Grievance Arbitration: Accommodating an Increasingly Diversified Work Force

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It has been generally accepted that the traditional function of collective bargaining is the establishment of broad principles or precepts concerning wages, hours, and terms and conditions of employment. These broad, mutually agreed upon principles are applied to various future fact situations. Where there is a conflict between labor and management over the appropriate or intended application of these broad principles, labor arbitration provides the mechanism to effectuate the terms of the collective bargaining contract. Thus, it can be fairly said that the labor arbitrator's role is one of "effectuating" the intent of the parties.[1]

Since World War II, there has been considerable progress in integrating the work force and thereby changing its demographics. These work force changes have in large part been prompted by federal and state anti-discrimination laws and judicial interpretations of these statutes. It is projected that the percentage of women and racial and ethnic minorities in the work force will continue to increase through the year 2000.[2] Moreover, the Americans with Disabilities Act[3] will also likely increase the percentage of disabled workers in the work force.

These changing demographics have generated considerable discussion concerning how to effectively manage this new work force.[4] Moreover, statutory and case law have defined such legal concepts as discrimination, affirmative action, reasonable accommodation, undue hardship, and harassment. These legal concepts or definitions also create the environment within which the parties negotiate collective bargaining agreements and arbitrators apply newly negotiated clauses and such traditional principles as just cause.

As the workplace becomes more demographically diversified, the role and function of labor arbitration becomes more than merely "effectuating" the intent of the parties. Labor arbitration also becomes a mechanism for accommodating the needs, interests, and legal rights of those individual workers traditionally excluded from the primary work force. This is particularly true given the evolution of extra-contractual legal obligations placed on the parties by equal employment opportunity laws.

This paper examines the interrelationship between the demographic and legal environments external to collective bargaining and the collective bargaining and arbitration process. It focuses on arbitral interpretations of contract clauses that specifically address equal employment opportunity and the effects of equal employment opportunity law on arbitral interpretation of traditional contract clauses. The paper examines three equal employment issues: accommodation of

[1] Taylor, "Effectuation of the Labor Contract through Arbitration," *Selected Papers from the First Seven Annual Meetings of National Academy of Arbitrators 1948-54*, 2 (1957).

[2] Fullerton, "Projections 2000—Labor Force Projections: 1985 to 2000," *Monthly Labor Review* (Sept. 1987).

[3] Americans With Disabilities Act of 1990 (ADA) § 2(a)(1), 136 *Congressional Record*, H4582 (July 12, 1990).

[4] See Copeland, "Learning to Manage a Multicultural Work Force," *Training* (May 1988): 49-56.

religious practices, affirmative action, and harassment.[5]

Particular attention has been paid to how arbitrators resolved these disputes and what remedy was granted by the arbitrator. Based on this sampling of relevant arbitral awards, it was concluded that for the most part, an arbitrator's handling of a case and the arbitral outcome paralleled what would have occurred if the matter were pursued under the applicable anti-discrimination statute. Accordingly, the authors conclude that labor arbitration remains as a legitimate, fair and efficient mechanism to resolve disputes arising in a demographically diversified and unionized work force.

Labor Arbitration as an Accommodating Mechanism

The first grievance arbitration that interpreted and applied an existing labor agreement was heard by Judge William Elwell of Bloomsburg, Pennsylvania, and involved the Anthracite Board of Trade and the Committee of the Workingmen's Benevolent Association. The issue involved "questions on interferences with the works, and discharging men for their connection with the Workingmen's Benevolent Association."[6] Judge Elwell rendered his award on April 19, 1871. Interestingly, Judge Elwell held, among other things, that there should be no discrimination against union members and officers. In many ways, Judge Elwell's decision prohibiting discrimination because of one's union membership and activities, effectively required an "accommodation" on the part of management. Subsequent to this decision, as most of you know, arbitration was used to settle disputes in the apparel, coal, entertainment, railroad, and automobile industries.

On January 12, 1942, President Roosevelt established the War Labor Board. The War Labor Board's policy toward grievance arbitration stimulated the development of that procedure as the predominant method of settling disputes under a collective bargaining agreement.[7]

In addition to fostering grievance-arbitration procedures to resolve such traditional collective issues as wages, hours, and benefits, the War Labor Board also fostered the inclusion of contract provisions prohibiting gender- and race-based discrimination.[8] In *Phelps Dodge Corp.*,[9] the War Labor Board directed that a seniority clause be adopted with the following language: "Equal opportunity for employment and advancement under this clause shall be made available to all to the fullest extent and as rapidly as is consistent with efficient and harmonious operation of the plant."

Consequently, from a historical perspective, grievance arbitration has been used as a "mechanism of accommodation" of the rights, interests, and needs of the individual workers who have been excluded from the traditional workplace. This is true whether the accommodation was made under the umbrella of the traditional just cause provision, equal pay provision, or non-discrimination provision.

Equal Employment Provisions

Unions and employers have responded to the development of the law of equal employment opportunity and the increasing diversity of the work force by negotiating specific equal employment contractual provisions. The most preva-

[5] Discussion of affirmative action issues in arbitration draws on our previously published work, Malin and Stallworth, "Affirmative Action and the Role of External Law in Labor Arbitration," 20 *Seton Hall L. Rev.* 745 (1990).

[6] R. Fleming, *The Labor Arbitration Process*, 2 (1985).

[7] See Freidin and Ulman, "Arbitration and National War Labor Board," 58 *Harv. L. Rev*, 309 (1945).

[8] The War Labor Board responded to the influx of women into traditionally male jobs by requiring equal pay for equal work. See *Brown and Sharpe Mfg. Co.*, No. 2228-D (Sept. 25, 1942). Furthermore, President Roosevelt issued Executive Orders 8802 (June 25, 1941) and 9346 (May 27, 1943) pronouncing that it was the "duty of all employers and all labor organizations to eliminate discrimination . . . because of race, creed, color or national origin."

[9] *Phelps Dodge Co.*, Case No. 2123-CS-D (Feb. 19, 1942).

lent are nondiscrimination clauses. In 1970, only 69 percent of collective bargaining agreements contained such clauses.[10] In 1985, 94 percent of all contracts contained nondiscrimination clauses.[11] Although less prevalent, if it was considered mutually beneficial, unions and employers have also negotiated affirmative action plans. In interpreting nondiscrimination clauses or affirmative action plans, arbitrators have done so in a manner that is generally consistent with judicial interpretations of equal employment laws. In interpreting nondiscrimination clauses, arbitrators generally have followed the law. In resolving affirmative action-related grievances, arbitrators' awards have been consistent with the external law. It is argued here that this is a result of the collective bargaining environment that produced affirmative action agreements.

Title VII's prohibition of religious discrimination includes a duty to reasonably accommodate an employee's religious practices, unless the accommodation would cause an undue hardship. In *Trans World Airlines v. Hardison*,[12] the Supreme Court held that an undue hardship exists where a proposed accommodation would impose more than a de minimis cost on the employer. In *Ansonia Board of Education v. Philbrook*,[13] the Court held that an employer need not accept an employee's proposed accommodation if the employer has offered its own reasonable proposal. Arbitrators construing contractual, nondiscrimination clauses have followed these and related lower-court decisions in determining whether employers have met their duties to reasonably accommodate grievants' religious practices. Most cases involve discipline or discharge. They are considered in the following discussion of the just cause provisions.

However, arbitrators have not distinguished discipline cases from those brought directly under the contractual, non-discrimination clause. For example, in *Hurley Hospital*,[14] the grievant protested, as contrary to her religious beliefs, the employer's requirement that she wear pants. The arbitrator upheld the employer's safety concerns but ordered that the employer allow the grievant to try to design an outfit that would meet the safety concerns and be consistent with the grievant's faith.

Attendant with the existence of a diversified work force is the occurrence of harassment. The basis for this harassment may be sex, race, ethnicity, religion, and an employee's physical or emotional disability. In *Meritor Savings Bank v. Vinson*,[15] the Supreme Court held that sexual harassment as a condition of employment violates Title VII. The Court endorsed earlier Equal Employment Opportunity Commission (EEOC) guidelines defining sexual harassment as: (1) *quid pro quo* harassment, where sexual favors are required to retain and advance in the job; and (2) hostile environment harassment, where the harassment does not result in loss of any tangible economic benefits. The Court held that for a hostile work environment to exist, the harassment must be sufficiently severe or pervasive to alter the victim's working conditions.

The Court further defined harassment as unwelcome sexual advances, rather than involuntary participation in sexual conduct. Conceptually, sexual harassment does not differ from racial, ethnic, religious, age, or disability-based harassment. EEOC guidelines on sexual harassment expressly provide that the same principles apply to race, religion, and national origin.[16] Just as courts have recognized harassment as a violation of equal

[10] *Basic Patterns in Union Contracts*, 10th ed. 112 (Washington, DC: BNA Books, 1983).

[11] *Basic Patterns in Union Contracts*, 12th ed. 130 (Washington, DC: BNA Books, 1989).

[12] 432 US SCt 63 (1977), 14 EPD ¶ 7620.

[13] 479 US SCt 60 (1986), 41 EPD ¶ 36,565.

[14] 1978-1 CCH ARB ¶ 8266 (Roumell 1978).

[15] 477 US SCt 50 (1985), 40 EPD ¶ 36,159 (1985).

[16] 29 CFR § 1604.11(a)n.

employment statutes, arbitrators have recognized that harassment may violate the contractual nondiscrimination clause.[17]

The most difficult issues in harassment grievances under nondiscrimination clauses is the arbitrator's remedial authority. EEOC policy guidelines require employers, found to have discriminated, to take corrective action to prevent supervisors or other managerial personnel from repeating their discriminatory conduct. Such corrective action may include disciplining the supervisor or manager, training the individual to overcome his or her prejudice, or removing the victim from the supervisor or manager's authority.[18]

Where the parties have a nondiscrimination provision that facially mirrors the proscriptions of Title VII, it could reasonably be argued that arbitrators have similar remedial authority. However, a review of the reported arbitral awards reflect that arbitrators are particularly reluctant to order an employer to transfer or discipline supervisors or co-workers of the harassed grievant.[19] Instead, arbitrators may feel that it is more within their remedial authority to issue a general order that the employer take all steps necessary to eradicate harassment from the workplace. In such instances, the arbitrator may also retain jurisdiction for a reasonable period of time to ensure remedial compliance. Presumably, where compliance is found to be less than appropriate under Title VII, the arbitrator can order a more specific remedy.

The Supreme Court has found that voluntary affirmative action plans are consistent with Title VII where: (1) the affirmative action plan is premised on a remedial purpose; (2) the rights of majority employees may not be unnecessarily trammeled; (3) the remedial purpose is present when the plan is designed to remedy a manifest racial, ethnic, or gender imbalance in a traditionally segregated job category; and (4) the plan's duration must be limited to an amount of time that is necessary to eliminate the imbalance.[20]

Our previously published review of affirmative action-related arbitral awards found that arbitrators generally interpret AAPs by attempting to reconcile their remedial purposes with other provisions of the contract.[21] For example, in *Glide School District 12*,[22] the arbitrator interpreted the contractual AAP adopting an Oregon statute that provided for a school district to maintain its affirmative action policy when reducing its work force and to maintain the "approximate proportion of men, women, and minorities in teaching positions in which those persons are underrepresented . . . ."

The arbitrator held that exemption from layoff would result only from underrepresentation at the time of the reduction in work force, and would not result merely because layoff by seniority would result in racial, ethnic, or gender underrepresentation in the work force. He reasoned that this interpretation was the plain meaning of "underrepresented" and the interpretation was consistent with the goal of affirmative action hiring. Otherwise, according to the arbitrator, affirmative action hiring would result in

[17] *Chicago Transit Authority*, 89-1 CCH ARB ¶ 8129 (Goldstein 1990); *Philadelphia Gas Works*, 90-1 CCH ARB ¶ 8061 (Tener 1989); and *PACCAR, Inc.*, 72 LA 759 (Grether 1979).

[18] EEOC Policy Statement, 8 FEP Manual 401:2615, 2616 (Feb. 5, 1985).

[19] See *Philadelphia Gas Works*, cited at note 17 (supervisor ordered to apologize to grievant but not ordered transferred); *Delta College*, 14 LAIS 4288 (Glazer 1987) (arbitrator lacks authority to order supervisor demoted); *Naval Weapons Center*, 86-2 CCH ARB ¶ 8383 (Connors 1987) (arbitrator's only available remedy is to recommend that employer take steps to eradicate bigotry); also see *Louisiana Pacific Graphics*, 87-1 CCH ARB ¶ 8150 (LaCugna 1986) (ordering reprimand of supervisor).

[20] *Johnson v. Transportation Agency*, 460 US SCt 616 (1987), 42 EPD ¶ 36,831; and *Steelworkers v. Weber*, 443 US SCt 193 (1979), 20 EPD ¶ 30,026.

[21] Malin and Stallworth, 20 *Seton Hall L. Rev.* 745, 762-69 (1990).

[22] *Glide School District 12* 79 LA 1139 (Lehleitner, 1982).

subsequent layoffs of senior majority employees, a result that would deter affirmative action hiring.

Arbitral interpretations of AAPs that safeguard seniority rights, unless necessary to achieve the plan's remedial purpose, are consistent with judicial interpretations of Title VII. However, they result not from following Title VII case law, but instead from a recognition that in collective bargaining, parties agree reluctantly to override seniority and do so only to the extent necessary to achieve clearly stated remedial objectives.

The Traditional Just Cause Clause

Most grievances involving religious accommodation or harassment arise out of discipline or discharges. The issues are raised in different ways, however. In religious accommodation cases, the grievant raises the employer's alleged failure to accommodate as a shield to defend against charges of misconduct. In harassment cases, the employer uses its duty to provide a nondiscriminatory workplace as a sword to justify disciplining the grievant. Religious accommodation grievances markedly illustrate how external equal employment law affects the interpretation of a traditional contract provision.

Prior to 1972, arbitrators generally found cause to discharge employees who, because of their religious convictions, disobeyed employer orders without inquiry into whether the employer could have accommodated the employee.[23] In 1972, however, Congress amended Title VII to expressly provide that absent undue hardship, an employer must reasonably accommodate an employee's religious beliefs. Since then, arbitrators have confronted the accommodation issue when evaluating the existence of cause for discipline and discharge. Even in the absence of a contractual, non-discrimination clause, arbitrators have held that an employer must meet its accommodation obligations to establish cause.[24] They have also recognized that in appropriate circumstances, employees acting out of religious compulsion may resort to self-help and need not abide by the principle, "Obey now and grieve later."[25] They have sustained discipline and discharges where accommodation would impose undue hardship on the employer,[26] but have found an absence of just cause where employers have breached their accommodation duties.[27]

In harassment cases, employers rely on their statutory obligations to prevent harassment in order to justify the discipline and discharge of harassers. Arbitrators generally agree and have frequently referred to those obligations in justifying discipline for harassment.[28] Examination of reported arbitral awards reveals that arbitrators clearly distinguish between shop talk and horseplay and harassment. For example, in *Kraft, Inc.*,[29] Arbitrator Elliot Goldstein held that the grievant's repeated racial slurs, and other comments about women and Mexicans "were ... socially [i]ndescribable and *directly* antagonistic toward these particular groups."

The "tone and import" of a racial slur may also distinguish it from shop talk and brand a grievant's conduct as harass-

[23] Helburn and Hill, "The Arbitration of Religious Practices Grievances," 39 *Arb. J.* 3, 6 (June 1984).

[24] See *Centerville Clinics, Inc.*, 86-1 CCH ARB ¶ 8050 (Talarico 1985); and *Alameida-Contra Costa Transit District*, 80-1 CCH ARB ¶ 8060 (Randall 1960).

[25] See *Dept. of Correctional Services*, 92 LA 1059 (Babiskin 1989); and Lucky Stores, 88 LA 841 (Gentile 1987).

[26] See *Georgia Power Co.*, 91-1 CCH ARB ¶ 8073 (Baroni 1990); *Centerville Clinics, Inc.*, 85 LA 1059 (Talarico 1985); and *Kansas City Transportation Authority*, 79 LA 299 (Belkin 1982).

[27] See *Dept. of Correctional Services*, 92 LA 1059 (Babiskin 1969); *Lucky Stores, Inc.*, a LA 841 (Gentile 1987); and *Alabama By-Products Corp.*, 83-1 CCH ARB ¶ 8001 (Clarke 1982).

[28] See *Kraft, Inc.*, 89 LA 27 (Goldstein, 1987); *IBP, Inc.*, 89 LA 41 (Eisler, 1987); *Tampa Electric Co.*, 87-2 CCH ARB ¶ 8320 (Vause, 1985); *Zia Co.*, 82 LA 640 (Daughton, 1984); *Atlantic Richfield Co.*, 83-2 CCH ARB ¶ 8584 (Nicholas, 1983); but see *Borg-Warner Corp.*, 78 LA 985 (Neas, 1982).

[29] *Kraft Inc., ibid.*

ment.[30] Other factors considered are grievants' persistent conduct,[31] its direction at a particular target,[32] and its malicious nature.[33] Furthermore, arbitrators have found that a level of general horseplay does not excuse physical sexual assault[34] or threats to rape a co-worker.[35]

The defense that the grievant harasser meant no harm and that the harassed victim is oversensitive is common. Many arbitrators have focused primarily on the victim's perception rather than the grievant's intent. An arbitrator's focus upon the victim's perception or view comports with the Supreme Court's framework of analysis of sexual harassment. Consequently, discipline has been upheld where the grievant's conduct was threatening or intimidating,[36] particularly where the grievant persists in such conduct with the knowledge that such conduct is unwelcome.[37] However, discipline has not been upheld where the alleged victim returned the grievant's conduct in kind[38] and where the victim did not regard the grievant's conduct as intimidating or offensive.[39]

Summary and Conclusion

Many arbitrators and commentators have drawn a dichotomy between external law and the collective bargaining agreement and have debated whether arbitrators may consider the former or are confined to the latter in resolving grievances. This review, however, suggests that the debate may be over-blown. The external law of equal employment and the accompanying demographic changes in the work force define the context in which collective bargaining agreements are negotiated and the context in which even traditional contract language is interpreted. The perceived tension between external law and the common law of the shop, at least in the equal employment area, may be more theoretical than real.

[The End]

Recent Trends in Arbitration of Substance Abuse Grievances

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Prior to making awards in discharge cases involving job-related substance abuse, arbitrators consider a number of factors that pertain to specific events involved. Their decisions are based on evidence presented by both parties at the arbitration hearing and the applicable provisions of the collective bargaining agreement or company rules. Other related legal proceedings, such as criminal prosecutions, decisions rendered by governmental agencies (i.e. workers' compensation), or other arbitration rulings may

[30] *Peninsular Steel Co.*, 86-2 CCH ARB ¶ 8443 (Ipavec, 1985).

[31] *County of Washoe*, 89 LA 198 (Concepcion, 1987).

[32] *Id.*

[33] *Hannaford Bros. Co.*, 93 LA 721 (Chandler, 1989).

[34] *GTE Florida, Inc.*, 92 LA 1090 (Cohen, 1989).

[35] *St. Regis Paper Co.*, 74 LA 1281 (Kaufman, 1980).

[36] *Hannaford Bros. Co.*, cited at note 33; *Tampa Electric Co.*, cited at note 28; *Peninsular Steel Co.*, cited at note 30; *University of Missouri*, 82-1 CCH ARB ¶ 8134 (Yarowsky, 1982); and *Memorial Hospital*, 79-1 CCH ARB ¶ 8081 (Sinicropi, 1978).

[37] *Cub Foods, Inc.*, 95 LA 771 (Gallagher, 1990); *IBP, Inc.*, cited at note 28; and *American Standard, Inc.*, 64 LA 15 (Lapsitz, 1974).

[38] *Heublein, Inc.*, 87-1 CCH ARB ¶ 8220 (Ellman, 1987).

[39] *Washington Scientific Industries*, 83 LA 824 (Kapsch, 1984); and *Nuclear Fuel Services, Inc.*, 93 LA 1204 (Clarke, 1989).