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Three years ago a footnote appeared in the United States Supreme Court decision of Alexander v. Gardner-Denver Co., which has provided a continuing source of controversy in the field of labor arbitration. The Court's decision labeled the traditional arbitration process an "inappropriate forum" for the resolution of Title VII disputes. Therefore, arbitration of discrimination grievances does not bar subsequent Title VII actions in federal court. However, in the footnote the Court justified the continued use of arbitration by authorizing trial courts to give weight to arbitration decisions. Deference to an arbitration ruling would depend on whether the anti-discrimination provisions of the parties' collective bargaining agreement are substantially the same as Title VII, the fairness of the

2. Id. at 56.
3. 42 U.S.C. §§ 2000e to 2000h (1970), as amended, 42 U.S.C. §§ 2000e to 2000h (Supp. II 1972) [hereinafter cited as Title VII]. Title VII of the Civil Rights Act of 1964 was enacted to prevent discrimination based on race, color, religion, sex, or national origin by an employer, labor organization, or employment agency. Section 2000e-2 provides:

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin.

(c) It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;
(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

4. 415 U.S. at 59-60.
arbitration procedures, the sufficiency of the arbitration record, and the special competence of the arbitrator.\(^5\)

Since the *Alexander* decision many authorities have recognized that traditional arbitration procedures cannot adequately protect a grievant with a Title VII claim.\(^6\) However, commentators are concerned with the increasing burden placed upon the judiciary since the enactment of Title VII. Therefore, much discussion has centered around revising the arbitration process to accommodate effectively Title VII claims.

This article will examine the traditional role arbitration has played in labor relations and the strengths and weaknesses of the post-*Alexander* views regarding the revision of the arbitration process. The arbitrators’ reactions to the *Alexander* footnote will be examined along with the interpretation and application it has received from the courts.

**THE RISE OF ARBITRATION**

The Supreme Court defined arbitration as “the means of solving the unforeseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties.”\(^7\)

Prior to the 1940’s the grievance arbitration process was rarely used.\(^8\) Between 1942 and 1945 the use of grievance arbitration accelerated due to the War Labor Board’s attempt to stabilize production.\(^9\) Congress declared arbitration the desirable method for settling grievances arising under collective bargaining agreements,\(^10\) but consistently refrained from providing for federal enforcement of these contracts.\(^11\) Congress finally supplied the necessary enforce-

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5. *Id.* at 60 n.21.
8. The infrequent use can be attributed to common law hostility toward arbitration. Federal courts applied the common law rule that executory contracts providing for arbitration are not specifically enforceable. *Red Cross Line v. Atl. Fruit Co.*, 264 U.S. 109, 112 (1924).
9. The War Labor Board had a strong policy of ordering the adoption of contract clauses providing for grievance arbitration. This policy stimulated the development of arbitration.
11. Nothing in the National Labor Relations Act of 1935 authorized the National Labor Relations Board to enforce such agreements, nor could the breach of a labor contract be treated as an unfair labor practice.
Arbitration and Title VII

ment provisions in the Taft-Hartley Act.\textsuperscript{12} Section 301 of this Act provides that parties to a collective bargaining agreement can be sued for contract violations in federal court.\textsuperscript{13}

Within this statutory framework the Supreme Court decided \textit{Textile Workers Union v. Lincoln Mills}.\textsuperscript{14} Holding that the arbitration provisions in collective bargaining agreements are specifically enforceable in federal court,\textsuperscript{15} the Court laid a foundation for a system of federal substantive law of arbitration under section 301.

The Supreme Court set forth the relationship between the arbitration process and the courts in the \textit{Steelworkers Trilogy}.\textsuperscript{16} The Court outlined the scope of judicial treatment for cases involving interpretation of a collective bargaining agreement containing a grievance arbitration procedure. A court's function is limited to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.\textsuperscript{17} In determining whether an issue is covered by the arbitration clause, a court should resolve all doubts in favor of arbitration.\textsuperscript{18} Furthermore, an arbitrator's award must be enforced by a court even if the arbitrator's interpretation of the contract is different from the court's or is ambiguous.\textsuperscript{19} The \textit{Steelworkers Trilogy} recognizes a realistic division of authority and expertise between the arbitrator and the courts, and establishes a strong basis for judicial deference to arbitration awards.

\textbf{Arbitration and Title VII}

Although the arbitration process received the Supreme Court's endorsement as the preferred method for resolving labor disputes, reliance on arbitration for resolving Title VII issues creates special problems. When a grievant's claim under a collective bargaining agreement is based on the anti-discrimination clause of the contract, an overlap exists between the grievance arbitration procedure and the remedies available under Title VII. Although Title VII does

\begin{itemize}
\item \textsuperscript{12} 29 U.S.C. § 141 \textit{et seq.} (1970).
\item \textsuperscript{13} 29 U.S.C. § 185 (1970).
\item \textsuperscript{14} 353 U.S. 448 (1957).
\item \textsuperscript{15} \textit{Id.} at 451.
\item \textsuperscript{17} United Steelworkers v. American Mfg. Co., 363 U.S. 564, 568 (1960).
\item \textsuperscript{18} United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 584-85 (1960).
\end{itemize}
not speak directly to the use of arbitration in resolving claims of employment discrimination, the legislative history manifests a congressional intent to provide the individual with multiple remedies against discrimination. Therefore, Congress left the courts the task of defining the parameters of the relationship between Title VII and arbitration.

**Alexander v. Gardner-Denver Co.**

In *Alexander v. Gardner-Denver Co.*, the Supreme Court unanimously agreed to limit the influence of arbitration awards in civil rights matters governed by Title VII. The Court found that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of the collective bargaining agreement and his cause of action under Title VII. It noted that arbitration is a comparatively inappropriate forum for the resolution of rights created by Title VII, because the resolution of statutory or constitutional issues is a primary responsibility of the courts.

Notwithstanding its refusal to endorse a policy of absolute deference to arbitration, the Court noted that the process has conciliatory, therapeutic effects and can be useful in resolving Title VII claims. The Court explained that "where the collective-bargaining agreement contains a non-discrimination clause similar to Title VII, and where arbitral procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee." A result satisfactory to both parties would end the dispute.

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20. In an interpretive memorandum introduced in the Senate, one of Title VII's sponsors stated that "Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and state statutes." 110 Cong. Rec. 7207; see 110 Cong. Rec. 13,650-52 (1964).

21. Prior to the Supreme Court's decision in *Alexander*, the circuits were divided on the issue of whether submission to final arbitration precluded an employee's right to a trial de novo under Title VII. See, e.g., *Rios v. Reynolds Metals Co.*, 467 F.2d 54 (5th Cir. 1972) (a federal court may, under limited circumstances, defer to a prior arbitration award); *Dewey v. Reynolds Metals Co.*, 429 F.2d 324 (6th Cir. 1970), aff'd by an equally divided court, 402 U.S. 689 (1971) (suit may not be brought in court after the grievance has been arbitrated); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969) (plaintiffs should be allowed to seek a remedy through arbitration and in court provided no duplicative relief results).


23. *Id.* at 59-60.

24. *Id.* at 56.

25. *Id.* at 57.

26. *Id.* at 55.

27. *Id.*
and avoid future litigation altogether.

The Alexander Court suggested that the arbitral decision may be admitted as evidence in a subsequent trial and be accorded such weight as a court deems appropriate. The footnote then stated that where an arbitral determination gives full consideration to an employee’s Title VII rights, a court may accord it great weight. While giving no specific guidance to district courts for determining the amount of weight to be given such awards, the Court listed four factors it considered relevant. They include: “the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators.”

Several factors may influence an employer and a grievant in their decision to utilize an arbitration procedure which attempts to comply with the criteria in the Alexander footnote. Obviously, the parties hope to reach a satisfactory resolution of their dispute through the arbitration process with its inherent benefits as a grievance resolution mechanism. In addition, the factors listed in the Alexander footnote provide grievants with safeguards that might not otherwise exist in arbitration proceedings. Employers can also benefit from the use of these stricter procedures. In the event the grievant is not satisfied with the arbitration result and later sues under Title VII, the arbitration proceeding conforming to the footnote is entitled to great weight from the courts. Thus, the employer will be relieved of a full reconsideration of the issue.

Arbitrators’ Reaction to Alexander

Various arbitration awards have resulted from procedures which appear to be specific attempts by the parties to comply with the standards promulgated by the Alexander footnote. In two recent
arbitration proceedings, contract provisions which incorporated anti-discrimination provisions consistent with Title VII's mandate were the subject of the arbitration.\textsuperscript{34} One of those contracts also stated that any provision in the contract contrary to established federal law is unenforceable.\textsuperscript{35} In a third arbitration, the collective bargaining agreement did not contain an anti-discrimination clause, but since the grievant had alleged discrimination in addition to his contract-based charges, the issue was addressed by the arbitrator.\textsuperscript{36} In these test proceedings, the parties specifically provided the arbitrators with authority to consider and apply relevant federal law.\textsuperscript{37} In arriving at their awards, the arbitrators gave full consideration to Title VII and other relevant statutory and administrative law.

The arbitrators also sought to provide the procedural fairness that the footnote prescribed. For example, one arbitrator noted that there had been eight days of testimony during the arbitration hearing.\textsuperscript{38} In one instance, the grievant was represented by her own counsel in addition to that provided by the union.\textsuperscript{39} In another case, the grievant did not have his own counsel, but the arbitrator commended the union for its thorough representation of the grievant's interests.\textsuperscript{40} The arbitration decisions were thorough, especially with respect to the discrimination issues. In general, the arbitrators in these grievance proceedings considered their training and professional experience sufficient to render them capable of hearing and deciding employment discrimination cases.\textsuperscript{41}

\begin{footnotes}
\item[34] Basic Vegetable Prod., Inc. and Teamsters Local 890, 64 Lab. Arb. 620, 621 (1975) (Gould, Arb.); Mountain States Tel. & Tel. Co., 64 Lab. Arb. 317, 318 (1974) (Platt, Arb.).
\item[39] Basic Vegetable Prod., Inc. and Teamsters Local 890, 64 Lab. Arb. 620 (1975) (Gould, Arb.).
\item[40] Gulf States Util. Co., 62 Lab. Arb. 1061, 1091 (1974) (Williams, Arb.). The arbitrator stated that "in fourteen years of arbitrating, the arbitrator has not seen a grievant as thoroughly defended and represented as in the subject case." \textit{Id.}
\end{footnotes}
Notwithstanding these few instances involving strict compliance with the footnote, the majority of post-Alexander arbitration decisions do not meet the standards set forth in the footnote. Consequently, these awards would not be entitled to "great weight" in a subsequent Title VII action. In these decisions the parties, the arbitrators, or sometimes both, demonstrate no desire to use the suggested arbitration procedure. For example, arbitrators frequently decide discrimination issues arising out of the bargaining agreement without ever mentioning Title VII. Also, by restricting the arbitrator's authority to the application of the contract, and by omitting a Title VII-like provision, parties preclude consideration of Title VII issues. Even when arbitrators are given the authority to apply statutory law in determining the validity of a claim, many have refrained from deciding the Title VII issue when there is no established Title VII case law upon which to rely.

This widespread failure to rely on the Alexander footnote could be due to its novelty and the consequent lack of judicial interpretation of the "great weight" standard. At this time, the increased costs of the new arbitration system outweigh the still uncertain benefits.

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43. See, e.g., St. Regis Paper Co., 65 Lab. Arb. 802 (1975) (Young, Arb.).

44. See Hollander & Co., 64 Lab. Arb. 816 (1975) (Edelman, Rosenberg & Craig, Bd. of Arb.). Where an employer asserted that performance of a contractual obligation to lay off workers in reverse order of seniority would result in a possible violation of Title VII, the arbitrator nonetheless found a violation of the labor contract. The Title VII case law in that area was not sufficiently clear to be relied upon and the arbitrator was unwilling to interpret Title VII on his own. He maintained that only the contract should be applied when conflicts between the collective bargaining agreement and Title VII arise until the Supreme Court or Congress decides which takes precedence. Id.
Since the judicial refinement of these standards is still developing, parties are more comfortable maintaining their established procedures rather than experimenting in an untested area.

Judicial Interpretation and Application of Alexander

None of the arbitration awards which were decided pursuant to the suggestions in the footnote have been relitigated in court.\(^45\) However, arbitration of Title VII issues not employing the Alexander suggestions has been subject to judicial interpretation. These decisions indicate a strict adherence to the suggested guidelines. For instance, in \textit{Franks v. Bowman Transportation Co.},\(^46\) an employee appealed a district court decision contending that the court erred in failing to give greater weight to the arbitration award in his favor. The appellate court rejected his claim, pointing out that the contractual right in question was not identical to the Title VII right and that the arbitrator did not decide the Title VII issue.\(^47\)

In \textit{Pearson v. Western Electric Co.},\(^48\) an employee commenced grievance procedures under the collective bargaining agreement and later brought a Title VII action against the employer. While the suit was pending the arbitration proceeding was settled. The grievant was reinstated and received full back pay. The grievant then moved for partial summary judgment claiming that the discrimination issue had been resolved in the arbitration proceeding. The court disagreed since nothing before the court indicated that the settlement in the arbitration proceeding covered the same issues presented in the Title VII action. The arbitration award could, however, be admitted as evidence and accorded such weight as the court thought proper.\(^49\)

Finally, in \textit{Dripps v. United Parcel Service, Inc.},\(^50\) a district court accorded an arbitrator's award "great weight,"\(^51\) but not because of satisfactory compliance with the footnote. Great weight was given

\(^{45}\) This lack of relitigation could be due in part to the fact that most of the arbitration decisions were favorable to the grievants. Also, in Basic Vegetable Prod., Inc. and Teamsters Local 890, 64 Lab. Arb. 620 (1975) (Gould, Arb.), the grievant waived her right to sue in federal court.

\(^{46}\) 495 F.2d 398 (5th Cir. 1974), \textit{rev'd on other grounds}, 424 U.S. 747 (1976). The Fifth Circuit was aware of the principles enunciated in Alexander and decided the case on those grounds. Curiously, however, the court never specifically mentioned the Alexander decision.

\(^{47}\) \textit{Id.} at 408-09; \textit{see Note, The Continuing Validity of Seniority Systems Under Title VII: Sharing the Burden of Discrimination, 8 Loy. Chi. L.J. 882 (1977).}


\(^{49}\) \textit{Id.}


\(^{51}\) \textit{Id.} at 422.
to the arbitration decision only after the court had adjudicated the Title VII issue and found that its result was consistent with the prior arbitration award.\textsuperscript{52} It appears that the "great weight" referred to by the court was certainly not the type anticipated in \textit{Alexander}.

With few exceptions, the response to the footnote by parties to arbitration can at best be characterized as cautious. Due to their adherence to established arbitration systems, the courts have had little opportunity to interpret and apply the \textit{Alexander} footnote.

\textbf{THE FUTURE OF TITLE VII ARBITRATION}

Due to the present lack of judicial guidance, the scope of arbitration’s role in determining Title VII issues still remains largely undefined. The \textit{Alexander} footnote is, however, a clear indication that arbitration can play a positive role in resolving Title VII claims. Many characteristics of arbitration make it a more desirable settlement method than litigation. Private arbitration is a relatively informal procedure compared to the procedurally complex judicial process. Therefore, grievants may obtain dispute resolutions much more quickly\textsuperscript{53} and at considerably less expense through arbitration than through litigation. In addition, the arbitration process provides grievants with the satisfaction of having their alleged wrongs decided without suffering the emotional stress often accompanying litigation.\textsuperscript{54} Not only will grievants with Title VII claims have a quick, inexpensive determination of their charge, but employers will also be relieved of the time and expense involved in defending a court action.

However, as the Supreme Court warned, the informality which makes arbitration an efficient, inexpensive, and expeditious means for dispute resolution renders it a less appropriate forum for the determination of statutory rights.\textsuperscript{55} The safeguards of the judicial process should be provided in the enforcement of a grievant’s right to equal employment opportunity. Moreover, the additional safeguards necessary to cure arbitration’s weaknesses would make it more procedurally complex, expensive, and time consuming.\textsuperscript{56}

Despite this warning, the benefits inherent in the arbitration pro-

\textsuperscript{52} At the end of the court’s opinion, it stated, “It is well to note that this conclusion is consistent with the decision of Clair V. Duff, the arbitrator to whom the grievance was submitted. The arbitrator’s decision that forbidding the wearing of beards by welders is justified on the basis of safety factors is entitled to great weight.” \textit{Id.} at 421-22.

\textsuperscript{53} The EEOC had a backlog of over 126,000 cases as of November, 1976, and it was continuing to rise. [1976] 93 LAB. REL. REP. (BNA) 145.


\textsuperscript{55} \textit{Id.}

\textsuperscript{56} \textit{Id.} at 58.
cess have motivated arbitrators and lawyers to propose revisions to the private arbitration system. They seek to fashion a process capable of accommodating Title VII disputes which will result in awards entitled to "great weight." The various proposed revisions are in substantial agreement on many of their basic elements, including the type of Title VII case suitable to arbitration, the type of procedure which should be used, and the necessary qualifications of the arbitrator.

**Types of Cases Suitable for Arbitration**

*Alexander* made it clear that not all types of Title VII violations may be resolved effectively through the use of arbitration. Therefore, commentators have attempted to define the characteristics of an arbitrable Title VII charge. For example, if the arbitrator is asked to decide a single issue in an area where the law is undisputed, arbitration would be more appropriate than in those instances involving complex or novel issues. With the former, the arbitrator would have the benefit of established case law to rely upon in making his decision. The latter type of case is more appropriate for judicial resolution to enable the courts to guide the development of the law.

Another factor to be considered is the number of claimants. Cases involving fewer grievants are more suitable for arbitration since they tend to be less complex and therefore more susceptible to a quick, inexpensive determination. The courts are more experienced and better equipped to handle the complexities of a large number of claimants. In addition, arbitration is incapable of effectively accommodating the class action suits which often result from discrimination charges. Arbitration can only resolve disputes between those employees presently employed and their employer. Class actions many times encompass not only present employees but past employees or persons who were never even hired due to discriminatory practices.

In another situation the identity of the defending party can be an important factor in determining the suitability of arbitration. Since

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58. 415 U.S. at 55.


60. *Id.*

61. *Id.*

62. The courts are more favorable to class actions in the employment discrimination field than in other areas because the very nature of a Title VII claim is class based. [1976] 92 LAB. REL. REP. (BNA) 357.
an employee's grievance is processed for him exclusively by the
union, cases alleging unlawful acts of discrimination by both his
employer and his union, or simply against the union, should be
excluded from arbitration. It would be impossible for an employee
to get a satisfactory resolution of a grievance when his charge is
against the very party assigned to represent him.

Suggested Procedures

Once the class of cases suited to the arbitration process is se-
lected, a special arbitration procedure should be established. This
process, preferably an expedited one, should be separate and dis-
tinct from other grievance procedures. There is no need to burden
the traditional grievance machinery with the more technical re-
quirements of Title VII arbitration. As a bare minimum, the condi-
tions set forth in the Alexander footnote should be satisfied. This
would include providing a complete record of the arbitration pro-
ceeding, furnishing a written statement of the arbitrator's findings
of fact and conclusions of law, and assuring that the anti-
discrimination clause in the contract is comparable to Title VII.

It has been suggested that the grievant be allowed to use his own
counsel to present the case as opposed to the usual reliance on the
union. Although it tends to prolong the hearing and results in
increased cost, by providing his own counsel a grievant can be cer-
tain that his interests are being fully represented.

63. Edwards, supra note 6, at 273.
64. Id. at 275.
65. Id. at 272.
66. Id.
67. 415 U.S. at 60 n.21.
68. [1976] 92 LAB. REP. (BNA) 177, 178; Coulson, supra note 6, at 145; Edwards,
supra note 6, at 275. This suggestion was followed in Basic Vegetable Prod., Inc. and Teams-
ters Local 890, 64 Lab. Arb. 620 (1975) (Gould, Arb.).

It is a recognized legal proposition that the union has the right to control the processing of
a grievance through arbitration and exclude the grievant's private counsel. However, in a
recent Supreme Court decision, Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976), a
union was found to have breached its duty of fair representation for what amounted to "bad
performance." The Court did not find that the union had proceeded in bad faith or in a
discriminatory manner. Its finding turned on the skill of the union with respect to the way it
had handled cross-examination of the witnesses. It appears that the union is not representing
the employee in the union's representative capacity, but as a lawyer for the grievant. After
Hines, there is a risk that a union's failure to have an arbitration case presented by an
attorney will be found to be a breach of the duty of fair representation. Giving the individual
the opportunity to be represented by his own counsel will avoid the problems which surfaced
in Hines. See generally Coulson, Vaca v. Sipes' Illegitimate Child: The Impact of Anchor

69. However, it appears that existing practices are adequate. In response to a survey taken
by the President of the American Arbitration Association, nine arbitrators replied that labor
The revised proceedings should include a provision by which the parties expressly authorize the arbitrator to hear and to determine the Title VII issues. Since labor arbitration was designed to interpret private contractual rights, the parties are able to restrict the scope of the arbitrator’s authority through their contract. When such restrictions limit the arbitrator to the application of the collective bargaining contract, most arbitrators will apply only the law of the shop and will avoid consideration of Title VII. For example, in *St. Regis Paper Co.*, a grievant claimed she had been denied benefits while she was absent due to pregnancy. The arbitrator denied her claim but was careful to note that his decision was based solely on the language of the collective bargaining agreement. He noted that “[t]his conclusion does not quite end the matter. Finding that the grievant is not entitled to sickness and accident benefits under the Agreement does not mean that she is not entitled to benefit from another source, specifically Title VII. . . .” The arbitrator refrained from deciding the Title VII issue because he believed that interpretation of federal law was not his proper function under the contract. According to the arbitrator, he was empowered by the parties to interpret only the language of the agreement and not to add to it or to change it. To avoid this problem the revised procedure should provide the arbitrator with the necessary authority to address Title VII issues.

The revised procedure should enable the arbitrator to award the grievant all relief available under Title VII. Traditional contractual remedies are often inadequate. For example, an arbitrator can

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70. *Id.* at 144; [1976] 92 LAB. REL. REP. (BNA) 177, 178.
71. *See* text accompanying note 7 *supra*.
73. *St. Regis Paper Co.*, 65 Lab. Arb. 802, 803 (1975) (Young, Arb.).
74. *Id.*
75. Edwards, *supra* note 6, at 272. Title VII relief is provided in 42 U.S.C. § 2000e-5(g) (Supp. IV 1974): (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

76. Coulson, *supra* note 6, at 150.
issue an award but cannot assure compliance. Courts, however, are empowered under Title VII to issue injunctions. The *Alexander* decision allows both successful and unsuccessful grievants to bring suit in court when full relief was not obtained through arbitration. Therefore, to alleviate the problem of inadequate remedies leading to relitigation, the arbitrator should be given the authority to award all appropriate remedies.

*Alexander* declared that mere resort to the arbitral forum does not constitute a waiver of an individual's Title VII rights. Further, neither the union nor the employee can prospectively waive these rights. The right to equal employment opportunity conferred by Title VII is a private right which may not be bargained away by unions in their contract with the employer. However, the *Alexander* Court recognized the possibility that an employee may, under certain circumstances, voluntarily and knowingly agree to settle a claim of employment discrimination and thereby waive his right to pursue a Title VII action in federal court. An effective waiver would completely foreclose the possibility of this claim ever being relitigated. Therefore, it has been suggested that the revised procedure should incorporate a waiver provision that could be voluntarily and knowingly signed by a grievant selecting arbitration. Since prospective waivers are ineffective, the grievant would have to waive his right to sue in federal court only after this right had accrued.

Such a waiver provision was signed by the grievant in *Basic Vegetable Products, Inc. and Teamsters Local 890* as a prerequisite to the arbitration procedure. The alternative to arbitration was a court remedy at the grievant's own expense. Even though this waiver was never tested in court, there remains some question as to its validity. A degree of economic coercion is present when an employee must choose between the relatively inexpensive arbitration machinery as opposed to the costly judicial process. Therefore, such a waiver might not meet the validity standards of "voluntary and knowing."

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77. See note 75 supra.
78. 415 U.S. at 51 n.14.
79. Id. at 52.
80. Id. at 51.
81. Id. at 52.
82. Id. at 52 n.15.
83. Coulson, supra note 6, at 145.
84. 64 Lab. Arb. 620 (1975) (Gould, Arb.).
If the grievant voluntarily selects arbitration and additionally files a Title VII complaint, it has been suggested that the employer should be able to refuse to arbitrate. By allowing this, an employer will be relieved of the burden of defending the same action in two forums. However, if the union agrees to the employer's withdrawal from arbitration there is a possibility that the union will have breached its duty of fair representation. This duty with regard to employment discrimination cases has been defined as requiring the union to assert the rights of its minority members and not to accept passively practices which discriminate against them. Positive assertion of those rights would probably prohibit union acquiescence to an employer's refusal to arbitrate.

**Competence of the Arbitrator**

In addition to these procedural safeguards, the Alexander footnote emphasized the need for an arbitrator with special competence to decide employment discrimination cases. At present, much controversy exists over whether arbitrators have the technical expertise to decide job discrimination issues governed by Title VII. One attorney contends that arbitrators are as competent to address Title VII issues as many federal judges. An arbitrator maintains that assurance of arbitral competence in the employment discrimination area requires special training of arbitrators.

Opponents of these positions contend that arbitrators are not professionally competent in the field of federal discrimination law and should not receive Title VII training. If employment discrimination issues are heard in arbitration, arbitrators would be addressing breaches of federal civil rights law as well as breaches of contract. Permitting an arbitrator to interpret federal statutes would mean delegating to him the power of a court. Although arbitrators are regarded as experts in the law of the shop, they are not necessarily

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86. Edwards, supra note 6, at 275.
87. Id. at 266. The standards for the union's duty of fair representation are not clearly defined. See note 68 supra.
88. EEOC v. Detroit Edison Co., 515 F.2d 301, 314 (6th Cir. 1975).
89. Professor Bernard Meltzer, among others, maintains that arbitrators should not be permitted to interpret federal statutes because they lack the institutional competence to address the significant public policy questions raised. [1976] 92 LAB. REL. REP. (BNA) 68; see Meltzer, supra note 41, at 730-38.
90. See remarks of attorney James Youngdahl in [1976] 92 LAB. REL. REP. (BNA) 177-78.
91. See remarks of Earle Brown, Regional Director of the American Arbitration Association, in Cleveland. Id.
92. Coulson, supra note 6.
regarded as having special competence in federal civil rights. The interpretation and application of Title VII requires expertise in federal substantive law, which requires the special competence of the courts. A national public policy on discrimination should be developed by the courts and should not be the creation of privately selected decision-makers.

**INHERENT STRENGTHS AND WEAKNESSES OF TITLE VII ARBITRATION**

Since a grievant can elect to arbitrate his claim and retain the right to sue in court, employers might be discouraged from entering into collective bargaining agreements providing for the arbitration of Title VII claims. However, there are several advantages to the employer pursuing arbitration. First, even though the employee retains his statutory right to sue, there is a greater possibility that he will not pursue that remedy after arbitration. Second, the cost of even an expanded arbitration procedure will be less than litigation and the final disposition of the case will be reached much more quickly. Finally, by using arbitration an employer will have the opportunity to become aware of and to correct any discriminatory practices in his plant before they reach a stage where litigation is the employee's only answer.

The proposed revisions to the arbitration process increase its potential as an effective Title VII forum. However, several weaknesses remain in the system that cannot be easily overcome.

Grievants have the power to prescribe the boundaries of the issues to be arbitrated. A grievant's wish not to have his statutory rights decided by arbitration limits the arbitrator to contract interpretation notwithstanding an employer's desire to have the charge decided under Title VII. This limitation on the scope of the issues

95. *Id.*
96. The EEOC recently indicated its stance in the arbitration-Title VII controversy when it decided not to proceed with a proposed pilot project to test the use of arbitration techniques in resolving employment discrimination charges. Under the abandoned proposal, the EEOC would have contracted with the American Arbitration Association to train arbitrators to decide Title VII disputes. [1976] 93 Lab. Rel. Rep. (BNA) 41.
97. 415 U.S. at 55.
99. This power appears to be one-sided. In Whitfield Tank Lines, Inc., 62 Lab. Arb. 934 (1974) (Cohen, Arb.), an employee alleged that his discharge was motivated by racial discrimination. The employer denied the charge, but suggested that in light of *Alexander* it would not be inappropriate for the arbitrator to ignore the issue since his decision would not be final and binding on either party. The arbitrator declined the invitation to bypass the charge for two reasons. First, the union had alleged discrimination and asked for arbitration. Secondly, *Alexander* did not completely abandon the use of arbitration in the case of disputes involving discrimination. Although the relationship between arbitration and Title VII is in an unsettled state, this arbitrator felt that it would be premature to abandon the use of arbitration.
could force the employer to defend what is basically the same dispute in two forums. There is no effective way to guard against this traditional limitation of the arbitration process. The revised arbitration systems will have to gain the confidence of employees so that they will prefer to arbitrate their employment discrimination claims rather than resort to the courts.

Another problem arises from the philosophy of certain arbitrators that a contract incorporates all applicable state and federal law. Therefore, even when Title VII is not mirrored in the bargaining agreement, it is sometimes used as a guide to dispute settlement. These arbitrators believe that equal employment opportunity is the law of the shop, as well as the law of the land. Accordingly, arbitrators should not wait for direction from the courts or governmental agencies before taking action. This approach can only lead to inconsistencies and conflict.

One arbitrator decided an unsettled issue of Title VII law based on the applicable EEOC guidelines. While recognizing that the guidelines are not binding on the courts, the arbitrator stated they constitute law in absence of judicial weight of authority to the contrary. In a later case, the Supreme Court decided the issue contrary to both the EEOC guidelines and the arbitrator's ruling. This inconsistency emphasizes the fact that courts cannot and should not be second guessed. The federal judiciary is the final, supreme authority with respect to federal law and it must remain in that position.

Those parties who use a revised arbitration process to decide employment discrimination charges are seeking to eliminate subsequent Title VII court action. If such an action is commenced, the parties at least hope the court will find the arbitration decision to be entitled to "great weight." For the revised systems to be successful, the courts must so find, thereby rendering full litigation unnecessary. As of yet, there is no indication the courts will move in that direction. Therefore, the parties to revised Title VII arbitration have nothing concrete to rely on other than the footnote in *Alexander*.

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100. See FSC Paper Corp., 65 Lab. Arb. 25, 27 (1975) (Marshall, Arb.).
104. Id. at 243.
CONCLUSION

Many of the trouble spots confronting Title VII arbitration can be resolved through prudent decision-making in the federal courts. The judicial process moves slowly and the courts are still in the early stages of interpreting and applying Title VII. Although a significant number of Title VII issues have been decided by the courts, it will be years before the law in that area comes close to being settled. Once the law becomes established, arbitrators will have precedent to look to in making their decisions. As arbitrators become more experienced with Title VII, employees will have more confidence in the system. When more arbitration decisions in compliance with the Alexander footnote find their way into the courts, the impact of the footnote can be accurately assessed.

Although time can cure some weaknesses, arbitration can never provide the effective Title VII forum many hoped it could. The traditional arbitration process must be extensively revised to enable it effectively to accommodate Title VII claims. Even the revised systems are limited with respect to the type of Title VII case they are capable of addressing. Once a proper case is processed through an appropriate procedure, the decision must be made by an arbitrator with special competence. Only when these strict requirements are met will the courts be entitled to afford great weight to these arbitration decisions. These numerous complexities surrounding Title VII arbitration clearly outweigh the limited benefits. The Supreme Court acted wisely when it relegated the relationship between the arbitration system and Title VII rights to a footnote.

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