CHAPTER 7

ARBITRATION OF DISCRIMINATION GRIEVANCES: ARBITRAL AND JUDICIAL COMPETENCE COMPARED

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The steady increase of legislation affecting employment[1] has heightened the role of arbitration in a variety of labor related situations. The arbitration of employment discrimination cases raises a number of concerns; the issue I have been asked to address today—that of arbitral competence versus judicial competence in such cases—is one that has been the subject of ongoing discussion and debate. In preparing this paper, we reviewed the literature of the field, which includes a number of studies and opinion pieces. We also conducted a small and, admittedly, unscientific survey of recently published arbitration decisions of cases involving several current gender discrimination issues. I must admit that when we started this project, I believed that we would conclude that the courts were a plaintiff's "best bet." Knowing my audience, I was naturally distressed with the thought of publicly condemning the very people who so kindly invited me to address them at their distinguished annual meeting and—on a more personal note—with whom my firm does business on a daily basis. However, I think that you will ultimately approve of, and probably concur with, our findings.

Any discussion of the arbitration of employment discrimination cases must, of course, start with the mention of the seminal

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[1]This legislation includes, e.g., the Fair Labor Standards Act (FSLA), 29 U.S.C. §§201–219 (1983), the Equal Pay Act, 29 U.S.C. §206 (1963), Title VII of the Civil Rights Act, 42 U.S.C. §§2000(e) to 2000(e)(17) (1982), the Occupational Safety and Health Act, 29 U.S.C. §§651–678 (1983), and the Employee Retirement Income Security Act, 29 U.S.C. §§1001–1453 (1976 & Supp. V 1981).

decision in *Alexander v. Gardner-Denver.*[2] In this landmark case, the United States Supreme Court held that an adverse decision at arbitration will not bar a subsequent suit under Title VII of the Civil Rights Act of 1964 and that employees are not required to exhaust their arbitration remedies before pursuing a claim of employment discrimination in the courts.

In a unanimous decision, the Court in *Gardner-Denver* reversed the lower court's ruling, holding that neither the federal policy favoring arbitration of employment disputes, the doctrine of election of remedies,[3] nor the waiver doctrine[4] precluded the claimant from being allowed a trial *de novo* under Title VII.

An underlying issue in *Gardner-Denver* was whether the arbitrators' role should be solely to interpret the labor agreement, or also to consider and apply external law. The Court reaffirmed its view that an arbitrator will exceed the scope of his or her authority when the arbitral decision is not an interpretation of the collective bargaining agreement, but instead is based solely upon the arbitrator's view of enacted legislation. The Court defined the "arbitrator's task as effectuating the intent of the parties." Quoting from the Steelworker's Trilogy in *Enterprise Wheel and Car Corp.*,[5] the Court reasoned that: "If an arbitral decision is based solely on the arbitrator's view of the requirements of enacted legislation, rather than on an interpretation of the collective bargaining agreement, the arbitrator has exceeded the scope of his submission and the award cannot be enforced." However, where contractual rights are similar to, or duplicative of, the substantive rights created by Title VII, the Court acknowledged that the arbitrator must consider and apply the law. Thus in effectuating the intent of the parties, an arbitrator may be bound to consider and apply external law. This need to look to external laws has raised the question of whether arbitrators are, in fact, competent to do so.

In the famous footnote 21 of *Gardner-Denver,* the Court stated that the weight a court should accord an arbitral decision will depend on the facts and circumstances of each case. Pursuant to the Court's mandate, relevant factors to consider include the

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[2]415 U.S. 36, 7 FEP 81 (1974).

[3]That is, an individual claimant's decision to seek recourse through one forum operates to preclude him or her from subsequently or concurrently seeking recourse of the same claim in another forum.

[4]That is, an individual claimant either expressly or implicitly waives his or her right to seek subsequent recourse of a claim in another form.

[5]363 U.S. 593, 46 LRRM 2423 (1960).

existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitration, adequacy of the record with respect to the issue of discrimination, and the special competence of the particular arbitrator.[6]

With regard to the first of these four criteria, we should note that Title VII and its interpretive case law may be specifically referred to in a contract's antidiscrimination clause. Even where such specific reference is not made, however, arbitrators have held that antidiscrimination clauses *sub silentio* assume applicable legal standards, that is, the standards of Title VII. The Court in *Gardner-Denver* expressed concern regarding the propriety of submitting discrimination cases to arbitration, a process which by its own evolution and judicial fiat is in certain respects self-limiting. These concerns underlie the criticisms of the arbitration process we will now examine.

Let me note at the outset that my examination of arbitral versus judicial competence focuses on the ability to decide only gender discrimination cases. While race discrimination cases obviously form a large part of the case law, that subject has been more widely discussed and debated and would probably necessitate a week-long rather than an hour-long session. At the same time the issues regarding arbitral competence are similar, I believe, in all forms of discrimination cases. Thus, we decided a limited scope of examination would suffice.

Basically, these cases encompass charges of failure to promote, unjust discharge or other discipline, sexual harassment, and unlawful conduct involving the principle of "fetal vulnerability." Note that discrimination which takes the form of failure to hire on the basis of gender generally cannot be brought to arbitration by a grievant because the employment relationship has yet to be established and, accordingly, contractual protections are not available. Note that the term "fetal vulnerability," also known as "fetal protection," refers to situations where an employer has taken steps to exclude women of childbearing age from jobs where possible exposure to certain toxic chemicals may potentially be harmful to fetuses. By looking at the outcome of arbitrations of gender discrimination grievances and judicial decisions interpreting Title VII, with empha-

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[6]415 U.S. at 60 n.21.

sis on sexual harassment and fetal protection as the issues of the 1980s, we can compare the competency of the two processes.

The criticism of arbitration in discrimination cases can be broken down into seven general categories.

First—the criticism that an employee will not be fairly represented because of possible acquiescence by her union in the alleged discriminatory practices of the employer.[7] The feared risk is that the union may not properly represent the grievant, because the union itself has played a role in supporting discriminatory employment practices, or has been sympathetic to the maintenance of these practices.

Second—it is argued that the arbitrator's traditionally narrow responsibility of contract interpretation does not include the vindication of statutory rights.[8] Since an arbitrator is unable to look beyond the four corners of the agreement unless specifically authorized to do so, the argument goes, the employee-grievant will be deprived of the statutory guarantees that are, more clearly, the appropriate subject for the courtroom and judicial interpretation.

Third—critics contend that the proper resolution of gender discrimination grievances requires a neutral and detached judge, and since the arbitrator is selected and paid by both parties, he or she will be unable to be neutral. The arbitrator, it is said, is likely to favor the party most likely to reappoint in future cases.[9]

Fourth—arbitration of discrimination cases has been criticized on the basis that, as a result of the Supreme Court decision of *Alexander v. Gardner-Denver*, the grievant could pursue an administrative remedy as well as a judicial remedy after an unfavorable arbitral award.[10] Thus, the arbitration award would not be final and binding upon the parties, a result with significant legal and social implications. In the first instance, the virtue of using arbitration to relieve the backlog of court and Equal Employment Opportunity Commission (EEOC) cases

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[7]*See, e.g.*, Coulson, *Arbitration: A Remedy for Discrimination Claims*, Management World, 5 (Feb. 1978), and Youngdahl, *Arbitration of Discrimination Grievances: A Novel Approach*, 31 Arb. J., 145–163 (1976).

[8]*See* Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 68 U. Pa. L. Rev. 245 (1969); and Friedman, *Individual Rights and Grievance Arbitrations*, 27 Arb. J. 252–273 (1972).

[9]Gould, *supra*, note 8.

[10]Robinson & Neal, *Arbitration of Employment Discrimination Cases: A Prospectus for the Future*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, ed. Dallas L. Jones (Washington: BNA Books, 1976), 20.

would not be realized. More importantly, it seriously undercuts the substantive theory of the deferral to labor arbitration awards which for forty-odd years has provided the backbone of labor relations as we know it.

Fifth—critics challenge the arbitrator's knowledge of the law and his or her ability to interpret or apply it correctly. Although it is clearly agreed that arbitrators possess a unique awareness of the common law of the shop, there is much disagreement currently about the ability of arbitrators to competently consider and resolve the statutory issues. A recent article in the *Arbitration Journal* suggested that where the issues involve "complex litigation," such as employment discrimination, there is no guarantee that arbitrators are qualified to interpret the law, as their knowledge does not necessarily include the ability to analyze a situation following principles of law.[11]

Sixth—there is a concern over a perceived lack of procedural due process afforded in the arbitral setting.[12] I would note two key concerns here: first, that the parties are not uniformly represented by attorneys, and as a result, the quality of the evidence presented may be deficient, and second, that the discovery process is, at best, abbreviated.

Finally—it may be claimed that, in some cases, the law is too new and evolving for arbitrators to properly use it as precedent. The claim here is that unlike a judge, it is not the arbitrator's duty to decide the law, but simply to interpret contractual provisions using the law as guidance or precedent. In cases of first impression—the argument goes—arbitrators would have no precedent to look to and would, therefore, be unable to decide the issue or fashion a remedy.

The literature is rich with studies that examine the process and results of arbitration of employment discrimination cases. The studies are illuminating, I believe, in our in-depth examination of each of these seven concerns.

The fear that an employee will not be represented by his or her union at arbitration due to a union's participation in the employer's discrimination, we believe, is generally without merit. There is nothing in the literature or case law to indicate

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[11]Scheinholtz & Miscimarria, *The Arbitrator as Judge and Jury: Another Look at Statutory Law and Arbitration*, 40 Arb. J. 35 (1985).

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

that union bias is a widespread problem. Furthermore, even in the isolated instance where discrimination by the union does become an issue, the grievant is not without remedy. Avenues exist that are sufficient to ensure that the union satisfies its duty to fairly represent all of its members. As the Supreme Court noted in *Vaca v. Sipes*[13] in 1967, a union's refusal to process a grievance may constitute a breach of its duty of fair representation. Such a breach is actionable either through the filing of an unfair labor practice charge or through a cause of action under Section 301 of the Labor-Management Relations Act.[14]

In unfair labor practice proceedings the National Labor Relations Board can enter broad orders requiring the union to cease and desist from the conduct and ordering it to take affirmative steps to make the charging party whole. The Board has regularly ordered an offending union to arbitrate grievances which it had wrongfully refused to handle.

As you are aware, federal courts have concurrent jurisdiction over these claims if the employee brings the action under Section 301.[15] While the courts have given unions wide latitude in deciding whether to take a case to arbitration and will, in general, not second-guess the union's preparation or presentation of the case, the more recent decision in *Bowen v. United States Postal Service*,[16] has, without question, made unions more careful in all aspects of handling their grievances and arbitrations.

Equally important, I believe, is the simple but inevitable fact of the changing social, political, and moral views of society in general, and of unions in particular, towards issues of discrimination. I think there is no questsion that the views on discrimination issues of both the rank and file and the leadership of most labor organizations have changed radically in the last 20 years. One need only look to the issue of comparable worth, perhaps the newest issue in this field, to see that this is true. AFSCME, the largest member of the AFL-CIO nationwide, has taken a leadership role in initiating demands for employer studies, filing EEOC charges, and pursuing court litigation on behalf of its female members to achieve pay equity.

For all of these reasons, we conclude that the concern regarding union bias is without merit.

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[13]386 U.S. 171, 64 LRRM 2369 (1967).
[14]29 U.S.C. §160, *et seq.*
[15]*See, e.g., Carey v. Westinghouse Elec. Corp.*, 375 U.S. 261, 55 LRRM 2042 (1964).
[16]459 U.S. 212, 112 LRRM 2281 (1983).

The next claim is that a grievant's statutory rights will not be violated through arbitration because the arbitrator's narrow responsibility is solely to interpret the collective bargaining agreement. Where the contract is silent on the issue of discrimination or the standards to apply in determining whether discrimination has occurred, it is feared that the broad statutory protections will be lost. Critics also contend that arbitrators are refusing to look to statutory law for guidance, even where the contract affirmatively authorizes such action. Our review of the literature reveals that this concern is misplaced. The studies show that in the overwhelming majority of published awards grievants are receiving the statutory protection of Title VII and the awards are in compliance with the Act.

A study by Margaret Oppenheimer and Helen La Van[17] examined all discrimination cases from March 1973 through November 1975 as reported in BNA's *Labor Arbitration* reports. Eighty-six cases were reported during this period. They were analyzed to assess the relationship between these arbitral decisions and the law, that is, to determine to what extent arbitrators cited federal or state statutes, EEOC guidelines, court decisions, and previous arbitration awards. The study found that arbitrators cited federal or state discrimination laws or EEOC guidelines in 50 percent of all cases and referred to judicial decisions in 40 percent. Other arbitral decisions were cited in 35 percent of the cases. Seventeen percent of all decisions cited all three, while another 28 percent cited two of the three. The authors concluded that arbitrators are indeed aware of the statutory and decisional law and are accurately citing and correctly applying these legal principles.

More recently, a study conducted by Benjamin Wolkinson and Dennis Liberson,[18] examined arbitration decisions involving allegations of gender discrimination published by BNA from 1975 to 1980. These decisions were analyzed to determine the degree of congruence between the determinations of the arbitrators, courts and the EEOC, and the extent to which arbitrators incorporated Title VII criteria into their awards. The authors examined the extent to which arbitrators looked to and applied Title VII and whether they, in fact, vindicated the stat-

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[17]*Arbitration Awards in Discrimination Disputes: An Empirical Analysis*, 34 Arb. J. 12 (1979).
[18]Wolkinson & Liberson, *The Arbitration of Sex Discrimination Grievances*, 37 Arb. J. 35 (1982).

utory rights. It is interesting to note that the study found that where arbitrators consciously applied legal considerations there was only one instance in which an arbitrator apparently misunderstood the law and sanctioned illegal conduct.[19] The authors discovered an apparent harmony between arbitrators and the courts in the interpretation of antidiscrimination law.

The study also found that the rules of contract construction and the application of the arbitral standards of reasonableness and fair play, when applied in the discrimination cases, protected minority rights to the same degree as judicial proceedings and the judicially developed interpretations of federal and state statutes. Stated otherwise, the arbitral and judicial proceedings may differ in approach and analysis, but they achieve similar results. The decisions of the arbitrators paralleled those positions adopted by both the EEOC and the courts. While the parallel may not be perfect, there is accord between these two forums.

Finally, a study of published arbitration awards by Professor Vern Hauck,[20] in 1984, found that the overwhelming majority of the awards adjusting claims of discrimination were in compliance with Title VII. After analyzing the statutes and the cases he too concluded that it was appropriate for labor arbitrators to decide discrimination complaints, and that the practice should continue.

We believe the statistics speak for themselves. Arbitrators are not afraid to look to applicable statutory and decisional law, will apply it if it is relevant, and do so in a competent fashion.

The next area of concern regarding the utilization of this forum deals with the fact that the arbitrator is chosen by the parties. The fear is that, as a result, the arbitrator may favor one party over the other, generally favoring the party most likely to reappoint him or her in future cases.

Initially it must be noted that this is a criticism that could be leveled against the arbitration process in general. More importantly, a review of the literature reveals nothing to substantiate this claim. On the contrary, the evidence indicates that arbitrators act impartially, and are "detached and neutral" parties to the process. The fear of the bias does not seem to translate into a tangible problem for the following reasons:

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[19]*Tinker A.F.B.*, 72 LA 358 (1979). *See* Wolkinson & Liberson, *supra.*

[20]*The Efficiency of Arbitrating Discrimination Complaints*, 35 Lab. L.J. 175 (1984).

The ability of either party to "strike," or veto, the name of an arbitrator, as well as to present names, keeps the arbitrator selection process within the parties' control. In fact, the parties generally expend a great deal of time and energy investigating the qualifications of potential arbitrators.

Judge Harry T. Edwards, former professor of law at Harvard, currently Judge of the Court of Appeals for the District of Columbia Circuit, conducted a well-known and most complete survey of arbitrators.[21] He discovered in his survey that only 10 percent of all the arbitrators surveyed heard fully 90 percent of the total employment discrimination cases. This indicates that the parties are carefully choosing the arbitrator to fit the case.

A 1984 study by Michele Hoyman and Lamont Stallworth[22] also examined another set of criteria which we believe may relate to this particular criticism. After examining thousands of cases, the authors concluded that the amount of Title VII litigation following arbitration is quite low. Their statistics support the assertion that the parties are generally satisfied with the results of the arbitration. If the arbitration were biased, such would not be the case.

Accordingly, based on a complete absence of any data demonstrating arbitrator bias, and the data showing that arbitral awards both "comply" with Title VII and are infrequently relitigated, we conclude that this criticism, too, is unfounded.

The fourth criticism leveled against arbitration of discrimination complaints deals with the awards' "lack of finality." Critics contend that the Supreme Court's decision in *Gardner-Denver* erodes the finality of arbitration awards—a concept which forms the backbone of ongoing labor-management relations. In essence, the decision allows the grievannt to relitigate his or her complaint in court, thereby getting the proverbial "second bite at the apple." This contention is also belied by the facts.

The recent study by Hoyman and Stallworth surveyed the experience of labor and management attorneys regarding review and reversal of arbitral awards by the EEOC or trial courts. The respondents to the study had participated in a total of 1,761 arbitration cases alleging either race or gender dis-

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[21]Edwards, *supra*, note 12.

[22]*The Arbitration of Discrimination Grievances in the Aftermath of* Gardner-Denver, 39 Arb. J. 49 (1984).

crimination. The authors found that only 27 percent of these 1,761 arbitration cases had been reviewed by either the EEOC or a state antidiscrimination agency, and only 17 percent of them had been reviewed by the courts.

Of the 17 percent which were relitigated, only 21, or 6.8 percent, were reversed, while 15.9 percent of the cases brought to the EEOC or state agencies were reversed. Looking at the total of 1,761 arbitration cases, the ones reversed by the EEOC or state agencies accounted for only 4.4 percent, and the ones reversed by the courts accounted for a mere 1.2 percent.

Therefore, the authors concluded that although *Gardner-Denver* permits a *de novo* hearing by a court or administrative agency, the result of these hearings in almost all instances has been in accord with the initial decision of the arbitrator. In fact, the arbitral awards remain final and binding on the parties notwithstanding *Gardner-Denver*. Few awards are being relitigated and fewer are reversed. We suggest that although the *Gardner-Denver* decision may, in theory, undercut the finality of arbitration, in reality the decision has had no such effect.

The fifth area of concern is that arbitrators are not sufficiently familiar with Title VII law to interpret and apply it properly. Once again field reports demonstrate that in practice the arbitrators' discussions accord with the law quite properly and, even where the law is subtle, or complex, there is no grave confusion about its application. For example, the study by Hauck showed that the overwhelming majority of awards reviewed were in compliance with Title VII.[23] The Wolkinson and Liberson study found only one instance in which the arbitrator apparently misunderstood the law.[24]

What is interesting to note, I believe is that while the arbitral awards demonstrate arbitral competence, arbitrators themselves may reach a different conclusion.

We turn, once again, to Judge Edwards' survey of arbitrators. The purpose of his survey was to determine whether the arbitration process was adequate to deal with legal issues arising under statutes such as Title VII. Judge Edwards found that most arbitrators do not feel themselves competent to hear cases involving discrimination charges. The survey also revealed that many arbitrators could not define elementary legal terms, that arbitrators

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[23]Hauck, *supra*, note 20.
[24]Wolkinson & Liberson, *supra*, note 18.

tended not to read labor advance sheets, and that some of them did not feel competent to decide discrimination issues, even after they had actually heard such cases. Most arbitrators reported that they were reluctant to apply federal or state statutes in discrimination grievances. The respondents said that they actually relied on Title VII legal precedence in only 12.5 percent of all the employment discrimination cases heard. On their face, these are disturbing and self-indicting comments. But even if they are true, they are not a cause for substantial concern.

Recall that, particularly in the area of discrimination, the arbitrators are being chosen with particular diligence. Roughly 10 percent of all arbitrators hear 90 percent of discrimination cases. In our opinion, this indicates that only arbitrators with demonstrated expertise in the area are being chosen to hear these claims. Therefore, the danger that an unknowledgable arbitrator may be chosen to adjudicate a discrimination claim is, in reality, *not* a significant risk.

Additionally, the study by Oppenheimer and La Van reached some other very interesting conclusions with regard to an arbitrator's competence. The authors examined a number of variables and found some significant relationships between them. While approximately two thirds of the responding arbitrators were lawyers, whether or not the arbitrator was a lawyer statistically had no effect on whether a finding of discrimination was made. Nor was it significantly related to whether the arbitrator cited the law, judicial decisions, other arbitrations, or past practice. Rather, Oppenheimer and La Van concluded that qualifications such as labor-arbitration experience and familiarity with the industry may be more relevant to the proper resolution of these disputes.[25]

Thus, while arbitrators themselves question their competence and while some of their comments reveal potentially disturbing facts about the lack of knowledge of the legal principles involved, this may very well be a classic case where actions speak louder than words. In fact, the vast majority of arbitration decisions on discrimination issues are in compliance with the governing law and relatively few decisions are relitigated and/or reversed. Once again, we conclude that this concern is without merit.

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[25]Oppenheimer & La Van, *supra*, note 17.

Critics next claim that the arbitration process does not accord adequate procedural due process. This includes giving the parties an opportunity to be heard, to present evidence, and to be free from arbitrary limitations imposed on the party's ability to prove his or her case. The seminal survey by Judge Edwards attempted to determine the extent to which the arbitration of discrimination grievances is procedurally fair and he examined several criteria. His results indicated for instance that lawyers represented both parties at arbitration in only 53 percent of the discrimination cases heard. In 25 percent of the cases, the company was represented by counsel while the union was without legal counsel, and the grievant appeared with his or her own legal counsel in only 9 percent of those cases. While it can be said that the presence of counsel for both parties does not necessarily ensure procedural fairness, strong arguments can be made, I believe, that the party not represented by counsel is at a distinct disadvantage in any quasi-judicial proceeding.

Furthermore, the factfinding process in arbitration is not equivalent to judicial factfinding. In the first instance the discovery process is far more limited in arbitration than in the judicial setting. Tools such as depositions and interrogatories are not the norm. This has led some to conclude that it is impossible to fully and adequately litigate discrimination claims in the arbitration forum.

Additionally, the judicial power to subpoena witnesses and testimony can be used to great advantage against a recalcitrant party in a court proceeding. While arbitration rules provide for the issuance of subpoenas, arbitrators have no authority of self-enforcement and, accordingly, the subpoena may be rendered meaningless. These two factors cause me the gravest concern in comparing and analyzing the judicial versus the arbitration processes. Discrimination cases more often and more clearly require prehearing information gathering than any other type of grievance. The discovery procedures available in the federal and state courts are, I believe, a distinct advantage to the claimant or grievant. This weighs heavily in favor of resolving the issues in the courtroom.

However, what is also clearly different are the evidentiary rules applied in each forum. While strict attention is paid to the rules of evidence in the courtroom, it is well-established practice that arbitrators give wide latitude to such rules in the arbitration process. Hearsay evidence, for example, is routinely allowed,

and arbitrators often deny relevancy objections based on their belief that the best way to get to the truth is to hear all the evidence from both sides and to decide at a later time the weight to accord to particular testimony or document. This procedural difference is the critical factor in my reaching the conclusion that the criticisms regarding procedural fairness are overstated. In fact, what information we may not be able to obtain prior to hearing through discovery, we may almost always be able to ascertain at the hearing. While it is clearly advantageous to obtain evidence prior to hearing, arbitrators will frequently allow for continuances to allow parties to read and review newly obtained evidence. Accordingly, we believe this criticism does not have serious practical effect.

Finally, critics claim that in some areas the law is too new to provide the firm guidance arbitrators require when called upon to interpret that law. One example of a novel issue in the discrimination field is that of "fetal vulnerability." Grievants in these instances allege greater discrimination when an employer adopts a policy of excluding or restricting women of childbearing age from certain jobs which involve exposure to chemicals potentially harmful to fetuses. Not until the 1980s did the courts have to decide whether a policy of fetal protection could be said to violate Title VII.[26] The issue appeared in grievance arbitration before then.

In 1979 Arbitrator Douglas V. Knudson was confronted with a grievance over a company policy which did not allow women of childbearing years to work in areas where there was potential lead exposure.[27] Such exposure had been demonstrated to cause fetal deformity. At issue in the case was whether the job posting notice, which excluded women ages 15 to 50 from applying for the job, violated the collective bargaining agreement which forbade discrimination on the basis of gender.

The arbitrator denied the grievance, holding that the union failed to present any medical data to contradict the company's conclusion that lead exposure was a major health risk for the pregnant or potentially pregnant employee. The decision was based solely on the arbitrator's interpretation of the collective bargaining agreement and not on a statutory analysis. He rea-

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[26]*See Wright v. Olin Corp.*, 697 F.2d 1172 30 FEP 889 (4th Cir. 1982); *Hayes v. Shelby Memorial Hosp.*, 726 F.2d 1543, 34 FEP 444 (11th Cir. 1984); and *Zuniga v. Kleberg County Hosp.*, 692 F.2d 986, 30 FEP 650 (5th Cir. 1982).

[27]*Olin Corp.*, 73 LA 291 (Knudson, 1979).

soned that where the contract specifically provided that the company was responsible for the occupational health of its employees, and where the company's decision to exclude women of childbearing age from lead exposure was based on professional medical recommendations, the decision was made in good faith to protect the health of the employees, and, therefore, was not discriminatory. Furthermore, the arbitrator determined that the company restriction as applied conformed with its well-established past practice of monitoring the effects of lead exposure on its employees and removing individuals with unacceptable blood lead levels from jobs with lead exposure.

Thereafter, other female employees of the same company at a different plant location filed suit in district court claiming that the employer's conduct constituted illegal gender discrimination. The district court first found that such a fetal protection policy could violate Title VII, but that the one in question did not.

The appeals court determined that the disparate impact/business necessity theory of claim and defense was the proper standard to be applied to the fetal vulnerability issue. Pursuant to this theory a plaintiff contends that disparate consequences of an employment practice, even if unintended or indeed benignly motivated, may, like intentional invidiously discriminatory employer actions, constitute violations of Title VII. The successful defense would demonstrate that in appropriate circumstances an employer has, as a matter of business necessity, imposed otherwise impermissible restrictions on an employment opportunity that are reasonably required to protect the health of unborn children against hazards of the workplace. Applying this standard the appeals court remanded back to the district court.

On remand, the district court applied the standard and found that the company's policy was justified by sound medical evidence, and was instituted and maintained without intent to discriminate. The court concluded from the evidence that the *prima facie* case of discrimination established by the plaintiff at trial had been effectively rebutted by the defendant, who showed through the testimony of expert witnesses a business necessity for its fetal protection policy.[28]

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[28]*Wright v. Olin Corp.*, 585 F. Supp. 1447, 34 FEP 1226 (W.D.N.C.), *vacated without opinion*, 767 F.2d 915 (4th Cir. 1984).

The district court's adjudication and the arbitral award were based on different principles of conflict resolution, yet the analyses parallel each other and achieve substantially similar results. Arbitrator Knudson found that the company's contractual responsibility for the occupational health of its employees was the basis for its fetal vulnerability policy, whereas the court found that the company's fetal protection program was based on sound public policy. Both forums determined that in establishing this program, the company acted on the best scientific evidence available. The arbitrator found no gender discrimination because not all women were automatically excluded from the jobs in question, and because the decision to exclude was made in good faith. The court found no discrimination because the company established the Title VII defense of business necessity for the exclusion of women, and because it found that there was no less discriminatory method of achieving the desired goal of fetal protection.

We believe this case is a clear demonstration that this last area of concern is without merit. At the arbitration back in 1979 it would have been impossible for Arbitrator Knudson to predict with any degree of certainty how the courts would approach the question of fetal protection. It was not then an issue clearly covered by Title VII and the arbitrator did not consider that possibility. Instead he drew upon the traditional principles of labor management relations and the common law of the shop to arrive at the same conclusion reached by the district court which employed a Title VII analysis. The cases are instructive, I believe, because they illustrate the basic harmony that exists between the two forums, even where an arbitrator is required to decide a question which may present a case of first impression.

Cases alleging sexual harassment also present a relatively new area of Title VII application.[29] In the 1981 case of *Bundy v. Jackson*,[30] the Court of Appeals for the District of Columbia Circuit decided that the prohibition against gender discrimination in terms and conditions of employment embodied in Title VII included a prohibition against sexual harassment. Further, an

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[29]This paper was presented on June 6, 1986. Thereafter, on June 19, 1986, the U.S. Supreme Court announced its decision in *Meritor Sav. Bank v. Vinson*, 54 USLW 4703, 40 FEP 1822 (1986). The Court held that Title VII is not limited to "economic" or "tangible" discrimination. A claim of harassment that, while not affecting economic benefits, creates a hostile or offensive working environment, presents a violation of Title VII (as does harassment that involves the conditioning of employment benefits on sexual favors).

[30]641 F.2d 934, 24 FEP 1155 (D.C. Cir. 1981).

employer who because of Title VII may not discriminate with respect to the terms, conditions, or privileges of employment may not permit sexual harassment to occur and may be liable for the acts of employees who participate in such conduct.

Surveys reveal that between 70 percent and 90 percent of working women report having experienced sexual harassment on the job.[31] Whatever the percentage there is little question that, if proven, the conduct may constitute a violation of a collective bargaining agreement's nondiscrimination clause.

There appear to be only three studies which have systematically attempted to identify and analyze reported arbitrations of sexual harassment claims. Two of the studies emphasize the fact that arbitration is used to protect the rights of the alleged perpetrator of the harassment, while court cases are brought to protect the rights of the alleged victim. These two studies conclude that charges of sexual harassment have been and will continue to be resolved in the courts, with arbitration playing only a minor role.[32]

However, a third study by W.B. Nelson finds that arbitration has been used far more than these other two studies indicate.[33] Nelson notes that except for the American Arbitration Association, none of the labor arbitration reporting services index *sexual harassment* as a separate term in their classification schemes. He found that all or most of these cases are indexed under *improper personal conduct* of one kind or another, and thus are difficult to locate. He further notes, correctly in my opinion, that there are undoubtedly many more unpublished cases, since it stands to reason that at least one of the parties is reluctant to publicize the decision, and that this reluctance is more likely to exist where the dispute involves sexual misconduct.

Nelson also discussed the distinction raised by Greenbaum and Fraser between cases concerning the victim and cases concerning the perpetrator and stated:

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[31]Safran, *What Men Do to Women on the Job: A Shocking Look at Sexual Harassment*, Red Book (Nov. 1976), 149; Farley, Sexual Shake Down: The Sexual Harassment of Women on the Job (New York: McGraw-Hill, 1978); MacKinnon, Sexual Harassment of Working Women (New Haven: Yale Univ. Press, 1979); Sexual Harassment in the Federal Work Place; Is it a Problem? A Merit System Review and Study (Washington: Government Printing Office, 1981).

[32]Marmo, *Arbitrating Sex Harassment Cases*, 35 Arb. J. 35 (1980); and Greenbaum & Frazier, *Sexual Harassment in the Workplace*, 36 Arb. J. 30 (1981).

[33]Nelson, *Sexual Harassment, Title VII, and Labor Arbitration*, 40 Arb. J. 55 (1985).

> This is a distinction without a difference. In every such case, the victim (or someone in her behalf) had lodged a complaint. That complaint was reviewed by management and found to have substance, or no discipline would have been assessed and no grievance filed—at least by the alleged harasser. We see no difference in the substance or the implications either for the parties or for public opinion.

Thus, I agree with Nelson's conclusions, and find that arbitration plays a major role in resolving disputes of sexual harassment.

We believe that, for several reasons, it is appropriate that arbitration be used to hear these sexual harassment cases. In the first instance, an arbitrator is arguably more qualified than a judge to examine and evaluate the industry's practice, the "law of the shop," to determine whether an "atmosphere of discrimination" existed. Equally as significant in my view, an arbitrator is not limited to the remedies available under Title VII. He or she may fashion a remedy taking into account such factors as the grievant's work history and the nature of the relationship between victim and perpetrator.

For example, a very recent award in Minnesota involved an employment counselor who was fired after being accused by three female welfare recipients of sexual harassment.[34] Arbitrator Thomas P. Gallagher said that the testimony presented by these three clients was convincing; that the grievant did indeed make sexually suggestive remarks to them; and that this conduct violated county regulations. However, he reduced the penalty against the grievant from dismissal to a suspension, finding that a lesser penalty than discharge was appropriate, since the grievant had not made physical contact with the women and had a previously unblemished record of employment over a period of some 21 years.

In this decision, Arbitrator Gallagher was able to exercise more flexibility than that normally available to the courts in fashioning a remedy in such a case. Indeed, this action would not have even reached the courts under Title VII because the statute protects only against sexual harassment in an employment context. The fact that the welfare clients were not employed by the county would have precluded them from bringing such a suit.

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[34]*AFSCME Council 14 and County of Ramsey*, 1986 Daily Lab. Rep. (BNA) 61:A–4 (Gallagher).

An obvious question must be raised about the inherent conflict between the victim and the perpetrator in the sexual harassment claim. To me the Minnesota award is a positive demonstration of the advantage of the arbitral forum. The victims could not have brought a lawsuit since they were not employees and, therefore, not covered by the protections of Title VII. Yet, through arbitration they achieved some form of vindication. The employee-perpetrator was successful in reducing his discharge to a suspension and, no doubt, learned a difficult lesson in the process. The employer became aware of a workplace problem—which is a critical educational process in my opinion—but was exposed to a relatively minimal risk and expense.

For all of these reasons we conclude that even the criticism about an arbitrator's ability to deal effectively with new legal issues is without basis in fact. Since we conclude that arbitrators are, in fact, competent to handle these cases, the question then becomes: Is there any advantage to the arbitral forum? The answer to this question may also be yes.

Resort to arbitration provides a relatively speedy alternative to bringing suit in the overburdened courts or administrative agencies. Recently the EEOC caseload has increased dramatically, as have the caseloads of the courts and state human relations agencies. They find themselves unable to service the claims received in a timely fashion. As a law review article by Anthony Bartlett recently pointed out, these practical problems have led to a reconsideration of some of the concerns regarding the use of arbitration in discrimination cases,[35] and proposed modifications to the process.

One such attempt at arbitration modification was provided by the AAA, which constructed a set of model rules designed to establish greater confidence by the parties in the use of arbitration to resolve discrimination claims. Basically, these rules require that the parties consist of an individual employee and employer, that the individual grievant be represented by a personal attorney, that the Federal Rules of Evidence be used for guidance, and that the arbitrator be selected from a panel composed of persons with a background in employment discrimination law and practice. Bartlett points out that modifications such as these will require a certain increase in formality, but concludes

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[35]Bartlett, *Employment Discrimination and the Labor Arbitrator: A Question of Competence*, 85 W.Va. L. Rev. 873 (1983).

that the formality will not be to such a degree as to contort the purposes and nature of arbitration.

Carol Webster, author of perhaps one of the most comprehensive articles on proposed changes in the arbitration of Title VII disputes suggests another approach.[36] In her view, Title VII should be amended to allow specifically for arbitration of all discrimination disputes. Her proposal for such an amendment is subject to certain limitations on the process.

One such limitation would be the exclusion of actions on behalf of a class. This type of action, Webster contends, is not suited to the efficiency of the arbitral forum. Discovery in an action on behalf of the class is so cumbersome and expensive that the financial and timesaving benefits of arbitration would be lost.

Finally, Judge Edwards has proposed a so-called "two-track" arbitration system for the resolution of employment discrimination cases.[37] His concern is that the traditional form of labor arbitration cannot satisfactorily resolve the complex and conflicting interests that arise with discrimination complaints. It should be noted that Judge Edwards views equal employment opportunity as a fundamental right, and believes that the enforcement of this right should be achieved in full view of the public, and in a public forum such as a court of law. Nonetheless, his proposal seeks to accommodate and reconcile the conflicting interests of the employer, who wishes to avoid multiple litigation, the union, which wants to comply with its duty of fair representation, and the employee, who seeks full relief and redress.

Accordingly, Judge Edwards would permit arbitration in only those cases in which the grievance alleges an act that might be considered a violation of both the collective bargaining agreement and of Title VII. His proposal would intentionally screen out the most difficult and significant employment discrimination cases. He would specifically exclude from arbitration all grievances which allege only a breach of the law, charge both the union and the employer with discrimination, seek reformation of the contract, claim inconsistency between the contract and a court or administrative order, constitute a class action, or involve unsettled areas of law. This limitation on the substantive juris-

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[36]Webster, *Arbitrating Title VII Disputes: A Proposal*, 33 Arb. J. 25 (1978).
[37]Edwards, *Arbitration as an Alternative in Equal Employment Disputes*, 33 Arb. J. 23 (1978).

diction of the arbitrator would, in his view, minimize or eliminate the necessity of court review.

What makes this a "two-track" arbitration system is that the arbitration of discrimination grievances would be separate and distinct from the normal contract grievance procedures. The parties to the contract would have to agree to a special procedure for the handling of the cases that survive the screening criteria. The procedure would be established for the life of the contract, and a special panel of lawyer-arbitrators, with expertise in Title VII law, would be appointed in advance and selected on a fixed rotation schedule.

While much of Judge Edwards' proposal is sound, I, for one, am not persuaded that it is needed.

Our examination of arbitral versus judicial resolution of employment discrimination cases has, in fact, changed my opinion about the propriety of the arbitration process in the resolution of discrimination cases. When we began the research for this speech, I thought that we would conclude that the courtroom was the better forum for resolving these claims, and I must admit that I agreed with this conclusion. The courts, I thought, are best equipped to entertain the legal arguments, hear and weigh the evidence, and vindicate the important civil rights created by statute. However, the literature and our own examination and experience leads me to conclude otherwise.

As I hope we have illustrated, most, if not all, of the criticisms leveled at arbitrators' competence in this area are without substance and are belied by the facts and statistics. Grievants are receiving the protections of the law through the arbitration procedure. The vast majority of awards comply with Title VII and simultaneously effectuate the intent of the parties to have these disputes settled through arbitration. Finality of awards is not really an issue as the statistics indicate that very few cases are relitigated and even fewer are reversed. Arbitrators are considering federal and state antidiscrimination statutes and regulations and applying them accurately. And finally, arbitrators are not afraid and, in fact, may be better equipped than judges to handle the newest issues in this field. In sum, the virtues of the traditional model of arbitration—the expeditious, inexpensive, and efficient handling of dispute resolution—can be enjoyed by grievants presenting discrimination claims and for that, you are to be commended.

Thank you.