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Arbitration: a Footnote's Chance

INTRODUCTION

It seems to me desirable that employment discrimination cases be heard by arbitrators wherever possible because of the complicated and time-consuming nature of Title VII litigation in the Federal Courts and the huge backlog with which the Equal Employment Opportunity Commission is now confronted. Delay and protracted litigation permit open wounds to fester. But traditional arbitration procedures are no answer to this problem. ¹

In Alexander v. Gardner-Denver Co., ² a unanimous Supreme Court held that arbitration of a discrimination grievance would not bar a subsequent Title VII action in federal court. ³ The Court,

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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, or to classify or refer for employment any individual on the basis 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 other-
however, also suggested that arbitral decisions could be admitted into evidence and accorded such weight as a trial court deems appropriate. After listing general factors to be considered in determining the weight afforded an arbitrator’s decision the Court maintained that:

Where an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight.7

The case of Basic Vegetable Products, Inc. and Teamsters Local 890,8 evidences an attempt by the parties and the arbitrator to comply with the standards promulgated by the Court in Alexander. The case also underlines the importance of the Equal Employment Opportunity Commission’s (EEOC) role as protector of Title VII rights.9

In Basic Vegetable Products the grievant10 alleged discriminatory practices by her employer which violated both Title VII and the collective bargaining agreement between management and union. In settling these dual claims the grievant voluntarily complied with an arbitration process enacted by management pursuant to the terms of an Equal Employment Opportunity Commission’s Concili-
ation and Settlement Agreement. Under that agreement’s arbitration clause, the grievant, the union, and management, all proper parties to the dispute, were afforded the opportunity to fully participate in any arbitration proceeding. This included the right to representation by counsel, the right to present testimony, and the right to examine and cross-examine witnesses. The agreement provided that the arbitrator be well versed in Title VII law as well as the law of the shop since Title VII law was to be given priority in settling the grievant’s disputes. The grievant and her union also waived their Title VII statutory right to sue in federal court by choosing to arbitrate these disputes.

This article will focus on the effect courts should give an arbitration award made pursuant to the unique procedures adopted in Basic Vegetable Products and whether the Equal Employment Opportunity Commission should formulate more definite standards to guide the courts in determining the effect to be given an arbitrator’s award in light of the Alexander decision.

NATIONAL LABOR POLICY AND ARBITRATION

Arbitration has been adopted as the primary method of resolving grievances arising under a collective bargaining agreement entered into between management and union. Under this method the parties voluntarily consent to have their disputes determined by an impartial judge of their own mutual selection and agree to accept the arbitrator’s decision as final and binding. The arbitral process is set in motion when an employee notifies the union that he has a

11. For a discussion of an EEOC conciliation and settlement agreement see text accompanying notes 71 through 76 infra.
12. See Paragraph XIV (3) of the Conciliation and Settlement Agreement. A copy of this agreement is on file at the Loyola University of Chicago Law Journal Office.
13. The union was a party since its contract rights under the collective bargaining agreement were allegedly violated.
15. See Paragraph XIV (3) of Conciliation and Settlement Agreement. The right to examine and cross-examine witnesses was a procedure developed by the Arbitrator pursuant to the Conciliation and Settlement Agreement.
17. Generally, the arbitrator uses the law of the shop and is unconcerned with common law. This distinguishes this arbitration agreement from others.
The union, as the representative of the grievant, handles the employee's complaint through the predetermined grievance procedure established in the collective bargaining agreement.

National labor policy favors the settlement of labor disputes by arbitration. This policy has its statutory basis in the Taft-Hartley Act. Section 203 (d) of that Act provides that final adjustment by a method agreed upon by the parties is declared to be the desirable method for settling grievances arising under the collective bargaining agreement. Congress, therefore, enacted section 301 of the Taft-Hartley Act in order to give federal courts jurisdiction over suits for violation of collective bargaining agreements.

The Supreme Court in Textile Workers Union v. Lincoln Mills held that the congressional policy embodied in section 203(d) of the Act was to promote industrial peace and that the grievance arbitration provision of a collective bargaining agreement was a major factor in achieving that goal. The Court declared that the agreement to arbitrate was the quid pro quo for an agreement not to strike. Viewed in that light, the Court reasoned section 301 of the Taft-Hartley Act does more than confer jurisdiction on the court — it expresses a federal policy that federal courts should enforce these

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21. The usual successive steps of the grievance procedure are intended to settle disputes on the basis of the agreement between the employer and the union prior to reaching the arbitration step. C. Updegraff, ARBITRATION AND LABOR RELATIONS 129 (3rd ed. 1970). If the grievance is not settled in the earlier stages of the grievance procedure then it reaches the final step — the arbitration proceeding. However, it is the union rather than the individual employee who has control of the manner of presentation of the grievance in the arbitration proceeding. See, e.g., Humphrey v. Moore, 375 U.S. 335 (1964).

The employee cannot demand that the union take his grievance to arbitration, since the right to require arbitration is based on the agreement to arbitrate. This agreement can only be enforced by one of the two contracting parties: the union and the employer. Black-Clawson Co. v. I.A.M. Lodge 355, 313 F.2d 179 (2d Cir. 1962). The union, however, does owe the employee a duty of fair representation. The duty is one which developed as an incident of the union's exclusive representative status as representative of all unit employees. Steele v. Louisville & Nashville Railroad Co., 323 U.S. 192 (1944); Vaca v. Sipes, 386 U.S. 171 (1967); see Peck, Remedies for Racial Discrimination in Employment: A Comparative Evaluation of Forums, 46 WASH. L. REV. 455 (1971). However, the Court in Vaca held that although this duty exists the individual employee does not have an absolute right to have a meritorious grievance taken to arbitration. Enforcement of the duty requires that the employee show that the union's refusal to process the grievance was arbitrary, discriminatory, or in bad faith. 386 U.S. at 191.


26. Id. at 455.
arbitration agreements — the best means of insuring industrial peace.  

In the Steelworkers Trilogy, the Court expanded its policy of specifically enforcing arbitration agreements and awards to include a policy of deferring to arbitral awards. These cases established the policy of federal courts in reviewing arbitration decisions as one limited to determining whether the grievance is covered by the collective bargaining agreements. Furthermore, doubts as to the coverage of the arbitration clause should be resolved in favor of arbitration. An arbitrator's award will be enforced by the court even if the arbitrator's interpretation of the contract differs from that of the court's. These decisions are based on the rationale that the collective bargaining agreement which includes the grievance arbitration machinery is an effort to erect a system of industrial self government which will provide industrial peace rather than industrial strife and economic dislocation. The swift disposition of grievances is an important goal and a principle virtue of arbitration. Arbitration, therefore, provides the remedy for poor labor relations which could result from the failure to settle grievances promptly.

When a collective bargaining agreement with a grievance arbitration provision contains an anti-discrimination clause an employee

27. Id.

The National Labor Relations Board (NLRB), which is authorized to administer the provisions of the Taft-Hartley Act, has also adopted the policy of selective deferral to arbitration. The NLRB announced this policy in Spielberg Manufacturing Co., 112 N.L.R.B. 1080 (1955). The Board stated that where disputes present both contractual and unfair labor practice issues and there was a prior arbitral decision, it will refrain from exercising its jurisdiction to resolve the unfair labor practice. The Board will defer if the arbitration proceedings are fair and regular, if all the parties agree to be bound, and if the decision of the arbitrator is not repugnant to the purpose and policies of the Act. 112 N.L.R.B. at 1082.

That policy has been enlarged to include pre-arbitration deferral. In Collyer Insulated Wire, 192 N.L.R.B. 837 (1971), the Board stated it will defer to arbitration even though the dispute had not yet come before the arbitrator. The Board, however, retains jurisdiction of the alleged unfair labor practice until it is demonstrated that the allegation is adequately resolved through arbitration. Thereafter, the Board applies the Spielberg standards to determine if deferral is warranted. The deferral doctrine emanates from the Board's policy to encourage the voluntary settlement of labor disputes and to effectuate the Act's goal of promoting industrial peace. 112 N.L.R.B. at 1082. See also Nash, Board Referral to Arbitration and Alexander v. Gardner-Denver: Some Preliminary Observations, 25 LAB. L.J. 259, 260 (1974).
who alleges discrimination has dual claims: one based on a violation of a Title VII right and one based on a violation of the collective bargaining agreement. While national labor policy encourages the settlement of contractual disputes through the grievance arbitration process, a question remains whether the arbitration process can be used to resolve Title VII claims.

**Title VII and Arbitration**

While Title VII is silent as to the use of arbitration in resolving claims of discrimination, the Act's legislative history does indicate that the statute is not intended as the exclusive means of relief from employment discrimination. Thus the extent to which arbitration can be effectively used in such cases remains unsettled. It is clear that the use of available arbitration machinery is not a prerequisite to bringing a Title VII action. However, prior to Alexander, the courts had disagreed as to whether submission to final arbitration precluded an employee's statutory right to a trial de novo under Title VII.

In Alexander v. Gardner-Denver Co., the Supreme Court unanimously held that grievance arbitration is not a bar to an employee's seeking judicial resolution of a Title VII claim. The Court in Alexander was confronted with the conflict between the individual's statutory right to bring suit under Title VII and the national labor policy of settling disputes through arbitration. Alexander, a black employee, was discharged by the Gardner-Denver Company for allegedly producing too much scrap. Following his dismissal, Alexander had his grievance determined by four separate tribunals: the grievance procedure which led to arbitration and a determination for the Company; the Colorado Human Rights Commission which dismissed the case; an EEOC investigation which found that the claim was not based on a reasonable cause; and the federal district court which granted summary judgment for the Company on the

34. 110 Cong. Rec. 13650-52 (1964).

The Ninth Circuit has held that even a favorable arbitration award on a claim of racial discrimination does not necessarily preclude an employee from court action for additional relief under Title VII. Oubichon v. North American Rockwell Corp., 482 F.2d 569 (9th Cir. 1973).

38. See text accompanying notes 19 through 32 supra.
basis of the arbitration award.\textsuperscript{39} Four adverse determinations notwithstanding, Alexander's \textit{pro se} petition for certiorari to the Supreme Court was granted.

In ruling against preclusion by arbitration, the Supreme Court noted that the grounds for its decision were based on the purposes and procedures of Title VII. Congress, the Court stated, had enacted Title VII
to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin.\textsuperscript{40}

Moreover, the ending of discrimination was to be given the "highest priority."\textsuperscript{41} To effect this policy, the Court held the statutory scheme vests the federal courts with the "final responsibility for enforcement of Title VII"\textsuperscript{42} along with "plenary powers to enforce the statutory requirements."\textsuperscript{43} Title VII guarantees an individual the right to have his statutory claim of discrimination adjudicated before a court of law.\textsuperscript{44} Therefore, a prior arbitral decision does not foreclose the individual's right to sue nor does it divest the federal courts of jurisdiction.\textsuperscript{45} The Court also stressed that "legislative enactments in this area have long evinced a general intent to accord parallel or overlapping remedies against discrimination" and that "submission of a claim to one forum does not preclude a later submission to another."\textsuperscript{46}

**WAIVER OF TITLE VII RIGHTS**

The Court in \textit{Alexander} also held that the employee had not waived his right to bring a Title VII action by submitting his dispute to a prior arbitration proceeding: "[T]here can be no \textit{prospective} waiver of an employee's rights under Title VII."\textsuperscript{47} The Court emphasized that the individual's statutory right to sue under Title VII is not part of the collective bargaining agreement package, but is instead an individual right to equal employment opportunity.\textsuperscript{48}

\textsuperscript{40.} 415 U.S. at 44.
\textsuperscript{41.} \textit{Id.} at 47.
\textsuperscript{42.} \textit{Id.} at 44.
\textsuperscript{43.} \textit{Id.} at 44.
\textsuperscript{44.} \textit{Id.} at 45.
\textsuperscript{45.} \textit{Id.} at 47.
\textsuperscript{46.} \textit{Id.} at 47-48.
\textsuperscript{47.} \textit{Id.} at 51 (emphasis added). The Court also held that the principles of collateral estoppel and \textit{res judicata} did not apply. \textit{Id.} at 49 n.10.
\textsuperscript{48.} \textit{Id.} at 52.
Nevertheless, the decision does recognize that an employee may waive his right to pursue a Title VII action as part of a settlement of his employment discrimination claim insofar as such consent to settlement is voluntary and knowing. The use of the word “settlement” in the opinion indicates that the grievant must receive consideration for his waiver before it can be found valid. Relying upon Alexander, a district court recently stated that there could be a legal waiver of additional back-pay claims where a release is signed knowingly and voluntarily for valuable consideration.

The arbitration clause used in Basic Vegetable Products required that the individual sign an express waiver of her Title VII right to sue. The grievant waived that right after her Title VII claim had already accrued. The waiver, therefore, unlike the one in Alexander, was not prospective. However, under Alexander for a waiver to be valid it must also be part of a voluntary and knowing settlement. An arbitration agreement like that signed by the grievant in Basic Vegetable Products is evidence that the grievant voluntarily chose arbitration as the method of settling her dispute in lieu of a Title VII right to sue. In consideration for her waiver, the grievant received an arbitration procedure that was accessible, fast, and inexpensive. The arbitration process also provided that the grievant be represented by counsel, the arbitrator be versed in public law, and the analysis of the grievance be based primarily on Title VII law. Conversely, a grievant could argue that since the arbitration clause was part of an EEOC conciliation and settlement agreement an element of coercion existed. This could be inferred from the fact

49. Id. at 52 n.15.

The knowing and voluntary standard was enunciated by the Supreme Court in Johnson v. Zerbst, 304 U.S. 458 (1938), and has been repeatedly used as the test to determine whether an individual waived a constitutional right. The Court in Johnson also stated that the courts will indulge every reasonable presumption against waiver of a fundamental constitutional right. Courts have also held that the waiver must be distinctly made and the fact that the individual knows his rights and intends to waive them must plainly appear. Universal Gas Co., v. Central Ill. Public Service Co., 102 F.2d 164 (7th Cir. 1939). Furthermore, ignorance of a material fact negates waiver. Wood v. U.S., 128 F.2d 265 (D.C. Cir. 1942).


that the grievant, a Latino woman employed by a company that had a record of past discrimination, was faced with a choice of pursuing her own cause of action or a settlement procedure suggested by the government. If the grievant chose to go it alone she would incur the financial costs of maintaining the suit as well as the repercussion of her lack of legal sophistication. Given the latter argument, it is doubtful that a court would hold a Basic Vegetable Products type waiver to be voluntary or knowing under Alexander.\(^\text{52}\)

**Deferral to Arbitration of Title VII Claims**

Assuming arguendo that the waiver in Basic Vegetable Products fails the Alexander test, the question arises whether a court should defer to the arbitrator's award made pursuant to the expanded arbitration proceeding. The Supreme Court in Alexander specifically addressed and rejected a rule of complete deferral to arbitration decisions on discrimination claims. The Court held the consequences of such a policy "would be to deprive the petitioner of his statutory right to attempt to establish his claim in a federal court."\(^\text{53}\)

The Court stated that "arbitration [is] a comparatively inappropriate forum for the final resolution of rights created by Title VII."\(^\text{54}\)

The arbitrator is guided by the collective bargaining agreement. His expertise is primarily in the law of the shop. Title VII, however, requires expertise in substantive federal law and consequently re-

\(^{52}\) It would be erroneous to conclude that the EEOC in putting an arbitration clause with a Title VII waiver in its conciliation and settlement agreement was approving that technique. That conciliation and settlement agreement was agreed to before the Supreme Court's decision in Alexander. Since Alexander, the EEOC has refused to permit the inclusion of that type of arbitration clause into its conciliation agreements. Telephone interview with Counsel for Basic Vegetable Products, Inc., San Francisco, California, July 24, 1975.

The process was developed with those particular parties and did not necessarily meet with the agreement of the General Council of the EEOC. Telephone interview with Marvin Rogoff, Special Assistant for Labor Relations, Equal Employment Opportunity Commission, Office of Compliance, Washington, D.C., July 23, 1975. [hereinafter cited as Rogoff Interview].

An EEOC staff member has commented:

[T]he Commission itself has not considered nor acted upon policy in the area of either deferring to such private processes or giving weight to the decisions ensuing from such procedures.


Furthermore, it is very doubtful that it could in fact support such a position under the statutory plan of Title VII and its congressional mandate. See text accompanying notes 66 through 76 infra. Nor does it appear, in view of current case law, that the courts would allow them such a position. See text accompanying notes 77 through 81 infra. Since putting binding arbitration clauses in its conciliation and settlement agreements appears to make it and not the courts the adjudicator of Title VII rights.

\(^{53}\) 415 U.S. at 56.

\(^{54}\) Id.
quires the competence of the courts. Moreover, the informality which enables arbitration to function as an efficient, inexpensive and expeditious means for dispute resolution renders arbitration a less appropriate forum for final resolution of Title VII issues than the federal courts. The Court also expressed concern that the standards needed to cure the procedural weaknesses would make arbitration a procedurally complex, expensive and time consuming process. The enforcement of a standard which adequately insures effectuation of Title VII rights would almost require courts to make de novo determinations of the employee's claims. Therefore, the court stated, "It is uncertain whether any minimal savings in judicial time and expense would justify the risk to vindication of Title VII rights."

In addition, the Court expressed doubt that the individual employee's Title VII right would be sufficiently protected in the grievance arbitration process where the union has exclusive control over the manner and extent to which a grievant is represented. In arbitration it is likely the interests of the individual employee will be subordinated to the collective interest of all employees in the bargaining unit. The Court noted, "... harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made."

The Expanded Arbitration Process

Although the Court did rule against absolute deferral, the decision does not discourage the use of arbitration in resolving Title VII claims. In fact the Court encouraged its use, citing arbitration's conciliatory and therapeutic effect. The Court acknowledged that arbitral decisions may be admitted as evidence and accorded such weight as the district court deems appropriate. It is significant to note, however, that the Court listed in a footnote factors which could be considered in determining the weight given an arbitral award:

55. Id. at 57.
56. Id. at 58. Labor arbitration practices vary greatly. The process can include: the presence of the grievant, representation of the grievant by counsel, rules of evidence or the right to cross-examine. See FAIRWEATHER, PRACTICE & PROCEDURE IN LABOR ARBITRATION (1973).
57. 415 U.S. at 58.
58. Id. at 59.
59. Id. at 58 n.19.
60. Id.
61. Id. at 55.
62. Id. at 60.
1) the existence of provisions in the collective-bargaining agreement that conforms substantially with Title VII;
2) the degree of procedural fairness in the arbitral forum;
3) the adequacy of the record with respect to the issue of discrimination;
4) the special competence of particular arbitrators.63

The Court further stated that “[w]here an arbitral determination gives full consideration to an employee’s Title VII rights, a court may properly accord it great weight.”64

In Basic Vegetable Products the parties made a diligent attempt to comply with the guidelines suggested by the Court in Alexander. All the parties agreed to have the arbitrator decide the Title VII claim and to have it specifically analyzed and determined primarily on Title VII law by an arbitrator who was known for his competence in public law. The fairness of the proceeding was evidenced by the fact that grievant and union were represented by private counsel, both sides were provided with a full opportunity to examine and cross-examine witnesses and to present testimony, and a full record was made of the proceedings.65

Applying those facts to the guidelines listed in Alexander, the arbitral award in Basic Vegetable Products meets the Court’s suggested standards and thus should be accorded “great weight.” The Supreme Court, however, left the determination of “great weight” entirely to the district court. No specific guidance for determining the weight to be given such awards was offered by the Court.

THE ROLE OF THE EEOC

The EEOC may provide guidelines to be used for determining the weight to be given arbitral awards.66 The 1964 Civil Rights Act created the EEOC as a conciliation agency. Its authority was limited to “informal methods of conference, conciliation, and persuasion.”67 Enforcement was left to the private individual who was given the

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63. Id. at 59 n.21.
64. Id.
65. 64 Lab. Arb. at 625 (1975).
66. 42 U.S.C. §§ 2000e-5 (a), (k) provide in part:
   (a) The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful employment practice as set forth in section 2000e-2 or 2000e-3 of this title.
   (k) In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the Commission or the United States, a reasonable attorney’s fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.
statutory right to bring suit based upon alleged employment discrimination in federal district courts.

Senate Bill 2515 was introduced in 1972 to amend the 1964 Civil Rights Act and to give the Commission administrative cease and desist powers, thus enabling it to investigate and adjudicate a charge of discrimination. The Commission's order would then have been subject to judicial review. However, the 1972 amendments as passed did not provide the EEOC with these powers. Instead, it merely reaffirmed the Commission's role as a conciliation agency. The amendment did give the EEOC the right to bring a civil action in a federal district court against any private individual.

The 1972 amendments did not alter the individual's right to bring an employment discrimination suit in federal court. After initially filing his claim with the EEOC, the individual can bring suit in the following situations: the Commission, after investigation, finds no reasonable cause exists to believe Title VII was violated; the EEOC finds reasonable cause but is unable to conciliate and does not itself bring suit; or the EEOC does conciliate with the alleged violator, but the individual does not choose to be a party to the conciliation agreement. Therefore, the statutory language of Title VII provides two primary methods of enforcing an individual's Title VII claim — the EEOC's compliance process and the individual's right to seek judicial determination of the claim.

The conciliation process is initiated after a charge is filed, an investigation is completed and reasonable cause is determined. Conciliation attempts to achieve voluntary compliance with Title VII by means of a written agreement. The agreement contains a resolution of the issues and the assurance that the party charged will terminate unlawful employment practices and take appropriate action. By signing the agreement, the charging party waives his right to sue the alleged discriminator subject to the latter's complying with the terms of the agreement. However, a conciliation agreement is enforced by the Commission.

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71. 29 C.F.R. § 1601.22 (1975).
72. Under Title VII, a charged party can include employer, union, or employment agency.
73. 29 C.F.R. § 1601.22 (1975).
75. Id. Enforcement is primarily accomplished through the reporting provisions of the
will receive judicial enforcement where the parties, on a joint motion, seek court approval of their agreement. On the granting of such a motion, the terms of the agreement are incorporated into a consent decree. This was the procedure which produced the conciliation and settlement agreement considered in Basic Vegetable Products.

Courts view the primary role of the EEOC as seeking the elimination of unlawful employment practices by informal means which lead to voluntary compliance. The EEOC has no power to adjudicate. The Supreme Court has held that an individual is not barred from bringing suit even where the Commission finds no grounds for his complaint. In addition, if a conciliation agreement is acceptable to the EEOC and not to the charging party, the latter may refuse to sign it and may file suit. This is true even where the agreement is favorable to the parties. To hold otherwise would make the EEOC the final adjudicator of an individual's Title VII grievance which would ignore Congress' mandate that federal courts have the ultimate power to determine Title VII rights.

Therefore, while the courts are cognizant of both methods of Title VII implementation — the EEOC's voluntary compliance process and the individual's right to judicial remedies — they are solicitous and protective of the latter method. Although recognizing that the EEOC was created to implement Title VII and end employment discrimination through a voluntary compliance procedure, the courts have repeatedly enforced the individual's right to his day in court in Title VII claims. Nevertheless, when an employee seeks arbitration as a means of redressing discriminatory practices, the EEOC is the proper agency to establish arbitral guidelines pursuant to Alexander.
POTENTIAL EEOC ARBITRAL GUIDELINES

Taking the Supreme Court's suggestion that arbitration decisions which meet certain standards be given "great weight" in a Title VII trial de novo, the Commission is researching and developing the capabilities of a private grievance process for discrimination complaints. The necessary components of such a procedure are: the matter be grievable under the contract, the grievant have free choice of representation, the facts be fully developed, the record be complete, and the arbitrator have the legal background to handle Title VII claims. This would require the arbitrators to become more skilled and better trained in public law. Moreover, there must be more minority and female arbitrators. The fact that there are so few female or minority arbitrators infers that the arbitration profession itself is insensitive to the problem of employment discrimination. If the arbitration profession has failed to recognize the problem in its own ranks it cannot be expected to effectively adjudicate the issues of employment discrimination in the industrial sector.

Although efforts are being directed towards making the grievance arbitration machinery more effective, the EEOC believes that an individual should not be left at the mercy of the arbitration system. The purpose of these guidelines would not be to restrict the grievant's remedies, but rather broaden them by utilizing the arbitrator's skills and the elaborate grievance machinery.

The Supreme Court in Alexander has held that arbitration will not preclude a Title VII action in a federal court. A result of this

82. Letter from Marvin Rogoff, Special Assistant for Labor Relations, Equal Employment Opportunity Commission, Washington, D.C., to Laura Boyer, August 5, 1975: One way by which the Commission might express the opinion that such an arbitration award be given great weight is through the issuance of guidelines, an avenue under current exploration.

83. This situation is to be distinguished from regular grievance arbitration, where the employee is not a party and his grievance is represented by the union. Under these guidelines, the employee need not choose the union as his representative. For a discussion of the union's role in arbitration of employment discrimination claims see note 21 supra.

84. See Rogoff Interview, supra note 52.

85. Id. For a thorough analysis of the capacity of the arbitration process and arbitrator to deal with legal issues, see Edwards, Arbitration of Employment Discrimination Cases: An Empirical Study, in PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (1975). The analysis is based on the author's survey taken February, 1975 of all United States members of the National Academy of Arbitrators.

86. See Rogoff Interview, supra note 52.

87. As of 1972, the National Academy of Arbitrators claimed only four blacks and three women members out of a membership of approximately three hundred and fifty. Gould, Judicial Review: As Arbitrators See It, in LABOR ARBITRATION AT THE QUARTER CENTURY MARK, PROCEEDINGS OF THE TWENTY-FIFTH ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 114, 117 (1972) [hereinafter cited as Gould].

88. See Rogoff Interview, supra note 52.
decision could be that management and union will discontinue arbitration of employee discrimination claims when the grievant is guaranteed a trial de novo on his Title VII claim. Such a result would be undesirable for minority and women employees, since arbitration presents a more expeditious route than protracted administrative and judicial proceedings. Furthermore, in refusing to arbitrate discrimination claims, the employment problems of women and minorities will remain outside of the union's concern. This will add impetus to the prevalent union attitude that employment discrimination claims are not their responsibility. Women and minorities will continue to exist as second class union members.

If, however, the EEOC establishes standards pursuant to *Alexander*, which encourage courts to accord arbitration decisions great weight, management and union may be persuaded to use this expanded arbitration process as a means of settling discrimination claims. If altered arbitration is successful in enabling employment discrimination claims to be effectively resolved within the grievance arbitration machinery, two national policies—industry's right to settle its own grievances and the individual's right to be free from employment discrimination—would be brought into harmony. Furthermore, problems facing minority and women union members will be greatly alleviated.

The strong possibility exists that altered arbitration will not encourage union and management to arbitrate employee discrimination claims. The mere possibility of a court giving the arbitration decisions "great weight" may not provide sufficient incentive for union and management to utilize arbitration. Perhaps they will take the risk that the employee will not pursue his Title VII grievance to the courts—a lengthy and potentially expensive process—nor seek assistance from the EEOC with its complicated procedure and backlog of cases.

The alternative to relying upon union and management's incorporation of these standards into a collective bargaining agreement is for the EEOC to embody them into its conciliation agreements. This would require an initial filing of suit by the grievant. It would also require the EEOC to effectively police the agreement to discover

90. *Id.*
91. *Id.*
any breach. The Commission would be required to seek judicial sanctions against the breaching party. Years could pass before the employee's grievance would be resolved.

**The Impact of Albemarle**

The two mentioned alternatives would prove successful if union and management would commit themselves to altered arbitration as a method of resolving employment discrimination claims. The Supreme Court, in *Albemarle Paper Co. v. Moody,* may have provided the stimulant for such a commitment. Justice Stewart speaking for the majority stated:

> It is the reasonably certain prospect of a backpay award that "provide[s] the spur or catalyst which causes employers and unions . . . to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." 96%

In *Albemarle,* the employees brought a class action against the plant owner and the employees' union alleging employment discrimination. Initially the employees sued only for permanent injunctive relief against "any policy, practice, custom or usage at the plant that violated Title VII." Nearly five years after initiating the suit, plaintiffs filed a claim for a back pay award. The Supreme Court held that after a finding of unlawful discrimination back pay should be awarded to the class of plaintiffs. This included the unnamed parties in plaintiffs class who had not themselves filed charges. The Court in *Albemarle* based its award of back pay on the twin statutory objective of Title VII—to achieve equality of employment opportunity and to make persons whole for injuries suffered through past discrimination. The Court declared that district courts may deny back pay only when to do so would not frustrate these dual statutory purposes.

**Conclusion**

Potential Title VII financial liability, not only for lawyer's fees and court costs but also for back pay awards, should provide the

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94. See note 75 supra.
95. 95 S. Ct. 2362 (1975).
97. *Id.* at 2367.
98. *Id.*
99. *Id.* at 2370 n.8.
100. *Id.* at 2371-72.
101. *Id.* at 2375.
needed stimulus for union and management to accept altered arbitra-
tion as a method of resolving employment discrimination claims.
Altered arbitration would be an effective way to limit their financial
liability. The grievance will be settled at an early stage at much
lower costs. There will be fewer charges filed under Title VII
proceedings and, therefore, fewer cases should reach the federal
courts. Furthermore, where the cases do reach the courts, the arbi-
trator’s award, if he complied with the altered arbitration process,
should be given “great weight” by the court. This would reduce
court time and costs. Equality in employment opportunity is an
ideal which will be realized when it becomes too expensive to ignore.
Perhaps that time has come.

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