CHAPTER 3

ARBITRATION AND DISCRIMINATION

I. ARBITRATION OF EMPLOYMENT DISCRIMINATION CASES: A PROSPECTUS FOR THE FUTURE

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Some would argue that broadening the scope of arbitration to encompass final resolution of employment discrimination claims would make the grievance-arbitration process the most efficient and expeditious vehicle for the resolution of Title VII claims.[1] This premise is based upon the consideration that there is an increasing need to accommodate the mandate of Title VII through arbitration in order to accord aggrieved employees quick resolution of their claims of discrimination. It is advanced that the continuously increasing caseload pending administrative processing before the Equal Employment Opportunity Commission and the lengthy delays and expense experienced through the alternative routes of litigation under Title VII and Sections 1981 and 1983 are manifestations of the ineffectiveness of existing procedures for the enforcement of federally secured rights to equal employment opportunity.

Since *Alexander* v. *Gardner-Denver Co.*,[2] the proponents of the use of arbitration as a primary dispute mechanism for employment discrimination cases argue that the employee's rights to Title VII civil action, after resort to the grievance-arbitration process—that is, after arbitration has resulted in an adverse determination or an agreement which the aggrieved party believes has

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1 Winn Newman, *Post-Gardner-Denver Developments in the Arbitration of Discrimination Claims*, in ARBITRATION—1975, Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Barbara D. Dennis and Gerald G. Somers (Washington: BNA Books, 1976), at 36; Gerald Aksen, *Post-Gardner-Denver Developments in Arbitration Law*, in ARBITRATION—1975, at 24.

2 415 U.S. 36, 7 FEP Cases 81 (1974).

failed to redress totally statutory rights guaranteed under Title VII—will discourage employers from entering into arbitration settlements. This argument rests on the supposition that, if the individual whose claim is cognizable under Title VII is not bound by the results of the arbitral award, the effectiveness of arbitration as a form of industrial self-government and as a dispute-resolution mechanism will be seriously damaged. Employers, it is advanced, will not be willing to settle claims during arbitration if the claim is subject to relitigation under Title VII in the federal courts. Finally, it is suggested that, since the arbitrator is a specialist in the "law of the shop" and since many discrimination cases involve interpretation of the contract, it is more desirable to have the dispute resolved by the parties through the grievance procedure than by the court. To prevent the diminution of the arbitration process, it is therefore proposed that arbitrators be given authority by the parties to act as judges in order that Title VII discrimination may be finally resolved in the collective bargaining process.[3]

On the other hand, there are others who emphatically reject the use of the grievance-arbitration procedure as a forum for the determination of both contract and legal rights.[4] In their view, to broaden the traditionally narrow scope of the arbitration procedure to accommodate the settlement of discrimination claims under Title VII and to further the public policy against discrimination in employment would destroy the very essence of the concept of industrial self-government by unduly encumbering the procedure and subjecting arbitral decisions to judicial review. Moreover, it is argued that to do so would be to repose in the hands of industrial specialists the enforcement of legal rights and public-policy considerations which have been expressly reserved to the judiciary. Even if arbitrators are professionally competent to decide legal issues, some opponents of the use of the grievance-arbitration procedure urge that the nature of the process will not allow for full and adequate consideration or enforcement of Title VII claims. Furthermore, the policy of arbitral deference would be impossible to maintain because the entire arbitration process would entail enforcement of public policies broader than

[3] Aksen, *supra* note 1.

[4] Harry T. Edwards, "Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives" (1976); David E. Feller, "The Impact of External Law upon Arbitration," prepared for a conference on the future of arbitration, sponsored by the American Arbitration Association, 1975.

those contained in the contract. Underlying this ongoing controversy, therefore, remains the issue of whether arbitration is appropriate for the resolution of discrimination cases within the context of Title VII and, if not, what the future role of arbitration in such cases may be.

It is undisputed that arbitration has a role to play in accommodating the overall purposes of Title VII, as an alternative forum for the settlement of discrimination cases under the terms of the collective bargaining agreement, particularly where the claim involves strictly an interpretation of the contract and the question of whether the terms of that contract were discriminatorily applied to an individual. However, for the reasons stated herein, to broaden the scope of the grievance process to encompass the interpretation of Title VII and the settlement of both contractual and legal rights of the employee would be entirely inconsistent with the underlying purposes of Title VII.

Title VII prohibits discrimination based on race, color, religion, sex, or national origin in all aspects of employment. It is clear from both the provisions of the Act and its legislative history that Congress, in a national effort to ensure equal employment opportunity, intended to preserve existing rights against employment discrimination and to emphasize the continued importance of each of the various institutions that enforce them.[5] However, the enforcement mechanism for the equal employment opportunity provisions of Title VII were carefully devised by Congress to accord to the aggrieved individual an administrative remedy of conciliation and voluntary settlement, as well as quick access to judicial enforcement. Congress did so because it perceived as paramount the individual's right to redress under the Act. As the Conference Committee's Section-by-Section Analysis of the 1972 amendments to the Act makes clear, Congress deemed it of the utmost importance to preserve to the private party a right of civil action to ensure that "all avenues be left open for quick and effective relief." [6] Further, the Committee's analysis makes it apparent that in order to make sure that the person aggrieved did not have to endure lengthy delays if the Commission

[5] Hebert and Resichel. *Title VII and the Multiple Approaches to Eliminating Employment Discrimination*, 46 N.Y.U.L. REV. 499, 458–61 (1971).

[6] "Section-by-Section Analysis," 118 CONG. REC. 7168, reproduced at p. 1857 of *Legislative History of the Equal Employment Opportunity Act of 1972*, U.S. Senate, Committee on Labor and Public Welfare, Subcommittee on Labor, 92d Cong., 2d Sess. (1972).

failed to act with due diligence and speed in the processing of the administrative charge, the private party could "elect to pursue his or her own remedy under Title VII in the courts." [7] The private individual's right of action was clearly intended "to remain an essential means of obtaining enforcement of Title VII," not only to redress personal injuries, but also as a means of vindicating an important congressional policy against discriminatory practices.[8] In creating this enforcement mechanism, Congress had hoped that charges would be processed by the Commission within 180 days of filing or as soon as practical. It was not unaware, however, of the problem of the Commission's increasing caseload; [9] thus, Section 706 (f) (1) of the 1972 amendments provided that if the Commission had failed to act upon a charge upon the expiration of 180 days from its filing, the aggrieved employee was to be notified and, within 90 days from receipt of that notice, had a right to institute civil action.[10] To emphasize further the importance of this private right of action, Congress provided for expeditious processing of all Title VII suits.[11]

In view of the foregoing analysis of the provisions of the Act, it is clear that, though Congress was concerned with the expeditious processing of Title VII claims, it viewed the private right of action to be of the utmost importance. It is further manifest that Congress intended that that right of action exist concurrently with whatever other alternative remedies an aggrieved party might have available.[12]

It is well settled that, although the subject of Title VII cases may overlap the grievance-arbitration procedure, Title VII rights are distinctly separate and legally independent from contractual rights under the nondiscrimination clause of the bargaining

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[7] *Id.*, at 1857; *see also EEOC* v. *Kimberly-Clark Corp.*, 511 F.2d 1352, 1358, 10 FEP Cases 1352 (6th Cir. 1975); *EEOC* v. *E.I. duPont de Nemours & Co.*, 516 F.2d 1297, 1300–1301, 10 FEP Cases 916 (3d Cir. 1975); *Tuft* v. *McDonnell Douglas Corp.*, 517 F.2d 1301, 1305–1306, 10 FEP Cases 929 (8th Cir. 1975).

[8] *Supra* note 2, at 45.

[9] *See Legislative History, supra* note 6, at 63–65, 72, 414–15, 495.

[10] Section 706 (f) (1), 42 U.S.C. 2000e–5 (f) (1) (Supp. II).

[11] Section 706 (f) (5), 42 U.S.C. 2000e (f) (5).

[12] *See* Senator Clark's interpretive memorandum in which it was explained that "Nothing in Title VII or anywhere else in this bill affects the rights and obligations under the NLRA or the Railway Labor Act. Title VII is not intended to and does not deny to any individual rights and remedies which he may pursue under other federal and state statutes." 110 CONG. REC. 7207 (1964). *See also* S. REP. No. 415, at 24, 92d Cong., 1st Sess (1971) for the 1972 Act in which it is explained that "provisions regarding the individual's right to sue under Title VII, nor any of the provisions of this bill are meant to affect existing rights granted under other laws."

agreement. It is equally clear that the assertion of a Title VII claim, after submission to arbitration, is not foreclosed by the application of the doctrine of election of remedies, collateral estoppel, res judicata, waiver, or the policy of judicial deference to arbitral decisions.[13] In applying the broad mandate of Title VII to recent cases, the Supreme Court has sought to strike a balance between seemingly competing and overlapping rights and to accommodate the federal policy against discrimination in employment practices. The need for such an accommodation is readily discernible when the dissimilarities inherent in both the rights and the procedures by which each is enforced are analyzed.

The arguments advanced by the proponents of the use of the arbitration procedure for the expeditious and final resolution of Title VII disputes will not withstand examination.

There remains little doubt that the national labor policy, which has as its underlying purpose the promotion of labor peace through the encouragement of the practice and procedure of collective bargaining and the negotiation of the terms and conditions of employment,[14] embodies nondiscrimination as a matter of highest priority.[15] The national policy of nondiscrimination is thus an appropriate subject of the grievance-arbitration process, which constitutes an integral part of the collective bargaining process. However, the submission of a discrimination claim to arbitration by an employee is only a means of vindicating a contract right under the labor agreement.

Traditionally, the grievance-arbitration process has been designed and limited to deal with the enforcement of private contractual rights. In fact, the narrow scope of arbitration is totally inappropriate to accommodate complex legal issues of interpretation and application of the requirements of Title VII to a particular industrial setting.

> "Arbitration is a means of solving the unforeseeable by molding a system of private law for all the problems which may arise (including discrimination on the basis of race, color, religion, sex, or national origin, if provided by the contract), and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through

[13] *Supra* note 2, at 49–52.

[14] 49 Stat. 449–50, Section 1 (1935).

[15] *Emporium Capwell Co.* v. *Western Addition Community Organization*, 420 U.S. 50, 80 LRRM 2660, 9 FEP Cases 195 (1975); *Alexander* v. *Gardner-Denver Co.*, *supra* note 2; and *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456–58, 40 LRRM 2113 (1958).

> the grievance machinery is actually a vehicle by which meaning and content is given to the collective bargaining agreement. . . . The grievance procedure is in other words, a part of the continuous collective bargaining process." *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 581 (1960).

The arbitrator is not a public tribunal of superior authority charged with the administration of justice for the community. Rather, he is part of a system of self-government, created by and confined to the parties, to administer the rule of law established by their collective agreement.[16] As proctor of the bargain, he must interpret and apply that agreement in accordance with the "industrial common law of the shop." "He has no general authority to invoke public laws that conflict with the bargain between the parties." [17] He may, of course, look for guidance from any source. Yet his award is enforceable only if its essence is derived from the collective bargaining agreement. An arbitral decision based solely on the arbitrator's view of the requirements of enacted legislation, rather than on an interpretation of the agreement, will be deemed to be beyond the scope of the arbitrator's submission authority.[18]

Conversely, in a Title VII civil action, the employee asserts an independent statutory right, the underlying facts of which may be common to the arbitration of a prior claim of discrimination under the labor contract, but which may not be abridged by that contractual agreement. The primary difference between this contractual right and the Title VII statutory right lies in the absolute strictures of Title VII, which represents a congressional command that each employee be free from unlawful discriminatory employment practices. The objective of Title VII is not the collective intent of the parties nor the application of an industrial rule of self-government. Instead, it encompasses a broad goal of assuring equality of employment opportunity through the elimination of devices and practices that discriminate on the basis prescribed as unlawful. The enforcement mechanism of this right has been carefully secured by Congress, with final responsibility vested solely with the federal courts.

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[16] Harry Shulman, *Reason, Contract and Law in Labor Relations*, 68 HARV. L. REV. 999, 1016 (1955); Bernard D. Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, at 32 (1971).

[17] *Supra* note 2, at 53.

[18] *Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 597, 46 LRRM 2423 (1960).

The logic of such enforcement measures is not difficult to fathom. Federal courts are vested with broad remedial powers to order affirmative action to eliminate discriminatory practices, including the reformation or elimination of provisions of a collective bargaining agreement. As such, they are the only appropriate forums within which practices and devices, though neutral on their face or even neutral in terms of intent, which operate to freeze the status quo of prior discriminatory employment practices, may be removed to insure compliance with the Act. At issue in a Title VII proceeding is the statutory right of an employee or prospective employee not to be discriminated against on an unlawful basis in the terms and conditions of employment. The trial judge bears a special responsibility in the public interest to resolve the employment dispute. Once the judicial machinery has been set into motion, the proceeding takes on a public character in which remedies are devised not only to accord relief, but to vindicate the policies of the Act. Once a violation has been found, the trial judge, in the formulation of a decree of relief, is vested with wide discretion to model that decree to obtain full compliance with the Act.[19] Through the courts, these rights are enforced on a uniform basis nationwide. This enforcement of rights affects an entire class, not just the parties.

The arbitrator's role, on the other hand, is to carry out the terms of the contract he is commissioned to interpret and apply. His narrow responsibilities do not include the vindication of statutory rights.[20] Upon determination that the terms of the collective bargaining agreement violate the provisions of Title VII, he cannot declare that agreement void and revise its provisions to conform to the law. Arbitration is still a private forum created by private parties to resolve disputes arising under the labor agreement. It is for this reason that arbitrators should not be given effective authority by the parties to act as federal judges in discrimination cases.

> "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 . . . selected by private parties to decide particular disputes which they have. A consistent and uniform body of 'law' binding on the nation should not be the

[19] *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1 FEP Cases 752 (5th Cir. 1969); *Hutchings* v. *U.S. Indus.*, 428 F.2d 303, 2 FEP Cases 725 (5th Cir. 1970); *Alexander* v. *Gardner-Denver Co.*, *supra* note 2.

[20] Meltzer, *supra* note 16, at 32–35.

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." [21]

This position is well founded when the arbitrator's past role under the nondiscrimination clause of the bargaining agreement is scrutinized. Arbitrators have generally been reluctant to rely upon public law concepts in their awards. They do not view themselves as mini equal employment opportunity commissions.[22] Moreover, the arbitrator's special competence pertains to the law of the shop, not to the interpretation and application of statutory or constitutional provisions.[23]

Finally, in *Alexander* v. *Gardner-Denver Co.*, the Court emphatically rejected the contention that the viability of the arbitration process would be significantly diminished if the employee, after resort to the grievance procedure, may assert his claim under Title VII.[24] It is, as the Court noted, unlikely that employers will be unwilling to bargain through the grievance procedure and to settle disputes through arbitration, since the primary incentive for an employer's entering into an arbitration agreement is the union's reciprocal promise not to strike.[25] In other words, the benefits to be derived by the employer from a no-strike pledge far outweigh the costs of duplicative proceedings resulting from according employees an arbitral remedy against discrimination and a judicial remedy under Title VII. Moreover, while the Supreme Court held that submission of a claim to arbitration does not constitute prospective waiver of a Title VII claim, it did not foreclose the possibility of settling a Title VII claim as part of the arbitration agreement, where the employee enters such a waiver voluntarily and fully informed of his/her rights.[26]

It should be noted, however, that the limitations on arbitration, as discussed herein, make it unlikely that such settlements

[21] Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in ARBITRATION—1975, *supra* note 1, at 59–92.

[22] William Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. PA. L. REV. 40, 47–49 (1969).

[23] Harry Platt, *The Relationship Between Arbitration and Title VII of the Civil Rights Act of 1964*, 3 GA. L. REV. 398, 403 (1969).

[24] *Supra* note 2, at 55.

[25] *See Boys Markets, Inc.* v. *Retail Clerks Local 770*, 398 U.S. 235, 248, 74 LRRM 2257 (1970); *Textile Workers Union* v. *Lincoln Mills*, *supra* note 15, at 455.

[26] *Supra* note 2.

will become a commonplace occurrence. Further, the question of whether a waiver was knowingly and willingly entered has the potential of generating a large volume of litigation which Title VII attorneys will not relish.

While the use of arbitration as a primary forum for resolving legal claims under Title VII cannot be supported, the grievance-arbitration procedure should not be conclusively ruled out of the equal employment opportunity process. Indeed, unions may be required under the duty of fair representation to process all employee claims of employment discrimination through the grievance procedure.[27]

When a particular claim is individual and does not require modifying the collective bargaining agreement or the "rules of the shop," an arbitral award is an efficient means of eliminating discriminatory practices and of devising changes within the industrial setting that conform to the requirements of Title VII. The arbitrator, commissioned to interpret and apply the collective bargaining agreement, may in such cases bring his judgment to bear to effectuate a fair resolution of the problem. He may devise remedies within the framework of the contract and existing undisputed law that accord to the parties an opportunity voluntarily to eliminate unlawful practices through a private system of self-government.

However, when a case involves legal interpretations of the statute (Title VII) or the determination of whether a term of the contract is discriminatory, or whether the effect of the provisions of the contract perpetuate past discriminatory practices, the matter must be left to the courts. For it is the courts which have been vested with broad equitable discretion to order such affirmative relief as may be appropriate to make persons whole for the injuries suffered on account of unlawful employment discrimination.

This is not to say that the arbitrator can never make a significant contribution in the enforcement process of a Title VII claim. Indeed, if at the arbitration stage a comprehensive factual record is developed on the issue of discrimination, the arbitrator's function could indeed be basic to the initial development of a Title VII case. For example, if the bargaining agreement con-

[27] *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301, 10 FEP Cases 239 (6th Cir. 1975); *United States* v. *Bethlehem Steel Corp.*, 312 F. Supp. 977, *modified on other grounds*, 446 F.2d 652, 2 FEP Cases 545 (2d Cir. 1971); *Emporium Capwell Co.* v. *Western Addition Community Organization*, *supra* note 15.

forms substantially to Title VII, the arbitrator, in the exercise of his special competence, may adequately develop the record to assist the court in its review of the voluntariness of waiver of Title VII rights as part of the arbitration settlement. In other cases, such a record would be useful in providing the court with insight into the complexities of a particular industrial setting. This is especially so with respect to the industry's local seniority practices, the relationship of one job to another in a particular job sequence or line of progression, testing requirements, and job qualifications.

The arbitrator may also be beneficial to the court in Title VII judicial proceedings. As part of the complex legislative scheme to eliminate discrimination, the court, upon a finding of liability in a Title VII case, may order far-reaching affirmative action to make whole the victims of unlawful discriminatory practices. It is also vested with discretion to order back-pay awards to further the "make whole" objectives of Title VII and to restore the victim to the position he/she would have had had it not been for the unlawful practices.[28]

In cases involving the award of back pay, the problem of determining what an employee would have earned in the absence of discrimination is complex. Though actual losses may not be computed with precision, entitlement is often conditioned upon either the employee's showing of positive proof or the employer's showing that, despite the discrimination, the plaintiff was not adversely affected.[29] Though not every member of a class of affected employees may be entitled to back pay, the judicial process is such that a separate determination on an individual basis as to who is entitled to recovery and the amount of that recovery is required. The determination of back-pay claims, thus, necessarily entails the individual assertion of claims and the presentation of supporting evidence.[30] It is therefore obvious that the fact-finding process on the issue of entitlement, the formulation of the method of calculation, and the distribution of back pay are matters in which the specialized competence of arbitrators may be used to assist the court.

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[28] *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 418, 10 FEP Cases 1181 (1975).

[29] *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1342, 7 FEP Cases 627 (5th Cir. 1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 437, 8 FEP Cases 84 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, *supra* note 19.

[30] *See generally Back Pay Remedy in Title VII Class Actions: Problems of Procedure*, 8 GA. L. REV. (1974). See also *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 7 FEP Cases 1115 (5th Cir. 1974); *Bing* v. *Roadway Express Co.*, 485 F.2d 441, 448, 6 FEP Cases 667 (5th Cir. 1974).

Moreover, the arbitrator, because of his expertise in the area of industrial relations, could lend assistance to the court in the enforcement of Title VII rights after a determination of liability and the entry of injunctive relief. Title VII requires the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classifications.[31] The thrust of the Act is directed to consequences of employment practices. Thus, when a violation is found, the court is vested with broad remedial powers to remove the vestiges of past discrimination, to eliminate present discrimination, and to assure the nonexistence of future barriers to equal job opportunities. Pursuant thereto, courts have ordered the imposition of hiring and membership goals for the speedy entry of minority craftsmen into a given trade, the suspension of testing requirements that do not conform to the EEOC guidelines, the revision of seniority rules and regulations, and the restructuring or merger of lines of progression for the purpose of according greater promotional and transfer opportunities to victims of unlawful discrimination.

The problems of remedying discrimination are difficult, and the determination of a suitable remedy by the revision of an industrial relations system is a complex matter. It is at this juncture that the arbitrator's expertise may again be utilized by the court —that is, in the fashioning and implementation of a decree designed to obtain the overall objectives of the Act. To the extent that the implementation of the decree in large part determines the success or failure of the judicial-enforcement proceedings, the court is in need of competent expertise in the area of industrial relations. The arbitrator, therefore, can play a significant role in the Title VII enforcement as an administrator of the court's decree.

The use of administrators in implementing judicially ordered affirmative action is not a new development. In the past, courts have utilized advisory committees or administrators to supervise various aspects of decree implementation. The functions and duties of the administrator have been varied: the dissemination of information to minority workers in order that they may take advantage of the provisions of the decree; establishment of a complaint procedure through which employees may seek redress of violations of the decree during the implementation process;

[31] *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971).

supervision and oversight of the implementation process, minimizing conflicts between the parties; providing the court with neutral expertise that can be utilized to modify existing employment practices to conform with the intent and objectives of the relief ordered; establishment of record-keeping requirements necessary to implement the provisions of the decree and to ensure performance and remedy of breaches thereof.[32]

Past experience with judicially appointed arbitrators has demonstrated that, though the scope of the arbitrator's authority as administrator in Title VII cases is limited by the scope of the decree and by the court's retention of jurisdiction and power of review, the arbitrator has performed a useful role in supervising the enforcement of civil rights decrees. The result has been that the court has been relieved of the intolerable regime of daily and minute supervision of its order, while at the same time it has achieved the goal of expert knowledgeable management of enforcement. For instance, in *United States* v. *Steamfitters Local 638*,[33] the administrator was charged with the responsibility for devising and installing an affirmative action program to meet a 30-percent-minimum journeyman-union-membership goal. As a part of his task, he was to supervise the testing of minority applicants for journeyman membership, to formulate an apprenticeship class of 400 members, and to study the industry's referral system. He was authorized, under the order of reference, to take all action necessary to implement performance, with a proviso that all decisions be in writing and subject to the review of the court. Under the goals and timetables of the affirmative action program, that 30-percent minority-membership goal is expected to be completely implemented within the time prescribed, with a minimum degree of difficulty.[34]

The use of judicially appointed administrators has not been without challenge. In *Local 28, Sheet Metal Workers*,[35] the Second Circuit flatly rejected a challenge to the use of an administrator to supervise the activities of the Joint Apprenticeship Pro-

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[32] *See generally Title VII Administrator: A Case Study of Judicial Flexibility*, 60 CORNELL L. REV. 53 (1974); Robert Coulson, *The Emerging Role of Title VII Arbitration*, 26 LAB. L.J. 263 (1975).

[33] 347 F.Supp. 164 (D.N.Y. 1972), *decision on merits*, 360 F.Supp. 979, 6 FEP Cases 319 (D.N.Y. 1973), *rem'd and mod. and aff'd*, 501 F.2d 622, 8 FEP Cases 293 (2d Cir. 1974).

[34] Joel D. Harris, Asst. U.S. Attorney, Southern District of New York, *id.*, at 69.

[35] *EEOC* v. *Local 28, Sheet Metal Workers Int'l Ass'n*, 532 F.2d 821, 12 FEP Cases 755 (2d Cir. 1976).

gram under the terms of a Title VII decree. In its order, the lower court had granted extensive supervisory power over Local 28 and its JAC to the administrator. He was charged with the task of developing and enforcing detailed plans for achieving the goals outlined in the decree. The court stated:

> "While union self-government is desirable and is, indeed, an ideal to which the law aspires, . . . our interest in union self-government cannot immunize Local 28 from the consequences of its actions. The apparent failure of the New York court order to change Local 28's membership practices to an appreciable extent, and the rather reluctant response made by Local 28 . . . convinces us that it is necessary for a court-appointed administrator to exercise day-to-day oversight of the union's affairs." [36]

Though the court indicated that the abridgment of the concept of self-government implied in its decision would be temporary, it nonetheless found the need for such strict enforcement justified by the union's past recalcitrance and the requirements of Title VII.

Conclusion

Arbitration is an inappropriate forum for the resolution of employment discrimination claims that involve the interpretation and construction of Title VII provisions or considerations of how the public policy against discrimination in employment may best be furthered. In short, public-policy considerations and statutory interpretation should be left to the judiciary and the public instrumentalities charged with the enforcement of Title VII in order that uniformity might be maintained in the rapidly developing case law. Any conclusion to the contrary would result in a piecemeal approach to a matter of highest national priority.

Moreover, as presently structured, the arbitration process is not equipped to accord to the claimant the type of protection and enforcement intended by Congress. Inherent in the right to independent civil action under Title VII is the right to due-process requirements—confrontation of the witnesses, cross examination, adequate representation of counsel—and the right to judicial review. To incorporate these requirements into the grievance-arbitration process would render that procedure cumbersome and time-consuming, thwarting the effect of its traditional role—effi-

[36] 12 FEP Cases at 762.

cient and expeditious labor-dispute resolution. Further, to expand the role of arbitration to encompass Title VII discrimination claims would not alleviate the existing administrative or judicial backlog, since the aggrieved party under the Act has an absolute right to pursue his/her administrative remedy after an unfavorable arbitral award, and in view of the fact that judicial deference to arbitral awards in employment discrimination cases under Title VII is not likely.