CHAPTER 4

THE CHANGING CHARACTER OF LABOR ARBITRATION

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Introduction

The much discussed shift of growth in labor arbitration and related neutral activity from the private sector to public sector is but the most salient current dimension of what is likely to be an accelerating degree of change in our profession. In light of the theme of this year's Annual Meeting, I believe the most productive tack I can follow is one that looks both to the private sector-public sector dichotomy and beyond, to the future of labor arbitration. My comments will center on three subjects: (1) the current reality of the practice of mainline labor arbitrators, (2) the several dynamics on the labor relations horizon which may significantly impact the institution of labor arbitration, and (3) the challenges and the opportunities those developments will present.

I will focus on the insular perspective of the individual labor arbitrator. My particular concern is the obligation, the duty, we Academy members bear as the leaders of our profession to ensure that we retain and accrue the skills and competencies necessary to remain active players in the labor dispute-resolution environment of tomorrow, and to ensure that arbitration remains the "procedure of choice" for resolving the full range of employee-employer workplace disputes.

A Third Era of Arbitration

At appropriate intervals during the life of the Academy, various of our more eminent thinkers have paused to take stock of

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the profession and to speculate as to the future of labor arbitration. The thoughts of Past President Killingsworth in 1972,[1] President-Elect Feller's classic 1976 discourse on "The Coming End of Arbitration's Golden Age,"[2] and Robben Fleming's "Reflections on Labor Arbitration" in the 1984 Proceedings[3] are prime examples of those treatises. A careful reading of these perceptive pieces revels two distinct stages in the life of the unique institution of labor arbitration as it has evolved on the North American continent.

The first stage can be demarcated by the initial 25 years of labor arbitration, from the late 1940s to the early 1970s. That period was characterized by the growth and maturation of the private-sector practice. The second period, from the early 1970s to the present, has been characterized by the growth and maturation of the public-sector practice.

The growth and metamorphosis of labor arbitration during these two periods was in large part the result of new legislation regulating the employer-employee relationship and shifts in judicial attitudes as to the appropriateness and effectiveness of arbitration as a vehicle for ensuring the protection of the workplace-related rights of American workers. I am convinced that we in the labor arbitration profession may well be on the cusp of a new, third era in the progression of our trade and the institution on which it depends. Like the other watersheds in the life of our profession, I believe the genesis of this new age of arbitration is to be found in several recent, very significant developments on the legislative and judicial fronts, which I will discuss shortly.

In 1984 Fleming aptly observed that "[s]ince arbitration is simply a mechanism for settling disputes, it has to take place within the milieu provided by the larger society. . . . the continued success of labor arbitration almost certainly depends on its ability to respond to new needs."[4] I will spend the remainder

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[1]Killingsworth, *Twenty-Five Years of Labor Arbitration—And the Future: I. Arbitration Then and Now*, in Labor Arbitration at the Quarter-Century Mark, Proceedings of the 25th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books, 1973), 11.

[2]Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books, 1977), 97.

[3]Fleming, *Reflections on Labor Arbitration*, in Arbitration 1984: Absenteeism, Recent Law, Panels, and Published Decisions, Proceedings of the 37th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books, 1985), 11.

[4]*Id.* at 11–12.

of the time allotted to me talking about change: how we in the labor arbitration profession have coped with it in the past, and how we can deal with it in the future.

The Practice of Labor Arbitration Today

The Numbers

Because it is not essential to my thesis and because the subject has been covered in numerous other venues, I will not elucidate extensively on the current statistics pertaining to the number of arbitration cases that have been decided in recent years in the private and public sectors. The annual ad hoc case statistics produced by the American Arbitration Association (AAA) and the Federal Mediation and Conciliation Service (FMCS) provide a good barometer of the total level of labor arbitration activity in the United States. These data for selected years from 1971 through 1991 show the following pattern of labor arbitration awards:

Year	*FMCS Awards*	*AAA Awards*	*Total*
1971	2,840	3,837	6,647
1975	4,484	6,784	11,268
1980	7,539	7,382	14,921
1981	6,967	7,256	14,223
1982	7,120	3,917	11,037
1983	6,096	6,956	13,052
1984	5,834	6,540	12,374
1985	4,406	6,563	10,969
1986	9,286	6,394	15,680
1987	4,145	5,651	9,796
1988	5,447	NA	
1989	3,769	NA	
1990	5,288	NA	
1991	5,451	NA	

AAA no longer keeps statistics on the number of its labor cases that actually result in an award. However, the number of case filings reported by AAA for the years 1988 through 1991 ranged from 17,620 to 16,430, roughly the same level of case-filing activity reported for the years 1981–1987.

These ad hoc case statistics do not present the full picture of the level of labor arbitration activity in the United States because

they do not reflect the large number of cases decided under permanent panel arrangements in the private and public sectors; the average number (4,093) of awards reported by the National Mediation Board in the railroad industry for the years 1987-1991; the large number of grievance arbitration awards issued under the auspices of the various state and local public employment relations boards (PERBs); and the interest arbitration awards and factfinding reports and recommendations promulgated in the federal, state, and local government sector each year. Regardless, they do provide a data baseline.

For the years 1981–1985 an average of 38.68 percent of awards sampled by the AAA were issued in the public sector. In 1984 FMCS reported that 16.9 percent of awards issued under its auspices were in the public sector. In 1985 FMCS reported a 15.75 percent public-sector figure. The remaining available data for AAA and FMCS cases show that the following percentages of the total ad hoc case load were from the public sector for the years 1986-1991.

Year	*Percentage of FMCS Awards Issued in the Public Sector*	*Percentage of AAA Awards Issued in the Public Sector*
1986	14.9	44.0
1987	15.3	44.0
1988	15.8	49.0
1989	15.1	47.0
1990	15.8	49.4
1991	14.4	50.0

The FMCS and AAA figures do not reflect the substantial increase in public-sector interest-disputes work that has transpired in the last two decades. When interest-arbitration and factfinding caseloads are considered, along with the grievance-arbitration work under state PERB auspices, the inference of a moderate shift toward the public sector is strengthened.

All of these numbers lead to a single, central conclusion. The expansion in traditional labor arbitration activity experienced in the first 40 years of our profession has ended. The private sector is at best stagnant and perhaps even moribund. There was a time when the public sector held out the prospect of greatly increased levels of arbitration. That is no longer true. Public-sector practice has entered its mature stage. The numbers of union members and the percentage of union membership in the public

sector have stabilized in recent years. Nothing indicates that a substantial increase in either figure will occur soon.

Ours is no longer a growth industry. In fact, there appears to have been a slight decline in the ad hoc caseload in recent years. Nevertheless, the ad hoc case statistics and the relatively robust nature of the public-sector labor relations sphere indicate that, at least for the present, there remains a reasonably stable level of arbitration and related dispute-resolution activity in industry and government. I will now turn from these numbers in an effort to fashion a snapshot of the practice of labor arbitration today, with an eye toward the skills and competencies required of those who do that work.

The Nature of Our Work — Circa 1992

In describing the current practice of mainline arbitrators, I will focus on three dimensions: (1) the various fora in which we work; (2) the functional expertise we exercise, i.e. what we do; and (3) the subject-matter expertise we require, i.e., what we know.

1. The Private Sector

Most work of private-sector neutrals consists of conventional grievance arbitration. Though there are exceptions, when compared to litigation, the typical private-sector arbitration tribunal is a relatively informal proceeding. But, for contractual provisions requiring full disclosure at the latter stages of the grievance procedure, there is no analog to prehearing discovery. Similarly, prehearing submissions/briefs are an anomaly. The rules of evidence are not applied in any formal sense. The relevant FMCS statistic indicates that transcripts are made in only one of four cases. Further, in most cases we need not be concerned with potential reversal on the merits by an appellate body.

St. Antoine's conceptualization of the arbitrator as the parties' "official contract reader" provides an apt description of the arbitrator's function in the private sector.[5] In the vast majority of the cases, competent performance requires the neutral to have:

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[5]St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1978), 34.

(1) a grasp of the body of arbitral principle embraced within the common law of the shop of labor arbitration;
(2) a basic understanding of the adversarial factfinding process that transpires at hearing;
(3) some feel for the rules of evidence and their purpose; and
(4) an ability to write awards which demonstrate to the parties that the arbitrator sees the relevant facts, understands their arguments, and bases the award on a cogent construction of the contract.

Within the context of contemporary private-sector practice, matters of external law are a comparatively minor factor. The admonition of Feller and St. Antoine to arbitrators confronted with contractual disputes and contract provisions embracing external law to "just do it!" provides the best description of how we operate today in this area of the practice.[6]

It appears that the neutrals selected to adjudicate these disputes have done so in a manner generally deemed acceptable by the parties and the employees whose interests are at issue. Employers and unions continue to arbitrate cases with substantial external law dimensions. There are no reports of a groundswell of employee refusals to accept the results produced by arbitration in these external law cases by pursuing separate Title VII (or other appropriate statutory) remedies sanctioned by the U.S. Supreme Court in *Alexander v. Gardner-Denver.*[7]

In summary on private-sector practice, to be acceptable, arbitrators need not be especially conversant with substantive employment-related law, the rules of evidence, prehearing discovery, evaluating claims for compensatory and punitive damages or attorney's fees, or similar matters more attendant to litigation than arbitration. Rather, the key to competent practice is the ability skillfully to steer the process on a course which balances the desire of the parties for informality, speed, and cost control with the need to ensure the levels of procedural due process and analytical rigor necessary to preserve the integrity and fairness of the contractual arbitration mechanism.

It is the capacity for maintaining this very delicate balance that has been the crucial factor in achieving and securing arbitration's long-term viability. I believe that it also will be the key to

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[6]Feller, *supra* note 2, at 125–26; St. Antoine, *supra* note 5, at 34–35.
[7]415 U.S. 36, 7 FEP Cases 81 (1974).

maintaining the pre-eminent status of arbitration in the future. I will return to this important point at the conclusion of my paper.

2. The Public Sector

The functional and subject-matter expertise required of private-sector arbitrators provides the baseline competencies for the arbitration of grievances in the public sector. However, it is only a baseline. The presence of large numbers of professional employees and specialized departments or sub-units of government, the more litigious nature of public-sector employers and unions, and the resultant need at times to conduct a somewhat more formal hearing than is the norm in industry are factors that distinguish the public-sector practice. The frequent interjection of civil service regulations, employer agency rules, and statutes pertaining to the employment conditions of government employees requires public-sector grievance arbitrators to develop a faculty for interrelating and reconciling these noncontractual promulgations with the relevant terms of the collective bargaining agreement.

As the public-sector practice evolved, grievance arbitrators found themselves engaged in what can be described as "the application of external law without the fuss." We have just "done it" because the parties expect it. Largely as a result of these heightened external law considerations, in some public-sector jurisdictions—most notably the federal sector—grievance arbitration awards are subject to administrative agency or judicial review, typically to ensure that the award comports with relevant law, rule, and regulation.

The ramifications for the neutral of these dimensions of public-sector grievance-arbitration practice are clear. Practice in the government sector is at times more demanding. The neutral is frequently required to be more than a mere reader of the contract. Any arbitrator who has decided a federal-sector environmental differential-pay case or has been compelled to comport an award with the relevant case law of the federal Merit Systems Protection Board can testify as to the lengths to which this heightened rigor can extend. That fact notwithstanding, the most difficult aspect of public-sector practice is found in the interests dispute-resolution arena.

When the neutral is appointed to serve as a factfinder or arbitrator in a public-sector interest dispute, a new genre of

functional and subject-matter expertise is demanded. The neutral's role shifts from that of contract reader to contract writer. In determining what form the impassed provisions of the parties' collective bargaining agreement should or will take, the neutral must engage in an entirely different kind of analysis than is required in the adjudication of rights disputes. The criteria upon which the recommendation or award of the public-sector interest neutral must be based are notably different from the precepts of the common law of the shop relied on by grievance arbitrators. Proper application of these interest criteria obliges the neutral to have a sound knowledge, inter alia, of the government budget-formulation process, state and local tax structures, and a sense for how the result of the dispute-resolution process will affect the efficiency of the governmental unit, the level of services it is able to provide, and the morale of the work force.

3. Conclusions on the Juxtaposition of Private- and Public-Sector Practice

On a number of levels public-sector practice is more complex and perhaps more difficult than traditional private-sector grievance arbitration. Nonetheless, after some twenty years of substantial levels of public-sector grievance and interest-arbitration activity, it is clear that the members of our profession who choose to work in the public sector have handled the transition well. With some tailoring and upgrading, the same set of functional skills and basic subject-matter expertise equips the qualified labor neutral to work in both the private and public sectors. In general terms we who wish to continue toiling in these fields as they are presently configured need not be concerned with a substantial enhancement of the skills and knowledge which have brought us to our current professional status. To the extent that this present private-sector and public-sector work is available in the future, our employability and the overall quality of the services we provide to the parties is assured.

The question upon which the remainder of my comments will focus is whether the skills and knowledge mix of 1992 mainline arbitrators will be sufficient to enable us to serve competently in the employment dispute-resolution sphere of the future.

The Future of Employee-Employer Dispute Resolution

Several recent and very significant developments on the legislative and judicial fronts prompt me to speculate that in the next

decade and century the cutting edge of labor arbitration and the growth sector of our profession may well lie in the adjudication of claims by employees that their individual employment-related rights guaranteed by statute have been violated by the employer. I will now turn to a brief review of each of these factors.

Legislative Developments

On the statutory side, the passage of the Americans With Disabilities Act (ADA)[8] and of the Civil Rights Act of 1991[9] reflects a renewed emphasis on statutory guarantees of fair treatment in the workplace extended to individual workers.

The ADA's bar on employment discrimination against "qualified individual[s] with a disability" takes effect in July of 1992. It is a sweeping proscription which includes virtually any physical or mental impairment that substantially limits one or more of a person's major life activities. The clear focus of the ADA is on protection of individual disabled persons. These disparate-treatment claims, as opposed to the broader and more complex disparate-impact pattern or practice cases, are very much amenable to arbitration. That Congress contemplated the use of arbitration and other alternative dispute-resolution (ADR) devices is indicated by Section 513 of the Act which states:

> Where appropriate and to the extent authorized by law, the use of alternative dispute resolution including settlement negotiations, conciliation, facilitation, mediation, factfinding, mini-trials and arbitration, is encouraged to resolve disputes under this Act.[10]

The Civil Rights Act of 1991 also will have a profound impact on the numbers of employment-discrimination claims entering

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[8]Pub. L. No. 101-336, 104 Stat. 327-337 (1990).

[9]Pub. L. No. 102-166, 105 Stat. 671-1100 (1991).

[10]*Supra* note 8, §513. There is some basis for speculation as to the extent of the commitment of Congress to final and binding arbitration of ADA claims. The Joint Explanatory Statement of the Senate-House Conference states in relevant part as follows with regard to §513.

> It is the intent of the conferees that the use of alternative dispute resolution is completely voluntary. Under no conditions would an arbitration clause in a collective bargaining agreement or employment contract prevent an individual from pursuing their rights under the ADA.

Obviously, employees who knowingly enter into employment contracts, whereby they agree to arbitrate any claims that their ADA rights have been violated, would do so voluntarily. Thus, if the reference to "rights" means the substantive rights and protections afforded qualified individuals with a disability secured by the Act, this passage from the legislative history does not present a bar to arbitration. However, if the term "rights" is also interpreted to mean procedural rights, that is, the right to bring suit in the federal courts, there may be reason for concern.

the adjudication queue in coming years. Time considerations oblige me to cite only the most noteworthy aspects of this statute. In acting to reverse a number of recent Supreme Court decisions deemed misdirected, Congress substantially strengthened the Title VII bar on employment discrimination on the basis of race, color, sex, national origin, and religion. Although the precise impact is unclear, the extensive focus in Section 105 of the Act on the employer's heightened burden in proving business necessity and job-relatedness in disparate-impact cases will certainly spill over to disparate-treatment cases. In a similar manner the Act's new standard of proof for mixed motive cases will make it more difficult for employers to prevail where there are both legitimate job-related and arguable illegal discriminatory reasons for a challenged personnel action.

The Act also offers considerable additional incentive to protected group members, and the attorneys who represent them, to initiate employment-discrimination actions under Title VII. First, as a result of the juxtaposition of Section 102 with Section 1981 of the Civil Rights Act of 1866,[11] the individual victims of intentional (read "disparate treatment") race, color, national origin, sex, religious, and disability-based discrimination are now entitled to both compensatory and punitive damages. Second, Section 103 facilitates the recovery of attorney's fees by prevailing complainant employees in these disparate-treatment intentional-discrimination cases. The attractiveness to employers of submitting Title VII claims to arbitration before mutually selected neutrals is greatly heightened by the Section 102(c) guarantee of a jury trial to disparate-treatment complainants who seek compensatory or punitive damages.

The 1991 Act amends Title VII by adding the same ADR-related language as in the ADA. Recent initiatives by the Equal Employment Opportunity Commission (EEOC) leave little doubt that mediation will play a significant role in the resolution of employment-discrimination claims under Title VII, the ADA, and the other statutes administered by the EEOC. The increasingly diverse American work force and the political infeasibility of elected officials' appearing unresponsive to the predicaments of protected group members make unlikely any reversal of the trend toward enhanced statutory protection of individual employment rights. What remains unclear at this

[11] *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

point is the extent to which the federal judiciary will approve the use of arbitration as a means for adjudicating employment-discrimination claims.

The third statutory development is the recent promulgation of the Uniform Employment Termination Act[12] by the National Conference of Commissioners on Uniform State Laws. This is a far-reaching statute that will, in the states where it is adopted, provide just cause protection for virtually all private sector employees: managers, supervisors, and rank and file workers. Arbitration is the adjudicatory device of choice settled upon by the Commissioners. The Act contemplates extensive prehearing discovery and leaves such determinations to the arbitrator. Arbitrators are authorized to award attorney's fees and costs. Judicial review of arbitrators' awards is confined to the narrow grounds consistent with those set forth in state uniform arbitration acts and the Federal Arbitration Act. At this very early date no one can reliably predict how many states will adopt the Uniform Act. Nevertheless, the Commissioners' action in promulgating the Act is a harbinger of possible statutory developments on the state level.

Judicial Developments

In 1991 the U.S. Supreme Court decided what could become a seminal case in the employee-employer arbitration field, *Gilmer v. Interstate/Johnson Lane Corp.*[13] The *Gardner-Denver*-based presumption that arbitration is not an appropriate device for the final and binding adjudication of statutory-based employment-discrimination claims has been the touchstone for discussion of these matters for almost twenty years. *Gilmer* provides reason to question whether that long-standing presumption has been mooted.

Viewed in its broadest context, *Gilmer* can be read to signal a changed attitude on the part of the new Supreme Court majority as to the propriety of permitting statutory claims of potential litigant employees to be definitively resolved in arbitration. Placed in the most narrow context, *Gilmer* may establish little more than a very technical exception to the unfavorable attitude toward arbitration and arbitrators reflected in *Alexander v. Gardner-Denver*.

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[12]Uniform Employment Termination Act, Appendices A and B (1992).
[13]*Supra* note 7.

The specific result reached in *Gilmer* provides the first reason for pause with regard to the continued viability of the broad rule of *Gardner-Denver*. The Court held that arbitration of claims of illegal age discrimination is not inconsistent with the ADEA. The second attention-demanding facet of *Gilmer* is found in a very significant change in the Court's attitude toward the suitability of arbitration for adjudicating alleged violations of statutory individual employment rights. After observing that claims of violations of the Sherman Act, the Racketeer Influenced and Corrupt Organizations (RICO) Act, and the 1933 and 1934 Securities Acts are appropriate for arbitration, the Court stated: "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the [ADEA] will continue to serve its remedial and deterrent function."[14] In reaction to the complainant employee's challenges to the adequacy of arbitration procedures as a means for adjudicating statutory claims, the Court stated:

> [I]n our recent arbitration cases we have already rejected most of these arguments as insufficient to preclude arbitration of statutory claims. Such generalized attacks on arbitration "res[t] on suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants," and as such, they are "far out of step with our current strong endorsement of the federal statutes favoring this method of resolving disputes."[15]

A pivotal dimension of *Gilmer* for arbitrators is found in the Court's rejection of the argument that *Alexander v. Gardner-Denver* and its progeny preclude final and binding arbitration of statutory-based employment-discrimination claims. The key to the Court's refusal to follow the *Gardner-Denver* result rests in the distinction it drew between arbitration of a statutory discrimination claim under the terms of a collective bargaining agreement and such arbitration under a separate contractual agreement between the employee and the employer.[16] Very significantly, the Court observed:

> The Court in *Alexander v. Gardner-Denver* also expressed the view that arbitration was inferior to the judicial process for resolving statutory claims. That "mistrust of the arbitral process," however,

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[14]55 FEP Cases at 1120 (quoting *Mitsubishi Motors Corp. v. Solier Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985)).

[15]55 FEP Cases at 1121 (quoting *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477, 481 (1989)).

[16]*Id.* at 1123.

> has been undermined by our recent arbitration decisions. "[W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals inhibited the development of arbitration as an alternative means of dispute resolution."[17]

Even the most reserved reader of these excerpts from the *Gilmer* opinion will find it difficult to resist the inference that the Court is signaling a very consequential shift in attitude toward the arbitration of statutory discrimination claims. The rule of *Gilmer* reduces to a simple proposition: Unless Congress intended to preclude complainant employees from waiving the judicial forum and agreeing to arbitrate their statutory claims, agreements to that effect will be honored by the federal courts.[18] If this rule stands up in the face of the Federal Arbitration Act's exemption for employment contracts, there will be profound ramifications of *Gilmer* for labor arbitrators and the profession of labor arbitration. Further analysis of *Gilmer* is beyond the scope of this paper. However, there are several questions remaining as to its reach.

The first goes to the scope of the Section 1 FAA exemption for contracts of employment. The holding in *Gilmer* is based in large part on the strong federal policy favoring arbitration reflected in the Federal Arbitration Act (FAA).[19] FAA Section 1 provides that the statute's terms are not intended to "apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." In *Gilmer* the Court expressly declined to address the effect of exemption of "contracts of employment" because the matter had not been argued below, and because the contract at issue was not an employment contract. Undoubtedly, the Court will soon be asked to resolve the question of the reach of the FAA Section 1 exemption. A narrow reading of the exemption, limiting it only to employees in the seafaring, railroad and perhaps other transportation industries, will open a wide door to increased arbitration activity. If the Court were to take the broad view of the Section 1 exemption (a result which I believe improbable), *Gilmer's* effect would be limited to agreements to arbitrate con-

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[17] *Id.* at 1123 n.5 (quoting *Shearson/American Express v. McMahon*, 482 U.S. 220, 231-32 (1987) and *Mitsubishi, supra*, note 16 at 626–27).

[18] 55 FEP Cases at 1121.

[19] 9 U.S.C. §1, *et seq* (1925).

tained in collateral, nonemployment contracts.[20] Given the resonant nature of the Court's endorsement of arbitration in *Gilmer*, it is unlikely to read FAA Section 1 as a sweeping bar to the enforcement of voluntary contractual agreements by employees and employers to arbitrate employment-related disputes of a statutory origin. If the Court were to adopt the broad view of the exemption, attention almost certainly would turn to Congress in an employer-lead effort to strike or expressly narrow the reach of the exemption.

Another question pertaining to the reach of *Gilmer* is the manner in which it will be reconciled with *Alexander v. Gardner-Denver*. The Court may decide that the hostility of its earlier and now departed majority toward arbitration as a vehicle for adjudicating statutory claims is out of step with current day reality. Carried to the extreme, this attitude would result in a reversal of *Gardner-Denver*. On the other hand, *Gardner-Denver* and *Gilmer* can be reconciled easily, and this is the more likely result. *Gilmer* involved a contractual commitment by an individual employee to arbitrate all claims arising out of his employment. *Gardner-Denver* stands for the proposition that complainant employees represented by an exclusive representative union cannot be deemed to have waived their rights to pursue a statutory remedy under Title VII or similar statutes merely because they chose to file and arbitrate a grievance under the contract negotiated by their representative union and the employer. There is every possibility that the "no election of remedies" rule of *Alexander v. Gardner-Denver* will continue to be the law with regard to arbitration arising under traditional collective bargaining agreement arbitration clauses. Because the *Gardner-Denver* scenario does not involve a contractual agreement to arbitrate between the individual complainant employee and the employer contemplated by the rule of *Gilmer*, the Court may conclude that the two cases are not in conflict.

The Prospect for the Future

Whatever the outcome of the juxtaposition of *Gilmer* and *Gardner-Denver*, a major shift in the playing field of labor arbitra-

[20]This broad reading of the FAA Section 1 exemption is reflected in the application of *Gilmer* set forth in the opinion of the U.S. Court of Appeals for the Sixth Circuit in *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 57 FEP 386 Cases (6th Cir. 1991). A post-*Gilmer* opinion illustrative of the narrow view of the exemption is *Dancu v. Coopers & Lybrand*, 778 F. Supp. 832 (E.D. Pa. 1991), citing *Tenney Engineering, Inc. v. United Electric Radio & Machine Workers*, 207 F.2d 450 (3d. Cir. 1953).

tion clearly is about to occur. The federal and state courts are severely overloaded, and the specter of increased numbers of employment discrimination and wrongful discharge actions resulting from the passage of the ADA, the Civil Rights Act of 1991, and state wrongful termination statutes leaves the Supreme Court in search of viable ADR options. In the absence of a clear congressional directive to the contrary, there is every reason to conclude that the Court will move decisively in the direction of sanctioning the arbitration of individual statutory employment rights claims.

If arbitration receives that stamp of approval, a number of new arbitral fora will be created for the adjudication of statutory-based claims of discriminatory treatment and wrongful termination. First, large numbers of unionized employees will certainly continue to submit their potential statutory-based claims to arbitration under the just cause and/or nondiscrimination and similar "incorporation" provisions of the collective bargaining agreement. Second, employers and unions may decide to include in their collective bargaining agreements separate arbitration mechanisms specially fashioned for the adjudication of employees' statutory claims.[21] Third, as the employment-at-will doctrine continues to erode at the state level, thereby diminishing the reluctance of employers to enter into individual employment-related contracts with employees, large numbers of nonunion employers almost certainly will find a way to make contractual agreements to arbitrate employment-related disputes a condition of hire. Fourth, there is the prospect of arbitration of wrongful discharge claims under the procedures established pursuant to various state adaptations of the Uniform Employment Termination Act. Finally, with regard to matters of federal law, we should not dismiss the possibility that Congress or the U.S. Supreme Court will settle on a special master-like device for securing the benefits of arbitration, while retaining in the federal judiciary the ultimate adjudicatory authority.[22]

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[21]Of course, in the absence of a binding, pre-arbitration contractual agreement between the individual employee and the employer, whereby the employee agrees to submit the statutory claim to arbitration, the employee's right to file suit in the appropriate court remains intact even after the arbitration award has issued under a collective bargaining agreement arbitration mechanism.

[22]*See* Ashe, *Due Process and Fair Representation in Grievance Handling in the Public Sector: Comment*, in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), 149.

In order to bring my analysis full circle, I turn to the question of arbitrator and advocacy competencies that will be required if this new era of arbitration comes to pass.

Required Competencies

Individual arbitrators remain employable, and labor arbitration remains useful, only so long as arbitrators possess the functional proficiencies and the subject-matter knowledge required by those we serve. Accordingly, it is imperative, at the nascent stage of this third era of arbitration, to assess precisely what functional and subject-matter expertise will be required and to ascertain what steps must be taken in order to ensure our selection.

Footnote 21 of the *Alexander v. Gardner-Denver*[23] opinion provides a guide for ascertaining the type of arbitration proceeding deemed an acceptable surrogate for judicial determination of statutorily-provided individual employment rights. The Supreme Court pointed to procedural fairness, the adequacy of the record, and the arbitrator's special competence as important factors in evaluating the adequacy of an arbitral award as a substitute for court adjudication. The Court's opinion in *Gilmer* provides further insight when it speaks, inter alia, to:

(1) the responsibility of the parties to evaluate the competence and impartiality of the arbitrators they select;
(2) the elements of sufficient prehearing discovery;
(3) the importance of cogent written awards; and
(4) effective arbitral exercise of the authority to order damages (compensatory and punitive) and appropriate equitable relief.[24]

What does this say about the minimal qualifications for the neutrals wishing to secure employability as arbitrators of individual statutory employment rights disputes?

First, no one can be considered qualified to arbitrate statutory rights disputes without a basic understanding of the relevant law. The relevant law under wrongful termination statutes con-

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[23]*Supra* note 9, at 60.

[24]*Gilmer v. Interstate/Johnson Lane Corp., supra* note 15, 55 FEP Cases at 1121–22. It is likely that many of these same procedural and substantive standards will be reflected in the regulations promulgated by the state agencies assigned administrative responsibility under the various state adaptations of the Uniform Employment Termination Act.

sists largely of the common law of the shop of labor arbitration pertaining to employee discipline. No problem here. However, arbitrators who accept appointments in cases involving claimed violations of Title VII, the ADA, and other statutes must demonstrate a working knowledge of the basic protections and proscriptions of those statutes as well as the case law underlying them. Advocates in these cases bear an important parallel obligation to select arbitrators who are adequately versed in the substantive law at issue.

An important point needs to be made here. Although a law degree is a useful credential for this type of work, it is neither a precondition nor a presumptive qualification for appointment. Most Title VII, ADA, and related EEO law-based cases involve disparate treatment, individual claims of intentional discrimination centering upon challenged disciplinary actions, promotion decisions, and similar issues. The arbitration tribunals wherein these disparate-treatment cases are decided will be very similar in character to the type of arbitral proceedings that are the heart of the traditional private-sector practice. For more complex pattern or practice disparate-impact cases in class-action-like configurations, advocates must be careful to select neutrals with the necessary dual expertise in the relevant law and the conduct of complex hearings.

The second area of expertise required of the neutral is a grasp of the rudiments of the prehearing discovery process. This is not complicated. These matters can be handled by a reasonable combination of prehearing correspondence between the neutral and the parties, conference telephone calls, and/or a single prehearing conference. Federal Rules of Civil Procedure 26-37 provide the basic framework for requests for document production, interrogatories, requests for admissions, depositions, and subpoenas. Application of the Federal Rules in any formal sense is not necessary to assure reasonable prehearing discovery. Rather, arbitrators need only to generally comport with largely informal, even verbal, discovery-related orders and rulings with the general thrust and intent of the Federal Rules. In this connection, the old "bugaboo" of rules of evidence rears its head. Although competent practice in the third era of arbitration will certainly require some tightening of the old reliable "for what it is worth" standard, strict adherence to the Federal Rules of Evidence or their state analogs will probably not be required. A basic understanding of the concepts of relevancy and mate-

riality, an appreciation of the importance of balancing the probative value of particular evidence against the prejudice it may work to the case of the nonproffering party, and a comprehension of the principles underlying the hearsay evidence rule and the major exceptions thereto are the core competencies called for in this area.

Third, a written transcript to ensure an adequate record will place a sharp focus on any significant rulings made by the arbitrator. This will increase the importance of the neutral's ability to make decisive, correct rulings on evidentiary and procedural questions during the hearing. Arbitrators will not be able to hide behind the veil of an informal record.

Finally, calculation of compensatory and punitive damages, equitable relief, and attorney's fees will be an integral part of the arbitrator's remedial powers in the third era. Gaining an adequate mastery of these remedy-related matters may involve difficult transitional tasks.

Clearly, those chosen to arbitrate statutory claims will need to attain and/or sharpen, and exercise new functional and subject-matter expertise. In addition, because of the potential volume of mediation activity under the ADR provisions of the ADA and Title VII, demonstrated competence as a mediator will prove a useful credential. At the same time it is critical that we not abandon our old skills and knowledge. If arbitration of statutory-based claims becomes a reality, continued viability and growth of the process depends on our ability to balance old and new competencies.

Conclusion

There is no good reason to believe that the "large scale experiment" that is labor arbitration is complete.[25] Measurable change is almost certain to occur in the next ten years with its attendant peril and uncertainty. Nevertheless, we must confront these new challenges and lead the process of change and adaptation. Mainline labor arbitrators have an overriding duty to provide the parties we serve—employees, unions and employers—with the dispute-resolution services they require. Because this new era of

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[25]Smith, *The Presidential Address*, in Problems of Proof in Arbitration, Proceedings of the 19th Annual Meeting, National Academy of Arbitrators, ed. Jones (BNA Books, 1967), 77.

practice will not entail abandonment of our traditional practice or disloyalty to the parties we now serve, I see no ethical barriers to our entry.[26] Undoubtedly, the core work of established labor arbitrators will remain the arbitration of contractual disputes between employee representative unions and employers. That likelihood notwithstanding, we cannot leave this new playing field to the more entrepreneurial "wannabees" at the fringes of our profession.

If this new work demands an upgrading, refinement, or rebalancing of our skills and the arbitration process itself, so be it. There will be opportunity for the same on-the-job training many of us received in public-sector practice. Nevertheless, most of us will be required to expend additional effort to ensure that we are capable of competently supervising the discovery process, conducting hearings deemed "fair" by judicial standards, and properly resolving a broad range of remedy questions. If, as I believe is likely, the standards for judicial review are those of the Federal Arbitration Act, we need not fear full-blown judicial review of the merits of our awards. If under the possible alternative mechanisms for arbitrating these statutory claims, more extensive judicial review transpires, our knowledge, analysis, and application of the substantive law must be good enough to stand that test.

If the third era of arbitration materializes, the long-term viability of this new variant of dispute resolution will depend on our ability to continue the process of adaptation and change that began with George Taylor's original model of the profession and has proceeded through the maturation of the public-sector practice. It will be the responsibility of arbitrators and advocates to ensure that in this new, more demanding context arbitration remains an affordable, comprehensible, and reliable dispute-resolution mechanism. As in the past, maintenance of the highest standards of professionalism, integrity, and competence are the keys to continued successful evolution of labor arbitration. We must strive to preserve the right-heartedness, the good-spirited nature, and the humility that are the hallmarks of our profession and the "kind of peacemaking" we practice.[27] The

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[26]In fact, in the third era unions may find significant opportunity for bringing unorganized employees within their ranks by offering a cost-effective alternative to the retention of independent counsel.

[27]St. Antoine, *Whither Arbitration? Comment*, in Arbitration 1991: The Changing Face of Arbitration in Theory and Practice, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1992), 55.

key to continued vitality of professionals and their profession is growth and effective response to change and uncertainty. Labor arbitrators have always confronted challenge and embraced change. Continued loyalty to the needs of the parties and the institution we serve compels similar conduct now.[28]

MANAGEMENT PERSPECTIVE

STEVEN B. RYNECKI*

Introduction

Over the past decade as Wisconsin Chapter Industrial Relations Research Association (IRRA) Secretary-Treasurer, I have seen a radical waning of interest in traditional "bread and butter" private-sector issues, such as strikes and picketing or aggressive, hard-nosed bargaining for major new gains. Instead, labor seems on the defensive almost everywhere in the private sector. And the future does not seem to hold much promise. Although those of us active in joint labor-management activities, like the IRRA, are committed to slowing or reversing the slide into oblivion, it seems more of a calling than a lucrative career as we become increasingly irrelevant to the world around us.

But all is not lost. The public sector is an exception to the general demise of industrial relations. As opportunities in private-sector industrial relations have dwindled, public-sector opportunities have expanded. For those able to adapt to the different challenges of the public-sector practice, this growth has helped fill the void left by the diminishing private-sector work. For example, since the early 1970s, my firm's practice has developed from a private-sector base involving only a few attorneys to a burgeoning private/public-sector practice constituting a large percentage of the overall gross billings of our law firm.

Now, once again, we are facing new challenges. While the growth is continuing in the public sector, the nature of the practice is changing. Increasingly we are getting cases involving civil rights and other employment law claims against union and nonunion employers (public and private sector). Consequently,

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[28] *See* Stark, *The Presidential Address: Theme and Adaptations*, in Truth, Lie Detectors, and Other Problems in Labor Arbitration, Proceedings of the 31st Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books, 1979), 1, 29.

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