CHAPTER 6

HOW OTHERS VIEW US AND VICE VERSA: ADMINISTRATIVE AND JUDICIAL CRITIQUES OF THE ARBITRATION PROCESS

I. ARBITRATION OF TITLE VII CLAIMS: SOME JUDICIAL PERCEPTIONS

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In the last 10 or 12 years, a great deal has been written and said about the role of arbitration and arbitrators in employment discrimination disputes. Several speakers have previously addressed this body on the subject. Many of the problems focused on in these discussions have been settled for us by the Supreme Court in *Alexander* v. *Gardner-Denver Co.*,[1] reinforced by *Barrentine* v. *Arkansas-Best Freight System, Inc.*,[2] a Fair Labor Standards Act case, decided in April of this year. It is now clear, at least, that resort to arbitration never precludes an employee alleging employment discrimination from bringing his or her claim to court. How this doctrine will be applied to employees' claims of unfair labor practices is not at all clear, but that is a subject for another talk.

From the arbitrator's point of view—and indeed from the court's point of view—many questions remain unanswered. Employment discrimination is a rapidly changing and developing field of law, so it is hardly surprising that arbitrators and courts alike, to say nothing of unions, employees, and employers, are continually faced with new and unresolved problems—problems of procedure as well as of substance.

To say that an employee never, or almost never, waives his claim of discrimination by going to arbitration tells us little about what does or should happen in arbitration, or about how the court should treat the arbitration in subsequent litigation. Among the more serious questions which remain are: Should

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[1]415 U.S. 36, 7 FEP Cases 81 (1974).
[2]49 U.S. LW 4347 (April 6, 1981).

arbitration deal with claims of discrimination at all? Are unions competent or motivated to represent employees making discrimination claims? Are arbitrators competent to consider questions of public law? All of these questions could be subsumed in one basic question: What is the role of private bargaining and grievance arbitration in eliminating discrimination in the workplace?

The nature of the problem is graphically illustrated by the Supreme Court's decision in *Emporium Capwell Co.* v. *Western Addition Community Organization.*[3] Several black employees of the Emporium claimed that the Emporium systematically discriminated against blacks in hiring and promotion. The union agreed to file grievances on behalf of the employees and to investigate the charges of racial discrimination. The grievants, however, expressed the view that the grievance and arbitration machinery was inadequate to deal with a systematic problem, and they ultimately refused to participate in the arbitration. Four of the grievants then sought a personal interview with the president of the company. When this was refused, they picketed the store to protest the company's alleged racism. When the minority employees repeatedly refused to stop picketing, they were fired.

Western Addition Community Organization filed an unfair labor practice charge with the NLRB on behalf of the strikers. The Board ultimately held that the discharged employees had been seeking to bargain separately with the company over the concerns of minority employees. This, in the Board's view, threatened to undermine the ability of the union, the exclusive bargaining representative, to bargain with the employer. The picketing was therefore unprotected activity and could properly be the basis of discharge.[4] The District of Columbia Court of Appeals disagreed with the Board and refused to enforce its decision.[5]

The Supreme Court, in turn, reversed the D.C. Circuit and agreed with the Board. In the course of its opinion, the Supreme Court made a number of interesting observations. It pointed out in a footnote that the employees could have, but did not, file a charge with the EEOC.[6] It also noted that no showing had been

[3]420 U.S. 50, 88 LRRM 2660 (1975).
[4]192 NLRB No. 19, 77 LRRM 1669 (1971).
[5]485 F.2d 917, 83 LRRM 2738 (D.C.Cir. 1973).
[6]420 U.S. at 65, note 16.

made that the statutory procedures were too cumbersome to be effective. The Court concluded that the contractual grievance-arbitration machinery, together with the nondiscrimination clause in the contract, was adequate to deal with the problem; and if it was not, under *Gardner-Denver* the claimants would not be precluded from bringing their claim in court. Finally, importantly, and indeed I think most surprisingly to some, the Court held that the employees' substantive rights under Title VII cannot be pursued at the expense of orderly collective bargaining under the NLRA.

The decision obviously implicates a number of policy questions and brings immediately to mind a host of problems. The Court is telling us apparently that minority employees may file charges with the EEOC (or the state agency), or may proceed through their union's contractual grievance-and-arbitration machinery, or may do both, but that they may not work outside the union or statutory procedures to correct what would clearly be unlawful employment practices. Yet the Supreme Court, in *Vaca* v. *Sipes*[7] and elsewhere, has acknowledged that unions themselves have frequently participated in the discrimination proscribed by Title VII. Furthermore, although the union is held to a "duty of fair representation," as a practical matter it must also represent the majority interest or risk losing its support. Are the courts putting unions in an impossible position? Frequently a Title VII claimant's rights must be vindicated at the expense of other employees who have previously benefited from the employer's discrimination. And yet the union is duty-bound to protect those employees as well as those discriminated against.

If the union is unable or unwilling to press the discrimination claim as vigorously as the employee thinks necessary, the employee is relegated to the statutory machinery. However this pursuit, unlike arbitration, must be at the employee's expense; arbitration, of course, is paid for by the union and the employer. A litigated Title VII action frequently consumes three years or more, first in the EEOC's efforts to conciliate, then in the process of discovery and trial. As a result, our court (the Ninth Circuit) is currently considering acts of discrimination which occurred many years ago. The strain a Title VII suit puts on the litigants and their employment relationships is notorious. I understand from practitioners that their clients rarely remain employed by the employer they sue.

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[7]386 U.S. 171, 64 LRRM 2369 (1967).

I cannot help but think that an employer in the Emporium's position might have been better off dealing directly with the dissatisfied employees, if that were the price of avoiding a Title VII suit. Certainly the minority employees might have fared better, and the union, too, might have escaped a sticky wicket. But the question I want to discuss with you is how arbitration could be made to better serve the parties in cases involving discrimination, and to focus on how the arbitral process has operated in the context of discrimination-based complaints and how it might operate better. The conduct of the *Emporium* employees in end-running both the union and the proposed arbitration is at least evidence of a perception on the part of the employees either that the union was not fully representing them, or that the arbitration process would not serve their best interests. They could have been wrong on either or both scores.

In quest of support for some of my hunches I have been reading in foreign territory for me—arbitration opinions. I must say I find them interesting fare.

In my brief and admittedly very unscientific review of the decisions reported in BNA's Labor Arbitration Reports for the last three years, I have arrived at some interesting conclusions. First, as I'm sure you are aware (which I was not), a large proportion of the reported disputes involve employment discrimination claims. And this is four to six years after the *Gardner-Denver* decision; the fears expressed by the Sixth Circuit in *Dewey* v. *Reynolds Metals Co.*,[8] to the effect that arbitration would not be used if employees got another bite of the apple in a court proceeding, have not been borne out. Neither employers nor unions appear reluctant to use the arbitration machinery to solve Title VII problems, even though the grievant can bring the claim again in court. Almost every decision I read, by the way, involved a nondiscrimination clause in the contract, as well as some reference incorporating into the contract Title VII or similar state statutes. These findings were heartening.

Less heartening by far, I found what seemed to me very little uniformity in the way the arbitrators deal with discrimination claims. From one point of view, this is as it should be. The parties are free to order their contractual relations as they see fit; arbitration is attractive partly because the parties can make it serve their own ends. But that is not a sufficient answer to the

[8]429 F.2d 324, 332, 2 FEP Cases 687 (6th Cir. 1970).

problems raised by Title VII claims. The answer depends in part on what we want to accomplish with arbitration. It seems to me that there are several good reasons why arbitrators should be familiar with Title VII and should try to interpret contractual language so as to be consistent with it. If final resolution of the dispute is a goal of arbitration, and surely it should be, then the arbitrator's decision needs to deal with the discrimination claims in a way that minimizes the attractiveness of pursuing the matter in court. If the arbitrator takes too restricted a view of the rights of the grievant, the grievant may resort to litigation more often than might be necessary.

From the grievant's point of view, it is equally important that the arbitrator take as liberal a view of employees' rights as a court would, because the time, expense, and aggravation of a court suit may in fact, if not in law, make arbitration the forum of last resort for many.

Another good reason for the arbitrator to apply Title VII standards more or less as a court would is that that may very well be—should be presumed to be—what the parties intended. Many collective bargaining agreements today contain nondiscrimination clauses; many of these refer specifically to state and federal laws. While the parties probably did not intend for the arbitrator to invalidate contract clauses he or she finds inconsistent with public law (although this also has frequently been done), they probably did intend that the contract be read whenever possible to be consistent with the external law.

A fear which I have heard expressed is that arbitrators who are chosen by the parties, and who depend to some extent on their continued popularity with the parties, may not be willing to enforce fully the strictures of Title VII even if given the power. I am inclined to think such fears are overstated. As I have said, employers and employees have demonstrated their willingness to take Title VII claims to arbitration even after *Gardner-Denver.* If compliance with the demands of a fairly tough-minded arbitrator is the price of avoiding continued unrest and eventual litigation, I think the parties will be willing to accept the arbitrator's decision.

Whether the arbitrator is or should be competent to deal with discrimination claims is a more difficult question. Many arbitrators note in their decisions that they are neither competent nor empowered to interpret and apply external law. Others, by contrast, feel perfectly free to read and apply the statute even when it conflicts with the plain requirements of the contract. Occa-

sionally the parties even request such a ruling. Most often, however, it appears that the arbitrator takes a middle ground: reading the contract in light of the perceived requirements of the statute. This is far preferable in my view to an approach which deliberately ignores external law, especially in those cases where the arbitrator knows the contract, as he or she interprets it, to be possibly or probably illegal. The latter approach is almost certain to lead to litigation sooner or later.

I think it bids fair that so many collective bargaining agreements now contain antidiscrimination clauses. But, as I indicated, I am concerned that the arbitrator's interpretation and enforcement of these clauses is anything but uniform.

Beyond lack of uniformity, the decisions I read suggest that some arbitrators are not familiar with Title VII or the case law surrounding it. One particular type of case I think illustrates the problems. These are the cases in which the employee complains of sexual harassment, something that has only recently been recognized as a violation of Title VII.[9]

While an employee could sue in court for damages due to sexual harassment even if she has not lost her job, in the arbitral context the focus of the dispute will usually be whether the employee was dismissed for nondiscriminatory reasons during the probationary period, for "just cause" thereafter, or denied a promotion for permissible reasons. Of course such a charge will be difficult to prove, either in court or in arbitration, except in the most egregious cases. But arbitrators seem to impose a much higher standard of proof on the grievant than would a court. This may in part have to do with the perceived requirements of the contract; for instance, less is required to discharge a probationary employee than an employee protected by a "just cause" provision. The burden of proof in arbitration is said to be on the probationary employee. Interestingly, however, a court would not make the same distinction. The burdens of proof would be allocated according to the dictates of *McDonnell Douglas Corp.* v. *Green,*[10] regardless of the nature of the action taken against the employee, or the employee's status.[11]

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[9]See 29 C.F.R. §1604.11 (1980); *Bundy* v. *Jackson,* 24 FEP Cases 1155 (D.C.Cir. 1981); *Barnes* v. *Costle,* 561 F.2d 983 (D.C.Cir. 1977).

[10]411 U.S. 792, 5 FEP Cases 765 (1973). The Supreme Court clarified the requirements of *McDonnell Douglas* in *Texas Department of Community Affairs* v. *Burdine,* 101 S.Ct. 1089, 1093–1095, 25 FEP Cases 113 (1981).

[11]I do not mean to suggest that when a "just cause" provision imposes a higher standard of proof on an employer than a court would under Title VII, that the arbitrator should not apply the contract. The employee is certainly entitled at least to the measure of protection provided by the contract.

In one arbitral decision I read,[12] the arbitrator imposed on the probationary employee the entire burden of proving sexual harassment. He dismissed her testimony as "self-serving," and discounted the testimony of her coworkers. In particular he noted that there was no direct corroboration of the sexual demands allegedly made by her supervisor, although other portions of the grievant's testimony were corroborated. The arbitrator held that her dismissal was not shown to be discriminatory.

I am not suggesting that a court necessarily would ultimately have reached a different conclusion. However, the allegations of sexual demands, the testimony of coworkers, and the fact of the dismissal would at least have made out a prima facie case against the employer under *McDonnell Douglas.* The burden would then have been on the employer to show legitimate business reasons for the firing. The employee would then have had an opportunity to show that the reasons given by the employer were pretextual.

In a much more egregious case, the arbitrator found that the employee's allegations of truly outrageous sexual harassment were true, but that the "Company" did not know about them, even though the employees responsible for her training certainly did.[13] When the company did learn of the incidents, it put a stop to overt harassment, although not to the "cold shoulder" treatment the grievant received. She was nonetheless fired. The company claimed she had failed to learn her job; she countered that she had had no opportunity to learn it because the harassment by her coworkers was so severe.

The arbitrator denied the employee relief on the ground that because the employer didn't know about the harassment, it was not responsible. The arbitrator reached this conclusion by imposing a very high standard of proof on the employee. He first observed that a charge of sexual harassment was akin to a charge of criminal activity, so that the employer should be presumed innocent until proven guilty. The standard of proof he actually employed, however, was preponderance of the evidence rather than beyond a reasonable doubt—not as bad, but still wrong—and he concluded that the employee had failed to show that her employer knew about the harassment.

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[12] *Paccar, Inc.*, 72 LA 769 (Grether 1979).
[13] *Amoco Texas Refining Co.*, 71 LA 344 (Gowan 1978).

I suggest that the arbitrator asked the wrong questions. Once he concluded that the employee had in fact been harassed, he should have asked: Did the harassment affect her ability to learn the job? Should the employer have taken steps to protect her from harassment? Should it have taken remedial action once it learned of the incidents, rather than allowing other employees to give the victim the cold-shoulder treatment? And it was certainly within the arbitrator's power, without necessarily finding the employer "guilty" of harassment, to require the employer, for instance, to offer the woman employee a second training period (the first period was at best a "hazing" period), during which she would be put in a less hostile environment and allowed to learn her job.

The arbitrator's decision presents a striking contrast to the EEOC's recently issued guidelines for sexual harassment cases.[14] The guidelines state that an employer will be held liable for sexual harassment if any supervisory employee knows of the incidents. Furthermore, the employer is liable if it should have known of the incidents, even if no supervisory employees actually knew of them.[15]

I find it very likely that a court, faced with the same case, would have found a violation of Title VII. Furthermore, if a violation were found, the fact that the employer had put a stop to the conduct after it had continued for several months would not be deemed adequate as a remedy. The employee was still suffering from a severe disadvantage in her training program; that is suggested by the fact that the employer fired her for failing to learn the job. The court could have ordered reinstatement and back pay, as well as other equitable remedies, aimed at preventing similar incidents in the future.

Again, I do not suggest that a court would necessarily have reached a different result—and I certainly do not suggest that the arbitrator was wrong under the contract. What I do suggest is that the case law in this area makes it very attractive for the employee to pursue her claim in court. If the employer lost after the several years usually required for such litigation, it could well be liable for a large amount of back pay. The arbitration in that case does not seem to have fulfilled the function of satisfactorily resolving the dispute between the parties.

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[14]29 C.F.R. §1604.11 (1980).

[15]*See also, Miller* v. *Bank of America,* 600 F.2d 211 (9th Cir. 1979); *Barnes* v. *Costle,* 561 F.2d at 992–993.

Another example of a situation in which courts and arbitrators arrive at widely differing decisions is in the consideration of evidence that tends to show a pattern or practice of discrimination by the employer. Such evidence frequently includes statistical data. I have not read an arbitration of an individual grievance (I am not talking here about systemic or class grievances) in which the arbitrator considered such evidence important. One decision in particular struck me. The grievant claimed that he was fired after his probationary period because of racial discrimination. The union presented evidence that minority employees almost never successfully completed probation under this particular supervisor. The arbitrator held, however, that because no particular "incidents" of racial discrimination involving this particular employee had been shown, his firing was not discriminatory.[16]

In court, on the other hand, statistics may be used to make out a prima facie case of discrimination even in an individual action.[17] Such evidence is frequently, although not always, part of the plaintiff's case. Indeed, it would be difficult in many cases to prove discrimination without the inference raised by statistical disparities.

A systematic study by arbitrators of Title VII, and a conformance to court-blessed standards of proof, would do much to achieve uniformity. Indeed, adherence to the teachings of the two cases I've mentioned, *McDonnell Douglas* v. *Green*[18] and *Texas Dept. of Community Affairs* v. *Burdine*,[19] would suffice, with the caveat that whenever a higher standard is imposed on the employer under the contract, the contract should control.

On a happier note, I have discovered that some arbitrators have pursued some innovative techniques to enforce the requirements of Title VII. The courts are probably not, in general, even aware of these developments (at least this representative of the court confesses ignorance). I refer to several recent cases in which the arbitrator was specifically asked to pass on the legality of a particular course of action.

In one such case the employer was involved in ongoing Title VII litigation.[20] The trial judge had made findings of fact and conclusions of law, but had not yet ruled on the appropriate

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[16]*Paccar, Inc.*, 72 LA 771 (Grether 1979).
[17]*See, e.g., Heagney* v. *University of Washington*, 642 F.2d 1157 (9th Cir. 1981).
[18]*Supra*, note 10.
[19]*Supra*, note 10.
[20]*Operating Engineers Employers*, 72 LA 1223 (Kramer 1979).

relief. The parties asked the arbitrator to decide whether the employer should discontinue use of the exclusive hiring hall required by the contract but found illegal by the judge. The arbitrator decided that, in light of the judge's decision, the hiring hall could be discontinued despite the express language of the contract.[21]

Another case involved a government contractor which, at the government's informal request, had made unilateral changes in its seniority system.[22] The union protested. The arbitrator found an intractable conflict between the contract and the possible statutory requirements. He therefore ordered the parties to seek an official government opinion on the statutory requirements, and retained jurisdiction pending the result. He also suggested that if such an opinion was not forthcoming, he might seek to join the United States in the arbitration proceeding so that it might be bound by the result. Although the legal effect of such a procedure, as the arbitrator recognized, is extremely doubtful, it does represent a valiant effort by the arbitrator to deal with the problem without remitting the parties to a solution by strike or litigation. I decline to predict how the court would respond to a challenge to the arbitrator's joinder of the United States as a necessary party to the arbitration.

Arbitrators have been called upon to deal with similar situations when statutory requirements change during the life of the collective bargaining agreement. The Pregnancy Amendments of 1978[23] caused quite a problem in this regard. Many contract clauses were plainly illegal under the amendments. Arbitrators have been faced with the question of whether to enforce the contract clauses or to invalidate them under the new law; other disputants have sought an interpretation of new contract clauses written to comply with the amendments. One arbitrator, interpreting a parallel state law, awarded a pregnant employee sick leave, although the contract did not require it and past practice was clearly shown to be otherwise. The arbitrator considered it his duty to read the contract to be consistent with the new legal requirements.[24]

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[21]I note that the final decree in the case referred to did not require that the exclusive hiring hall be disbanded, but rather that certain referral quotas for minorities be observed. *Commonwealth of Pennsylvania* v. *Local Union 542, International Union of Operating Engineers,* 488 F.Supp. 988 (E.D.Pa. 1980). This does not detract from my point, that the arbitrator made an admirable effort to settle the controversy consistent with the law as he understood it.

[22]*Max Factor & Co.,* 73 LA 742 (Jones 1979).

[23]42 U.S.C. §2000e(k) (Supp. III 1979).

[24]*Muskego-Norway School Dist.,* 71 LA 509 (Rice 1978).

In another case the arbitrator was asked to decide whether the newly written contract clause required disability benefits for an employee who was on pregnancy leave at the time the amendments took effect.[25] The employer had denied the benefits. The arbitrator read the EEOC guidelines and decided that they required benefits to be paid as of the effective date. He concluded that the contract must have been intended to require what the statute required. The employer was instructed to reprocess the grievant's claim for benefits.

Pulling the threads together, I really have a rather simple thesis. I put aside the philosophic and theoretical problems posed by arbitration of discrimination cases: the incompatibility of majoritarian union interests on the one hand and employer goals on the other. I recognize the difficulties of relying on private dispute resolution to vindicate the rights of employees who have been the victims of discrimination and to eliminate that discrimination in the workplace. I look at the tools we have and the realities of the workplace. I conclude that arbitration in the context we know it—grievances under the collective bargaining agreement—is the best tool we have, the best forum for the grievant. And I think arbitrators have it within their power and their grasp to improve the process in order to accomplish the goals of Title VII, in the context of the traditional forum. Some of you are already doing an excellent job.

The advantages of relying on private arbitrators to settle discrimination claims are, of course, first and foremost, that the machinery is already in place; second, arbitration provides speedy dispute resolution by persons knowledgeable about the industry and the players, and persons who are skilled in resolving disputes in a way that does not disrupt ongoing relationships.

The courts and the EEOC are poor instruments for the vindication of individual grievants' claims. There is no commitment or capacity to preserve ongoing relationships. Detailed understanding of the particular business or industry is lacking. The EEOC and the courts face mounting backlogs. In an ideal division of labor, the EEOC and the courts would better serve in the class-action case, the industry-wide problem, leaving the individual grievance to the arbitration process.

Your sense of frustration (not to speak of the employers' and

[25] *Northern Indiana Public Service Co.*, 74 LA 604 (Kossoff 1980).

the unions') at the ability of the unrequited grievant to start all over again in the courts can be lessened if you see, as did the Supreme Court in *Gardner-Denver,* that because of the inherent tensions between Title VII goals and the traditional grievance and arbitration procedures there must be an ultimate opportunity to resort to the courts for vindication of such rights. Certainly for now the courts provide a necessary corrective aspect. You, as arbitrators, can offer the parties greater assurance of finality if you can secure for arbitral awards in the discrimination area a deference from the courts not unlike that accorded your awards in other areas.

Arbitrators certainly have the power and the flexibility to achieve this result. My reading has convinced me that you are not reluctant to read and apply external law when you feel the situation requires it. I would urge that the goal of achieving finality makes that effort very worthwhile. To the extent that a fair reading of the collective bargaining agreement can encompass a resolution consistent with Title VII, arbitrators should so decide. To the extent that the arbitrator has in his/her arsenal remedies akin to Title VII remedies, they should be employed.

I conclude with Justice Powell's ultimate sentence in *Gardner-Denver:* "The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate,"[26] footnoted with the following words:

> "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."[27]

I urge that you accept the challenge.

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[26]415 U.S. at 60.
[27]415 U.S. at 60, note 21.