J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 6(2) 81-101, 1997-98

AFTER-ACQUIRED EVIDENCE: WHAT SHOULD ARBITRATORS AND COURTS DO AFTER *MISCO, McKENNON* AND *GILMER*?

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ABSTRACT

In its 1987 *Misco* decision, the Supreme Court indicated that arbitrators under collective bargaining agreements have broad discretion to reject "after-acquired" evidence. In its 1995 *McKennon* decision, however, the Court decided that the courts must accept such evidence in cases brought under the Age Discrimination in Employment Act. Arbitrators considering the impact of *McKennon* on their procedures must first recognize that the "after-acquired" label is a misnomer. They should focus not so much on when evidence is acquired as on the policies and purposes underlying the arbitration systems in which they function. One probable result is that arbitrators appointed under individual contracts of employment are more likely to admit this evidence than those appointed under collective agreements.

A major reason many workers value being represented by a union is that their collective bargaining agreement protects them from arbitrary firing. When a worker is discharged and believes the firing was wrongful, that worker may file a grievance in protest. If the union finds merit in the protest, it will pursue the issue through the grievance process established by the collective agreement. If the matter is not resolved through face-to-face negotiation, an arbitrator may be called in to decide whether the discharge was for "good cause" [1]. At times an employer will fire an employee for one reason, but later discover another allegedly sufficient cause for firing the same worker. Two types of issues then emerge. The first is for the arbitrator. Should s/he consider this "after-acquired evidence" of employee misconduct, and for what purposes? The second confronts

doi: 10.2190/3AX1-TG0E-U8EV-N3EC
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a court that is asked to enforce an award based on that arbitrator's decision. Is the award entitled to enforcement?

After-acquired evidence problems in employee discharge cases have been before the Supreme Court twice in the last decade. In 1987, in *United Paperworkers International Union v. Misco, Inc.* [2], the Supreme Court enforced an arbitrator's award, including an order to reinstate a dismissed employee, in a case in which the arbitrator refused to consider evidence of drug use acquired by the employer after the disputed firing. The Court's decision overturned holdings by both the district court and the Fifth Circuit that the award should not be enforced because it required the employer to reinstate a worker whom the employer reasonably judged to be a drug user to a job involving the operation of dangerous machinery. More recently, in *McKennon v. Nashville Banner* [3], the Court ruled that in an action for wrongful discharge brought under the Age Discrimination in Employment Act [4] a federal court should admit evidence of employee misconduct uncovered after a discharge, but not as a total bar to liability. This evidence is relevant for more limited purposes, such as deciding what might constitute an appropriate remedy. In particular, the Court's opinion indicates reinstatement is not a proper remedy if the employer proves the after-discovered misconduct was such that it would have led the employer to dismiss the worker in the first place [5].

The two decisions are clearly not in direct conflict. For grievance arbitration to help foster peace in the workplace as a substitute for strikes, the arbitration process needs to yield a result that is almost always final. Arbitration awards that languish in enforcement proceedings for months or years are not likely to find favor with workers. This need for finality in labor arbitration has long led courts to enforce arbitrators' awards with which the enforcing tribunal might disagree if it reexamined the evidence and the agreement independently [6]. No such concern for fostering an alternative system for resolving disputes is present when a court itself applies the various public laws banning discrimination; there the underlying concern is to seek a result consistent with congressional intent. Moreover, in the statutory context, the higher federal courts are charged with the responsibility of correcting the errors of lower courts; the rulings of arbitrators, on the other hand, are generally not subject to correction. A court may refuse to enforce an arbitrator's award if the arbitrator exceeds his/her authority, or dispenses a personal brand of industrial justice without relying on the contract, but may not refuse to enforce it simply because the arbitrator's weighting of the evidence or reading of the contract seems to the court clearly wrong.

While the decisions in *Misco* and *McKennon* do not conflict, the different rulings about the relevance of after-acquired evidence do suggest that arbitrators may in some instances wish to think again about the matter. For courts asked to enforce awards, the issues may become particularly vexing because of a third Supreme Court decision. In *Gilmer v. Interstate/Johnson Lane Corp.* [7], the

Court held it is proper for an individual employee to agree to submit questions of the application of public law—in that case, as in *McKennon*, the Age Discrimination in Employment Act [4]—to final and binding arbitration. (No union was involved in *Gilmer*.) In such a case, both the integrity of the alternative dispute resolution system as a means of bringing a controversy to an end and the substantive correctness of the decision as an interpretation and application of congressional will are involved.

Before turning to arguments for and against receiving this proof, it should be pointed out that the phrase "after-acquired evidence" itself is misleading. It is often not so much *when* evidence is obtained that matters, but whether the justification the employer offers for a discharge or for discipline differs from what the employer originally announced. Take, for example, a case in which a worker is fired for fighting on the job. At the time of the discharge the company has taken statements from two eyewitnesses to the fight. After a grievance is filed, management decides to solidify its case and obtains additional statements from two more witnesses to the fight. At the arbitration hearing, the original two witnesses are unavailable, so the company calls two of the persons whose statements were first taken after the discharge. It is hard to envision an arbitrator excluding such evidence. Two justifications for admitting are particularly telling: 1) At the time of the discharge, the employer has already conducted an investigation with real substance, and 2) one is talking about the same fight that was the subject of employer–union discussion all along. Neither union nor employee has been prejudiced in preparing the case [8]. A different situation would exist, however, if, when the company interviewed the additional witnesses, one expressed satisfaction that the employee was fired because the discharge worker was a cocaine user whose drug habit imperiled the safety of the workplace. Now a wholly separate reason for discharge has come into the picture, and it is this sort of newly acquired evidence that causes problems. "Additional misconduct" evidence might in some ways be a better term. The phrase "after-acquired evidence" is useful in one way, however. It distinguishes a situation in which an employer is aware of more than one instance of serious misconduct at the time of firing and chooses to rely on fewer than all of the possible reasons for discharge. This raises a waiver or estoppel issue (discussed briefly below) that is not present when the evidence first comes into the employer's hands after the discharge.

The following section articulates familiar arguments for accepting and rejecting proof of afterdiscovered misconduct. The next sets out in greater detail the rationales for the three Supreme Court decisions. The article then turns to a related problem—the acceptance or rejection of evidence of postdischarge conduct—as a means of further sharpening our understanding of the values that compete in this context. The concluding section suggests possible resolutions of some of the issues.

ARGUMENTS FOR REJECTING AND ADMITTING EVIDENCE OF ADDITIONAL REASONS TO DISCHARGE

Reasons to Reject After-Acquired Evidence

The protection from arbitrary discharge a union-represented employee gets under a collective bargaining agreement is both substantive and procedural. On the substantive side, the usual collective agreement replaces the common law rule that an employer may discharge an at-will employee for good reason, bad reason, or no reason at all with the requirement that a discharge be for sufficient cause [9]. This substantive change in the applicable rule is important in and of itself. Roughly a third of all reported labor arbitration cases involve discharges; union-represented grievants prevail in a significant proportion [10]. The substantive change would, however, be much less important if it were not for the procedural changes that accompany it. In the usual case, the burden of proof is on management to prove there was indeed "cause" for the firing. Moreover, the employee need not retain counsel or represent his/her own interest; the union will provide representation. The grievance-arbitration procedure, while far from costless, is cheaper and quicker than going through the courts [12].

Labor arbitrators appreciate that both substantive and procedural fairness are at issue in discharge cases brought under collective agreements [13], and it is the concern with procedural fairness that has led many either to reject after-acquired evidence entirely, or to limit its use sharply. The argument proceeds roughly along these lines: If the employer is limited to discharge for cause, then basic fairness requires that whether the employer had good cause to discharge a grievant be judged as of the time the discharge decision was made. To allow the employer to bring in evidence of misconduct that the employer has uncovered only after the firing means that the inadequacy of the employer's initial investigation is insulated from challenge. Since the grievance/arbitration process is the only means available to control the justness of that investigation, arbitrators should not admit after-acquired evidence. To consider such proof even for the purpose of limiting the remedy is wrong, since reducing the cost of the employer's wrongful act also reduces the incentive for the employer to investigate properly and make better judgments in the future.

Other arguments for rejecting this evidence emphasize the nature of the arbitration proceeding as an informal, less-drawn-out proceeding than a trial. By using the time of discharge as a guide to what evidence to consider, the arbitrator has a clear "bright line" test for relevance and materiality. Moreover, it permits the parties to focus their preparation and their presentations and lessens the likelihood that the union will seek a continuance on the grounds of surprise.

In the most extreme case—when the additional reason for discharge is not relied on by the employer until the arbitration hearing—there is a jurisdictional reason for refusing to deal with this proof [14]. Arbitration is, after all, a

consensual process. The disputes the union and employer have agreed to arbitrate are those that have gone through the grievance process, so there has been a possibility to resolve them through discussion. If an issue has never been raised until arbitration, it is hard to see how the union has agreed to submit it to the arbitrator. The *Misco* arbitrator was faced with roughly this sort of situation.

In more formalistic terms, it is sometimes possible to make out an argument based on waiver and estoppel principles. When an employer tells an employee that s/he is fired for specific reasons, the employer by implication also tells the employee: "Your other faults are not of concern to us, nor do we need look any further for a reason to fire you." On this basis, the employer can be said to waive its privilege to seek further reasons for the firing. Whether it is fair to imply such a waiver is obviously open to question. This sort of reasoning can be used with greater force in a slightly different sort of case, one in which an employer has in its hands evidence of more than one possible cause for discharge and chooses to rely on only one [15]. Put in estoppel terms, the employer's stated reason for firing constitutes a representation on which the discharged worker and that worker's union rely in deciding whether to seek redress or not. If the stated reason is not the "true" basis for discharge (asserted at the arbitration hearing), the employee has been significantly harmed by relying on the earlier representation. Under this approach, the "detriment" suffered by the employee (and to some extent by the union) occurs almost immediately after the reason for discharge is announced.

These arguments do not apply with equal force, however, to all evidence of past misconduct that is not directly referred to at the time of dismissal. If an employee has a generally poor record—episodes of tardiness, warnings about attitude problems, reprimands for lackadaisical performance, and so on—need a firing for one more instance of misconduct stand or fall on that one instance alone? Many arbitrators routinely admit proof that an employee's past record is bad, without regard to whether the stated reason for discharge given at the time of the firing says anything about that prior record or not [16]. In this instance, there is no argument that the employee is unfamiliar with past misdeeds, and if the company has kept records of poor prior history and shared these with the union during the grievance procedure, the union also has no "surprise" argument available to it.

Reasons to Admit After-Acquired Evidence

Arbitrators who favor admitting after-acquired evidence argue that not to do so is both unrealistic and inefficient [17].

The rejection of such evidence is unrealistic, it is said, because it fails to give adequate consideration to two significant interests: the interest of the employer in having a competent, honest, and reasonably behaved workforce, and the interest of other employees in having an acceptable fellow employee. If, for example, a

postdischarge investigation reveals the fired worker concealed a history of violent conduct in past jobs, either by giving false answers on the job application or by bullying others, they reason, it is surely appropriate for the arbitrator to consider whether such a person should be returned to the working area [18]. To ignore such evidence subjects fellow workers to potentially serious hazards. It is also unrealistic to expect that nonlawyer supervisors who prepare the statement of reasons for firing will give in detail every item of misconduct that has led to the decision.

It is inefficient to reject this evidence because the employer remains entitled to consider it in deciding whether to fire the worker again after reinstatement. That was the pattern in *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America* [19]. The series of events in that case began when Chrysler decided to fire a male forklift operator for sexually harassing a female coworker. The operator's union filed a grievance and while it was being processed, Chrysler's investigation continued. When the case was ultimately presented to an arbitrator, Chrysler offered proof that on four other occasions, in addition to the one that led to his firing, the operator had engaged in harassment of female fellow workers. The arbitrator refused to consider the evidence on the grounds that it could not have been the basis for the discharge since Chrysler was unaware of it at the time of the firing. The arbitrator found the discharged worker had, in fact, engaged in the single act of harassment that was the basis for the discharge, but that the incident did not justify so severe a sanction. The award reduced the firing to a suspension and ordered the employer to reinstate the discharged worker. Chrysler sought to have the award set aside on public policy grounds, but the district court, citing *Misco*, held that the award was entitled to enforcement [20]. While the appeal of that ruling was in effect, Chrysler wrote the forklift operator, informing him that he was to be reinstated and that at some point during his first day back at work, he would be fired again, on the basis of the additional incidents of harassment uncovered during the postdischarge investigation. The Seventh Circuit upheld the district court's decision to enforce the original arbitration award, but refused to hold that the "second" firing was in contempt of the enforcement order. Since the arbitrator had refused to consider the evidence of the additional acts of harassment, the court reasoned, this evidence constituted a new ground for discharge that Chrysler was entitled to weigh in deciding whether to keep the "reinstated" worker on the job.

THE RATIONALES OF *MISCO, McKENNON* AND *GILMER*

The *Misco* Rationale

The grievant in *Misco* was discharged because he was found by police in the employer's parking lot in the back seat of another person's car; there was marijuana smoke in the air and a lighted marijuana cigarette in the front ashtray.

A company rule forbade having drugs on the employer's premises. The discharged worker filed a grievance claiming his termination was not for just cause. The police, who had apprehended the grievant, found marijuana gleanings in the grievant's own car shortly after his arrest. The employer was unaware of this finding at the time of the discharge, but learned of it later, a few days before the arbitration hearing on the discharge grievance. The arbitrator refused to admit evidence of this finding of marijuana gleanings in the grievant's own vehicle. The justification for this rejection, quoted in a footnote to the eventual Supreme Court opinion was:

> One of the rules in arbitration is that the Company must have its proof in hand before it takes disciplinary action against an employee. The Company does not take the disciplinary action and then spend eight months digging up supporting evidence to justify its actions. . . . Who knows what action the Grievant or the Union would have taken if the gleanings evidence had been made known from the outset . . . [2, at 33].

The arbitrator found the company had not carried its burden of proof in demonstrating that the grievant had in fact been in possession of marijuana on its premises, based on proof of the cigarette in the front ashtray incident. He therefore ordered the company to reinstate the grievant to his position as an operator of hazardous machinery.

The employer filed an action in federal district court to vacate the award, arguing that to reinstate a drug user to a position in which he would operate dangerous machinery was against public policy. The court granted the employer's request and a divided panel of the Fifth Circuit affirmed [21]. The majority opinion in the court of appeals held that the evidence of the finding of marijuana gleanings taken with the evidence of the "front ashtray" incident clearly demonstrated the grievant had violated the company's rule against on-premises drug possession. The panel further reasoned that the only reason the arbitrator did not so find was a "narrow focus" on the grievant's procedural rights [21, at 743]. The panel also held that to order reinstatement of a person who was clearly a drug user to a position in which he would operate dangerous machinery violated public policy.

The Supreme Court reversed [2]. The Court held that under its earlier decision in *United Steelworkers of America v. Enterprise Wheel & Car Corp.* [6] the courts are not to overturn the factfindings of arbitrators simply because the court finds that factfinding to be improvident—or even silly [6, at 38]. More important to this discussion was the Court's holding that the court could not

> refuse to enforce the award because the arbitrator, in deciding whether there was just cause to discharge, refused to consider evidence unknown to the Company at the time [the grievant] was discharged. . . . This, in effect, was a

> construction of what the contract required when deciding discharge cases. . . . And it was consistent with our decision in *John Wiley & Sons v. Livingston* . . . that when the subject matter of a dispute is arbitrable, "procedural" questions which grow out of the dispute and bear on its final disposition are to be left to the arbitrator [6, at 40].

The Court also pointed out that the "public policy" on which the court below had relied was not a specific statute or regulation, but rather a generalized notion of what constitutes the public interest. This is not, therefore, like a case in which an employer is ordered to put back on the public streets a driver who has lost his/her driver's license.

The *McKennon* Rationale

Christine McKennon worked for a newspaper for thirty years prior to being fired. For some time before she lost her job she had suspected her age was a factor weighing against her and that she was therefore more likely to be selected for discharge than younger workers. As a precaution against this, she copied a number of confidential documents concerning the newspaper's financial condition, documents to which she had access because of her position in the comptroller's department. She was, in fact, charged with the task of destroying these documents. After she was fired, she commenced an action against her former employer charging discrimination in violation of the Age Discrimination in Employment Act (ADEA) [4]. During preparation for trial, the employer learned while deposing Ms. McKennon that she had copied the documents. In its subsequent motion for summary judgment, the employer urged that it was entitled to judgment because this copying was itself a sufficient cause for discharge. The trial court accepted the employers' argument (crediting the affidavit of the newspaper's chief executive that this copying would lead to discharge in virtually any situation). The district court's grant of summary judgment was upheld by the Sixth Circuit, but a unanimous Supreme Court reversed [3].

Justice Kennedy's opinion emphasized heavily the objectives of the ADEA: 1) deterrence, i.e., elimination of age (over 40) as a characteristic to be considered in determining which employee to fire (or to deny promotion or otherwise to place at a disadvantage); and 2) compensation, i.e., the congressional desire that a worker who has suffered disadvantage due to age should be made whole for the losses that worker has experienced. To rule as the district court had would undercut both these objectives, since an employer that had unlawfully used age as a negative factor in making a decision would escape without liability because of the employee's lapse, and the employee would suffer economic loss because of the employer's wrongdoing, yet be unable to receive compensation for that loss. To find the employer liable, on the other hand, would vindicate both objectives.

The role of plaintiffs in discrimination actions is important, the opinion suggests, because through such actions are the policies of the act most likely to be realized:

> The objectives of the ADEA are furthered when even a single employee establishes that an employer has discriminated against him or her. The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a mis-appreciation of the Act's operation or entrenched resistance to its commands . . . [3, at 885].

While imposing liability on the employer despite the discharged worker's misconduct, the Court nonetheless found that misconduct relevant so far as an appropriate remedy was concerned. Much of the relief in discrimination cases is essentially equitable [22], particularly injunctions ordering reinstatement and back pay. Justice Kennedy noted that one of equity's most familiar concepts—unclean hands—is not fully applicable to cases in which a suitor is enforcing important public policies. Employee misconduct is not irrelevant, however, since the statute in question does not purport to limit an employer's general power to decide whom to hire and fire. He concluded that an employee who has engaged in significant wrongdoing is not entitled to reinstatement absent unspecified "extraordinary circumstances." His opinion also limits the back pay remedy by confining it to the period prior to the time the employer learned of the plaintiff's misconduct that would in fact justify discharge. The opinion acknowledged that there will be many fact permutations that may call for unusual relief, but stated that the "general rule" is to be that neither reinstatement nor front pay is to be considered an appropriate remedy in these circumstances. The reason is that it "would be both inequitable and pointless to order the reinstatement of someone the employer would have terminated, and will terminate, in any event and upon lawful grounds" [3, at 886]. This picks up on the statement in *Misco* that the arbitrator's decision in that case to put "aside the evidence about the marijuana found in [the discharged worker's] car during this arbitration did not forever foreclose the Company from using that evidence as the basis for a discharge" [2, at 41]. While Justice Kennedy's opinion does not mention the *Chrysler Motors* opinions from the Seventh Circuit, discussed below, this language seems to approve the reasoning here.

The *Gilmer* Rationale

The plaintiff in *Gilmer v. Interstate/Johnson Lane Corp.* [7] was required by his employer, the defendant, to register as a securities representative with the New York Stock Exchange (NYSE). The registration application included an agreement to abide by the NYSE's rules, including a rule that requires that any controversy arising out of a representative's employment—or discharge from

employment—be submitted to arbitration. When the defendant discharged Gilmer, who by then was sixty-two years old, Gilmer filed a charge with the Equal Employment Opportunities Commission (EEOC) alleging that the discharge violated the Age Discrimination in Employment Act [4]. The matter was not resolved at the administrative agency, and Gilmer subsequently filed a civil action in federal district court. The employer filed a motion to compel arbitration. The district court denied the motion, reasoning that arbitration was not final and binding in a case involving an employee's statutory right to be free from arbitrary discrimination. The court relied on the Supreme Court's decision in *Alexander v. Gardner-Denver Co.* [23], which permitted a plaintiff to pursue a claim that his discharge was unlawful under Title VII of the Civil Rights Act of 1964 despite an arbitrator's ruling that the discharge was for cause under the applicable collective bargaining agreement. The Fourth Circuit reversed, and the Supreme Court affirmed the circuit court decision.

Justice White, writing for the majority, emphasized the strong federal policy favoring arbitration agreements, a policy underscored by recent decisions of the Court interpreting the Federal Arbitration Act [24], the statute under which the employer sought arbitration in the *Gilmer* case. Those cases, for instance, had held that statutory claims can be the subject of executory agreements to arbitrate [25]. Because of that strong policy favoring arbitration, Justice White reasoned, arbitration of a statutory claim should be held to be available unless the statute that is the basis of the claim prohibits the use of arbitration, or unless the purposes and policies of the statute would conflict with the use of arbitration. He found no such conflict in this case. The ADEA, he noted, empowers the EEOC to use a wide variety of conciliation and other techniques to resolve disputes. He rejected the argument that arbitration is inappropriate in disputes about how to apply statutes involving significant "social policies," regarding that as a matter settled in earlier cases involving securities regulation. Thus, it does not matter that the use of arbitration may restrict the flow of cases into the federal courts, a flow the plaintiff argued to be necessary for fleshing out the protection afforded by this generally worded statute.

Justice White also rejected arguments that the agreement to arbitrate was the result of unequal bargaining power, noting that is true in many commercial contracts whose arbitration clauses the Court had enforced. The opinion also dismissed Gilmer's claim that the procedures provided by arbitration are not adequate to handle ADEA disputes. Justice White went into considerable detail about the procedural rules for NYSE arbitrations, discussing provisions to protect against arbitrator bias, to allow document discovery, and so on. The plaintiff fares no better urging that the remedies provided by arbitrators are likely to be more limited than those available in the courts. The opinion again points to broad grants of remedial power in the NYSE's rules.

Finally, the Court denied that requiring arbitration of Gilmer's ADEA claim conflicts with the holding in *Alexander v. Gardner-Denver Corp.* That

arbitration, Justice White noted, was conducted under a collective bargaining agreement. Under that agreement, the arbitrator's sole authority was to enforce the terms of the contract, not to deal directly with statutory matters. Moreover, he noted, the possibility of a conflict between the interest of the collective bargaining representative and the individual in such proceedings distinguishes arbitration under a union contract from arbitration under an individual agreement.

Most of Justice Steven's vigorous dissent was devoted to the question of whether employer-employee disputes lie beyond the scope of the Federal Arbitration Act, an argument the plaintiff had failed to raise. He also urged that to leave discrimination claims to arbitral forums dominated by firms that have long practiced discrimination is to leave the foxes as guards of the henhouse.

A RELATED ISSUE: PROOF OF POSTDISCHARGE CONDUCT

Proof of some postdischarge conduct is widely acknowledged to be relevant to remedy issues [26]. It is regularly admitted by arbitrators, and reminds us again that "after-acquired evidence" can sometimes be a misnomer, that the concern is not so much with when evidence is acquired, but with what issues have been identified and refined in the grievance process so they are properly before an arbitrator for decision. When and why such proof is admitted may offer guidance in formulating positions on afterdiscovered evidence of prefiring misconduct.

Employer Tenders of Proof of Postfiring Conduct

The most obvious (and widely agreed-on) admissible item of evidence of events subsequent to the firing is proof of postdischarge earnings. These earnings should normally be applied as a credit against backpay due. There are arguable exceptions, of course. Should an employer be entitled to the benefit of such a credit if the employer has made it difficult for the discharged worker to find employment by giving him/her unjustifiably bad references? If a long period goes by before the arbitration proceeding and the worker acquires new skills during that time, thus becoming eligible for jobs that would not have otherwise been possible, should the employer get the full benefit of the worker's enterprise? Thus, an arbitrator reduced the backpay award to a grievant who, after his wrongful firing, failed even to read the want ads, though fully able to work [27].

Other information about postdischarge matters may also be relevant. If reinstatement is an issue, surely an employer would want an arbitrator to know that a truck driver has lost his/her license to drive at some point after firing. This does not mean that reinstatement is necessarily unavailable, but it may have to be conditioned on the employee's once again becoming eligible to do the job.

Employers can hardly be charged with poor investigation in such cases—the information was not available at the time of the decision to fire [28]. Unfair

surprise can still be an issue if the employer has failed to make information available in the grievance process when it could have done so, but in the two illustrations just used, the employee and union would already have access to the information anyhow.

An important qualification applies here, however. Once an employer has fired an employee, that worker's duty of loyalty is much reduced, if not wholly eliminated. If the employee believes his/her statutory rights have been violated, an adversary relationship may be present. Thus, a federal district court in New York recently held conduct much like that in the *McKennon* case—copying information from a confidential file—after a discharge was not to be considered as a bar to a remedy, in part because the information in that file would have been discoverable in the action she brought to challenge her discharge [29].

Employee/Union Tenders of Proof of Postfiring Matters

At times, it may be the grievant who wishes to bring up postdischarge matters. A worker discharged for substance abuse may well want the arbitrator to know that s/he has entered a treatment program for persons with drug or alcohol problems. A worker fired for sexual harassment who has undergone sensitivity training following the firing may offer proof of that as a factor to consider in deciding whether to reinstate. An employee fired for poor work performance may tender proof of further skill training following the discharge.

Should such proof be considered? A strong logical objection can be made to much of this sort of proof. If the only issue that has percolated through the grievance process to the arbitration stage is whether the employer had "good cause" for discharge, how can subsequent employee reform or accomplishment be relevant? If, for example, on-the-job drug use is a good cause for discharge, then later addiction therapy is not the basis for an appeal to an arbitrator, but rather a basis for asking the employer to give the employee another chance, not as a matter of right but as a matter of grace. Only if the collective bargaining agreement authorizes the arbitrator to dispense "grace" is it proper for him/her to do so [30]. While the logic of such an objection is powerful, it rests on a perspective from which it is possible to think of "good cause" as a straightforward "yes or no" proposition. While that may sometimes be true, it often is not. Take the case of the worker fired for "poor performance." In many jobs, such a judgment is at best difficult to make, because so many subjective assessments are involved. Even when much of a job's functions can be quantified, it is going to be true by definition that half of the workers in that job will perform "below average." (Half will perform "above average" also, of course.) If an employee discharged for poor performance soon thereafter successfully passes the test at the end of a training course that requires many of the same skills that the job requires, surely that is relevant to whether the employer's "poor performance" rating was objectively correct.

Then there are "mitigation" and "aggravation"—terms that cover a number of related concepts, such as excuse and justification. Consider, for example, a firing for insubordination. That sort of misconduct takes a variety of forms and just how serious a particular disobedient act may be involves analyzing a number of factors. One of those factors in many cases is the grievant's state of mind at the time of the insubordinate act. If a discharged worker seeks out professional counseling after being fired, and the diagnosis indicates the grievant was suffering from depression, or acute anxiety, or the like, surely this is relevant information an arbitrator should consider. Like the example used in the prior paragraph—passing a skills test soon after being fired for poor performance—this post-discharge diagnosis is relevant because of its implications about the circumstances at the time of discharge. That is not always the sort of relevance involved, however. Consider an aggravation case: during the preparation of a case for arbitration, a worker discharged for poor performance threatens potential witnesses. The threat tells one little if anything about the poor performance, but may tell a great deal about the grievant's credibility, and about whether reinstatement is appropriate.

In each of the situations just discussed, the employee can argue that one reason for considering the evidence is that the worker could not have made it available to the employer at the time of the firing. It is new information, even though it may relate to the events that led to the firing. There remains, however, the question of what to do about the problem of "surprise"—what if the new information surfaces for the first time at the arbitration hearing, so that it was never considered in the prearbitration forums of the grievance process? One difference between this and the *McKennon* sort of situation is that there is no lack of jurisdiction argument to be made. Whether the worker discharged for insubordination had the intent to disregard others or otherwise act in disregard of the employer's interests will have been present throughout the discussion of the discharge in the grievance process. The same is true of the question of whether the worker is able to handle the job. Whether and to what extent the employee's back pay remedy is to be reduced by postfiring earnings is impliedly present in almost every wrongful discharge case. In the context of postfiring conduct issues, the question is simply one of whether it is fair and reasonable to consider matters not already talked through by the parties prior to the hearing. Certainly an arbitrator should stand ready to adjourn a hearing for a brief time at the request of either party when it is suggested that a totally new matter has arisen, to afford an opportunity for the parties to consult.

CONCLUSION

Arbitration Under Collective Agreements

The task of the arbitrator under a collective agreement is in many ways more difficult than that of a court deciding a breach of contract action. Not only is the

arbitrator the reader of the parties' contract and determiner of facts, s/he also plays a pivotal role in seeing to it that the system of industrial self-governance erected by the parties continues to function.

First, how should the appropriate balance be struck when evidence of additional reasons for discharge, acquired after firing, is offered in cases not involving statutory issues? One obvious recommendation is not to treat all after-acquired evidence as if it is equally the result of employer capriciousness and poor investigation. Arbitrators should be willing to consider whether after-acquired evidence was in fact discoverable prior to the discharge. It is one thing to reject proof that an employee falsified a job application when the truthfulness of the answer could have been checked easily at the time of the application. It is another to reject such evidence when the applicant concealed the truth with such skill that no routine competent investigation would be expected to uncover it. An applicant who takes on an assumed name and provides forged documents to substantiate false claims has little reason to expect that sort of fraud to be overlooked, *Les Miserables* notwithstanding. On the other hand, an arbitrator who takes seriously the view that procedural regularity in an employer's decision to fire is a major value under the good-cause discharge standard of the contract may still reject such evidence if the employer had made no attempt whatever to check into what the employee had stated on the application.

Grievance arbitrators must also remember that the adequacy of an employer's statement of why an individual has been fired is important not only to that worker, but also to the collective bargaining representative. Union resources are limited. If the employer gives a reason for firing to the union, the union will most likely accept that at face value and will decide on that basis how seriously to pursue the matter. When a union challenges a discharge, it is also challenging the adequacy of the employer's procedure for determining that discharge is proper. That challenge may well be entitled to vindication even if in fact the employee on whose behalf the union speaks deserved to be fired for reasons other than those the employer initially gave. Under the typical collective agreement, however, that sort of union interest is not easy to vindicate. Arbitrators have limited remedial powers. While a declaration that the employer acted wrongly might not be totally valueless to the union, such a remedy lacks enough teeth to be likely to lead a careless employer to reform its ways. How to vindicate a union's worthy claim that an employer conducted a terrible investigation when the grievant is a truly unsavory character is a problem that calls for truly creative thinking.

The need to protect the union from employer manipulation also suggests it is important *when* the employer first raises the evidence of additional wrongdoing. If it is raised at the first step of the grievance process, the union and the worker are less likely to be prejudiced than if such evidence is first introduced so late in the process that there is no practical opportunity to discuss the evidence before the case goes to arbitration.

What if a collective agreement provides that a discharged employee may grieve on the basis of a statutory violation? A fair number of agreements these days provide that an employer will abide by discrimination laws, thus giving an arbitrator under that agreement jurisdiction over the question whether a statute has been violated. Is an arbitrator enforcing such a collective agreement in the same position as one interpreting an individual contract of employment pursuant to *Gilmer*? To this writer, the answer is a qualified "no." The arbitrator under a collective agreement continues to have special concerns with the totality of the contract that are peculiar to this kind of bargaining relationship. As pointed out before, there is no other agency available to ensure that the procedures used by the employer in deciding to fire an employee are reasonably calculated to limit discharges to those for cause.

Suppose, then, that an arbitrator is asked to decide a claim of wrongful discharge under a collective agreement that includes a) a conventional "good-cause"-for-discharge provision, and b) an agreement that the employer will not violate any discrimination laws. The employee's grievance is that s/he was fired because of membership in a protected class. Ought the arbitrator to think that s/he is free to refuse to hear after-acquired evidence a la *Misco*? If the arbitrator does refuse to give any weight to the after-acquired evidence, is the resulting award entitled to enforcement in the courts?

The appropriate answers are not intuitively obvious. Ultimately, both should be answered "yes," but with the caution that in such a case an arbitrator should think long and hard about whether the evidence in a discrimination grievance case ought to be treated in the same way as in other cases. The key to the first question is how to read the two contract provisions together, as an arbitrator is bound to do. At least three options are available. First, the arbitrator may conclude that the parties intended discrimination law violation charges to be considered solely under those laws, without regard to the general contract limits on discharge. This can be justified on the grounds of the familiar maxim that when a contract memorial includes both a broad general provision touching a subject and also a specific one, it is the specific one that controls. That rationale is suspect, however, in many cases, because between the discharge-for-cause provision and the provision requiring the employer to honor discrimination statutes, it is not at all clear which is truly the "general" provision. A pledge to abide by law is itself broad and imprecise. At all events, an arbitrator who decides that the anti-discrimination clause controls will probably feel bound to produce the same solution that would be produced by the courts, and will therefore accept after-acquired evidence under the *McKennon* rationale and will use it in considering the scope of the remedy to be provided.

A second possibility is to treat the antidiscrimination section of the collective agreement as simply modifying the discharge-for-cause provision. Under that interpretation, the sole function of the antidiscrimination clause in a wrongful firing case is to deprive the employer of a "for cause" defense to the extent that

the employer would not have such a defense under the discrimination laws. An arbitrator who takes this approach will then apply whatever approach s/he usually takes with respect to after-acquired evidence problems.

A third intermediate position is also possible. The arbitrator may well decide that the two clauses are to be read together, but that the presence of an anti-discrimination clause that refers to public law suggests the outcome in arbitration proceedings should usually track the result that would be obtained in the courts. An arbitrator who takes this position would generally be expected to hear after-acquired evidence, but could still refuse to do so if convinced that accepting such evidence in a particular case would undermine the integrity of the grievance/arbitration system.

A decision by an arbitrator who excludes after-acquired evidence on the basis of taking the second or third positions just outlined should still be enforced by the courts under Section 301. The point to remember is that while a collective agreement cannot take away statutory rights, it can expand upon them. An arbitrator who reads the contract to require more of an employer than does a statute has done exactly what s/he was hired to do: read the contract. That the reading given expands on the procedural or substantive rights provided by statute is no reason to deny enforcement.

Moreover, if the arbitrator holds against the employee's grievance, it is possible for that worker to take the case into the courts under Title VII. It is therefore not necessary for the court to "correct" an arbitrator's evidentiary rulings to vindicate the statutory objective.

Should *Gilmer* Arbitrators Rule in the Same Fashion as Arbitrators under a Collective Agreement?

Gilmer arbitrators, operating outside the collective bargaining context, are in a different position from that of grievance arbitrators appointed under collective agreements. The focus of a *Gilmer* arbitrator is on the correctness of the outcome in the individual case. Arbitration is not an alternative to a strike, in the *Gilmer* context, but is rather an alternative to a trial. Thus, the *Gilmer* arbitrator should primarily be concerned with reaching the result that a federal district court would reach on the same facts. Given that, this "judge for hire" should hear after-acquired evidence on the same basis as would a court, and should give it the same limited effect, considering it not on the issue of whether the employee is liable, but on the issue of the scope of the remedy.

Is reaching the same result that a court would likely reach the only value a *Gilmer* arbitrator should consider? Or should that arbitrator also be concerned with how well the employer's system of deciding whom to fire is working? Suppose, for example, the arbitrator concludes that the true reason for a discharge was not poor performance, the reason given at the time of firing, but rather the supervisor's discomfort with the fired worker's recent religious conversion as a

"born again" Christian. The record also indicates, however, that the fired worker lied twelve years before on the employment application about never having used marijuana, that the employer has a consistent policy of not hiring those who state they were marijuana users, and that the employer has never before investigated the truthfulness of that particular answer on the application. First, one must note that predicting what a court would do with that record is not itself totally clear. The evidence about employer attitudes toward marijuana use points in two directions: The refusal to hire known users indicates the answer to this question is important; the failure ever to check on the truthfulness of answers indicates the answer is of little significance. Second, the arbitrator has identified a member of management whose decision making is seriously flawed, not simply because that manager is violating a statutory command not to discriminate, but because that manager is focusing attention on matters other than performance, the concern that should presumably be his/her principal concern. Whether the arbitrator should think s/he is foreclosed from ordering reinstatement in those circumstances is a troubling question.

Judicial Enforcement of Awards in *Gilmer* Arbitration

Ought a court that is asked to enforce (or vacate) an arbitrator's award that purports to resolve a worker's statutory rights give that award the same deference the court would give to an award made under a collective agreement? Consider the hypothetical case just posed, taken one step further. Suppose, first, that the arbitrator in that case states that s/he is not going to consider after-acquired evidence of a false answer on the application form, because it is so stale an offense and because the fired worker's record of good performance entitles that worker to a "second chance," no matter what may be the employer's attitude about false answers on employment applications. Reinstatement is therefore ordered. The district court, on the other hand, concludes it would consider the evidence of the false answer and would deny reinstatement. Second, suppose the tables are turned. The arbitrator concludes reinstatement is barred by the false answer, while the court concludes that under these facts reinstatement remains an appropriate way to vindicate the statute banning discrimination. Should the court vacate the award in either case, or enforce it?

The answer suggested by *Gilmer* is that the award should be enforced in either case, although the second situation is far more problematic. If no reason at all is given for a decision, it is entitled to enforcement unless the opposing party demonstrates the award is the product of fraud or dishonesty, or is clearly beyond the scope of the arbitrator's power under the relevant agreement. Statement of reasons with which a court disagrees ought not to deprive the award of enforcement. If courts succumb to the temptation to review arbitrators' reasoning on the basis of whether they agree or not, then arbitration loses its finality, as well as the virtues of speed and economy. The societal interest in effective alternative

dispute resolution is substantial. Allowing it to "trump" the employer's interest in getting precisely the same result that a court case might produce is not shocking in this hypothetical case, since at the end of the day the employer is ordered to do no more than restore to his/her job a worker who has performed well for a significant period. Allowing that interest to trump the fired worker's interest in vindicating rights granted the worker by statute is more troubling. For the moment, however, *Gilmer's* rationale seems to call for that outcome. Whether some future Congress may decide to the contrary remains to be seen.

* * *

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ENDNOTES

1. Many terms are used as rough synonyms. Some contracts speak only of "cause," some of "proper cause" or "just cause" or the like. Most arbitrators find little difference between the meaning of such terms.
2. *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987).
3. *McKennon v. Nashville Banner Publishing Co.*, U.S., 115 S.Ct. 879 (1995).
4. 29 U.S.C. 621-634.
5. *McKennon* did not involve an arbitration proceeding. The discharged employee was not represented by a union, and if there was an arbitration clause in her individual contract of employment, it was not mentioned.
6. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).
7. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
8. As the summary of the *Misco* opinion below demonstrates, it is possible to argue that *Misco* was this sort of case. The employee was discharged because of marijuana possession on the employer's premises, and the evidence rejected by the arbitrator involved additional proof of just that. The arbitrator rejected the evidence, however, because he concluded that 1) the employer's initial investigation was seriously deficient (A supervisor who had the chance to accompany local police when they were searching the fired worker's car declined to do so, for instance.); and 2) the case involved two "possessions" of marijuana, not just one. The latter point is debatable and is not made explicit in the arbitrator's opinion. The rejected evidence involved a different quantity of marijuana from the one that led to his discharge—a marijuana cigarette in the front ashtray of a car in which the discharged worker was sitting in the back seat. The rejected evidence was of marijuana "gleanings" found in the worker's own car. The letter of discharge treated the "ashtray cigarette" as a full justification

for discharge, and this justifies treating the "ashtray cigarette" possession and the "gleanings" possession as separate incidents. Some arbitrators might well treat the *Misco* "possessions" as a single incident of violating the rule against bringing drugs onto the work premises. An arbitrator who does so would be more likely to admit the evidence. Even if one treats the case as involving only a single incident of possession, however, there might still be problems with the adequacy of the initial investigation.

9. See generally R. Covington and K. Decker. *Individual Employee Rights in a Nutshell*, West Publishing Co., St. Paul, Minnesota, 1995, pp. 221-253 for a discussion of the at-will concept.
10. Of the 6,011 reported closed arbitration cases administered by the Federal Mediation and Conciliation Service, Washington, D.C., in 1992, 2,641 were discipline and discharge cases [11].
11. United States Federal Mediation and Conciliation Service, Forty-fourth and Forty-fifth Annual Reports, 1991-1992, p. 41.
12. Ray J. Schoonhoven, ed., *Fairweather's Practice and Procedure in Labor Arbitration*, 3rd ed., Bureau of National Affairs, Washington, D.C., pp. 527-528, 1991. In 1992, the average elapsed time between the filing of a grievance and the issuance of an arbitrator's award was 316.87 days [11, p. 40]. There are limits to this reasoning, of course, since some fired workers may be able to convince a government agency to take up their claims, and some are able to obtain representation on the basis of a contingent fee arrangement. It is unlikely that a fired worker is as likely to pursue these routes as to file a grievance with the worker's union.
13. The concern over procedural regularity is not limited to evidentiary questions, of course. Consider, for example, the case of B-Line Systems Inc. and Machinists, District 9, 100 Lab. Arb. 933 (1993) (Cohen, Arbitrator), in which a firing was set aside because the employer failed to issue a termination slip as required by the contract—even though the issue was not raised in the grievance and arbitration proceeding.
14. See Elkouri & Elkouri, *How Arbitration Works*, 4th ed., Bureau of National Affairs, Washington, D.C., pp. 673-677, 1985.
15. This is a pattern different from that in *McKennon*. There, while the fired worker's alleged misconduct was discoverable by the employer before the discharge, it had not in fact been discovered.
16. See, e.g., Salt River Project Agricultural Improvement and Power District and International Brotherhood of Electrical Workers, 91 Lab. Arb. 1193 (Ross, Arb.) (1988).
17. A number of decisions favoring the admission of such evidence in a variety of circumstances is summarized in George Nicolau, *After-Acquired Evidence: Will the McKennon Decision Make a Difference?, Dispute Resolution Journal*, July-September 1995, p. 17.
18. See Sunshine Specialty, 55 Lab. Arb. 1061 (Lewin, Arb.) (1970).
19. *Chrysler Motors Corp. v. International Union, Allied Industrial Workers of America*, 2 F.3d 760 (7th Cir. 1993).
20. 748 F. Supp. 1352 (E.D. Wis. 1990), aff'd 959 F.2d 685 (7th Cir. 1992). In a related proceeding, Chrysler was held not to be precluded from pursuing its appeal by its second firing of the same worker. [909 F.2s 248 (7th Cir. 1990).]
21. 768 F.2d 739 (5th Cir. 1985).

22. The statute applicable to this case was the pre-1991 act, which provided primarily equitable relief.
23. *Alexander v. Gardner-Denver Co.*, 415 U.S. 16 (1974).
24. 9 U.S.C. 1-16. The statute provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." [9 U.S.C. 1]. Whether this exception applies broadly to all workers engaged in commerce, or narrowly, only to those engaged in interstate transportation, is a matter of dispute. The circuit courts of appeals are divided on the matters. See Holcome, *The Demise of FAA's "Contract of Employment" Exception?*, in 1992 *J. Disp. Resolution* 213 (1992); Cox, *Grievance Arbitration in the Federal Courts*, 67 *Harv. L. Rev.* 691 (1954). This was not raised in the *Gilmer* litigation, but is mentioned at length in the dissenting opinion.
25. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985).
26. See generally M. Hill & A. Sinicropi, *Evidence in Arbitration*, 2d ed., Bureau of National Affairs, Washington, D.C., pp. 60-66, 1987.
27. Cleveland Pneumatic Co. and Aerosol Aircraft Employees Ass'n, 89 Lab. Arb. 1071 (1987) (Sharpe, Arbitrator).
28. The importance of the evidence not being available to the employer previously is underscored in an opinion dealing with an unusual request by an employer to have an arbitration proceeding reopened. The employer urged that since the credibility of the grievant was necessarily in issue, the arbitrator should reopen the proceeding to receive in evidence a newspaper article published after the arbitration hearing had been held, relevant to that credibility issue. Arbitrator Dennis Nolan granted the request. Westvaco, Virginia Folding Box Div'n and Bellwood Printing Pressmen, 91 Lab. Arb. 707 (1988) (D. Nolan, Arbitrator).
29. *Sigmon v. Parker, Chapin, Flattau & Klimpl*, 69 FEP Cases 69 (E.D.N.Y. 1995).
30. See Duquesne Light Co. and International Brotherhood of Electrical Workers, 92 Lab. Arb. 907 (1989) (Sergent, Arbitrator). The opinion distinguishes carefully between the situation in which an employer acts with undue harshness, and that in which it simply refuses to grant additional grace. The former—stringency of application of rules that goes beyond the reasonable expectation of workers with respect to discipline in the type of industrial setting involved—is ordinarily within arbitrator competence to decide unless the collective agreement withdraws such power. The latter is beyond the arbitrator's authority to correct, unless the collective agreement can be read to delegate to the arbitrator the power to decide on the employer's behalf when grace should be employed. Such authority may be express or implied. The most likely source of an implied authority to consider "grace" issues is the familiar principle that employers should act consistently. See Browning-Ferris Industries of Ohio, Inc. and International Brotherhood of Teamsters Local 571, 77 Lab. Arb. 289 (1981) (Shanker, Arbitrator). If the employer has power to fire for a first drug offense under the contract but has in fact refused to exercise that power in a dozen cases provided the employee involved has sought counseling, then the "grace" pattern has become so clear that an arbitrator may well feel the employer should at least explain why those other cases were different. Arbitrator Sergent in *Duquesne Light* recognized this possibility by implication through the way in which he detailed how far the employer had gone

in insuring that the fired worker was aware of counseling available to him, and through his careful recounting of the lenient treatment the grievant had received over a period of time.

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