CHAPTER 6

CONFLICTS ARISING OUT OF WORK FORCE DIVERSITY

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This broad topic, "How to Deal With Conflicts Arising Out of Work Force Diversity," can be analyzed from several different perspectives: (1) a social-psychological approach,[1] (2) organizational or intraorganizational behavior, and (3) procedural and substantive justice. Because we are not sociologists, psychologists, or organizational behaviorists, we will follow the procedural and substantive justice approach in the context of the dispute-resolution process, using primarily arbitration[2] to handle or resolve diversity-related work force disputes. The basis for this approach, practically and theoretically, is that issues of diversity implicate federal and state antidiscrimination laws. In many instances, diversity-related disputes are either founded on or have the potential of involving statutory-based claims of discrimination. Consequently,

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[1] *See, e.g.*, Marmo, *Arbitrators View Problem Employees: Discipline or Rehabilitation*, 40 J. Contemp. Law 41 (1983); Greenbaum, *The Disciplinatrator, the Arbichiatrist, and the Social Psychotrator: An Inquiry Into How Arbitrators Deal With Grievant's Personal Problems and the Extent to Which They Affect the Awards*, 37 Arb. J. 51 (1982); Wolkinson & Barton, *Arbitration and the Rights of Mentally Handicapped Workers*, Mo. Lab. Rev. (June 1980), 41.

[2] In addition to mediation and arbitration, other dispute resolution processes include factfinding, conciliation, early neutral evaluation, judicial arbitration, summary jury trials, and guaranteed fair treatment programs (peer review), as well as judicial and administrative agency alternative dispute resolution programs. *See Cost of Litigation*, Gilmer *Decision Encourages Alternative Dispute Resolution*, 243 Daily Lab. Rep. (BNA) A-8 to A-10 (Dec. 18, 1991). Recently it has been suggested that mediation will be used more often than arbitration. Pollack, *Arbitrator Finds Role Dwindling as Rivals Grow*, Wall St. J. (Apr. 28, 1993).

we treat interchangeably diversity-related and statutory-related workplace disputes. The overarching question is how a dispute-resolution process, such as mediation and conventional arbitration, may require modification or restructuring in light of diversity-related disputes and the evolving national public policy which encourages private resolution of these statutory-based employment conflicts.[3]

Although this public policy has focused on resolution of disputes in nonunion settings,[4] we are interested in how mediation and arbitration can be used to supplement our overburdened public justice system to resolve "diversity- or statutory-related work force disputes" in a fair, expeditious, and economical fashion. We will explore the issues of perception of fairness or unfairness and third-party neutral bias in resolving these disputes. Finally, we will discuss the types of diversity-related issues that can best be resolved through mediation, arbitration, or our public justice system.

Defining Diversity: Then and Now

Since World War II, progress has been made in integrating the work force and thereby changing its demographics. These changes have in large part been prompted by federal and state antidiscrimination laws and their judicial interpretation. At the Academy's 1991 Annual Meeting, Bruce Fraser referred to this demographic change as "a new diversity in the workplace"[5] and provided some staggering statistics, which we will not repeat here.[6]

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[3]*See, e.g., Gilmer v. Interstate/Johnson Lane Corp.*, 111 U.S. 1647, 55 FEP Cases 1116 (1991); *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641 (1983); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 7 FEP Cases 81 (1974). *See also* Americans With Disabilities Act (1990), §513, *Alternative Means of Dispute Resolution:* "Where appropriate and to the extent authorized by law, the use of alternative means of dispute resolution, including settlement negotiations, conciliation, facilitation, mediation, factfinding, minitrials, and arbitration, is encouraged to resolve disputes arising under this Act." There is similar language in Civil Rights Act of 1991, §118; in proposed Senate bill, Employment Dispute Resolution Act of 1992 (S. 3356, Oct. 6, 1992); in Administrative Dispute Resolution Act, Pub. L. No. 101-552, 104 Stat. 2736 (Nov. 15, 1990); in Judicial Improvements Act of 1990, Pub. L. No. 101-650, 104 Stat. 5089 (Dec. 1, 1990); in Civil Justice Reform Act of 1990, 28 U.S.C. §1; and in Negotiated Rulemaking Act of 1990, Pub. L. No. 101-648, 104 Stat. 4969 (codified at 5 U.S.C. §580).

[4]*See, e.g.*, Westin & Feliu, Resolving Employment Disputes Without Litigation (BNA Books, 1988); McCabe, Corporate Nonunion Complaint Procedures and Systems: A Strategic Human Resources Management Analysis (Praeger, 1988).

[5]Fraser, *A New Diversity in the Workplace—The Challenge to Arbitration: The U.S. Experience*, 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, 1991), 143.

[6]*Id.* at 143–44. It is estimated that in more than three-fourths of the 25 largest urban areas in the United States, people of color are in the majority.

During World War II, the "diverse work force" included women, African Americans, and Hispanics. It now includes all people of color, those over age 40, women, the disabled, gays and lesbians, obese individuals, and the often forgotten white male.[7] Fraser appears to reject the notion that there is one standard for all and that "treating everyone fairly doesn't mean treating them the same." He argues that this "new diversity" poses a special set of challenges to arbitration:

> First, there is a challenge to effective factfinding, the task of collecting and interpreting evidence in a fair and unbiased way. . . . Second, there is a challenge to the task of decisionmaking. The new diversity raises a question of social responsibility: What should be done if the decision flowing from the evidence appears to be simply unfair to the grievant as an individual?[8]

We can readily appreciate the problem involved with effective factfinding when the disputants lack facility with English, for example, but there is serious debate as to whether arbitrators should decide issues of fairness or "social responsibility" when a labor agreement expressly and unambiguously reflects what the parties already have agreed is "fair."[9] Such decisions "mete out" fairness based on the arbitrator's personal notions of fairness or justice and not those of the parties. Questions of "social responsibility" or "fairness" perhaps can best be resolved by negotiation with the aid of a mediator.

Fraser touches on another critical point concerning issues of work force diversity, that is, "perceptions of fairness" or, more appropriately, "perceptions of unfairness."[10] This perception of unfairness gives rise to many, if not all, workplace disputes. It also causes the filing of discrimination and statutory-based grievances.

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[7]*McDonald v. Santa Fe Trails Transp. Co.*, 427 U.S. 273, 12 FEP Cases 1577 (1976). *See also* Blumrosen, *Strangers No More: All Workers Are Entitled to "Just Cause" Protection Under Title VII*, 2 Indus. Rel. L.J. 519 (1978).

[8]Fraser, *supra* note 5, at 146–47.

[9]*See, e.g.*, Gottesman, *A Union Viewpoint: New Diversity in the Workplace*, in Arbitration 1991, *supra* note 5, at 166.

[10]*See, e.g.*, Sheppard, Lewicki, & Minton, Organizational Justice: The Search for Fairness in the Workplace (Lexington Books, 1992); Greenberg, *Looking Fair v. Being Fair: Managing Impressions of Organization Justice*, in Research in Organizational Behavior, Vol. 12, ed. Staw & Cummings (JAI Press, 1990), at 111–57; Ewing, Justice on the Job (Cambridge: Harvard Bus. School Press, 1989); Lind & Tyler, The Social Psychology of Procedural Justice (Plenum Press, 1988); Deutsch, Distributive Justice: A Social-Psychological Perspective (New Haven: Yale Univ. Press, 1985).

Perceptions of Unfairness: Claimant's Perspective

In a broadcast on National Public Radio,[11] *Wall Street Journal* editor Joseph Boyce referred to a "black tax," which black people have had to pay in actual dollars because of discrimination against them over the years. Using the sale of his Atlanta home as an example, Boyce said, "The difference in the appraisal was $125,000 [*sic*]," depending on whether the appraiser presumed that a black or a white family lived in the house, based on who was present and the furnishings, such as displayed family photographs. This unfair treatment is not an unusual experience among people of color. Consequently, when a supervisor or a fellow employee engages in behavior perceived as unfair, arbitrary, or capricious, it is not difficult to understand why a person of color might view it as discriminatory. For example, "a Mr. Boyce" might attribute as racially motivated a new requirement that employees have a master's degree as a condition for a promotion, particularly if the minority employee was otherwise in line for the promotion.[12]

Women have similar perceptions of unfairness, based particularly on their experiences of sexual harassment.[13] A U.S. government study found that "over 40 percent of female federal employees reported incidents of sexual harassment in 1987, roughly the same number as in 1980."[14] In 1988 another U.S. government report estimated that 73 of every 100,000 females in the country stated they had been raped.[15] These situations underscore how "social experiences," both in and outside the workplace, may influence perceptions of unfair treatment at work. This basic understanding can facilitate resolution of diversity-related or potential statutory-related workplace disputes prior to arbitration or court litigation and even prior to the filing of a formal grievance or claim.

Arbitral Decisionmaking and Issues of Diversity: Then and Now

Speculation about the future of private resolution of diversity-related workplace disputes must be predicated on an understand-

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[11]National Public Radio, Morning Edition, May 23, 1992 (transcript of interview with Joseph Boyce, editor, Wall Street Journal, on the "Black Tax").

[12]*See, e.g.*, Bing, Crazy Bosses: Spotting Them, Serving Them, Surviving Them (William Morrow & Co., 1992).

[13]*See* McCann & McGinn, Harassed: 100 Women Define Inappropriate Behavior in the Workplace (Business One Irwin, 1992).

[14]U.S. Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update II* (1988).

[15]Federal Bureau of Investigation, *Uniform Crime Reports for 1988* (1989), at 16.

ing of how these disputes were resolved in the past. As early as 1942, the War Labor Board fostered the use of grievance arbitration procedures to resolve traditional collective bargaining issues, such as wages, hours, and benefits, and supported the inclusion of contract provisions prohibiting gender[16] and race-based discrimination.[17] With an increasingly diverse work force composed primarily of women, African Americans, and Hispanics, labor and management negotiated equal employment contractual provisions. However, examination of arbitral awards during this period reveals that issues of work force diversity, as defined then by the terms "impermissible discrimination" and "integration," were resolved in a distinctly different manner.

As late as 1971 in her presidential address at the Academy's 24th Annual Meeting, Jean McKelvey reported that "stewardesses" (now called flight attendants) were terminated if they married or became pregnant.[18] In denying a promotion to a female employee, one arbitrator was persuaded by the testimony of the employer's physician that females, as a class, should not be assigned to positions involving heavy lifting because:

> (a) females are more prone to low back pain due to their anatomy; (b) intra-abdominal pressure can lead to the displacement of the pelvic organs; (c) weakness and fatigue during the menstrual period can be aggravated by lifting; (d) there is the danger of miscarriage during pregnancy.[19]

As the external law developed under Title VII, the definition of impermissible discrimination changed under both federal statute and labor agreements.

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[16]The War Labor Board responded to the influx of women into traditional male jobs by requiring equal pay for equal work. *See Brown & Sharpe Mfg. Co.*, Case No. 2228-D (Sept. 25, 1942). Furthermore, President Roosevelt issued Executive Orders No. 8802 (June 25, 1941) and No. 9346 (May 27, 1943), pronouncing that it was the "duty of all employers and all labor organizations to eliminate discrimination . . . because of race, creed, color or national origin." At the conclusion of the war, state protective labor laws were reinstated, effectively removing "Rosie the Riveter" from the workplace in many instances.

[17]*Phelps Dodge Co.*, Case No. 2123-CD-D (Feb. 18, 1942), where the War Labor Board directed the following seniority clause: "Equal opportunity for employment and advancement under this clause shall be made available to all to the fullest extent and as rapidly as is consistent with efficient and harmonious operation of the plant." Malin & Stallworth, *Arbitration Accommodation Mechanism*, 42 Lab. L.J. 551 (1991).

[18]McKelvey, *Presidential Address: Sex and the Single Arbitrator*, in Arbitration and the Public Interest, Proceedings of the 24th Annual Meeting, National Academy of Arbitrators, eds. Somers & Dennis (BNA Books, 1971), 1.

[19]*Robertshaw Controls Co.*, 48 LA 101, 106 (Shister, 1967). A pre-Title VII award stated that, despite the fact that Mississippi had no statute limiting weights for females, the company had a duty to protect the health and safety of its employees even though they were willing to perform the jobs. *Mengel Co.*, 18 LA 392 (Klamon, 1952).

Similarly, examination of early arbitral awards reveals that arbitrators upheld the legal doctrine of "separate but equal."[20] As external public law changed, the separate but equal doctrine was abandoned as it applied both to "Negro" and "white" jobs and to "male" and "female" jobs. One important consequence of this phenomenon has been the application of the strict scrutiny test in claims of race and sex-based discrimination.[21] Coincidentally, even before the enactment of Title VII and subsequent evidentiary case law,[22] arbitrators applied those same evidentiary standards, including disparate treatment, statistical evidence, and the "effects" or disproportionate impact test.

An example of where we are today in examining diversity-related work force disputes is illustrated in an unreported decision referred to as the "Twinkies" case,[23] which involved the discharge of an employee caught shoplifting on the premises of his employer's customer. In the arbitration hearing, the union raised as a "mitigating defense" that the grievant was disabled and lacked responsibility for the misdeed because of his "alcoholism, eating disorder and kleptomania." Based on the testimony of the treating psychologist, the union argued that the shoplifting was a "behavioral manifestation" of the grievant's essential obsessive-compulsive character disorder and was directly affected by his alcoholism, the need for a "carbohydrate high," and the similar "rush or high" he obtained from stealing items of small value in dangerous situations where he might be caught. Consequently, the union urged that the arbitrator should recognize kleptomania as a disease or compulsive disorder similar to alcoholism, caused by the same psychological phenomenon, and that the grievant should be reinstated the same as any employee who has sought treatment and been successfully rehabilitated.[24] The arbitrator denied the grievance. The Twinkies case illustrates how innovative advocates can become in arguing

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[20]*See, e.g., Republic Steel Corp.*, 17 LA 71 (Marshall, 1951).

[21]The critical role which the federal courts have played in eliminating the legal basis for demographic-based separation and unequal treatment in our society is illustrated in *Brown v. Board of Educ.*, 374 U.S. 483 (1954); *Steele v. Louisville-Nashville R.R.*, 323 U.S. 192, 15 LRRM 708 (1944); *Rosenfeld v. Southern Pac. Co.*, 444 F.2d 1219, 3 FEP Cases 604 (9th Cir. 1971).

[22]*See, e.g., McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 5 FEP Cases 965 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 3 FEP Cases 175 (1971).

[23]The "Twinkies" case is an actual dispute; however, the parties have not granted permission for publication.

[24]*See, e.g.*, Abramson & Snow, *Alcoholism and Kleptomania: Looking at the Legal Inconsistencies*, 7 Employee Rel. L.J. 619 (1982). It should be noted that kleptomania is not considered a disability under the ADA.

statutory- or diversity-based defenses and how the definition of "new diversity" may be arguably expanded under the Americans with Disabilities Act (ADA).

Victims' Perceptions of Unfairness: Judiciary View

The recognition of the different social experiences of persons of the "new diversity" has caused a number of courts to adopt a similar "victim perspective," advocating that the standard for fairness in sexual and racial harassment cases is the alleged victim's perception of workplace events.[25] This philosophy has significant implications for third-party neutrals and triers of fact in diversity-related work force disputes as well as for the demographic-based selection of neutrals for these disputes.

In *Ellison v. Brady*[26] the Ninth Circuit (San Francisco) applied the "reasonable woman and victim's perspective" test in determining whether the conduct complained of was sufficiently severe or pervasive to constitute a sexually hostile environment under *Meritor Savings Bank.*[27] In *Ellison,* a female Internal Revenue Service (IRS) trainee worked with a male trainee in the San Mateo, California, office. The coworkers never became friends and they did not work closely together, but on one occasion the woman accepted the man's luncheon invitation. Thereafter, according to the woman, the man commenced to "pester" her with unnecessary questions and "hanged" around her desk. He also asked her out for drinks and for lunch, but she rejected these invitations. He subsequently handed her a note, stating: "I cried over you last night and I'm totally drained today. I have never been in such constant term oil (*sic*). Thank you for talking with me. I could not stand to feel your hatred for another day."[28]

The woman subsequently showed the note to her supervisor, after which she was assigned to St. Louis for four weeks' training. The man mailed her a letter that she described as "twenty times, a hundred times weirder" than the first note.[29] Stating that she "just

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[25] *See Harris v. Forklift Sys.*, 62 USLW 4004 (Nov. 1993), where the Supreme Court held that to be actionable, harassment creating a hostile environment need not affect the victim's psychological well-being.

[26] 924 F.2d 872, 54 FEP Cases 1346 (9th Cir. 1991).

[27] *Meritor Sav. Bank v. Vinson,* 477 U.S. 57, 40 FEP Cases 1822 (1986). *See also* Peterson & Messengell, *Sexual Harassment Cases Five Years after* Meritor Savings Bank v. Vinson, 18 Employee Rel. L.J. 489 (1992).

[28] 924 F.2d at 874, 54 FEP Cases at 1349.

[29] *Id.*

thought he was crazy," she contacted management again, requesting that either he or she be transferred because she could not be comfortable working in the same office with him. Management advised the man to leave her alone and subsequently transferred him to San Francisco. The woman returned to San Mateo. After the man filed a grievance, his transfer was changed to a six-month separation and he was returned to San Mateo. The woman filed a formal sexual harassment complaint with the IRS, which was denied. She then filed a complaint in federal district court. On summary judgment, the trial court found in favor of the IRS.

On appeal, the Ninth Circuit overruled the trial court, holding that the man's conduct constituted severe and pervasive sexual harassment. Noting the importance of recognizing the "social experience" of women, the court explained the appropriateness of adopting the "reasonable woman" standard and its rationale as follows:

> By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."[30]

This rationale has also been applied in racially hostile environment cases. In *Harris v. International Paper Co.*,[31] the trial court recognized the different "social experiences" of African Americans and the propriety of applying "a reasonable black person standard" in the trier-of-fact's analysis and evaluation of "racial hostile environment." *Harris* involved a paper mill in Maine, where three black employees were subjected to racial epithets. Other employees wore Ku Klux Klan garb at work and were insubordinate to a minority supervisor. The court concluded that the black employees had been subject to a "gauntlet of racial abuse from the time of [their] arrival at the Jay mill," and that these abuses were widely known by management.

Noting the differing perspectives of minority persons and women, the trial court expressed an awareness and sensitivity toward the "black tax" or "social experience" of African Americans and recognized the need for such sensitivity and awareness in a trier of fact. This is particularly relevant to neutrals as triers of fact in sexual, racial, ethnic, and homosexual hostile environment disputes. This

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[30] *Id.* at 879–80, 54 FEP Cases at 1352–53 (quoting *Henson v. City of Dundee*, 682 F.2d 897, 902, 29 FEP Cases 787 (11th Cir. 1982)). *See also* Abrams, *Gender Discrimination and the Transformation of Workplace Norms*, 42 Vand. L. Rev. 1183, 1205 (1989).

[31] 765 F. Supp. 1509, 61 FEP Cases 152 (D. Me. 1991).

court's sensitivity and awareness also has implications for labor and management representatives who select third-party neutrals. The trial court concluded:

> Since the concern of Title VII and the MHRA [Maine Human Rights Act] is to redress the effects of conduct and speech on their victims, the fact finder must "walk a mile in the victim's shoes" to understand those effects and how they should be remedied. In sum, the appropriate standard to be applied in this hostile environment racial harassment case is that of a "reasonable black person."[32]

Implications of *Ellison* and *Harris*

The practical and theoretical implications stemming from adoption of the "reasonable victim's perspective" in diversity-related work force disputes lead to the following questions:

1. Must triers of fact and third-party neutrals obtain sensitivity training in the social experiences of various demographic groups to apply the victim's perspective standard meaningfully?
2. Must demographic similarity be considered in selecting neutrals generally, and in diversity-related disputes particularly?
3. Might this effectively "tilt" the scales of fairness against the charged employer?
4. Should the employer be reluctant to use a woman, Hispanic, African American, or disabled person in a diversity-related dispute?
5. Does this same concern exist in selecting factfinders, mediators, or arbitrators, or does it vary depending on which dispute-resolution process is used?
6. In sexual harassment disputes, is the resolution of these matters facilitated by using a person of the same gender as the alleged victim, or should a two-person male-female team be used?
7. In racial discrimination disputes, does using a person of the same racial group as the arbitrator lend an added perception of fairness from the grievant's perspective, the outcome notwithstanding?

We are sure that these practical and theoretical questions are often considered but rarely publicly voiced by labor and management advocates who select neutrals.

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[32] *Id.* at 1516.

Arbitral Value Judgments, Bias, and Perception of Fairness

Perceptions of fairness and the victim's perspective standard have implications for the arbitral process and particularly for the arbitrator as the trier of fact. This point has been clear in three recent cases, two of which involved alleged sexual abuse: *Newsday v. Typographical Union Local 915 (Long Island),*[33] *Stroehmann Bakeries v. Teamsters Local 776,*[34] and *F.O.P. Fort Pitt Lodge No. 1 and City of Pittsburgh.*[35] In *Newsday* and in *Stroehmann,* the arbitration awards were vacated on the basis, *inter alia,* that the awards violated the clear public policy against sexual harassment.[36] Although not controlling, the arbitrators' apparent bias influenced the courts. In the third case, *F.O.P. Fort Pitt Lodge No. 1,*[37] the police officer grievant was reinstated by a panel of arbitrators. The neutral arbitrator's choice of words has caused considerable controversy as "biased and sexist." These cases have significant implications for the arbitral resolution of diversity-related or statutory-related workplace disputes.

Newsday[38] involved a male employee whom the court described as a "chronic sexual harasser." The grievant had been discharged in 1983 for sexual harassment but was reinstated on a last-chance basis.[39] In 1988 the grievant again engaged in several acts of sexual harassment and was terminated. Recognizing the grievant's history of sexual harassment and the previous arbitral award, the arbitrator nevertheless reinstated the grievant under the concept of progressive discipline, conditioned on the grievant's completing a medical examination.[40] Rejecting "the Union's position that the three incidents never occurred," the arbitrator found that "they all happened as described in the testimony of [the grievant's] coworkers" and concluded:

> There is no doubt that the actions by [the grievant] in moving his hand down [one coworker's] back from her rib cage to her waist, in slapping, or patting, [another coworker] on her rear end, and in slamming into

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[33]915 F.2d 840, 135 LRRM 2659 (2d Cir. 1990).

[34]969 F.2d 1436, 140 LRRM 2625 (3d Cir. 1992), *aff'g* 762 F. Supp. 1187, 136 LRRM 2874, 55 FEP Cases 606 (M.D. Pa. 1991); *Stroehmann Bakeries,* 98 LA 873 (Sands, 1990).

[35]AAA Case No. 55-390-0297-92 (Leahy, 1992) (unpublished decision).

[36]For a contrary holding, see *Chrysler Motors Corp. v. Industrial Workers* (AIW), 959 F.2d 685, 139 LRRM 2865 (7th Cir. 1992).

[37]*Supra* note 35. *See* Neumeier, *Lend Me Your Ear: An Open Forum for Members,* NAA Chronicle (Apr. 1993), 5.

[38]*Supra* note 33.

[39]*Cf.* Grinstead, *The Arbitration of Last Chance Agreements,* 48 Arb. J. 71 (1993).

[40]135 LRRM at 2661.

> [a third's] back was conduct that violated both the composing room office rules and Newsday's policy against "harassing, abusive or intimidating" behavior. This conduct was quite offensive to the women involved, and clearly constitutes harassment under Newsday's policy, as well as interference with "the business of the office" under the rules of the composing room.[41]

The employer's petition for vacatur was granted by the trial court. On appeal, the Second Circuit affirmed the vacatur order, characterizing the arbitral award as follows:

> Award of reinstatement completely disregarded the public policy against sexual harassment in the workplace. [The arbitrator's] award condones [the grievant's] latest misconduct; it tends to perpetuate a hostile, intimidating and offensive work environment. Above all, the award prevents Newsday from carrying out its legal duty to eliminate sexual harassment in the workplace.[42]

The Second Circuit's recognition of the *Misco*[43] public policy exception was also applied by the trial court in *Stroehmann*,[44] which involved a male delivery driver with 17 years' seniority. Stroehmann Bakeries had a rule that prohibited immoral conduct while on duty. One evening the driver made a delivery to a company customer, where he was admitted by a female night clerk. According to the woman, while the driver unloaded a bread order, he talked about an "orgy" he was going to have with two "girls." When the woman asked if he was married, the driver said yes but that he had sex with other women. After unloading the bread, the driver went to a produce cooler and took out an orange, asking the women "if her breasts were as hard as that orange." He then attempted to pull up her shirt and, when she resisted and walked away, he followed her to the front of the store. The woman also claimed that he tried to grab her breasts. This alleged incident was reported to the customer company's management, who conveyed it to Stroehmann. After interviewing the driver, Stroehmann concluded that he had committed the acts complained of. The driver did not have union representation during this interview, which resulted in his discharge.[45]

In addressing the just cause issue, the arbitrator noted that "[t]his sexual misconduct case turns less on determinations of

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[41] *Id.*

[42] *Id.* at 2663.

[43] *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987).

[44] *Supra* note 34.

[45] *Cf. Weingarten, Inc. v. NLRB*, 420 U.S. 251, 88 LRRM 2689 (1975), where the Court held that an employee is entitled to union representation in an investigatory interview that may result in discipline or discharge.

witnesses' credibility than on the adequacy of Stroehmann's investigation prior to its discharge decision."[46] In reinstating the grievant with full back pay, the arbitrator stated:

> [T]he unchallenged "facts" [the alleged victim's manager] accepted as true can also support the equally illogical conclusion that [the female employee], unattractive and frustrated, could have fabricated a disturbing incident to titillate herself and attract her mother's caring attention. And, her story having gained sufficient momentum, [the employee] was unable to disengage from it. Whether one casts either [the grievant] or [the employee] as the victim, neither scenario can stand scrutiny based on Stroehmann's burlesque of an investigation.[47]

The arbitrator did not address the fact issue of whether sexual harassment had occurred.

Based on the absence of a finding of fact on the sexual harassment issue and the arbitrator's personal observations about the alleged victim's appearance as "unattractive and frustrated," the trial court vacated the award as contrary to the public policy against sexual harassment.[48] The court remanded the matter for a de novo hearing before a different arbitrator, concluding "that [the arbitrator] had demonstrated a clear pre-disposition in [grievant's] favor and an insensitivity to sexual harassment claims."[49] The court of appeals affirmed the trial court's decision. Of particular relevance to the concept of fairness and arbitral bias is the court's rationale for sustaining the remand to a different arbitrator:

> After careful consideration, we have concluded that the district court did not abuse the discretion it had to formulate an appropriate remedial order because the record shows [the arbitrator] was biased or partial towards [the grievant]. Although he may not have demonstrated general bias against all persons claiming sexual harassment, his partiality in this case is demonstrated by his behavior and comments during the hearing.[50]

Both *Newsday* and *Stroehmann* are instructional on how the judiciary views the way arbitrators should *not* deal with diversity-related or statutory-related workplace disputes. First, if there is an issue of public policy, the courts expect arbitrators to make a finding of fact; otherwise, the award may be subject to vacatur pursuant to the *Misco*[51] public policy exception. You may recall that

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[46] *Supra* note 34, 98 LA at 873.
[47] *Id.* at 876.
[48] *Supra* note 34, 140 LRRM at 2625.
[49] *Id.* at 2628.
[50] *Id.* at 2532–33.
[51] *Supra* note 43. *See also Chrysler Motors, supra* note 36.

in *Alexander v. Gardner-Denver Co.*,[52] the arbitrator failed to address the grievant's assertion of racial discrimination. The Supreme Court found, *inter alia*, that the grievant was not precluded from concurrently or subsequently seeking timely recourse under applicable federal antidiscrimination law, thereby giving the grievant effectively "two bites at the apple." A similar result is arguably obtained under *Misco*. Second, the courts are increasingly sensitive to arbitral bias, demonstrated either by the language of the opinion or by the admission of testimony generally considered biased, sexist, or racist.

The language in *Newsday* and *Stroehmann* pales, however, in comparison with the inappropriate and "sexist" expressions in *F.O.P. Fort Pitt Lodge No. 1 and City of Pittsburgh*,[53] as reported in the Academy's *Chronicle*.[54] The dispute involved the discharge of a police officer for being out of his assigned duty area, during which time he had a sexual liaison with a woman. The neutral arbitrator's opinion received wide public criticism, focusing more on his offensive language than on the decision to reinstate the officer. The arbitrator stated:

> The grievant is not the first man to lose his head over a piece of tail, a stiff penis has no brains. In today's sexual climate, it is not the offense it once was. He did engage in conduct that no police force can countenance, and he did prejudice the good reputation of the police force and the City of Pittsburgh.
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> The grievant has paid a high price in the loss of time and great embarrassment. Discharge would be excessive.

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[52]415 U.S. 36, 7 FEP Cases 81 (1974). The Supreme Court later expanded the *Gardner-Denver* rationale to statutory claims under the Fair Labor Standards Act in *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728, 24 WH Cases 1284 (1981), and under 42 U.S.C. §1983 in *McDonald v. City of West Branch, Mich.*, 466 U.S. 284, 115 LRRM 3646 (1984). Other federal courts followed suit with respect to 42 U.S.C. §1981 in *Wilmington v. J.I. Case Co.*, 793 F.2d 909, 40 FEP Cases 1833 (8th Cir. 1986); ERISA in *Zipf v. AT&T Co.*, 799 F.2d 889 (3d Cir. 1986); and the Age Discrimination in Employment Act in *Nicholson v. CPC Int'l*, 877 F.2d 221, 49 FEP Cases 1678 (3d Cir. 1989) *and Steck v. Smith-Barney, Harris Upham & Co.*, 661 F. Supp. 543, 43 FEP Cases 1736 (D. N.J. 1987).

In the past several years, however, possibly signaling a major reversal, the U.S. Supreme Court has upheld final and binding arbitration of statutory issues in nonlabor, commercial cases, for example, under the Sherman Antitrust Act in *Mitsubishi Motors Corp. v. Soler Chrysler, Plymouth*, 473 U.S. 614 (1985); under RICO in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987); under the Securities Exchange Act of 1933 in *Rodriguez de Quijas v. Shearson/American Express*, 490 U.S. 477 (1989); and under ERISA in *Shearson Lehman/American Express v. Bird*, 110 S.Ct. 225 (1989), ordering arbitration; on remand the Second Circuit held that the arbitration barred a court suit, 926 F.2d 16 (2d Cir. 1991).

[53]*Supra* note 35.

[54]Neumeier, *supra* note 37. *See also All Share Blame for Leahy, Schott*, South Hills, Dec. 13, 1992; *Blunt Wording of Arbitrator's Ruling in Police Sex Case Angers City Officials*, Allegheny Bulletin (undated), at A6.

In her *Chronicle* report, Elizabeth Neumeier stated:

> This case is an extreme example of an arbitrator's biases impacting the arbitration process. While we may all agree this arbitrator was stupid in failing to cloak his bias, the phenomenon is not an aberration. We have all read decisions which have made us cringe. . . . As stated in the Code, "essential personal qualifications of an arbitrator include . . . impartiality . . . in labor relations matters." . . . Our obligation to provide a fair hearing extends to all participants in the process. This means treating each person with respect, at the hearing and in the award. . . . More problematic, and damaging to the profession in my view, is how arbitrators contend with their more generalized biases—biases which often mirror the prejudices of society at large. . . . With the changing workforce, arbitrators must be sensitive to these issues—our continuing credibility depends on it.

Neumeier's concerns should be heeded. As professional organizations (such as the Academy and the Society of Professionals in Dispute Resolution) contemplate their role in the evolving private employment dispute-resolution arena, third-party bias will definitely retard, if not thwart, the potential and desperately needed development of dispute resolution in this area. No civil rights organization is likely to embrace alternative dispute resolution (ADR) if neutrals are perceived as insensitive and biased. Among other reasons, this is why plaintiff employment counsels prefer jury trials—because juries are perceived as more sensitive and perhaps more sympathetic than adjudicators.

Arbitral Handling of Diversity Grievances

Increased diversity in the work force requires arbitrators to broaden concern for fairness, impartiality, and the appearance of procedural propriety.[55] Whereas traditionally arbitrators tended to focus on union and management perceptions, now they must also be concerned with the perceptions of all parties involved, including individual grievants and complaining witnesses. However, concern for conducting the hearing and for the language used in the arbitral award is not sufficient. The evolving nature of workplace disputes forces arbitrators to consider an increasing number of

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[55]A critical aspect of arbitral handling of diversity grievances involves witness credibility. Triers of fact should be aware of cultural differences. In many Asian cultures, for example, to look directly into someone's eyes is generally considered inappropriate. However, in our society reluctance to look directly into the eyes of the questioner or trier of fact may detract from the witness's credibility. Similarly, a young African American male may testify in a rather defiant fashion, not intending to be disrespectful or belligerent.

statutory-related issues, and here too arbitrators must broaden their focus.

Traditionally, arbitrators have focused on the facts and the contract and have interpreted the contract in light of the parties' intent. Even when considering external law in resolving contractual grievances, the arbitrator's focus remains on the parties. Specifically, the arbitrator's interpretation of external law, even if erroneous, becomes merged with the contract and is subject to further party control through modification of the contract. As Judge Harry Edwards has explained:

> When construction of the contract implicitly or directly requires an application of "external law," i.e., statutory or decisional law, the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the "contract reader," his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship to the contract. Thus, the parties may not seek relief from the courts for an alleged mistake of law by the arbitrator.... The parties' remedy in such cases is the same remedy they possess whenever they are not satisfied with the arbitrator's performance of his or her job: negotiate a modification of the contract or hire a new arbitrator.[56]

A consequence of the arbitrator's traditionally narrow focus on the contract is the individual's ability to relitigate the dispute de novo in court under the applicable statute. As the Supreme Court recognized in *Alexander v. Gardner-Denver Co.*:[57]

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under [the] collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these . . . rights is not vitiated merely because both were violated as a result of the same factual occurrence.[58]

In light of *Gardner-Denver*, Judge Harry Edwards has suggested that arbitration is an appropriate vehicle for resolving issues of workplace diversity or, more specifically, employment discrimination disputes that are factual in nature and require only the application of established law. However, employment discrimination cases raising unsettled issues of public law should be left to the courts and administrative agencies. Edwards cautions that the use of arbitration and other forms of ADR should not be allowed to

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[56] *Postal Workers v. U.S. Postal Serv.*, 789 F.2d 1, 6, 122 LRRM 2094, (D.C. Cir. 1986).
[57] *Supra* note 52.
[58] *Id.* at 49.

sanction the replacement of public forums, protecting basic legal values, with private forums, resolving disputes on the basis of nonlegal social mores. Many issues of public law require a choice between conflicting public values, which should be resolved by judges and other officials charged with lawmaking in the public interest, rather than by private dispute resolvers.[59] Edwards noted that a collectively bargained grievance and arbitration procedure may be ill-suited as a forum for resolving complex employment discrimination issues. If arbitrators stray far outside the boundaries of traditional contract interpretation, their awards may not command the high level of deference they currently receive from the courts.[60] He suggested that arbitration procedures are best used for, and perhaps should be confined to, claims that an employer's conduct violated both the employment contract and the law.[61]

Judge Edwards's concerns reflect the limited role arbitrators play in our system of justice because, as part of a private system, they are accountable only to the parties, the drafters of the contract, which is the governing document in most arbitrations.[62] The parties can reverse an arbitration award by amending the express language of the contract. When interpreting a statute, however, arbitrators are not accountable to Congress but to the private parties who selected them. Courts, in contrast, are publicly accountable. Their decisions are subject to ultimate reversal by Congress. Indeed, the history of employment discrimination law consists partly of statutory amendments to overturn court decisions, such as the Pregnancy Discrimination Act, the Older Workers Benefit Protection Act, and the Civil Rights Act of 1991.[63]

Unfortunately, all statutory-related grievances are not likely to be confined to individual factual claims of discrimination, as suggested in *Gardner-Denver* and by Judge Edwards. When unions refuse to bring discrimination or other grievances because of

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[59]Edwards, *Alternative Dispute Resolution: Panacea or Anathema?* 99 Harv. L. Rev. 668, 671–72 (1986).

[60]*See, e.g., Newsday, supra* note 33; *Stroehmann Bakeries, supra* note 34 and *Chrysler Motors v. Allied Industrial Workers, supra* note 36.

[61]Edwards, *Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives*, 27 Lab. L.J. 265, 273 (1976).

[62]Of course, arbitrators are publicly accountable to the very limited extent that their awards may be denied enforcement as contrary to public policy. *See, e.g., Paperworkers v. Misco, Inc., supra* note 43.

[63]For further elaboration on the different roles of arbitrators and judges and the implications for arbitral decisionmaking in statutory matters and judicial review of arbitration awards, see Malin & Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 Hastings L.J. 1187 (1993).

complicated legal issues, they may face liability for discrimination or breach of the duty of fair representation.[64] Even if the parties limit diversity-related grievances to individual factual discrimination claims, unanticipated legal issues are bound to arise.

Thus, we must face the question: What's an arbitrator to do? If arbitrators confine themselves to their traditional roles, responsive to the parties' expectations and intent, they maximize the likelihood that de novo statutory litigation will undermine the finality of awards. Instead, the arbitral determination must give full consideration to an employee's equal employment opportunity (EEO) statutory rights. Recognizing this, however, merely begs the question: How is a "privately accountable" arbitrator to interpret and apply public law?

Because arbitrators lack the public accountability and availability of congressional oversight of judges, they lack the institutional competence to make public law. This is in marked contrast to their institutional competence to make private law.[65] Thus, in resolving issues of public law, arbitrators must draw on the institutional competence of publicly accountable judges and administrative agencies. To do this, arbitrators cannot confine themselves to the authority cited by the parties. Rather, they must educate themselves with respect to the settled meaning of statutory language as interpreted in administrative rulings and judicial decision. The precedent which binds judges in the jurisdiction where the arbitrator sits is also binding on the arbitrator. If no directly binding precedent exists, arbitrators should look to the weight of judicial and administrative authority on the issue. In gray areas where judges have yet to tread, arbitrators should avoid novel interpretations and, instead, extend the law in unsurprising ways. In other words, arbitrators should be guided by the personal normative constraint of exercising judicial caution in interpreting and applying external law, even if they believe that a more radical interpretation would better develop the law.[66]

A normative philosophy of judicial caution maximizes the likelihood that the arbitral award will be consistent with public law and minimizes incentives for the aggrieved individual to relitigate de novo. It also imposes a broader responsibility on the arbitrator than

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[64]*See, e.g., Goodman v. Lukens Steel Co.*, 482 U.S. 656, 44 FEP Cases 1 (1987).

[65]*See, e.g.*, Meltzer, *Arbitration and the Courts: Is the Honeymoon Over?* in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1988), 39.

[66]For further discussion, see Malin & Ladenson, *supra* note 63.

under traditional models of arbitral decisionmaking. It requires arbitrators to be qualified and competent in relevant statutory and case law and may impose an ethical obligation on arbitrators not sufficiently qualified to decline statutory-related cases. Acceptance of this norm of arbitral decisionmaking will help maintain arbitration's vitality in the "statutory world" in which we work.

What About the Parties?

The vitality of the grievance arbitration procedure in a statutory world lies in the hands not only of the arbitrator but also of the parties. Arbitration remains solely a creature of the contract, and the parties control the procedures and the arbitrator's authority. The parties should exercise authority in these areas to ensure procedures which facilitate the resolution of statutory claims in arbitration so that the arbitrator is authorized to resolve these claims in full accordance with public law. Specifically, we make the following recommendations, most of which are equally applicable under traditional labor arbitration and individual private agreements to arbitrate or mediate:

1. The individual claimant-employee must be fairly and adequately represented.[67]
2. There must be an adequate record of the arbitral proceeding (e.g., use of a court reporter or tape recording).
3. The factfinding process must be improved by requiring some form of pretrial or hearing discovery.
4. The parties should expressly stipulate that the factual issue of discrimination arises under both the contract and applicable EEO statutes.
5. For the arbitral award to be final and binding on the claimant-employee, constituting a waiver of future EEO-related causes of action, the claimant must "voluntarily and knowingly" enter into a settlement or agreement to arbitrate

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[67]The concept of third-party intervention is not a new one. *See, e.g.*, Kamer, *Employee Participation in Settlement Negotiations and Proceedings Before the OSHRC*, 31 Lab. L.J. 208 (1980); Gould, *Third Party Intervention: Grievance Machinery and Title VII*, in Black Workers in White Unions (Ithaca: Cornell U. Press, 1977), 223; Gould, *Labor Arbitration of Grievances Involving Racial Discrimination*, 118 U. Pa. L. Rev. 40 (1969–70). Recently, others have suggested granting individual grievants third-party standing: *see* symposium on "Employee Voice" in 34 Cal. Mgmt. Rev. 95 (1991–92): Aaron, *Employment Voice: A Legal Perspective*, 124; Lewin & Mitchell, *Systems of Employee Voice: Theoretical and Empirical Perspectives*, 95; Bain, *Employee Voice: A Comparative International Perspective*, Proceedings of the Annual Meetings of the Industrial Relations Research Association (IRRA, 1991).

(implicitly acknowledging that the right to take the claim to arbitration is itself a settlement of one aspect of the EEO dispute).[68]

6. A claimant not represented by an attorney should be afforded a reasonable period of time to consult legal counsel concerning any agreement to arbitrate or tentative settlement agreement as a condition for considering such agreements final and binding and enforceable in court.
7. The grievant should be made aware of the right to seek recourse under the contract and applicable EEO statutes.
8. The grievant should be advised that merely filing a grievance does not toll the statutory claim.[69]
9. The collective bargaining agreement should not exclude the arbitration of statutory-related discrimination grievances. In fact, labor and management may be well advised to have a special arbitration procedure for these disputes.[70]
10. In seeking redress for alleged discrimination, the disputants and their representatives should be mindful of the remedies to which the alleged discriminatee would otherwise be entitled under the Civil Rights Act of 1991.

Summary and Conclusion

From the employee-plaintiff perspective, the evidence is clear that there is general displeasure with and distrust of the administration and litigation process. In one study, EEO claimants expressed a preference for an alternative method of resolving their complaints.[71] Satisfaction was more related to the process than to the outcome of the litigation. Employee frustration with resolving grievances or exercising "voice"[72] has come to public attention as a result of recent acts of employee violence in the U.S. Postal Service.[73] Such acts shock the general public and underscore the

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[68]Concerning the issue of "knowing and willing" waiver, see King, Nager, Noble & Young, *Agreeing to Disagree on EEO Disputes*, 9 Lab. Law. 98, 108–20 (1993).

[69]*Electrical Workers, Local 790 v. Robbins & Meyers, Inc.*, 429 U.S. 229, 13 FEP Cases 1813 (1976).

[70]*See, e.g.*, Jaffe, *The Arbitration of Statutory Disputes: Procedural and Substantive Considerations*, in Arbitration 1992: Improving Arbitral and Advocacy Skills, Proceedings of the 45th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1992), 110.

[71]Christovich & Stallworth, *The Equal Opportunity Act and Its Administration: The Claimant's Perspective*, in 38th Annual Proceedings, Industrial Relations Research Association, ed. Burton (IRRA, 1985), 47.

[72]*Cf. supra* note 67.

[73]Stuart, *Murder on the Job*, Personnel J. (Feb. 1992), 72. The ADA also covers employees with psychological disorders.

important "psychological and economic" effects of job loss from the employee's perspective.[74] From economic as well as basic practical and human perspectives, it is incumbent on employers, labor organizations, academicians, professional organizations (e.g., the National Academy of Arbitrators and the Society of Professionals in Dispute Resolution), and antidiscrimination agencies to advocate conscientiously for experimentation with ADR processes in resolving diversity-related disputes in the workplace.

Grievance arbitration traditionally has been a primary vehicle for the exercise of employee voice in the unionized workplace. It can and should continue to do so. For this to occur, arbitrators should broaden concern for fairness and the appearance of procedural propriety through sensitivity to the perceptions not only of union and management but also of the increasingly diverse individuals drawn into the process. In resolving grievances raising statutory-related issues, arbitrators should broaden their focus to encompass external law. In interpreting external law, they should be guided by a norm of judicial caution and respect for established precedential authority. The parties should evolve the process to better accommodate individual statutory claims procedurally and to clarify arbitral authority so that these claims are resolved fully in accordance with statutory law. Together, the parties, the arbitrators, and the broader dispute-resolution profession can ensure that arbitration (and perhaps other ADR methods) will retain vitality in a workplace characterized by increasing statutory regulation and increasing conflicts arising from a diverse work force.

LABOR PERSPECTIVE

PATT A. GIBBS*

My comments on the paper by Lamont Stallworth and Martin Malin will center on two areas: (1) the necessity for sensitivity on the part of the arbitrator, and (2) ways in which union and management can cooperate to accommodate the diverse nature and

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[74] *See, e.g.*, Gaylord & Symons, *Coping With Job Loss and Job Change*, Personnel (Sept.-Oct. 1984), 70; War & Payne, *Social Class and Reported Changes in Behavior After Job Loss*, 13 J. Applied Soc. Psychol. 206 (1983); Cottle, *Unemployment Is a Killer Disease*, USA Today (Aug. 6, 1992), at 13A, where it was reported that after six months of unemployment there is an association between unemployment and death within one year.

*Gibbs & French, Roanoke, Texas.

diverse needs of today's work force. My opinions are formed from my role as a union advocate and former union leader.

Sensitivity by the Arbitrator

It would be difficult to overstate the need for sensitivity, understanding, and a lack of bias in arbitration proceedings. It is crucial that arbitrators understand and, at least to some extent, adopt the "reasonable woman and victim's perspective" standard as articulated by the Ninth Circuit (San Francisco) in *Ellison v. Brady*[1] and as described in the Stallworth-Malin paper. In the decades since the passage of antidiscrimination legislation, there has been a tremendous increase in diversity of the work force.

In plants that once hired only white males, there are now women and people of various racial and ethnic origin. In work forces that were once strictly composed of single, white females, women and men, African Americans and Hispanics, and gay men and lesbians now work side by side. Thus, there are many issues facing management, the work force, and its union representatives that were not present two decades ago.

In some instances the bargaining agent is faced with the dilemma of how to fairly represent more than one party to a dispute. For example, if a male union member is charged with sexually harassing a coworker, the union must consider its responsibility to defend the accused harasser while at the same time fairly representing the interests of the accuser. In another case the accused sexual harasser may even be of the same sex as the accuser, making it more imperative that the union avoid personal bias in handling the grievance. Or, a coworker may complain to management about ethnic or racial slurs, and again the union may have a conflict with regard to its duty to represent the complainer and the accused. In these settings the neutral referee must be sensitive to the thought patterns and feelings of the minority worker.

It is most disheartening to hear of a case where a gay male lost his job because he was absent from work after his lover had died of AIDS and was reluctant to explain his sexual orientation, and hence his acute distress, to his supervisor. It is even more discouraging to learn that the behavior and attitude displayed by the arbitrator in the first five minutes of the hearing led the union

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[1]924 F.2d 872, 879, 54 FEP Cases 1346, 1352 (9th Cir. 1991).

representatives to immediately and correctly conclude that this worker would not be returned to his job.

From the union perspective, how can the bargaining agent ensure that its members will get a fair and unbiased hearing and that the arbitrator will not come with preconceived notions? One answer is to have greater diversity among the arbitrator work force. When a female worker complains of sexual harassment and has a hearing before a female arbitrator, that worker is likely to feel that she is getting a fair hearing. When African Americans who have been disciplined see an African American on the hearing panel, they are more inclined to believe that the odds are not totally stacked against them. Clearly, it is not necessary to be a member of the minority class to be sensitive to the concerns and perceptions of that class. But as long as most arbitrators are heterosexual white men, sensitivity training and an emphasis on the "reasonable woman" or "reasonable minority person" standard are more important than if the arbitrators are more of a reflection of diverse genders, racial and ethnic origin, and sexual preference.

Because the union's role is to ensure that its members are well and fairly represented, union representatives must be aware that arbitrators come with their own particular biases and prejudices which can negatively affect the grievant's ability to get a fair hearing. Union advocates should not be afraid to explore and question potential prejudices prior to selecting an arbitrator when the dispute involves issues where bias and prejudice are common.

Innovative Diversity Programs

The Civil Rights Act has propelled the flight attendant work force in America into the spotlight of adapting to diversities. The second topic of this commentary concerns some highly innovative and heartening responses to the new diversity in the flight attendant work force at American Airlines. Prior to the passage of the Civil Rights Act, American Airlines, like most other domestic carriers, hired only single, white, slim, young women to work in their "stewardess" corps. During the past two decades, that work force has undergone tremendous change. Today any given American Airlines flight is likely to be staffed with a cabin crew that is ethnically diverse, consisting of men and women, married and single, gay and straight, and, finally, young and old.

Because of the relatively new diversity in this work force, and because not until the passage of the Civil Rights Act could flight

attendants grow old, marry, and have families, there is a range of problems and illnesses that this work force did not face in the past but must face today.

Employee Assistance Programs

With greater longevity of the work force, one of the first problems that required a response was drug and alcohol abuse. The flight attendants at American responded to this problem by setting up a program known as "EARS," which later developed into a cooperative plan between union and management and is now known as the Employee Assistance Program. At its inception the flight attendants, with the involvement of their union, sought to get treatment for fellow workers who suffered from drug and alcohol abuse. Long before management officially accepted drug and alcohol abuse as a disease for which workers should be given assistance rather than terminated, the flight attendants and their union worked quietly and often undercover to get the needed treatment without bringing the problem to management's attention in a manner that would subject that worker to discipline.

Eventually management recognized the need for rehabilitation of its employees, and today a greatly expanded program involves the workers, the union, and management. This program has also been expanded to include help for spousal abuse, child abuse, anorexia nervosa, and many other problems facing a diverse work force.

Professional Standards Peer Patrol

Next, the flight attendants and their union developed a program known as "Professional Standards." At each base one or more flight attendant volunteers as a Professional Standards representative. Flight attendants are encouraged to report problems on the job to the Professional Standards team rather than to management. Again, the goal is to assist in correction of problems on a peer level rather than subjecting the offending worker to discipline and/or punitive action. This committee is particularly adept and effective at dealing with problems due to diversity in the work force, because it operates on a peer level without threat of exposure or discipline.

For example, if there is a problem on board the aircraft because a group of workers are afraid they may contract AIDS from a gay coworker, or a dispute due to a misunderstanding between culturally and racially diverse workers, a Professional Standards

representative is available to resolve the problem in a confidential and nonthreatening manner without involving management.

AIDS Resource Network

AIDS has had a devastating impact on the flight attendant work force. Many flight attendants have been afflicted with this disease, and many have died from it. When the disease first became epidemic, management was reluctant to permit flight attendants who were HIV positive or who had AIDS to remain on the job.

The flight attendant union, the Association of Professional Flight Attendants (APFA), responded to the disease in two ways. *First*, it set about to ensure that flight attendants afflicted with this disease would not lose their jobs so long as they were physically able to work. This was accomplished by filing and pursuing to arbitration grievances on behalf of workers whom management refused to clear for work after they had been treated for HIV-related infections, including full-blown AIDS. *Second*, the union helped to fund and assist the AIDS Resource Network (ARN) within the company and the flight attendant work force. ARN refers afflicted workers to institutions and treatment centers and educates the entire work force about HIV and AIDS so that co-workers will not fear working alongside an HIV-infected flight attendant.

Although management did not initially face this problem with an open mind and open heart, it is a pleasure to report that management eventually became most cooperative. Today HIV-infected workers need not fear for job security so long as they are healthy enough to perform required job functions. The union and management have worked together to develop specific protection kits to be used by the work force in areas where a worker might be exposed to body fluids or contaminated blood. In addition, management has assisted workers too ill to work as flight attendants but fully capable of performing less strenuous work to find alternative jobs within the company which they can perform while disabled from the flight attendant position. Finally, the company has embraced ARN and has contributed much toward education and acceptance of AIDS-related issues.

Wings Program

Perhaps the most innovative of the programs set up by the flight attendants at American Airlines is "Wings." As with all mighty oaks, this program was conceived with a single seed: A flight attendant

who had gone blind was close to early retirement, but she had used all her sick leave and was unable to work due to her poor vision. Some co-workers called the union and asked whether they could fly her trips while she was paid and credited for the time flown until she reached retirement age. The union approached the company with this novel idea, and an agreement was reached whereby union representatives flew this worker's trips and the flight attendant was paid and received sufficient credits to allow her to retire.

Out of this little seed a great program was born. The Wings program now has its own charitable organization charter and is set up as a separate entity supported on a volunteer basis by the flight attendants. This arrangement requires and receives cooperation from both APFA and American Airlines management. The purpose of the Wings program is to financially assist ill flight attendants, and it helps flight attendants stricken with AIDS, cancer, and many other diseases.

Each flight attendant base (or domicile) has a Wings representative or team of representatives, who have independent decision-making authority over the funds collected at that base. The funds are collected and maintained in the American Airlines Employees Federal Credit Union. As occurred with the initial Wings beneficiary, the Wings organization solicits other flight attendants to work extra trips at no pay for the benefit of flight attendants too ill to work. Flight attendants may also donate a maximum of six vacation days per year to the Wings program, utilized to fill in the schedule of an ill flight attendant who receives full pay.

Money may also be donated to the Wings program via payroll deductions. And, finally, Wings committees sponsor several fund-raising activities in the flight attendant operations area each year, including bake sales, raffles, Christmas bazaars, and craft sales.

Clearly this program could not be successful without the cooperation and assistance of management. Although the Wings committee is responsible for soliciting other workers to fill the schedule of an ill flight attendant, without management's active cooperation it would be impossible to substitute one worker for another on a given schedule. The permission and assistance of management is also required to conduct fund-raising activities on company property. This program has been and continues to be highly successful thanks to the dedication of its volunteers, the generosity of workers who are willing to contribute money and work trips for free for an ailing coworker, and the assistance of both management and union to support and promote the efforts of Wings.

Conclusion

Stallworth and Malin have unquestionably identified a problematic area of labor-management relations and one that requires awareness on the part of unions, management, and arbitrators. I hope that these comments will serve as a focal point for both labor and management in considering ways to handle problems created by diversity in the work force.