

CHAPTER 10

ARBITRATION OF DISCRIMINATION GRIEVANCES

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The most dramatic development in labor law and industrial relations in recent years has been in the area of employment discrimination. The Equal Pay Act of 1963; Title VII of the Civil Rights Act of 1964, as amended by the Equal Opportunity Act of 1972; and the Age Discrimination in Employment Act of 1967, as amended in 1978, are all based primarily on Congress's power to regulate commerce. With limited exceptions, these statutes cover all private employment, and they prohibit discrimination because of race, color, sex, religion, national origin, and age. In addition, there is Executive Order 11246, which includes the same prohibitions and applies to employment under federal contracts and federal financial-assistance projects. The Vocational Rehabilitation Act of 1973, as amended in 1978, prohibits discrimination against the handicapped. As of now, the VRA applies only to federal employment and private employment under federal contracts and federal financial-assistance projects. Bills are pending in Congress to bring the handicapped under the general coverage of Title VII, and there seems little doubt that this will be done in the early 1980s.

These federal programs have generated a staggering amount of compliance and enforcement activity. The amount of litigation is voluminous and shows no sign of abating. Indeed, when Title VII includes the handicapped, a substantial increase seems likely.

Collective bargaining agreements have long contained a section prohibiting discrimination on the basis of union activity, tracking a statutory prohibition in the National Labor Relations Act. As no-discrimination statutes have been enacted by Con-

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gress, the no-discrimination sections in the labor agreements have been expanded to include the prohibited statutory bases. Thus, in many instances, an allegation of discrimination may be processed both under a statute or as a grievance under a collective agreement. In the leading case of *Alexander v. Gardner-Denver*,¹ the Supreme Court held that the arbitration of a discrimination grievance did not constitute a waiver of the Title VII cause of action, and that the plaintiff was entitled to trial de novo in the federal court. The Supreme Court stated, however, that "The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate." The Court here added its well-known footnote 21 discussing the factors the court might consider.

Gardner-Denver created early fears that employers, in order to avoid having to defend twice or more, would seek to negotiate no-discrimination sections out of the labor agreements. This has not happened; to the contrary, as noted, these sections are generally being expanded to parallel the statutes. From the employer view, this brings such grievances within the scope of the no-strike clause and the *Boys Markets* injunction. Unions feel impelled, because of their fair-representation obligation, to negotiate such contractual prohibitions. It has even been argued that the failure to make discrimination claims grievable under the agreement would constitute a violation of Title VII.²

The arbitration of discrimination claims has been discussed at previous annual meetings of this Academy in 1971, 1972, 1974, 1975, and 1976. The subject has not been on the program for the past three years. These earlier papers have evaluated arbitration awards in sex- and race-discrimination cases,³ discussed *Gardner-Denver* and whether and how the arbitration process might be modified accordingly,⁴ recracked the old chestnut

¹415 U.S. 36, 7 FEP Cases 81 (1974).

²Hill and Sinicropi, *Excluding Discrimination Grievances from Grievance and Arbitration Procedures: A Legal Analysis*, 33 Arb. J. 16 (1978).

³McKelvey, *Sex and the Single Arbitrator*, in Proceedings of the Twenty-Fourth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1971), 1; Gould, *Judicial Review of Employment Discrimination Arbitrations*, in Proceedings of the Twenty-Fifth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1973), 114.

⁴Coulson, *Black Alice in Gardner-Denverland*, in Proceedings of the Twenty-Seventh Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1975), 236; Aksen, *Post-Gardner-Denver Developments in Arbitration Law*, and Newman, *Post-Gardner-Denver Developments in the Arbitration of Discrimination Claims*, in Proceedings of the Twenty-Eighth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 24, 36; Williams, *Arbitration and Discrimination: A Modest Proposal for the*

whether arbitrators of discrimination claims should consider public law,⁵ and in one empirical study raised questions as to the competence and knowledgeability of arbitrators to decide discrimination claims.⁶ None of the previous discussions, however, has catalogued in summary fashion the numerous practical limits to the utility of the arbitration process under collective bargaining agreements in the resolution of discrimination claims.

1. Arbitration is available only to employees in a unionized work force. The acts of Congress apply without reference to unionization as broadly as Congress has chosen to use its commerce-regulation power. Roughly accurate estimates are that about 30 million employees are covered by collective agreements, whereas Title VII reaches almost three times that number. And, even if the employer is unionized, the statutes apply to many employees not included in the bargaining unit, and to whom the grievance procedure is not available. An outstanding example is found under the Age act, which has been referred to as the discrimination statute for advantaged white males, since the typical plaintiff is a middle-level executive of advancing years who has been replaced by a comparative adolescent. It can be noted that the American Arbitration Association has tried to encourage individual-worker arbitration of discrimination claims in nonunion work forces,⁷ but the program has not gotten off the ground. Last October Bob Coulson told me that only one employer had adopted the AAA format.

2. Arbitration under labor agreements will reach only employer, but not union, discrimination, and in many situations the union may have covertly participated in the discrimination.

3. Arbitration is limited to actions taken under the labor agreement, and the grievants are incumbent employees. But the more pervasive and socially harmful discrimination is in the hiring practices themselves, which are beyond the reach of the grievance procedure. Thus, arbitration has no role to play in the

Immediate Future, in Proceedings of the Twenty-Ninth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 34.

⁵Meltzer, *Arbitration and Discrimination: The Parties' Process and the Public's Purposes*, in Proceedings of the Twenty-Ninth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 46. See also Robinson and Neal, *Arbitration of Employment Discrimination Cases: A Prospectus for the Future*, *id.*, at 20.

⁶Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in Proceedings of the Twenty-Eighth Annual Meeting, National Academy of Arbitrators (Washington: BNA Books, 1976), 59.

⁷See Coulson, *Fair Treatment: Voluntary Arbitration of Employee Claims*, 33 Arb. J. 23 (1978).

cardinal objective of achieving equality of initial employment opportunity.

4. The concept of discrimination is no longer confined to actions directed at particular individuals, but more broadly embraces systemic practices that affect large numbers of people. The distinction between disparate treatment and disparate impact is now well recognized in discrimination law. Systemic discrimination is usually dealt with under the disparate-impact branch, and typically through the legal device of the class action. Arbitration does not provide anything comparable to the class action in the federal courts, and is therefore confined almost altogether to individual claims of disparate treatment.

5. With respect to the development and preparation of cases, arbitration provides to the advocate no counterpart to the methods of discovery which are normal to the federal courts under their rules of civil procedure. Nor is there in arbitration anything comparable to the pretrial conference which is so widely used in the federal courts. Even though the case may have legal overtones, the grievant may not be represented by an attorney. In many cases there is no transcript.

6. The remedial power of an arbitrator, though equitable in nature and accorded considerable latitude under the Supreme Court's decision in *Enterprise Wheel*,⁸ one of the 1960 *Trilogy*, could not realistically be equated with the equitable power of a federal court operating under a broad statutory mandate. Federal courts possess a remedial power arbitrators do not enjoy—the power to enforce their own orders.

7. Questions have been raised as to the competence of arbitrators generally to decide discrimination claims, at least when the case includes public-law dimensions. Discrimination grievances raise in perhaps its most important context the much-discussed question of the power/duty of the arbitrator to consider/apply public law in deciding a grievance under the contract. The various views of this issue have been expressed many times at these meetings and will not be regurgitated here. Suffice it to say that many collective agreements today expressly authorize the arbitrator to resort to public law, and many arbitrators do so whether expressly authorized or not.

In recognition of the foregoing considerations, former pro-

⁸*Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

fessor Edwards developed a two-track arbitration system, one track for traditional contract grievances and a second track/procedure providing for a limited use of arbitration in discrimination grievances.⁹

Whereas the federal courts continue to be flooded with discrimination cases under the modern statutes, there has been no comparable upsurge in the arbitration area. In the *Labor Arbitration Reports (LA) Cumulative Digest* covering volumes 61-70 and the five-year period 1974-1978, the section digesting discrimination cases runs only 12 pages out of a total of 578; the number of discrimination cases is about 150. Volume 71 of LA contains only 18 such cases, and Volume 72 only 12. The AAA's Summary of Arbitration Awards for the period January 1979-April 1980 reports only about a dozen cases. One assumes that the publishers would be eager to report cases in such a highly publicized area. But if the published cases are a fair reflection of the unpublished ones, then it is apparent that discrimination grievances represent a very small percentage of the total arbitral product. And conversations among arbitrators do not indicate widespread arbitration of discrimination claims. And as for that famous footnote in *Gardner-Denver*, a study last year found only two cases in which a federal court had given weight to an arbitration decision.¹⁰

In sum, the subject may be one whose importance has been inflated by excessive discussion. The published awards reveal that, with few exceptions, arbitration is confined to individual claims of disparate treatment.¹¹ While important to the individuals concerned, such cases in the aggregate do not match the significance of class actions reaching systemic discrimination under the statutes. Thus, it seems clear that the national policy against employment discrimination must continue to find its primary enforcement in the federal courts. But, with judicial and EEOC backlogs being what they are, the arbitration process can perform a useful role, even though a modest and subordinate one, in the resolution of disputes arising out of the implementation of that national policy.

Most of the reported arbitration cases deal with alleged dis-

⁹Edwards, *Arbitration as an Alternative in Equal Employment Disputes*, 33 Arb. J. 23 (1978).

¹⁰Wolfson, *Social Policy in Title VII Arbitrations*, 68 Ky. L.J. 101 (1979-80), 137.

¹¹Oppenheimer and LaVan, *Arbitration Awards in Discrimination Disputes: An Empirical Analysis*, 34 Arb. J. 12 (1979).

crimination in discipline, work assignment, promotion, and other individual decisions. There is a fair number of cases dealing with the denial of pregnancy benefits, an issue now largely laid to rest by act of Congress.

I would like to focus on a newly emerging problem, one in the area of sex discrimination. In line with the theme of this year's meeting, it is a problem area that poses sensitive and difficult issues of fact. It is the problem of sex harassment, and it surfaced for the first time in federal court under Title VII only five years ago. In *Corne v. Bausch & Lomb, Inc.*,¹² female plaintiffs alleged that they had been repeatedly subject to verbal and physical sexual advances by their supervisor, and had ultimately been forced to resign because of his unwelcome activities. The district court held that there was no cause of action under Title VII, that the supervisor was not an employer but rather a fellow employee, and that the company was not vicariously liable because the supervisor's acts served no company policy and accrued no benefit to it. The court viewed the supervisor's conduct as "a personal proclivity . . . satisfying a personal urge." The court reacted to the floodgate syndrome, stating that there "would be a potential federal lawsuit every time any employee made amorous or sexually oriented advances toward another." Subsequent cases have repudiated this early restrictive view.

In 1977, courts of appeal for the Third, Fourth, and District of Columbia Circuits recognized causes of action under Title VII for sex harassment. Perhaps the leading decision is that of the Third Circuit in *Tomkins v. Public Service & Gas Co.*¹³ In this case plaintiff, secretary to a company supervisor, alleged that he told her she should lunch with him at a nearby restaurant to discuss his upcoming evaluation of her work, as well as a possible promotion; that at lunch he stated his desire to have sexual relations with her and that this would be necessary to a satisfactory working relationship; that when she attempted to leave, he threatened her with recrimination and told her that no one in the company would help her if she complained; that subsequently she was transferred to an inferior position in another department; that she was subjected to false and adverse performance evaluations, disciplinary layoffs, and threats of demotions; and that the company knew or should have known of, and

¹²390 F.Supp. 161, 10 FEP Cases 289 (D. Ariz. 1975).

¹³568 F.2d 1044, 16 FEP Cases 22 (1977).

had acquiesced in, the supervisor's actions. The district court dismissed the complaint, characterizing the supervisor's acts as an "abuse of authority . . . for personal purposes." This, the court of appeals said in reversing, "overlooked the major thrust of Tomkins' complaint, i.e., that her employer, either knowingly or constructively, made acquiescence in her supervisor's sexual demands a necessary prerequisite to the continuation of, or advancement in, her job." The court distinguished between "complaints alleging sexual advances of an individual or personal nature and those alleging direct employment consequences flowing from the advances . . .," a distinction which "recognizes two elements necessary to find a violation of Title VII: first, that a term or condition of employment has been imposed and second, that it has been imposed by the employer, either directly or vicariously, in a sexually discriminatory fashion." Applying these requirements to the complaint, the court stated: ". . . we conclude that Title VII is violated when a supervisor, with the actual or constructive knowledge of his employer, makes sexual advances or demands toward a subordinate employee and conditions that employee's job status-evaluation, continued employment, promotion, or other aspects of career development on a favorable response to those advances or demands, and the employer does not take prompt and appropriate remedial action after acquiring such knowledge."

Bear in mind that all the court of appeals did was to reverse the district court's dismissal of the complaint for failure to state a course of action. In such an action, the allegations of the complaint are accepted as true. At trial, the allegations will have to be proved. As an advocate or as an arbitrator, consider the evidence which must be adduced and will be probative on any number of critical issues: Were the sexual advances actually made and made as a condition of employment; what constitutes actual or constructive knowledge of the employer (and, parenthetically, who is the "employer" for this purpose); what constitutes prompt and appropriate remedial action? In many if not most cases, there will be conflicting one-to-one testimony on whether the sexual advances were made. Adverting to the "difficulty in differentiating between spurious and meritorious claims," the court opined that "we are confident that traditional judicial mechanisms will separate the valid from the invalid complaints."

In March of this year, the EEOC issued its guidelines on

sexual harassment. They state that unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature is a violation of Title VII when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, or (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual.

In several respects the EEOC guidelines go well beyond the judicial decisions. First, they impose liability on the employer "regardless of whether the specific acts complained of were authorized or even forbidden by the employer and regardless of whether the employer knew or should have known of their occurrence." Second, they go beyond the supervisor/employee context and include in the definition of unlawful harassment sexual conduct which "has the purpose or effect of substantially interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." This concept of sexual harassment was advanced in the *Tomkins* case, but the Third Circuit declined to pass on it. The EEOC guidelines state that, with respect to conduct by persons other than its agents and supervisors, the employer is responsible for acts of sexual harassment in the workplace where the employer, or its agents or supervisory employees, knows or should have known of the conduct. An employer may rebut apparent liability for such acts by showing that it took immediate and appropriate corrective action.

Third, the EEOC guidelines emphasize prevention as the best tool for the elimination of sexual harassment. Steps which should be taken by an employer are affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment, and development of methods to sensitize all concerned. As I read the guidelines, these steps are not legally required, but are factors which certainly will be taken into account in determining whether a violation has occurred.

Given the judicial decisions sustaining a cause of action for sex harassment under Title VII and promulgation of the EEOC guidelines, increased compliance and enforcement activity under the statute seems inevitable. Last fall the House Civil Service Committee held three days of hearings on sex harassment in the federal service, several federal agencies have already

issued directives, and at least one union has prepared a handbook on the subject.

What is the utility of the arbitration process in sex harassment cases? Obviously it will not be available if neither the female nor the harassing male are members of a bargaining unit. In the collective bargaining context, there may be a number of complicating factors that will affect the availability or utility of the grievance and arbitration system. Has the company adopted a procedure for dealing with complaints of sex harassment? Is the harassing male a nonunit supervisor or a member of the unit? What is the purpose of the grievance—to end the harassment or to obtain some employment opportunity denied for failure to cooperate?

A recent study of arbitration decisions in sex-harassment cases,¹⁴ the first such published to my knowledge, demonstrated that arbitration has been invoked in almost all cases by male employees who have been disciplined by management for harassing females. The study covers the period 1958–1978, thus ending just as the new legal developments under Title VII are beginning. The study shows that at least some employers were responding to sex-harassment complaints even before the law required it, that unions were frequently placed in a role-conflict situation in the processing of grievances with both females and males in the unit, that complaining females sometimes receive the cold-shoulder treatment or worse from fellow employees, and that arbitrators have given variable responses and rationales.

Recently I have arbitrated two cases involving sex harassment. One case was of the model just discussed: the grievant was a male employee who was disciplined for harassing fellow female employees. The other was also a discipline case, but here the grievant was a female who had been discharged for walking off her Saturday 4 p.m.-midnight shift. Part of her defense was that her supervisor who imposed the discipline had made sexual advances. In both cases there was sharply conflicting testimony. I suggest to you that sexual-harassment cases pose especially difficult and important problems of factfinding, since the decision for all, but especially the male and female, may be more pervasive and far-reaching in personal as well as job conse-

¹⁴Marmo, *Arbitrating Sex Harassment Cases*, 35 Arb. J. 35 (March 1980).

quences than such issues as insubordination or absenteeism.

As a reprise on my original theme, the arbitration forum in sex-harassment cases for many reasons cannot be considered equivalent to the judicial one, but it does seem clear that there are situations in which it is appropriate and may play its subordinately useful role.

If time permitted, I would explore with you briefly another emerging area of discrimination—the handicapped. Here again federal law and forums will be predominant, but in certain situations arbitration will be appropriate and can make its contribution, and I think we can predict safely that in the 1980s issues involving handicaps will emerge more frequently in arbitration cases. Arbitrators, of course, are not totally unfamiliar with the problem. Cases involving epileptics and alcoholics, for example, have been around for a long time. But new developments, such as the expansion of the definition of a handicapped individual and the requirement of reasonable accommodation, will demand new thinking. We may even be required to make reasonable accommodation at our hearings in order to afford procedural due process to persons with auditory, visual, and speech impairments. I hope my fellow members of this panel will contribute their wisdom to this matter of discrimination against the handicapped.

In conformity with the factfinding theme of this meeting, let me in closing remind you of a basic fact that tends to be forgotten. As advocates and decision-makers in the broad field of employment discrimination, we become absorbed in the details of our specific problems and individual cases. The larger purpose of the no-discrimination laws becomes obscured. That purpose is to provide equal employment opportunity to our people by eliminating artificial and unfair factors that are unrelated to work performance. The honest differences as to fact and law, the spurious claims and obstructionist defenses, are natural and inevitable. They do not gainsay the basic facts that the United States is engaged in a national and human effort unique in our history and I think unmatched in any other country, that this effort is a noble and idealistic one, and that as Americans we can take pride in it.

Comment—

J. LEON ADAIR*

As pointed out by Bill Murphy, there are certain practical limitations in the utilization of arbitration in regard to discrimination claims. Certainly, there are particular discrimination claims better suited for courts than for arbitration. But, from a practical standpoint, it is the vitality of day-to-day grievance-arbitration machinery, giving meaning and life to rights and obligations in a well-reasoned collective bargaining agreement, that provides an employee with the very best vehicle for vindication of most discrimination claims.

Without even considering a no-discrimination provision, a collective bargaining agreement embodying meaningful seniority, transfer, promotion, layoff, and disciplinary clauses provides a means by which most discrimination claims can be resolved. In fact, in most instances sound collective bargaining agreements provide much broader coverage to those in the bargaining unit than does the combination of the relatively few meaningful discrimination statutes.

For example, in the South Central Bell-CWA agreement, the parties have embodied job-bidding selection and transfer provisions. Moreover, an "arbitrary action" standard by which selections and transfers are measured has been included. Pursuant to this selection provision, a female employee was denied a frame person's position due to her weight. The arbitrator, in finding "arbitrary action," based his decision in large part on the fact that overweight men were satisfactorily performing the duties of that same position.

Pursuant to an identical provision in the Southern Bell-CWA agreement, the company's selector selected a junior employee for promotion over the senior grievant in part because the grievant was "distractingly overweight." Again, while the company urged the soundness of its action because of the face-to-face customer contact required by the job, the arbitrator found "arbitrary action," based primarily on the unreasonableness of the selector's utilization of weight as a factor.

Again, under the "just cause" provision of the South Central

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Bell contract, the discharge of a female employee, who refused to move light fixtures up steps because they were too heavy and bulky for her five-feet-four-inch, 105-pound frame to carry, was challenged to arbitration. The arbitrator, in alluding to the reasonableness of the grievant's safety-hazard belief, sustained the grievance. It is submitted that this decision is but an acknowledgment that in the industrial setting there are many types of handicaps among the work force for which reasonable accommodations must be made to avoid discrimination against those so handicapped.

These are basic examples of the day-to-day operation of the grievance-arbitration machinery giving meaning and life to employee rights under a collective bargaining agreement. Not only was a female protected from disparate treatment on the basis of sex in the first example (which protection would also have been afforded under Title VII), but also in both weight-related cases grievants were protected from disparate treatment based on their weight (concerning which discrimination there is no statutory protection). In all three examples, female employees were protected from being discriminated against because of their physical handicaps.

Moreover, the grievance-arbitration procedure, as compared to court action, allows valuable flexibility in the handling of a grievance situation factually intertwined with both discrimination and basic contract claims. Consequently, many potential discrimination claims are headed off by traveling an entirely different route in arbitration.

For example, in another selection case wherein certain senior female grievants were not considered for a job requiring climbing solely on the basis of their failure to make a passing score on a Physical Abilities Test Battery (PATB), the challenge in arbitration was directed to a contractual provision requiring consideration of "all necessary qualifications" rather than to the fact that the company's own validation study disclosed that this test would eliminate 50 percent of all women candidates as compared to less than 10 percent of all male applicants. (And, one of the PATB tests designed to determine stamina was a measurement of body fat, even though women are generally conceded to possess, on the average, approximately 10 percent more body fat than men.) This matter was resolved by the parties short of court action by the arbitrator's finding that the contract had been so violated. Again, this underscores the utility of arbitration in discrimination-related matters.

Moreover, we all know of examples of arbitration wherein discrimination was *the* main issue. One such case involved Georgia Power and the IBEW. A grievance was filed on behalf of a black male claiming that he had been discharged because of his race. In that particular case, the grievant was discharged upon destroying office equipment and throwing certain objects at his supervisor. Evidence was presented to the effect that the grievant had been the object of racial slurs and insults by fellow employees for an extended period of time and that management had done little to stop this alleged behavior. The arbitrator, while asserting that the grievant's action could not be tolerated, sustained the grievance on the basis of this racial provocation.

Much has been written regarding the shortcomings of the arbitration process in the area of case development and preparation. While it is certainly true that the Federal Rules of Civil Procedure provide for a broad range of discovery not available in arbitration, much information, including documents and statistical studies, can be obtained for grievance arbitration. The Supreme Court in *NLRB v. Acme Industrial Co.*¹ held that the duty to bargain unquestionably extends beyond the period of contract negotiation and applies to labor-management relations during the term of the agreement, including the processing of grievances. The Court further held in *Acme* that the employer's duty to furnish relevant information needed by a union for the processing of grievances includes all information having a "potential" relevance to the union's evaluation of a contractual claim.

Parties can utilize the NLRB in obtaining data relevant to the handling of grievances for arbitration, including information pertinent to discrimination claims. In two relatively recent cases, *Westinghouse Electric Corp.*² and *East Dayton Tool & Die Co.*,³ the Board held that the union was entitled to a wide range of statistical data regarding race and sex matters including, among other items, the number of employees in each job classification by race and sex, their seniority, their wage rates, and the number hired and promoted during certain periods of time. In addition, the Board concluded that the union had the right to copies of all complaints and charges alleging discrimination with respect to bargaining-unit employees filed against the company pursuant

¹385 U.S. 432, 64 LRRM 2069 (1967).

²239 NLRB No. 19, 99 LRRM 1482 (1978).

³239 NLRB No. 20, 99 LRRM 1499 (1978).

to various federal and state fair employment practice laws, along with information pertaining to the status of each. And, finally, the Board held that the company was under an obligation to produce data disclosing the race and sex of job applicants.

In both of these cases the parties had negotiated antidiscrimination clauses into their contracts, and in one of these contracts the discrimination clause included the phrase, "The Company and Union agree to provide equal employment opportunity without regard to race, color, creed or national origin."

The Board based its decisions not only on the antidiscrimination clauses themselves, but also on the very nature of the collective bargaining representative's status as representative of all unit employees, which imposes an obligation on the representative to represent the interests of minorities with due diligence, fairly, and in good faith.

In addition, any relevant data in connection with a discrimination claim not forthcoming prior to arbitration can, in almost every case, be obtained by a request of the arbitrator. Who among us would chance an adverse impression or inference by refusing such a request?

In short, there are ways and means by which most relevant information can be obtained in discrimination-type grievances being handled in arbitration.

And, finally, much has been said and written about the effect on arbitration of the Supreme Court's action in *Alexander v. Gardner-Denver*.⁴ Further, there have been many suggestions, some which appear to be quite extreme, as to how the arbitration procedure may be changed and improved so as to place the proceeding in the best possible light when viewed by a judge in a trial de novo of a discrimination claim.

In the first place, arbitration just does not lend itself to a proper treatment of certain discrimination claims. This does not mean, of course, that we should do other than give it our best in arbitration. In fact, we'd better give it our best or we'll be facing a meritorious fair-representation suit. *Gardner-Denver* is an ever-present reminder to give such a grievance as thorough treatment as reason and the circumstances of the case permit. However, once we have given it our best, we shouldn't worry about the weight that a court will give the job that has been done

⁴415 U.S. 361, 7 FEP Cases 81 (1974).

in arbitration. The goal is to stamp out discrimination in the workplace.

In regard to the suggestions that the parties either eliminate or broaden to a much greater extent antidiscrimination clauses in the collective bargaining agreement in order to accommodate the problems created by *Gardner-Denver*, I disagree. Arbitration is what it is today because it is designed to handle grievances in an uncomplicated, inexpensive, and expeditious fashion. To eliminate the antidiscrimination clause is to invite litigation; and to broaden this provision to include, among other items, the arbitrator's rewriting provisions found by him to be discriminatory would greatly complicate the collective bargaining process. In my opinion, both of these suggestions are in the category of overreaction. We don't endure a heart transplant to improve our appearance.

It would be my suggestion that we not alter the method now used, just improve our performance thereunder. In closing, I would suggest that we view *Gardner-Denver* as Mark Antony viewed Caesar when he said: "The evil that men do lives after them. The good is oft interred with their bones" [Julius Caesar, Act III, Scene ii].

And I would add: "And, so let it be with *Gardner-Denver*-type cases."

Comment—

ROBERT W. ASHMORE*

In responding to Bill Murphy's remarks, I will first make a few general comments on the arbitration of discrimination cases. Then I will talk briefly about the possible uses of arbitration in handling sexual harassment cases and cases involving the handicapped.

I.

I agree with Bill that, although the role of arbitration in resolving claims of discrimination is limited, it serves an important function within its limited sphere. Arbitration should be as simple a process as it can be made to be: a private resolution of a dispute by an individual selected by the parties, rendered reasonably promptly and economically, and final and binding absent very unusual circumstances. It would be a mistake to attempt to modify the arbitration of discrimination cases to make arbitration, in effect, an enforcement arm of the EEOC. To the extent that employers are denied the right to participate in the choice of the arbitrator, they are going to want, and deserve, a right of appeal from the decision, and the resulting expenses and delays would destroy much of arbitration's value in such cases.

Certain comparisons between arbitration and litigation, it seems to me, miss the point. Commentators often forget that the vast majority of Title VII cases are resolved short of litigation by EEOC personnel, many of whom have limited experience and very heavy caseloads. Frequently, administrative resolutions are delayed for years.

I believe that many more discrimination cases are resolved through grievance procedures than are reflected in published decisions. Employers are not as willing to take a questionable case to arbitration where the issue involved is discrimination, since the publicity generated by a company's losing a discrimination case is considerably more likely to affect the employer adversely than in the case of a discharge for other reasons.

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Because the grievance and arbitration process brings together in a routine way management and union people accustomed to dealing with each other, there is likely to be less emotionalism than there is when a government agency is involved. Arbitration offers a far more realistic opportunity for an employee actually to get his job back, where there is evidence of discrimination in connection with the discharge decision.

While the union's duty of fair representation will be discussed in a further session today, I want to say a word about it in connection with the arbitration of discrimination cases.

In *Vaca v. Sipes*,¹ the Supreme Court said that fair representation includes a duty to "serve the interests of all members without hostility or discrimination toward any, to exercise . . . discretion with complete good faith and honesty, and to avoid arbitrary conduct." In *Hines v. Anchor Motor Freight, Inc.*,² however, a Supreme Court majority clouded the issue of the extent to which a union will be held liable to one of its members for breaching its fair representation duty in processing a grievance through arbitration. Some attorneys representing unions have taken the position that under *Hines*, where a union's gross breach of duty in processing a grievance "taints" an arbitration decision, and the grievant eventually wins reinstatement in an "untainted" arbitration years later, the employer is liable for back wages for the *entire* period, including the period of delay caused by the union's misconduct.

I don't read *Hines* that way, and I think that the courts will ultimately hold unions liable for breaches which cause a delay in a grievant's reinstatement. At present, however, the Supreme Court has failed to spell out the union's liability in such instances. The resultant confusion in legal obligations does little to promote effective union representation in discrimination cases. That is particularly true since discrimination cases often involve conflicts between members of the bargaining unit.

II.

Concerning the problem of sexual harassment in the workplace, as with other kinds of employment discrimination, many cases will *not* be resolved in arbitration.

¹386 U.S. 171, 64 LRRM 2369 (1967).

²424 U.S. 554, 91 LRRM 2451 (1976).

Many such cases will involve allegations of supervisory harassment. Where such a charge is found valid by management, the supervisor is likely to be fired or otherwise severely disciplined. Action against supervisors, of course, will generally not be subject to arbitration. Even where a supervisor is not involved, management's response in disciplining the unit employee engaged in misconduct will in many cases resolve the grievance or potential grievance of the victim of harassment.

On the other hand, such discipline of, typically, a male employee considered to have engaged in sexual misconduct may itself give rise to a grievance by the male. These will be troublesome for unions because of the internal conflict between male and female members of the bargaining unit. Such cases point up the need for holding unions accountable for arbitrary, discriminatory, or bad-faith actions in processing grievances.³

Some special problems are likely to arise in the arbitration of sex harassment cases. Defining just what "sexual harassment" is will be an initial problem. Obviously, physical assault or improper physical contact should be included in the definition. Obscene gestures or taping obscene pictures to a woman's locker will, in many instances, be included. A more troublesome area is that of verbal harassment. To what extent does actionable sexual harassment encompass words (or actions) not directed at a female employee but inadvertently overheard (or observed) by the female? The answer in a particular case may depend on such factors as whether the employee engaging in offensive conduct could have reasonably expected to be overheard (or observed), where within the facility the incident occurred, and whether the employer had, or had not, taken corrective action in response to prior similar complaints. A further problem is whether arbitrators should reject employer policies which are not "sex blind," or should approve policies which impose upon male employees more stringent standards of acceptable behavior when women are present. I predict that arbitrators are going to expect an employer's sex harassment policy to be "sex blind" on its face, since males as well as females could be subjected to actionable sexual harassment. But I also predict that the application of such "sex blind" policies will in many cases require male employees to speak and behave differently

³See *Vaca v. Sipes*, *supra* note 1.

when they are around women employees from the way they behaved around other male employees in the past. In other words, as in the case of race discrimination, past practice—"we've always talked that way"—will often not be a valid defense to a grievance claiming sexual harassment.

On the other hand, I suspect that in many cases there will continue to be a valid distinction between what is considered unacceptable vulgarity in an office and what is considered unacceptable in a steel mill. The sensitivity (or oversensitivity) of a particular grievant, however, may also be relevant, even in a steel mill, and employers are going to have to struggle with questions of how far they will seek to defend a sex harassment case by impugning the character and reputation of a grievant. Obviously, where such a defense is presented, there will be some difficult questions of admissibility for arbitrators.

A further potential problem relates to the matter of remedies. What remedies are available if management discounts the grievant's story, or finds provocation, and refuses to act? Where a grievant can show some money loss due to unlawful retaliation by a supervisor, as through discipline or failure to promote, in cases where the employer knew or should have known of sexual harassment, an employee will often be able to obtain a make-whole remedy.

On the other hand, what if the employer has a long-standing and widely disseminated policy against sexual harassment, a policy which has been consistently enforced? In that context, let us say that a lower level foreman with an impeccable prior record refuses to promote a female who has rejected his sexual advances. The victim of this misconduct then waits 30 days to report the incident. At that point the foreman is fired and the promotion error is corrected. Must the employer be absolutely liable for back wages for the intervening 30 days—that is, for the sexual deviations of all its supervisors, without regard to whether the employer knew or should have known of the problem and where the employee failed to report it promptly? I think not, but the EEOC's guidelines would impose absolute liability on the employer in such cases.⁴ This question will ultimately have to be resolved in the courts.

In various other situations involving sexual harassment, such

⁴29 C.F.R. §1604.11.

harassment is likely to be unrelated to any specific monetary loss. If the employer rejects the complaint of an alleged victim, the grievant will, I believe, be limited to seeking a cease and desist order against management. Arbitrator Ralph Seward said: "The ordinary rule at common law and in the developing law of labor relations is that an award of damages should be limited to the amount necessary to make the injured party 'whole.' Unless an agreement provides that some other rule should be followed, this rule must apply."⁵ Claims of damages for mental anguish are too speculative to be resolved in arbitration.⁶

Aside from the problems of absolute employer liability and damages beyond a make-whole remedy, I believe that arbitration is better suited for handling sexual harassment cases than are the backlogged courts. The matter of delay could be a particular problem in such a case. And an arbitrator having an understanding of an industry or of a particular company will be in a better position than the courts to define sexual harassment in a particular employment context.

III.

The applicability of arbitration to cases involving the handicapped is a considerably more complicated problem. Here, as elsewhere, many issues will be outside the scope of arbitration, particularly in the area of hiring. Other matters may just not be suited for arbitration, or even litigation. I will talk first about traditional arbitration and then about affirmative action involving the handicapped.

For years, arbitrators have dealt effectively with the many difficult problems of when a handicapped employee is qualified to retain or to bid for a particular position. In other words, the question has been whether the employee meets the minimum standards of the job. Cases such as those involving epilepsy, personality disorders, back problems, and alcoholism, while often involving medical testimony, are nevertheless well suited for decision by arbitrators.

As affirmative action leads to the hiring of more and more

⁵*International Harvester Co.*, 15 LA 1, 1 (Seward, 1950); accord, *National Lead Co.*, 36 LA 962, 964 (Marshall, 1961); *Bearings Co. of America*, 35 LA 569, 573 (Abersold, 1960).

⁶See *Walker Manufacturing Co.*, 42 LA 632 (Anderson, 1964); *Sylvania Electric Products, Inc.*, 37 LA 458 (Jaffee, 1961); *Sears, Roebuck & Co.*, 35 LA 757 (Miller, 1960); *Permutit Co.*, 19 LA 599 (Trotta, 1952).

handicapped individuals, there is bound to be a substantial increase in the number of arbitrations requiring individual determinations of fitness to perform a particular job. I doubt that the mental processes of an arbitrator in deciding such cases are likely to differ in any significant respect from those of a judge faced with the same issues. Particularly since these cases usually concern a single individual having a unique disability, arbitrators can serve a valuable role in resolving many of them.

One difficult issue likely to arise is whether an individual is eligible to bid for a position if he has the necessary seniority and is otherwise eligible, but has a debilitating disease that will predictably require his demotion or termination within a few months or within a few years. Certainly, the length and expense of any training problems involved are relevant and important factors to be considered in deciding such cases.

A further problem that may arise in the arbitration of handicapped cases is that more and more employers are likely to refuse to accept an arbitration award as final where a ruling in favor of a handicapped employee conflicts with what the employer considers to be its statutory duty to provide a safe place for employees to work or, in the case of airlines, a statutory duty to maintain the highest degree of safety in the public interest.⁷

The matter of affirmative action is an entirely separate problem. Under the Rehabilitation Act of 1973, almost all federal contractors must include clauses in which the contractor agrees (1) not to discriminate, and (2) to undertake affirmative action to provide employment opportunities for the handicapped. Responsibility for enforcement presently rests with the Office of Federal Contract Compliance Programs (OFCCP) of the Department of Labor.⁸

While Bill Murphy may be correct in predicting that handicap discrimination will soon be brought within Title VII, the desirability of such a change is very questionable.

First, the EEOC finally appears to be making some progress in eliminating its extraordinary backlog of cases. With 12 million or more handicapped adults in the population, the influx of charges of handicap discrimination could hardly fail to disrupt

⁷See 29 U.S.C. §654(a)(1) (OSHA requirements); 49 U.S.C. §1421(b) (1970) (Federal Aviation Act requirements); *World Airways, Inc. v. International Brotherhood of Teamsters*, 578 F.2d 800, 99 LRRM 2325 (9th Cir. 1978).

⁸41 C.F.R. §60-741(28).

the ongoing enforcement programs of the EEOC under its existing statutory authority.

Second, a very important aspect of the affirmative action obligations, and a difference from the cases decided traditionally in arbitration, is the duty to accommodate the physical and mental limitations of employees and applicants "unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business."⁹ The extent of this obligation is unresolved. The Supreme Court interpreted "reasonable accommodation" very narrowly in *Trans World Airlines v. Hardison*¹⁰ a religious discrimination case arising under Title VII. However, the extent to which the Court's decision concerning religious discrimination may apply to the Rehabilitation Act is not clear.

Certainly the approach of the Department of Labor goes far beyond the de minimis concept used by the Supreme Court in *Hardison*. One Labor Department spokesman has said that what the Department will consider "reasonable" will vary depending on the nature of the handicap involved, the size of the contractor, and the size and frequency of his government contracts.¹¹ This leaves a substantial amount of discretion to the Department of Labor's compliance personnel. Some examples of the kinds of accommodation which the Department is seeking to include are:

"Modification of building architecture to include wheelchair ramps, wider bathroom stalls, and raised door numbers for the blind; the installation of alternative warning devices for the deaf and blind; restructuring of job duties; and the purchasing of special aids for the handicapped to help them do the job (such as special telephones for the blind)."¹²

In my opinion, questions of whether an employer has made "reasonable accommodation" through the kinds of changes presently being sought through the affirmative action programs of the OFCCP are not well suited either for arbitration or for private litigation.

The Department of Labor already has considerable power to bring about accommodation of the handicapped. Where a com-

⁹40 C.F.R. §60-741.6(d); cf. 42 U.S.C. §20003(j) (religious discrimination under Title VII).

¹⁰432 U.S. 63, 14 FEP Cases 1298 (1977).

¹¹*Daily Labor Report*, No. 64 (April 1, 1977), A-4.

¹²*Ibid.*

plaint investigation reveals a violation of the affirmative action clause or of the regulations, the OFCCP's regulations provide that the matter should be resolved by informal means, including, whenever possible, conciliation and persuasion. If the apparent violation is not resolved informally, the OFCCP may then seek appropriate judicial action to enforce the affirmative action contract provisions, including appropriate injunctive relief. Alternatively, the OFCCP may impose sanctions, including the withholding of progress payments, termination of the contract, and declaring the contractor ineligible to receive future contracts. Such existing powers are better suited to effecting changes in building architecture, restructuring of job duties, and other matters involving variations in expense related to the size and frequency of his government contracts. An arbitration involving such issues would be closer to interest arbitration than to grievance arbitration.

One of the advantages of allowing the Department of Labor to serve as the principal enforcement agency is that the Department would be expected to resolve in advance any impeding agency demands upon employers, such as those which might arise between OSHA and OFCCP. The government would then be in a better position to deal constructively with employers in improving opportunities for the handicapped. As John Dunlop has said:

“Legislation, litigation, and regulations are useful means for solving some social and economic problems, but today government has more regulations on its plate than it can handle. . . . In many areas the growth of regulations and law has far outstripped our capacity to develop consensus and mutual accommodation to our common detriment. . . . Trust cannot grow in an atmosphere dominated by bureaucratic fiat and litigious controversy: It emerges through persuasion, mutual accommodation, and problem-solving.”¹³

IV.

In conclusion, I believe that arbitration will continue to play a valuable role in the resolution of discrimination cases, offering in discharge cases the most realistic prospect of actual reinstatement. Moreover, an increasing number of discrimination grievances will be filed as more employees become sensitive to real

¹³Dunlop, *The Limits of Legal Compliance*, 27 Lab. L.J. 67, 74 (1976).

or imagined discrimination, and as they become more aware of the delays and deficiencies in the administrative and judicial remedies.

Sexual harassment cases are well suited for arbitration, as are many cases involving handicapped persons. On the other hand, many "reasonable accommodation" issues, such as those involving whether the employer has spent enough money to accommodate a particular individual to a particular job, do not appear to me to be appropriate for arbitration, at least where they involve the major changes being sought by the OFCCP.