

## CHAPTER 8

### BLACK ALICE IN GARDNER-DENVERLAND

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"There were doors all around the hall, but they were all locked; and when Alice had been all the way down one side and up the other, trying every door, she walked sadly down the middle, wondering how she was ever to get out again. . . .

"However, on the second time round, she came upon a low curtain she had not noticed before, and behind it was a little door about fifteen inches high. . . .

"Alice opened the door and found that it led into a small passage, not much larger than a rat hole; she knelt down and looked along the passage into the loveliest garden you ever saw. How she longed to get out of that dark hall, and wander about among those beds of bright flowers. . . .

"'I think I could, if I only knew how to begin' (thought poor Alice). For, you see, so many out-of-the-way things had happened lately that Alice had begun to think that very few things indeed were really impossible." *Alice in Wonderland*.

Title VII and allied laws against illegal job discrimination are dramatically altering the employment relationship. Institutional discrimination is being identified and rooted out. Violations are still found in many aspects of employment: in hiring, in promotions, in seniority, in fringe benefits, in discipline, in layoffs. Hardly a transaction between the worker and the employer does not involve the likelihood that someone will file a charge that such laws have been violated.

Every employee or job applicant is a potential grievant: blacks, Spanish-Americans, females, young and old, Anglos (for reverse discrimination)—every race, color, and creed. Every employer and every union is a potential respondent—large or small, progressive or reactionary, impersonal or humanitarian. Every institution in America stands firmly within the target area. The

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Equal Employment Opportunity Commission itself has been accused of employment discrimination.

What shall we all do—employers, unions, employees, civil rights advocates, enforcement personnel, and arbitrators? Who makes the first move?

Management and labor are already moving. Most employers have created affirmative compliance programs. As new cases spell out evolving legal obligations, employers scramble into line. Employer obligations are not always clear: An employer's obligations under its collective bargaining contract often conflict with ill-defined, statutory prohibitions against job discrimination.

All of this provides a new challenge for those of us who encourage contract arbitration. Conflicts between the union contract and the job-discrimination laws can be arbitrated. Arbitrators can help employers bring about necessary compliance, with the least possible disruption in the production process. The union will want to participate in this effort.

What about the individual worker who encounters discrimination in the workplace?

“‘How am I to get in?’ asked Alice again in a louder tone.

“‘Are you to get in at all?’ said the Footman. ‘That’s the first question, you know.’

“‘It was, no doubt: only Alice did not like to be told so.’ *Alice in Wonderland*.

What about Black Alice? Under *Gardner-Denver*, she does not have to use grievance arbitration. She can go directly to an enforcement agency, and afterwards she can go to court. And there are lawyers and advocacy groups who are willing to help her get there.

Black Alice is no longer alone; she is part of a class. If her complaint involves a pattern and practice of discrimination, the law looms large behind her, at her beck and call.

Seemingly, arbitration must now satisfy a new client. Arbitrators have learned to accommodate the needs of labor lawyers, business agents, and personnel directors. When discrimination issues are involved, labor arbitration may have now become a consumer tribunal.

How does labor arbitration look to Black Alice? Have we ever considered labor arbitration through her eyes?

Grievants often come to arbitration stiff with suspicion. And when the grievant feels that she has experienced institutional prejudice and systematic discrimination, she will be particularly alienated, both from the employer and from the union. Who is her advocate? Who is her friend? Where will she look for sympathy? Where in the typical labor arbitration hearing will Black Alice find the therapy that Mr. Justice Powell promised her in *Gardner-Denver*?

The well-worn system of labor arbitration that you and I know so well, and find so comfortable, may not work in this new setting. Perhaps we must slip out of our old skin in order to create a new tribunal for Black Alice in Gardner-Denverland.

Erich Fromm tells us to "Cherish all forms of new life and be ready at any moment to help the birth of that which is ready to be born." Black Alice is seeking full participation in the social process called employment. Can we design a system that will draw her into that relationship, so as to help her gain a sense of identity with its purposes? Can we satisfy her yearning for justice and quench her life-long alienation?

There is no way that *every* angry grievant can be satisfied. But then, perfection does not exist in the personnel business. Employers have learned how to play such percentages. Most people are happy with the tranquility of a reasonably fair employment relationship. I believe that employers can design grievance systems for discrimination claims that will satisfy most employees.

What will this involve? Black Alice's union must convince her that she can look to it for advocacy. She should be represented in the grievance discussions and in any arbitration by a union advocate who relates to her view of the institution.

The grievance procedure itself may need restructuring. Black Alice should not be expected to confront tier after tier of pale, carbon-copy company officials. Perhaps discrimination issues could be shunted into the affirmative compliance office. Or top management might be involved at an early stage, to convince Black Alice that her claim is being given high-level consideration.

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In consumer tribunals, it can be important to determine how the grievant feels about the process. How can the therapeutic effect of grievance discussions be enhanced? Every effort should be made to settle such cases. But sometimes it is imprudent to volunteer concessions; a few grievances will still require arbitration. Even here, an informal, nonthreatening format might reduce the traumatic confrontation that sometimes poisons the grievant's day in court.

What does such a grievant seek in arbitration? If she did not hope for understanding and for justice, she would not be there. She expects effective advocacy from the union. She hopes for fair and courteous treatment from the employer. She hopes the arbitrator will exhibit an understanding of the facts of her case, the setting in which they occurred, and the obligations of the contract and of the law. Perhaps she also needs a sympathetic hearing of her story.

I am not one of those who believes that the practicing labor arbitrators of today should be swept away, for cosmetic reasons, and replaced by a new cast of characters selected for their sex or skin color. We will continue to recruit qualified new arbitrators. But at the same time, we should realize that parties will continue to look toward the experienced and acceptable practitioners of today for thoughtful participation in the resolution of the problems of tomorrow.

Have I oversimplified? Certainly. In future meetings, this Academy will schedule speakers on the precise ambit that should be given to the arbitrator's authority—on the range of disclosure that can be required in arbitration, on the remedies available to the arbitrator (are quotas a workable sanction?), on the proper weight to be given to an arbitrator's award. These are important subjects for your attention.

But my message concerns Black Alice, our fellow person—Black Alice who wants to enter “the loveliest garden”—Black Alice who can call out a civil rights advocate, who can activate the rusty machinery of an enforcement agency.

There are many lawyers and advocate groups today who believe that labor arbitration is just one more part of an unfair system that has covered this world with a pattern and practice of

discrimination, who believe that labor arbitrators are just one more sanctorium in the old boys' club.

For many years, we have claimed that labor arbitration is "the essence of freedom." Now we have an opportunity to prove that it can contribute to the making of an open society. What can you and I do for Black Alice?

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