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ARBITRATION OF EMPLOYMENT DISCRIMINATION CLAIMS: A NEED FOR STATUTORY REFORM?

LEROY D. CLARK*

AND

BARBARA A. BUSH**

1. Historic Genesis and Scope of Debate

The debate about the feasibility of resolving employment discrimination claims through arbitration as opposed to full fledged litigation was wide-ranging and arose shortly after the passage of Title VII of the Civil Rights Act in 1964. In most of the articles, arbitration was proposed to meet pressing problems—the mounting backlog of charges at the newly created Equal Employment Opportunity Commission (EEOC) and the length and high cost of Title VII litigation. One discussion analyzed how arbitrators had handled discrimination claims before the passage of Title VII, as possible guidance to the fledgling EEOC. Another writer was concerned with the emergence of new fora for the resolution of such disputes, and explored the advantages and disadvantages of arbitration in the search for an accommodation with Title VII which would reduce the possibility of multiple litigation. Later discussions proceeded from a perception that there were an overwhelming number of discrimination grievances beyond the capacity all of the equal employment opportunity enforcement agencies or that such agencies were administratively inept and unable to promptly and effectively handle discrimination claims. This article will be limited to a discussion of arbitration of anti-discrimination charges that could

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be brought under Title VII of the 1964 Civil Rights Act, and does not include charges which could be made under the federal constitution, other civil rights statutes (e.g., 42 U.S.C. sec. 1981) or other federal or state employment laws (e.g., the National Labor Relations Act). Arbitration of non-Title VII causes of action entail a host of considerations which are beyond the scope of this writing.

Title VII covers federal and state employees. There have been some claims that arbitration in the public sector is of questionable legality on the ground that it is an improper delegation of the legislative body’s power to determine public policy. This doctrine has lost adherence in recent times and thus will not be pursued further here. One must keep in mind, however, that the mechanics and procedures for utilizing arbitration may differ for public and private sectors of employment.

Proponents of arbitration as a primary, supplemental or substitute remedy for employment discrimination argued (1) the expedience and economy of arbitration; (2) that it would conserve administrative and judicial resources; (3) that it would place the primary responsibility for resolving employment problems on employers and unions and foster voluntary resolution of issues of employment discrimination which is an implicit goal of Title VII; (4) that parties could select an arbitrator whose familiarity with industrial disputes would better serve their interests; and (5) that arbitration would create less disruption and publicity than protracted litigation or investigation by outside enforcement agencies.

There were, however, active opponents to arbitration of employment discrimination claims. They argued that arbitration procedure under the typical collective bargaining contract suffered from several severe limitations. First, that the process itself was inadequate because (1) it has not been geared to handle multiple claims from a large number of similarly-situated claimants (the kind appropriate for class action treatment in courts); (2) it lacks the procedural safeguards of litigation, as an extensive discovery and findings of fact and conclusions of law, etc.; (3) its initiation is under the control of the union which might not pursue a claim because of possible “reverse” discrimination charges from union members who would lose benefits they derived through discrimination or fail to adequately represent the grievant.

7. A number of writers have discussed the dilemma faced by unions in choosing between conflicting employee interests, particularly when employees with opposing interests are members of the same bargaining unit, and unions, may in this circumstance court “reverse” discrimina-
because the union is implicated in the discrimination. And that private arbitration outside the view of courts and administrative agencies having responsibility for enforcing statutes “in the public interest” is inappropriate for adjudication of “public” statutory rights.

Secondly, it was argued that arbitrators would be inferior to the judiciary in that they may be lawyers unfamiliar with the particular external statutory law, or worse, lay persons lacking the legal expertise to research and interpret case law developments, and further, that as the creation of the collective bargaining agreement, their allegiance is to labor and management, and the “law” of the contracts. Finally,

8. Margaret Oppenheimer and Helen LaVan, in a report of their study of 86 arbitration cases, note that in 6 of these cases there was evidence of explicit disagreement between the union and the grievant. They note further that no backpay was awarded in any of these cases while backpay was awarded in 25% of the cases where there was no apparent conflict between the union and the grievant. Openheimer & La Van, Arbitration Awards in Discrimination Disputes: An Empirical Analysis, 34 Arb. J. 12, 15 (March 1979).

9. This problem is reflected in James Youngdahl’s description of a special grievance procedure established under a settlement agreement between a large employer and union to handle discrimination claims. He notes that of five arbitration awards made under the procedure, only one gave any weight to Title VII law, although in each case the union cited a number of such decisions in support of the grievance. Arbitration of Discrimination Grievance: A Novel Approach Under One Collective Agreement, 31 Arb. J. 145, 160 (Sept. 1976). Professor Alfred Blumrosen also observed, during a 1968 survey of race discrimination cases submitted to arbitration, that there was a tendency for arbitrators to uphold discharge and discipline of minority employees for conduct challenging their employers’ discriminatory practices. In none of these cases did the arbitrators reference or appear to consider Title VII’s prohibition against retaliation. Blumrosen Labor Arbitration and Discrimination: The Situation After Griggs and Rios, 28 Arb. J. 145, 151 (Sept. 1973).

10. The dependency of the arbitrator on the parties to the contract has been raised frequently as a factor inhibiting fair resolution of employees’ discrimination claims under the contract grievance-arbitration procedure. The potential effects of this allegiance on the arbitration process are suggested in Oppenheimer & LaVan’s observation that arbitrators were more likely to cite law, judicial decisions or other arbitral decisions when sustaining a grievance than when denying one (a possible indication that the arbitrators were more concerned with the employer’s acceptance of an adverse award and therefore, offered more detail justifications for their decisions against the employer), supra note 3, at 16. There is also a possibility that the posture of the parties towards the settlement of a particular grievance may be influenced by their awareness of this allegiance. See e.g., Youngdahl, supra note 9 at 161, noting that the employer was less likely to cooperate in the process of a grievance or to entertain settlement proposals when an
it was argued that the range of remedies usually available under a collective-bargaining agreement would be insufficient to fully redress some statutory violations. For example, an arbitrator usually has no authority to void or reform provisions of the contract, and clearly has no authority to grant injunctions.

The Impact of *Gardner-Denver*

There were some proposals for addressing the full range of objections to arbitration, but after the Supreme Court's decision in *Alexander v. Gardner-Denver,* making it clear that the employee retains a right to federal suit even though he has resorted to collectively-bargained arbitration, the nature of the debate shifted to a search for ways to assure finality of arbitration in the fact of the Court's decision. Many of the earlier discussions had generally sought means of protecting employers and unions from multiple litigation and mentioned the advantages of arbitration to the grievant in only a token fashion. *Gardner-Denver,* however, forced the recognition that only by adequately protecting the grievant's statutory rights, could employers and unions hope to protect themselves from litigation in multiple fora. Thus, new proposals focused on investing the conventional grievance-arbitration process with the types of procedural safeguards which might entitle it to administrative and court deference, incorporation of arbitration into the administrative charge processing mechanism either through agency reorganization or statutory amendment, and voluntary arbitration schemes entirely outside the framework of both the collective-bargaining and the administrative agency processes. Those who, because of *Gardner-Denver,* questioned whether any of these mechanisms could adequately assure no litigation after arbitration speculated that employers and unions might exclude employment discrimination claims from the grievance-arbitration process.

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13. *Id.* at 26-27; and Webster, supra note 4.
2. Current Need for Arbitration

*Gardner-Denver* provoked a re-examination of the strategy for making conventional arbitration a "final" means of resolving employment discrimination disputes. However, there is now a need to re-examine whether the original assessments of the need for arbitration as a supplement or alternative to the administrative process are still accurate, especially given the substantial reorganization and reform of administrative procedures begun at the EEOC in late 1977. New programmatic initiatives saw the institution of a rapid charge and fact-finding process through which many individual claims were mediated quickly to negotiated settlements.

Under the Commission's former charge processing procedures, individuals were encouraged to file charges containing broad and general allegations of discrimination which could be used as vehicles for expanded investigations into possible class or systematic violations. By contrast, the rapid charge process stressed the necessity for specific, detailed charges limited to allegations of direct individual harm and similarly circumscribed investigations. The fact-finding conference, generally scheduled after notice of the charge and a preliminary request for evidence from the respondent and within six weeks of the filing of a charge, is designed to promote a negotiated settlement prior to a Commission determination (sometimes referred to as a "no fault" settlement). Thus, the parties are brought face-to-face to elicit pertinent facts and to assess the strengths and weaknesses of their case. The emphasis is on obtaining a speedy and mutually satisfactory settlement. Consequently, settlements concluded through this process are not necessarily based on the merits of a charge (since at this stage there has been no Commission finding) and need not provide "substantially full relief," the standard applied to settlements reached after a full investigation and Commission determination.

Worksharing agreements with state Fair Employment Practice (FEP) agencies were adopted under which the agencies are funded by the Commission to resolve prescribed numbers and categories of individual Title VII charges subject to the EEOC's review with "substantial weight" being given to state findings. The Commission funded only state agencies where the state anti-discrimination laws provided substantive protection from employment discrimination consistent with that provided by Title VII. Such agencies were required to establish management and procedural systems for handling charges closely analogous to those in place at the EEOC.

The professionalization of FEP internal operations and quality control of charge processing under these arrangements, coupled with
periodic Commission training programs for state and local agency personnel, permit effective apportionment of the charge workload which was not previously possible. Consequently, the Commission's review of state agency findings need not involve duplicative or lengthy investigations. Many charges are now resolved by state agencies, thus requiring no further Commission action.

Commission attorneys, previously isolated from compliance staff in five regional litigation centers were integrated into the twenty-two district offices. This allowed early dismissal of charges where there was a legal impediment, and assured that charges referred to litigation would have a sufficient evidentiary base.

With these new systems in place, the 1977 backlog of approximately 130,000 charges had by December 1979 been reduced by 45%, and by December 1980 by 66%. The processing time for individual charges was also reduced from an average of 2 years to 4 months with a 50% as compared to previous 14% remedy rate.\(^{16}\)

Given this type of administrative progress, one might well ask whether discussion of arbitration as a means of resolving claims has been drained of content. While the new procedures have resulted in a great progress toward elimination of the existing backlog, their successful implementation has led to heightened public awareness and expectations of the agency's ability to obtain redress for discriminatees, with a complementary increase in the filing of charges. Further, since assuming jurisdiction from the Department of Labor over the Equal Pay and Age Discrimination in Employment Acts in 1979, the EEOC has received and continues to receive numbers of such charges far in excess of those received by the Department of Labor. While the agency has performed well in meeting public expectations and handling its new subject matter jurisdiction, there are two factors which may arrest and reverse the recent trend toward reduction of a backlog of charges. First, the rapid charge process system has been strongly criticized by another federal agency, and this may prompt adoption of a higher quality, but more time consuming investigations. Secondly, the administration which came into office in 1980, has progressively reduced the budget and staff of the EEOC.

In a report to Congress the General Accounting Office (GAO) criticized rapid charge processing on the grounds that some settlements were negotiated on charges which appear meritless from the preliminary investigations, and would if pursued to an agency determination be

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16. Statement of Eleanor Holmes Norton, Chair, EEOC, before the Subcommittee on State, Justice and Commerce, the Judiciary and related Agencies of the Committee on Appropriations, House of Representatives, March 26, 1980.
dismissed for lack of evidence. The GAO recommended that The EEOC urge such charging parties to withdraw their charges or the Commission should find "no cause."

The GAO also suggested that a high degree of dissatisfaction by charging parties with their settlements (47%) was a product of their being misled about the weakness of their case by the fact that there was a settlement.

The GAO report was amply and properly criticized by the then Chair of the EEOC because of the questionable character of some of the evidence upon which they rested their conclusions. For example, the GAO concluded that some charging parties had weak or unfounded cases on the basis of evidence presented only by the respondent. They could, therefore, not have known what the situation would have been after full discovery by a charging party which might have undermined the respondent's submissions. Moreover the "dissatisfaction" level among complainants would undoubtedly have been much higher in the pre-rapid charge process days when it took years before any attention was given to their charges. Following the GAO recommendation, would naturally involve extended investigation of all charges resulting in the redevelopment of the agency's backlog.

The GAO report, however, cannot be totally dismissed because there probably is some tension between the speed of settlement and the quality of settlements. Quick negotiations without full investigations have to veer away from resolutions firmly grounded on the actual presence or absence of discrimination: employers may tend to see the EEOC process cynically (or accurately) as a "cheap buy-out" and charging parties may be getting more or less than they deserve. Arbitration may be a middle ground antidote to this conflict in objectives—for it would produce a stronger factual base for resolution than the rapid charge processing system, and yet not be as time consuming and expensive as full scale litigation.

A new factor which may prompt a search for supplementing the EEOC process with arbitration is the fact that the Reagan administration has cut the EEOC budget by 10% from fiscal year 1981 to 1983. Staff at the agency was reduced by 12%. At the end of the Carter administration it was predicted that given the new rapid charge process and the level of agency funding obtained at that time, that the backlog could be completely eliminated 1982. By June of 1983, however, approximately 3,800 cases were backlogged. These budget and staff

17. Report to Congress by the Comptroller General of the United States, HRD-81-29, April 9, 1981.
cut-backs have been put into effect at the same time (1981-1983) that
the number of complaints increased by nearly 50%." Should this trend
continue throughout the second term of the Reagan administration it
might augur the development of a new backlog.

Aside from the probability that a supplemental resolution process
will be needed to assist the administrative agencies in handling
discrimination claims, there is another important fact which also argues
for the possibility of arbitration. Despite the presence of a major federal
agency (EEOC), the overwhelming number of suits which are filed in
the federal courts involve private parties suing other private parties.
There were over 9,000 such suits in fiscal year 1984, an increase of
38% over fiscal year 1980.

A fair number of such suits will not have received any investiga-
tion or efforts at resolution prior to suit because plaintiffs represented
by counsel frequently exercise their rights to sue after the charge has
been lodged with the EEOC a certain period of time. Arbitration might
reduce the number of such suits, particularly if it was provided for
non-unionized employees as well.

A final reason that arbitration may be a valuable supplementary
process is that it may be a better means than litigation for handling
problems in long-term human relationships. While some discrimina-
tion claims attack unfair or arbitrary practices which operate as a bias
against a group (e.g., requirement of a high school degree with no
data showing its relevance to job performance), many charges are
enmeshed in personal relationships (discharge after a conflict with a
foreman, some instances of sexual harassment etc.). In some of the
individual charges, the complainant may only seek back pay and have
no desire to return to, or continue, the employment there is an expec-
tation of a future organizing relationship. Courts are adequate in terms
of reconstructing a past event and deciding who is the "winner" and
who is the "loser," particularly strangers, or will have no complicated
future interaction. Courts have been less adept, however, in respond-
ing to events which are merely symptoms of some continuing under-
lying disturbance in personal relationships. Thus, arbitration or media-
tion which has long been the staple way of dealing with disturbances
in employment relationships, is now being experimented with to displace
courts in the area of marital disputes and landlord-tenant relationships.20

18. Palmer & Sawhill editors, The Reagan Record—An Assessment of America’s Chang-
19. Administrative Office of the United States Courts, Annual Report of the Director,
20. Holman and Noland Agreement and Arbitration: Relief to Over-litigation in domestic
Relations Disputes in Washington, 12 Williamette L.J. 527 (Summer 1976); Arbitration of Landlord-
Individual employment discrimination claims may often turn on the perceptions of the disputants and may have ordinary problems of human conflict intertwined with the race, sex, or national origin of the disputing parties. These circumstances may call for flexibility and creativity in attempting to adjust the living-together-on-the-job interaction. Arbitrators have excellent training for understanding and seeing the complexity in human interactions, and making and conditioning decisions in such a way as to make long-term interactions viable.

3. Under Current Law—What Accommodation for Arbitration During the Administrative Phase?

*Gardner-Denver* informs us of the relationship between arbitration and suit in federal court, but how should arbitration be accommodated by the EEOC during the administrative stage? The National Labor Relations Board (NLRB), which administers another statute governing the employment relationship integrated arbitration into its administrative process by way deferring jurisdiction when arbitration has begun, or dismissing charges when arbitration has been concluded, if the arbitration meets standards. Does this inform the EEOC as to the stance it should take with respect to arbitration, or is the National Labor Relations Act (NLRA) sufficiently different from Title VII so that no easy analogy is possible?

The NLRB had established its deferral policy before the *Gardner-Denver* case. However, if *Gardner-Denver* could be read broadly as stating that where federal statutory rights are at issue there can be no

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21. The Board’s deferral policy was first articulated in Spielberg Manufacturing Company, 12 NLRB 1080 (1955). Under *Spielberg*, the Board will defer to the arbitration process when an arbitrator has already decided the case where (1) the proceedings appear to have been “fair and regular” (2) the parties had agreed to be bound by the arbitral decision and (3) the decision is not “clearly repugnant” to the purposes and policies of the Act. The Board later added the requirement that the unfair labor practice presented to the Board must have been considered and ruled on by the arbitrator. Raytheon Co. v. NLRB, 140 NLRB, 883 (1963), enforcement denied, 326 F.2d 471 (1st Cir. 1964). The Board has recently assured greater deferral by holding that the arbitrator will be deemed to have considered the unfair labor practice where it “parallels” the contractual issue and where evidence was presented that was relevant to resolving the unfair labor practice charge. Oline Corp., 268 NLRB 573, 115 LRRM 1056 (1984).

The *Spielberg* rule was enlarged by the Board in Collyer Insulated Wire, 192 NLRB 837 (1971) where the Board deferred not to an existing arbitration award, but to the arbitration procedure itself established under the collective-bargaining agreement for the resolution of grievances. The Board retained jurisdiction, however, to assure that the arbitration met the *Spielberg* requirements.
final and binding arbitration, then the NLRB policy would be put in jeopardy. At least one commentator, however, argued that the Gardner-Denver decision should have no impact on the Board's deferral policy because the purposes, procedures, and statutory framework of Title VII were quite different from the NLRA. He noted specifically that the overall purpose of the NLRA is to promote industrial peace by fostering free collective bargaining and that the prevention of unfair labor practices by the Board is only one facet of a comprehensive regulatory scheme designed to achieve that end. In addition to the Board's processes, this comprehensive scheme incorporates the Labor Management Relations Act (LMRA), which provides for private enforcement of collective bargaining agreements through judicial action.

Under the LMRA, a federal common law of the labor agreement based on encouraging and enforcing arbitral determinations of labor disputes under the collective-bargaining agreement has developed. Finally, although the Board is vested with exclusive power to administer the NLRA, and where unfair labor practices are concerned, has pre-emptive authority over other enforcement processes encompassed in the statute, the LMRA also reflects the congressional preference that grievance disputes over the application of interpretation of collective bargaining agreements be finally adjusted by a method agreed upon by the parties. Neither the NLRA nor Section 301 of the LMRA offer guidance as to how the statutory law and common law invoked by these provisions are to be reconciled when both a contract violation and an unfair labor practice are implicated in a charge. However, it is "well-established that the Board has considerable discretion to respect an arbitration award and decline to exercise its authority over an unfair labor practice if to do so will serve the fundamental aims of the Act." Further, while certain rights under the NLRA are characterized as individual rights, the thrust of the statute is to protect the individual's right to participate or refrain from participating in collective activity. Thus, unlike Title VII, the NLRA neither accords a private right of action nor a prominent role in the statutory enforcement scheme to

24. NLRA, 29 U.S.C. 160(a): "The Board is empowered...to prevent any person from engaging in any unfair labor practice...affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law or otherwise.
the individual employee. The responsibility for enforcing the rights guaranteed by the Act are entrusted solely to the Board to be exercised in accordance with the overall statutory aim of promoting industrial peace through collective bargaining.

Under Title VII, the EEOC is under mandate to receive, investigate and where cause is found, to attempt conciliation. Critical to the statutory enforcement scheme is the reservation to the individual charging party of a private cause of action which can be exercised despite any EEOC action, inaction or determination.\textsuperscript{27} Title VII specifically provides for the EEOC's deferral of charges to state fair employment agencies whose decisions are to be accorded "substantial weight" by the EEOC in reaching its reasonable cause determination.\textsuperscript{28} Thus, as reflected in the statute and recognized by the courts,\textsuperscript{29} deferral to such agencies is an integral part of the statutory enforcement scheme. However, there is no mention in the statute or legislative history of deferral or accommodation by the EEOC to other enforcement or adjudicatory processes, such as arbitration. One might conclude from Congress' explicit incorporation of state agency proceedings into the enforcement process and its silence as to other proceedings that deferral to private arbitration and recognition of the findings and conclusions of the arbitration by the EEOC is beyond the authority of the Commission. At the very least, such a procedure would be likely to evoke criticism that the agency is abdicating to a private process, over which it has no control or oversight, its responsibility to enforce public statutory rights. On the other hand, the \textit{Gardner-Denver} Court clearly indicates that some degree of recognition by the federal judiciary of arbitral awards in Title VII cases would be appropriate where the conditions enumerated in footnote 21 of the opinion are satisfied.\textsuperscript{30} A reading of Title VII to prohibit similar recognition of arbitral awards by the EEOC in its administrative process would be somewhat anomalous and could lead to inconsistent results and duplicative utiliza-


\textsuperscript{28} See Section 706(b) of Title VII, 42 U.S.C. 20003-5(b).


\textsuperscript{30} "We adopt no standards as to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective-bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight." 415 U.S. 36, 60 (1974).
tion of administrative and judicial resources. Thus, a respectable argument could be made that the EEOC’s deference to arbitral awards, though not explicitly authorized by statute, is authorized by court decision and necessary to the harmony of federal labor policy. One court has held that attorney’s fees may be recovered under Title VII by a plaintiff who prevails in arbitration, thus supporting the view that arbitration may be incorporated into the scheme of the anti-discrimination statute. 11

There is another factor which may lend support to the argument for the EEOC’s deference to arbitral awards. Both the NLRB and the courts have recognized that certain employee activity protected by Title VII, e.g., the filing of a Title VII charge or other opposition to an employer’s unlawful employment practices, may also constitute “concerted” activity protected under the NLRA. 12 Query, whether such an unfair labor practice charge arising out of the frustration of Title VII rights can be referred to binding arbitration by the Board under Gardner-Denver. If so, and Title VII is construed to preclude the EEOC’s deference to arbitration, the result will be that a charging party’s entitlement to a de novo judicial determination of his/her claim will depend upon the forum in which the charge is filed.

If one assumes the EEOC has authority to defer to arbitration, questions are presented both as to the point in the administrative process at which recognition of a prior arbitral decision could feasibly occur and the legal effect of such recognition. It is doubted that the EEOC could treat arbitration as a substitute for its own administrative processing of a charge, since even state agency determinations are not statutorily dispositive of the EEOC’s determinations 13 and even Gardner-Denver does not give unexamined finality to an arbitrator’s decision in the federal courts. Moreover, no matter what the degree of deference the EEOC is accorded, arbitration would not be final and binding on the courts not only because of Gardner-Denver, but because the EEOC determination itself is not treated as conclusive by the courts in a trial de novo.

The statutory mandate that the Commission attempt to conciliate where a cause determination has been made on a charge raises further questions as to whether the EEOC may suspend its conciliation attempts in deference to an on-going arbitration proceeding and/or, in some manner, consider a prior arbitral decision in the conciliation process.

32. See Briscoe v. NLRB, 637 F.2d 946, 103 LRRM 1110 (3rd Cir. 1981) and NLRB cases cited therein.
Query, however, whether the Commission could adopt a prior arbitral award as the basis for a conciliation agreement where the award addresses the same allegations as those raised in the charge and grants the full relief available under Title VII. The terms of the conciliation agreement in that instant would be merely that the respondent or the charging party comply with the provisions of the prior arbitral award.

The procedure would not be subject to challenge by a charging party, for his right to sue is not conditioned on conciliation by the Commission. Such a party would merely reject the arbitration and request the "right-to-sue" letter at the appropriate time. A respondent, however, might have standing to object to this procedure if he were sued by the Commission after he rejected the "arbitration-settlement," because he could claim that it did not fully satisfy the Commission's duty to conciliate before it instituted action.

Acceptance of the prior arbitral award through this procedure might also accord a final status to the award with respect to the charging party since voluntary acceptance of a settlement with full knowledge of its terms, and in satisfaction of his Title VII claim could, under Gardner-Denver, be construed as an effective waiver by the plaintiff of the right to further litigate the claim.

While the discussion of agency deference to arbitration has focused primarily on arbitration under the collective-bargaining agreement, many of the same legal and practical questions apply to agency recognition of purely private, non-contractual arbitration. Moreover, in the latter circumstance, a challenge of illegal delegation of governmental functions to private parties could not be countered by an argument based on the need to harmonize the federal labor policy, as in the case of contract grievance-arbitration sanctioned by the NLRA and LMRA.

Under any scheme of deferral or recognition of arbitral awards, the agency would, in any event, have a responsibility to look very closely at the arbitration process to ensure that procedural safeguards are provided and statutory rights adequately protected.

3. Finality

In summary none of the proposals outlined above present an unquestionable method for the EEOC's recognition of arbitral pro-

34. See Occidental Life Insurance Co., supra note 27.
35. While a number of Commission-initiated suits have been dismissed by the courts because of EEOC's failure to perform its statutory duties to a defendant or adhere to its own regulations, this type of sanction has generally been based on the additional finding that the defendant
ceedings, nor do they completely remove employment discrimination charges from the agency's caseload, or assure that finality will be achieved through the arbitration process. In fact, any question of finality through the collective-bargaining grievance arbitration procedure may be moot in view of cases like *Gardner-Denver*, regardless of the procedural safeguards with which the process is invested.

In *Gardner-Denver*, the Court distinguishes between rights conferred on employees collectively which can be waived by the union as collective-bargaining agent, and an individual's Title VII rights which are not subject to waiver through the majoritarian process of collective-bargaining. The Court stresses two points regarding waiver; (1) that individual statutory rights may not be waived by third parties, and (2) that such rights, in any event, may not be waived prospectively. It could be argued, however, that while the decision does not permit prospective waiver of the employee's rights by the employer and union, neither does it foreclose an entirely voluntary waiver by the individual of his/her rights at the time he/she opts to pursue the grievance-arbitration procedure. Even this possibility is not certain, however, given the language in the Court's decision. The potential for waiver by the individual of Title VII rights is discussed by the Court in the context of voluntary settlements. The Court indicates that such waivers will be effective when the employee's consent thereto was "voluntary" and "knowing." Nowhere in the decision does the Court specifically address the circumstances under which an individual might effectively waive statutory rights in the context of grievance-arbitration.

While the Court does not discuss the differences between settlement and contract arbitration which would make waiver possible in one situation and not the other, such a distinction may nevertheless have intended since there are differences in the processes which may contribute or detract from the individual's ability to make an effective ("knowing" and "voluntary") waiver. In the case of settlement, both the grievant and the employer know exactly what compromises are being made before signing the agreement; whereas, in arbitration, the parties cannot predict the outcome of the adjudication or know in advance to what conditions they will be bound.

The implications of this distinction were clearly articulated by the Fifth Circuit in *Strozier v. General Motors Corporation* involving an employee's right to file a Title VII suit where the claims had previously been voluntarily settled or successfully arbitrated.36 The employee in

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36. 635 F.2d 424, 24 FEP Cases 1370 (5th Cir. 1981).
question had filed a grievance on several occasions of discipline. A grievance based on the plaintiff's discharge was voluntarily settled during the pendency of the lawsuit with the plaintiff being reinstated with backpay. A second grievance, based on a later discharge, was submitted to binding arbitration under the collective-bargaining agreement and decided in the plaintiff's favor with reinstatement, full seniority and backpay.

With respect to the settlement, the court held that since the remedy sought and settled was identical to the remedy sought in the lawsuit, the plaintiff's voluntary acceptance of the settlement foreclosed a subsequent lawsuit, even though the plaintiff's statutory claims were not expressly covered in the settlement agreement. The court also found that the relief obtained in arbitration was fully equivalent to that sought by the plaintiff in his lawsuit to enforce his statutory rights and therefore, that there was no further relief the court could grant and hence, the court made clear that neither the denial of an arbitration award nor success in arbitration is judicially dispositive of Title VII rights:

Settlement of a dispute is inherently different from resolution through arbitration. A settlement is a compromise voluntarily agreed to by the parties. Each party generally accepts something less than that to which he believes he is entitled based on a decision that the compromise is more advantageous to him than the sum of the risks and benefits involved in pursuing the claim. Arbitration, on the other hand, is an 'adjudication' of conflicting interests by a neutral third party. In binding arbitration, neither party is free to accept or reject the ruling of the arbitration. Once the dispute has been submitted to arbitration, the parties must abide by the arbitral decision.37

These distinctions, the court felt, required different approaches to the question of whether a right to file a Title VII suit on the claims existed. The court's emphasis on the distinction between settlement and arbitration, and on the arms-length compromise aspect of settlement raises a question as to whether even a voluntary waiver can be made in the arbitration context where the parties cannot know whether or to what extent their rights will be compromised.38 It raises the further question of whether the Supreme Court intended such a distinction in Gardner-Denver.

37. Strozier, supra fn. 34, 234 FEP Cases 1370, 1371.
38. The same distinction might apply where non-commercial arbitration is concerned.
Any ambiguity on this point appears to have been dispelled in the Barrentine case involving statutory rights under the Fair Labor Standards Act (FLSA). At issue was whether the plaintiff's truck-drivers for Arkansas-Best whose competition claim of payment for work done prior to beginning their main tasks which had been denied in arbitration, could bring a suit under the FLSA. The Eighth Circuit held that wage disputes under the FLSA can be the subject of binding arbitration where the collective-bargaining agreement so provides and where the employees knowingly and voluntarily submit the grievance to arbitration.

Relying upon Gardner-Denver, the Supreme Court rejected the Eighth Circuit's ruling and held that rights under the FLSA, like rights under Title VII are non-waivable and are best protected in a judicial rather than in an arbitral forum. The dissent by Chief Justice Burger and Justice Rehnquist (who joined in the Court's Gardner-Denver opinion) is interesting for its reiteration on this point with respect to Title VII rights. While the dissenters argue that the broad language of Gardner-Denver should not be read to prohibit employees and employers from agreeing to a means other than litigation for enforcing rights under the FLSA, they do not dispute the majority's express reliance on Gardner-Denver for the proposition that Title VII rights are not susceptible to waiver in the collective-bargaining arbitration context.

The Court's earlier statement in Gardner-Denver that the mere resort by an individual to the arbitral forum to enforce contractual rights does not constitute a waiver of statutory rights under Title VII, left room for discussion of the possibility that resort to the arbitral process, with the express intention to be bound by that procedure, could be construed as an effective waiver of the right to further litigate statutory claims. However, the Barrentine "dictum gloss" on Gardner-Denver seriously undercuts the claim by some commentators that finality can be achieved through arbitration with respect to Title VII claims.

The fact that finality may not be achievable through arbitration under current court decisions, or that agency recognition of such proceedings present problems of statutory interpretation, does not moot the discussion. The cultivation of alternative procedures for eliminating discrimination in the workplace from the outset, and efficiently and adequately handling those claims which do arise, is perhaps of equal significance. Thus, to the extent that grievance-arbitration of employment discrimination claims is structured in such a way that the individual's statutory rights are fully protected, the grievants' satisfac-

tion with the fairness of the process may, in fact, result in finality either through the grievant obtaining full relief or accepting the arbitrator's decision by not filing suit.

4. A Need for Statutory Reform

The problems and ambiguities explored above suggest that if arbitration is to have a firm and unequivocal place within the scheme of Title VII it would best be achieved by statutory amendment. In particular the Congress should give thought to modifying *Gardner-Denver* and allowing arbitration to be an elective substitute for the state and federal administration processes and final and binding in limited circumstances, with appropriate safeguards. It is only in such a posture that arbitration could act as a relief to the administrative and judicial case loads. Such arbitration should not be mandatory for either party and there should be no requirement that the charging party exhaust their process before resorting to state or federal administrative processes, or suit. The process would be strengthened if both parties enter it in a wholly voluntary posture. There may be the need for some counseling from the EEOC for the charging party, to assure a full understanding of the election. Moreover, to further increase the utility of arbitration in this context, it should not be limited to unionized employees with collective-bargaining agreements, but should be made available to the three-fourths of the work force that is not organized.

One commentator proposed scientific amendments of Title VII to encompass arbitration which meet some of the objections noted earlier in the article. She suggests that the EEOC pay and train the arbitrators; that the General Counsel of the EEOC be empowered to screen out class actions and cases with novel issues of law; and that there be limited judicial review.

Specific section of Title VII should also be revised as follows: Section 706(f)(1) would be amended to eliminate the charging party's right to a notice of right-to-sue where the charging party has earlier requested and submitted his/her claim to arbitration.

Since there would be no union personnel to represent the unorganized workers, they would have to retain private counsel. Therefore, section 706(k) should be amended to expressly include arbitration as a proceeding under Title VII in which attorneys' fees may be awarded to the prevailing party, either by the arbitrator or,

40. Webster, supra fn. 4.
by the federal district court where attorneys' fees were denied to a prevailing party by the arbitrator.

Sections 706(b) and 709(e) which prohibit disclosure to the public by Commission officials and employees of charges filed with the Commission and information gathered during the course of the investigation of a charge would be amended to make clear that arbitrators to whom the parties are referred under the statute are not members of the public. This would permit the Commission to make available to the arbitrator any investigatory materials gathered prior to the arbitration.

In conclusion, the authors recognize that there may not be any single solution to the problem of efficiently handling discrimination claims in a manner which protects employees' statutory rights. While there should be one entity with ultimate responsibility for enforcement of the statute, the continued pervasiveness of employment discrimination is likely to generate more changes than any one agency or procedure can effectively handle. The eventual solution will require the best efforts of employers and unions, both at the bargaining table in the grievance resolution process, creative strategies on the part of the enforcement agencies and organizations such as the American Arbitration Association, in short, a joint effort.