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# Affirmative Action Issues and the Role of External Law in Labor Arbitration (with L. Stallworth) (symposium)

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# AFFIRMATIVE ACTION ISSUES AND THE ROLE OF EXTERNAL LAW IN LABOR ARBITRATION*

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A claimant alleges that an employer has discriminated against Hispanic Americans with respect to promotional opportunities. The employer responds that greater opportunities for advancement of Hispanic employees must be consistent with the efficient and harmonious operation of the plant. The adjudicator orders that the seniority clause of the collective bargaining agreement must contain the following language: "Equal opportunity for employment and advancement under this clause shall be made available to all to the fullest extent and as rapidly as is consistent with efficient and harmonious operation of the plant."[1]

Although the above scenario would appear to describe federal court litigation under Title VII of the 1964 Civil Rights Act[2] (Title VII), it is actually taken from a 1942 decision of the National War Labor Board (War Labor Board).[3] The War Labor Board's promotion of grievance arbitration is generally credited with establishing arbitration as the predominant method for settling disputes over the interpretation and application of collective bargaining agreements.[4] Thus, since the modern beginning of the institution of labor arbitration, collective bargaining agreements have addressed equal employment opportunity (EEO) is-

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1 Phelps Dodge Corp., 1 War Labor Reports 29 (1942).

2 42 U.S.C. § 2000e (1976 & Supp. 1982).

3 *See supra* note 1 and accompanying text.

4 *See infra* notes 11-14 and accompanying text.

sues,[5] and arbitrators have been asked to resolve EEO related grievances. Nevertheless, there has been an ongoing debate over the ability and propriety of arbitrators resolving EEO issues. Since the enactment of Title VII, the debate has focused on the role of external law in grievance arbitration. The debate is part of a broader controversy over the appropriate role of the grievance arbitrator.

This article analyzes the treatment of affirmative action issues in the context of the ongoing debate over the labor arbitrator's role. Part I briefly chronicles the rise of modern labor arbitration and develops the issue of the role of law in arbitration within the context of a broader issue—the role of the arbitrator. Part II examines the general impact of Title VII on grievance arbitration. Part III analyzes arbitration awards which have interpreted affirmative action agreements between employers and unions. The article compares arbitration awards to the developing case law concerning voluntary affirmative action. The research finds significant similarities between the arbitration approach to disputes under voluntary affirmative action agreements and the judicial approach to Title VII challenges to voluntary affirmative action plans. This harmony is attributed to the context within which unions and employers negotiate affirmative

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[5] The War Labor Board addressed cases involving sex discrimination in employment and instituted the principle of giving equal pay to women who performed the same quality and quantity of work as men. *See, e.g.*, General Elec. Co. and Westinghouse Elec. Mfg., Co., 17 L.R.R.M. (BNA) 1667 (1945); Rotary Cut Box Shook Indus., 13 L.R.R.M. (BNA) 1709 (1943); General Motors Corp., 11 L.R.R.M. (BNA) 1571 (1942); Brown and Sharpe Mfg. Co., 11 L.R.R.M. (BNA) 1567 (1942). When women replaced men in jobs which were altered to accommodate them, the Board ordered proportionate rates for proportionate work. *See, e.g.*, Norma-Hoffman Bearings Corp., 10 L.R.R.M. (BNA) 1085 (1942). Further, if assigning heavy tasks to male workers could be done without increasing the cost of production, the Board saw no reason for differential rates of pay. Brown and Sharpe Mfg. Co., 11 L.R.R.M. (BNA) 1567 (1942).

Similarly, the Board addressed issues of race-based discrimination. In 1941, the President issued an Executive Order strongly declaring that equal opportunity is the policy of the United States. In carrying out this objective, the Board again adopted the principle of giving equal pay for equal work. *See, e.g.*, Southport Petroleum Co., 12 L.R.R.M. (BNA) 1777 (1943); Miami Copper Co., 15 L.R.R.M. (BNA) 1538 (1944). In addition, the Board advocated eliminating race discrimination in such areas as promotion, transfer, discharge, and discipline. *See, e.g.*, Phelps Dodge Corp., 1 War Labor Reports 29 (1942) (addressing discriminatory promotion policies regarding Hispanics); Hercules Power Co., 11 L.R.R.M. (BNA) 1795 (1943) (requiring that all the employees of a defense contractor, including black employees, be given equal opportunity for advancement). Thus established, sex and race-based discrimination could be attacked through contractual grievance procedures, despite the absence of a law requiring equal opportunity.

action agreements. Part IV analyzes the arbitration of grievances arising out of unilateral employer action undertaken to meet the employer's alleged affirmative action obligations. Specifically, the article finds a sharp division among arbitrators over whether, and to what extent, an arbitrator should consider affirmative action obligations. It argues that, in appropriate cases, arbitrators should consider an employer's affirmative action obligation and provides a framework for such consideration under the collective bargaining agreement. The analyses in Parts III and IV leads to the overall conclusion that arbitration can provide an appropriate forum for the resolution of affirmative action disputes, absent a conflict of interest among labor, management, and bargaining unit employees.

## I. THE RISE OF LABOR ARBITRATION AND THE CONTROVERSY OVER THE ARBITRATOR'S ROLE

Professor Lawrence Stessin asserted:

> The first recorded instance of labor arbitration in America is enjoying its own bicentennial. It seems that an ironmonger was hired to forge a chain and stretch it across the Hudson River in order to frustrate any British attempt to use the waterway in Britain's campaign against Washington's army. The ironmonger wanted tuppance more than the going rate as "danger pay" on the grounds that if the mission failed and he was caught, his fate would be sealed. His employer insisted that the project was not *that* dangerous and suggested that a local clergyman be selected to decide the dispute. The worker won.[6]

The form of arbitration referred to by Stessin, commonly known as interest arbitration, involves the determination of the terms and conditions of a labor agreement. The first grievance arbitration, interpreting and applying an existing labor agreement, was heard by Judge William Elwell of Bloomsburg, Pennsylvania.[7] Judge Elwell was selected by the Committee of the Anthracite Board of Trade and the Committee of the Workingmen's Benevolent Association to serve as an umpire to settle disputes between those parties involving "questions on interferences with the works, and discharging men for their connection with the Workingmen's Benevolent Association."[8] Judge Elwell rendered his award on April 19, 1871.

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[6] Stessin, *Expedited Arbitration: Less Grief over Grievances*, 55 HARV. BUS. REV. 128, 133 (1977) (emphasis in original).

[7] E. WITTE, HISTORICAL SURVEY OF LABOR ARBITRATION 11 (1952).

[8] R. FLEMING, THE LABOR ARBITRATION PROCESS 2 (1965).

The decision apparently satisfied the parties because they thereafter agreed to let Judge Elwell decide the "bill of wages."[9]

Toward the end of the nineteenth century and at the beginning of the twentieth century, arbitration was used to settle disputes in the apparel, coal, entertainment, and railroad industries. Arbitration received a major boost in 1937 when General Motors and the United Auto Workers agreed that, upon mutual consent, unresolved grievances would be referred to an impartial umpire.[10]

On January 12, 1942, President Roosevelt established the War Labor Board and charged it with the responsibility of settling labor disputes which threatened to disrupt war-time production.[11] The War Labor Board encouraged parties to include grievance and arbitration provisions in their collective bargaining agreements, and in cases where one party resisted inclusion of an arbitration clause, the Board usually ordered it.[12] The War Labor Board's policy toward grievance arbitration stimulated the development of that procedure as the predominant method of settling disputes under a collective bargaining agreement. By 1944, seventy-three percent of collective bargaining agreements contained arbitration provisions.[13] Currently, over ninety-eight percent have such provisions.[14]

As grievance arbitration grew in acceptance, academicians, lawyers, and other practitioners directed their attention to the fundamental question of whether arbitration is an extension of the collective bargaining process in which arbitrators attempt to mediate disputes or whether it should be regarded as a quasi-judicial process. Two well known labor relations experts at the time addressed the question concerning the proper role of the arbitrator and the function of the arbitration process. In 1949, Dr. George W. Taylor, former chairman of the War Labor Board, maintained that the "fundamental nature of grievance arbitration" is derived from three basic characteristics: (1) the grievance arbitration clause is the *quid pro*

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9 *Id.* Judge Elwell essentially held that the labor agreement was as sacred as other contracts and must be adhered to. Further, according to Judge Elwell, there should be no discrimination against union members and officers. Lastly, he recommended the creation of a dispute settlement mechanism to resolve labor disputes. *Id.*

10 *See* Nolan & Abrams, *American Labor Arbitration: The Early Years*, 35 U. FLA. L. REV. 373 (1983). *See generally* R. FLEMING, *supra* note 8, at 2-14 (a discussion on arbitration practice at the turn of the century).

11 Exec. Order No. 9017, 7 Fed. Reg. 237 (1942).

12 *See generally* Freidin & Ulman, *Arbitration and the National War Labor Board*, 58 HARV. L. REV. 309 (1945) (discussing the role of the National War Labor Board); R. FLEMMING, *supra* note 8, at 14-21 (reviewing the period between 1941-57).

13 R. FLEMING, *supra* note 8, at 18.

14 BASIC PATTERNS IN UNION CONTRACTS 33 (11th ed. 1986).

*quo* for the no strike or lockout agreement; (2) the clause constitutes an agreement to arbitrate future unknown disputes; and (3) grievance arbitration invariably involves additional efforts toward fashioning a more complete agreement, as well as the interpretation of existing terms.[15] In light of these characteristics, Taylor asserted that grievance arbitration consists of more than mere contract administration but is also an extension or continuation of the process of making the labor agreement. As a consequence, Taylor concluded that grievance arbitration is logically an extension of the collective bargaining process.[16] Acceptability of the arbitrator's award becomes of paramount importance in the American system of industrial self-government.[17] Consequently, it becomes the role of the arbitrator and the function of the arbitration process to facilitate further agreement through the use of mediation and conciliation.[18] Yet this desire to obtain acceptability from the parties may operate to the detriment of the individual grievant's contractual and statutory rights. This is particularly a concern in race and sex discrimination cases where the interests of the union, management, and individual employees are not always in harmony.

J. Noble Braden, Vice-President of the American Arbitration Association, maintained an opposite viewpoint of the role of the arbitrator. Braden, in 1948, asserted that an arbitrator must adhere to a quasi-judicial role and thus base his or her decision only on the merits of the evidence presented. This contrasts sharply with the mediation approach where acceptability and compromise are the essence of the process.[19] Consequently, if the union presents the fac-

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15 Taylor, *Effectuation of the Labor Contract Through Arbitration*, in SELECTED PAPERS FROM THE FIRST SEVEN ANNUAL MEETINGS OF THE NATIONAL ACADEMY OF ARBITRATORS 1948-54, 21 (1957).

16 *Id.* at 21-22.

17 For further discussion on industrial self-government, see G. TAYLOR, GOVERNMENT REGULATION OF INDUSTRIAL RELATIONS (1948).

18 Taylor, *The Voluntary Arbitration of Labor Disputes*, 49 MICH. L. REV. 787, 795 (1951). For a supporting view, see W. SIMKIN, ACCEPTABILITY AS A FACTOR IN ARBITRATION UNDER AN EXISTING AGREEMENT 3, 67 (1952), as quoted in Garrett, *The Role of Lawyers in Arbitration*, in PROCEEDINGS OF THE 14TH ANNUAL MEETING, NATIONAL ACADEMY OF THE ARBITRATORS 117 (1957).

19 *See generally* Braden, *The Function of the Arbitrator in Labor-Management Disputes*, 4 ARB. J. 35 (1949) (reviewing Dr. Taylor's opinion on the role of arbitrators). For a similar view, see Morse, *The Scope of Arbitration in Labor Disputes*, 23 COMMONWEALTH REV. 1 (1941). Senator Wayne Morse perceived the role of the arbitrator as follows:

> The work of the arbitrator and the process of arbitration are entirely different from the work of the mediator and conciliator and the process of mediation and conciliation. Arbitration is a judicial process. The arbitrator sits as a private judge. . . . The principle of compromise has

tual evidence concerning the grievance, the arbitrator's decision will be based solely on this evidence and not upon an acceptable compromise. The Braden approach provides the individual grievant with a greater opportunity for a full and fair hearing. Of course, even this depends upon the ability of the union to adequately and honestly present the case before the arbitrator.

Braden also asserted that when a matter has been submitted to arbitration, it is presumed that the good offices of conciliation and mediation have been exhausted.[20] He further argued that, because both common law and statutory standards require arbitrators to be impartial and objective, the mediation approach in arbitration is inappropriate.[21]

Braden noted that during the late 1940's, there was a trend of incorporating into labor agreements "restrictive and limited arbitration clauses" which served to expressly limit the authority and power of an arbitrator. Also during this period, there was a similar increase in the number of court claims alleging that the arbitrator either exceeded his authority or failed to afford the parties a fair and impartial hearing. Braden asserted that these trends served as further evidence of the parties' preference to encourage arbitrators to adhere to a quasi-judicial role.[22]

The role of arbitration as a quasi-judicial process has become the dominant view in modern grievance arbitration. Within the confines of a quasi-judicial role, the arbitrator, facing grievances which also implicate statutory rights, must decide what effect, if any, to give to public law.

Traditionally, the arbitrator must base the decision on the contract, as an expression of the mutual intent of the parties. The arbitrator must not impose his or her own notions of justice on the parties, and must base the decision on the record made by the parties themselves. Lastly, the arbitrator may not alter the collective bargaining agreement by adding to or subtracting from its provi-

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> absolutely no place in an arbitration hearing. The moment an arbitrator compromises one of the issues involved in a case that moment he disqualifies himself as an arbitrator.

*Id.* at 3.

20 Braden, *Problems in Labor Arbitration*, 13 MO. L. REV. 143, 150 (1948).

21 *Id.* at 145.

22 *Id. See also* Davey, *Labor Arbitration: A Current Appraisal*, 9 INDUS. & LAB. REL. REV. 85 (1955). In support of Braden's position, Davey stated that few companies or unions wished to have the arbitrator depart from straight adjudication of the claim, and that there are very few arbitrators who could function effectively "in the George Taylor manner." *Id.* at 88. Accordingly, Davey maintained that "in grievance arbitration the arbitrator's function is properly a quasi-judicial one." *Id.*

sions. Arbitrators have developed their roles, over a period of years, to that of judges in a system of industrial justice. The arbitration system is private in the following sense:

> When the parties agree to arbitrate . . . it is they—and they alone—who control virtually the entire process: they structure and formulate the grievance-arbitration section of their agreement; they select the arbitrator, define the issues, determine the scope of his authority, set forth the criteria he may consider, control the remedy, provide for the binding effect of the award, and even arrange for its enforcement.[23]

Within this role, arbitrators have received a very broad measure of deference from the courts. Thirty years ago in the *Steelworkers Trilogy*,[24] the United States Supreme Court held that a grievance must be arbitrated unless it can be said with positive assurance that the dispute is not arbitrable. The Supreme Court also held that an arbitration award must be enforced as long as it draws its essence from the contract. This broad level of deference is premised on the parties' control of the system. Given that control, when the parties receive an award, they get exactly what they bargained for.[25]

The traditional function of the arbitrator to strictly interpret and apply the collective bargaining agreement was strained in the 1960's. The enactment of Title VII and the National Labor Relations Board's (NLRB) development of a policy of deferring to arbitration awards in unfair labor practice cases,[26] thrusts considerations of public law into the private arbitration process. A prominent debate at the 1967 meeting of the National Academy of Arbitrators focused attention on the impact of these developments on the arbitrator's role. The principals in this debate were Professor Bernard Meltzer and arbitrator Robert Howlett. The ongoing debate is often referred to as the Meltzer-Howlett controversy.

Professor Meltzer advocated the traditional view that the arbitrator is the proctor of the agreement and not the law, and therefore, he "should respect the agreement and ignore the law."[27] He

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[23] Gross, *The Labor Arbitrator's Role: Tradition and Change*, 25 ARB. J. 221, 223 (1970) (footnote omitted) (quoting P. PRASOW & E. PETERS, ARBITRATION AND COLLECTIVE BARGAINING: CONFLICT RESOLUTION IN LABOR RELATIONS 258 (1970)).

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

[25] *See* United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 37-38 (1987).

[26] *See, e.g.*, Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955).

[27] Meltzer, *Ruminations About Ideology, Law and Arbitration*, in PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 16 (1967).

contended that arbitrators lack the authority and the expertise to base an award on the law rather than on the contract,[28] and that courts and administrative agencies have the plenary authority, and the appropriate procedural framework to resolve such issues.[29]

Peter Seitz has been another strong advocate of confining arbitrators to their traditional roles. According to Seitz, police, courts, judges, probation officers, and prisons are "established by the state to fulfill and to vindicate public morality and public policy as articulated in the statute."[30] Seitz further argued that the arbitrator is a "creature of the labor agreement," and the arbitrator's jurisdiction is limited to interpreting and applying the labor agreement and not judging whether society has been injured.[31]

On the other hand, Robert Howlett viewed the arbitrator as a judge who is nonetheless "bound by law, whether it be the Fourteenth Amendment . . . or a city ordinance. . . . The law is part of the 'essence [of the] collective bargaining agreement' to which Mr. Justice Douglas [in the *Steelworkers Trilogy*] has referred . . . ."[32]

Professor James A. Gross has voiced support for the Howlett position, by reviewing the role of the arbitrator in light of relevant court decisions. In support of his conclusion, advocating the application of public law in arbitration, Gross argued:

> [T]he Trilogy cases clearly established a federal labor policy in which labor arbitration was substituted for the public judiciary as a forum in which to dispose of industrial disputes. Such a substitution requires a minimum arbitral *quid pro quo*, that is, in return for non-reviewability, labor arbitrators are expected to consider and, if appropriate, apply statutory and constitutional rights and obligations even where such public rights and obligations are contrary to the intentions of the parties.[33]

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[28] *Id. See* Roadmaster Corp. v. Production & Maintenance Employees' Local 504, 851 F.2d 886, 888 (7th Cir. 1988).

[29] Meltzer, *supra* note 27, at 16-17.

[30] Seitz, *The Arbitrator's Responsibility for Public Policy*, 19 ARB. J. 23, 24 (1964) [hereinafter *Arbitrator's Responsibility*]. *See* Seitz, *How to Succeed in Killing Arbitration Without Really Trying*, in SEMINAR ON COLLECTIVE BARGAINING: 1967 A VIEW OF CONTEMPORARY DEVELOPMENTS IN ARBITRATION 91-104 (1967). For a reply to Seitz's argument, see Gross, *Communications*, 21 INDUS. & LAB. REL. REV. 427, 431-32 (1967).

[31] *Arbitrator's Responsibility*, *supra* note 30, at 24.

[32] Howlett, *The Arbitrator, the NLRB, and the Courts*, in PROCEEDINGS OF THE 20TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 67, 83 (1967).

[33] Gross, *supra* note 23, at 225. In a similar article dealing with how arbitrators have accommodated state labor protective laws with regard to female employees, Professor Jean T. McKelvey came to the same conclusion as Professor Gross, that is, where the labor agreement conflicts with the public law, the arbitrator must rec-

Gross further argued that the reasonableness of the Supreme Court's required exhaustion of arbitral remedies in *Republic Steel v. Maddox*[34] and the Supreme Court's hands-off policy in the *Steelworkers Trilogy* "is dependent upon the fairness of the arbitration process that the individual grievant is obliged to use."[35] According to Gross, such fairness necessarily requires that the arbitrator accept the responsibility for the protection of the grievant's right to a full and fair hearing where (a) the union chooses not to protect such rights and/or, (b) the grievant is denied the right of participation or representation at the arbitration hearing. As a consequence, Gross concluded that the arbitrator must look, when necessary, beyond his or her obligation to the parties and act in accord with public policy and protection of the individual grievant's rights.

Although rejecting most of Howlett's contentions, Meltzer arguably appears to agree with Howlett on one point. Where federal law is helpful in resolving a question of contract interpretation, both Meltzer and Howlett assert that the arbitrator should interpret the contract in a manner consistent with the relevant statute. Underlying this apparent meeting of the minds is the thought that, when a contract clause is susceptible to two interpretations, the arbitrator should not render an award which would be repugnant to applicable law.[36]

As in most controversies, there is always some middle ground to be espoused by some other interested participant observers.[37] In the Meltzer-Howlett controversy, this role has been played by Richard Mittenthal and Michael Sovern.

Mittenthal asserted that a court can and does apply the relevant law in a contract dispute to the extent that the application of that law merely acts as a restriction on the initially rendered contract interpretation. Therefore, contrary to Howlett's belief that "the law is part of the essence [of the] collective agreement," Mittenthal maintained that it cannot be assumed by implication that the law is incorporated into the labor agreement. Mittenthal argued that the arbitrator derives his powers solely from the contract and not from any superior law. Thus, he continued, the arbitrator has no author-

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ognize and apply the public law. McKelvey, *Sex and the Single Arbitrator*, 24 INDUS. & LAB. REL. REV. 335, 353 (1971).

34 379 U.S. 650 (1965).

35 Gross, *supra* note 23, at 230 (footnote omitted).

36 Meltzer, *supra* note 27, at 15.

37 For an advocate's view espousing a middle ground position, see Scheinholtz & Miscimarra, *The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration*, 40 ARB. J. 55 (1985).

ity to apply the law in order to place limitations upon contractual rights. Mittenthal concluded that the arbitrator is a creature of the parties and is not vested with the responsibilities given to a judge to apply the limiting terms of an applicable statute to the labor agreement.[38]

Mittenthal, however, rejected Meltzer's position concerning the competence of arbitrators. Mittenthal asserted that many arbitrators possess the requisite expertise to apply the law. Moreover, the parties possess discretion in choosing an arbitrator whom they believe will fulfill their needs.[39] In response to Meltzer's argument that the parties are opposed to an arbitrator applying the law, Mittenthal cited the high frequency of savings clauses in collective bargaining agreements as evidence that the parties do not desire to be bound by an invalid provision. Notwithstanding his earlier conclusion that arbitrators lack plenary authority to apply the law, Mittenthal concluded that the parties do not desire to have the arbitrator accord merit to a provision which is clearly unenforceable under the law.[40] Moreover, because of the parties' desire for finality in arbitration, this desire might not be satisfied where an award ordering compliance with an illegal provision may be set aside by a reviewing court. In summary, Mittenthal concluded that the arbitrator should not render an award, if in so doing, the award requires conduct prohibited by law.[41]

Sovern, in agreement with Mittenthal, refuted Meltzer's "competency argument" by maintaining that certain arbitrators are capable of applying the law. Sovern further rejected Meltzer's argument that the parties are able to authorize the arbitrator solely to interpret and apply the contract and not the law. Sovern argued that the Supreme Court's rejection of conventional intent analysis as the definitive approach to interpreting arbitration agreements is the major force in opposition to Meltzer's "consent" argument.[42] In taking

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38 Mittenthal, *The Role of Law in Arbitration*, in PROCEEDINGS OF THE 21ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 43, 44-45 (1968).

39 *Id.*

40 *Id* at 49-50.

41 *Id* at 50 (emphasis in original). Mittenthal cautioned:

> This principle, however, should be carefully limited. It does not suggest that an 'arbitrator should pass upon all the parties' legal rights and obligations.' . . . 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.

*Id.*

42 Sovern, *When Should Arbitrators Follow Federal Law?* in PROCEEDINGS OF THE 23RD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 29, 37 (1970).

this position, Sovern compared the Supreme Court's policy concerning the presumption of arbitrability to the situation where the arbitrator's authority to resolve both statutory and contractual questions are in doubt. Based on this comparison, Sovern concluded that the arbitrator must seek the best answer, regardless of what the parties have intended. In the absence of any express provision to the contrary, Sovern would consider and apply the law.[43]

In addressing the question of when an arbitrator should apply the law, Sovern offered four conditions precedent to such actions: the arbitrator is qualified; the question of law is involved in a dispute over the application or interpretation of a contract before him; the question of law is raised by a contention that, if the conduct complained of does violate the contract, the law nevertheless immunizes it or even requires it; and lastly, the courts lack primary jurisdiction to adjudicate the question of law.

The most common issues of public law in grievance arbitration arise in the area of equal employment opportunity. A 1975 survey by then Professor, now United States Court of Appeals Judge, Harry T. Edwards, revealed that two-thirds of those arbitrators who responded would not interpret and apply the law in Title VII-related grievances.[44] Nevertheless, arbitrators have historically resolved and continue to resolve employment discrimination grievances, and the evidence indicates that they are doing so competently and in general accordance with the law under Title VII.[45]

## II. LABOR ARBITRATION AND TITLE VII

The Supreme Court has addressed the relationship between labor arbitration and Title VII on two occasions. The Court has refused to broadly preempt statutory rights to accommodate the institutional interests of labor arbitration, but has allowed lower courts to reconcile those rights and interests on a case-by-case basis. Similarly, the Court has refused to broadly preempt contractual rights to accommodate Title VII interests, but has suggested ways that arbitrators can reconcile the two on a case-by-case basis.

The Court in *Alexander v. Gardner-Denver Co.*[46] addressed the

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[43] *Id.*

[44] Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 59, 79 (1975).

[45] Stallworth & Hoyman, *The Arbitration of Discrimination Grievances in the Aftermath of Gardner-Denver*, 30 ARB. J. 49 (1984).

[46] 415 U.S. 36 (1974).

impact of labor arbitration on a Title VII cause of action. Gardner-Denver discharged Alexander, a black drill press trainee, allegedly for producing an excessive amount of scrap. Alexander claimed that his discharge violated the applicable collective bargaining agreement's just cause provision. He filed a racial discrimination complaint with the Colorado Civil Rights Commission, which referred it to the Equal Employment Opportunity Commission (EEOC). The arbitrator upheld Alexander's discharge, finding that Gardner-Denver had just cause. Alexander subsequently sued under Title VII. The lower courts, relying on the arbitration award, granted Gardner-Denver summary judgment.

The Supreme Court unanimously reversed and held that neither the doctrines of election of remedies or waiver, nor the federal policy favoring arbitration of employment disputes precluded a trial *de novo* on the Title VII claim. The Court also refused to adopt the NLRB's policy of deferral to arbitration awards in Title VII litigation.

The Court provided several compelling reasons to support its decision. The Court observed that Congress intended to vest final responsibility for the enforcement of private Title VII rights in the federal courts. According to the Court, it was the intention of Congress that Title VII supplement rather than supplant other discrimination remedies. In the Court's words:

> Title VII's purpose and procedures strongly suggest that an individual does not forfeit his private cause of action if he first pursues his grievance to final arbitration under the non-discrimination clause of a collective bargaining agreement.
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> . . . .
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> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under [the] collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these . . . rights is not vitiated merely because both were violated as a result of the same factual occurrence.[47]

The Court also rejected the argument that by proceeding to arbitration, Alexander had elected his remedies. The Court observed that Congress had set forth precise jurisdictional prerequisites for civil rights actions without mentioning arbitration. Therefore, the Court concluded that Title VII clearly provided for relief in several

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[47] *Id.* at 49.

nonexclusive forums and that it was not inconsistent to allow arbitration to resolve contractual rights while allowing the federal judiciary to resolve statutory rights.[48]

The *Alexander* Court also dismissed the related argument that by proceeding to arbitration, Alexander waived his Title VII rights. The Court reasoned that, unlike the union, whose responsibility it was to protect the collective rights of the bargaining unit members, Title VII protected the rights of the individual employee. The Court intimated its distrust of the institutional nature of the collective bargaining process:

> A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. And a breach of the union's duty of fair representation may prove difficult to establish. In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers.[49]

Because waiver of these rights would defeat the paramount congressional purpose behind Title VII, the Court determined that the individual statutory rights conferred by Title VII could form no part of the collective bargaining process.[50]

While acknowledging that arbitration was well suited for resolving contractual disputes, the Court concluded that arbitration was inappropriate for resolving Title VII disputes. The Court based its distinction on the arbitrator's desire to effectuate the parties' intent, rather than the requirements of the legislation.[51] Nevertheless, the Court gave lower courts a means by which to accommodate arbitration in Title VII litigation. The Court opined that the arbitration award may be admitted as evidence in the litigation and left it to the lower courts to determine the award's evidentiary weight. The *Alexander* Court commented:

> *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

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48 *Id.* at 59-60.
49 *Id.* at 58 n.19 (citations omitted).
50 *Id.* at 59-60.
51 *Id.* at 56-57.

> 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.[52]

The Supreme Court, in *W.R. Grace & Co. v. Rubber Workers, Local 759*,[53] addressed the degree to which an arbitration award may be supplanted by Title VII concerns. In *W.R. Grace*, the EEOC found reasonable cause to believe that Grace had discriminated against blacks and women in hiring for its Corinth, Mississippi plastics plant, and that the plant-wide seniority system, provided for in the collective bargaining agreement, unlawfully perpetuated the effects of past discrimination. The EEOC and the company began conciliation negotiations in which the union refused to participate.

While conciliation negotiations were pending, the collective bargaining agreement expired and the union struck. The company hired replacements, including women, for positions in which it had not previously employed women. The parties settled the strike with a new contract which continued the plant-wide seniority system. The company retained the female strike replacements and assigned them to positions ahead of returning male strikers who had greater seniority. The returning strikers filed grievances alleging that the company's action breached the shift preference provision of the contract.

The company refused to arbitrate. Instead, it filed an action in federal district court to enjoin the arbitration until it concluded conciliation negotiations with the EEOC. Before the court ruled, the company and the EEOC reached a conciliation agreement which ratified the company's position concerning shift preference and pro-

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52 *Id.* at 60 n.21 (emphasis added). *See also* Nolan & Abrams, *American Labor Arbitration: The Maturing Years*, 35 U. FLA. L. REV. 557, 619 (1983) (characterizing *Gardner-Denver* as inviting parties to construct arbitration procedures to allow courts to give awards substantial weight).

53 461 U.S. 757 (1983).

vided that, in the event of layoffs, the company would maintain the existing percentage of women in its work force.

The company then joined the EEOC as a defendant in its lawsuit and asked the district court to enjoin the arbitration awards which conflicted with the conciliation agreement. The EEOC cross-claimed against the union and counterclaimed against the company, seeking a declaration that the conciliation agreement prevailed over the contract or that the seniority system was not bona fide under Title VII of the 1964 Civil Rights Act.

With the matter pending, the company laid off employees in accordance with the conciliation agreement. Male employees who were laid off ahead of junior female employees filed grievances. The district court then held that the seniority system could be modified to alleviate the effects of past discrimination and that the conciliation agreement prevailed over the contract.

The union appealed, and while the appeal was pending, the company laid off additional employees in accordance with the conciliation agreement. Again grievances were filed by males who had been laid off, but had seniority over some females who were retained. The Fifth Circuit Court of Appeals reversed the district court, holding that the seniority system was bona fide and ordering the company to arbitrate. The company reinstated the laid off males and the claims for back pay proceeded to arbitration.

The first of the employee grievances came before Arbitrator Anthony J. Sabella, who held that the company breached the contract but denied the grievant back pay, reasoning that a back pay award would be inequitable because it would penalize the company for complying with an outstanding court order. The next three grievances came before Arbitrator Gerald A. Barrett, who held that he was not bound by the Sabella award and found that the contract made no exceptions for breaches committed in good faith and awarded back pay.

The Supreme Court held that enforcement of the Barrett award would not be contrary to public policy. It reasoned that the award did not require the company to make layoffs or to conduct the layoffs in breach of the conciliation agreement. Instead, the award merely ordered the company to compensate the grievants for the contract breach caused by its compliance with the conciliation agreement. The Court determined that the award did not violate the public policy requiring compliance with court orders.

The *W.R. Grace* Court also held that enforcement of the award would not contravene the public policy favoring conciliation of

equal employment opportunity disputes. In its reasoning, the Court clearly held that a conciliation agreement must be viewed in light of, and not in place of, the collective bargaining agreement.[54] The Court recognized that the Barrett award was not the only permissible result that an arbitrator could reach. It suggested ways that the arbitrator could have reconciled the contract with the law.

The Court observed that Barrett could have viewed the conciliation agreement and the district court order as giving rise to a defense of impossibility, but chose not to do so. The Court characterized the impossibility defense as a doctrine of contract interpretation, appropriate for an arbitrator to consider, but also observed that the defense might not be available when an employer's own actions create the condition of impossibility.[55]

The Supreme Court also observed that the contract provided the following severability clause: "In the event that any provision of this Agreement is found to be in conflict with any State or Federal Laws now existing or hereinafter enacted, it is agreed that such laws shall supersede the conflicting provisions without affecting the remainder of these provisions."[56] Similar clauses are common in other collective bargaining agreements. The Court recognized the company's argument that, in light of the clause, the contract itself required that the conciliation agreement prevail over the seniority provisions, but chided the company for presenting that argument to the lower court instead of to the arbitrator.

Finally, the Court's reasoning in holding that the award did not violate public policy suggests that arbitrators may consider the effects of a court order, and by implication, other legal obligations of the employer when fashioning a remedy for a contract breach. The *W.R. Grace* Court noted:

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54 The Court in *W.R. Grace* stated:

> In this case, although the Company and the Commission agreed to nullify the collective-bargaining agreement's seniority provisions, the conciliation process did not include the Union. Absent a judicial determination, the Commission, not to mention the Company, cannot alter the collective-bargaining agreement without the Union's consent. . . . Permitting such a result would undermine the federal labor policy that parties to a collective-bargaining agreement must have reasonable assurance that their contract will be honored. Although the ability to abrogate unilaterally the provisions of a collective-bargaining agreement might encourage an employer to conciliate with the Commission, the employer's added incentive to conciliate would be paid for with the union's contractual rights.

*Id.* at 771 (citations omitted).

55 *Id.* at 767.

56 *Id.* at 765 n.8 (quoting the 1974 and 1977 collective bargaining agreements).

> Compensatory damages may be available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy. This principle is particularly applicable here; since the employees' Union had no responsibility for the events giving rise to the injunction, and entered into the collective-bargaining agreement ignorant of any illegality, the employees are not precluded from recovery for the breach.[57]

Thus, the Supreme Court's holdings in *Gardner-Denver* and *W.R. Grace* were quite narrow. They do not preclude either the courts from accommodating arbitration awards in subsequent Title VII litigation or the arbitrators from accommodating an employer's equal employment legal responsibilities in interpreting and applying labor contracts. Indeed, the cases suggest ways of accomplishing both types of accommodation. The Court's decisions, however, beg the question of when such accommodations are appropriate. The delineation of an appropriate role for grievance arbitration in equal employment opportunity law may also provide insight into the use of arbitration in resolving employment discrimination disputes outside the collectively bargained grievance procedure.[58]

Judge Harry Edwards has suggested that arbitration is an appropriate vehicle for resolving employment discrimination disputes that are factual in nature and require only the application of established law. Employment discrimination cases raising unsettled issues of public law, however, should be left to the courts and administrative agencies. He cautions that the use of arbitration and other forms of alternative dispute resolution should not be allowed to sanction the replacement of public forums, protecting basic legal values, with private forums, resolving disputes on the basis of nonlegal social mores. He further observes that many issues of public law require a choice between conflicting public values. Such conflicts should be resolved by judges and other officials charged with lawmaking in the public interest, rather than private dispute resolvers.[59] Judge Edwards has also observed that a collectively bargained grievance and arbitration procedure may be ill-suited as a forum for

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[57] *Id.* at 769 n.13 (citations omitted).

[58] There is ongoing debate over whether the collectively bargained grievance and arbitration procedure can serve as a model for employment dispute resolution in the nonunion setting. *See* Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REF. 249 (1983); Stieber & Murray, *Protection Against Unjust Discharge: The Need for a Federal Statute*, 16 U. MICH. J.L. REF. 319 (1983); Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916 (1979).

[59] Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 671-72 (1986).

resolving complex employment discrimination issues. He has recognized that if arbitrators stray far outside the boundaries of traditional contract interpretation, their awards may not command the high level of deference that they currently receive from the courts. He has suggested that collectively bargained arbitration procedures are best used, and perhaps should be confined to, claims that an employer's conduct violated both the contract and the law.[60]

No issue in the field of equal employment opportunity has generated a deeper clash of public values than the propriety and legality of affirmative action for women and minorities. It is beyond debate that there is no EEO issue which raises more emotion and concern. Among other things, it brings to the fore the competing socio-economic interests of majority and minority groups over fundamental issues such as economic and job security. The Supreme Court has been sharply divided by this issue, deciding several of its affirmative action cases without a majority opinion.[61] The legal complexity of affirmative action issues may suggest that they are ill-suited for resolution in arbitration. By exploring the arbitration experience, the following two sections analyze the suitability of arbitration as a forum for resolving disputes involving affirmative action.

## III. Interpretation of Affirmative Action Agreements in the Arbitration Process

Arbitrators have been asked and authorized to resolve disputes over the interpretation and application of affirmative action plans agreed to by employers and unions. Some of these plans had been agreed to in collective bargaining.[62] Other plans were the result of conciliation agreements and consent decrees to which the union had been a party.[63] At least one published deci-

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

61 Most Supreme Court affirmative action decisions which have had majority opinions have obtained only five votes. *See, e.g.*, Johnson v. Transportation Agency, 480 U.S. 616 (1987); United States v. Paradise, 480 U.S. 149 (1987); Sheet Metal Workers Local 28 v. EEOC, 478 U.S. 421 (1986); Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986); Firefighters Local 1784 v. Stotts, 467 U.S. 561 (1984); Steelworkers v. Weber, 443 U.S. 193 (1979). Only in Firefighters Local 93 v. City of Cleveland, 478 U.S. 501 (1986), did the majority opinion receive six votes.

62 *See, e.g.*, Baltimore County Bd. of Educ., 84 Lab. Arb. (BNA) 642 (1985) (Wahl, Arb.); Glide School Dist. 12, 79 Lab. Arb. (BNA) 1138 (1982) (Lehleitner, Arb.); Flint Bd. of Educ., 77 Lab. Arb. (BNA) 244 (1981) (Daniel, Arb.).

63 *See, e.g.*, City of Toledo, 88 Lab. Arb. (BNA) 137 (1986) (Feldman, Arb.); Bethlehelm Steel Corp., 84 Lab. Arb. (BNA) 225 (1985) (Sharnoff, Arb.); Bethlehelm Steel Corp., 78 Lab. Arb. (BNA) 625 (1982) (Sharnoff, Arb.); International Paper Co., 68 Lab. Arb. (BNA) 155 (1977) (Taylor, Arb.); International Pa-

sion resulted from a grievance procedure established under an affirmative action agreement negotiated among a multi-employer association, union, and minority community groups.[64] These cases provide a reasonable basis for evaluating arbitration as a method for resolving disputes over affirmative action plans adopted voluntarily by both parties. They may appropriately be compared to the developing law of voluntary affirmative action under Title VII.

On two occasions, the Supreme Court has found that the voluntary affirmative action plans at issue were consistent with Title VII.[65] These cases have required that affirmative action plans be premised on a remedial purpose and that the rights of majority employees not be unnecessarily trammeled. The remedial purpose is present when the plan is designed to remedy a manifest racial, ethnic, or gender imbalance in a traditionally segregated job category. The plan's duration must be limited to an amount of time which is necessary to eliminate the imbalance. In other words, the plan must be aimed at attaining, rather than maintaining, racial, ethnic, or gender balance. Further, the plan must not unnecessarily or unduly adversely affect majority employees.

Six years before the Supreme Court first considered affirmative action under Title VII, Arbitrator Edgar A. Jones, Jr. issued one of the first published awards interpreting an affirmative action agreement.[66] The agreement was embodied in a consent decree which terminated Title VII litigation brought by the government against the union and the multi-employer association of which the company was a member. The agreement required the union, subject to the availability of qualified black applicants and employees, to refer, and the employers to hire, one black for every three other employees referred and hired within specific job classifications, until the respective classification's employees were twelve and one-half percent black. The agreement further provided that no employer was required to hire unqualified or unneeded workers, to discharge majority employees, or to maintain unneeded positions or job classifications.

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per Co., 65 Lab. Arb. (BNA) 197 (1975) (Williams, Arb.); Stardust Hotel, 61 Lab. Arb. (BNA) 942 (1973) (Jones, Arb.).

64 *See* Electrical Contractors Ass'n, 65 Lab. Arb. (BNA) 233 (1975) (Hughes, Arb.).

65 Johnson v. Transportation Agency, 480 U.S. 616 (1987); Steelworkers v. Weber, 443 U.S. 193 (1979).

66 Stardust Hotel, 61 Lab. Arb. (BNA) 942 (1973) (Jones, Arb.).

The grievance arose when the employer filled a vacancy for a captain in its showroom with a black captain from one of its other restaurants, instead of a more senior white captain. The showroom position was considered a promotion because it produced substantially greater tips. The employer contended that its action was justified by the consent agreement.

Arbitrator Jones observed that the consent agreement was the result of intense negotiations among the government, representatives of minority workers, the employers, and the union. In his view, the agreement represented an accommodation of the legitimate competing interests of each of these groups. His analysis presaged the Supreme Court's analysis of affirmative action six years later. Jones reasoned:

> [T]he decree seeks to effectuate a needed remedial discrimination, without which minority employees would never overcome the arbitrary handicaps of past years. But the decree seeks to do so without unreasonably surcharging other workers who may not be born into a racial minority but are nonetheless equally needful of jobs and promotions to sustain their own families in pretty much the same economic circumstances as their black coworkers.[67]

To this end, Arbitrator Jones regarded the consent decree as very carefully drafted, using precise language in setting forth the parameters of its minority preferences. Significantly, the decree provided for minority preferences with respect to hiring and promotion by job classification, but did not expressly provide preferences with respect to assignments to restaurants within job classifications. Such assignments, Arbitrator Jones concluded, were left to the operation of the contractual seniority system. Because the action of the employer went beyond the affirmative action agreement, Arbitrator Jones sustained the grievance.

Arbitrators have consistently ruled that minority status does not automatically entitle an employee to the benefits of an affirmative action agreement. The employee must qualify under the terms of the agreement. For example, in *International Paper Co.*,[68] Arbitrator J. Earl Williams held that the employer breached the contract by awarding a job to a black employee over a more senior white despite an affirmative action agreement covering the job. The agreement defined the beneficiaries of an affirmative action override of seniority as black employees hired before September 1, 1962 and those

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[67] *Id.* at 946.

[68] 65 Lab. Arb. (BNA) 197 (1975) (Williams, Arb.).

hired after that date and initially placed in positions that had previously been segregated. The junior black employee awarded the job, however, had been hired after 1962 and had not been placed in a previously all black position. Therefore, the arbitrator reasoned, she was not entitled to outbid a more senior white employee for the job.

Similarly, in *Bethlehem Steel Corp.*,[69] Arbitrator Joseph M. Sharnoff upheld the employer's award to a junior black employee of a position in a line-of-progression which would lead to a craft job, ahead of a senior black employee. Both had competed against a white employee who had the most seniority of the three. The black employee to whom the job was awarded was not in a craft position, whereas the more senior black employee who grieved was already in a craft position. Arbitrator Sharnoff sustained the employer's position that the affirmative action override of seniority was designed to increase the number of black employees in craft positions. Consequently, the only minority employees entitled to a racial preference in bidding for craft positions were those who were not already in other craft positions.

Even where particular minority employees fall within the class of employees an affirmative action agreement was intended to benefit, arbitrators have held that those employees are not entitled to a racial, ethnic, or gender preference which would exceed the remedial purpose of the agreement.[70] Arbitrator F. Jay Taylor's decision in *International Paper Co.*,[71] illustrates the remedial purpose limitation. In response to the Office of Federal Contract Compliance Programs' (OFCCP) findings of discrimination, the employer and union negotiated an affirmative action agreement which defined the class of black employees who had been subjected to past discriminatory practices and provided that whenever one of these employees was bidding for an opening in competition with other employees, the opening would be filled according to company seniority rather than job seniority. In all other circumstances, the job seniority provisions of the collective bargaining agreement were to govern.

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69 78 Lab. Arb. (BNA) 625 (1982) (Sharnoff, Arb.).

70 *See, e.g.*, Glide School Dist. 12, 79 Lab. Arb. (BNA) 1139 (1982) (Lehleitner, Arb.) (affirmative action agreement did not justify employer's exclusion of native American from consideration for layoff where native American representation in the employer's workforce exceeded that in the county); International Paper Co., 68 Lab. Arb. (BNA) 155 (1977) (Taylor, Arb.) (minority employee entitled to racial preference under affirmative action agreement loses entitlement upon attaining the position he would have attained in the absence of prior discrimination).

71 68 Lab. Arb. (BNA) 155 (1977) (Taylor, Arb.).

The grievance in *International Paper Co.* arose out of a vacancy posted by the company which resulted in bids from three employees. Two of the employees were white. One had greater company seniority and the other had greater job seniority. Had there been only these two employees bidding for the job, the position would have been awarded to the employee with the greater job seniority. However, the third employee who bid for the job was a member of the class of black employees who had been subjected to prior acts of discrimination. The black employee had the least amount of job seniority and the least amount of company seniority of the three bidders. Nevertheless, because of the black employee's bid, the company believed that the affirmative action agreement required it to award the job on the basis of company seniority. Consequently, it awarded the job to the white employee with the most company seniority.

Arbitrator Taylor sustained the grievance of the white employee with the most job seniority. He held that the affirmative action agreement should not apply because the black employee had reached the position within the company that he would have reached had there been no prior discrimination. Arbitrator Taylor reasoned as follows:

> The Jackson [affirmative action] Agreement . . . defined a remedy which would correct the effects of past discrimination. And to this Arbitrator the case turns on this key point—the intent of the Jackson Memorandum. Undisputedly, it was designed to dispose of claims of promotional discrimination as a practical matter on a workaday level, specifically in regard to Black employees. It has a purpose which, in effect, flows from the law of the land—the Civil Rights Act of 1964. In my opinion, once that purpose has been achieved, as was true in the instant case, then it cannot be used to circumvent the provisions of the Labor Agreement.
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> . . . .
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> Uncontested testimony and documented exhibits confirmed that there was no way that [the black employee] could further benefit by the provisions of the Jackson Agreement. Insofar as he was concerned, the Jackson Agreement had rectified the effects of past discrimination. If, then, the purpose of the Jackson Memorandum is to right a past wrong, and, as in the instant case there is no wrong to be righted, then why use the Jackson Memorandum as an instrument to promote one employee ahead of another in obvious and clear violation of Contract Seniority? I must reason that [a minority] employee can trigger Company Seniority rather than Job Seniority only

> when it would serve the purpose and intent of the Jackson Memorandum.[72]

When an arbitrator concludes that an affirmative action override of other contract provisions may apply, the arbitrator may still have to interpret the affirmative action language to resolve the grievance. Arbitrators interpret affirmative action language in ways that reconcile the affirmative action plan's remedial goals with the rest of the collective bargaining agreement. For example, in *Glide School District 12*,[73] Arbitrator George Lehleitner interpreted the contractual affirmative action plan that adopted an Oregon statute that provided that a school district shall maintain its affirmative action policy when reducing its work force and shall maintain the "approximate proportion of men, women and minorities in teaching positions in which those persons *are* underrepresented . . . ."[74] Arbitrator Lehleitner held that exemption from layoff would result only from underrepresentation at the time of the reduction in work force, and would not result merely because layoff by seniority would result in racial, ethnic, or gender underrepresentation in the work force. He reasoned that this interpretation was the plain meaning of "underrepresented" and the interpretation was consistent with the goal of affirmative action hiring. Otherwise, according to Lehleitner, affirmative action hiring would result in subsequent layoffs of senior majority employees, a result that would deter affirmative action hiring.

The foregoing discussion should not suggest that there is an evolving common law of the shop which interprets affirmative action agreements as narrowly as possible. Arbitrators have applied affirmative action agreements to a variety of facts, and where the record has established breaches of those agreements, arbitrators have awarded appropriate remedies.[75] Moreover, where an affirmative action agreement contains clear remedial goals, the agreement may

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72 *Id.* at 159-60.

73 79 Lab. Arb. (BNA) 1139 (1982) (Lehleitner, Arb.).

74 *Id.* at 1145 (emphasis in original). *See also* Baltimore County Bd. of Educ., 84 Lab. Arb. (BNA) 642, 646 (1985) (Wahl, Arb.) (school board permitted to transfer white male teacher instead of black female teacher with less seniority).

75 *See, e.g.*, City of Toledo, 88 Lab. Arb. (BNA) 137 (1986) (Feldman, Arb.); Bethlehem Steel Corp., 84 Lab. Arb. (BNA) 225 (1985) (Sharnoff, Arb.); Electrical Contractors Ass'n, 65 Lab. Arb. (BNA) 233 (1975) (Hughes, Arb.). *See also* Rutgers Univ., 85 Lab. Arb. (BNA) 1073, 1077 (1985) (Talmadge, Arb.) (evidence did not establish breach of affirmative action plan); Berkeley Unified School Dist., 80 Lab. Arb. (BNA) 1154, 1157 (1983) (Concepcion, Arb.) (evidence did not establish discriminatory preference of black female over white male in deciding who should be involuntarily transferred); School Bd. of Palm Beach County, 74 Lab. Arb. (BNA) 494, 498 (1980) (Manson, Arb.) (evidence did not establish that employer violated

impliedly modify other contractual provisions where such an implied modification is essential to attaining those goals. Arbitrator William Daniel found such an implied modification of the seniority provisions in *Flint Board of Education*:[76]

> Though the union would interpret the affirmative action program as requiring merely "taking positive action to insure equal opportunity" it is difficult to perceive what an equal opportunity would be provided to minorities or females if seniority were strictly applied. Reasoning backward from the absurdity of such a result it must be concluded that in some respect it was intended that an affirmative action program in order to function, would have to do so within a concept of modified seniority application. The equal opportunity spoken of by the parties would be hollow indeed if it were only the opportunity to apply and lose or apply and be in a seniority sense relegated to the lowest of positions. The conclusion of the arbitrator is that if indeed the parties have agreed to include within their contractual agreement an affirmative action program and application of such concepts then such would of necessity require a modification in the application of seniority so as to make the term "equal opportunity" meaningful and effective.[77]

The review of arbitration awards in this article finds that they fare well when compared with the United States Supreme Court decisions. Arbitrators have not expressly analogized to the Supreme Court's Title VII affirmative action decisions. They have, however, implicitly applied the Supreme Court's affirmative action guidelines in interpreting collectively bargained affirmative action plans. This should not be surprising. The nature of the collective bargaining process compels such an approach.

When a union agrees to an affirmative action plan it usually agrees to modify seniority and other long-standing contract provisions. The almost universal reason for such modifications is the need to remedy past discrimination. Agreement with a remedial purpose, however, is not equivalent to abandonment of seniority and related contract principles. Most affirmative action agreements are designed to override seniority and related contract provisions only when, and to the extent necessary, to achieve clearly stated remedial goals. Thus, it follows that affirmative action plans are inter-

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non-discrimination clause of contract by failing to follow its affirmative action policy).

[76] 77 Lab. Arb. (BNA) 244 (1981) (Daniel Arb.).

[77] *Id.* at 246-47.

preted in light of, and confined to, its express remedial purposes. When those purposes are achieved, affirmative action overrides of seniority and related provisions can no longer be contractually justified.

## IV. UNILATERAL EMPLOYER AFFIRMATIVE ACTION

Numerous grievances have arisen challenging the application of affirmative action plans to which the union did not consent. Most of these cases arose where the employer settled one or more complaints with an administrative agency by entering into a conciliation agreement calling for the taking of affirmative action. Others arose where employers adopted affirmative action plans, believing such plans were necessary to comply with agency regulations such as those of the OFCCP.

Grievances frequently allege that the employer's application of its affirmative action plan conflicts with one or more specific provisions of the contract. The most commonly alleged conflict involves the contract's seniority provisions. Grievances also frequently allege that application of an affirmative action plan conflicts with the contract's non-discrimination clause.

Grievances over affirmative action plans adopted pursuant to conciliation agreements with government agencies, or for the purpose of complying with agency regulations, raise issues concerning the relevance of the external law of affirmative action to grievance arbitration.[78] Just as arbitrators have taken divergent

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[78] Some employers have unilaterally adopted affirmative action plans as a matter of policy and without any claim of legal compulsion. Such action amounts to an assertion of management rights and is subject to traditional scrutiny under the arbitration agreement. There is a consensus of arbitral authority that, in most instances, such unilateral changes in working conditions breach the contractual nondiscrimination clause. *See, e.g.*, Minnesota Dept. of Corrections, 88 Lab. Arb. (BNA) 535 (1987) (Gallagher, Arb.); Struck Constr. Co., 74 Lab. Arb. (BNA) 369 (1980) (Sergent, Arb.); City of Detroit, 73 Lab. Arb. (BNA) 717 (1979) (Daniel, Arb.); ITT Continental Baking Co., 72 Lab. Arb. (BNA) 1234 (1979) (Hunter, Arb.). This consensus breaks down where an employer claims that its right to set reasonable qualifications for a position includes a right to specify minority or female status. For example, in Southwestern Elec. Power Co., 77 Lab Arb. (BNA) 553 (1982) (Bothwell, Arb.), Arbitrator William C. Bothwell rejected the company's argument that its affirmative action obligations as a government contractor required it to fill a craft apprenticeship position with a woman ahead of a man who had greater department seniority. He then rejected the company's argument that it had the right to designate being female as a qualification for the position. Arbitrator Bothwell reasoned:

> Mr. W. A. Mason, Director of Labor Relations for the Company, testified that under the Management Rights Article . . . the Company has the right to specify the qualifications for any job, and therefore may de-

views on the general issue of the relevance of external law, they have taken a wide range of views over the relevance of government compelled affirmative action.

Many arbitrators, consistent with the Meltzer view of the role of public law and the Edwards view of the suitability of arbitration for considering complex issues of public law, have considered only the contract, without regard to the effects of conciliation agreements or government regulations requiring affirmative action.[79] Under this view, the effects of government regulations should be left for resolution before the appropriate administrative agency or court. Arbitrator Mark Kahn's decision in *Detroit Department of Police*[80] provides an excellent illustration of this position.

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> termine that an applicant must be a female. Mr. Mason went on to state that the Company had the right to establish qualification requirements of Catholic, Methodist, or white male. The arbitrator can not agree with this view . . . . For the company to establish such qualifications would violate Article 14, Rule 16 which provides, "The Company and the Union agree to comply with federal laws covering equal employment opportunity without discrimination with regard to race, color, religion, sex or national origin . . . . " Such qualifications would violate both the contract and federal law.

*Id.* at 556.

In City of Dayton Ohio, 78 Lab. Arb. (BNA) 1114 (1982) (Daniel, Arb.), however, Arbitrator William P. Daniel sustained a police chief's consideration of race as a factor in filling a vacancy. The vacancy arose when one of three court detail officers left his position. *Id.* at 1115. Of the three, the officer who left was the only black. *Id.* Sixty percent of the clientele using the court were black and Arbitrator Daniel observed that there was a valid operational reason for consideration of race in filling the vacancy. *Id.* at 1116. He also found, however, that race was not the sole factor and that the white grievant had been denied the position in an effort to avoid dealing with conflicts with his existing superior. *Id.* at 1119. Moreover, Arbitrator Daniel determined that the sole issue before him was whether the employer had acted arbitrarily or capriciously. *Id.* He refused to consider the union's claim that the employer violated the contractual nondiscrimination clause because that issue had not been raised in the grievance procedure in a timely manner. *Id.* at 1117.

[79] *See, e.g.*, Jefferson Chem. Co., 72 Lab. Arb. (BNA) 892, 898 (1979) (Goodstein, Arb.) (consent orders to which union was not a party do not override contract provisions, but grievance is denied because union failed to prove that grievant was qualified for training program from which he was rejected); USM Corp., 69 Lab. Arb. (BNA) 1051, 1056-57 (1977) (Gregory, Arb.) (grievance upheld because employer failed to comply with collective bargaining agreement); Bliss & Laughlin Indus., Inc., 64 Lab. Arb. (BNA) 146, 149 (1974) (McKenna, Arb.) (OFCCP affirmative action requirement cannot override contract's seniority system, at least not without the adoption of a formal affirmative action program); *cf.* Day & Zimmerman, Inc., 60 Lab. Arb. (BNA) 495, 499 (1973) (Marcus, Arb.) (employer cannot unilaterally substitute questionnaire for aptitude test without meeting OFCCP guidelines).

[80] 78 Lab. Arb. (BNA) 486 (1982) (Kahn, Arb.).

The grievance in *Detroit Department of Police* protested the assignment of a January 9, 1975, seniority date to another police officer and the resulting recall of that officer, rather than the grievant, from layoff. The other officer's application to the Detroit Police Department had initially been rejected because he had been hospitalized for one week due to a gastric ulcer. In 1976, the rejected applicant wrote to President Jimmy Carter for a review of his case. President Carter referred it to the Law Enforcement Assistance Administration (LEAA). LEAA completed its investigation in 1980, finding that the applicant's rejection was the result of handicap discrimination. Under a resolution agreement, the city offered the applicant the opportunity to complete the selection process for police officers. The applicant agreed to forfeit back pay and pension benefits prior to his actual hire date, and the city agreed to award a seniority date of January 9, 1975, the estimated date on which he would have been hired but for the discrimination.

Arbitrator Kahn ruled that the assignment of a January 9, 1975, seniority date violated the collective bargaining agreement which defined seniority as "service with the Police Department of the City of Detroit as a police officer." The arbitrator emphasized that his ruling was limited to his interpretation of the contract and that he was not considering the merits of the discrimination claim which prompted the resolution agreement.[81] Arbitrator Kahn recognized that his ruling might result in further litigation among the parties. However, he viewed this as a necessary result of his limited authority under the contract as compared to the broader authority of a court or agency enforcing the civil rights laws.[82]

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[81] *Id.* at 491-92. Arbitrator Kahn cautioned:

> Nothing in this Opinion should be construed as implying any judgment on the merits of [the discrimination complainant's] claim to employment or on the Investigative Findings of LEAA to the effect that [the complainant] had been a victim of handicap discrimination in violation of Federal law. The Investigative Findings of November 12, 1980, did not constitute a conclusive determination of [complainant's] case but an invitation to negotiate a resolution to [complainant's] complaint. The decision of the City to undertake such a negotiation appears to have been prudent and reasonable under the circumstances, but nothing in those circumstances authorized the City to enter into a settlement which violated its Agreement with the Association.

*Id.*

[82] *Id.* at 492. Arbitrator Kahn characterized his ruling as follows:

> This finding [of a contract breach], as the City says, will "probably force the respondent [City] and the Union before the LEAA and the Federal

Arbitrator Charles Gregory expressed a similar view concerning the relative roles of arbitrators and the courts in *USM Corp.*[83] Arbitrator Gregory determined that his responsibility was to decide the issue according to the terms of the agreement while leaving the interpretation of anti-discrimination laws to the courts.

This approach, which excludes consideration of conciliation agreements and government agency rules mandating affirmative action, preserves the arbitrator's traditional role of interpreter of the collective bargaining agreement, premised on the arbitrator's expertise in the common law of the shop. This approach also recognizes that the parties select an arbitrator for his or her knowledge of collective bargaining and contract interpretation, and not necessarily with regard to the arbitrator's knowledge of equal employment law.

This approach also recognizes the inherent limitations in reliance on conciliation agreements and agency regulations. Employers who adopt affirmative action plans to conform to agency regulations are presenting their interpretations of the law, which may not be correct. Preliminary findings of statutory violations, which usually form the basis for the negotiation of conciliation agreements, usually result from agency investigations and do not have the benefit of trial proceedings and written, reasoned analysis of an evidentiary record. Arbitrators must be reluctant to accept such preliminary findings uncritically. Moreover, exclusion of the employer's need to comply with government mandated affirmative action requirements protects the union from unilateral changes in terms and conditions of employment agreements for which the parties should have collectively bargained.

Thus, the principal factors which militate against arbitrator consideration of government mandated affirmative action in resolving a grievance are concerns over the arbitrator's expertise, the unreliability of preliminary findings of statutory violations, and the absence of a negotiated agreement with the union.

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> Court . . . ." The Court is not, of course, limited in its authority (as I am) to interpreting and applying the parties' Agreement in determining a remedy for discrimination in the event that the Court should find discrimination . . . to have occurred. Another possibility, of course, is that this arbitration decision may lead the parties, including the Association if any deviation from the Agreement is involved, to formulate a new Resolution Agreement.

*Id.*

[83] 69 Lab. Arb. (BNA) 1051, 1056 (1977) (Gregory, Arb.).

Some arbitrators, consistent with the Howlett position on the role of public law, have viewed government mandated affirmative action as overriding conflicting provisions of the collective bargaining agreement. They have relied on contract language severing illegal provisions from the rest of the agreement[84] and on the general principle that a subsequently enacted law may override a contract provision.[85] They have also held that a grievance is not arbitrable when a law overrides the contract.[86]

Arbitrator Robert W. Foster's decision in *ASG Industries, Inc.*,[87] provides a detailed explanation of the rationale that underlies this approach. The company and union expressly agreed to require standards for admission to a craft apprenticeship training program. One of the requirements was a general aptitude test. However, the test was not, and could not be, validated. As a government contractor, the company submitted its affirmative action plan to OFCCP. The Atomic Energy Commission, the agency with initial review authority over the company's plan, recommended that the company not use unvalidated tests and that the company notify all employees that apprenticeship applicants would no longer be tested. The company complied with these recommendations and the union grieved, contending that this breached the express agreement governing admission into the apprenticeship program.

Arbitrator Foster held that the company was excused from complying with the collective bargaining agreement. He addressed each of the concerns which have led other arbitrators to refuse to consider government mandated affirmative action when resolving grievances. He considered the unreliability of preliminary agency findings in the context of a union contention that eliminating the test was merely a suggestion and not a government directive. He viewed the agency's "suggestion" as an effective directive because of the potential consequences if the company did not comply.[88]

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84 *See, e.g.*, Copolymer Rubber & Chem. Corp., 64 Lab. Arb. (BNA) 310 (1975) (Dunn, Arb.); ASG Indus., Inc., 62 Lab. Arb. (BNA) 849 (1974) (Foster, Arb.).

85 *See, e.g.*, Mechanical & Sheet Metal Contractors, 71 Lab. Arb. (BNA) 286 (1978) (Yarowsky, Arb.); Mountain States Tel. & Tel. Co., 64 Lab. Arb. (BNA) 316 (1974) (Platt, Arb.); ASG Indus., Inc., 62 Lab. Arb. (BNA) 849 (1974) (Foster, Arb.).

86 *See, e.g.*, Lockheed Missles and Space Co., 72-1 Arb. (CCH) 8360 (1972) (Koven, Arb.).

87 62 Lab. Arb. (BNA) 849 (1974) (Foster, Arb.).

88 *Id.* at 852-53. Arbitrator Foster analyzed the issue as follows:

The Union argues that the word "recommendation" in the first para-

Arbitrator Foster also reviewed the basis for the Atomic Energy Commission's finding that the test was discriminatory. He concluded that the finding was consistent with the Supreme Court's decision in *Griggs v. Duke Power Co.*[89] He observed that the company's failure to validate the test and the failure to admit any blacks to the apprenticeship program prior to the elimination of the test from the admission process made it likely that the continued use of the test would have been illegal. Arbitrator Foster agreed with the union that the company could not avoid the contract's requirement that the test be used "on the naked assertion that compliance would be in violation of law."[90] However, he rejected the union's argument that the contract imposed on the company a duty to contest the agency's determinations.[91]

Arbitrator Foster also considered the unilateral nature of the company's action and its failure to negotiate with the union before dropping the test. He rejected the union's argument that this amounted to a bad faith refusal to bargain and a ground for sustaining the grievance.[92]

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graph of that letter falls short of legal compulsion. When taken in its total context, however, it is clear that this letter was a direction to "notify all employees by posted notice that all testing for selection for apprenticeship training has been discontinued and that future applicants will not be tested." The letter came as a result of a review of the Company's Affirmative Action Program required by federal law and was stated as a condition of compliance with that law. The Company was fully aware at that time of the authority of the federal agency to direct compliance with an acceptable Affirmative Action Plan and the consequences that would result from non-compliance.

*Id.*

89 *Id.* at 853-54 (citing Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

90 *Id.* at 853.

91 Arbitrator Foster questioned:

To what lengths must the Company go in exhausting its legal remedies in an effort to preserve the use of testing as a factor in the selection of apprentices? . . . Neither the Company nor this Arbitrator need conclusively establish with final certainty the state of the present law on this complex issue. A reasonable and good faith determination that compliance with the contract terms is likely to be deemed illegal should be sufficient, particularly in view of the drastic consequences that could result from the failure to follow the directions of the federal enforcement authority.

*Id.*

92 The Arbitrator continued:

By hindsight, it would have been desirable in the interest of good industrial relations to have involved the Union with the problems faced by the Company at the earliest possible time. . . . The Company did make an effort in early November of 1972 to explain its position to the Union and the consequences that could result from noncompliance with the direction to discontinue testing. In any event, it appears as a practical

Arbitrator Foster held that the company was justified in refusing to abide by the contract's testing requirement. He premised his authority to excuse the company's breach of contract on a provision in the collective bargaining agreement that rendered void any provision that conflicted with external law and on the general principle of contract interpretation, which excuses nonperformance that is due to supervening illegality. Foster reasoned as follows:

> Article thirty-eight of the collective bargaining agreement renders null and void those provisions in the agreement which are "in conflict with any applicable valid federal or state law." This provision re-states the established principle of general contract law that "supervening illegality" justifies avoidance of a contractual obligation as a matter of public policy. Thus, even without such an express provision in the collective bargaining agreement, there is an inferred condition in every contract that performance would not violate existing laws.[93]

We believe that arbitrators act within the scope of their authority when they rely on the doctrine of illegality or on a contract's severance clause to hold that government mandated affirmative action overrides express provisions of the collective bargaining agreement. Although dicta in the *Steelworkers Trilogy*[94] suggested that they exceeded their authority, later dicta in *W.R. Grace* clearly recognized illegality and a contractual severance clause as legitimate arbitral tools.[95] We believe, however, that arbitrators should avoid this approach.

Contract language which severs illegal provisions from the rest of the agreement is standard boilerplate and probably intended as a savings clause, preserving the enforceability of the lawful portions of the contract. We doubt that such clauses are intended to confer

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> matter that negotiation with the Union upon receipt of the October 16, 1972 letter from the federal enforcement authority, which triggered the Company's decision to post the notice suspending the tests as a factor in apprenticeship selection, would have undoubtedly been fruitless. Therefore, the Union's charge that the Company failed to bargain in good faith . . . must be dismissed as "advocate's rhetoric."

*Id.*

93 *Id.* at 852. For a further discussion of clauses which sever illegal contract provisions, see Block, *Legal and Traditional Criteria in the Arbitration of Sex Discrimination Grievances*, 32 ARB. J. 241, 243-44 (1977).

94 The Court commented that "[the award] may be read as based solely upon the arbitrator's view of the requirements of enacted legislation, which would mean that he exceeded the scope of his submission." United Steelworkers of America v. Enter. Wheel & Car Corp., 363 U.S. 593, 597 (1960).

95 *See supra* notes 55-56 and accompanying text.

general plenary authority on arbitrators to invalidate alleged illegal provisions. Absent a clear indication that the parties intended the severance clause to empower arbitrators to invalidate contract provisions, arbitrators should not stretch the clause to give them that power.

Arbitrators should be very reluctant to employ the doctrine of illegality. Often, an employer's prior discriminatory conduct creates the employer's current affirmative action obligation. Under these circumstances, the doctrine of illegality would not excuse the employer's breach of contract. Even where the employer is blameless, it should bear a very heavy burden of persuasion.[96]

Furthermore, we believe that an arbitrator should not automatically dismiss an employer's failure to bargain with the union on the ground that negotiations would have been fruitless. Even if the arbitrator is convinced that the provision conflicts with government affirmative action requirements, the arbitrator should not assume that negotiations would have failed to produce a compromise and a modification of the contract, which would have differed from the employer's unilateral action.

The appropriate arbitral inquiry is whether the contract provision which was allegedly violated is capable of an interpretation consistent with the required affirmative action. An underlying general principle of interpretation is that when a contract is susceptible to two interpretations, one that renders the contract unenforceable and one that renders it enforceable, the latter should usually prevail.[97] In appropriate cases, the non-discrimination clause provides a means of reconciling an employer's affirmative action obligations with the collective bargaining agreement.

Arbitrator John P. Owen's decision in *IMC Chemical Group*[98] illustrates the use of a contract's non-discrimination provision to reconcile seemingly contradictory affirmative action obligations and contract provisions. Pursuant to a conciliation agreement with the

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96 *See, e.g.*, Southwestern Elec. Power Co., 77 Lab. Arb. (BNA) 553 (1981) (Bothwell, Arb.) (arbitrator evaluated facts and law and rejected employer's contention that it was required to bypass seniority provisions and appoint a female as a craft apprentice to comply with its affirmative action plan which had been mandated by its contracts with the General Services Administration); Mountain States Tele. & Tele. Co., 64 Lab. Arb. (BNA) 316, 329 (1974) (Platt, Arb.) (company may override seniority to comply with government mandated affirmative action plan but to do so, must show that seniority override is a matter of real necessity).

97 *See, e.g.*, Mason & Hanger-Silas Mason Co., 75 Lab. Arb. (BNA) 1038, 1040 (1980) (Shearer, Arb.); Stokely-Van Camp, Inc., 71 Lab. Arb. (BNA) 109, 112 (1978) (Snow, Arb.).

98 73 Lab. Arb. (BNA) 215 (1979) (Owen, Arb.).

Department of Energy (DOE), the company hired five women. DOE later required the company to grant these female employees retroactive seniority, dating from the date they would have been hired had there been no discrimination.

The union grieved, alleging that the grant of retroactive seniority violated the contract's definition of seniority as dating from the actual first day of work. The union argued that the company violated the contract and that the conciliation agreement with DOE was irrelevant. In the union's view, the five female employees received seniority-based positions to which the grievants were contractually entitled.

The company argued that its conduct was required by federal law, that the arbitrator should consider the requirements of the law in reaching a decision, and that the award of retroactive seniority had a *de minimis* impact on the seniority system. The company contended that collective bargaining agreements are subject to the requirements of federal law and are superceded by federal law in the event of a conflict.

Arbitrator Owen rejected both extreme positions. He observed that to rule in the union's favor could result in an illegal award. He viewed the contract's non-discrimination provision as authorizing him to interpret the contract's other provisions in light of principles of equal employment opportunity law. He accepted the DOE's judgment that the company's hiring practices had been discriminatory. Thus, there was a conflict between the contractual definition of seniority and the contractual guarantee against discrimination. He held that it was appropriate to resolve the conflict by granting retroactive seniority.

In *Minnesota Department of Corrections*,[99] Arbitrator Thomas Gallagher sustained a grievance by relying on a non-discrimination clause to reconcile a consent decree with the contract. In 1979, it was the employer's policy not to assign female guards to positions that required work in the male prisoners' living areas. In 1982, the Minnesota Department of Human Rights brought a class action administrative complaint against the Department of Corrections on behalf of the female guards. Extensive negotiations resulted in a consent decree that provided that strip searches, body cavity searches, pat searches, urine sample collection, and shower monitoring would be male-only positions, except in emergency situa-

[99] 88 Lab. Arb. (BNA) 535 (1987) (Gallagher, Arb.).

tions. All other positions in the male prisoner living areas would be open to women as well as men.

For nine years the male grievant had been assigned to a security work area which contained three positions: control center, relief, and security squad. The security and relief positions could only be filled by males. Only the control center position could be filled by a female.

In 1986, the security position became available. The posting for the job, however, also included the control center position. When the only bidder for posting was a female, she was assigned to the control center position, the grievant was reassigned to the relief position, and the employee in the relief position was assigned to the security squad position. The union protested the involuntary reassignment of the grievant.

Arbitrator Gallagher held that the law did not require the consent decree to supersede the contract. Relying on the contract's prohibition of sex discrimination, he ruled that when a preference is to be given between two employees a balancing test must be used to select the least harmful result. The arbitrator balanced the effect of not reassigning the grievant, which would result in females having a diminished opportunity for lateral moves to new work areas, against the effect of reassigning the grievant, which would result in males losing equal access to male-female positions. If each time there was a vacancy in a male-only position, the employer were permitted to reassign male employees out of male-female positions, male employees would automatically be displaced from male-female positions by a female employee's bid. Arbitrator Gallagher concluded that reassigning the grievant from the control center violated the agreement's provision against sex discrimination.

Another approach to reconciling an employer's affirmative action obligations with specific contract provisions is to consider whether the employer may treat minority status as a relevant qualification in filling a position. Although arbitrators have reached conflicting conclusions in the absence of government compulsion,[100] government mandated affirmative action strengthens the argument for treating minority status as a qualification. This is particularly true where the government is the employer's principal customer. The OFCCP requires affirmative action as a condition to a government contract or grant. This requirement may, in appropriate cases, be treated as comparable to other specifications by the gov-

100 *See supra* note 78.

ernment concerning the qualifications of employees to perform the work.

Arbitrators act properly when they rely on contractual non-discrimination and qualifications clauses to reconcile employer affirmative action obligations with the other provisions of the contract. Nevertheless, concerns over the arbitral expertise, the employer's collective bargaining obligations, and the unreliability of preliminary agency and unilateral employer determinations of legal obligations[101] should not be dismissed lightly. These concerns should define a framework within which arbitrators should attempt to reconcile the contract with the employer's affirmative action obligations.

i. *Expertise*

Concerns over arbitrator expertise should be considered on two levels: institutional expertise and individual expertise. Arbitrators' institutional expertise is derived from their selection by the parties and the parties' agreement to be bound by their interpretation of the contract. Thus, in grievance arbitration, an arbitrator's institutional expertise is limited to contract interpretation. There is no general presumption that the parties who have agreed to abide by an arbitrator's interpretation of their contract have also agreed to abide by his or her interpretation of statutes and administrative regulations.[102] However, as the Supreme Court observed in *W.R. Grace*, government mandated affirmative action plans may be relevant in interpreting the contract. The arbitrator's institutional expertise does extend to consideration of the effects of such affirmative action requirements on the interpretation of the contract. A key concern is whether the employer raised its affirmative action obligations in the prior steps of the grievance procedure. Where the affirmative action obligations were properly raised, the parties, aware of the pending issues, will probably select an arbitrator who has expertise in equal employment opportunity matters.[103]

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101 *See supra*, text following note 83.

102 *See* Metlzer, *Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination*, 39 U. CHI. L. REV. 30, 33 (1971).

103 *See* Edwards, *Arbitration of Employment Discrimination Cases: An Empirical Study*, in PROCEEDINGS OF THE 28TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS, 59, 84 (1976) (ten percent of arbitrators surveyed received 90 percent of employment discrimination cases); *cf* Scheinholtz & Miscimarra, *The Arbitrator as Judge and Jury: Another Look at Statutory Law in Arbitration*, 40 ARB. J. 55, 62 (1985) (making a similar point where the collective bargaining agreement incorporates a statute by reference).

The issue of an individual arbitrator's expertise in equal employment opportunity law should not be handled any differently than the issue of an individual arbitrator's expertise in any other complex matter which may be necessary to resolve a particular grievance. The *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes* requires that an arbitrator "decline appointment, withdraw, or request technical assistance when he or she decides that a case is beyond his or her competence."[104]

ii. *Reliability*

Preliminary findings of statutory violations which underlie conciliation agreements are not inherently reliable. An employer's unilateral decision that agency regulations require it to engage in affirmative action is even less reliable. Consequently, the arbitrator should not accept blindly the employer's contention that it was required to undertake affirmative action as a matter of law; nor should the arbitrator accept without question the joint contentions of the employer and the government agency who are parties to a conciliation agreement. The Supreme Court has held that white male employees are not bound by affirmative action requirements embodied in consent decrees to which they were not parties.[105] It follows, *a fortiori*, that employees and unions who were not parties to conciliation agreements are not bound by them.

An employer, relying on government mandated affirmative action to support its position in grievance arbitration, bears the burden of creating an evidentiary record to support its contention that its actions were required as a matter of law. An arbitrator should review that record. If the arbitrator concludes that such actions were not legally required, the arbitrator should disregard the affirmative action plan in interpreting the contract. Thus, for example, in *USM Corp.*,[106] Arbitrator Gregory reasoned that his refusal to consider the company's affirmative action plan which had been approved by the OFCCP was particularly appro-

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104 CODE OF PROFESSIONAL RESPONSIBILITY OF LABOR-MANAGEMENT DISPUTES 1 § (B)(1) (amended May 29th 1985) (drafted by the National Academy of Arbitration, the American Arbitration Association, and the Federal Mediation and Conciliation Service). A critical issue here is whether arbitrators will voluntarily admit to their lack of expertise and decline the appointment. Judge Edwards' survey of arbitrators, *supra* note 103, revealed that 72 percent responded that they were professionally competent to decide legal issues in EEO cases but only 14 percent could define some basic concepts of EEO law.

105 Martin v. Wilks, 109 S. Ct. 2180, 2184 (1989).

106 69 Lab. Arb. (BNA) 1051 (1977) (Gregory, Arb.).

priate because he found no evidence of discrimination in the employment practices at issue and because the seniority system which the company claimed it was compelled to modify was a lawful bona fide seniority system under Title VII of the 1964 Civil Rights Act.[107]

iii. *Duty to Bargain*

Concerns over the effects of the employer's promulgation of an affirmative action policy without the union's consent and, in many cases, without negotiating with the union, should be analyzed on a case-by-case basis. Frequently, an employer's implementation of an affirmative action program at the government's insistence will differ markedly from the typical assertion of a management right to undertake unilateral action. Arbitrator Rolf Valtin's analysis in *Hayes International Corp.*[108] illustrates these differences.

In *Hayes International Corp.*, the company's business was almost entirely dependent on government contracts. Seventeen female employees filed a sex discrimination complaint with the Defense Contract Administration Service (DCAS). The company successfully resisted the complaint before the DCAS, but the DCAS decision was reversed on appeal by the OFCCP. The OFCCP determined that there was an overconcentration of female employees in two of nine seniority units and advised the company that to maintain its awardable status it would have to adopt a program which would facilitate the transfer of female employees out of the two units. The company entered into a conciliation agreement which provided female employees in the two units with a one-time opportunity to apply for transfer to another unit and, where necessary, receive training at the company's expense.

Arbitrator Valtin summarized how the company's implementation of the conciliation agreement's transfer program differed from the typical unilateral assertion of a management right as follows:

> This fact—the fact that the Transfer Program came into being through imposition by the government rather than through the Company's self-initiative and the fact that the program cannot possibly be viewed as having been inspired by managerial desires for efficiency or managerial desires to be relieved

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107 *Id.* at 1056.

108 79 Lab. Arb. (BNA) 999, 1001 (1982) (Valtin, Arb.).

> from obligations under the collective-bargaining Agreement—is so central to the case as to call for elaboration. . . . [I]t is clear beyond question: that the Transfer Program was forced upon the Company, that there is nothing in the Transfer Program which operated to the Company's advantage in relation to the collective bargaining Agreement, and that the Transfer Program was of one-shot and otherwise limited character. Truly all that the Company can be taken to have done was to have accepted what its principal—indeed, its well-nigh exclusive—customer was, requiring as the minimum condition for retaining the awardable status. And the customer was not a corporation acting from profit motives, but the U.S. government acting in enforcement of national non-discrimination policies.[109]

Frequently, unions will not be parties to the original proceeding which leads to a preliminary agency finding of discrimination and an invitation to negotiate a conciliation agreement. Complaints which focus on hiring practices will not name unions as co-defendants because hiring is usually an exclusive employer function. Complaints which arise from an employer's status as a government contractor usually will not name the union as a co-respondent because only the employer is party to the government contract. The employer, however, may invite the union to participate in conciliation agreement negotiations. In government contract cases, OFCCP regulations grant the union a right to participate to the extent that the proceedings may necessitate a revision of the collective bargaining agreement.[110]

In an appropriate case, an arbitrator should consider whether the union had an opportunity to participate in the conciliation process and the results of the union's participation. Concerns with the employer's taking of unilateral action are strong where the union never had an opportunity to participate. These concerns are even stronger where the employer has admitted that a proposed affirmative action plan would require changes in the collective bargaining agreement, negotiated with the union, and where the employer has implemented the affirmative action plan despite not reaching agreement with the union.[111]

Concerns with unilateral employer action lessen, however, where, as was the case in *W.R. Grace*, the union has refused an invita-

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109 *Id.* at 1004-05.

110 41 C.F.R. § 60-30.24(a)(1) (1989).

111 *See* USM Corp., 69 Lab. Arb. (BNA) 1051 (1977) (Gregory, Arb.); *but see* Copolymer Rubber & Chem. Corp., 64 Lab. Arb. (BNA) 310 (1975) (Dunn, Arb.).

tion to participate in the conciliation process. Under these circumstances, the union may be forcing the employer to engage in needless litigation and, if the employer is a government contractor, run the risk of losing a substantial amount of business.

In summary, arbitrators reconciling contractual provisions with an employer's affirmative action obligations must consider whether the affirmative action issue was raised in the grievance procedure, whether the individual arbitrator is qualified to interpret and apply the law, whether the employer has proven in the arbitration proceeding that its conduct was legally obligated, and whether the union was given an opportunity to negotiate the affirmative action plan.[112]

## V. CONCLUSION

The purpose of this article was to review and analyze reported arbitration awards involving affirmative action-related grievances. These arbitration disputes arise within essentially two contexts: (1) grievances under affirmative action plans negotiated by both the employer and the labor organization and sometimes state or federal anti-discrimination agencies; and (2) affirmative action plans voluntarily implemented by the employer without the participation of a labor organization, but in compliance with a perceived legal obligation.

Historically, labor arbitration has been used to resolve various types of discrimination grievances including sex and race-based cases. Those disputes usually involved individual claims of discrimination. Such disputes involved evidentiary or factual issues arising under established industrial and legal definitions of impermissible discrimination. These disputes did not involve the broader public policy related issue of affirmative action which remains an area in legal flux.

In individual factual claims of discrimination there is an identifiable victim and a specific violator or causal act. In affirma-

[112] Even if no such interpretation is available, the arbitrator should consider the possibility, suggested in *W.R. Grace & Co.*, that the conflict between the contract and the employer's affirmative action obligations can be resolved through the remedy rather than by invalidating the contract provision. For example, in *USM Corp.*, Arbitrator Gregory sustained a grievance which resulted from the company, following its affirmative action plan, promoting a minority employee over a more senior white employee. Arbitrator Gregory, however, refused to order the employer to displace the minority with the white grievant. Instead, he ordered the employer to give the grievant backpay and a comparable position, if one was available. If no comparable position was available, he ordered the company to give the grievant sufficient monetary damages to compensate him for the harm he suffered.

tive action disputes, however, there may not be identifiable victims and/or violators. The emotional upheaval is created, in large part, because of the attendant or potential remedy in this area. Members of the majority class are seen to bare the brunt and the cost of remedying the alleged past acts of discrimination for which majority employees may not be directly responsible, but from which they have invariably benefitted.

A number of noted observers have cautioned that arbitration may not be an appropriate forum for the resolution of EEO disputes. Notwithstanding their cautionary words, the evidence clearly indicates that the parties have been utilizing arbitration to resolve affirmative action-related grievances.

An examination of the reported arbitration awards reveals that arbitrators are very cognizant of the external public law and policy within which they are functioning. Consequently, arbitrators clearly set forth their self-perceived role and authority under the negotiated collective agreement and the relevant affirmative action plan.

Arbitrators have generally applied Supreme Court guidelines in interpreting collective agreements and affirmative action plans. Interestingly, arbitrators may not always expressly cite and rely upon the Supreme Court guidelines in the affirmative action area. A close examination of arbitral awards, however, clearly supports the conclusion that arbitrators implicitly apply such guidelines.

When a contract provision allegedly clashes with an employer's affirmative action obligations, arbitrators generally should attempt to reconcile the affirmative action plan with the collective agreement. In so doing, arbitrators should consider the following factors: (1) whether the affirmative action was unilaterally created and implemented without the labor organization's participation; (2) whether there has been a finding of discrimination; (3) whether the collective agreement includes a saving clause and/or a non-discrimination clause; and (4) whether minority status is considered as a qualification *per se*, as may be required by a government customer of the employer.

As we enter the 1990's and the attendant drastic change in the demographics of the work force, there will undoubtedly be an increasing number of statutory EEO-related claims and grievances filed. Given the legal complexities and the emotions involved in affirmative action disputes, it behooves labor, management, and government to support the use of arbitration

as a fair, expeditious, and economical vehicle by which these issues may be resolved in a final and binding fashion. This is in keeping with the national policy favoring labor arbitration and collective bargaining and the national policy encouraging the conciliation of EEO disputes.