators' Views Concerning the Role of the Arbitrator in Deciding Employment Discrimination Cases

Whether or not arbitrators are professionally competent to decide legal issues in cases involving claims of employment discrimination, it still must be realized that many arbitrators are loath to decide such issues. For many years, various members of the National Academy of Arbitrators have debated the question dealing with the proper role of the arbitrator in handling "legal" issues in arbitration cases. Several theories have been advanced, most notably by Bernard Meltzer, Robert Howlett, Richard Mittenthal, Theodore St. Antoine, and Michael Sovern. All of these theories were ably summarized by Dean Sovern in a paper entitled "When Should Arbitrators Follow Federal Law?" that was delivered during the 1970 meeting of the National Academy of

Arbitrators.[21] While these debates have been healthy academic exercises, they really have not told us much about what arbitrators are actually doing as a group (or what they feel that they ought to be doing) when presented with legal issues in connection with claims of employment discrimination in arbitration. One of the reasons for the current survey was to get better and more accurate empirical data on this subject. The results of the survey on this point are interesting but not surprising.

Nearly two thirds of the responding arbitrators stated that they believed that an arbitrator has no business interpreting or applying a public statute in a contractual grievance dispute. (However, nearly one half of the responding arbitrators did indicate that an arbitrator should be free to *comment* on the relevant law if it appears to conflict with the collective bargaining agreement.) Only one third of all of the responding arbitrators indicated that they believed a collective bargaining agreement must be read to include by reference all public law applicable thereto. In other words, most of the arbitrators rejected the view that an arbitrator should always apply constitutional, statutory, or common law principles to aid in the resolution of contractual grievance disputes.

Nearly all of the responding arbitrators who believed that an arbitrator has no business interpreting or applying a public statute in a contractual grievance dispute conceded that there were certain exceptions to this rule. Of these respondents, 85 percent agreed that an arbitrator may consider and interpret public law in order to avoid compelling a union or a company to do something that is *clearly* unlawful. Ninety-five percent of them agreed that an arbitrator may properly refer to the applicable law if it can be found that the parties have intentionally adopted a contract clause pursuant to an existing statute with the object of incorporating the body of public law into the contract. Finally, 97 percent of these respondents agreed that an arbitrator should consider public law when the parties have, by submission, conferred jurisdiction upon him or her to decide the contract issue in light of the applicable federal or state law.

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[21] Michael I. 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, eds. Gerald G. Somers and Barbara D. Dennis (Washington, BNA Books, 1970), pp. 29-47.

Although most of the responding arbitrators appear to accept the view that an arbitrator generally has no business interpreting or applying a public statute in a contractual grievance dispute, except in limited and exceptional circumstances, the survey results on this point are nevertheless anomalous in certain respects. More than one third of all of the respondents disagreed with the result in the *Gardner-Denver* decision. This figure by itself is not surprising. However, nearly 30 percent of all of the respondents who stated that an arbitrator has no business interpreting or applying public law in a contractual grievance dispute also stated that they disagreed with the opinion in *Gardner-Denver.* This result would appear to be inherently illogical.

Most of the respondents (90 percent) who disagreed with the result in *Gardner-Denver* felt that they were professionally qualified to resolve legal issues in employment discrimination cases. This surely is not surprising, nor is it surprising that these persons would prefer some kind of deferral rule as opposed to the principles stated in the *Gardner-Denver* decision. However, it is curious that nearly 20 percent of the responding arbitrators who stated that they were *not* professionally competent to handle legal issues in employment discrimination cases also stated that they disagreed with the decision in *Gardner-Denver.* This position is surely inherently illogical.

Not only did a substantial majority of the responding arbitrators who disagreed with the decision in *Gardner-Denver* indicate that they felt professionally competent to decide legal issues, but 86 percent of this group also stated that they had read judicial opinions involving claims of employment discrimination and 60 percent of the group stated that they regularly read labor advance sheets to keep abreast of current developments under Title VII. Taken together, these statistics not surprisingly suggest that those persons who are most familiar with the law under Title VII are more inclined to disagree with the result in *Gardner-Denver.*

However, these findings do not negate the data that reveal that only 71 percent of the responding arbitrators felt that they were professionally competent to decide legal issues in cases involving claims of employment discrimination; only 52 percent of the responding arbitrators indicated that they regularly read labor advance sheets to keep abreast of current developments under Title VII; and only 14 percent of the responding arbitrators felt confi-

dent that they could accurately define "bona fide occupational qualification," "reasonable accommodation/undue hardship," and "preferential treatment" and explain the relevant law under Title VII with respect to each of these legal concepts.

Regional Differences

The evidence from the survey reveals some minor, but no significant, distinctions in the attitudes expressed among the arbitrators from different geographic regions in the United States. For example, more than 50 percent of the responding arbitrators from every region in the country felt that they were professionally competent to decide legal issues in employment discrimination cases: The figures ranged from 94 percent in Michigan, 91 percent in the Midwest, 86 percent in the Southeast, 74 percent in the Southwest (including California and Hawaii), 67 percent in the Northeast, and 50 percent in the Northwest (including only Idaho, Washington, and Oregon).

Likewise, the proportional number of employment discrimination cases heard in arbitration appeared to be evenly divided throughout the various regions in the country. Of the respondents from the northeast region, 54 percent indicated that they had heard employment discrimination cases in arbitration during the past year; 50 percent of the respondents from the Southeast and the Northwest had heard such cases; 44 percent of the respondents from the Midwest and the Southwest had heard discrimination cases; and 67 percent of the respondents from Michigan had decided employment discrimination cases.

It is interesting that nearly 53 percent of the respondents from the midwest region indicated that they did not agree with the Supreme Court decision in *Gardner-Denver*. This percentage was nearly 20 points higher than the next highest region. The figure is not surprising, however, when it is coupled with the fact that 91 percent of all of the respondents in the Midwest felt that they were professionally competent to decide issues in cases involving claims of employment discrimination.

Conclusion

There is nothing wrong with arbitrators' deciding cases involving claims of race, sex, national origin, or religious discrimina-

tion. For, as the Supreme Court noted in *Gardner-Denver,* "where the collective-bargaining agreement contains a nondiscrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee." But it should not be assumed that merely because an arbitrator has heard a case involving a claim of employment discrimination that he has also resolved the underlying "legal" issues that may be posed. The data recovered from the survey strongly militate against any such conclusion.

The evidence as to whether and how many arbitrators are professionally competent to decide legal issues in cases involving claims of employment discrimination is at best mixed. Furthermore, even assuming, *arguendo,* that most arbitrators are professionally competent to decide such issues, the nature of the arbitration process often will not allow for full and adequate consideration of an employee's Title VII rights. Finally, the evidence from the survey suggests that even when arbitrators are professionally competent to decide legal issues and when the arbitration process is adequate to allow for full consideration of legal questions arising pursuant to Title VII, still many arbitrators believe that they have no business interpreting or applying a public statute in a contractual grievance dispute.

Given all of these considerations, the courts should be very wary about reading *Gardner-Denver* too expansively in a manner that might well result in the development of de facto schemes of deferral that effectively foreclose full and complete judicial resolution of employment discrimination claims.

Some of the arbitrators who responded to the survey, and who indicated that they were opposed to the decision in *Gardner-Denver,* argued that they were as competent as many judges to decide legal issues arising pursuant to Title VII. Whether or not this is true is really beside the point. One responding arbitrator put the problem in proper perspective with the following comment: "Subjectively and privately I feel as well qualified as many of the judges writing the decisions; but I would not publicly make this claim, nor would I be eager to assume that responsibility unless the parties explicitly so requested."

Another responding arbitrator commented that the *Gardner-Denver* decision

"permits the arbitrator to confine himself to interpreting the collective bargaining agreement with less strain on his conscience, particularly where the agreement and the law are not congruent, because the grievant now clearly has an alternative tribunal which is not confined to the terms of the collective bargaining agreement. I think this will tend to make many cases much less elaborate since there is no longer any question of meeting all the standards which would be relevant if deferral to arbitration by the courts or EEOC was a possibility."

Arbitrators, unlike judges, are accountable only to the parties and their decisions are rarely subject to close judicial review. The simple fact is that arbitrators are not responsible for developing principles of public law. As the Court in *Gardner-Denver* noted, "the specialized competence of arbitrators pertains primarily to the law of the shop, not the law of the land." Therefore, even if some arbitrators are better qualified than some judges to decide certain legal issues, this still would not militate in favor of a deferral rule in cases involving claims of employment discrimination.

The proper role of the arbitrator, as distinguished from arbitral competence, is the real reason why the Supreme Court should not dilute the *Gardner-Denver* decision in favor of any deferral rule. This point was best stated by Dean Shulman, in his oft-quoted article, "Reason, Contract and Law in Labor Relations," [22] as follows:

"A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of industrial self-government created by and confined to the parties. He serves their pleasure only, to administer the rule of law established by their collective agreement."

A modern-day version of this same idea was stated by one of the arbitrators who responded to the survey and made the following comments:

"A national public policy on discrimination should and must be developed, under statutes, by public administrative quasi-judicial agencies and courts; not by private persons like me, selected by private parties to decide particular disputes which *they* have. A consistent and uniform body of 'law,' binding on the nation should not

[22] 68 *Harv. L. Rev.* 999, 1016 (1955).

be the creation of private decision-makers but of public instrumentalities. Arbitration of labor-management disputes has been successful because of its restricted role. Freight it with the responsibility of law enforcement and the interpretation of statutes and great harm will be done to the institution as it presently exists.

"[The *Gardner-Denver* decision] hasn't changed my thinking at all. I was always confident that when the question reached the Supreme Court, an arbitrator's decision on the application of a statute would not (and should not) be binding and final as his decision on the private disputes of parties under their contract. Those whose bowels are in an uproar over *Gardner-Denver* are acting in accordance with Maxim #244 of Publilius Syrus: 'The end justifies the means.' Occasionally this may be so; but there is no insufficient justification in this case. The Court has decided wisely."

Appendix A

RESULTS FROM SURVEY QUESTIONNAIRE DEALING WITH ARBITRATION OF EMPLOYMENT DISCRIMINATION CASES SINCE THE ISSUANCE OF THE GARDNER-DENVER DECISION

1. Date when survey questionnaire was sent out: February 3, 1975
2. Deadline for survey replies: April 1, 1975
3. Sample group: All current United States members of the National Academy of Arbitrators
4. Total number of surveys sent out: 409
5. Total number of responses: 200 (49 percent)
6. Responses by region:

Region	*No. of Surveys Sent Out*	*No. of Responses from Region (% of Total Responses)*	*Percentage of Returns from the Region*
Northeast	147	70 (35%)	47.6%
Southeast	78	31 (15.5%)	39.7
Northwest (Idaho, Washington, and Oregon)	7	4 (2%)	57
Midwest	68	37 (18.5%)	54.4
Southwest (including California and Hawaii)	77	37 (18.5%)	48
Michigan	32	20 (10%)	62.5
Unidentified	—	1 (.5%)	
	409	200 (100%)	48.8%

7. Number of years of arbitration experience among respondents:	Mean—21 years Median—22 years Range—4-40 years
8. Average age of respondents:	Mean—49 years Median—51 years
9. Full-time vs. part-time status among respondents:	Full-time—61 (33%) Part-time—123 (66%)
10. Professional training of respondents:	Lawyers—108 (54%) Economists—58 (29%) Political Scientists —14 (7%) Industrial Relations—54 (27%) Business—10 (5%) Other—11 (5.5%)
11. Number of respondents who have read *judicial* opinions involving claims of discrimination under Title VII:	Yes—154 (77%) No—31 (16%) NA—15 (7%)
12. Number of respondents who regularly read labor advance sheets to keep abreast of current developments under Title VII:	Yes—105 (52.5%) No—79 (39.5%) NA—16 (8%)
13. Number of respondents who believe that they can define "bona fide occupational qualification," "reasonable accommodation/ undue hardship," and "preferential treatment" (as legal principles arising under Title VII) without doing any research:	Can accurately define terms and explain the relevant law —28 (14%) Could make a good "educated guess" —60 (30%) Would prefer to research the question—96 (48%) NA—16 (8%)
14. Respondents' viewpoints concerning the role of the arbitrator in handling employment discrimination cases:	
a. An arbitrator has no business interpreting or applying a public statute in a contract grievance dispute. If there is an irreconcilable conflict between Title VII and the terms of an agreement, it is the arbitrator's duty to abide by the contract and ignore the law.	28 (14%)
b. An arbitrator has no business interpreting or applying a public statute or law in a contract grievance dispute. How-	

ever, an arbitrator should be free to comment on the relevant law, especially if it appears to conflict with the contract. 96 (48%)

c. A collective bargaining contract must be read to include by reference all public law applicable thereto; hence, an arbitrator should always apply constitutional, statutory, and common law to aid in the resolution of any grievance dispute. 53 (26.5%)

d. No choice. 4 (2%)

e. A different choice other than (a), (b), or (c). 3 (1.5%)

15. Number of respondents who selected (a) or (b) above (and thus agreed that an arbitrator has no business interpreting or applying a public statute in a contract grievance dispute) who were willing to modify their positions by one of the following three exceptions:

a. An arbitrator may consider and interpret public law in order to avoid compelling a company or union to do something that is clearly unlawful. Yes—105/124 (85%) No—10/124 (8%)

b. If it can be found that the parties have intentionally adopted a contract clause pursuant to an existing statute, with the object of incorporating the body of public law into the contract, then the arbitrator may properly refer to the applicable statute and any regulations or decisions thereunder in attempting to ascertain the meaning of the contract clause in issue. Yes—118/124 (95%) No—1/124 (.8%)

c. An arbitrator should consider public law when the parties have, by submission, conferred jurisdiction upon him or her to decide the contract issue in light of applicable federal or state law. Yes—120/124 (97%) No—2/124 (1.5%)

16. Number of respondents who heard employment discrimination cases during the 12 months between February 1, 1974, and February 1, 1975: Yes—93 (46.5%) No—107 (53.5%)

17. Total number of employment discrimination cases heard by respondents: 328

18. Average number of employment discrimination cases heard by all respondents: 1.8

19. Average number of employment discrimination cases heard by respondents who decided employment discrimination cases: 3.52

20.	Number of cases involving race discrimination:	231 (70%)
21.	Number of cases involving sex discrimination:	86 (26%)
22.	Number of cases involving national origin discrimination:	16 (4.8%)
23.	Number of cases involving religious discrimination:	5 (1.5%)
24.	Number of cases in which there were lawyers representing both the union and the company:	173 (52.7%)
25.	Number of cases in which the company was represented by legal counsel:	251 (76.5%)
26.	Number of cases in which the union was represented by legal counsel:	174 (53%)
27.	Number of cases in which the grievant was represented by legal counsel who was not otherwise associated with the union or the company:	30 (9%)
28.	Number of cases in which the grievant had filed a charge of discrimination with the EEOC, or a state civil rights agency or in court:	84 (25%)
29.	Number of cases in which the issue of relevance of Title VII was raised:	103 (31%)
30.	Number of cases in which the company argued that the legal precedents under Title VII were relevant and should be considered by the arbitrator:	42 (12%)
31.	Number of cases in which the union argued that the legal precedents under Title VII were relevant and should be considered by the arbitrator:	72 (22%)
32.	Number of cases in which the company argued that the legal precedents under Title VII were irrelevant and should not be considered by the arbitrator:	45 (13.7%)
33.	Number of cases in which the union argued that the legal precedents under Title VII were irrelevant and should not be considered by the arbitrator:	18 (5.4%)
34.	Number of cases in which the arbitrator actually relied on Title VII precedent in reaching his or her opinion:	41 (12.5%)
35.	Number of cases in which the arbitrator actually cited legal precedents under Title	

VII in the body of his or her arbitration decision:	37 (11%)
36. Number of cases where a transcript of the proceedings was made:	140 (42.6%)
37. Number of cases in which the arbitrator felt that the record was complete enough so that all of the legal issues under Title VII could have been resolved in a court of law:	179 (54.5%)
38. Number of cases in which the arbitrator actually ruled in favor of the grievant:	111 (33.8%)
39. Number of cases in which the arbitrator actually found that the company and/or the union was guilty of race, sex, religious, or national origin discrimination which was prohibited by the collective bargaining agreement:	53/111 (48%)
40. Number of cases in which the arbitrator found the company and/or the union was guilty of race, sex, national origin, or religious discrimination as prohibited by Title VII:	23/111 (20.7%)
41. Number of cases in which both parties submitted prehearing and/or posthearing briefs:	172 (52.4%)
42. Number of cases in which the company or the union argued that the claim of discrimination was not arbitrable under the collective bargaining agreement:	11 (3.3%)
43. Number of cases where the parties' contract explicitly excluded discrimination claims from arbitration:	16 (4.8%)
44. Number of respondents who feel that they are professionally competent to decide *legal* issues in cases involving claims of race, sex, national origin, or religious discrimination:	Yes—143 (71.5%) No—32 (16%) NA—25 (12.5%)
45. Number of respondents who agree with the judicial opinion rendered in the *Gardner-Denver* decision:	Yes—74 (37%) No—57 (28.5%) Qualified yes—22 (11%) No opinion—47 (23.5%)
46. Number of respondents who are now more reticent about deciding employment discrimination cases:	Yes—23 (11.5%) No—125 (62%) NA—52 (26%)
47. Number of arbitrators who are now less reticent about deciding employment discrimination cases:	Yes—5 (2.5%) No—127 (63.5%) NA—68 (34%)

48.	Number of respondents who advised grievants of their statutory rights before the issuance of the *Gardner-Denver* opinion:	Yes—30 (15%) No—120 (60%) NA—50 (25%)
49.	Number of respondents who would now (since the issuance of the *Gardner-Denver* opinion) advise grievants of their statutory rights:	Yes—48 (24%) No—100 (50%) NA—52 (26%)
50.	Number of respondents who find that they now spend more time with "legal" issues in employment discrimination cases since the issuance of the *Gardner-Denver* opinion:	Yes—31 (15%) No—78 (39%) NA—91 (45.5%)
51.	Number of respondents who find that they spend less time with "legal" issues in employment discrimination cases since the issuance of the *Gardner-Denver* opinion:	Yes—2 (1%) No—98 (49%) NA—100 (50%)
52.	Number of respondents who have found that the parties tend to be better prepared in employment discrimination cases since the issuance of the *Gardner-Denver* opinion:	Yes—25 (12.5%) No—62 (31%) NA—113 (56.5%)

Appendix B

SURVEY QUESTIONNAIRE
ARBITRATION OF EMPLOYMENT DISCRIMINATION CASES SINCE THE ISSUANCE OF GARDNER-DENVER

1. How long have you been arbitrating grievance disputes? ____
2. What is your age? ____
3. Do you arbitrate on a full-time or part-time basis? (check one)

   Full-time ____ Part-time ____
4. If you arbitrate on a part-time basis, what work do you engage in during the remainder of your time? ____
5. What is your professional training?

   Lawyer ____ Industrial Relations ____
   Economist ____ Business ____
   Political Scientist ____ Other ____
6. Have you read any *judicial* opinions involving claims of discrimination under Title VII?

   Yes ____ No ____
7. Do you regularly read labor advance sheets (published by BNA or CCH or the like) to keep abreast of current developments under Title VII?

   Yes ____ No ____
8. "Bona fide occupational qualification," "reasonable accommodation/undue hardship," and "preferential treatment" are three

concepts which are frequently discussed in connection with legal principles arising under Title VII. Could you, *without doing any research,* define each one of these terms and accurately explain the current status of the law under Title VII with respect to each of these concepts? (check one)

a. I feel confident that I could accurately define each of the terms and explain the relevant law. ____
b. I could make a *good* "educated guess," but I would not certify my answer as being accurate. ____
c. I would prefer to research the question before answering. ____

9. If you had to make a choice, which one of the following viewpoints would you endorse? (check only one)

a. An arbitrator has no business interpreting or applying a public statute in a contract grievance dispute. If there is an irreconcilable conflict between Title VII and the terms of an agreement, it is the arbitrator's duty to abide by the contract and ignore the law. ____
b. An arbitrator has no business interpreting or applying a public statute or law in a contract grievance dispute. However, an arbitrator should be free to comment on the relevant law, especially if it appears to conflict with the contract. ____
c. A collective bargaining contract must be read to include by reference all public law applicable thereto; hence, an arbitrator should always apply constitutional, statutory, and common law to aid in the resolution of any grievance dispute. ____

10. If you marked choice (a) or (b) above, please indicate whether you accept any of the following modifications:

	Yes	No
a. An arbitrator may consider and interpret public law in order to avoid compelling a company or union to do something that is *clearly* unlawful.	____	____
b. If it can be found that the parties have *intentionally* adopted a contract clause pursuant to an existing statute, with the object of incorporating the body of public law into the contract, then the arbitrator may properly refer to the applicable statute and any regulations or decisions thereunder in attempting to ascertain the meaning of the contract clause in issue.	____	____
c. An arbitrator should consider public law when the parties have, *by submission,* conferred jurisdiction upon him or her to decide the contract issue in light of applicable federal or state law.	____	____

11. During the past twelve months (since Feb. 1, 1974), how many cases have you heard or decided involving claims of race, sex, national origin, or religious discrimination? ____

(The following questions (12-35) assume that you have heard some cases involving claims of race, sex, religious, or national origin discrimination during the preceding twelve months. In answering these questions, please rely solely on your experiences during the past twelve months. Please be sure to answer questions 36-38 even if you do not answer questions 12-35.)

12. How many of these cases have involved race discrimination? ____
13. How many of these cases have involved sex discrimination? ____
14. How many of these cases have involved national origin discrimination? ____
15. How many of these cases have involved religious discrimination? ____
16. In how many of these cases have there been lawyers representing both the union and the company? ____
17. In how many of these cases was the company represented by legal counsel? ____
18. In how many of these cases was the union represented by legal counsel? ____
19. In how many of these cases was the grievant represented by legal counsel who was not otherwise associated with the union or the company? ____
20. In how many of these cases had the grievant already filed a charge of discrimination with the EEOC, or a state civil rights agency or in court? ____
21. In how many cases was the issue of the relevance of Title VII raised? ____
22. In how many cases did the *company* argue that the legal precedents under Title VII were relevant and should be considered by the arbitrator? ____
23. In how many cases did the *union* argue that the legal precedents under Title VII were relevant and should be considered by the arbitrator? ____
24. In how many cases did the *company* argue that the legal precedents under Title VII were irrelevant and should not be considered by the arbitrator? ____
25. In how many cases did the *union* argue that the legal precedents under Title VII were irrelevant and should not be considered by the arbitrator? ____
26. In how many of these cases did you actually rely on Title VII legal precedent in reaching your opinion? ____
27. In how many of these cases did you actually cite legal precedents (arising under Title VII) in the body of your arbitration decision? ____
28. In how many of these cases was a transcript of the proceedings made? ____
29. In how many of these cases did you feel that the record was

complete enough so that all of the legal issues under Title VII could have been resolved in a court of law? ——

30. In how many of these cases did you actually rule in favor of the grievant? ——
31. In how many of these cases did you actually find that the company and/or union was guilty of race, sex, religious, or national origin discrimination which was proscribed by the contract? ——
32. In how many of these cases did you actually find that the company and/or union was guilty of race, sex, national origin, or religious discrimination as proscribed by Title VII? ——
33. In how many of these cases did both parties submit prehearing and/or posthearing briefs? ——
34. In how many of these cases did the company or the union argue that the claim of discrimination was not arbitrable under the contract? —— (Explain.) ——————————
35. Have you been involved in any cases during the past twelve months where the parties' contract explicitly excluded discrimination claims from arbitration? If so, how many? ——
36. Do you feel professionally competent to decide *legal* issues in cases involving claims of race, sex, national origin, or religious discrimination? Yes —— No ——
37. Do you agree with the result in *Gardner-Denver?* If not, please explain your thinking. ——————————
38. Has the *Gardner-Denver* opinion caused you to change your thinking about the arbitration of employment discrimination cases? If so, please explain by answering "yes" or "no" to the following questions:

	Yes	No
Are you more reticent about deciding employment discrimination cases?	——	——
Are you less reticent about deciding employment discrimination cases?	——	——
Before *Gardner-Denver,* did you ever advise grievants of their statutory rights?	——	——
Since *Gardner-Denver,* do you (or would you) advise grievants of their statutory rights?	——	——
Since *Gardner-Denver,* do you find that you spend more time with "legal" issues in discrimination cases?	——	——
Since *Gardner-Denver,* do you find that you spend less time with "legal" issues in discrimination cases?	——	——
Have you found that the parties tend to be better prepared in discrimination cases since *Gardner-Denver?*	——	——

Please explain any other ways that the decision may have changed your thinking about the arbitration of discrimination cases: ——————————