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The Arbitration of Discrimination Grievances in the Aftermath of *Gardner-Denver*

MICHELE HOYMAN AND LAMONT E. STALLWORTH

The Supreme Court has recently reaffirmed its earlier rationale in *Alexander* v. *Gardner-Denver Co.* (1974) and the broader issue of the balancing of the enforcement of federal statutory rights and national policy favoring arbitration. An analysis of the views of labor law attorneys concerning *Gardner-Denver* and other related issues is therefore very timely.

Based on a national survey of attorneys who represent labor organizations and management, the authors conclude that the majority of the responding attorneys do not agree with the Supreme Court's decision in *Gardner-Denver*. The authors further conclude that the respondents in the study would support either a modification of *Gardner-Denver* or a change in Title VII that would afford a claimant a right to an election of remedies and not "two bites of the apple."

One of the most significant court cases concerning labor arbitration law was the Supreme Court's decision in *Alexander* v. *Gardner-Denver* (1974).[1] In that case, the Court held that a grievant who had lost a grievance alleging race discrimination in arbitration was not precluded from subsequently seeking recourse under Title VII of the Civil Rights Act of 1964, as amended.[2] This decision reversed the final and binding effect of an arbitral award where Title VII rights are involved. *Gardner-Denver* left the door open for the relitigation of an arbitral award in the trial courts.

There have been a number of empirical examinations of the effect of this and related Supreme Court cases.[3] This article is particularly timely in light of the Court's recent decision reaffirming the *Gardner-Denver* rationale.[4] The views of attorneys who represent either labor organizations or employers concerning the Supreme Court's major holding in *Gardner-Denver* and other policy issues are considered. In addition, the article examines whether experience with review or reversal[5] of an arbitral

[1] 415 U.S. 36, 7 FEP Cases 81 (1974).

[2] Section 704(a) of the act provides:

"It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by the subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing under this subchapter."

For the purpose of this study, a Title VII-related grievance is a grievance that alleges discrimination based upon race, sex, national origin, color, or religion.

[3] Since *Gardner-Denver*, the Supreme Court has also held that the prior submission of a grievance to arbitration does not preclude subsequent recourse under the Fair Labor Standards Act. See Barrentine *et al.* v. Arkansas-Best Freight System, Inc., 450 U.S. __, 67 L.Ed.2d 641, 101 S.Ct. 1437 (1981).

[4] See "Justices Hold Arbitration No Bar to Civil Rights Claim" and "Court Rules That Trustees Need Not Arbitrate [ERISA] Dispute," *Daily Labor Report* No. 76 (April 19, 1984), reporting on court of appeals cases Robbins v. Prosser's Moving and Storage Co., 700 F.2d 433 (1983) and McDonald v. City of West Branch, Michigan, CA6 No. 83-219 (April 19, 1983).

[5] For the purpose of this study, the terms *review*, *relitigation*, and *reversal* are applied as follows: *Review* is used to indicate the reinvestigation of the claim of discrimination either by the EEOC

award by the EEOC or the trial court has an effect on their attitudes toward certain labor relations policies. It was contemplated that because these individuals had actually experienced the practical effect of *Gardner-Denver*, their opinions or attitudes would differ from those who did not have such an experience. Participants in the survey were also asked about their attitudes toward a proposed statutory change in Title VII.[6] This proposed statutory change would limit the individual's future Title VII-related cause of action where the individual had "knowingly and voluntarily" allowed his or her individual grievance to be decided in arbitration.

"This article is particularly timely in light of the Court's recent decision reaffirming the *Gardner-Denver* rationale."

BACKGROUND

As early as World War II, labor arbitration was used as a mechanism to resolve industrial disputes.[7] A pol-

or by a state antidiscrimination agency. *Relitigation* is used to indicate the act of submitting the same claim of discrimination to the trial courts for determination. *Reversal* is used to indicate a situation in which there is a conflict of results or determinations between either the trial court and an administrative agency and the determination by the arbitrator. It was hypothesized that if an attorney were to have an arbitral award reviewed, relitigated, or reversed, this would influence his or her opinion about certain issues related to *Gardner-Denver* and the arbitration of discrimination grievances.

[6] The question on the statutory amendment was "To what extent do you either support or oppose a statutory amendment to Title VII prohibiting an individual claimant-employee who has 'knowingly and voluntarily' allowed his or her individual discrimination grievance to be decided in arbitration from also having the statutory right to file subsequently or concurrently a claim with the EEOC or filing a suit in federal court concerning the same factual claim of discrimination?"

[7] See U.S. National War Labor Board, *The Termination Report of the National War Labor Board* (Washington, D.C.: G.P.O., 1947). See, also, Edwin Witte, "Wartime Handling of Labor Disputes," *Harvard Business Review* 25 (1947): 169–189. For an extensive analysis of discrimination since World War II, see Lamont E. Stallworth, "The Arbitration of Discrimination Grievances: An Examination Into the Treatment of Sex and

icy favoring voluntary private dispute settlement mechanisms was adopted by Congress in its enactment of the National Labor Relations Act of 1935 (the Wagner Act). The Supreme Court's landmark decisions in 1960, the Steelworkers' Trilogy,[8] further underscored the favored use of arbitration as a matter of national labor policy. The Trilogy was particularly significant because it established, among other things, the final and binding effect of an arbitral award.

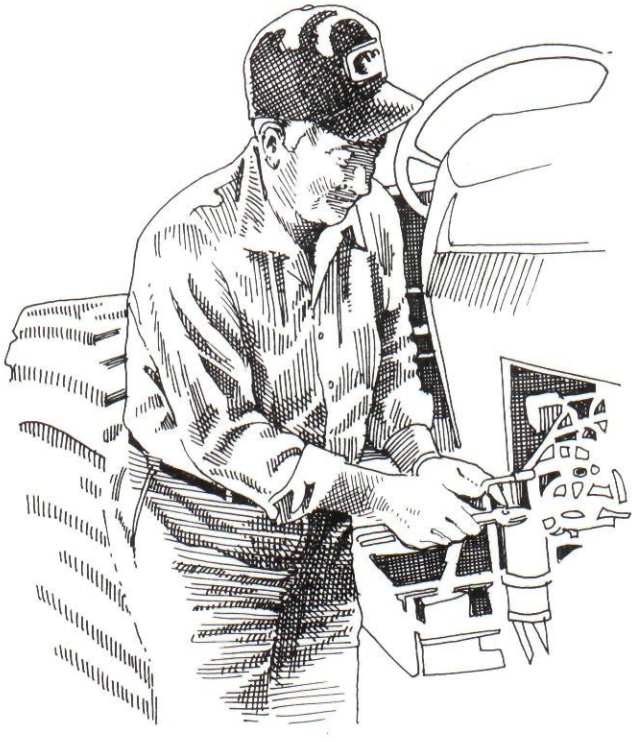
This was the status of labor arbitration until the enactment of Title VII. Title VII brought about a conflict between federal labor policy, which emphasized the private resolution of industrial disputes through grievance arbitration, and the national policy, which attempted to eliminate employment discrimination through the exercise of individual statutory rights. The threshold issue that arose as a result of Title VII was whether the prior submission of a grievance to arbitration precluded the individual from subsequently or concurrently seeking recourse under Title VII. Or, posed in more figurative terms, does the individual have "two bites of the apple?"[9]

The Court addressed this issue in *Alexander* v. *Gardner-Denver*. The Court maintained that the individual grievant should not be deprived of his or her statutory rights under Title VII in favor of contractual rights. Thus, the antidiscrimination policy articulated in Title VII was seen as superseding the national policy favoring the resolution of employment-related disputes through grievance arbitration.

Although *Gardner-Denver* raised questions concerning the future utility of arbitration where statutory-related grievances are involved,[10] it should be noted that the courts still favor the resolution of discrimination claims without resort to litigation.[11] On this score, the Court set forth in footnote 21 the factors that might be considered in determining the degree of evidentiary weight that may be accorded an arbitral award by the trial courts.[12] There is little known, however, about either the effect of the Court's decision or what has been the experience with arbitrating discrimination claims following *Gardner-Denver*. That lack of information is what this study attempts to rectify.

METHODOLOGY

The data for this study were collected during the spring and summer of 1981. The authors conducted a sur-



Race-Based Discrimination Grievances by Arbitrators Since World War II" (unpublished Ph.D. dissertation, New York State School of Industrial and Labor Relations, Cornell University, Ithaca, N.Y., 1980).

[8] United Steelworkers v. American Manufacturing Co., 363 U.S. 564 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). See, also, Textile Workers v. Lincoln Mills of Alabama, 77 S.Ct. 912 (1957). Prior to the Steelworkers' Trilogy, the courts did not take such a favorable view toward arbitration. See, for example, International Association of Machinists v. Cutler-Hammer Inc., 271 App. Div. 197, 67 N.Y.S.2d 317 (1st Dep't 1947). The *Cutler-Hammer* doctrine has since been repudiated by statutory amendment. See N.Y. Civ. Prac. Law § 7501 (1963).

[9] One commentator has aptly referred to the *Gardner-Denver* holding as "rightfully permitting the grievant one bite at two different apples."

[10] See, for example, Bonnie L. Siber, "The Gardner-Denver Decision: Does It Put Arbitration in a Bind?" *Labor Law Journal* (November 1974): 708–717. See, also, David E. Feller, "Arbitration: The Days of Its Glory Are Numbered," *Industrial Relations Law Journal* 2 (Spring 1977): 97–130. Cf. Arthur Stark, "The Presidential Address: Theme and Adaptations," in James L. Stern and Barbara D. Dennis, eds., *Truth, Lie Detectors and Other Procedures in Labor Arbitration*, Proceedings of the Thirty-first Annual Meeting of the National Academy of Arbitrators (Washington, D.C.: Bureau of National Affairs, 1979), pp. 1–29.

[11] See, for example, United States v. Allegheny Ludlum Industries, Inc., 517 F.2d 826 at 858 (CA5 1975); Lyght v. Ford Motor Co., 458 F.Supp. 137 (E.D. Mich. 1978), *rev'd*, 54 Daily Labor Report A-8 (CA6 1981). See, also, Strozier v. General Motors Corp., 422 F.Supp. 475 (N.D. Ga. 1977); Chief Justice Warren E. Burger, "Isn't There a Better Way?" Annual Report on the State of the Judiciary at the Midyear Meeting of the American Bar Association, Chicago, Illinois, January 24, 1982; and "Judge Edwards Defends Use of Arbitration as Better Means to Settle Labor Disputes," *Daily Labor Report* No. 107 (June 3, 1982), pp. A-1 to A-2 and D-1 to D-5.

[12] The Court, rather than "sounding the death knell for arbitration," set forth the possible evidentiary weight which might be accorded by the trial courts to a relitigated Title VII-related arbitral award. This is set forth in footnote 21:

". . . Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral form, adequacy of the record with respect to the issue of discrimination, and the special competence of particular consideration to an employee's Title VII rights, a court may properly accord it great weight. This is specially 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 its full availability of this forum." (*Id.* at 90.)

vey of attorneys who typically represent either management or labor in grievance arbitration. The survey instrument was sent to a random sample of persons who were listed as members of the Labor and Employment Law Section of the American Bar Association. The survey was also sent to attorneys who were employed directly by international unions.[13] Attorneys for the parties were surveyed, rather than the parties themselves, because of anticipated difficulties in contacting the appropriate labor and management representatives in specific cases. It was also thought that labor relations attorneys were best qualified to answer general questions on the subject of judicial review.

The overall response rate for the sample was 33.2 percent of the completed surveys; two could not be used. Therefore, the total number of completed surveys was 659. There were 791 cases reported by the surveyed attorneys involving discrimination grievances that were reinvestigated by a state or federal antidiscrimination agency or relitigated in the federal district court.[14] The surveyed attorneys were asked to relate their responses to their post *Gardner-Denver* experience in arbitrating discrimination grievances (that is, subsequent to February 24, 1974). Because of the national scope of the mailing list, the survey responses reflect the responding attorneys' experience with the EEOC and the various state antidiscrimination agencies and state and federal courts throughout the United States.

Of the 659 respondents, the majority (67.5 percent) represented management, for a total of 445 individuals. One hundred and one respondents (15.3 percent) represented unions. The remainder represented neither labor nor management; therefore, they were placed in the category of "other."[15] There were approximately four times as many management attorneys than labor union attorneys responding to the study. This reflects the fact that there are considerably more attorneys representing management than labor organizations.[16]

"Examining the number of reversals by the EEOC out of all cases, it can be seen that 77 of a total of the 1,761 cases are reversed (4.4 percent)."

AREAS OF INQUIRY

The questionnaire was a ten-page survey with primarily close-ended items. The questions included items concerning the views of the respondents on their experience following the *Gardner-Denver* decision[17] and on a proposed statutory provision requiring the election of remedies. There were also items about changes in the grievance and arbitration procedure that have occurred and the most common types of discrimination claims heard in arbitration (for example, individual factual claims versus claims raising legal issues).[18] Respon-

[13] Specifically, respondents' names were drawn from the official mailing list for the Labor and Employment Law Section of the American Bar Association and from the *National Directory of Labor Organizations'* list of "in-house" union attorneys. The majority of the respondents (67.5 percent) represented management—a total of 445 individuals. The 101 union representatives accounted for 15.3 percent. The remaining respondents included attorneys who represent individual plaintiffs in discrimination suits, EEOC or state antidiscrimination commission attorneys, National Labor Relations Board or state labor relations attorneys, law professors, and part-time and full-time arbitrators. Because there are more attorneys who represent management, the authors made an attempt to counter this fact by also surveying labor union attorneys who were listed in the *National Directory of Labor Organizations*.

[14] These are not 791 unique cases, since it is possible for the same case to be reviewed by the EEOC and by the courts. The number of cases reported under review by the EEOC is 484 and the number reported under review by the courts is 307. Many of these are probably the same case. If that is true, the figure 791 suggests a much higher amount of activity than is actually present, based on the number of unique cases.

[15] The mailing list acquired from the ABA contains the names of individuals who serve in various capacities and occupations. The distribution of the respondents by occupation was

		%
Represent Management	445	68.1
Represent Labor	101	15.5
Represent Individual Plaintiffs	10	1.5
EEOC Attorneys	7	1.1
NLRB Attorneys	20	3.1
Law Professors	5	.8
Professors and Labor Arbitrators	4	.6
Full-time Arbitrators	8	1.2
Judges	3	.5
Retired from Law	1	.2
Other	49	7.5
	653	100.0

Missing = 6 cases

[16] For an explanation concerning the greater number of management attorneys than union attorneys responding to the study, see *supra* fn. 13.

[17] Although not discussed in this article, the authors also inquired about the respondents' agreement with the Supreme Court's decision in Barrentine v. Arkansas-Best Freight System, Inc., 450 U.S. __, 67 L.Ed.2d 641, 101 S.Ct. 1437 (1981).

[18] An example of an individual factual claim of discrimination would be "Was Harrel Alexander

dents were also asked about the number of cases relitigated and the frequency with which these relitigated cases were reversed by either the trial court or the EEOC. There were additional items on the characteristics of the respondent, for example, amount of experience in the practice of labor and employment law.

FINDINGS AND DISCUSSION: TYPES OF COMPLAINTS

Respondents reported a total of 1,761 discrimination cases. As would be expected, the vast majority involved factual claims. Specifically, there were 1,481 (84.0 percent) factual claims of discrimination. There were 117 cases (6.6 percent) involving the alleged illegality of contract provisions. There were 111 cases (6.3 percent) that were reverse discrimination cases.[19] There were 189 cases (a full 10 percent of the sample) that were class action claims. A case could be classified as having two different characteristics (for example, a class action and illegality of contract claim).[20] This accounts for the fact that the above percentages total more than 100 percent.

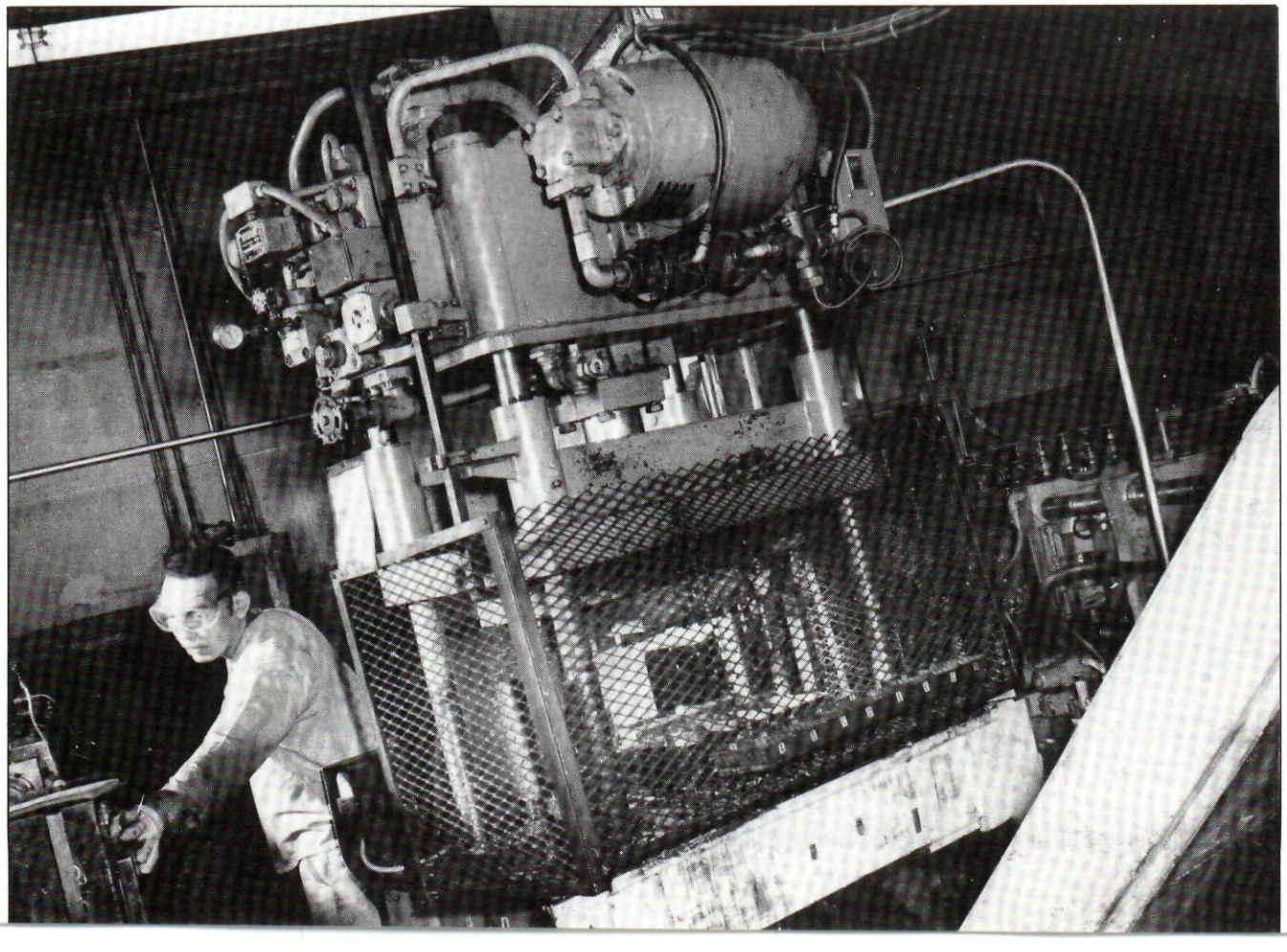
The number of reverse discrimi-

"For the courts, the number of reversals out of all discrimination cases is 21 out of 1,761 or 1.2 percent."

discharged for unlawful discriminatory reasons?" An example of a legal claim of discrimination would be "Is it unlawful to exclude pregnancy-related illness from contractual sick leave provisions?" (See, for example, General Electric v. Gilbert, 429 U.S. 125 (1976).)

[19] Under Title VII, white males are also protected against discrimination or preferential treatment. See, for example, McDonald v. Santa Fe Trail Transportation Co., 423 U.S. 923, 12 FEP Cases 1577 (1976) and Alfred Blumrosen, "Strangers No More: All Workers Are Entitled to Just Cause," *Industrial Relations Law Journal* 2 (1978): 519–566. For a discussion of class action suits under Title VII and Rule 23 of the Federal Rules of Civil Procedure, see Schlei and Grossman, "Chapter 34 Class Actions," in *Employment Discrimination Law* (Washington, D.C.: Bureau of National Affairs, 1983), pp. 714–740.

[20] The sum of all these categories is 1,898. This is in response to a series of questions asking the types of claims that are filed. It is possible for one case to involve two types of discrimination. A case could be a factual case and involve reverse discrimination, for example. The number of unique discrimination cases—as indicated by another question that asked how many different discrimination cases respondents had handled—is 1,761.



nation cases (6.3 percent) is higher than what one would expect, given that the original intention of the Civil Rights Act of 1964 was to end discrimination against blacks, not against whites. This reflects how knowledgeable employees are about their rights. The number of illegality of contract provision cases is also very high, given that many parties think of the role of the arbitrator only in terms of resolving disputes over contract language, rather than of deciding statutory issues.[21] Finally, it is impossible to assess the proportionate amount of activity that class action claims represent, that is, the actual number of claimants. Although these claims constitute 10 percent of this sample, they may represent a greater or lesser proportion of all activity, since a class action by definition represents more than one case and the exact number it represents is unknown. In the aggregate of the 1,761 discrimination cases, the arbitrator ruled in favor of the claimant 270 times.

REVIEW AND REVERSAL

Following *Gardner-Denver,* one major and immediate concern of labor and management was whether it would lead to a massive number of discrimination claims being reviewed by the EEOC and the courts.[22] Review in this study refers to the process of submitting a discrimination grievance previously heard in the arbitral forum to either the EEOC, a state antidiscrimination agency, or the trial courts.

Respondents were asked to indicate how many discrimination grievances they had handled since *Gardner-Denver.* As the authors reported elsewhere, the total number of "unique" discrimination cases reported by the respondents was 1,761.[23] With a total of 659 respondents, this results in an average of 2.6 cases per respondent. Of these discrimination grievances, 484 or 27.4 percent were reviewed by the EEOC or state antidiscrimination agencies. Thus, more than a quarter of these cases were reviewed by administrative agencies.

There may be several reasons for the great amount of review activity. One is that the perception of individuals may be that they have a higher probability of succeeding in their claims through the EEOC rather than through arbitration. The EEOC provides a relatively inexpensive method of redress compared to a court proceeding. Also, the evidentiary standard for establishing probable cause required by the EEOC is less strict than that required by the trial court.[24]

One of the troublesome aspects of studying the effect of a public policy is the problem of establishing the base line from which to measure the change. In other words, how much review activity could have been expected without the change implied by *Gardner-Denver?* Prior to *Gardner-Denver,* it was possible to have some review activity.[25] It was very little, however, because the courts were relying on the national labor policy favoring arbitration.[26]

"The data suggest that neither review nor reversal has a significant effect on the parties' attitudes toward the *Gardner-Denver* decision, with the exception of review by the EEOC."

[21] See Michele M. Hoyman and Lamont E. Stallworth, "Arbitrating Discrimination Grievances in the Wake of *Gardner-Denver,*" *Monthly Labor Review* (October 1983): 3–9, in which the authors noted that 83 percent of the respondents reported that they favored, either conditionally or unconditionally, the Meltzer school of thought. This school asserts that the proper role of the arbitrator is to interpret and apply the labor agreement and not the law.

[22] See, for example, Jay S. Siegel, "An End to Multiple Litigation of Non-Meritorious Title VII Discrimination Claims," *Labor Law Journal* 28 (April 1977): 195–199.

[23] To determine the actual number of labor arbitrations presented involving discrimination, the following questions were asked: (1) "Since *Gardner-Denver* (1974), approximately how many *discrimination* grievances have you presented in labor arbitration? (If none, fill in zero and skip to Q. 17.)" (2) "In how many of these discrimination grievances did the arbitrator actually find that the company and/or union was guilty of discrimination?" See also Hoyman and Stallworth, *op. cit.*

[24] See, generally, Arthur B. Smith, Jr., Charles Craven, and Leroy Clark, *Employment Discrimination Law* (Indianapolis: Bobbs-Merrill, 1981).

[25] The positions of the various courts of appeals were set forth in seven leading decisions: Dewey v. Reynolds Metal Co., 429 F.2d 324 (1970), *aff'd,* 402 U.S. 689 (1971); Hutchings v. U.S. Industries, 426 F.2d 303 (1970); Newman v. Avco Corp., 451 F.2d 743 (1971); Spann v. Kaywood Div. Joanna Western Mills, 446 F.2d 120 (1971); Rios v. Reynolds Metal Co., 467 F.2d 541 (1972); Bowe v. Colgate Palmolive, 416 F.2d 711 (1969); and Oubichon v. North American Rockwell Corp., 482 F.2d 324 (CA5 1970).

[26] *Supra* fn. 8.

A comparative analysis of court and EEOC relitigation and review activity in the present study reveals that there is much less court relitigation activity than administrative agency review activity. It is, however, still substantial. Of the 1,761 cases, there are 307 (17 percent) of the discrimination cases that have been relitigated by the courts. This is a very high rate, given the substantial cost of relitigation from the individual claimant's point of view.[27] Thus, the large amount of review activity suggests that *Gardner-Denver* has had more than just a procedural effect.

Seventy-seven of the 484 cases (15.9 percent) of the arbitral awards that were reviewed were reported to be reversed by either the EEOC or state antidiscrimination agencies. This suggests that there is approximately a one-out-of-six chance that a reviewed arbitral award will be reversed by the EEOC. If the reversals by the trial court are examined, there is a much different picture. Of the 307 Title VII-related arbitral awards relitigated in the trial courts, only 21 (6.8 percent) were reversed. This is a dramatically smaller percentage of reversals than that found in EEOC or state agency decisions.[28]

A closer examination of the number of reversals of *all* discrimination cases, rather than merely those reviewed and relitigated, yields a much more modest figure and perhaps a more accurate estimate of the effect of the review process. From the point of view of the litigants, the important question is how frequently does reversal occur out of all potential cases? For the purpose of this study, the term *potential case* is used to describe any Title VII-related grievance arbitration that may be reviewed or relitigated under Title VII, during the seven-year time period following *Gardner-Denver* (1974).

In this study, there were 1,761 potential cases.[29] Examining the number of reversals by the EEOC out of all cases, it can be seen that 77 of a total of the 1,761 cases are reversed (4.4 percent). For the courts, the number of reversals out of all discrimination cases is 21 out of 1,761 or 1.2 percent. This finding paints quite a different picture. Depending on the forum to which the grievant takes his or her case, there is either a one-out-of-25 chance for EEOC reversal or a one-out-of-100 chance of reversal by the courts. In other words, there is only a very small chance of a single discrimination case being reversed.

The data indicate that there is a substantial amount of review activity. More than a quarter of all discrimination arbitral awards were reviewed by the EEOC.[30] A very small fraction of all discrimination cases, however, are reversed. This study indicates that only one-out-of-100 cases are reversed by the courts. Therefore, it is reasonable to conclude that the effect of *Gardner-Denver* has been primarily in the form of review and relitigation, rather than in reversals. Thus, the effect of *Gardner-Denver* appears to have more procedural significance than practical or substantive significance, except where review activity implies a substantive effect. For instance, the parties who anticipate that they may be reviewed may adopt some of the protections for the individual grievant's rights as articulated in *Gardner-Denver*.[31]

ATTITUDES TOWARD *GARDNER-DENVER*

There was not much popular support for *Gardner-Denver* when it was rendered. It is believed that this was not so much because of its legal reasoning, but because of its practical effect of eroding the final and binding nature of arbitration. Consequently, it was argued that *Gardner-Denver* undermined the traditional notions of industrial self-regulation. In fact, this survey found that a substantial portion of attorneys oppose the Court's holding in *Gardner-Denver*.

LABOR AND MANAGEMENT ATTITUDINAL DIFFERENCES

An analysis of the data according to labor organization attorney representatives versus management attorney representatives reveals significant labor and management differences. Seventy-two percent of those attorneys who represent labor agree with *Gardner-Denver*, whereas only 28.2 percent of the management representatives agree with *Gardner-Denver*.

REVIEW AND REVERSAL: EFFECT ON VIEWS

It was contemplated that those representatives who had the experience of having a Title VII-related grievance either reviewed or reversed would be less likely to support *Gardner-Denver*. The data suggest that neither review nor reversal has a significant effect on the parties' attitudes toward the *Gardner-Denver* decision, with the exception of review by the EEOC. Review by the EEOC is positively and significantly associated with disagreement with *Gardner-Denver*. In other words, those individuals who have actually experienced review of arbitral awards by the EEOC are more likely to express disagreement with *Gardner-Denver*, independent of the outcome of the review.

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[27] There are other noneconomic costs involved in deciding to file a charge or suit. See Sandra Gleason, "The Probability of Redress: Seeking External Support," in Barbara Forisha and Barbara Goldman, eds., *Outsiders on the Inside: Women and Organizations* (Englewood Cliffs, N.J.: Prentice-Hall, 1981), in which Gleason makes the point that the cost of a female filing are quite high. These include the cost of lawyers' fees, time, stress, and the possibility of retaliation on the job.

[28] These results were first reported in Hoyman and Stallworth, *op. cit.*

[29] See *supra* fn. 23, regarding how this number was determined.

[30] For an explanation of the terms *review, relitigation,* and *reversal,* see *supra* fn. 5.

[31] The Court set forth its concern in footnote 19. The Court expressed further concern about the union's exclusive control over the manner and extent to which an individual grievance is presented. See Vaca v. Sipes, 386 U.S. 171, 64 LRRM 2369 (1967) and Republic Steel Co. v. Maddox, 379 U.S. 650, 58 LRRM 2193 (1965). In arbitration, as in collective bargaining, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. See J.I. Case Co. v. Labor Board, 321 U.S. 332, 14 LRRM 501 (1944). Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. See, for example, Steele v. Louisville & N.R. Co., 323 U.S. 192, 15 LRRM 715 (1944) and Tunstall v. Brotherhood of Locomotive Firemen, 323 U.S. 210, 15 LRRM 715 (1944).

LITIGANTS' VIEWS ON APPROPRIATE EVIDENTIARY WEIGHT

Soon after *Gardner-Denver*, a number of scholars feared that either the trial courts would establish, in effect, an arbitral deferral policy under footnote 21[32] or that the utility of arbitration in this area would be lost.[33] Because of these strong and divergent views, it was initially thought in this study that respondents who actually spent the time and money involved in having a case reviewed or reversed would tend to accord relitigated arbitral awards a considerable or great degree of evidentiary weight.[34] The data do not support this view.

In other words, opinions on evidentiary weight of those respondents whose decisions have been reviewed and those respondents who have been reversed by the EEOC or by the courts do not vary from the opinions of those whose awards have not been reviewed or reversed.

LABOR AND MANAGEMENT DIFFERENCES

The status of litigants as labor or management attorney representatives was not correlated with the degree of evidentiary weight that they thought should be accorded an arbitral award. An analysis of the experience of the parties having undergone review or reversal by the EEOC did not tend to predict whether a respondent would support the judicial practice of according an arbitral award either considerable weight or great evidentiary weight by the trial courts.

STATUTORY AMENDMENT TO TITLE VII

A large proportion (78.5 percent) of the respondents would favor a statutory amendment precluding an individual claimant who "knowingly and voluntarily" permitted his or her claim to be determined in arbitration from subsequently seeking recourse under Title VII. This finding is consistent with the views of a number of labor relations experts. In addition, it supports the notion of the viability of some form of arbitration in the resolution of Title VII-related grievances and is in line with the suggestion of Chief Justice Burger to explore the expanded use of arbitration instead of litigation in such civil matters.[35]

There were differences in the way that labor and management responded to the waiver question. Of the management respondents, 91 percent supported a statutory limitation on the grievant's redress if the grievant knowingly and willingly waived his or her legal rights when the case went to arbitration. Only 45 percent of the labor respondents supported such a change.[36]

Those who have had experience with discrimination cases expressed a different attitude to this statutory limitation than those who had none. By "experience with discrimination cases," we mean that an attorney for labor or management reported having experience with one or more discrimination cases. For instance, 83 percent of the group with discrimina-

"A large proportion (78.5 percent) of the respondents would favor a statutory amendment precluding an individual claimant who 'knowingly and voluntarily' permitted his or her claim to be determined in arbitration from subsequently seeking recourse under Title VII."

[32] See "Judge Edwards Defends . . . ," *op. cit.*

[33] See Feller, *op. cit.*

[34] Generally, it has been found that the trial courts do not accord relitigated arbitral awards either considerable or great evidentiary weight. See Hoyman and Stallworth, *op. cit.*

[35] *Infra*, fn. 11.

[36] Of the labor respondents, 45 of them (45.5 percent) favored the statutory limitation given a signed waiver and 54 respondents (54.5 percent) opposed the statutory amendment. Of the management respondents, 403 respondents (91 percent) supported the statutory amendment and 39 (8.8 percent) opposed it. (The Pearson's correlation = .46, sig. = .001.)

tion experience favored this statutory limitation, as opposed to 17 percent of those with no experience. Surprisingly, however, there is no relationship between review or reversal either by the courts or the EEOC and the attitude toward the waiver scheme.

LABOR AND MANAGEMENT VIEW OF THE EFFECT OF *GARDNER-DENVER*

The opinions of the responding attorneys concerning the policy issues raised by the *Gardner-Denver* Court fall substantially short of a resounding endorsement. Sixty percent disagreed with the decision. There are significant differences in how labor and management view *Gardner-Denver,* with labor supporting it more frequently.

The responding attorneys had a favorable view toward a statutory amendment limiting the redress available to a grievant if he or she knowingly and willingly signed a waiver before agreeing to submit his or her grievance to arbitration. What these results suggest is an endorsement of traditional notions of collective bargaining. The parties seem to still have grave doubts about the *Gardner-Denver* rationale almost ten years after the decision.

IMPLICATIONS OF THE STUDY

The authors do not propose to advance any definitive policy recommendations based upon this study. The data collected, however, do have some significance, particularly since this information was drawn from attorneys who have substantial experience in representing labor organizations and management in matters concerning discrimination grievances. The three most noteworthy findings that these representatives offer concern (1) the frequency of review and relitigation, (2) the fact that in the overwhelming number of instances, the determination of the arbitrator is not in conflict with the findings of state and federal antidiscrimination agencies, and (3) support of the respondents for a statutory change of Title VII that effectively eliminates affording the individual claimant the opportunity or the right to have "two bites of the apple."

The second finding suggests that the responding attorneys are of the opinion that arbitration has played an effective role in resolving discrimination grievances. Support for the proposed statutory amendment, however, suggests that arbitration may be more acceptable to litigants if the claimant were to be precluded from having "two bites of the apple" where he or she has knowingly and voluntarily allowed his or her claim to be determined in arbitration. Perhaps, here lies the answer to the *Gardner-Denver* riddle and the nongovernmental resolution of other statutory-related grievances. ■

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