CHAPTER 2

THE CHANGING FACE OF JUST CAUSE: ONE STANDARD OR MANY?

I. OVERVIEW

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Life used to be so simple. Joe steals a wrench. Joe gets fired. The union grieves, the company denies, I hear the case, management says I can't substitute my judgment for that of the employer, I substitute my judgment for that of the employer. Joe goes back to work. I go home. My kids go to college. Life was simple.

But then, disaster strikes. In between investigations, Congress passes laws. Lots of them. Now, mind you, they're not those seditious laws designed to undermine the fabric of our American heritage, like you can't buy more than 12 bazookas a month. Nor are they diabolical Republican traps that require you to disclose the names of all Buddhist campaign contributors. By golly, this is one of those rare instances where Congress passes a law we can all love: If a person can do her job, then you can't discriminate against her because she's disabled. It's a good law, says the union bargaining committee, and anyway, let management explain to everyone why it doesn't want it in the contract.

And so, we now have contracts that explicitly incorporate laws that people (including arbitrators) may well have heard of, seen, or read: the Rehabilitation Act, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act (ADEA), the Americans with Disabilities Act (ADA), the Family and Medical Leave Act (FMLA), the Older Workers Benefit Protection Act (OWBPA). Ladies and gentlemen, I stand before you and ask, in the immortal words of Al Capone: "What are we going to do about all these damn laws?"

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So a case comes to arbitration. It's your run-of-the-mill case, except Joe is a 52-year-old, one-legged, transvestite kleptomaniac, and he's telling the company (through a terrified union representative), "You have violated the collective bargaining agreement and every statute in the United States Code." And the arbitrator, a decent sort of chap, a minister with a small parish in Ohio who prides himself on common sense and a pretty good knowledge of the industrial workplace, looks heavenward and says, "What have I done to deserve this?"

The temptation, in the face of these ubiquitous statutory incursions, is to somehow change gears; to abandon what would otherwise be a straightforward consideration of fairness and industrial justice, according to the contract and the context of these particular parties, and to proceed instead in accordance with some perceived overlay of legislative intent. For example, the ADA[1] requires that certain "disabled workers"—whoever that may be—be "accommodated"—whatever that may mean. The case law is arcane, tricky, and developing as we speak on both these issues. Nevertheless, an arbitrator may blithely conclude that an individual who abuses alcohol is per se an alcoholic—he's not—or, for that matter, that alcoholism is automatically to be considered a disability under the ADA[2]—it's not. The same arbitrator may conclude, erroneously as far as that statute is concerned, that alcohol-related misconduct, including absenteeism or accidents, is somehow to be mitigated because of the disease.[3] The arbitrator may decide that the overall tenor of the statute requires consideration of postdischarge activity such as rehabilitation efforts; this in circumstances where the arbitrator might otherwise have discounted such evidence, focusing solely on the facts as they existed at the time of dismissal.[4] This melding of vague concepts of federal

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[1]42 U.S.C. §12114.

[2]*See* 29 C.F.R. §12114(a).

[3]42 U.S.C. §12114(c) specifies that an employer:

> May hold an employee who . . . is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if such unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee. . . .

[4]Consider the following case: An employee is discharged for destroying a company delivery truck while he was driving drunk. At arbitration, it is argued that (1) the employee is an alcoholic, (2) alcoholism is a disease, (3) the thus-diseased worker should be protected by the ADA, and (4) in any event, the grievant has taken vigorous strides to recognize his problem, seek rehabilitation, and, in short, turn his life around. The discharge, it is alleged, was the "rock bottom" point that such individuals need to hit in order to drive home the message.

The employer, for its part, claims that the ADA does not cover or in any way protect the grievant. To the contrary, it notes, nothing in the ADA suggests that evidence of postincident conduct is relevant. What matters, it argues, is the conduct at the time of discharge.

or state law and privately negotiated understandings under the contract is what I worry about in speaking of the "Changing Face of Just Cause."

Faced with this brave new world,[5] one perceived by many arbitrators (wrongly) as involving a more public role for a private process, neutrals do strange and wonderful things. And so, I might add, do the parties.

Contract Language

One begins with the premise that the collective bargaining agreement is a private document. Arbitrators are private creatures of this contract. However unattractive, thoughtless, and errant our decisions, those are the decisions for which these parties have bargained. We are not assigned; we are selected. We have no life tenure; indeed, none of us has tenure (at least as arbitrators) and some of us have no lives. This is a self-contained, self-executing system. And the bedrock core and character of this process is the notion of just cause. That is the contract's standard. It is one that may be informed or somehow seasoned by external law concepts that are incorporated by the parties. But unless specifically mandated otherwise, by those same parties, that is our standard for evaluating discipline. Most collective bargaining agreements specifically incorporate just cause, or a close variation, as the appropriate standard to be applied to discipline and discharge cases. Even when contracts are silent on the standard, most arbitrators will readily infer such an approach to the extent that management will be hard-pressed to argue successfully for any other approach, absent very explicit language. Even in employment-at-will situations outside the collective bargaining context, many courts are comfortable in requiring a showing of cause for discipline or discharge.

One can debate the question of whether an arbitrator should consider such after-acquired circumstances, and a general review of the literature suggests that there is some substantial diversity on this point. But this is another instance where, whatever the arbitrator's conclusion, he or she need not be compelled by the statutory limitations. That is, one may conclude that the question of whether "just cause" existed for the discharge should not be answered with reference to events following the discharge. But whether that is or is not the case should not be decided by whether such reference is prohibited by the ADA.

[5]The ADA is generating a large and very accessible body of case law. For purposes of this discussion, that statute will be utilized extensively. But the principles are equally applicable to all federal and state discrimination statutes.

There is a limitless range of contract language that deals with federal or state law and that may or may not embody it directly. Some provisions leave little question as to the incorporation by reference of external law. For example:

> This agreement shall be interpreted to permit the reasonable accommodation of disabled persons as required by State and/or Federal Law, including the Americans with Disabilities Act (ADA). In the event a proposed accommodation will conflict with an express provision of this Agreement, the parties, at either party's request, shall meet to discuss the proposed accommodation.

This language rather clearly incorporates the ADA, but one has no idea what would happen in the event law conflicts with contract. Another company and union have negotiated the following:

> It is the policy of [the company] to provide all applicants and employees with an environment free from unlawful discrimination on the basis of . . . physical disability, medical condition . . . or membership in other protected groups as prohibited under State and Federal law. It is further the policy of [the company] not to tolerate harassment by any of its employees at the workplace on the basis of . . . physical or mental disability, or membership in other protected groups.

This is a less direct incorporation of external law. No statute is mentioned, but there is little doubt from the reference to "unlawful discrimination" that the parties intend to abide by the general tenets of statutory mandates. Or, consider the following:

> It is the continuing policy of the company and the union that the provisions of the Agreement shall be applied to all employees without regard to race, color, religious creed, national origin, disability, Viet Nam era service, sex or age, except where age or sex is a bona fide occupational qualification.

This may be characterized as a purely contractual endorsement of antidiscrimination policy, without overt reference to the statutes themselves.

The Decisions

What do arbitrators do with such language? Often, they do nothing at all, simply deciding for themselves whether, and to what extent, external law may be applicable. Where the collective bargaining agreement is silent on consideration of any external law, arbitrators have not hesitated to confine their scrutiny solely to the labor agreement and to the just cause standard. See, for

example, *Zebco Division, Brunswick Corp.*,[6] where the arbitrator stated, in relevant part:

> The Union contends that because Grievant is recovering from cocaine dependence, and suffers from borderline personality traits, he is handicapped within the meaning of Oklahoma Statutes protecting the handicapped against job discrimination. Another forum must be sought for that determination. My function and jurisdiction is limited to a just cause determination under the contract.[7]

Other arbitrators have found that they could consider the ADA, even though the labor agreement said nothing about disabled people. Said one arbitrator:

> The [company's] Agreement contains an exclusive non-discrimination clause . . . [that] prohibits discriminating because of Union membership or activity, race, creed, color, sex, age and national origin. It says nothing about the rights of handicapped employees.[8]

Having noted this, however, the arbitrator concluded that he could readily turn to a variety of resources for guidance:

> When contract negotiators restrict an employer's disciplinary authority with the single term "just cause," they open each discipline grievance to arbitral intrusion. They license arbitrators to do precisely what the Supreme Court sought to restrain—fashion decisions based on individual ideas of industrial justice. While the words "just cause" may seem straightforward and simple, they are not. They embody a profusion of concepts and ideals about what is a just penalty.[9]

After concluding that one may look to arbitral precedent as a source, another "obvious resource" for deciding what constitutes just cause is, said the arbitrator, basic societal values, as reflected by arbitrators "decades before the ADA was enacted," including the "long-recognized" element of "reasonable accommodation."[10] But (covering all bases), the arbitrator also found the ADA relevant:

> The arbitrator agrees that technically, he cannot decide whether [the company] violated the [Americans with Disabilities Act] when it discharged Grievant. That is a question for the courts. But he is empowered and obligated to decide if Grievant's penalty was just and fair. In making that determination, it is appropriate to look to the Act for guidance.[11]

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[6] 1993 WL 788448 (Thornell 1993).
[7] *Id.* at 7–8.
[8] *Thermo King Corp.*, 102 LA 612, 615 (Dworkin 1993).
[9] *Id.*
[10] *Id.*
[11] *Id.*

The arbitrator then went on to discuss some loosely fashioned assumptions about the ADA and to conclude in the overall that any accommodation was unnecessary and the grievance should be denied. In this case, the arbitrator clearly recognized the contract as the controlling document. At the same time, he acknowledged the potential impact of the statute in determining overall fairness for purposes of ruling on just cause.

In another case, notwithstanding the parties' having specifically stated in the contract that "employment decisions shall comply with all applicable laws prohibiting discrimination in employment including . . . Americans With Disabilities Act," the arbitrator firmly concluded that his authority was limited solely to application and interpretation of the collective bargaining agreement; he was thus without authority or jurisdiction to render a decision concerning the question of whether the employer violated the grievant's rights under the federal ADA.[12]

In *King Soopers,*[13] an employee was fired for telling fellow employees and supervisors that he was upset, and that he was going to get his assault rifle and "take care of some people." There is no indication that the parties had dealt with mental disability in their contract, but the arbitrator, citing agreement by the parties, concluded that when a termination is for reasons relating to a mental disability, the matter should not be treated as a disciplinary problem. " 'Just cause,' in a disciplinary sense, is not the appropriate standard in cases such as this," he stated.[14] Rather, the arbitrator found that the question was whether the company, in discharging an employee, was acting in a manner that was *reasonable* and free from arbitrary or discriminatory motivation. In that case, the union argued that the employer's actions violated the ADA. The arbitrator stated: "Even assuming the arbitrator has the authority to enforce external law such as the ADA . . . the result under the ADA would at most be no different than the result reached under the Labor Agreement."[15] For that reason (having informed the parties of how the case would come out under the ADA), the arbitrator said that he would not address the ADA issue. The arbitrator reinstated the employee, placing him on a medical leave of

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[12]*American Honda Motor Co.,* 1998 WL 1110336, at 5 (DiLauro 1998).
[13]*King Soopers, Inc.*, 1993 WL 795457 (Snider 1993).
[14]*Id.* at 11 (citing *East Ohio Gas Co.*, 91 LA 366 (Dworkin 1988); *Lockheed Missile & Space Co.,* 89 LA 506 (Wyman 1987); *National Steel Corp.,* 66 LA 533 (Traynor 1976); *Arandell Corp.,* 56 LA 832 (Hazelwood 1971)).
[15]*Id.* at 20 n.8.

absence. The company had erred, said the arbitrator, by treating the employee's misconduct as a disciplinary matter, rather than as a question of how to deal with a medical or psychological illness. "In so doing," said the arbitrator, "the company acted in an unreasonable and discriminatory fashion. It treated a medical problem as a disciplinary matter and did not consider the medical aspects of the case, of which it was aware."[16]

This is an interesting mix of theories that reflects the schizophrenia that often surrounds the handling of these questions. On the one hand, the arbitrator suggested that, without regard to the result under the law, what he was doing amounted to private contract interpretation even assuming the law had been incorporated into the labor agreement. As I shall discuss more fully, that is the correct approach. On the other hand, it is unclear as to where the arbitrator in this case derived his authority to discard the just cause approach and assume some other standard. The result in the case easily could have been reached through a just cause approach. There is nothing anomalous about concluding (as did the arbitrator) that a psychologist's opinion that the grievant was no threat to anyone was persuasive, and that the company had supplied no compelling evidence to the contrary. Under that approach, the discharge was unreasonable and, significantly, it therefore lacked just cause.

Today, we face a labor relations scene involving a vast array of public labor-related statutes; courts willing to tolerate and even mandate private arbitrators interpreting and applying those statutes, at least within that labor relationship; and parties that are struggling to identify the proper way to recognize and accommodate those laws.[17] As a result, it is entirely possible that courts and arbitrators will reach starkly differing results, given the same set of facts.[18]

The systems for enforcing private contract and public statutes can differ substantially. This is because courts, in applying various discrimination statutes, are looking not to whether the decision to dismiss was correct, but to whether it was discriminatory. To be

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[16]*Id.* at 13.

[17]The Supreme Court granted certiorari in *Circuit City v. Adams*, 68 U.S.L.W. 3724 (U.S. May 22, 2000), in which, it appears, the Court will address the Federal Arbitration Act's applicability to "contracts of employment."

[18]Note that the burdens of proof are reversed, depending on the forum. In court, a worker-plaintiff must assume the burden of proving that the company discriminated. In arbitration, however, the company must sustain its burden of proving just cause.

sure, a court will examine whether the decision was a pretext for discrimination, but if it is merely wrong, unsubstantiated by the evidence, "high handed, . . . medieval . . . [or] mistaken,"[19] the case for violation of the ADA, for example, has not been made.[20] Let me highlight my point with a simple hypothetical.

> An employee is dismissed for stealing a wrench. The company bases its actions on the credible reports of two solid witnesses. But, as it turns out through testimony and evidence at arbitration, those witnesses are simply wrong.

The union makes a predictable response: The employer has the burden of proving just cause, and it has failed, because its assumptions were incorrect. The employer points out that, although wrong, it was nevertheless acting reasonably on the facts as it knew them. Few arbitrators in this room would sustain the discipline under those circumstances.

Compare this case to one recently litigated under the ADA.[21] An automotive worker, Smith, joined the Chrysler company in 1994. At the time, a variety of employment forms inquired about, among other things, his health. One question was whether he had ever suffered from narcolepsy. He responded, "No." Another question was whether he suffered fatigue or drowsiness on the job. Again, he responded that he did not. In fact, he did have a disease—it was not narcolepsy—that caused him to "drop off to sleep" when his attention was not focused on a given task. Both before and after his employment with Chrysler, he aggressively sought treatment for his condition and for some years was successful in keeping it in check. He began to suffer relapses, however, that manifested themselves in causing him to black out while he was driving. His doctors told him that he needed a regular sleep schedule, among other things, and he therefore applied for a change from the night to the day shift. He supported his request with a doctor's certificate noting that this was not just a matter of convenience but of medical necessity. Chrysler researched his employment application, found that he had answered "No" to the narcolepsy question, and fired him for having falsified his employment application.

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[19] *See Pollard v. Rea Magnet Wire Co.,* 824 F.2d 557, 44 FEP Cases 1137 (7th Cir. 1987).

[20] In *Mechnig v. Sears, Roebuck & Co.,* 864 F.2d 1359, 1365 (7th Cir. 1988), the court stated: "We do 'not sit as a super-personnel department that reexamines an entity's business decisions.'" (citing *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986)).

[21] *Smith v. Chrysler Corp.,* 155 F.3d 799 (6th Cir. 1998).

The district court granted summary judgment to Chrysler, holding that Smith's sleeping disorder "does affect a major life activity as if he is not totally engaged during the period in which he is awake, he will fall asleep."[22] Although the court held that Smith had established a *prima facie* case under the ADA, it rejected his contention that Chrysler's proffered nondiscriminatory reason for the firing was a pretext designed to hide unlawful discrimination.

The Sixth Circuit affirmed the district court's judgment. It did so based on its conclusion that Chrysler had reasonably relied on particularized facts at hand that led it to determine that Smith had lied about his being a narcoleptic. Chrysler had produced letters from Smith's treating physician stating that he was being treated for narcolepsy. Thus, said the court, the burden of proof shifted to Smith to demonstrate that Chrysler's reliance on those facts was unreasonable."[23] "The key inquiry," said the court, "is whether the employer made a reasonably informed and considered decision before taking an adverse employment action."[24] To those of us who think that a decision of an employer in terminating someone ought to be correct on the facts, this is an astonishing standard.

In *Pesterfield v. Tennessee Valley Authority,*[25] an employee sued his employer after it refused to clear him as medically able to return to work; he had been hospitalized for treatment of a psychological disability. The employer claimed that it was relying on a letter from a treating psychologist. The employee argued that the employee's interpretation of the letter was mistaken. The psychologist testified that his letter had, in fact, been misinterpreted and that the employee was fully able to return to work at the time the letter was written. The court (the Sixth Circuit, again) held that the employer should prevail, noting that "the question is thus not whether TVA's decision that plaintiff was not employable due to his psychiatric condition was correct measured by 'objective' standards. What is relevant is that TVA, in fact, acted on its good faith belief about plaintiff's condition based on [the doctor's] opinion and, as the District Court pointed out, there is no proof to the contrary."[26]

The court went on to state:

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[22]*Id.* at 804.
[23]*Id.* at 807.
[24]*Id.*
[25]941 F.2d 437, 56 FEP Cases 1005 (6th Cir. 1991).
[26]*Id.* at 443.

> TVA's medical staff reasonably relied upon the medical report of the plaintiff's private psychiatrist and reasonably interpreted its contents. Plaintiff has failed to prove that TVA's decision to terminate him was based upon a stereotype attitude toward persons with psychological handicaps rather than upon a reasoned and medically supported judgment that plaintiff could not be returned to work safely under any accommodation that TVA could make.[27]

Thus holding, the court in *Pesterfield* found no violation. This is a very common outcome, at least in the Sixth and Seventh Circuits. Forget for the moment that the outcome is loony. Because a showing of "intent" is required for a violation of the statute, the employer is able to avoid liability by showing good faith. The result, however, is that the employee has been subjected to precisely the type of folly the ADA was designed to prevent. And we are left with the following Alice in Wonderland result: If an employer fires a disabled employee who can really do the job, it's OK as long as the employer really believed he couldn't do it. But if the employer secretly *knew* he could do it, then the employee gets his job back.

If, instead of landing in Wonderland, Alice had dropped into Nevada, she really would have seen some wonders. In *Southwest Gas Corp. v. Fausto Vargas,*[28] the Nevada Supreme Court considered a termination (in a nonunion case) where a jury returned a $365,000 damage award against the employer for a breach of a "just cause" requirement in its employee handbook. The employee had been fired for sexual harassment. A jury found that the discharge lacked just cause. The Nevada Supreme Court concluded that it was the employer who should be the ultimate finder of facts underlying the termination, so long as the determination is made on the basis of "good cause." "Good cause," it appears, was defined by the court as "good faith":

> . . . [A]llowing a jury to trump the factual findings of an employer that an employee has engaged in misconduct rising to the level of "good cause for discharge, made in good faith and in pursuit of legitimate business objectives," is a highly undesirable prospect. In effect, such a system would create the equivalent of a preeminent fact-finding Board, unconnected to the challenged employer, that would have the ultimate right to determine anew whether the employer's decision to terminate an employee was based upon an accurate finding of misconduct, and whether any such misconduct was qualitatively and quantitatively sufficient to constitute good cause for discharge. This *ex officio* "fact-

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[27] *Id.* at 443–44.
[28] 901 P.2d 693 (Nev. 1995).

> finding Board" unattuned to the practical aspects of employee suitability over which it would exercise consummate power, and unexposed to the entrepreneurial risks that form a significant basis of every State's economy, would be empowered to impose substantial monetary consequences on employers whose employee termination decisions are found wanting.[29]

Where does just cause fit in the context of these external laws? How do the two systems coexist? The question of contracts and external law is by no means new to this Academy. The debate started in the late 1960s, when Messrs. Howlett, Meltzer, and Mittenthal dealt with the vexing question of external law and its relationship to the collective bargaining agreement.[30] Howlett opined that all agreements must be construed strictly in accordance with the law. Meltzer concluded that, as a privately negotiated document, the agreement should stand on its own and that

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[29]*Id.* at 699. As indicated, this was a nonunion employment case. It is unclear as to whether the court would have treated a collectively bargained contract similarly. Said the court: "There are obvious policy concerns implicated in treating an employment contract implied from an employee manual in the same manner as a negotiated contract. . . ." But there is no reason to read its "good faith" analysis as necessarily limited to employment contracts.

In *McCoy v. WGN Continental Broadcasting Co.,* 957 F.2d 368, 373, 58 FEP Cases 350 (7th Cir. 1992), the Seventh Circuit commented on the issue of pretext, noting that it "does not address the correctness or desirability of reasons offered for employment decisions. Rather it addresses the issue of whether the employer honestly believes in the reasons it offers."

In *Kariotis v. Navistar Int'l Transp. Corp.,* 131 F.3d 672, 4 WH Cases 2d 1168 (7th Cir. 1997), the Seventh Circuit underscored its decision in *McCoy* by citing it in concluding that ". . . if the company honestly believes in [the reasons presented for the firing], the plaintiff loses even if the reasons are foolish or trivial or baseless." *Id.* at 676. The court cited, as well, its decision in *Gustovich v. AT&T Communications, Inc.,* 972 F.2d 845, 59 FEP Cases 1060 (7th Cir. 1992), observing that "arguing about the accuracy of the employer's assessment is a distraction, . . . because the question is not whether the reasons for an employer's decision are 'right but whether the employer's description of its reasons is honest.'" 131 F.3d at 677 (citations omitted). *See also Pollard v. Rea Magnet Wire Co.,* 824 F.2d 557, 44 FEP Cases 1137 (7th Cir. 1987).

But see Marcy v. Delta Airlines, 166 F.3d 1279 (9th Cir. 1999). There, the Ninth Circuit found that the Montana Wrongful Discharge from Employment Act could not be read to justify a decision simply made on the basis of a good-faith, but mistaken, belief that the employee had committed the offending acts. It noted, among other things, that in drafting the statute, the legislature had considered, but rejected, language that would protect management discretion by allowing business to make "employment decisions for business reasons." *Id.* at 1284. Case law under that statute supported the notion that a dismissal could be overturned if it was based on a mistaken interpretation of the facts.

[30]*See* Mittenthal, *The Role of Law in Arbitration,* in Arbitration 1968: Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 42; Meltzer, *The Role of Law in Arbitration: A Rejoinder,* in Arbitration 1968: Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 58; Howlett, *The Role of Law in Arbitration: A Reprise,* in Arbitration 1968: Developments in American and Foreign Arbitration, Proceedings of the 21st Annual Meeting, National Academy of Arbitrators, ed. Rehmus (BNA Books 1968), 64.

arbitrators should in no way be influenced by the existence of a statute. Mittenthal took a middle position and, predictably, was attacked by both sides. The debate was both scholarly and instructive, but it need not be revisited at this point. Events thereafter have given us a different focus.

In 1974, *Alexander v. Gardner-Denver*[31] essentially set the issue to rest. The Supreme Court concluded that arbitrators should stick to their guns and that the court would take care of the statutory issues, giving the arbitrator's award appropriate deference to the extent the court thought the statutory issues had been appropriately handled. (Normally, my review of this chronology, and the attending case law, takes a 16-week course. I find, however, that if I omit the personal anecdotes and war stories, then I can get through it in about six minutes.) But just when we thought courts did not want us dealing with public policy—that we were too limited in scope, education, and legal insight to handle anything so complex as discrimination law—along came *Gilmer*[32] and *Mitsubishi*[33] to assure us that not only are we fully competent to understand such stuff, but that our decisions on the subject are so desirable as to preclude one's access to federal court. Now what do we do?

It should come as no surprise to anyone in this room that arbitrators handle the imposing presence of external law in a variety of manners. I suggest that all of us accept the premise that, particularly where the law is expressly incorporated by reference, the contract is to be read in a manner consistent with the law. At least that is true in theory. In practice, arbitrators tend to be as uncomfortable in dealing with the statutory overlay as courts are in dealing with workplace disputes in general and arbitration in particular.

In the midst of increasing influxes of statutes into contracts, it is critical that we, as partners in the collective bargaining process, keep sight of the private, contractual nature of this system. For arbitrators, this means "understand just cause"—it has been neither preempted nor subsumed by any statutory construct. Only by maintaining a clear view of its private character and identity will collective bargaining retain the integrity of this powerful, mutually bargained mechanism. Only in this posture will courts be able to

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[31]415 U.S. 36, 7 FEP Cases 81 (1974).
[32]*Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20, 55 FEP Cases 1116 (1991).
[33]*Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985).

grant deference to the system while continuing to monitor, as they should, the broader public policy implications reflected in the statutes.

The Supreme Court recognized the private nature of the industrial relationship in the *Steelworkers Trilogy*:

> . . . Arbitration of labor disputes under collective bargaining agreements is part and parcel of the collective bargaining process itself.
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> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract; it is a generalized code to govern a myriad of cases which the draftsman cannot wholly anticipate. The collective bargaining agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. . . .[34]

The Court explicitly observed that labor arbitrators do different things than do the courts:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it. . . . The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished. For the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs. The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.[35]

Given the unique nature of the collective bargaining process, the Court held that:

> . . . the function of the court is very limited when the parities have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, when it was his judgment and all that it connotes that was bargained for.[36]

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[34] *Steelworkers v. Warrior & Gulf Navigation,* 363 U.S. 574, 578–79, 46 LRRM 2416 (1960).
[35] *Id.* at 581–82.
[36] *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 567–68, 46 LRRM 2414 (1960).

Times are changing. Arbitrators will, in fact, have to deal with the prospects of incorporated statutory references, because they are surely relevant. Contracts should not be interpreted in a manner that is clearly contrary to a statutory mandate, particularly where the parties have incorporated it into the agreement.

But even where that has happened, the resulting document remains the private product of collective bargaining, negotiated by those who set down their mutually agreed course of conduct and who, significantly, designated the private arbitrator as the parties' officially appointed "reader" of the contract. These are the words of Professor (NAA President) Theodore St. Antoine, when he explained (should there have been any doubt) what the Supreme Court was talking about in deferring to an arbitrator's industrial expertise:

> . . . He (or she) is their joint alter ego for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated or unanticipated omission of the initial agreement. Thus, a "misinterpretation" or "gross mistake" by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his own word is their contract. . . . In sum, the arbitrator's award should be treated as though it were a written stipulation by the parties setting forth their own definitive construction of the contract.[37]

St. Antoine went on to highlight a critically important distinction about the arbitrator's role in the face of external law. He observed that from the standpoint of the arbitrator, if the contract language tracks statutory language (and surely if the contract explicitly incorporates external law by reference), then we may properly assume that the parties intended us to apply that language in accordance with the statute. But the corollary to this is that the parties' agreement is to be bound by the *arbitrator's interpretation* of that statute. That is an extremely important assumption, central to everything I have to say in this paper. It means this whole exercise remains private—within the confines of the collective bargaining agreement. In recent dicta, the D.C. Circuit Court of Appeals stated:

> In these cases, although public law is relevant to determining what contractual right the parties enjoy, the rights themselves are still privately created contractual rights, not publically created statutory rights.[38]

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[37]St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny,* 75 Mich. L. Rev. 1137, 1140 (1977).

[38]*Cole v. Burns Int'l Sec. Servs.,* 105 F.3d 1465, 1475, 72 FEP Cases 1775 (D.C. Cir. 1997).

This concept was echoed and expanded upon in *Chisholm v. Kidder, Peabody Asset Management, Inc.,*[39] a Federal Arbitration Act (FAA) case decided in 1997. There, the district court underscored the purpose of the FAA to "reverse the longstanding judicial hostility to arbitration agreements . . . and to place arbitration agreements on the same footing as other contracts."[40] Said the court:

> While it is true that the Supreme Court has indicated that rights are not surrendered when a party agrees to arbitrate and that judicial review, although limited, is sufficient to ensure that arbitrators comply with the law, *Gilmer,* 500 U.S. at 28 . . . *McMahon,* 482 U.S. at 232, . . . *Mitsubishi,* 473 U.S. at 637 . . . , *there is absolutely nothing in any of these Supreme Court cases or in any Second Circuit precedents which indicates that the scope of judicial review for statutory claims is any different from any other arbitrated claims.*[41]

Thus, the distinction between private and public arenas has important ramifications not only to the role of the arbitrator but also to the response of the courts. Said St. Antoine:

> The deference due to arbitrators in the collective bargaining context may be justified even when arbitrators rely on "external" or "public" law in interpreting a collective bargaining agreement.[42]

Characterizing the arbitrator as "reader of the contract" can mean only that his or her reading of the statute, as incorporated in the contract, either expressly or impliedly, should be binding on these parties in precisely the same way as an invited neutral's interpretation of any other contract clause.[43] None of this is to say that the arbitrator must somehow re-mold the federal law. Neither, however, must one assume that the law devitalizes or preempts the

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[39]966 F. Supp. 218 (S.D. N.Y. 1997), *aff'd,* 1998 U.S. App. Lexis 22385 (2d Cir. 1998).

[40]966 F. Supp. at 221 (citing *Gilmer v. Interstate/Johnson Lane Corp.,* 500 U.S. 20 (1991), and *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 24, 103 S. Ct. 927, 941 (1983)).

[41]*Id.* at 226–27 (emphasis added).

[42]St. Antoine, *supra* note 37, at 1140.

[43]This does present the possibility that incorporating the statute into the contract, thus subjecting it to arbitral interpretation and application, may better immunize an award from judicial review than not doing so. But if it does, it is wholly consistent with the increased willingness of the legislatures to delegate this statutory administration to arbitrators. Surely, inherent in that judgment is the recognition that workplace disputes ought to be resolved in the workplace. Also inherent in that recognition is that many, perhaps most, workplace disputes are of mixed origin. A black man is fired for poor workmanship. He claims race discrimination when, in fact, the real question is whether he was a shoddy worker. One can argue over the wisdom of relegating statutory disputes to binding resolution at arbitration—reducing the process to one bite of the apple. But one must surely acknowledge the good sense inherent in trying to resolve these workplace matters in the workplace itself.

critical role of the parties' chosen judge. Just cause lives. Recalling the advice of Professor St. Antoine, what the parties are bargaining for is the contract reader's interpretation of the labor agreement. The arbitrator's job is to judge discipline on the basis of essential fairness. With reference to the examples cited earlier, I would submit that allowing a discharge to stand on a patently false premise (notwithstanding the good faith of the employer) is manifestly unfair and precisely the type of authority that the arbitrator has both the mandate and the obligation to exercise. This should in no way be viewed as courts ceding any authority to arbitrators in terms of forging statutory case law. Rather, it follows directly from the *Steelworkers'* clear recognition of the meaningfully private nature of the collective bargaining relationship.

How, then, should the arbitrator implement his or her contractual charter? How, in practice, does one accommodate the application of private rules in an increasingly public arena? Consider the following cases.

In *Meijer, Inc.,*[44] a grocery store employee affected with bipolar disorder made crude remarks to a customer. The arbitrator found the conduct proper cause for termination. However, the grievant's illness at the time of the incident was, he concluded, a contributing factor to the misconduct and should serve as mitigation. His handling of the ADA/contract issue is of some note:

> . . . The arbitrator finds that under a contract requiring just cause for disciplinary action against an employee, rights established by law, such as the ADA, must be taken into consideration in determining whether just cause exists. In other words, to terminate a person for a circumstance, which, by law is protected, could not possibly be just and, therefore, cause could not exist under the collective bargaining agreement. However, such obligations established outside the contract and incorporated must be strictly read and applied.[45]

Note that the arbitrator in this case recognized the incorporation of the ADA into the contract but made its interpretation and application a matter of contract analysis. According to the arbitrator, disciplinary action that does not pass muster under the external statute could not satisfy the contractual standard of just cause. That, I suggest, is a wholly responsible way of maintaining the purely private posture of the collective bargaining process while at

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[44]103 LA 834 (Daniel 1995).
[45]*Id.* at 838.

the same time recognizing the existence and impact of external law.

In this case, the arbitrator went on to overturn the discharge, even though he held that the grievant would not have been protected by the ADA. The arbitrator found, among other things, that the grievant had failed to maintain proper medication and treatment and, moreover, that there would have been no possible accommodation for his problem. But having found that, the arbitrator also concluded that discharge was inappropriate and that the employee should be reinstated, but to a position that would avoid all customer contact.[46] Here again, one may quarrel with the remedy in this case but the wisdom of the remedy is not the compelling point. It is the fact that the arbitrator applied a just cause standard.

In *Interstate Brands Corp.*,[47] the grievant was discharged for failing to report an accident, driving an incorrect truck route, and generally exhibiting behavior that suggested he was a danger to himself and to others. The contract in that case stated: "This Agreement shall be interpreted to permit the reasonable accommodation of disabled persons as required by State and/or Federal Law, including the Americans with Disabilities Act (ADA)." Noting that the aim of the ADA is to make the workplace more accessible for disabled employees through the "reasonable accommodations" provisions, the arbitrator ultimately concluded that accommodations in this case would have been futile. But here again, he did so as an aspect of his just cause consideration:

> As in most such laws and regulations, application of the ADA is a case by case determination. The federal agency responsible for enforcement of the ADA is the EEOC; but, must be considered by arbitrators in light of the above discussion on the impact of external law on arbitration. However, it should be emphasized that the primary *controlling factor* in this arbitration case is the Agreement between the parties, specifically the just cause requirement for discharge.[48]

Does this mean that arbitrators can ignore the federal law? It depends on what you mean by "ignore." What does it mean to incorporate by reference? Should we, as arbitrators, infer that the

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[46]For an enlightening discussion of remedies and seniority rights, see *Arbitration, Labor Contracts and the ADA: The Benefits of Pre-Dispute Arbitration Agreements and an Update on the Conflict Between the Duty to Accommodate and Seniority Rights,* 21 Ark. L. Rev. 455 (1999).

[47]113 LA 161 (Howell 1999).

[48]*Id* at 168.

parties sat down and decided to swallow, wholesale, each section and each implementing regulation? For example, did the company and union seriously intend to adopt a punitive damage approach, as some laws provide, thereby abandoning the core and character of the compensatory/make-whole scheme of the labor agreement? Surely, we would reject any suggestion to that effect. Is it not more reasonable to assume that the parties were intent on reflecting their commitment to the general goals of the existing statute? It is probably politically impossible at this stage for parties to fail to incorporate many external statutes, either explicitly or otherwise. But absent clear guidance from the parties, the assumption by the arbitrator must be that these statutes have been incorporated, if at all, for the purpose of absorbing their generalized benevolent goals, and not necessarily for their specifics in every detail. Thus, for example, it is more than likely that parties to the collective bargaining process will, because it is the law, pay homage in one way or another to an antidiscrimination statute like the ADA. But the intent therein is to acknowledge that a capable worker will not be denied continued employment merely because of a disability. It is unlikely that the parties will have focused on the myriad of ticklish problems that can arise, such as burdens of proof, remedies, or arcane legal ramblings such as evidenced by the Sixth and Seventh Circuits.

This approach is conceptually stable. If the arbitrator's judgment is that the overriding goal of the ADA has been satisfied by avoiding discrimination and that essential fairness requires a result that finds good faith different from and irrelevant to the concept of good cause, that is a decision that may well be contrary to a court's reading of the ADA. But the arbitrator has fully fulfilled his or her appointed task: The arbitrator has served as the reader of the contract.

Can Arbitrators Handle It?

Alexander v. Gardner-Denver[49] told us, in essence, to do our best on deciding Title VII cases; the Court may or may not give deference to the arbitration decision and that, in any event, a claimant could have a second bite of the apple. The Court was clearly concerned about the issue of arbitrators' qualifications to handle statutory

[49]415 U.S. 36, 7 FEP Cases 81 (1974).

issues. And, from Harry Edwards's 1976 review of our qualifications, some concern was in order.[50] That year, he reported that at least 16 percent of arbitrators had never read any judicial opinions involving Title VII, 40 percent did not read labor advance sheets to keep abreast of developments under Title VII, and of those arbitrators who had never read a judicial opinion on employment discrimination and who did not read advance sheets, 50 percent nonetheless felt professionally competent to decide legal issues in cases involving employment discrimination.[51] What does this mean for the process?

We can chuckle over such professional chutzpah, but let me suggest that the arbitrators may have been right! Knowingly or not, those who felt competent to decide such potentially complex and demanding statutory cases, notwithstanding their innocence verging on virginal, so far as hardcore legal research is concerned, were enunciating the central point of my discussion today. Just cause lives. We can argue all we want (and we have), year in and year out, as to the impact of external law on the collective bargaining agreement. But there has never been any doubt that an essential core and character of the labor arbitrator's job description is to dispense industrial justice according to the labor agreement, and that means just cause.[52]

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[50]Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study,* in Arbitration—1975: Proceedings of the 28th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), 59.

[51]*Id.* at 71–72.

[52]In *Mitsubishi Motors v. Soler Chrysler-Plymouth,* 473 U.S. 614 (1985), the Supreme Court was even more explicitly supportive:

> In any event, adaptability and access to expertise are hallmarks of arbitration. The anticipated subject matter of the dispute may be taken into account when the arbitrators are appointed, and arbitral rules typically provide for the participation of experts either employed by the parties or appointed by the tribunal. . . . Moreover, it is often a judgment that streamlined proceedings and expeditious results will best serve their needs that causes parties to agree to arbitrate their disputes; it is typically a desire to keep the effort and expense required to resolve a dispute within manageable bounds that prompts them mutually to forgo access to judicial remedies. In sum, the factor of potential complexity alone does not persuade us that an arbitral tribunal could not properly handle an antitrust matter.
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> . . . For similar reasons, we also reject the proposition that an arbitration panel will pose too great a danger of innate hostility to the constraints on business conduct that antitrust law imposes. International arbitrators frequently are drawn from the legal as well as the business community; where the dispute has an important legal component, the parties and the arbitral body with whose assistance they have agreed to settle their dispute can be expected to select arbitrators accordingly. . . . We decline to indulge the presumption that the parties and arbitral body conducting a proceeding will be unable or unwilling to retain competent, conscientious, and impartial arbitrators.

Id. at 633–34 (citations omitted).

Judicial Review

The emphasis, it must be remembered, is on the law of the workplace, as foreseen by the Supreme Court some 40 years ago. On that law, arbitrators are the experts. This is relevant in viewing the response of the judiciary. Courts can readily continue to defer to arbitration awards on two theories. First, even assuming an arbitrator's interpretation of a statute is seriously at odds with what a court would do, it can content itself with the knowledge that these awards have no real precedential value outside the particular labor relationship. Surely, they will not be seen as guidance for the legal system. Second, to the extent management or labor, perhaps both, is sufficiently offended by the result, there is always the next round of collective bargaining.

From the standpoint of the arbitrator, if a court sees fit to overturn an award, there is no harm done to the collective bargaining scheme. This is not a case of courts using the "public policy" wedge to overturn a distasteful, but otherwise legitimate, exercise of contractual prerogatives. Instead, this is a valid and necessary intervention where, in a court's judgment, the terms of a statute have been directly misapplied. It is wholly appropriate that public policy not be forged or fashioned by private processes. To the extent an award forces parties to *violate the law*, there is every reason for a reviewing court to step in and set the system straight.[53] Alternatively, however, the court could also choose to defer, notwithstanding such misapplication; this on the theory suggested above that it is, after all, an exercise in contract interpretation by the arbitrator and, however misguided, it nevertheless represents the bargained for result. This would be squarely in accordance with and supportive of national policy favoring internal dispute resolution.

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[53]My words here are chosen carefully: There has been, and will be, probably to a greater extent than ever before, continuing debate over the so-called "public policy" reviews by courts. I am firmly of the belief that a court should recall the critical premise of this private dispute settlement system: Collective Bargaining. The parties have bargained for the contract reader's resolution of their dispute and, right or wrong, that decision should remain unaffected. Unquestionably, a court may be uncomfortable to find that an arbitrator has reinstated an alcoholic pilot. But without regard to the wisdom of that decision, it is a result the parties themselves could have agreed upon without fear that a court would disturb that result. Thus, so long as the arbitrator has not required any illegal act, a court must not, in the name of "public policy," step in to second guess and thereby undercut the private dispute settlement system.

Both courts and arbitrators are venturing into uncharted, unfamiliar territory. Courts are confronting scenarios that, although statutory in their genesis, are nevertheless industrial workplace disputes that the Supreme Court long ago decreed to be best settled in the workplace, by private means. For their part, arbitrators are dealing with an ever-increasing overlay of external law normally reserved to the judicial system. Anomalies in both these spheres should come as no surprise. The courts must deal with their own problems. But arbitration is my business and my concern. It is simply wrong for arbitrators and parties to believe that standard notions of just cause are vanishing or somehow "morphing" into a blend of contract and law with the arbitrator becoming more judgelike in stature. It is contrary to every notion of a private collective bargaining system, it is contrary to any mandate the parties have given us, notwithstanding the explicit or implied incorporation of federal statute into the labor agreement, and it is wrong in terms of federal policy that has generally favored this private dispute settlement system.

I am in no sense suggesting that the parties or the arbitrator ignore the existence of, for example, a federal or state antidiscrimination statute, particularly where the parties have chosen to incorporate it in their agreement. But as a general matter, those statutes are themselves reflecting societal concepts of fairness that could hardly be ignored in attempting to set straight a situation that, in the arbitrator's judgment, amounts to employer error. And, yes, there may be situations where the arbitrator is called upon to interpret and apply specific statutory provisions that are relevant, not because they have been specifically bargained and/or discussed, but because the statutes themselves have been incorporated by reference. St. Antoine is right: That, too, is an exercise in private contractual analysis and application.

So, life is not so simple anymore. Yet, what I have attempted to portray is the picture of a still private process that, although becoming unavoidably intertwined with labor-related statutes, nevertheless will continue to function effectively, maybe even better, so long as the parties to the agreement, and their designated reader, remember their roots.

On balance, I do not see this new world of incorporated law as a threat to the collective bargaining process, assuming we continue to regard this process as private and administer it as such. In the final analysis, what we may discover is that we are witnessing the

development of a more sophisticated and ultimately compassionate system, where private rules are informed and appropriately tempered by broader societal mandates. But however informed and sophisticated (if that be the impact of external legislation), the system must retain its clearly private identity. It is the arbitrators' and the parties' obligation as trustees of that system to recall that adjudging disciplinary matters is, in all instances, an exercise in the application of just cause.

II. UNION RESPONSE

GEORGE H. COHEN*

To begin, I have one disclaimer and one admission. The disclaimer: I speak today on behalf of no one. I am here only in response to Jim Oldham's irrepressible charm. The admission: Each of us comes to this gathering with his or her own preconceived notions concerning who you "characters" are, what you actually do after the hearing ends, and what respect your awards deserve when you "finally" get around to issuing them.

The baggage I carry is extremely well documented: In 1966, as a young man, I joined a labor law firm that primarily represented the Steelworkers Union. Only six years earlier the Supreme Court had issued the almighty *Steelworkers Trilogy*[1]—three opinions that I am honored to say have David Feller's fingerprints all over them.

During the intervening 34 years, every time I have walked through the Bredhoff & Kaiser library, Vol. 363 U.S. automatically pops open and rekindles my "true believer" mentality. My credo has been and remains today the same credo that you red-blooded Academy members embrace when you pay your annual dues:

1. Arbitration exists as the alternative to industrial strife—the strike—not as the alternative to litigation.
2. Thus, for good reason, there is a very strong presumption in favor of the arbitrability of all workplace disputes.

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[1] *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).