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THE ARBITRATION OF GENDER DISCRIMINATION GRIEVANCES IN THE UNITED STATES

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ABSTRACT

The resolution of allegations of gender discrimination falls under the anti-discrimination laws of the United States, but also often under collective bargaining agreements negotiated by employers and unions. This article examines labor arbitrators' decisions concerning gender discrimination issues in the United States. The authors examined published arbitration awards since 1964 and found that arbitrators have been routinely dealing with pregnancy, seniority, ability, sexual harassment, and hostile working environment issues. Arbitrators are developing a common law concerning these issues, which draws its essence from the collective bargaining agreements, but in the context of the applicable external law. The article presents current arbitral thought on each of these important issues.

Gender discrimination in the United States has taken several different forms. Wage and employment discrimination on the basis of gender [1, 2], sexual harassment [3], hostile work environment issues [4], and reverse discrimination [5] are issues that have found their way into arbitration through grievances filed under collective bargaining agreements. There have been numerous studies concerning various aspects of gender discrimination issues published in recent years [6-10]. These studies have focused on issues ranging from how the courts have interpreted and applied antidiscrimination statutes [9] to the economic

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reasons for and consequences of such discrimination [6]. There have even been texts on bringing claims of discrimination before labor arbitrators [10]. Given this attention in the literature, it is clear that gender discrimination issues continue to arise under collective bargaining agreements and find their way through the grievance procedure to arbitration.

This article examines the arbitration case law that has evolved in the unionized sectors of the U.S. economy. Before we examine arbitral thought concerning discrimination grievances, a quick review of the overlapping jurisdiction between grievance arbitration and external antidiscrimination law is offered to set the stage for the arbitrators' interpretations and applications of the collective bargaining agreements and the role of external law in shaping those decisions.

The authors examined published arbitration decisions concerning gender discrimination issues published by the Bureau of National Affairs, Inc., in Labor Arbitration Reports for various years since 1964. The cases selected for examination here were among those that best represent the mainstream arbitral thought on the issues presented.

ARBITRATION AND THE CIVIL RIGHTS STATUTES

Many collective bargaining agreements contain "antidiscrimination" clauses that bar disparate treatment arising from differences in gender (as well as religion, age, race, color, place of national origin, and union or nonunion affiliation). The result is that there is overlapping jurisdiction between antidiscrimination statutes and many collective bargaining agreements. In *Alexander v. Gardner-Denver* the U.S. Supreme Court decided that employees who had a grievance alleging discrimination under their collective bargaining agreements could still seek relief before the Equal Employment Opportunity Commission and ultimately the courts, even if their grievances had been heard in arbitration [11, 12].

This overlapping jurisdiction has been the subject of considerable controversy [13, 14]. However, there seems to be a trend in arbitration that arbitrators will apply the external law when presented with issues that are both alleged contractual violations and statutory violations [15, 16]. Because the arbitrator has derivative authority to consider external antidiscrimination law when the contract takes notice of those requirements, the overlapping jurisdictional problems may, in part, be resolved by arbitrators properly exercising that derivative authority. As Arbitrator Brookins observed:

> The Collective-Bargaining Agreement contains a nondiscrimination provision that referentially incorporates both federal and state Antidiscrimination law. However, the Arbitrator will resolve this dispute under the contractual *just cause* clause, without a rigorous application of external law but still following the general guidelines and structure of federal law so that the opinion and award are not repugnant to that law [15, p. 1053].

This decision is consistent with the requirements enunciated in the Supreme Court's reasoning in *Wright v. Universal Maritime Service Corp.,* in which the standards for deferral to an arbitrator's award in discrimination matters were laid out [17, 18]. However, the courts have permitted deferral of jurisdiction to arbitration concerning discrimination claims only when the labor agreement specifically requires final and binding arbitration and the contract takes notice of the external antidiscrimination laws [19, 20].

When a contract takes notice of and incorporates the requirements of the antidiscrimination law into its collective bargaining agreement, deference to the arbitrator's award will be given by the E.E.O.C. and the courts pursuant to *Wright v. Universal Maritime Service Corp.* However, not all collective bargaining agreements have antidiscrimination language that incorporates the external law into the contract. Arbitrator Klein ruled that an arbitrator need not consider Title VII of the Civil Rights Act of 1964 in resolving a sex-bias claim when there is no mandate in the parties' collective bargaining agreement to do so and the collective bargaining agreement contains a separate nondiscrimination clause [21]. On the other hand, other arbitrators have applied external antidiscrimination statutes when the contract explicitly required the arbitrator to do so [22]. Further, other arbitrators have applied statutory standards when the contract remained silent on the issue of whether the arbitrator was expected to apply the external law. This approach is consistent with the recent ruling by Arbitrator Brookins cited above [23, 24]. In other words, the application of external law in these matters is not a well-settled issue in labor arbitration.

The consequences of this difference in contractual arrangements is whether the contract incorporates the external law. Deferral of jurisdiction to private arbitration by the E.E.O.C. and the courts is likely if the arbitrator remains within the statutory bounds of the antidiscrimination statutes and therefore the award is not contrary to the requirements of the law. On the other hand, parties to collective bargaining agreements who fail to take notice of the external law and incorporate language into the contract requiring the application of the antidiscrimination statutes do so at their own peril. An arbitrator's award under the latter circumstances may well be anything but final and binding.

Motivation for the Negotiation of Nondiscrimination Clauses

Nondiscrimination clauses are frequently negotiated by the parties and included in their collective bargaining agreements. This has been particularly true since the Congress enacted the Civil Rights Act of 1964. In essence, the parties to collective bargaining agreements joined in the parade to provide equal rights to protected classes of employees. Nondiscrimination clauses fall into two basic categories: mutual pledges to adhere to statutory requirements concerning discrimination [25], and mutual pledges not to engage in discrimination separate and

apart from their statutory obligations [26]. The inclusion of nondiscrimination language in the parties' contract reflects the fact that a significant number of union members in the United States fall into protected classes. These are the groups of employees identified by the statute whose rights are protected by the antidiscrimination statutes.

As noted in Elkouri and Elkouri:

> Subsequent to the Civil Rights Act, many parties incorporated antidiscrimination language into their agreements. In finding a violation of such a contract, an arbitrator emphasized that "[m]ale and female employees have equal claim to any work opportunity, subject only to their being eligible and qualified." [Glass Containers Corp., 57 LA 997, 999 (Dworkin, 1971)] Under a contract containing a clause obligating the parties to "fully comply with applicable laws and regulations regarding discrimination," it was held that the clause was violated by a scheduling plan adopted without intent to discriminate but that did have the "disparate impact" of laying off female employees while hiring males. In this case, the arbitrator pointed to Supreme Court decisions recognizing that the Civil Rights Act may be violated if the practice producing the unintentional disparate impact cannot be justified by business necessity. . . . [A. J. Bayless Markets, 79 LA 703 Finston, 1982; cited in 27, p. 915].

The motivation for the introduction of these nondiscrimination clauses is rather simple and straightforward. Women and minorities comprise a substantial portion of union membership in the United States. In 2003, 58.5 percent of union members in the United States were either nonwhite or female (see Table 1). Consequently, the majority of union members fall into protected minority categories by gender or race. Given that unions are democratic organizations, it should come as no surprise that antidiscrimination issues have become important union concerns. At the same time, employers who are increasingly concerned with bad press or costly and risky litigation, wish to avoid the problems associated with discrimination complaints that are taken to the courts or administrative law agencies. By negotiating antidiscrimination language into their collective bargaining agreements, employers intend the grievance-arbitration machinery to supplant any need for external litigation. Table 1 shows union affiliation by selected demographic characteristics in the United States for 2003.

Table 1 indicates that women now comprise nearly 50 percent of wage and salary workers employed in the United States. Women also comprise about 42.7 percent of U.S. union members. In 1985, women constituted only about 30 percent of union members in the United States [28]. There is little doubt that much of the recent litigation concerning fair representation has also contributed to the organizational sensitivity of unions to antidiscrimination measures [29]. Certainly the rise in wrongful discharge lawsuits and E.E.O.C. complaints have also resulted in increased employer sensitivity to these issues. Therefore, the realities of labor markets have dictated negotiation of nondiscrimination

Table 1. Union Affiliation of Employed Wage and Salary Workers by Selected Characteristics, 2003

	Total employed (millions)	Union members (millions)	Percentage union members
Total population	122,358	15,776	12.8
Women	59,122	6,732	11.4
Nonwhite	35,092	4,591	13.1
Nonwhite females	16,524	2,092	12.7
Nonwhite and women	77,690	9,231	11.9

Source: U.S. Department of Labor News Release, January 21, 2004, Table 1: Union Affiliation of Employed and Salary Workers by Selected Characteristics, 2002-2003.

provisions into the language of their respective collective bargaining agreements as a matter of economic self-interest.

ARBITRATION AND GENDER DISCRIMINATION GRIEVANCES

Discrimination on the basis of gender can arise from several different aspects of the employment relationship. It is not simply a matter of not hiring or not paying equal pay for equal work. Gender-based issues brought to arbitration can include qualifications and ability to perform work, pregnancy issues, preferential treatment of employees by gender, seniority matters, hostile-work-environment issues, and sexual harassment. Each of these categories is examined in the following sections.

Qualifications and Ability to Perform

Stereotyping of employees and their abilities often gives rise to grievances. Gender may be considered by employers only if it is a legitimate occupational qualification required for the normal operation of the business [1, Section 703(e)]. For example, female employees who are qualified and able to perform the work may not be precluded from promotions or bids for those jobs because of stereotyping of female abilities [30, 31]. One arbitrator has ruled that the employer's unilateral adoption of its own affirmative action program that bypassed seniority in favor of female employees, where male employees were otherwise qualified, was improper under the contract [32]. Both competitive and noncompetitive seniority rights are earned by service, which are not subject to legitimate bifurcation by gender, even to remedy past discrimination. Where there are legitimate

job-related tests for the performance of a job, the employer may rely on the results of those tests in selecting male employees over female employees [33]. Arbitrators have consistently ruled that where the evidence, either through practical tests or trial periods, has shown that the aggrieved female cannot perform the work, the employer has the right not to put her into the position [34, 35]. Conversely, where the test or trial period shows the female can do the work, that evidence must be considered in determining whether to award her the position [36]. Further, the evidence obtained from that test or trial period must be free of sexual bias to be relied on in framing a management decision [37].

Physical abilities often arise as issues in grievance arbitration. It is sometimes alleged that female workers have limited ability to perform certain types of heavy manual labor. An arbitrator, rejecting the union's contention that the senior female employee should have been afforded a trial period, ruled that the female employee was properly denied a construction job because of her inability to pass a legitimate physical test [22]. On the other hand, arbitrators have ruled that a trial period should be granted where the female's physical abilities to perform the work are in question [38]. In general, a female employee has a right to expect that she will be judged not on the basis of her gender, but on the basis of her physical and mental abilities to perform the work.

Pregnancy Issues

Pregnancy is a condition that is gender-specific. Medical-benefit and job-assignment issues have arisen under collective bargaining agreements concerning pregnant employees. Arbitrators have held that where the contract was silent with respect to disability benefits for maternity, if disability benefits were available for other nonwork-related medical conditions, then the employer must provide such benefits for pregnancies [23]. In one case, where the employer had not provided maternity-leave benefits for a period of seventeen years, the arbitrator ruled that this was discriminatory and ordered the employer to provide back benefits for the aggrieved employee when she returned from childbirth [39]. Pregnancy may result in temporary, partial disabilities due to the medical condition. Discrimination against pregnant women is therefore gender discrimination and not permissible under nondiscrimination contract language and the public policy of the United States.

Pregnancy can have an effect on an employee's ability to perform certain types of work. Reassignment of duties is also an issue that frequently arises in matters concerning pregnancy. The employer has a legitimate interest in the health and safety of its employees and may therefore act to protect employees who are pregnant under their enumerated management rights in the contract. It is a common practice to assign light-duty tasks to employees who are pregnant. In the case of a pregnant police officer, she was involuntarily transferred from her vice and narcotics position to a light-duty job in the property section. The arbitrator

sustained the city's right to involuntarily assign this officer to light duty, over her objections, to protect her and her unborn child's health and safety [40].

In fact, arbitrators have recognized the right of employers to reassign a female employee to a lower-paying, light-duty assignment if not otherwise barred by the contract [41]. In one specific case, a pregnant employee who was assigned to duties that required lifting and climbing found these actions difficult. She applied for limited duties, and the employer refused the request. The arbitrator in this matter ruled that where the employer had granted limited duty to male employees suffering from physical limitations, a pregnant woman was also entitled to such consideration [42]. However, such considerations must be based on the limitations caused by the pregnancy. One arbitrator found that where a request for a different assignment by a pregnant woman was not the result of the physical limitations caused by the pregnancy, the employer was within its rights to deny the request [43].

Management has a legitimate interest in protecting the health and safety of all employees to reduce their potential liability should an employee be injured. Rather than taking a patriarchal stance where females are being treated differently than males, arbitrators are enforcing management's inherent rights to protect its economic interests. An employer is placed in harm's way if it permits an employee to assume an unreasonable risk of injury. By requiring employees to refrain from duties that increase the risk of injury, an employer is minimizing its tort liabilities.

Seniority and Preferential Treatment Issues

Competitive seniority is how collective bargaining agreements differentiate between employees for respective rights under the contract. Seniority issues are typically inherent in bidding, promotion, transfer, and layoff matters. The relation of seniority to qualifications differs from contract to contract. Where contracts give preference to seniority over relative qualifications, arbitrators will require those standards to be applied regardless of gender [44]. Similarly, if relative qualifications are used to differentiate between employees who have established seniority, arbitrators have consistently required those standards to be applied regardless of gender [45]. In other words, a woman has the same right to prove her qualifications as a man and cannot be barred from proving her qualifications even with hard physical labor.

Preferential treatment of female employees not authorized by the contract is also held to be improper by arbitrators [46]. So-called "reverse discrimination" in the assignment of work duties [47], or the assessment of work performance is not permitted by arbitrators on the basis of gender [48]. The contractual requirements will be enforced, and no special treatment based on a person's gender is normally permitted either under collective bargaining agreements or the law.

Hostile Work Environment and Sexual Harassment

Sexual harassment is probably the largest body of the published arbitration cases concerning gender discrimination. This category of behavior has been barred by legislation. Also, it has long been recognized in arbitration that sexual harassment is conduct worthy of disciplinary action for the perpetrators and appropriate remedies for its victims [49]. Sexual harassment can manifest itself in several different ways, such as direct unwelcome sexual propositions, harassing actions and statements, and the creation of a generally hostile work environment based on sexual contexts. In general, sexual harassment is categorized into two classes of conduct (1) *quid pro quo* and (2) hostile work environment harassment [27].

Quid pro quo harassment occurs when continued employment or some benefit or right of employment is conditioned upon sexual favors. This type of conduct is normally perpetrated by supervisory or managerial personnel on their subordinates. Where the evidence demonstrates that a supervisor makes unwelcome sexual advances toward subordinates, arbitrators have consistently ruled that the employer is liable for that supervisor's misconduct [50]. The remedies for such managerial conduct have included removing the supervisor from the victim's work environment and otherwise making the victim whole, which may include damages for medical treatment, loss of income, or promotions, etc. [50, 51]. In addition, arbitrators have found that just cause exists for the discharge of employees where the *quid pro quo* theory of sexual harassment was supported by clear and unmistakable evidence [52, 53].

Under the theory of the creation of a hostile work environment, the offensive conduct is often less direct but clearly wrong. The measure of a hostile work environment under the Supreme Court's decision in *Harris v. Forklift Systems* [54] is the presence of an environment abusive to an employee, based on gender, that affects his/her work performance, psychological well-being, or is threatening or humiliating. The Court reasoned that the totality of the conduct and the circumstances in which the conduct occurred must be given consideration in determining whether a hostile environment was created based on sexual harassment. Particularly humiliating conduct that is habitual is often subject to progressive discipline. Should the offender not heed the warnings issued, arbitrators have sustained discharges for creating a hostile work environment for others [55]. In one extreme case, an employee was deemed to have been subjected to a hostile work environment when her supervisor invited her to his home for a drink, told her she had beautiful eyes, and touched her breasts. In this case, the arbitrator found that the supervisor's conduct was entirely inappropriate and because of the supervisor-employee relationship, a hostile work environment was created by the supervisor's suggestive behavior and physical assault [56]. In a similar case, another arbitrator determined that unwelcome physical contact, after the victim had asked on at least three occasions that the contact stop, was sufficient

to find that a hostile environment had been created and discharge was appropriate [57]. Arbitrator Singer, on the other hand, found that the employer did not have just cause to discharge an employee who patted his lap and invited a female employee to sit [58]. In the case before Singer, the actions were obnoxious but did not rise to a level where anything but corrective and progressive discipline should be applied.

However, a finding of inappropriate conduct or verbally abusive conduct has not always led to a finding of a hostile work environment resulting from sexual harassment. In one case, a working foreman became verbally abusive and made remarks that could be reasonably construed as sexually harassing. In this case, the arbitrator found that since the abusive employee was not a managerial employee (he had no authority to hire or fire), his conduct did not subject his employer to liability for sexual harassment [59].

Arbitrators have sometimes looked at the effects of the alleged harassment to determine the merits of the case. Arbitrators have found that substandard work performance may be evidence of a hostile work environment form of sexual harassment if a nexus between the performance and the sexually harassing conduct can be made [52]. In one case, the arbitrator found that the absence of that nexus was sufficient to determine the absence of a hostile environment due to sexual harassment [60].

The severity of the harassing conduct is also taken into consideration by arbitrators. In one case, while there was evidence of sexually harassing remarks, the evidence showed little more than an inability of a junior female and a senior male employee to work together. The employer transferred the junior female employee, who then grieved the involuntary transfer. Arbitrator Fullmer denied the grievance, reasoning that claims of sexual harassment were not proven and there was an established practice of transferring the junior employee when there were interpersonal problems between employees [61].

Employees have a right under the Civil Rights Act of 1964 to bring charges of discrimination free from employer retaliation. Arbitrators have generally extended such rights under labor agreements. For example, charges of sexual harassment against the owner of a hotel had resulted in a female employee being discharged for "slandering" the hotel owner. Arbitrator Goldberg found that Title VII of the 1964 Civil Rights Act provided protections for the employee in bringing such complaints. The arbitrator reasoned that unless the complaints were so utterly devoid of truth as to bring them outside of the protections of the law or contract, public policy and the contract protect employees' rights to bring sexual harassment complaints. To find otherwise, it was reasoned, would discourage employees from bringing such complaints, as is their right under both public policy and the labor agreement. The complaining employee was reinstated and made whole for the wrongful discharge [62].

Sexual harassment is considered moral turpitude, at its extreme. Therefore, arbitrators may require a higher quantum of proof for such conduct than for simple

industrial offenses [17]. In large measure, this is due to the social stigma associated with sexual misconduct. It is also well-recognized in arbitration that the industrial context in which the sexual harassment occurs is also an important determinant of the penalties and the burden of proof. Sexual harassment in a factory setting is conduct that is not acceptable, but the damaging implication of that conduct is generally exacerbated when it occurs in schools, or service institutions where children may be at risk [17].

CONCLUSIONS

With the Supreme Court's decision in *Alexander v. Gardner-Denver*, issues of overlapping jurisdiction between the anti-discrimination laws and arbitration become serious complications in resolving gender discrimination issues. The Court's decision in *Wright v. Universal Maritime Service Corp.* made clear that the deferral policies of the E.E.O.C. and courts would continue if arbitrator's decisions were not repugnant to the external law and the collective bargaining agreement incorporated the external law. It is upon this foundation that arbitral thought is examined in this article concerning various gender discrimination issues.

In examining the published arbitration decisions concerning these issues, it is clear that arbitrators have a balancing act to perform. As Arbitrator Brookins stated, he applied the standards of the contract, but within the context of the applicable external law. The preponderance of the published decisions of arbitrators concerning these issues show the same sensitivities as those of Brookins.

Arbitrators have found that female employees are entitled to the same seniority rights and rights to prove their abilities to perform work as male employees. It is clear that employers have occasionally, either paternal instincts or other motivations, denied female employees their seniority rights or denied them the ability to prove they can perform the work. In such cases, female employees have had those contractually specified rights enforced in arbitration.

Pregnancy issues are treated much the same as any other short-term disability issue under the contract. Arbitrators have corrected management errors when pregnant females have been denied leaves of absence, disability benefits, or limited-duty assignments when such rights were granted to employees with other physical limitations. However, employers may, under the management rights provisions, seek to protect employees' health and safety and involuntarily reassign them to light or limited duties. If such action is taken, it must be within the context of what would be done with any other like physical limitation.

Sexual harassment and the creation of a hostile work environment is serious misconduct under the law and under most labor agreements. Arbitrators have applied the just-cause standards, but within the context of the external law, in determining whether an act of sexual harassment occurred and if so, what the appropriate corrective action is to protect the victim and to otherwise make her

whole. This particular class of cases requires that each case be judged on its respective merits and that ranges of corrective actions be applied by arbitrators to punish the perpetrators and restore the victim's rights.

In examining the published arbitration cases concerning gender issues, it is clear that disputes over these matters continue to be processed through grievance procedures and to come before arbitrators. It is also clear that an evolving common law is being established in arbitration that should help guide managers and unions in dealing with these important issues.

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