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Labor Arbitration and Title VII of the Civil Rights Act of 1964

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I. Introduction

Title VII of the Civil Rights Act of 1964[1] sets forth certain broad prohibitions of discrimination against individuals on the basis of race, color, religion, sex or national origin. Although Title VII deals with discrimination by employers,[2] employment agencies[3] and labor unions,[4] this comment will concern itself only with the employer, and, more specifically, with one particular problem arising from an employer-employee relationship.[5]

A discriminatory act by an employer against an employee which constitutes a violation of the provisions of Title VII may also be a violation of other local, state or federal laws, and may be a violation of a provision of the collective-bargaining agreement governing the employer-employee relationship. Each of these separate violations may give rise to an independent remedial right. Each such separate remedial right may lead to a different forum for purposes of adjudicating the controversy. A current question of substantial significance and complexity is whether an individual who believes that he has been the subject of a prohibited discriminatory act should be permitted to pursue a remedy in a multiple number of forums for this single act of discrimination, or should be limited to having his case tried once and conclusively determined. Specifically, this comment will deal with the problems arising from the situation where an employee claiming discrimination seeks relief through a grievance and arbitration procedure pursuant to the terms of a collective bargaining agreement, and either

1. Title VII, §§ 701-16(c), 42 U.S.C. §§ 2000e-2000e-15 (1964).
2. *Id.* § 2000e-2(a).
3. *Id.* § 2000e-2(b).
4. *Id.* § 2000e-2(c).
5. *Id.* § 2000e-2(a). This section specifically provides:
It shall be an unlawful employment practice for an employer—
(1) to fail to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
(2) to limit, segregate or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

concurrently or subsequently seeks relief for the same allegedly discriminatory act by taking his problem to an appropriate state or federal agency, or by directly filing suit in the federal or state courts.

To determine where the courts may go when faced with a situation of the nature just described, we will first consider where the courts have already gone when faced with this problem, and they have gone in a variety of directions for a multitude of different reasons. As will be seen, the question has caused a division among the federal appellate courts, and the only case reaching the United States Supreme Court resulted in a four-four ballot. Some consideration will then be given to certain factors to which the author feels the courts have failed to give sufficient weight in considering the problem, and, finally, some tentative suggestions as to a compromise solution will be proposed.

II. The Case Law

A. *Bowe v. Colgate-Palmolive Company*

In the fall of 1969 the United States Court of Appeals for the Seventh Circuit became the first appellate court to face the question of defining the relationship between an action in the federal courts under Title VII and an action involving the same issue brought to arbitration pursuant to the provisions of a collective bargaining agreement governing the terms of the concerned employer-employee relationship. In the case of *Bowe v. Colgate-Palmolive Co.*[6] the court was faced with a claim brought by female employees of one of Colgate's plants alleging that they were intentionally discriminated against by a system of job classification which deprived them of certain promotional opportunities, and that they were subject to discriminatory layoffs under a segregated plant seniority system based upon sex. Prior to trial, the district court required the plaintiffs to elect whether they would pursue their statutory remedy in federal court, or seek a remedy through utilization of the grievance and arbitration procedure according to the terms of the collective bargaining agreement. The appellate court unanimously reversed, holding that the trial court had erred by not permitting the plaintiffs to pursue a remedy in both the court and through their grievance and arbitration procedure. The only restriction which the appellate court would apply was that an election of remedies would be

6. Bowe v. Colgate-Palmolive Co., 416 F.2d 711 (7th Cir. 1969) *rev'g* 272 F. Supp. 332 (S.D. Ind. 1967).

required so as to preclude the possibility of duplicate relief which would result in an unjust enrichment or windfall to the plaintiffs.[7] While the court recognized that their holding resulted in requiring a defendant to defend in two different forums, they were more concerned with what they considered to be "crucial differences" between the two processes and the remedies afforded by each. They were also concerned that:

> [T]he arbitrator may consider himself bound to apply the contract and not give the types of remedy which are available under the statute.[8]

To understand the development of the subsequent case law in this area, it should be noted that in this case the plaintiffs had not at the time of commencement of the federal suit actually presented their grievance in arbitration.

B. *Dewey v. Reynolds Metals Company*

The second appellate court to consider the arbitration question was the Sixth Circuit. In the case of *Dewey v. Reynolds Metals Company*[9] the court was asked to decide whether an employee who was allegedly wrongfully discharged from his employment because of his religious beliefs could bring an action in federal court under the provisions of Title VII after a grievance which had been filed by the employee under the provisions of his collective bargaining agreement had been finally adjudicated and denied in arbitration.

The specific facts of the *Dewey* case are worth detailing inasmuch as they vividly reveal the succession of actions which a determined employee can pursue. Dewey was discharged from his employment because of his repeated refusal either to work on Sunday or provide a replacement in accordance with established plant rules. Believing that he had been discriminatorily discharged because of his religion, Dewey filed a grievance to this effect in accordance with the provisions of the applicable collective bargaining agreement. The grievance was processed through the various steps of the grievance procedure and an arbitration hearing was held in April, 1967. In June, 1967, the arbitrator issued a ruling denying Dewey's claim.

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7. *Id.* at 715.
8. *Id.*
9. 429 F.2d 324 (6th Cir. 1970) *aff'd* 402 U.S. 689 (1971). (Affirmed by a divided Court.)

Contemporaneously with the filing of his grievance, Dewey filed a similar charge with the Michigan State Civil Rights Commission. The Commission found that there were insufficient grounds upon which to issue a complaint against Dewey's former employer. Dewey then requested the United States Office of Federal Contract Compliance to review his charges of religious discrimination, and that office also found no basis for such a charge. Finally, on January 4, 1967, Dewey filed a charge with the Equal Employment Opportunity Commission alleging that he had been discriminated against because of his religion. This Commission investigated the charge, and determined contrary to the recommendation of its Regional Director, that there was reasonable cause to believe that the employer had violated Title VII. After unsuccessful attempts to conciliate, the Commission notified Dewey of his right to bring a suit under section 706 of the Act.[10] The district court ruled that Dewey's previous pursuit of his contractual remedy did not preclude his bringing a suit under Title VII to the federal courts, and upon hearing the case on its merits, decided the allegation of discrimination in Dewey's favor. The court of appeals reversed.

Unfortunately, for those who have subsequently attempted to assess the significance of the *Dewey* decision, the court of appeals in its decision first reviewed in detail the holdings of the district court on the merits of the case, and specifically reversed the lower court's rulings. Only after reversing upon the merits did the appellate court consider the argument raised below that pursuit of the contractual remedy should be a bar to seeking further relief upon the same charge but in a different forum.

The court of appeals, in its discussion of the effect of the prior arbitration decision, noted the arbitrator clearly had jurisdiction to determine the grievance inasmuch as it involved an interpretation of a term of the collective bargaining agreement. Judge Weick, writing for the majority, stated that:

> Where the grievances are based on an alleged civil rights violation, and the parties consent to arbitration by a mutually agreeable arbitrator, in our judgment the arbitrator has a right to finally determine them. Any other construction would bring about the result present in the instant case, namely, that the employer, but not the employee, is bound by the arbitration.
>
> This result could sound the death knell to arbitration of labor

10. Title VII, § 706, 42 U.S.C. § 2000e-5(e) (1964).

> disputes, which has been so usefully employed in their settlement. Employers would not be inclined to agree to arbitration clauses in collective bargaining agreements if they provide only a one-way street, *i.e.*, that the awards are binding on them but not on their employees.
>
> The tremendous increase in civil rights litigation leads one to the belief that the Act will be used more frequently in labor disputes. Such use ought not to destroy the efficacy of arbitration.[11]

For the majority of the court in *Dewey* the issue was viewed as:

> [N]ot whether arbitration and resort to the courts could be maintained at the same time; rather our case involves the question whether suit may be brought in court *after* the grievance has been finally adjudicated by arbitration.[12]

The decision in *Dewey* was appealed to the Supreme Court and affirmed by an equally divided court.

Of significance in the later development of this area of the law in the Sixth Circuit is that Judge Weick in writing for the majority made no reference to the prior decision by the Seventh Circuit in *Bowe v. Colgate-Palmolive Co.*, nor did he use the expression "election of remedies." Judge Combs, writing in dissent, did both; he characterized the decision of the majority as based on an election of remedies application, and relied on *Bowe* to counter such an argument.

C. *Hutchings v. United States Industries, Inc.*

Less than a month after the Sixth Circuit's decision in *Dewey*, the Fifth Circuit, in the case of *Hutchings v. United States Industries, Inc.*,[13] chose to reverse its lower court and follow the Seventh Circuit's decision in *Bowe*. In *Hutchings*, a Negro employee, who had twice been to arbitration to protest his employer's failure to promote him, and who had lost both times, was held entitled to bring an action based upon this same claim in federal court under Title VII. In addition, the court held that even though the employee did not file a charge until 154 days after the alleged violation, the 90-day requirement of section 706(d)[14] of the Civil Rights Act was tolled when the employee invoked

11. 429 F.2d 324, 332.
12. *Id.*
13. Hutchings v. United States Industries, Inc., 428 F.2d 303 (5th Cir. 1970).
14. Title VII, § 706, 42 U.S.C. § 2000e-5(d) (1964).

the contractual grievance procedure in an attempt to obtain private settlement of the suit.

Judge Ainsworth, in writing for a unanimous court, reviewed the emphasis which Congress has placed in Title VII on private settlement of discriminatory practices without litigation, but noted that when voluntary compliance cannot be achieved, and the EEOC has issued the right to sue notice, the individual has perfected his right to seek judicial consideration of his grievance. Continuing, Judge Ainsworth wrote:

> To the federal courts alone is assigned the power to enforce compliance with section 703(a), and the burden of obtaining enforcement rests upon the individual claiming to have been aggrieved by its violation. . . . When, as frequently is the case, the alleged discrimination has been practiced upon the plaintiff because he is a member of a class that is allegedly discriminated against, the court trying a Title VII suit bears a special responsibility in the public interest to resolve the employment dispute by determining the facts regardless of the individual plaintiff's position, . . . for "whether in name or not, the suit is perforce a sort of class action for fellow employees similarly situated."[15]

In contrast to their belief that the trial judge in a Title VII case bears a special responsibility in the public interest due to the class nature of the action, the *Hutchings* court viewed the arbitration process as a private one essentially tailored to the needs of the contracting parties. The court also expressed its concern that in the arbitration proceeding the arbitrator's role is to determine the contract rights of the employees, as distinct from the rights afforded them by enacted legislation such as Title VII, and consequently to allow resort to arbitration to be a bar to pursuit of a legislative remedy may result in the complainant never having the opportunity to determine whether he has been deprived of a statutorily protected right.[16]

In reversing, the court noted that the only application of an election of remedies doctrine to Title VII cases should be to the extent necessary to insure that a plaintiff not receive duplicate relief in the public and private forums which would result in an unjust enrichment to him.[17]

Of special significance, and even greater puzzlement, is the court's footnote to its reversal order:

> Because the rights and remedies at issue in the grievance or arbitra-

15. 428 F.2d 303, 310.
16. *Id.* at 313.
17. *Id.* at 314.

> tion proceeding and the rights and remedies at issue in the Title VII case differ, the arbitrator's award or grievance determination certainly are not binding upon the court. This does not mean, however, that the award or determination ought to be disregarded altogether. The courts should evaluate both awards and grievance determinations or settlements in deciding Title VII issues of violations and relief. That is, the awards and determinations may properly be considered as evidence. . . . The record in this case does not reveal whether Title VII rights, or similar contractual rights, were ever considered during the processing of Hutchings' grievances. . . . In view of the state of this record, *we leave for the future the question whether a procedure similar to that applied by the Labor Board in deferring to arbitration awards when certain standards are met might properly be adopted in Title VII cases.*[18] (Emphasis added.)

If the last sentence of the above quotation is omitted, the *Hutchings* opinion is clear and unequivocal as to its holding and reasoning. The last sentence either represents merely a little judicial fence-straddling, or it indicates a sincere underlying concern over the apparent significance of the holding with respect to the arbitration procedure as a practical, viable tool for resolving employee-employer disagreements.

D. *Spann v. Kaywood Division, Joanna Western Mills Co.*

Subsequent to the Supreme Court's even split in *Dewey*, the Sixth Circuit has had two opportunities to reconsider its position in *Dewey*, and on both occasions it has declined to broaden its holding and has in fact, for all practical purposes, so restricted its result as to make its practical usefulness to the employer almost nonexistent. In August, 1971, in *Spann v. Kaywood Division, Joanna Western Mills Co.*[19] an employee, having obtained and accepted an arbitration award reinstating him to his position in appellee's plant, sought an additional remedy from the court under Title VII which the arbitrator had denied—back pay. The court held that the facts of the case were within the court's previous holding in *Dewey*. The court, in referring to *Dewey* stated: "[In *Dewey* we held] that pursuit of arbitration, without some simultaneous use of *court or agency* processes, precluded judicial jurisdiction to later review the arbitrator's decision (emphasis added)."[20]

18. *Id.* at n.10.
19. 446 F.2d 120 (6th Cir. 1971).
20. *Id.* at 122.

However, as has been previously stated, although Dewey did not apparently file suit in federal court until after the arbitration decision was rendered, he did clearly make simultaneous use of agency processes. During the period when his grievance was being processed, he presented his complaint to both the Michigan State Civil Rights Commission and to the Office of Federal Contract Compliance. Moreover, his charge was filed with the Equal Employment Opportunity Commission on January 4, 1967, and the arbitration decision was not rendered until June, 1967. Therefore, it appears that either the court has misread the *Dewey* holding, or is consciously restating it in a manner to further limit its application to only those situations where no recourse is made to either a court or an agency until after the arbitration ruling has been issued. Since their conclusion restates this same position it is hardly likely that this narrowing of *Dewey* is merely the result of an inadvertent statement.

The court refused to accept Spann's argument that under the applicable labor agreement the arbitrator was without jurisdiction to decide the issue of racial discrimination. The court concluded that the provision in the labor agreement stating equal pay should be paid for equal work, and equal privileges must be granted regardless of race, creed or color gave the arbitrator jurisdiction to decide an issue of racial discrimination.[21] The court concluded by stating:

> This case falls squarely within the reasoning and facts of *Dewey*, and we intimate no opinion on cases falling without the scope of that decision. We hold only that where all issues are presented to bona fide arbitration and *no other refuge is sought until that arbitration is totally complete, Dewey* precludes judicial cognizance of the complaint.[22] (Emphasis added.)

Before leaving *Spann*, it should also be carefully noted (in order to appreciate this court's next decision) that Spann specifically argued that the arbitration proceeding was a sham because the union failed to vigorously pursue the racial question, and that this argument was also rejected by the court.

E. *Newman v. Avco Corporation*

In *Newman v. Avco Corporation*[23] the Sixth Circuit was faced with an action brought by a Negro employee on an employer's alleged failure

21. *Id.* at 123.
22. *Id.*
23. 3 FEP 1137, 451 F.2d 743 (6th Cir. Oct. 27, 1971).

to provide a proper training period for the employee to learn a new job. Newman was discharged from Avco on February 1, 1966, allegedly for failure to perform properly a newly assigned job. On February 2, 1966, pursuant to the collective bargaining agreement between Avco and the union, a grievance was filed on behalf of Newman. The grievance was amended one week later to include a specific charge that the discharge was racially discriminatory, and in violation of the labor agreement and Title VII. An arbitration hearing was conducted on April 21 and 22, 1966. In addition to union representation, Newman was represented at the arbitration hearing by his own attorney who argued the allegations concerning racial discrimination. Subsequent to the arbitration hearing, and prior to the issuance of the arbitration decision on June 28, 1966, Newman, on May 2, 1966, filed a charge with the Equal Employment Opportunity Commission. The Commission found reasonable cause to believe that Avco *and the union* were in violation of Title VII. Thereafter, upon notification by the Commission of failure to achieve voluntary compliance with Title VII through conciliation, Newman brought suit against both Avco and the union on behalf of himself and all other Negroes who were similarly situated.

The district court applied an election of remedies theory, granted the defendant's motion for summary judgment, and dismissed the plaintiff's class action. The court of appeals reversed. The court distinguished *Dewey* by noting that in *Dewey*, as opposed to the case at bar, there was a full evidentiary record so that there was no way of knowing whether some or all of the four Supreme Court Justices voting to affirm reached their conclusion on the basis of the merits of the case as contrasted with the alternate procedural ground. The court then stated that:

> Congress, intimately familiar with arbitration in labor-management contracts, employed no language in Title VII which even intimates support for the election of remedies doctrine. And several courts have squarely rejected it. . . .
>
> . . . .
>
> Further, we do not read *Dewey* as based upon the doctrine of election of remedies. The majority opinion of this court in *Dewey* did not so characterize its reasoning. On the contrary, as has been indicated it seems apparent that the second ground relied on for the decision in *Dewey* was the doctrine of estoppel. This equitable agreement holds that where the parties have agreed to resolve their grievances before (1) a fair and impartial tribunal (2) which had

> *power to decide them*, a District Court should defer to the fact finding thus accomplished.[24] (Footnotes omitted.)

The court examined the two criteria it deemed applicable to estoppel, and concluded that the doctrine should not be applied at this stage of this proceeding. In reaching this conclusion the court said:

> [A]lthough Newman submitted his discharge to arbitration, he did not have a clearly voluntary choice as to whether or not to do so. The labor-management contract in this case is a typical one, the union having gained a mandatory arbitration clause in apparent exchange for a no-strike clause. The labor-management contract required appellant Newman to promptly file a grievance and to proceed through each step of the machinery, the last of which was arbitration. Failure to file initially or to pursue each step to final conclusion automatically rendered the discharge final. Had appellant ignored the quick and readily available grievance machinery of the labor-management contract, he would certainly have been met at the federal courthouse with a motion to dismiss his complaint for failure to exhaust his contractual remedies.[25]

The court then questioned whether the arbitrator even had the right to decide the employee's race discrimination claims. Noting that under the provisions of the applicable labor agreement the arbitrator's jurisdiction was limited to determining questions involving the interpretation of the terms of the labor agreement, that the arbitrator was specifically prohibited from adding to, subtracting from, or changing any of the terms of the agreement, and that the subject agreement did not contain any prohibition against race discrimination, the court concluded that "major aspects" of the case presented to the district court were either not presented in arbitration or were beyond the arbitrator's power to decide. "*To such issues* plainly neither the doctrine of res judicata nor collateral estoppel can apply (emphasis added)."[26] The court distinguished *Spann* by noting that there not only was there an award, but the award, which was largely favorable to Spann, was accepted by him. Moreover, here, unlike in *Spann*, the employee charged that there existed a "long-standing conspiracy to maintain a system of race discrimination participated in by both company and union."[27]

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24. *Id.* at 1140.
25. *Id.*
26. *Id.* at 1141.
27. *Id.* at 1140.

III. Discussion

The complex problem under consideration presents a classic example of conflicting policies coming to a focus on a particular question, a satisfactory resolution only being possible through some compromise of each of the involved principles—a result which fully satisfies nobody, but which yields a resultant vector that will hopefully continue to press ahead in a manner representative of the national interest.

There clearly has been, and continues to be, a national policy in favor of encouraging and protecting the arbitration institution as the means for the final adjustment of labor disputes.[28] However, an arbitrator's decision is, of course, only binding as to issues properly within his jurisdiction.[29] Furthermore, there are certain recognized exceptions to the doctrine of arbitral finality such as where there is a claim by the employee of a deprivation of fair union representation.[30] Finally, although it seems too obvious to require statement, a conflict only exists between preserving the finality of the arbitration process and pursuit of a remedy in another forum if the same precise issue is involved in both instances. Unfortunately, too many courts have failed to recognize this point. For example, there is a clear distinction, and hence no true conflict, between an arbitration decision holding that an employee was not entitled to an available promotion according to the seniority provisions of a labor agreement, and a finding by a court or agency that the same employee was discriminated against because the applicable seniority provision is itself discriminatory. Conversely, a true conflict exists when an arbitrator determines that an employee was properly discharged for fighting because he did engage in the prohibited act and his discipline was not unequal to that accorded other similarly situated employees irrespective of race, and an agency or court finding that this same discharge was discriminatory. Again, no true conflict exists where an arbitrator is required to decide an issue solely on the basis of the provisions of a collective bargaining agreement. It is specifically prohibited from adding to, subtracting from or modifying such provisions,

28. *See* the Steelworkers Trilogy: United Steelworkers of America v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); and United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960). *See also* Boys Market, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970).

29. United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

30. Vaca v. Sipes, 386 U.S. 171 (1966).

and the concerned agreement does not include an anti-discrimination clause. Of course, the courts shall have to be constantly vigilant to detect the presence of a litigant who arbitrates, and loses, on one issue and then comes to the courts with the same basic charge presented perhaps in a slightly different manner.

With the current concern for the rights of the individual and the unquestioned need to eradicate discrimination in all of its sundry forms,[31] we have, at the time of weighing the various conflicting interests involved in this question, given too little concern to the plight of the employer. While there are undoubtedly employers who continue to blatantly discriminate, there are also a considerable number of employers who are making strenuous, good-faith attempts to be non-discriminatory in their hiring and employment practices, and who have as their goal the ultimate elimination of all traces of any prior discriminatory practices. Employers in this latter group are certainly deserving of consideration. Unless some substantial effect is given to the final findings of whatever forum is the first to consider a specific allegation of discrimination, the employer is, in effect, being required to play Russian roulette. As he is taken from the arbitration proceeding, to a local agency, to a state agency, to any of several federal agencies, he is faced with the frustrating knowledge that at no point will he finally be sustained as to the issue in dispute until he has been subjected to litigation in the courts; yet, the likelihood of an adverse decision is omnipresent. The procedure is clearly not conducive to a prompt, final determination of the issue, and such a lengthy process is of substantial detriment to the employer. As a result of the length of such a procedure, retroactive damages can increase to a point out of all realistic proportion to the issue. The employer clearly has to bear the burden of the cost of litigating his side of the issue, whereas the charging party may have the benefit of the advocacy of a concerned agency, and may even be provided with free counsel when the matter enters the courts.[32] Moreover, civil rights issues by their very nature often require extensive research into employment records, detailing of job progressions, development of

31. Title VII has been interpreted as not only prohibiting present acts of discrimination but as requiring the elimination of racially neutral conditions, such as seniority provisions, which act to perpetuate the results of prior discrimination. Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968).

32. *E.g.*, Title VII, § 706, 42 U.S.C. § 706, 42 U.S.C. § 2000e-5(e) (1964) provides in part that:

> Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs or security.

hiring statistics—all at considerable expense to the employer.[33] As successive investigatory meetings, conciliation meetings and hearings are held, the employer must bear the cost of the disruption to production resulting from the need to absent supervisors from their normal production responsibilities so that they can appear and offer the necessary testimony. A cost which may be difficult specifically to dollarize, but which may be substantial in volume, is that resulting from the adverse publicity an employer may receive as his case moves from one public forum to another. Such adverse publicity may not only have a significant negative influence on a firm's sales but, most unfortunately, adverse publicity may give the employer a bad image in the local Black community and be a real deterrent to the employer's good faith effort to attract and hire skilled minority members as part of an affirmative action program.

IV. Conclusion

An individual who believes that he has been the victim of a prohibited discriminatory act has, without question, the right to have his claim adjudicated fully and fairly by a competent impartial third party —once. Where a party has submitted his claim to the arbitration process and an agency or court is asked to review the merits of this same claim, the following suggestions may be found to be of some value in balancing the conflicting policies which will be argued to the court.

1. An arbitrator dealing with an issue involving a minority member should be keenly aware of the potential of future litigation. The arbitration decision should set forth precisely the factors considered in arriving at a final holding. For example, whether the arbitrator considered the issue at hand in light of an antidiscrimination clause in the collective bargaining agreement, whether he was permitted to and did consider statutory law,[34] what precisely were the issues raised by the charging

33. *See* H. Kessler & Company v. Equal Employment Opportunity Commission, 3 FEP 956 (N.D. Ga. Sept. 27, 1971) where the court stated:

> [T]he Court notes that arguments concerning inconvenience and difficulty in producing information in Title VII cases have been made, and most often rejected. . . . If the information or records sought is relevant or material to the charge under investigation and the EEOC proceeds as authorized by statute, then any inconvenience or difficulty . . . must be considered as a "part of the social burden of living under government."

34. Although outside the scope of this comment, for an insight into the conflicting views held by arbitrators with respect to their responsibility and authority to apply public law to contract disputes see Mittenthal, *The Role of Law in Arbitration*, Proceedings of the Twenty-first Annual Meeting, National Academy of Arbitrators (1968), and Sovern,

party and the specific holdings of the arbitrator as to these issues, and whether issues were raised by the charging party which the arbitrator either found unnecessary to reach or which were, in his opinion, outside of his jurisdiction. These key issues should be expressly treated in the arbitration decision.

2. A court should address its attention to the critical question of whether the claimant has previously been afforded the opportunity to present his allegations fully and fairly before a competent, impartial third party. A court should not concern itself with the presence or lack of fine procedural distinctions which are wholly without substantive effect. For example, it makes little sense to say that an individual who files his suit in court the day before an arbitration decision is rendered is entitled to be heard, whereas the individual who files his suit the day after the arbitration decision is rendered is barred from bringing his claim to the courts. It is readily apparent that there is no simple mechanistic test which a court can routinely apply to determine whether a prior arbitration decision should act as a bar to further litigation. Each case should receive careful consideration based upon its own peculiar circumstances.

3. Even where a claimant convinces a court that he is bringing an action substantially different from that which was decided by an arbitrator, the court should give considerable weight to whatever findings the arbitrator did make to the extent they enter into the case at bar. Such a procedure should act to dissuade attempts to finesse around the prior arbitration decision.

4. The fact that the plaintiff appeared before an arbitrator in his individual capacity and now comes to the court in a class action suit should not cause the court to ignore the arbitration decision. By giving the arbitration decision the full weight it is due, the court may be able to conclude quickly that the plaintiff is not a proper representative of the alleged class. Allowing too much significance to attach to the fact that at some point in time between the conclusion of the arbitration proceeding and the filing of the court action a matter has been transformed into a class action will only encourage the well versed attorney to make class allegations in every suit he files subsequent to an arbitration proceeding. Such a result, in view of the complexities of litigating pursuant to Rule 23,[35] would be a real disaster to both the courts and the parties.

When Should Arbitrators Follow Federal Law?, PROCEEDINGS OF THE TWENTY-THIRD ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS (1970).

35. FED. R. CIV. P. 23.

Moreover, courts should not too readily accept the argument that labor arbitration is essentially a private proceeding while court or agency action better represents the "public interest." There is a clearly established federal labor policy of viewing arbitration as a substitute forum for the public judiciary in which to dispose of industrial disputes. Our national policy is, therefore, to leave to the hands of the arbitrator the responsibility for the preservation of industrial peace, certainly an item of national concern and public interest.

By considering some of the foregoing suggestions it is hoped that courts, agencies and arbitrators will be enabled to better focus on the nature of the substantive issue which they must decide, and move away from simply mechanical application of fixed rules not really susceptible of general application. Only in this way can the rights of all concerned parties, the employee, the public, and the employer be adequately protected and a result in harmony with the forwarding of all of our national interests be attained.

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