Indiana Law Review

Volume 10 1977 Number 5

The Authority of a Labor Arbitrator to Decide Legal Issues Under a Collective Bargaining Contract: The Situation After Alexander v. Gardner-Denver

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I. BACKGROUND AND INTRODUCTION

In enacting the Labor-Management Relations (Taft-Hartley) Act (LMRA), Congress specifically recognized the arbitration process.[1] However, legislative and judicial acceptance and recognition of the arbitration process was long in coming. Courts initially made no effort to accommodate the labor arbitration process, considering it to be competitive with the court system, and hence, a process which should be discouraged.[2] After passage of the Arbitration Act,[3] courts agreed that they had the power to enforce arbitration agreements in collective bargaining contracts.[4] The applicability of the Arbitration Act to collective bargaining agreements became something of a moot issue after *Textile Workers v. Lincoln Mills of Alabama*,[5] which held that section 301[6] of the LMRA provides a body of

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The author wishes to express his appreciation to Professor William Buss of the University of Iowa College of Law for his assistance in the preparation of this Article.

[1]Section 203(d) of the Labor Management Relations Act, Pub. L. No. 101, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141-197 (1970 & Supp. V 1975)), provides that "[f]inal adjustment by a method agreed upon by the parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement."

[2]*See, e.g.*, U.S. Asphalt Ref. Co. v. Trinidad Lake Petroleum Co., 222 F. 1006 (S.D.N.Y. 1915); International Ass'n of Machinists v. Cutler-Hammer, Inc., 271 App. Div. 917, 67 N.Y.S. 2d 317, *aff'd*, 297 N.Y. 519, 74 N.E.2d 464 (1947) (if meaning of provision of contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate; function of court to determine whether dispute is subject to arbitration).

[3]9 U.S.C. §§ 1-14 (1970).

[4]*E.g.*, Hoover Motor Express Co. v. Teamsters Local 327, 217 F.2d 49 (6th Cir. 1954).

[5]353 U.S. 448 (1957).

[6]29 U.S.C. § 185 (1970). Section 301(a) of the Labor Management Relations Act provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this

substantive law for the enforcement of collective bargaining agreements. Subsequently, the Supreme Court established the primacy of grievance arbitration as a mechanism for the resolution of industrial disputes in the famous *Steelworkers Trilogy.*[7]

Federal courts have limited the scope of judicial review of arbitration awards by holding that the award is not reviewable on the merits[8] and may be set aside only upon a showing of fraud or gross

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chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

[7]United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

[8]*See* United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *But cf.* Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (1976) (proof of breach of the union's duty of fair representation held to remove the bar of finality from an arbitral decision). In *Hines*, petitioner-plaintiffs, who were employed as truck drivers by Anchor Motor Freight, were discharged for allegedly seeking reimbursement for motel expenses in excess of the actual charges sustained by them. The union claimed that petitioners were innocent, and opposed the discharge, based on the applicable collective bargaining contract which forbade discharges, except for just cause. In accordance with the collective bargaining contract, the matter was submitted to a joint arbitration committee, consisting of an equal number of union and company representatives, which found that the discharges were for just cause. Petitioners later discovered that the motel clerk had falsified the motel records, had recorded on the registration card less than was actually paid by the discharged employees, and had retained for himself the difference between the amount receipted and the amount recorded. Petitioners then filed suit for one million dollars damages from their employer and the local and international unions, alleging that the employer wrongfully discharged the petitioners from their jobs and that the unions represented their grievance in bad faith.

The district court granted summary judgment for the union and company, finding that the issue had been finally decided in arbitration and that the plaintiffs had failed to show sufficient facts to find "bad faith," "arbitrariness," or "perfunctoriness" in the union's conduct. Hines v. Local 377, Int'l Bhd. of Teamsters, 84 L.R.R.M. 2649 (N.D. Ohio 1973), *aff'd sub nom.* Hines v. Anchor Motor Freight, Inc., 506 F.2d 1153 (6th Cir. 1974), *rev'd*, 424 U.S. 554 (1976). The Court of Appeals for the Sixth Circuit reversed the summary judgment as to the local union, holding that the issue of bad faith should not have been summarily decided, that there were sufficient facts from which bad faith or arbitrary conduct could be inferred by the trier of fact, and that the employees should have been afforded an opportunity to prove their charges. However, the court of appeals affirmed the judgment in favor of the company, citing the finality provision of the collective bargaining agreement. Hines v. Anchor Motor Freight, Inc., 506 F.2d 1153 (6th Cir. 1974). The decision of the court of appeals with respect to Anchor was appealed to the United States Supreme Court and limited to the following question: "[w]hether petitioner's claim under LMRA [Taft-Hartley] § 301 for wrongful discharge is barred by the decision of a joint grievance committee upholding their discharge, notwithstanding that their union breached its duty of fair representation in processing their grievance so as to deprive them and the grievance committee of over-

misconduct.[9] As stated in *Hines v. Anchor Motor Freight, Inc.*,[10] "[C]ourts are not to usurp those functions which collective bargaining contracts have properly 'entrusted to the arbitration tribunal,'" but rather "should defer to the tribunal chosen by the parties finally to settle their disputes."[11] As indicated by the Supreme Court, to allow federal courts to review the merits of a dispute "would make meaningless the provisions that the arbitrator's decision is final, for in reality it would almost never be final."[12]

The National Labor Relations Board (NLRB)[13] has emphasized a strong federal labor policy favoring the collective bargaining mechanism for the resolution of industrial disputes. Section 10(a) of the LMRA[14] provides that the Board is empowered to prevent any person from engaging in any unfair labor practice and that this power shall not be affected by any other means of adjustment or prevention established by agreement. However, section 203(d) of the

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whelming evidence of their innocence of the alleged dishonesty for which they were discharged." 424 U.S. at 561 n.7. The Court stated that petitioners were not to be accorded the right to relitigate their discharge merely because they offered newly discovered evidence supporting the propositions that the charges against them were false and that they were, in fact, discharged without just cause. *Id.* at 571. However, the finality provision of a collective bargaining contract would not bar a subsequent relitigation when the employee's representation by the union has been dishonest, in bad faith, or discriminatory. Accordingly, if the employee could prove that the discharge was in fact erroneous and that the union's breach of duty had tainted the decision, the employee would have a remedy against the employer as well as the labor union. *Id.* at 567.

[9]For an excellent review of those instances under which a court will vacate the award of an arbitrator, see O. FAIRWEATHER, PRACTICE AND PROCEDURE IN LABOR ARBITRATION, ch. XVII (1973).

[10]424 U.S. 554 (1976).

[11]*Id.* 562-63 (quoting U.S. Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 599 (1960)).

[12]*Id.*

[13]The administration of the National Labor Relations Act, 29 U.S.C. §§ 151-168 (1970 & Supp. V 1975), is vested in an independent five-member agency known as the National Labor Relations Board. Members are appointed by the President with advice and consent from the Senate and are not subject to removal, except for neglect of duty or malfeasance in office. The Board is empowered to delegate to any group of three (a quorum) any or all of the powers which it may itself exercise. The Board has no rights and duties with respect to conciliation, mediation, or arbitration, nor has it jurisdiction over wage disputes, or authority to order the parties to enter into a contract or include specific terms therein. The main function of the Board is to process two categories of cases: representation cases and unfair labor practice cases. Representation cases arise under § 9, 42 U.S.C. § 159 (1970 & Supp. V 1975), and involve representation and selection of bargaining representatives by employees. Unfair labor practice (complaint) cases arise under § 10, 42 U.S.C. § 160 (1970 & Supp. V 1975), and are concerned with the prevention of employer and union unfair labor practices.

[14]*Id.* § 160(a).

LMRA also provides in part that "[f]inal adjustment by a method agreed upon by the parties is . . . the desirable method for settlement of grievance disputes arising over the applicaton or interpretation of an existing collective-bargaining agreement."[15] The Board has resolved the problem of harmonizing its duty under section 10(a) with its obligation to promote the private resolution of grievance disputes, which arguably may also be considered unfair labor practices, by formulating procedures under which it will defer either to an arbitration award previously issued[16] or defer to an arbitration process prior to the issuing of an award.[17]

In general, both the federal courts and the NLRB have favored the grievance-arbitration mechanism in resolving industrial disputes based on the principles of collectivity and rule by the majority.[18] For example, a union may decide not to process a grievance alleging a violation of the collective bargaining agreement because of doubts as to its merits or conflicts with other union interests. Under *Vaca v. Sipes*,[19] before an employee can maintain a suit for breach of contract against the employer, he must first demonstrate that the union breached its duty of fair representation. This requirement places a difficult burden of proof on the employee, especially in light of the test employed by the courts in finding a breach.[20] Thus, it appears

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[15]*Id.* § 173(d).

[16]In Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955), the Board held that "the desirable objective of encouraging the voluntary settlement of labor disputes will best be served" by the recognition of a prior arbitration award involving conduct which might constitute an unfair labor practice under § 8, 29 U.S.C. § 158 (1970 & Supp. V 1975), if the Board finds that: (1) [T]he arbitration proceedings "have been fair and regular," (2) all parties have agreed to be bound by the decision, and (3) "the decision . . . was not clearly repugnant to the purposes and policies of the [NLRA]." 112 N.L.R.B. at 1082. Later, in International Harvester Co., 138 N.L.R.B. 923 (1962), the Board refined these criteria in upholding an arbitration award which was not "palpably wrong," and where the proceedings were not "tainted by fraud, collusion, unfairness, or serious procedural irregularities." *Id.* at 928-29.

[17]In Joseph Schlitz Brewing Co., 175 N.L.R.B. 141 (1969), the Board indicated that it would not assert jurisdiction in deference to the grievance-arbitration machinery provided that certain criteria were met. The Board formulated the following requirements: (1) "[T]he contract clearly provides for grievance and arbitration machinery," (2) the conduct "is not designed to undermine the Union and is not patently erroneous but rather is based on a substantial claim of contractual privilege," and (3) "it appears that the arbitral interpretation of the contract will resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the [NLRA]." *Id.* at 142. *See also* Collyer Insulated Wire, 192 N.L.R.B. 150 (1971).

[18]*See, e.g.*, Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975); Vaca v. Sipes, 386 U.S. 171 (1967); J.I. Case v. NLRB, 321 U.S. 332 (1944).

[19]386 U.S. 171 (1967).

[20]The Supreme Court has established in Vaca v. Sipes, 386 U.S. 171 (1967), that a breach of the statutory duty occurs "when a union's conduct . . . is arbitrary, discrimi-

that a system which vests the union with virtually total control over the decision of whether to process a grievance—perhaps a necessity to the maintenance of a strong and effective collective bargaining and arbitration system—may, in the process, subvert the needs of a minority group or an individual employee attempting to end discriminatory employment practices.[21]

Title VII of the Civil Rights Act of 1964[22] exemplifies the conflict between a federal labor policy which emphasizes the private settle-

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natory, or in bad faith." *Id.* at 207. The arbitrary or bad-faith conduct requirement is not satisfied merely by showing that the employee has a meritorious grievance and that the union refused to process it to arbitration. However, as stated in *Vaca*, "[A] union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion." *Id.* at 191. The Court stated that "in administering the grievance and arbitration machinery as a statutory agent of the employees, a union must, in good faith and in a nonarbitrary manner make decisions as to the merits of a particular grievance." *Id.* at 194. *But see* Beriault v. Longshoremen Local 40, 501 F.2d 258 (9th Cir. 1974) (the duty to act "fairly" is breached when the union's actions are arbitrary; such actions need not be deceitful, dishonest, or in bad faith).

[21]"The collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interests of an individual employee to the collective interests of all employees in a bargaining unit." Vaca v. Sipes, 386 U.S. 171, 182 (1967). In addition, the Supreme Court has limited the ability of employees to avail themselves of self-help remedies. In Emporium Capwell Co. v. Western Addition Community Org., 420 U.S. 50 (1975), the Court held that picketing the premises of the employer and urging a consumer boycott in order to force the employer to bargain over alleged employment discrimination were unprotected activities under the LMRA, because the employees effectively bypassed the union and demanded that the Company bargain with the picketing employees for the entire group of minority employees. The Court rejected the argument that employees who seek to bargain separately with their employer over the elimination of racially discriminatory employment practices which peculiarly affected them should be free from the constraints of the exclusivity principle of § 9(a), 29 U.S.C. § 159(a) (1970). The employees cited the time-consuming nature of the grievance procedure and the national labor policy against discrimination as requiring this exception. The Court reasoned that "it is far from clear that separate bargaining is necessary to help eliminate discrimination." 420 U.S. at 66. In *Emporium* the collective bargaining agreement contained a provision prohibiting all manner of invidious discrimination without qualification and made any violation a grievable issue. In addition, the union was prepared to go to arbitration, and "[t]hat orderly determination, if affirmative, could lead to an arbitral award enforceable in court." *Id.* Furthermore, "[e]ven if the arbitral decision denies the putative discriminatee's complaint his access to the processes of Title VII and thereby to the federal courts is not foreclosed." *Id.* n.18.

[22]Civil Rights Act of 1964, §§ 701-718, 42 U.S.C. §§ 2000e to 2000e-17 (1970 & Supp. V 1975). Title VII of the Civil Rights Act of 1964 explicitly prohibits discrimination in employment as to hiring, firing, compensation, terms, conditions, or privileges of employment on the basis of race, color, religion, sex, or national origin. *Id.* § 2000e-2 (1970). It is now clear that white persons have a cause of action for employment discrimination under Title VII. McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976). Since 1972 the Act has applied to employers engaged in interstate commerce who have employed at least 15 employees during each working day in each of 20 or more calendar weeks of the current or preceding calendar year. 42 U.S.C. § 2000e(b)

ment of industrial disputes through the grievance-arbitration procedure and a national policy which attempts to eliminate employment discrimination. This conflict is intensified when a discriminatory act by an employer or labor organization constitutes a violation of Title VII[23] as well as a violation of the terms of a collective

(Supp. V 1975). It also applies to employment agencies procuring employees for such an employer, *id.* §§ 2000e(c), 2000e-2(b) (1970 & Supp. V 1975), and to almost all labor organizations, *id.* §§ 2000e-(d), 2000e-2(c) (1970). The 1972 amendments extended coverage to all state and local governments, government agencies, political subdivisions (except for elected officials, their personal assistants, and immediate advisors) and the District of Columbia departments and agencies (except where subject by law to the federal competitive service). *Id.* § 2000e(a), (f) (Supp. V 1975).

An aggrieved employee charging a violation of the Act must file a charge with the EEOC within 180 days after the alleged violation, unless the person has commenced a proceeding before an authorized state or local authority. 42 U.S.C. § 2000e-5(e) (Supp. V 1975). In the latter case, the charge must be filed within 300 days after the violation occurred or within 30 days after the person aggrieved has received notice that the deferral agency has terminated the proceeding, whichever is earlier. *Id.*

The reach of Title VII's prohibitions against employment discrimination has been expanded by the courts to include even neutrally stated and indiscriminately administered employment practices or procedures, in the absence of demonstrable business necessity, if the practice operates to favor an identifiable group of white employees over a protected class. Griggs v. Duke Power Corp., 401 U.S. 424 (1971).

Provision is made in the Act to preclude application of federal preemption to state or local laws assigned to proscribe employment discrimination. 42 U.S.C. § 2000e-7 (1970). Thus, if an individual initially processes an employment discrimination charge in a state or local forum and receives an adverse ruling (or fails to obtain a timely ruling), this does not bar him from subsequently bringing a Title VII action. *See, e.g.*, Cooper v. Phillip Morris, Inc., 464 F.2d 9 (6th Cir. 1972); Voutis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971).

[23]42 U.S.C. § 2000e-2(a) to (c) (1970) provides in part:

(a) Employer practices.

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 . . . because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees . . . 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.

. . . .

(c) Labor organization practices.

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 . . . 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; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

bargaining agreement. For example, an individual covered under a labor agreement may allege that the employer has violated the terms of the agreement by discharging the employee for something other than "just cause."[24] If, at the same time, the employee alleges that the discharge was based on race or some other criterion proscribed by Title VII, he may commence an action under that statute. The Supreme Court held in *Alexander v. Gardner-Denver Co.*[25] that an arbitral award does not bar a concurrent or subsequent suit in federal court alleging discrimination under Title VII.[26] Effectively this means that the employee may file a grievance pursuant to the terms of a collective bargaining agreement and concurrently or subsequently assert a Title VII claim in another forum. In declining to hold that an arbitral determination would bar a Title VII suit, the *Alexander* Court was especially cognizant of the arbitrator's task in

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[24]Grounds for discharge, either in the form of a "just cause" limitation or a listing of specific offenses for which one may be disciplined or discharged, are mentioned in approximately 97% of labor contracts. [1976] LABOR RELATIONS EXPEDITOR (BNA) 131. Frequency figures are based on a sample of 400 representative union contracts in effect during 1973-74.

[25]415 U.S. 36 (1974).

[26]Prior to the Supreme Court's ruling in Alexander v. Gardner-Denver Co., *id.*, the federal courts were split in attempting to resolve the conflict between the following "pro-" and "anti-bar" decisions, with the former holding that an arbitral determination operates as a bar to further action under Title VII, and the latter holding that an arbitrator's decision is not such a bar:

Pro-bar decisions: Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972); Alexander v. Gardner-Denver Co., 466 F.2d 1209 (10th Cir. 1972), *rev'd*, 415 U.S. 36 (1974) (the Supreme Court took an anti-bar stand); Thomas v. Phillip Carey Mfg. Co., 455 F.2d 911 (6th Cir. 1972) (favorable arbitration award bars Title VII claim in federal court); Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970); Sanchez v. TWA, 8 Empl. Prac. Dec. 5075 (D.N.M. 1973), *rev'd and rem'd*, 499 F.2d 1107 (10th Cir. 1974) (decided consistently with the Supreme Court's decision in *Alexander*); Taylor v. Springmeier Shipping Co., 3 Empl. Prac. Dec. 7011 (W.D. Tenn. 1971) (resort to contract grievance procedure on claim of wrongful discharge amounted to election of remedies); Edwards v. North Am. Rockwell Corp., 291 F. Supp. 199 (C.D. Cal. 1968) (pursual of contract remedy to conclusion considered binding "election of remedies"); Washington v. Aerojet-General Corp., 282 F. Supp. 517 (C.D. Cal. 1968) (binding election of remedies made when grievant agreed to third step of grievance procedure to reduce one month's disciplinary layoff to nine days).

Anti-bar decisions: Franks v. Bowman Transp. Co., 495 F.2d 398 (5th Cir. 1974); Oubichon v. North Am. Rockwell Corp., 482 F.2d 569 (9th Cir. 1973); Macklin v. Spector Freight, Inc., 478 F.2d 981 (D.C. Cir. 1973) (policy of honoring private grievance decisions not to be followed where fairness of procedure attacked); Voutsis v. Union Carbide Corp., 452 F.2d 889 (2d Cir. 1971) (federal court can entertain complaint of sex discrimination despite settlement under a state fair employment practices provision); Newman v. Avco Corp., 451 F.2d 743 (6th Cir. 1971); Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970); Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969).

relation to the collective bargaining agreement. The Court noted that the labor arbitrator, as proctor of the bargain, has no general authority to invoke public laws that conflict with the agreement. Citing *United Steelworkers v. Enterprise Wheel & Car Corp.*,[27] the Court stated:

> If an arbitral decision is based solely on the arbitrator's view of the requirements of enacted legislation, rather than on an interpretation of the collective bargaining agreement, the arbitrator has exceeded the scope of his submission, and the award will not be enforced. Thus, the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII.[28]

The obligation and authority of a labor arbitrator to interpret and apply the law in resolving conflicts arising under the labor agreement has been the subject of much debate.[29] This Article will explore and analyze the problems and issues arising when an arbitrator is presented with the opportunity to interpret and apply the law in resolving a contractual dispute, particularly those disputes which are cognizable under Title VII. Part II will review the positions taken by selected members of the National Academy of Arbi-

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[27]363 U.S. 593 (1960).

[28]415 U.S. at 53-54.

[29]*See generally* Cox, *The Place of Law in Labor Arbitration*, in THE PROFESSION OF LABOR ARBITRATION, SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS, 1948-1954 at 76 (BNA 1957); Howlett, *The Role of Law in Arbitration; A Reprise*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION; PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 64 (BNA 1968); Howlett, *The Arbitrator, the NLRB, and the Courts*, in THE ARBITRATOR, THE NLRB, AND THE COURTS; PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 67 (BNA 1967); Meltzer, *The Role of Law in Arbitration; Rejoinders*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION; PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 58 (BNA 1968); Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, in THE ARBITRATOR, THE NLRB, AND THE COURTS; PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1 (BNA 1967); Mittenthal, *The Role of Law in Arbitration*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION; PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 42 (BNA 1968); St. Antoine, *The Role of Law in Arbitration: Discussion*, in DEVELOPMENTS IN AMERICAN AND FOREIGN ARBITRATION; PROCEEDINGS OF THE TWENTY-FIRST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 75 (BNA 1968); Sovern, *When Should Arbitrators Follow Federal Law?*, in ARBITRATION AND THE EXPANDING ROLE OF NEUTRALS; PROCEEDINGS OF THE TWENTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 29 (BNA 1970).

trators[30] and other authorities. Part III will focus on the analysis and reasoning provided by the Supreme Court in *Alexander*, with respect to the problems and policy considerations of arbitrators interpreting and applying the law when resolving grievances. Finally, Part IV will review selected cases subsequent to *Alexander* involving the general authority of arbitrators to decide Title VII-type grievances.

II. The Arbitrator and the Law: Deciding Legal Issues Under a Collective Bargaining Agreement

As indicated earlier, the obligation and authority of a labor arbitrator to interpret and apply the law when resolving grievances has been the subject of much debate.[31] Two situations are to be distinguished. In the first, the contractual and statutory standards are not in conflict, but overlap. In this case, few argue that arbitrators should ignore federal law when a contractual provision is ambiguous and can be interpreted in two ways—one consistent with the law and one inconsistent therewith. Meltzer[32] argues that in such a situation, there is not necessarily an incompatability between the statutory and contractual standard.

> [W]here a contractual provision is susceptible to two interpretations, one compatible with, and the other repugnant to, an applicable statute, the statute is a relevant factor for interpretation. Arbitral interpretation of agreements, like judicial interpretation of statutes, should seek to avoid a construction that would be invalid under a higher law.[33]

The second situation involves the case where a conflict exists between the agreement and the statute. The orthodox position is that an arbitrator's decision is constrained by the collective bargaining agreement; when there is conflict the arbitrator should respect the agreement and ignore the law. Meltzer, the leading exponent of this traditional view, has argued that arbitrators should respect the agreement, which is the source of their authority, leaving to the courts or other official tribunals the determination of whether the agreement contravenes a specific statute. Otherwise, arbitrators

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[30]The National Academy of Arbitrators was organized in 1947 in cooperation with the American Arbitration Association. In addition to setting standards for labor arbitrators, the Academy provides a forum for discussing problems of labor arbitration within the profession.

[31]*See* note 29 *supra* and accompanying text.

[32]Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration*, *supra* note 29.

[33]*Id.* at 15.

would be deciding issues beyond the scope of not only the submission agreement, but also arbitral competence.[34] However, Meltzer would deem the arbitrator to be justified in resolving a legal question if the parties have requested the arbitrator to issue an additional advisory opinion[35] or if they intended to incorporate legal standards into the agreement.[36] Absent these special circumstances, Meltzer believes that an arbitrator who invokes the law to defeat the negotiated contract exceeds the authority conferred by the submission agreement.[37] As a final argument for the traditional view, Meltzer asserts that there is no reason to credit arbitrators with having any special legal competence.[38]

A contrary position is taken by Howlett,[39] who argues that "arbitrators *should* render decisions on the issues before them *based on both contract language and law.*"[40] This position is based on the following considerations: (1) The rationale that "each contract includes all applicable law," which becomes "part of the 'essence [of the] collective bargaining agreement' to which Mr. Justice Douglas has referred in [*Enterprise Wheel*],"[41] (2) the policy of the NLRB, as enunciated in *Spielberg*, favoring the arbitral determination of legal issues,[42] and (3) the notion that "an arbitrator who decides a dispute without consideration of legal issues disserves his management-union clients."[43] Indeed, under Howlett's view, an arbitrator is not only under a *duty* to apply substantive law, but is also under an affirmative *duty* to probe for a statutory violation. "Unless he does so, neither the General Counsel nor the Board will 'defer' to the arbitrator's decision."[44]

Several commentators have proposed solutions somewhere between the Meltzer and Howlett positions. Cox has argued that an arbitrator should look to the statutes in order to avoid rendering an award that would *require* the parties to violate the law.[45] This position, states Cox,

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[34]*Id.* at 16.

[35]*Id.* at 31.

[36]*Id.* at 15.

[37]*Id.* at 16-17.

[38]*Id.*

[39]Howlett, *The Arbitrator, the NLRB, and the Courts*, *supra* note 29.

[40]*Id.* at 83 (emphasis in original).

[41]*Id.* (citing United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960)).

[42]*Id.* at 79 (citing Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955)).

[43]*Id.* at 85.

[44]*Id.* at 92.

[45]Cox, *The Place of Law in Labor Arbitration*, *supra* note 29, at 78.

> does not suggest that an arbitrator should pass upon all the parties' legal rights and obligations. It does not suggest that an arbitrator should refuse to give effect to a contract provision merely because the courts would not enforce it. Nor does it imply that an arbitrator should be guided by judge-made rules of evidence or contract interpretation. The principle requires only that the arbitrator look to see whether sustaining the grievances would require conduct the law forbids or would enforce an illegal contract; if so, the arbitrator should not sustain the grievance.[46]

In an address before the National Academy of Arbitrators in 1968, Mittenthal[47] refined Cox's position:

> On balance, the relevant considerations support Cox's view. The arbitrator should "look to see whether sustaining the grievance would require conduct the law forbids or would enforce an illegal contract; if so, the arbitrator should not sustain the grievance." This principle, however, should be carefully limited. It does not suggest that "an arbitrator should pass upon all the parties' legal rights and obligations" or that "an arbitrator should refuse to give effect to a contract provision merely because the courts would not enforce it." Thus, although the arbitrator's award may *permit* conduct forbidden by law but sanctioned by contract, it should not *require* conduct forbidden by law even though sanctioned by contract.[48]

Mittenthal cited several interesting examples which demonstrated the rationale behind his position, including the following, which was first proposed by Cox. After World War II a conflict developed between provisions of the Selective Service Act and contractual provisions of collective bargaining contracts dealing with seniority. The Supreme Court interpreted the Act to require employers to give veterans preference over nonveterans in the event of layoffs during the first year after their discharge from the armed forces,[49] while the common collective bargaining contract gave veterans only the seniority they would have had if they had not been drafted. The other example concerned a problem arising under the National Labor Relations Act. Without prior discussion with the union, an employer advanced the starting time at the plant pursuant to a con-

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[46] *Id.* at 79.

[47] Mittenthal, *The Role of Law in Arbitration*, *supra* note 29.

[48] *Id.* at 50.

[49] Fishgold v. Sullivan Corp., 328 U.S. 275 (1946).

tract which granted the employer "sole jurisdiction over all matters concerning the management of the plant subject only to the terms of the agreement." In the first example, the union filed a grievance when the employer released a nonveteran who had more contract seniority than a veteran. In the second, the union charged that the statutory rights and duties are a part of the contract and that the unilateral action was a violation of section 8(a)(5) of the LMRA, which makes it an unfair labor practice for the employer to refuse to bargain collectively with representatives of his employees.

Mittenthal would apply the Supreme Court ruling in the first example and deny the grievance because such an award would require the employer to engage in conduct forbidden by law. In the second hypothetical, he would sustain the grievance if there were no contract violation, for even if the employer's actions were contrary to law, the award would merely permit and not require illegal action. Mittenthal supports his position with the following reasoning:

> One of the reasons for this proposition [that arbitrators should consider the law to avoid an award which would *require* unlawful conduct] is that contracts contemplate 'final and binding' awards and that an award compelling unlawful conduct cannot really be 'final and binding.' The dispute over the contract, over the award itself, would continue into the courts.[50]

However, Mittenthal realizes that the arbitrator should, for the same reason, enforce statutory obligations because his failure to do so would likely result in a court suit.

> When an arbitrator refuses to enforce a statutory obligation, his award is 'final and binding' with respect to the contract. The grievant has no contract question to take to court. He may pursue his statutory rights in the appropriate forum, but such a suit has nothing to do with the contract.[51]

Sovern[52] offers a more detailed compromise to the debate, listing the following criteria which should be satisfied before an arbitrator entertains a legal issue:

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[50]Mittenthal, *The Role of Law in Arbitration*, *supra* note 29, at 52 n.37.

[51]*Id.* This author takes the position that the distinction which Mittenthal makes with respect to "permitting" and "requiring" a violation of the law is not functionally useful. As Meltzer notes, "[I]f the arbitrator is viewed as 'enforcing' contracts, he 'enforces' an illegal contract equally whether he causes an employer to engage in an act prohibited by statute or, by denying a remedy, condones the prohibited act already executed by the employer." Meltzer, *The Role of Law in Arbitration; Rejoinders*, *supra* note 29, at 60.

[52]Sovern, *When Should Arbitrators Follow Federal Law?*, *supra* note 29.

1. The arbitrator is qualified.
2. The question of law is implicated in a dispute over the application or interpretation of a contract that is also before him.
3. The question of law is raised by a contention that, if the conduct complained of does violate the contract, the law nevertheless immunizes or even requires it.
4. The courts lack primary jurisdiction to adjudicate the questions of law.[53]

Sovern notes that in a Title VII case, the fourth criterion is not met, "[s]ince the courts are entrusted with primary jurisdiction to decide Title VII questions. . . ."[54]

III. The Alexander Position

A. Background

In May 1966, Harrell Alexander was hired to perform maintenance at the plant of the Gardner-Denver Company. In June 1968, Alexander was awarded a trainee position as a drill operator where he remained until his discharge in September 1969. He was told that he was being discharged for producing too many defective parts.

On October 1, 1969, Alexander filed a grievance pursuant to the terms of the collective bargaining contract.[55] Under the agreement, the company retained the right to hire, suspend, or discharge employees for proper cause. The agreement also provided that "there shall be no discrimination against any employee on account of race, color, religion, sex, national origin, or ancestry,"[56] and that "no employee will be discharged, suspended or given a written warning notice except for just cause."[57] A broad arbitration clause was included to cover the differences between the company and the union as to the meaning and application of the provisions of the labor contract. Disputes were to be processed through a multi-step grievance procedure with final and binding arbitration as the last step.

The union processed Alexander's grievance through the above machinery. In a final prearbitration step, Alexander raised the claim, apparently for the first time, that his discharge resulted from

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[53] *Id.* at 38.

[54] *Id.* at 45.

[55] The grievance stated: "I feel I have been unjustly discharged and ask that I be reinstated with full seniority and pay." Alexander v. Gardner-Denver Co., 415 U.S. 36, 39 (1974).

[56] *Id.* at 39 n.1.

[57] *Id.* at 40-41 n.3.

racial discrimination. At the hearing, Alexander testified that his discharge was the result of racial discrimination and informed the arbitrator that because he could not rely on the union, he had filed a charge with the Colorado Civil Rights Commission.[58] In December, after an arbitration hearing, Alexander was found to have been discharged for just cause. The arbitrator's opinion made no reference to Alexander's claim of racial discrimination.

In June 1970, pursuant to a referral by the Colorado Civil Rights Commission, the EEOC determined that there was not reasonable cause to believe that a violation of Title VII had occurred. After being notified of his right to institute an action under the Civil Rights Act of 1964, Alexander filed an action in district court. Stating that the issue raised by the suit was the need to determine "just how many chances plaintiff should be afforded to try to establish his claim of discrimination," the district court granted summary judgment to the employer.[59]

In *Alexander*, the Supreme Court had to decide under what circumstances, if any, an employee's statutory right to a trial de novo

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[58]*Id.* at 42.

[59]Alexander v. Gardner-Denver Co., 346 F. Supp. 1012 (D. Colo. 1971), *aff'd*, 466 F.2d 1209 (10th Cir. 1972), *rev'd*, 415 U.S. 36 (1974). The lower court focused on the dichotomy of authority found in Dewey v. Reynolds Metals Co., 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided court*, 402 U.S. 689 (1971), and Hutchings v. United States Indus., Inc., 428 F.2d 303 (5th Cir. 1970), and adopted, in their entirety, the views expressed in *Dewey*:

> We hold that when an employee voluntarily submits a claim of discrimination to arbitration under a union contract grievance procedure—a submission which is binding on the employer no matter what the result—the employee is bound by the arbitration award just as is the employer. We cannot accept a philosophy which gives the employee two strings to his bow when the employer has only one. Congress has given the employee one and one-half strings under the Equal Employment Opportunity procedure. It is true that the Commission can enter no order binding on the employer, but with a finding of probable cause, reserving to the employee the right to sue, he is given the assistance of an agency of the United States Government in attempting to bring about a settlement of the claimed discrimination. This amounts to a half string.
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> . . . To hold that an employee has a right to an arbitration of a grievance which is binding on an employer but is not binding on the employee—a trial balloon for the employee, but a moon shot for the employer—would sound the death knell for arbitration clauses in labor contracts. Such a result would bring to a tragic end the many years of effort which have brought about the now prevailing arbitration procedures to resolve labor disputes. The vital importance of the rights protected by the Civil Rights Act must not be overlooked, but it is the employee who elected arbitration. His was a voluntary choice, and he should be bound by it.

Alexander v. Gardner-Denver Co., 346 F. Supp. at 1019.

under Title VII is precluded by a prior submission of his claim to final arbitration. Hence, the Court was faced with two important, but conflicting national policies: encouragement of voluntary settlement of disputes through grievance-arbitration procedures negotiated by the parties, and elimination of employment discrimination.[60]

The Court noted the absence of any express authority in Title VII itself with respect to the relationship between federal courts and the grievance-arbitration machinery of collective bargaining agreements. However, the Court stated that prior legislative enactments[61] and the legislative history of Title VII[62] suggested a Congressional intent to allow an individual to pursue his rights independently under both Title VII and other applicable state and federal statutes. "The clear inference," reasoned the Court, "is that Title VII was designed to supplement, rather than supplant, existing

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[60]It is noteworthy that with respect to precedent, an equally divided Court had affirmed Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971), three years earlier. In addition, the Supreme Court considered the relationship between contract and statutory remedies in United States Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971). In *Bulk Carriers*, a seaman brought an action in district court under the Seaman's Act of 1790, § 6, 46 U.S.C. § 596 (1970), to recover wages allegedly due. The seaman was also subject to a collective bargaining agreement containing a grievance procedure with final arbitration as the last step. The Supreme Court held that the seaman was not required to exhaust his contractual remedies. In his concurring opinion, Justice Harlan recognized that the ultimate resolution of the conflict between statutory and contractual rights would proceed "with close attention to the policies underpinning both the duty to arbitrate and the provision by Congress of rights and remedies in alternative forums." 400 U.S. at 359.

[61]The Court cited the Civil Rights Act of 1870, ch. 114, § 16, 42 U.S.C. § 1981 (1970):

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

and the Civil Rights Act of 1871, ch. 22, § 1, 42 U.S.C. § 1983 (1970), which states the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

[62]In support, the Court cited an interpretive memorandum by one of the sponsors of the bill containing Title VII which stated:

> Nothing in title VII or anywhere else in this bill affects rights and obligations under the NLRA and the Railway Labor Act. . . . [T]itle VII is not intended to and does not deny to any individual, rights and remedies which he

laws and institutions relating to employment discrimination."[63] The Court rejected the theory of "election-of-remedies" or "res judicata-collateral estoppel"[64] as a rationale for precluding relitigation. Analogous to the procedure under the National Labor Relations Act, where conduct may implicate both contractual and statutory rights, the Court held that the relationship between the forums is complementary, "since consideration of the claim by both forums may promote the policies underlying each."[65] The "separate nature of . . . contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence."[66] In addition, the Court rejected the argument that an "election of remedies is required by the possibility of unjust enrichment through duplicative recoveries," for "even in cases where the employee has first prevailed, judicial relief can be structured to avoid such windfall gains."[67]

> may pursue under other Federal and State statutes. If a given action should violate both title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction.

415 U.S. at 48 n.9 (quoting 110 CONG. REC. 7207 (1964)). The Court also discussed the legislative history of Title VII:

> Moreover, the Senate defeated an amendment which would have made Title VII the exclusive federal remedy for most unlawful employment practices. [A] similar amendment was rejected in connection with the Equal Employment Opportunity Act of 1972. The report of the Senate Committee responsible for the 1972 Act explained that neither the provisions regarding the individual's right to sue under title VII, nor any of the other provisions of this bill, . . . [were] meant to affect existing rights granted under other laws.

Id. (citations omitted).

[63] 415 U.S. at 48-49.

[64] *Id.* at 49. As noted by the Sixth Circuit in Tipler v. E. I. duPont deNemours & Co., 443 F.2d 125 (6th Cir. 1971), res judicata and collateral estoppel are different theories which often lead to the same result. The *Tipler* court noted:

> [A]pplication of the doctrine of res judicata necessitates an identity of causes of action, while the invocation of collateral estoppel does not. Each doctrine, on the other hand, requires that, as a general rule, both parties to the subsequent litigation must be bound by the prior judgment. The essence of collateral estoppel by judgment is that some question or fact in dispute has been judicially and finally determined by a court of competent jurisdiction between the same parties or their privies. Thus, the principle of such an estoppel may be stated as follows: Where there is a second action between parties, or their privies, who are bound by a judgment rendered in a prior suit, but the second action involves a different claim, cause, or demand, the judgment in the first suit operates as a collateral estoppel as to, but only as to, those matters or points which were in issue or controverted and upon the determination of which the initial judgment necessarily depended.

443 F.2d at 128 (quoting 1B MOORE'S FEDERAL PRACTICE ¶ 441[2] (2d ed. 1974) (footnotes omitted)).

[65] 415 U.S. at 50-51.

[66] *Id.* at 50.

[67] *Id.* at 51 n.14.

The Supreme Court also rejected "waiver" as a possible legal basis for the preclusion rule, stating that "[i]n no event can the submission to arbitration . . . under the nondiscrimination clause of a collective-bargaining agreement constitute a binding waiver with respect to an employee's rights under Title VII."[68] The Court's reasoning is instructive.

> It is true, of course, that a union may waive certain statutory rights related to collective activity, such as the right to strike. These rights are conferred on employees collectively to foster the processes of bargaining and properly may be exercised or relinguished by the union as collective-bargaining agent to obtain economic benefits for union members. Title VII, on the other hand, stands on plainly different ground; it concerns not majoritarian processes, but an individual's right to equal employment opportunities. Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. Of necessity, the rights conferred can form no part of the collective-bargaining process since waiver of these rights would defeat the paramount congressional purpose behind Title VII. In these circumstances, an employee's rights under Title VII are not susceptible of prospective waiver.[69]

Significantly, *Alexander* took an inflexible position in refusing to adopt a preclusion rule or a deferral standard. A deferral rule was viewed as laced with many of the objections applicable to a policy of preclusion. Nor would a more demanding deferral standard provide a solution.[70] In support of its position, the Court stated that deferral criteria which "adequately insured effectuation of Title VII rights

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[68] *Id.* at 52 n.15.

[69] *Id.* at 51-52 (citations omitted). With respect to the waiver argument, the Court further stated:

> The actual submission of petitioner's grievance to arbitration in the present case does not alter the situation. Although presumably an employee may waive his cause of action under Title VII as part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver. Since an employee's rights under Title VII may not be waived prospectively, existing contractual rights and remedies against discrimination must result from other concessions already made by the union as part of the economic bargain struck with the employer. It is settled law that no additional concession may be exacted from any employee as the price for enforcing those rights.

Id. at 52.

[70] 415 U.S. at 58. *Alexander* rejected the more demanding test adopted in Rios v. Reynolds Metals Co., 467 F.2d 54 (5th Cir. 1972).

would tend to make arbitration a procedurally complex, expensive, and time-consuming process."[71] Such a standard of review would effectively require courts to make de novo determinations of an employee's claim. In addition, a deferral rule was seen as adversely affecting the arbitral system. The Court noted that employees, "fearing that the arbitral forum cannot adequately protect their rights under Title VII, . . . may elect to bypass arbitration and institute a lawsuit."[72] This, reasoned the Court, would reduce voluntary compliance and settlement of Title VII claims, resulting in more, not less, litigation. Thus, while not adopting any "de jure" deferral standards, the Court stated that the arbitral decision "may be admitted as evidence and accorded such weight as the court deems appropriate."[73]

Lest anyone believe the Court had finally resolved the controversy, the following footnote was inserted:

> We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors 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. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum.[74]

It is especially noteworthy that throughout the opinion the Court focused on the role of arbitration "in a system of industrial

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[71]415 U.S. at 59. For a detailed analysis of the reasoning of the Court with respect to deference standards, *see* Hill, *The Effects of Non-Deference on the Arbitral Institution: An Alternative Theory*, 28 LAB. L.J. 230 (1977).

[72]415 U.S. at 59.

[73]*Id.* at 60.

[74]*Id.* at 60 n.21. Upon remand, the district court found that Alexander had in fact been discharged for just cause. Alexander v. Gardner-Denver Co., 8 Empl. Prac. Cas. 1153 (D. Colo. 1974), *aff'd*, 519 F.2d 503 (10th Cir. 1975).

government,"[75] as well as some of the institutional deficiencies of the arbitration process. The Court felt that the arbitral institution was a comparatively inappropriate forum for *final* resolution of Title VII rights. This conclusion was based on the following considerations: (1) The role of the arbitrator is to effectuate the intent of the parties; (2) because the arbitrator's authority is the collective bargaining agreement, any conflict between Title VII and the agreement must be resolved in favor of the agreement;[76] (3) the specialized competence of arbitrators lies primarily in the law of the shop, not in the law of the land;[77] (4) arbitral fact-finding is not equivalent to

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[75]415 U.S. at 52.

[76]*Id.* at 56-57.

[77]*Id.* The extent to which arbitrators possess the expertise to decide legal issues in employment discrimination cases has been the subject of empirical investigation. One study randomly selected members of the National Academy of Arbitrators and attempted (by questionnaire) to determine the views of arbitrators with respect to their expertise in handling legal issues. Of the 79 members returning the questionnaire, 18% felt competent and expert about interpreting the provisions of a collective bargaining agreement in accordance with Title VII, 47% believed themselves competent, and 31% responded that they would rather avoid the legal issue; 4% had no opinion. The figures were 23, 58, 13, and 6%, respectively, for those respondents who were also lawyers. Note, *The Authority and Obligation of a Labor Arbitrator to Modify or Eliminate a Provision of a Collective Bargaining Agreement Because in His Opinion it Violates Federal Law*, 32 OHIO ST. L.J. 395 (1971).

Of the 200 Academy members responding to a 1975 survey, only 52% indicated that they read advance sheets to keep current with respect to Title VII developments, nearly 40% answered that they did not read the sheets, and 8% declined to answer. Only 72% indicated that they felt professionally competent to decide legal issues in cases involving claims of race, sex, national origin, or religious discrimination. Sixteen percent answered that they did not feel competent, and 12% declined to answer the question. *See* Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in PROCEEDINGS OF THE TWENTY-EIGHTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 59 (BNA 1976).

What is especially interesting is Edwards' finding that of the 83% who indicated that they had never read a judicial opinion involving a claim of employment discrimination, 50% of this same group nevertheless answered that they felt professionally competent to decide legal issues in discrimination grievances. One-half of those who felt they were not professionally competent to decide legal issues also answered that they had heard and decided employment discrimination cases during the past year.

The above data, especially Edwards' findings, appear to support *Alexander's* concern with the expertise and competence of labor arbitrators to decide legal issues, and especially those involving employment discrimination. Edwards reasoned that there would be little interest in the question of the competence and expertise of arbitrators if only qualified arbitrators were being selected. However, based on the survey data, such is not the case. The existing selection processes fail to screen out persons who are not professionally qualified to decide legal issues.

It is noteworthy that arbitrators themselves are supportive of the *Alexander* rationale. Approximately two-thirds of the responding arbitrators in the Edwards study adopted Meltzer's position, *see* notes 32-38 *supra* and accompanying text, that an ar-

judicial fact-finding;[78] (5) the record of the arbitration proceeding is generally incomplete relative to that of a court; the usual rules of evidence do not apply; and the rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable;[79] (6) arbitrators have no obligation to the court to give reasons for an award;[80] (7) the general informality of the arbitration procedure relative to the court system makes it a less appropriate forum for final resolution of Title VII issues;[81] and (8) the interests of an individual employee may be subordinated to the collective interests of all employees in an arbitration hearing, due in part to (a) the union's exclusive control over the manner and extent to which an individual grievance is presented;[82] (b) the lack of "harmony of interest" between union and employer, given a charge of racial discrimination against the former; and (c) the difficulty of establishing a breach of the duty of fair representation.[83]

B. Alexander and the Authority of the Arbitrator

The *Alexander* decision has resolved little of the Meltzer-Howlett-Cox-Mittenthal debate. The Court, in dicta, merely cited the dicta in *Enterprise Wheel*[84] and stated that the arbitrator has authority to resolve only questions of contractual rights.[85] Presum-

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bitrator has no business applying a statute in a contract-grievance dispute. In addition, 85% of those respondents felt that an arbitrator may consider and interpret public law in order to avoid compelling the parties to violate the law. But at the same time, Edwards found that more than one-third of the arbitrators disagreed with the result in *Alexander*, which, argues Edwards, is inherently illogical.

[78]415 U.S. at 57.

[79]*Id.* at 57-58.

[80]*Id.* at 58.

[81]*Id.*

[82]*Id.* n.19 (citing Vaca v. Sipes, 386 U.S. 171 (1967), and Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965)).

[83]*Id.*

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> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

415 U.S. at 53 (quoting United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593, 597 (1960)).

[85]"Thus the arbitrator has authority to resolve only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are

ably, under *Alexander*, no legal infirmity would result in the situation where an arbitrator, faced with an ambiguous contract, looks to Title VII for guidance in resolving the dispute. Indeed, the Supreme Court in *Enterprise Wheel* contemplated that the arbitrator would look for guidance from many sources, including the law.[86]

Where the question does *not* require choosing one of two interpretations of an ambiguous provision—one consistent with the law, the other inconsistent—arbitrators are entitled to rest their decisions squarely on the law if the parties have granted the arbitrator such authority, either by contract or submission agreement.[87] As an example, the parties may execute a contract incorporating the provisions of Title VII, in which case the arbitrator would be within his authority in basing the award on his interpretation of Title VII. Here again, *Alexander* would not preclude the arbitrator from deciding the Title VII issue; the Court states that when the collective bargaining agreement contains a nondiscrimination clause similar to Title VII, arbitration may well produce a satisfactory settlement.[88] When no explicit discrimination clause similar to Title VII is present, most collective bargaining agreements will contain a "just cause" restriction with respect to discipline or discharge.[89] Accordingly, an arbitrator may well invalidate conduct by an employer based on criteria prohibited by Title VII. Even if a contract does not contain any limitation on the right to discipline or discharge, some arbitrators have held that a "just cause" term is implied.[90] Hence, in the last two examples, where the arbitrator has not been given the contractual authority to apply the law, an aggrieved employee may still be afforded an adequate remedy in the arbitral forum. Again, *Alexander* does not preclude this result.

In the difficult situation where the arbitrator has not been given the authority to apply the law, and he feels that the arbitral award

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similar to, or duplicative of, the substantive rights secured by Title VII." 415 U.S. at 53-54.

[86]*See* note 84 *supra*.

[87]*See* O. FAIRWEATHER, *supra* note 9, at 111.

[88]415 U.S. at 55. *See also* Goodyear Tire and Rubber Co. v. Rubber Workers Local 200, 42 Ohio St. 2d 516, 330 N.E.2d 703 (1975) (arbitrator had authority to modify contract pursuant to EEOC guidelines where contract provided for modification by federal statute).

[89]Grounds for discharge, either in the form of a "just cause" limitation or a listing of specific offenses for which one may be disciplined or discharged, are mentioned in approximately 97% of contracts. Frequency figures are based on a sample of 400 representative union contracts in effect during 1973-74. [1976] LABOR RELATIONS EXPEDITOR (BNA) 131.

[90]*E.g.*, Cameron Iron Works, Inc., 25 Lab. Arb. & Disp. Settl. 295 (1955); *contra*, Okenite Co., 22 Lab. Arb. & Disp. Settl. 756, 760-61 (1954).

would conflict with Title VII if he were to follow the agreement instead of the law, *Alexander* appears to mandate that the arbitrator follow the agreement. The Court states that "[w]here the collective-bargaining agreement conflicts with Title VII, the arbitrator must follow the agreement."[91]

At this juncture some elaboration is needed. *Alexander* indicates that the arbitrator can resolve "only questions of contractual rights, and this authority remains regardless of whether certain contractual rights are similar to, or duplicative of, the substantive rights secured by Title VII."[92] An arbitrator who is not explicitly granted the power by a collective bargaining agreement to apply the law and is faced with a contract which "requires" or "permits" a violation of Title VII must, under *Alexander*, follow the agreement. This is not to say that under *Alexander* the arbitrator cannot resolve the dispute consistently with Title VII. Arguably, the arbitrator who determines that the agreement, in fact, incorporates "the law" may well resolve the dispute consistently with Title VII on the theory that the parties did not intend to negotiate an agreement that is contrary to law. However, in drafting the opinion, the arbitrator must be especially cognizant of the dicta in *Enterprise Wheel:* "[The] award is legitimate only so long as it draws its essence from the collective bargaining agreement. When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."[93] An award invalidating a discriminatory employment practice based solely on what the arbitrator believes to be required by Title VII will not be enforced; arguably such an award does not "draw its essence from the collective bargaining agreement."[94] If the opinion of the arbitrator "is based solely upon the arbitrator's view of the requirements of the enacted legislation," he has exceeded the scope of his submission.[95]

In absence of specific authority to incorporate the law, the arbitrator, under *Alexander* and *Enterprise Wheel*, must make clear that his award is based upon the collective bargaining agreement, and not upon his application of Title VII. Of course, under *Enterprise Wheel* the arbitrator may look to the law for help in determining the sense of the agreement.[96] Such "reaching out" for the law by

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[91]415 U.S. at 57.

[92]*Id.* at 53-54.

[93]363 U.S. at 597.

[94]*Id.*

[95]*Id.*

[96]Such language as "I, the arbitrator, sustain the grievance on the basis of Section 703 of Title VII, Griggs v. Duke Power Corp., and the recent EEOC Guidelines on Testing," may not withstand a subsequent court challenge. However, the following language would probably withstand a challenge in the courts:

the arbitrator is also permitted by *Alexander*, but again, the arbitrator must carefully word the opinion so as to indicate that his decision is, in fact, based upon the agreement.

IV. Title VII—The Grievance Procedure and the Authority of the Arbitrator: Recent Case Law

The *Alexander* Court recognized the possibility that employment discrimination cases may, under certain circumstances, be adequately resolved in grievance and arbitration proceedings.

> Where the collective bargaining agreement contains a nondiscrimination clause similar to Title VII and where procedures are fair and regular, arbitration may well produce a settlement satisfactory to both employer and employee. . . . [A]rbitration may often eliminate those misunderstandings or discriminatory practices that might otherwise precipitate resort to the judicial forum.[97]

Although it seems clear that *Alexander* does not require exhaustion of the grievance procedure prior to initiating a Title VII action,[98] the Court found no infirmity in those cases where arbitrators resolve Ti-

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> [T]his grievance is upheld on the grounds that the agreement does not permit the employer to promote on the basis of data obtained from an invalidated test, which, although fair on its face, operates to discriminate on the basis of race, and furthermore, my findings appear to be consistent with Title VII.

[97]415 U.S. at 55.

[98]Courts have held that an employee need not exhaust the grievance and arbitration procedure contained in a collective bargaining agreement before commencing a Title VII action. King v. Georgia Power Co., 295 F. Supp. 943 (N.D. Ga. 1968); Dent v. St. Louis Ry., 265 F. Supp. 56 (N.D. Ala. 1967); Reese v. Atlantic Steel Co., 282 F. Supp. 905 (N.D. Ga. 1967). The issue of exhaustion is not entirely foreclosed by *Alexander*, where the Supreme Court never explicitly addressed the issue. Additionally, the facts of *Alexander* do not lend themselves to a definitive holding, because Alexander had exhausted his contractual remedies prior to initiating a suit in federal court. However, prior decisions by the Supreme Court, *e.g.*, United States Bulk Carriers, Inc. v. Arguelles, 400 U.S. 351 (1971), as well as the language of *Alexander*, indicate that an employee need not resort to the grievance procedure before initiating a Title VII suit. *Alexander* correctly noted that Title VII does not speak explicitly to the relationship between the federal courts and the grievance procedure, but instead it "[vests] the federal courts with plenary powers to enforce the statutory requirements; and it specifies with precision the jurisdictional prerequisites that an individual must satisfy before he is entitled to institute a lawsuit." 415 U.S. at 47. The Court stated that in the present case, these prerequisites were met when the petitioner filed a timely charge of employment discrimination with the EEOC, and received and acted upon the Commission's statutory notice of the right to sue. In light of the overall emphasis in *Alexander* on the separate nature of contractual rights under the grievance procedure and statutory rights under Title VII, there is little reason to believe that the Court implicitly held that exhaustion was required. Subsequent to *Alexander*, the courts that

tle VII-type grievances pursuant to their authority under the agreement.[99]

Courts that have considered the issue of arbitral authority subsequent to *Alexander*[100] have not always resolved the issue consistently with that decision. In *Southbridge Plastics Division v. Rubber Workers Local 759*,[101] a federal court granted the employer an injunction against the union processing the grievances of the employees to arbitration. The employees were alleging a layoff which was in violation of the terms of the collective bargaining agreement. The company had previously been the subject of an EEOC complaint filed by certain female employees alleging sex discrimination with respect to its hiring policies and job classification system. The EEOC found the system of departmental- and plant-wide seniority, provided for in the agreement, unlawful because it perpetuated the effects of past sex discrimination. Accordingly, the company and the EEOC entered into a conciliation agreement which would effectively shield women from the effects of the past discriminatory practices.[102] After refusing to sign the agreement, the union

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have considered the exhaustion issue have invariably held that an employee need not exhaust his or her contractual remedies before initiating a Title VII action. Leone v. Mobile Oil Corp., 523 F.2d 1153 (D.C. Cir. 1975); Waters v. Wisconsin Steel Workers, 502 F.2d 1309 (7th Cir. 1974); Tuma v. American Can Co., 373 F. Supp. 218 (D.N.J. 1974); Kewin v. Melvendale Bd. of Educ., 65 Mich. App. 472, 237 N.W.2d 514 (1975); Markarian v. Roadway Express, Inc., 56 Mich. App. 43, 223 N.W.2d 356 (1974).

[99]415 U.S. at 53.

[100]*See, e.g.*, Southbridge Plastics Div. v. Rubber Workers Local 759, 403 F. Supp. 1183 (N.D. Miss. 1975); Goodyear Tire & Rubber Co. v. Rubber Workers Local 200, 42 Ohio St. 2d 516, 330 N.E.2d 703 (1975); Bridgeton Educ. Ass'n v. Board of Educ., 132 N.J. Super. 554, 334 A.2d 376 (1975); Board of Higher Educ. v. Professional Staff Congress, 80 Misc. 2d 297, 362 N.Y.S.2d 985 (1975).

[101]403 F. Supp. 1183 (N.D. Miss. 1975).

[102]The conciliation agreement provided, in part, as follows:

> [A]ll recruiting, hiring, training, compensation, overtime, job classifications and assignments, working conditions and privileges of employment shall be maintained and conducted in a manner which does not discriminate on the basis of race, color, sex, religion or national origin in violation of Title VII of the Civil Rights Act of 1964, as amended.
>
> . . . .
>
> . . . [N]otwithstanding any provision(s) of any collective bargaining agreement to which it is a party at its Corinth facility, including a contract with the International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America and its Local Union Number 759, [Southbridge] will adhere to the following:
>
> a. No female employee, whether employed at the present time or hired at a future date, will be removed from her job or her shift by a male employee by utilization of the shift preference provisions of any collective bargaining agreement in effect at the Corinth facility.

initiated grievances when several senior males were not given preference in shift assignments within the plant. Southbridge refused to arbitrate, reasoning that if the arbitrator's decision were favorable to the union members, the company would be required to reassign female employees, contrary to Title VII and the EEOC conciliation agreement. The company then sought an injunction "to preclude the union from utilizing the clauses of the collective bargaining agreement upon which it relies in initiating and processing the instant grievances."[103] Citing *Alexander*, the court stated the following:

> The court is of the opinion that *no useful purpose would be served by requiring arbitration of the grievances* filed by the union members. Since the arbitrator should not and could not go beyond the bounds of the collective bargaining agreement in resolving the dispute before him, he or she would be unable to consider the effect of Title VII upon the relative rights of the parties. "[T]he arbitrator has authority to resolve only questions of contractual rights. . . ." Arbitration under these conditions would be futile and pointless.[104]

The decision in *Southbridge* is unfortunate and probably incorrect. It is doubtful that the *Alexander* decision stands for the proposition that federal courts should grant such injunctive relief merely

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> b. In the event that it becomes necessary for [Southbridge] to lay off employees who are in effect at the Corinth facility and said layoff will result in females being laid off if the applicable provisions of the collective bargaining agreement were utilized in a greater percentage than they constitute of the bargaining unit, the following procedure will be utilized:
>
> (1) Female employees will be laid off in direct proportion to the percentage which they make up of a bargaining unit covered by a collective bargaining agreement. For example, if in a bargaining unit covered by a collective bargaining agreement which has four hundred (400) members of which three hundred (300) are male and one hundred (100) females who have less plant seniority than the males, [Southbridge] decides to lay off one hundred (100) employees, then since females constitute 25 percent of the bargaining unit, twenty-five (25) females in order of their seniority will be laid off.
>
> (2) In no event will any female employee be laid off by utilization of the foregoing procedure if she would not have been laid off if the applicable contract provisions were utilized. For example, if [Southbridge] were to lay off one hundred (100) employees in accordance with the terms of the applicable collective bargaining agreement and only ten (10) females would be laid off, then only ten (10) females will be laid off.

Id. at 1185-86.

[103] *Id.* at 1185.

[104] *Id.* at 1188 (citations omitted) (emphasis added).

because the court feels that an arbitrator should not and would not consider the effect of Title VII upon the relative rights of the parties. *Alexander* contemplates that the parties may resolve Title VII-type disputes in the grievance and arbitration procedures.[105] In *Southbridge*, the court felt that "no useful purpose would be served by requiring arbitration."[106] Arbitration of the dispute in this case *may* have served no useful purpose, but this is not to assert that arbitration *could not have* served a useful purpose. The arbitrator could well have adopted Howlett's theory[107] that the agreement "incorporates the law" and then rendered a decision consistent with Title VII. In addition, the conciliation agreement would not have precluded such a result. A conciliation agreement "is nothing more than a contractual settlement of a dispute prior to filing of suit, and, as such, is to be analyzed according to the general contract law principles of federal law."[108] Furthermore, the agreement may be more exacting than Title VII by requiring the parties to the agreement to engage in a course of action not otherwise required by Title VII.[109] In *Southbridge*, the union was not a party to the conciliation settlement and was therefore not affected by any "deals" the employer struck with the EEOC. The Company effectively bound itself to two agreements, one with the union, and another with the EEOC. With respect to the rights of the parties under the collective bargaining agreement, the conciliation agreement was a nullity. If, in fact, the seniority provisions of the collective bargaining agreement were in conflict with Title VII, a determination to this effect could have been made independently of the conciliation agreement. Moreover, an arbitrator may well have made this determination under the collective bargaining agreement so as to render a decision consistent with Title VII. The *Southbridge* solution of denying the union access to arbitration encourages employers to attempt to extricate themselves from the unenviable dilemma of defending actions in two forums, a solution arguably neither warranted nor contemplated by *Alexander*.

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[105]415 U.S. at 55.

[106]403 F. Supp. at 1188.

[107]Howlett, *The Arbitrator, the NLRB, and the Courts*, note 29 *supra*. *See* notes 39-44 *supra* and accompanying text.

[108]EEOC v. Mississippi Baptist Hosp., 12 Fair Empl. Prac. Cas. 411, 412 (S.D. Miss. 1976).

[109]*See, e.g.*, Jersey Cent. Power & Light Co. v. Local 327, IBEW, 508 F.2d 687 (3d Cir. 1975), where the conciliation in effect required the company to establish a five-year affirmative action program designed to increase the percentage of minority group and female employees. In addition, it provided for reporting, modification of the maternity leave policies, and certain payments by the company to employees and others for past discriminatory practices. *Id.* at 695.

Bridgeton Education Association v. Board of Education[110] was decided subsequently to *Alexander* and dealt with the issue of arbitral authority to decide statutory issues. In *Bridgeton*, the teachers' association filed grievances when the Board of Education unilaterally changed the requirements that special education teachers would have to satisfy in order to continue receiving extra pay of $400. Following the grievance procedure in the contract, the association processed the grievance through four steps, but the final determination was adverse to the teachers. Rather than proceeding to arbitration, the association filed suit claiming that such a policy change is a working condition which must be negotiated under state law. The Board of Education argued that the elimination of extra compensation was merely a "policy decision," and, as such, the grievance procedure was the proper method for resolving the dispute under New Jersey law; since the association had already chosen the grievance procedure, it was foreclosed from filing suit due to estoppel, laches, and failure to exhaust administrative remedies.[111]

In holding for the teachers, the court identified the issue to be whether the association was foreclosed from instituting the suit because it had previously elected to file a grievance.[112] The court stated that it was "uniquely a court's function to rule on alleged violations of statutes."[113] "The grievance procedure does not and cannot decide if a statute has been violated. That question is for the court, and the fact that an act may constitute a grievance does not foreclose a court from deciding if the same act also violates a statute."[114]

The New Jersey court was correct in stating that the grievance does not and cannot decide if a statute has been violated. Recognizing that this case did not involve a violation of Title VII, the New Jersey court cited Justice Powell's language in *Alexander*: "[T]he distinctively separate nature of . . . contractual and statutory rights is not vitiated merely because both were violated as a result of the same factual occurrence."[115] But, as in *Southbridge*, the grievance procedure could have resolved the dispute and the resolution may well have been consistent with the statute. Arguably, the court had a more narrow alternative available in *Bridgeton*. Pursuant to the policy of the National Labor Relations Board, the court could have deferred to the arbitrator's expertise in resolving the grievance

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[110]132 N.J. Super. 554, 334 A.2d 376 (Super. Ct. 1975).

[111]*Id.* at 557, 334 A.2d at 378.

[112]*Id.*

[113]*Id.*

[114]*Id.*

[115]*Id.* (quoting Alexander v. Gardner-Denver Co., 415 U.S. 36, 50 (1974)).

dispute while still retaining jurisdiction to the Title VII suit. If the arbitral resolution was contrary to, or inconsistent with the statute, the court could have amended or vacated the award. Such an alternative would have accommodated the arbitral forum while at the same time preserving the statutory rights of the parties.

Goodyear Tire & Rubber Co. v. Rubber Workers Local 200,[116] decided subsequently to *Alexander*, involved arbitral authority and Title VII-type issues. Goodyear filed an action in state court seeking to vacate an arbitrator's award granted pursuant to the terms of the collective bargaining agreement. The company and the union were parties to two agreements, a collective bargaining agreement and a pension agreement. The union challenged provisions in each agreement, applying different standards to maternity disability from those applied to other forms of disability caused by illness or injury.[117] The dispute was submitted to arbitration as provided for in the grievance procedure of both agreements and the arbitrator sustained the grievance with regard to the payment of disability benefits under the pension agreement. No case for a denial of disability leave or extension was presented under the collective bargaining agreement. The company argued that the arbitrator had exceeded his powers in that he made an error in law by determining that the EEOC guidelines[118] were federal regulations. The pension agreement in effect at the time of the dispute contained a clause which provided that "the provisions [of the agreement] may be appropriately modified where necessitated by federal or state statute or regulation."[119] The arbitrator held that the guidelines had become a part of the Code of Federal Regulations, and, accordingly, constituted a federal regulation within the meaning of the pension agreement.[120]

The Ohio Supreme Court refused to vacate the award. The court stated that the company was correct in asserting that the EEOC guideline cited was not a federal regulation, but rather an admini-

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[116]42 Ohio St. 2d 516, 330 N.E.2d 703 (1975).

[117]The collective bargaining agreement provided for temporary disability leave for the period of any illness, but limited pregnancy leave to four months after the birth of the child. The pension agreement provided for the payment of disability benefits for a maximum of 52 weeks for all disabilities due to any one pregnancy. *Id.* at 517, 330 N.E.2d at 705.

[118]The specific guideline concerning employment policies relating to pregnancy and childbirth, 29 C.F.R. § 1604.10(b) (1976), essentially provides that disabilities caused or contributed by pregnancy or related conditions must be treated in the same manner as other temporary disabilities for purposes of benefits, privileges, and leave.

[119]Goodyear Tire & Rubber Co. v. Rubber Workers Local 200, 42 Ohio St. 2d at 519, 330 N.E.2d at 706.

[120]*Id.* at 520-21, 330 N.E.2d at 707.

strative determination of the meaning of Title VII promulgated by the EEOC.[121] In addition, the decision of the arbitrator was held to be ambiguous.

> It could mean either that the arbitrator believed the Guideline to be binding, or that he interpreted the term "regulation," as used in the contract, to include an administrative Guideline such as this one, which was published in the Code of Federal Regulations and was an administrative interpretation of a federal statute.[122]

Nevertheless, the court, citing *Enterprise Wheel*, stated that "[a] mere ambiguity in the opinion . . . which permits the inference that the arbitrator may have exceeded his authority, is not a reason for refusing to enforce the award."[123]

It is interesting to contrast the decision by the Ohio Supreme Court with that of the federal court in *Southbridge*. In *Southbridge*, the arbitrator was never afforded the opportunity to resolve the dispute under the collective bargaining agreement. Rather, the federal court ruled that "no useful purpose could be served by requiring arbitration" since the arbitrator could not and should not consider the effect of Title VII on the rights of the parties. Had the facts of *Goodyear* been before the *Southbridge* court, the decision may have gone the other way. The federal court may have reasoned that since the EEOC guidelines are not federal regulations, the arbitrator could not consider the effects of Title VII with respect to the disputed contractual provisions. Concededly, the contract in *Goodyear* made it easier for the arbitrator to render a decision based on the agreement which would be consistent with Title VII. Unlike the contract in *Southbridge*,[124] the *Goodyear* agreement contained an explicit provision which effectively allowed the arbitrator to appropriately modify the agreement where necessitated by federal or state statute or regulation.[125] But again, the arbitrator could have concluded that the contract in *Southbridge* did "incorporate the law," based on a Howlett-type theory, and thereby rendered a decision consistent with Title VII.

V. Conclusion

The main infirmity in applying the law to resolve Title VII-type grievances is neither that arbitrators, as a class, are incompetent,

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[121] *Id.*

[122] *Id.*

[123] *Id.* at 522, 330 N.E.2d at 707.

[124] *See* note 102 *supra*.

[125] 42 Ohio St. 2d at 520, 330 N.E.2d at 706.

nor that the entire discrimination area is so complex that arbitrators could not acquire the necessary expertise to resolve the case consistently with Title VII or other relevant statutes.[126] Rather, the infirmity lies in clothing the arbitrator's decision with a greater degree of finality than that of a federal court, which is the effective result when an individual is precluded from commencing a Title VII action because he first resorted to the arbitral forum. In light of the paramount national policy of eliminating employment discrimination, it is desirable to protect an individual from an erroneous decision by allowing an effective appeal from an arbitral decision when Title VII rights are at issue; such is the state of the law after *Alexander.*

Alexander mandates that the courts grant a statutory remedy *in addition to, and not as a substitute for,* any contractual remedy granted by an arbitrator. As indicated earlier,[127] the courts in *Southbridge* and *Bridgeton* effectively granted statutory relief as a substitute for arbitration. Therefore, the result in the *Goodyear* decision is arguably more consistent with the tenor of *Alexander*; that is, although the arbitrator has the authority to resolve only questions of contractual rights, the arbitrator's decision pursuant to the collective bargaining contract may also afford the parties a solution to an industrial dispute which is consistent with Title VII.

Indeed, there are compelling policy reasons for providing the arbitral forum with the opportunity to resolve Title VII-type grievances, notwithstanding the absence of finality under *Alexander.* While *Alexander* made it clear that an arbitrator's decision does not preclude an employee from subsequently filing a Title VII action in federal court, it nevertheless sanctioned the grievance and arbitration mechanism as a relatively inexpensive and expeditious means for resolving a wide range of disputes, including claims of discriminatory employment practices.[128] This would especially be true when

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[126]There is a tacit assumption throughout the discussion in this Article, and the discussion in *Alexander* with respect to the competence or expertise of labor arbitrators. The assumption is that an arbitrator who lacks expertise in the Title VII area will do better to ignore the legal issues, rather than attempt to decide the issue, hoping to resolve the dispute consistently with Title VII, notwithstanding the lack of expertise; or attempt to educate himself with respect to Title VII and then make the decision, again hoping to resolve the grievance in accordance with the law. Perhaps the main focus should be on the parties that control the arbitration process. The union and employer may in fact not want to settle the legal issue and that is why they are in arbitration, not in a court of law. In cases where the parties are in arbitration because they prefer a settlement rather than employee rights under Title VII, the decision in *Alexander* not to preclude an individual from initiating a suit in federal court subsequent to an arbitral hearing appears all the more correct.

[127]*See* notes 101-15 *supra.*

[128]415 U.S. at 55.

the agreement contains a nondiscrimination provision similar to that of Title VII.[129]

Considering the expense and time necessary to process a Title VII-type grievance, use of the arbitral forum would relieve the EEOC and the federal courts of a large backlog.[130] Initial resort to the arbitral forum would further the use of the arbitral process, while relieving the administrative and judicial machinery of cases which could be settled at the grievance or arbitration level. Having employees submit all grievances under the grievance procedure—a procedure negotiated, maintained, and administered by the union—would also tend to minimize any possible disruptive influences resulting from first resorting to "outsiders" for assistance, while enhancing the status of the union as the exclusive bargaining representative. The arbitral forum also provides a means of satisfying the common desire of both labor and management to avoid the adverse publicity of a Title VII suit.

The arbitration procedure itself may even be of therapeutic value to the individual employee in the broader context of democratic self-government in grievance matters. Both parties in an arbitration have the opportunity to select the individual who may ultimately be the final arbiter of the dispute. By selecting an arbitrator who is acquainted with the industrial setting, the resulting decision will more likely measure up to the expectations of the parties.[131]

In view of the aforementioned advantages of the arbitral forum, it becomes crucial to maintain such a forum as a viable institution

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[129]In Emporium Capwell Co. v. Western Addition Community Organization, 420 U.S. 50 (1975), a post-*Alexander* decision, the Court again voiced its approval of the grievance mechanism for the possible resolution of Title VII claims. The Court stated: "The collective-bargaining agreement involved here prohibited without qualification all manner of invidious discrimination and made any claimed violation a grievable issue. The grievance procedure is directed precisely at determining whether discrimination has occurred." 420 U.S. at 66. In this particular case, that orderly determination could resolve a "pattern or practice" of discrimination. *Id.* at 66-67.

[130]For example, in fiscal year 1974 the EEOC received 56,000 new charges; meanwhile, 78,000 investigations were in process. 9 EEOC ANN. REP. 47 (1974). The total budget for the EEOC during this period was 44.5 million. *Id.* at 29.

[131]When discrimination is at issue, the question arises over how to select the arbitrator and how to conduct the hearing so as to insure that all the facts and issues are presented in a manner which adequately addresses the discrimination issue. A common criticism of arbitration is that the grievant generally has no say in selecting the arbitrator and no effective role in conducting the hearing. *See* Brodie, *Antidiscrimination Clauses and Grievance Processes*, 25 LAB. L.J. 352 (1974); Bloch, *Race Discrimination in Industry and the Grievance Process*, 21 LAB. L.J. 627 (1970). The argument that it may be unrealistic to trust the arbitration process to resolve Title VII disputes when the process is written, designed, and controlled by the parties may have much

for the resolution of civil rights disputes. The opposite tendency could well result by an overextension of *Alexander*. The mere possibility that an arbitral award will not be in accord with the mandates of Title VII, either because the arbitrator fails to "look to the law for help" in resolving a contractual dispute, or because the arbitrator incorporates an incorrect interpretation of Title VII in his award, should not preclude access to the arbitral forum. Courts should not grant statutory relief as a substitute for contractual remedies. To do so would effectively displace an individual's contract rights with those of a statute, a result not warranted or even contemplated by *Alexander*.

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merit, especially if the individual is simultaneously charging the union and the employer with acts of discrimination. *See, e.g.*, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Local 189, United Papermakers v. United States, 416 F.2d 980 (5th Cir. 1969).

A partial solution to the potential conflict-of-interest problem is to allow grievants to appear with their own counsel at the arbitration hearing. However, in absence of clear evidence that the grievant will not be fairly represented by the union, he or she will generally not be permitted to retain outside counsel to prosecute a claim. In addition, outside civil-rights or other interest groups will not be allowed any third-party intervention rights to submit grievances, or to represent employees in arbitration who are covered by a contract and represented by a union. Even if the individual is provided the option to be represented by his or her own attorney in an arbitration hearing, this option may be of doubtful effectiveness if the individual is urging an interpretation of the collective bargaining agreement which differs from that of the parties who negotiated the contract, or if the individual is attacking the provisions of the agreement as being "unjust" or "improvidently negotiated." In addition, Meltzer has noted that the grievant who exercises that option would in effect be expressing his distruct of union representation whose good will might be important in preparing the case. Meltzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 45 (1971).