out in the *Steelworkers Trilogy*[24] will, when tested, survive untouched in variants of X's case. However, the resource-allocation problems plaguing the courts have, if anything, increased rather than diminished. Perhaps some kind of limited deferral, circumscribed deference, or different review process will be applied to arbitrations involving statutory versus completely private issues. Only time will tell. Lacking clear guidance on the legislative and judicial fronts, advocates and arbitrators must consider whether stricter, more comprehensive standards of advocacy and decision making must apply in these ADA cases. Arbitrators must ponder whether we ought to play a more active role in ensuring that, after hearing X's case and those like it, we have the information we need to decide issues raised by external laws such as the ADA.

LABOR PERSPECTIVE

GAIL LOPEZ-HENRIQUEZ*

As a labor advocate, I have become very concerned about the consequences, for both unions and for individual workers, of some of the views that have been advocated concerning arbitration of disability discrimination issues. There are six major issues that raise the thorniest problems in this area. These are: (1) group rights versus individual rights; (2) deferral to arbitration; (3) election of remedies; (4) the arbitrator's authority to interpret or enforce statutory law; (5) conflicts between contract language or accepted past practices and the Americans with Disabilities Act (ADA); and (6) the ramifications of the *Goodman v. Lukens Steel*[1] decision of the Supreme Court holding that a union could not refuse to grieve and arbitrate issues of racial discrimination.

The issue of group rights versus individual rights is the first mentioned because, for me as a union advocate, it is a very central concern and my position on many of the other issues derives from it. It is necessary for me to point out, however, that I have represented and continue to represent individual employees in disability discrimination cases as well as other types of employment

[24] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

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[1] 482 U.S. 656, 44 FEP Cases 1 (1987).

discrimination cases, in addition to my representation of unions. My position on these issues is based on my concerns for both the union and the individual employee as well as my very vivid realization of the difference between how a case can be pursued in an arbitration forum as opposed to what I can do with a case that is in litigation in the courts.

It is well recognized that unions have an obligation to represent the interests of the bargaining unit as a whole and to weigh the interests of the unit as against the interests of the individual when they come in conflict. There is a group interest in seniority systems, in systems of job posting, in shift preference, which the union must represent. These group interests are incorporated in the collective bargaining agreement negotiated by the union. There are also issues such as the burden on co-workers if a disabled employee is relieved of physically demanding or other unpleasant tasks. Indeed, other bargaining unit employees may have very strong feelings about the increased burden that would be placed on them if some workers are taken out of the rotation or relieved of certain job obligations. Safety also may be implicated as is certainly central to the case discussed in Joan Dolan's paper. In some cases the disabled individual may present an actual or potential danger to co-workers. In psychiatric cases violence or unpredictable behavior may be an issue. There is an increase in public awareness of workplace violence and potential employer liability. Unions must be concerned with fair and equal treatment for all employees. This leads to another interesting question: If the employer is required to undertake a significant expense to make an accommodation to a disabled employee, does this benefit all of the employees, or to what extent does it decrease the resources that would be available for the benefit of all employees? Unions must consider these conflicts when they are addressing potential disability issues.

For these reasons I believe that disabled individuals should have the right to select an advocate who can act solely in their best interests without these competing loyalties. Because of my convictions about the primacy of group rights in the role of the union and the degree to which I believe that the contract which has been negotiated between the parties on behalf of all employees must be respected, I disagree with the position expressed by Dolan in support of the decision in *City of Dearborn Heights*,[2] where the arbitrator decided that certain provisions in the contract with

[2]101 LA 809 (Kanner 1993).

respect to shift preference could be violated because of the needs of an individual with a medical disability.

In light of the role of the union that I have espoused, I believe that judicial deferral to arbitration in this context is entirely inappropriate. The grievance and arbitration procedure is controlled by the union, not the disabled individual. The union has an obligation to act in the best interests of all bargaining unit employees, not just the individual. A union may make valid judgments about whether to pursue a grievance and the strategy to be utilized if they do. Such judgments may be in the best interests of the bargaining unit, but contrary to the interests of the individual or less effective in advancing the specific interests of the individual.

This issue was recognized by the U.S. Supreme Court in its decision in *Alexander v. Gardner-Denver Co.*,[3] where, citing *Vaca v. Sipes*[4] and *Republic Steel Corp. v. Maddox*,[5] it stated in a footnote: "A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented." In arbitration, as in the collective bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. Moreover, harmony of interest between the union and the individual employee cannot always be presumed. In addition, a union cannot be expected to be expert in the legal intricacies of the ADA, nor should a union be required to take the position that the contract incorporates the entire ADA, the Equal Employment Opportunity Commission (EEOC) regulations, and the decisional law.

Furthermore, the arbitration forum is less suited to the effective development of a discrimination case. It does not include the opportunities and protections of a judicial proceeding, such as discovery, preparation time (which is certainly vastly different for union counsel in an arbitration case), or strict adherence to rules of evidence. The Supreme Court pointed to these concerns when it stated in *Gardner-Denver*:

> [T]he fact-finding process in arbitration usually is not equivalent to judicial factfinding. The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination and testimony under oath, are often se-

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[3]415 U.S. 36, 58 n.19, 7 FEP Cases 81, 89 n.19 (1974).
[4]386 U.S. 171, 64 LRRM 2369 (1967).
[5]379 U.S. 650, 58 LRRM 2193 (1965).

> verely limited or unavailable. . . . Indeed, it is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts.
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> . . . [A] standard that adequately insured effectuation of Title VII rights in the arbitral forum would tend to make arbitration a procedurally complex, expensive, and time-consuming process. . . .
>
> . . . Fearing that the arbitral forum cannot adequately protect their rights under Title VII, some employees may elect to bypass arbitration and institute a lawsuit.[6]

It is clear that deferral by the courts to the arbitration process would require a major change in the way unions handle arbitrations. Would they be required to use a lawyer in every case? My clients don't. They decide what cases they want me to handle and what cases they want their staff representatives to handle. They employ staff representatives who have worked for the union for many years and who are very competent and effective in presenting cases in arbitration, but they are not familiar with the ADA or with court decisions. Would a policy of deferral to arbitration require the union to cite legal authority, to write briefs, to obtain a transcript, to use medical experts in every case? Unions can't afford to do this. It is clear that arbitration would no longer be the speedy and inexpensive process, accessible to nonlawyers, that it was devised to be.

In my opinion, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*,[7] where the Court deferred to an agreement to arbitrate in an individual contract, clearly recognizes the difference between that case and arbitration in the collective bargaining context. The *Gilmer* decision was relied upon exclusively by the court in *Austin v. Owens-Brockway Glass Container*,[8] the deferral case Dolan discussed. The court in *Austin* did not mention the Supreme Court's decision in *Gardner-Denver*. In fact, there have been many articles and lectures by management lawyers, arguing that *Gilmer* now has overruled *Gardner-Denver* and that courts should defer to the arbitration provisions of collective bargaining agreements in statutory discrimination cases. However, in its decision in *Gilmer*, the Court explicitly drew a distinction between collective bargaining agreements and individual employment agree-

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[6]415 U.S. at 57–58, 59, 7 FEP Cases at 89, 90 (footnotes and citations omitted).
[7]500 U.S. 20, 55 FEP Cases 1116 (1991).
[8]844 F. Supp. 1103, 145 LRRM 2445, 2 AD Cases 1649 (W.D. Va. 1994).

ments in which the parties agree to arbitrate statutory claims. The Court specifically cited the principle that the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit and stated that an important concern in *Gardner-Denver* was the tension between collective representation and individual statutory rights, a concern that was not applicable to the *Gilmer* case, where it was an individual who was agreeing to arbitrate statutory cases.

For the same reason it is inappropriate to limit a discriminatee to an election of remedies between arbitration or a civil action based on statutory claims. A union may need to pursue contractual issues in the interests of the bargaining unit, but its strategy and its presentation may well be very different from what private counsel would do when acting on the sole behalf of the individual. Therefore, even in cases where the union has taken a case to arbitration, individuals should still have access to the enforcement of their statutory rights through the judicial process.

The *Goodman* decision adds another complicating factor. For all the reasons that I've just mentioned, a union may tell its members with truly the best intentions and the individuals' interests at heart, that they would be better off going to the EEOC and going to court on their cases, especially when the union knows that the individuals have already consulted and retained their own attorney for that purpose. In *Goodman*, the Supreme Court said that a union may not refuse to file a grievance regarding race discrimination or be an accomplice to race discrimination by the employer. To what extent would that decision apply to disabilities and require a union to grieve disability discrimination against an individual, or policies that operate to the disadvantage of disabled employees? Under this logic, a union may not tell an employee to resort to the administrative and judicial processes rather than use the grievance procedure. This question is unresolved (and as yet unlitigated, to my knowledge) and raises some complicated problems for both the union and the individual, particularly in light of the possibility that the employer could subsequently argue that a court action is barred by virtue of the plaintiff's use of the grievance and arbitration procedure.

Further complications arise inasmuch as there are many common contractual provisions and practices that may violate the ADA, but nevertheless have been explicitly agreed upon between the parties or have become an accepted past practice. The ADA may establish obligations contrary to the contract or practice.

Based on the ADA, may an arbitrator find an obligation to provide light duty when there is no contract language or a consistent or comprehensive past practice? In light of the ADA, is the employer permitted to distinguish between work-related and non-work-related disabilities in the availability of light duty? Many employers do this. But if it is possible to accommodate the first, is there an obligation to accommodate the second? In just one of the many more potential examples, may an employer continue to maintain no-fault absenteeism policies that can lead to the termination of employees with disabilities? If management has the right to establish work rules pursuant to a management rights clause, or if there has been a prior agreement to an absenteeism policy between the parties, may arbitrators overturn such policies based on ADA principles or may they hold that the no-fault policy cannot be applied to employees with disabilities? Wouldn't it be unfair to nondisabled employees if the absenteeism policy applied to them and would justify their termination if they got sick or broke their legs or had many other perfectly valid medical reasons for being absent which did not qualify as disabilities under the ADA, but that policy would not apply to a co-worker with an ADA-recognized disability, who was thereby protected from discipline? On the other hand, is a union potentially liable under the theory of *Goodman* if it insists that the policy be applied equally to all workers?

Finally, what are the parameters of the arbitrator's authority to interpret or enforce statutory law? There are a number of subsidiary questions that may affect the scope of the arbitrator's authority. Should it matter whether the contract contains an explicit nondiscrimination clause? Should it matter whether that antidiscrimination clause specifically refers to disability discrimination or whether it even goes further such as the provision Dolan discussed which specifically refers to the ADA? The opinions expressed by many commentators essentially redefine the role of the labor arbitrator. Is this what the parties bargained for?

I have a great deal of concern about the potential ramifications of such wholesale changes in the practice of arbitration. However, I think that it is possible to reconcile the issue of the arbitrator's possible lack of authority to go outside of the contract with the principles underlying the ADA. It should be recognized that the ADA, the regulations, and other statutory law are guides to evolving standards of fairness. There are many other issues that have arisen over the years that were not, in earlier years, issues with

which arbitrators had to concern themselves. Just cause is clearly an evolving concept. I submit that the ADA can be used by analogy and example, but the strict enforcement of statutory rights is properly the role of public administrative agencies and the courts.

MANAGEMENT PERSPECTIVE

JAMES J. KELLEY*

Arbitrator Joan Dolan has posed an artful hypothetical that weaves the subtle nuances of an all too typical Americans with Disabilities Act (ADA) claim into the more fundamental question of whether these issues should be arbitrable at all. Academy members have addressed the arbitration of statutory claims on a number of previous occasions, and there is room for differing points of view on the question. This management commentator approaches the issue as a convert. Shortly after *Alexander v. Gardner-Denver Co.*,[1] I routinely counseled clients to restructure the discrimination clauses of their collective bargaining agreements so that they could have the option of pursuing an election of remedies argument to preclude a "second bite at the apple." I reasoned that it was fundamentally unfair for an employer to be subject to an arbitration process that was final and binding on only one side. I am not certain that I still agree with that conclusion.

Clearly the classic advantages of employment arbitration over employment litigation are as valid today as they ever have been. Even if the process is formalized to allow for limited discovery, and hearings become more detailed and routinely transcribed, arbitration is still an inexpensive alternative to litigation. Discovery costs will be decreased. Claims will be resolved more quickly. If the decision is adverse to the employer, potential back-pay remedies will be diminished and there will be little or no appellate recourse. The parties can be confident that their employment dispute will be submitted to a neutral factfinder familiar with principles of industrial justice, an alternative far more preferable in my mind, than an unpredictable jury.

In many respects these advantages inure as much to aggrieved employees as employers. Even though the range of remedies for intentional discrimination has been expanded by the Civil Rights

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