WORKFORCE DIVERSITY

A Continuing Challenge for ADR

By Lamont E. Stallworth and Martin H. Malin

What elements should be considered in designing a dispute resolution process, using primarily arbitration,[1] to handle or resolve diversity-related workforce disputes? The basis for this question, practically and theoretically, is that when one now refers to issues of diversity, one in effect is implicating federal and state antidiscrimination laws. In many instances, disputes that are referred to as diversity-related disputes are either founded on or have the potential of being imbued with statutory-based claims of discrimination. Consequently, we shall refer interchangeably to diversity-related workforce disputes and statutory-related workplace disputes. Given these premises, the overarching issue is how a dispute resolution process such as mediation or conventional arbitration might have to be modified or restructured in light of diversity-related disputes and in light of the evolving national public policy encouraging the private resolution of statutory-based employment conflicts.[2]

The issue of workplace diversity invariably implicates federal and state antidiscrimination laws, say the authors. In each diversity-related dispute is the potential for a statutory-based claim of discrimination that requires the ADR professional to balance delicate issues while ensuring not only fairness, but the perception of fairness as well. ADR is preferred by many for these types of disputes because they value the quality of the ADR process. What is certain is that arbitrators must broaden their focus and consider an ever-increasing number of statutory-related issues.

Although public policy encouraging private dispute resolution has focused most recently on the resolution of disputes in non-union settings,[3] our interests and concerns are on how mediation and arbitration can be used to supplement our overburdened public justice system so as to resolve "diversity or statutory-related workforce disputes" in a fair, expeditious and economical fashion. In addressing this rather fluid topic, we have attempted to explore or touch upon the issues of perception of fairness or unfairness and third-party neutral bias in resolving such disputes. Finally, we discuss the types of diversity-related issues that might best be resolved through mediation, arbitration, or our public justice system.

Defining Diversity

Since World War II, there has been considerable progress in integrating the workforce and thereby changing its demographics. These changes have in large part been prompted by federal and state antidiscrimination laws and judicial interpretation of these statutes. In a National Academy paper, professor Bruce Fraser referred to this demographic change as creating "a new diversity in the workplace,"[4] and provided some staggering statistics:

> It has been estimated that the U.S. population will increase by more than 40 million people over the next two decades. Of this growth, 47% will be people of Hispanic background, 22%

During the next decade, people of color, white women and immigrants will account for 85% of the new growth in the U.S. labor force.

will be of African-American background, and 18% will be of Asian background and other people of color. Whites will account for only 13% of the increase . . .

During the next decade, people of color, white women and immigrants will account for 85% of the new growth in the U.S. labor force . . . By the year 2000, women will make up nearly half the workforce, with over 60% of all American women employed. African-Americans will comprise 12% of the workforce, Hispanic-Americans 10% and Asian-Americans 4%. Each of these percentages has increased significantly in only 10 years. In some urban areas the nonwhite growth will be even greater. Of the 25 largest urban areas in the U.S., people of color are in the majority in more than three-quarters.

The workforce is aging. Employees in the 35–54 age bracket will increase from 38% in 1985 to about 51% by the year 2000. During this same period those in the 16–24 age bracket will decline by 8%. And, finally, although the labor force expanded at 2.9% per year in the 1970's, it will expand at only 1% annually in the 1990's. From these data there can be no dispute that the future workforce is expected to draw upon significantly fewer available employees from a decidedly different labor pool.[5]

The "diverse workforce" during World War II included women, African-Americans and Hispanics. It now includes all people of color, those over 40, women, the disabled, gays and lesbians, and white males.

Fraser appears to reject the notion that there is one standard for all stating that "treating everyone fairly doesn't necessarily mean treating them the same."[6] He argues that this "new diversity" poses a special set of challenges to arbitration: (1) "There is a challenge to effective fact-finding, the task of collecting and interpreting evidence in a fair and unbiased way" and (2) "A challenge to the task of decision-making. The new diversity raises a question of social responsibility: What should be done if the decision flowing from the evidence appears to be simply unfair to the grievant as an individual?"[7]

One can readily appreciate the problem involved with effective fact-finding when the disputants lack facility with English, for example. There is serious debate, however, as to whether arbitrators should take on the role and authority of deciding issues of fairness when a labor agreement expressly and unambiguously reflects what the parties already have agreed is "fair."[8] An arbitrator taking on such a responsibility would be put in the role of "meting out" fairness based on his or her personal notions of fairness or justice and not that of the parties. When there is a question of "social responsibility" or "fairness," perhaps it is best for the parties to negotiate that particular "individual dispute of fairness" with the aid of a mediator.

Notwithstanding this debate over the "social responsibility " of the arbitrator, Fraser touches on a critical point concerning issues of workforce diversity, *i.e.*, "perceptions of fairness" or, more appropriately, "perceptions of unfairness."[9] It is this perception of unfairness that gives rise to many workplace disputes. It also gives rise to the filing of discrimination and statutory-based grievances.

Unfairness: Claimant's Perspective

In a broadcast on National Public Radio,[10] *Wall Street Journal* editor Joseph Boyce referred to a "black tax," which, according to Boyce, black people have had to pay in actual dollars because of discrimination against them over the years.[11] Boyce related a story about the sale of his Atlanta home:

> I was moving to New York and the policy of the company that I was with at the time was to give you a bridge loan to put a down payment on a home in a new location if they transferred you. To make sure that they were protected as well as you were protected in case you couldn't sell your home for some reason or another, they would appraise your house and then guarantee you 105% of that appraisal if you had difficulty selling your house and repaying the loan.
>
> When the appraisers came to my home, my wife and children were in the house. A couple of weeks later I got a call from the office that handles moving in New York saying they couldn't understand why the appraisal was so low. My house was listed in the mid-80s, which is not a bad price in Atlanta. However, the appraisal came in in the low-70s, and they couldn't understand it, because they'd seen pic-

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tures of my home. And I couldn't either. But they said, in any case, they were going to throw out the appraisal because something was flawed.

The reason the appraisers gave for low-balling the house was that the drapes and the carpet in the family room or the den were worn and perhaps needed to be replaced. But I thought maybe something was afoot other than just the fact that the carpet and the drapes needed to be replaced, and so did the business office in New York. So what we decided to do was to have the house reappraised and instead of my family being there, my secretary, who is Caucasian, and her son were at the house when the next appraiser came, and the next appraiser also was white. And when that appraiser came, my secretary was in the kitchen, her little boy was playing in the den and watching television. All the family pictures—my family pictures and artworks and artifacts that indicated a black family lived in that house—had been removed, and her family pictures were around the house. The difference in the appraisal was $12,500 with nothing else changed in the house except the color of the skin of the occupants. And that was roughly 15% of the sale price of my home. I call that a part of the black tax.

The unfair treatment Boyce speaks of is not an unusual experience among people of color. Consequently, when a supervisor or foreman at work, or for that matter a fellow employee, engages in behavior that is perceived as "unfair," or arbitrary, or capricious, it is not difficult to understand why a person of color might view it as discriminatory.

Women have similar perceptions of unfairness, based particularly on their experiences of sexual harassment. One U.S. government study found that "over 40% of female federal employees reported incidents of sexual harassment in 1987, roughly the same number as in 1980"[12] and, according to another U.S. government report, in 1988, an estimated 73 of every 100,000 females in the country reported they had been raped.[13] These situations underscore how one's "social experiences" both in and outside the workplace may influence perceptions of unfair treatment in the workplace. This basic understanding may facilitate the resolution of a number of diversity-related or potential statutory-related workplace disputes prior to arbitration or court litigation and even prior to a formal grievance being filed.

Then and Now

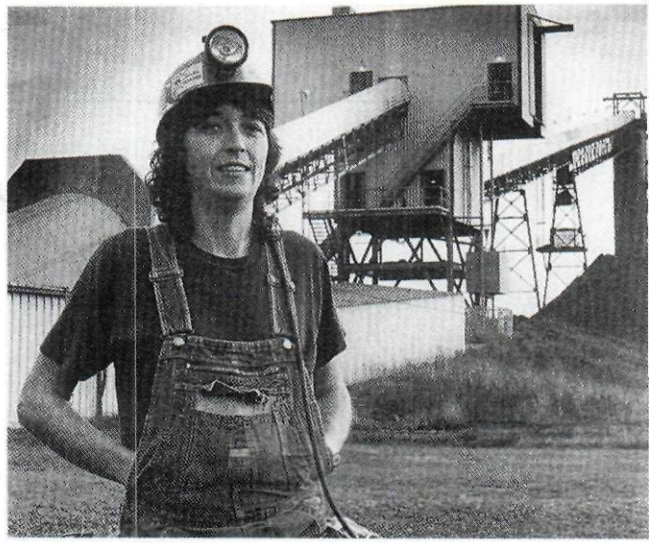
Before one can speculate about the possible future of the private resolution of diversity-related workplace disputes or conflicts, it is worthwhile to understand how such disputes were resolved in the past. This historical context provides a benchmark against which to assess where we are now.

As early as 1942, President Roosevelt, under the War Labor Board, fostered the use of grievance arbitration procedures to resolve such traditional collective bargaining issues as wages, hours and benefits. The Board also fostered the inclusion of contract provisions prohibiting gender-[14] and race-based discrimination.[15] In the face of the exigencies of World War II, and an increasingly diverse workforce comprised primarily of women, African-Americans and Hispanics, labor and management negotiated specific equal employment contractual provisions. However, an examination of arbitral awards during this period reveals that issues of workforce diversity, as defined then by the term "impermissible discrimination" or "integration," were defined and resolved differently from the way they are defined and resolved today.

As late as 1971, then National Academy president, Jean McKelvey, reported in her presidential address, entitled "Sex and the Single Arbitrator," that women flight attendants (then called "stewardesses") were terminated if they got married or became pregnant.[16] In denying a promotion to a female employee, one arbitrator was persuaded by the testimony of the employer's physician that females, as a class, should not be assigned to positions involving heavy lifting because:

> (a) females are more prone to low back pain due to their anatomy; (b) intra-abdominal pressure can lead to the displacement of the pelvic organs; (c) weakness and fatigue during the menstrual period can be aggravated by lifting; (d) there is the danger of miscarriage during pregnancy.[17]

Needless to say, as the external law developed under Title VII, the definition



Women in traditionally male-dominated industries, such as the female miner (above), are often targeted first in times of layoff. Below, as more people of color enter various workplaces, arbitrators must exhibit sensitivity in cases involving racial or ethnic disputes.

of what constituted impermissible discrimination also changed under both federal statute and the labor agreement.

Similarly, an examination of several early arbitral awards reveals that arbitrators recognized and upheld the legal doctrine of "separate but equal."[18] As the external public law changed, however, the "separate but equal" doctrine was abandoned, along with "negro jobs" and "white jobs," at least in theory. In time, the "separate but equal" doctrine was also abandoned as it applied to sex discrimination claims and led to the demise of the formal distinction between "male jobs" and "female jobs." One important consequence of this legal phenomenon has been a trend toward the application of the strict scrutiny test in claims of race and sex discrimination.[19] Thus, coincidentally, arbitrators have been applying evidentiary standards that paralleled the standards used under Title VII in factual claims of discrimination.

An often overlooked segment of the workforce is the elderly, but this will have to change because the workforce is aging.

A somewhat exaggerated example of where we are today in defining or examining diversity-related workforce disputes is illustrated in an unreported decision that a colleague has referred to as the "Twinkies" case.[20] The "Twinkies" case involved an employee who was caught shoplifting while on the premises of one of his employer's customers. The individual was discharged and the matter proceeded to arbitration. The union raised as a "mitigating defense" that the grievant was disabled and lacked responsibility for the misdeed based on his "alcoholism, eating disorder and kleptomania." Based upon the testimony of the grievant's treating psychologist, the union further argued that his shoplifting was a "behavioral manifestation" of the essential obsessive-compulsive character disorder of the grievant and that the "pilferage" was directly effected by his alcoholism, need for a "carbohydrate high" and the similar "rush or high" the grievant obtained from stealing items of small value in dangerous situations where he might be caught. Consequently, the union urged the arbitrator to recognize kleptomania as a disease or compulsive disorder similar to alcoholism and caused by the same psychological mechanism. The union further urged that the grievant be reinstated as would an alcoholic employee who has sought treatment and has been successfully rehabilitated.[21]

The arbitrator denied the grievance. However, as it concerns us today, the "Twinkies" case illustrates how innovative advocates will become in imbuing grievances with arguable statutory or diversity-based defenses. The "Twinkies" case also illustrates how the definition of "new diversity" can be arguably expanded. The "Twinkies" case is not an aberration but an indication of how advocates will use such statutes as the ADA as a "mitigating defense."

Victims' Perceptions

A number of courts have apparently adopted a "victim perspective," advocating that the standard for fairness to be used by the trier of fact is the alleged victim's perspective of workplace events.[22] This approach has significant implications for third-party neutrals and triers of fact in diversity-related workforce disputes, as well as for the demographic-based selection of neutrals for these disputes.

In *Ellison v. Brady*,[23] the Ninth Circuit Court of Appeals applied the "reasonable woman and victim's perspective" in determining whether the conduct was sufficiently severe or pervasive to constitute a hostile environment under *Meritor Savings Bank v. Vinson*.[24] In *Ellison*, a female Internal Revenue Service trainee assigned to San Mateo, Calif., worked with a male trainee who was also assigned to the San Mateo office. The coworkers never became friends and they did not work closely together. On one occasion, the female employee accepted a luncheon invitation from the male trainee. According to the female trainee,

the male employee commenced to "pester" her with unnecessary questions and "hanged" around her desk. He also asked her out for drinks and on another occasion for lunch. The female trainee rejected both of these invitations. The male trainee subsequently handed the female trainee a note, stating:

> I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day.[25]

The female trainee showed the note to her supervisor. The female trainee was then assigned to St. Louis for four weeks' training. The male trainee then mailed the female trainee a letter that she described as "twenty times, a hundred times weirder" than the note. The letter stated in part:

> I know that you are worth knowing with or without sex . . . Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan . . . Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks . . . I will [write] another letter in the near future.[26]

Stating that she "just thought he was crazy. I thought he was nuts. I didn't know what he would do next. I was frightened,"[27] the female employee contacted management and requested that either she or the male trainee be transferred since she would not be comfortable working in the same office with him. Management advised the male employee to leave the female employee alone and subsequently transferred him to San Francisco. The female employee returned to San Mateo. The male employee then filed a grievance, which was resolved by converting the transfer to San Francisco to a six-month separation from San Mateo. The female employee filed a formal sexual harassment complaint with the IRS. The complaint was denied, whereupon she filed a complaint in federal district court. The trial court granted an IRS motion for summary judgment.

On appeal, the Ninth Circuit found that the acts complained of constituted severe and pervasive sexual harassment. In reaching this conclusion, the appeals court stated:

> . . . in evaluating the severity and pervasiveness of sexual harassment, we should focus on the perspective of the victim . . . If we only examined whether a reasonable person would engage in allegedly harassing conduct, we would run the risk of reinforcing the prevailing level of discrimination. Harassers could continue to harass merely because a particular discriminatory practice was common, and victims of harassment would have no remedy.[28]
>
> We therefore prefer to analyze harassment from the victim's perspective. A complete understanding of the victim's view requires, among other things, an analysis of the different perspectives of men and women. Conduct that many men consider unobjectionable may offend many women.[29]

Above, a man works with dangerous substances in a chemical factory.

Noting the importance of recognizing the "social experience" of women, the Court explained the appropriateness of adopting the "reasonable woman" standard.

> We realize that there is a broad range of viewpoints among women as a group, but we believe that many women share common concerns which men do not necessarily share. For example, because women are disproportionately victims of rape and sexual assault, women have a stronger incentive to be concerned with sexual behavior. Women who are victims of mild forms of sexual harassment may understandably worry whether a harasser's conduct is merely a prelude to violent sexual assault. Men, who are rarely victims of sexual assault, may view sexual conduct in a vacuum without a full appreciation of the social setting or the underlying threat of violence that a woman may perceive.[30]

The court finally explained its rationale for adopting the reasonable woman perspective.

The increased diversity in the workforce requires that arbitrators broaden their concerns for fairness, impartiality and the appearance of procedural propriety.

We believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women. The reasonable woman standard does not establish a higher level of protection for women than men. Instead, a gender-conscious examination of sexual harassment enables women to participate in the workplace on an equal footing with men. By acknowledging and not trivializing the effects of sexual harassment on reasonable women, courts can work towards ensuring that neither men nor women will have to "run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living."[31]

The rationale applied by the Ninth Circuit in *Ellison* has also been applied in hostile racial environment cases. In *Harris v. International Paper Co.*,[32] the trial court recognized the different "social experiences" of African-Americans and the propriety of applying "a reasonable black person standard" in the trier of fact's analysis and evaluation of "racial hostile environment."[33] *Harris* involved the racial harassment of three black employees who worked at a paper mill in Maine. The harassment took many forms, including racial epithets, employees wearing Ku Klux Klan garb at work, and insubordination to the orders of a minority superior. The court concluded that the employees were subject to a "gauntlet of racial abuse from the time of [their] arrival at the Jay mill."[34] Further, these abuses were generally and widely known by management.

The trial court, in recognition of the differing perspectives of minority members and women noted:

> To give full force to this basic premise of anti-discrimination law, and to . . . the differing perspectives which exist in our society, the standard for assessing the unwelcomeness and pervasiveness of conduct and speech must be founded on a fair concern for the different social experiences of men and women in the case of sexual harassment, and white Americans and black Americans in the case of racial harassment. Several courts, after carefully considering these issues, have held that the appropriate objective standard for judging gender-related conduct is a "reasonable woman" standard.[35]

The trial court expressed an awareness and sensitivity toward the "black tax" or "social experience" of African-Americans, referred to earlier, and recognized that

> Black Americans are regularly faced with negative racial attitudes, many unconsciously held and acted upon, which are the natural consequences of a society ingrained with cultural stereotypes and race-based beliefs and preferences. As a result, instances of racial violence or threatened violence which might appear to white observers as mere "pranks" are, to black observers, evidence of threatening, pervasive attitudes closely associated with racial jokes, comments or nonviolent conduct which white observers are also more likely to dismiss as non-threatening isolated incidents. The omnipresence of race-based attitudes and experiences in the lives of black Americans causes even nonviolent events to be interpreted as degrading, threatening, and offensive. Even an inadvertent racial slight unnoticed either by a white speaker or white bystanders will reverberate in the memory of its black victim.[36]

The trial court further recognized the need for sensitivity and awareness in a trier of fact, particularly in sexual, racial, ethnic and homosexual hostile environment disputes. This observation also has implications for labor and management representatives who select third-party neutrals. The trial court opined:

> Since the concern of Title VII and the MHRA is to redress the effects of conduct and speech on their victims, the fact finder must "walk a mile in the victim's shoes" to understand those effects and how they should be remedied. In sum, the appropriate standard to be applied in this hostile environment racial harassment case is that of a "reasonable black person."[37]

There are a number of practical and theoretical implications that stem from adopting the "reasonable victim's perspective" in diversity-related workforce disputes. For example, must triers of fact and third-party neutrals obtain sensitivity training in the social experiences of various demographic groups to apply the victim's perspective standard meaningfully, or must demographic similarity be considered in selecting neutrals generally and in diversity-related disputes particularly? If the latter is true, might this effectively "tilt" the scales of fairness against

the charged employer? If so, should the employer either refuse or be reluctant to use, for example, a woman, Hispanic, African-American or disabled person in a diversity-related dispute? Does the same concern exist in selecting fact-finders, mediators or arbitrators, or does it vary, depending on which dispute resolution process is to be used? Does it facilitate the resolution of diversity-related disputes to use in sexual harassment disputes: for example, a person of the same gender as the alleged victim? Or should a two-person male-female team be used? Does having an arbitrator of the grievant's demographic group lend an added perception of fairness from the grievant's perspective, the outcome notwithstanding?

Perception of Fairness

Perceptions of fairness and the "victim's perspective standard" also have implications for the arbitral process and particularly for the arbitrator as the trier of fact. This point has been made clear in three recent cases, two of which involved alleged sexual abuse: *Newsday v. CWA Local 915*,[38] *Stroehmann Bakeries v. Local 776*,[39] and *F.O.P. Fort Pitt Lodge No. 1* and *City of Pittsburgh*.[40] In *Newsday* and *Stroehmann*, the arbitration awards were vacated on the basis, *inter alia*, that the award violated the clear public policy against sexual harassment. The court's perception of arbitral bias appears to have influenced the *Stroehmann* decision. In *F.O.P. Fort Pitt Lodge No. 1*, the grievant, a police officer, was reinstated by a panel of arbitrators. The neutral arbitrator's choice of words has caused considerable controversy as being "biased and sexist."[41] Each of these cases has significant implications for the arbitral resolution of diversity-related workforce or statutory-related workplace disputes.

Newsday involved a male employee whom the court subsequently described as a "chronic sexual harasser." The grievant had been discharged in 1983 for sexual harassment but was reinstated on a last-chance basis.[42] In 1988, however, the grievant again engaged in several acts of sexual harassment and was terminated. In his opinion, the arbitrator "rejected the union's position that the three incidents never occurred, and found that they all happened as described in the testimony of [the grievant's] co-workers." The arbitrator further stated:

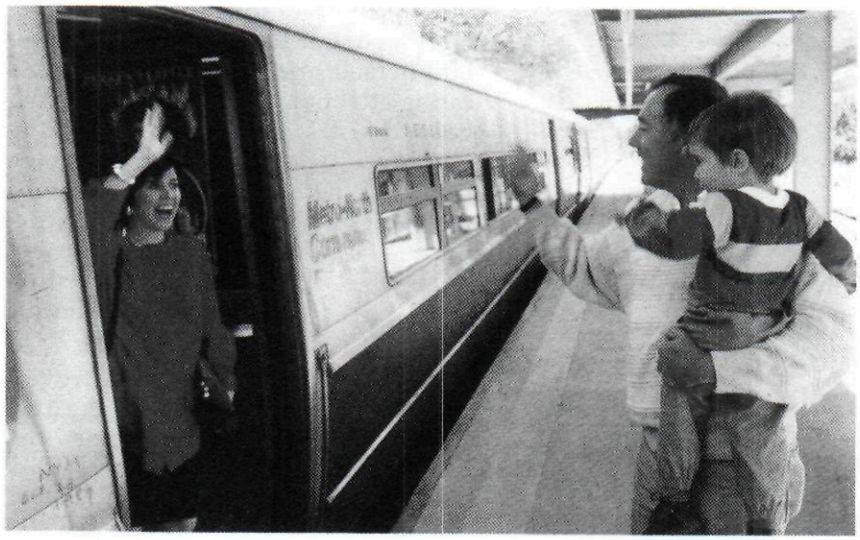
> There is no doubt that the actions by [the grievant] in moving his hand down [one co-worker's] back from her rib cage to her waist, in slapping, or patting, [another co-worker] on her rear end, and in slamming into [a third's] back was conduct that violated both the composing room office rules and Newsday's policy against "harassing, abusive or intimidating" behavior. This conduct was quite offensive to the women involved, and clearly constitutes harassment under Newsday's policy, as well as interference with "the business of the office" under the rules of the composing room.[43]

Nevertheless, relying on the concept of progressive discipline, the arbitrator reinstated the grievant, conditioned on completion of a medical examination.[44] The employer's petition for vacatur was granted by the trial court, and the Second Circuit affirmed, stating:

> [The] [a]ward of reinstatement completely disregarded the public policy against sexual harassment in the workplace. [The arbitrator's] award condones [the grievant's] latest misconduct; it tends to perpetuate a hostile, intimidating and offensive work environment. Above all, the award prevents Newsday from carrying out its legal duty to eliminate sexual harassment in the workplace.[45]

The Second Circuit's recognition of the *Misco*[46] public policy exception was also applied in *Stroehmann Bakeries*. *Stroehmann* involved a male delivery driver with seventeen years' seniority. The employer had a rule that prohibited immoral conduct while on duty. One evening, the driver made a delivery to one of the company's customers, where he was admitted by a female night clerk. According to the customer's employee, while the driver unloaded a bread order,

In most families today, both parents work, but sometimes traditional spousal roles are reversed.



he talked about an "orgy," and about sex with women other than his wife. The night clerk further alleged that the driver asked her about her breasts and attempted to pull up her shirt, and tried to grab her breasts. This alleged incident was reported to management and was conveyed to Stroehmann. Stroehmann interviewed the driver and concluded that he did commit the acts complained of. The alleged harasser did not have union representation during this interview, which resulted in his discharge.[47]

It is [the] perception of unfairness that gives rise to many workplace disputes.

The matter was submitted to arbitration on the basis that the grievant was discharged without just cause. The arbitrator, in addressing the just cause issue, averred that "this sexual misconduct case turns less on determinations of witnesses' credibility than on the adequacy of Stroehmann's investigation prior to its discharge decision.[48] In addition, the arbitrator observed that the alleged harasser was a "40-year-old, married man with two children, aged 15 and 13. He stands well over six feet tall and appears to weigh more than 200 pounds."[49] The arbitrator further observed that the alleged female victim "is five feet four and weighs 224 pounds. She does not have an active social life. W____ accuses L____ of having sexually assaulted her on Sunday night, Nov. 12, 1989."[50]

In sustaining the grievance and reinstating the grievant with full back pay, the arbitrator noted the following:

> The unchallenged "facts" [the alleged victim's manager] accepted as true can also support the equally illogical conclusion that [the female employee], unattractive and frustrated, could have fabricated a disturbing incident to titillate herself and attract her mother's caring attention. And, her story having gained sufficient momentum, [the employee] was unable to disengage from it. Whether one casts either [the grievant] or [the employer] as the victim, neither scenario can stand scrutiny based on Stroehmann's burlesque of an investigation.[51]

The arbitrator, however, did not address the fact issue of whether the alleged harassment took place.

Based on the absence of a finding of fact on the sexual harassment issue and the arbitrator's personal observations concerning the alleged female victim's appearance, the trial court vacated the award as being contrary to the public policy against sexual harassment. The trial court also remanded the matter for a *de novo* hearing before a different arbitrator. The trial court reasoned "that there exists a well-established public policy against sexual harassment in the workplace and that the arbitrator's award violated that public policy by ordering reinstatement without a factual finding on the merits of the allegations against [the grievant]."[52]

The trial court decided to remand the matter to a different arbitrator

> because it also concluded that [the arbitrator] had demonstrated a clear pre-disposition in [grievant's] favor and an insensitivity to sexual harassment claims. The district court reached the last conclusion based on its determination that the arbitrator emphasized such irrelevant matters as the alleged victim's social life and appearance and [the grievant's] marital status, expressed his personal opinions about Stroehmann's sensitivity to sexual matters and ignored [the grievant's] testimony that he told [female clerk] he wished his wife's breasts were hard like an orange.[53]

On appeal, the Third Circuit affirmed, stating:

> Under the circumstances present here, an award which fully reinstates an employee accused of sexual harassment without a determination that the harassment did not occur violates public policy. Therefore, [the arbitrator] construed the Agreement between the parties in a manner that conflicts with the well-defined and dominant public policy concerning sexual harassment in the workplace and its prevention. His award would allow a person who may have committed sexual harassment to continue in the workplace without a determination of whether sexual harassment occurred. Certainly, it does not discourage sexual harassment. Instead, it undermines the employer's ability to fulfill its obligation to prevent and sanction sexual harassment in the workplace. For these reasons, we conclude that reinstate-

The evolving nature of workplace disputes will force arbitrators to consider an increasing number of statutorily-related issues.

ment of this employee without a determination of the merits of the allegation violates public policy.[54]

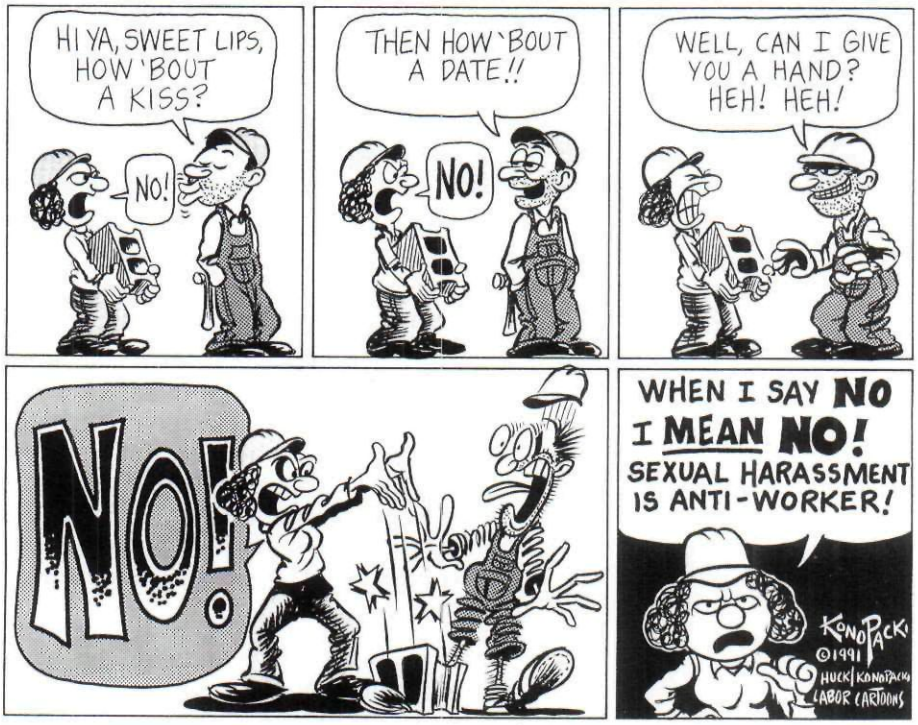
Of particular relevance to the concept of fairness and arbitral bias is the court's rationale for sustaining the remanding of the matter to a different arbitrator:

> After careful consideration, we have concluded that the district court did not abuse the discretion it had to formulate an appropriate remedial order because the record shows [the arbitrator] was biased or partial towards [the grievant]. Although he may not have demonstrated general bias against all persons claiming sexual harassment, his partiality in this case is demonstrated by his behavior and comments during the hearing. [The arbitrator] referred to the fact that [the female clerk] weighed 224 pounds and had no social life, and he characterized her as "unattractive and frustrated." He allowed [the grievant's] attorney, over objection, to ask [the witness]: "Would you think an average man would make a pass at a woman like that?" And "Would you think an average man or yourself would make a pass at a woman that weighs 225 pounds?" [The arbitrator] also cavalierly dismissed [the store manager's] reasons for finding [the female clerk] credible, *i.e.*, that she was "bashful" and "very Christian." Finally, and inexplicably, [the arbitrator] disregarded [the grievant's] admission that he made sexual comments to [the female clerk] about his wife's anatomy . . . Lastly, [the arbitrator] also stated that if he had to make a decision on the merits he would find in [the grievant's] favor, even though he had previously made it clear that he had not fully considered the evidence on the employer's charge that [the grievant] had made improper sexual advances to and committed a battery against [the female clerk]. There is no sound reason to defer to [the arbitrator's] award. His partiality toward [the grievant] is sufficient to support the district court's choice of an order directing [the grievant's] grievance be submitted to a different arbitrator for a de novo hearing as an appropriate remedy in this case. The indications of bias in this case are such that we are unable to say the district court abused its discretion in directing a remand to a different arbitrator.[55]

Both *Newsday* and *Stroehmann* are instructive on how the judiciary views the way arbitrators should not deal with diversity-related workforce or statutory-related workplace disputes. First, if there is an issue of public policy directly connected to the dispute, it is fair to conclude that the courts will expect arbitrators to make a finding of fact; otherwise, the award may be subject to vacatur pursuant to the *Misco* public policy exception.[56]

Second, the courts are becoming increasingly sensitive to arbitral bias as manifested or demonstrated by either the language of the opinion or the handling of testimony that is generally considered to be biased, sexist or racist.

In both *Newsday* and *Stroehmann Bakeries*, the arbitrators undoubtedly



expressed their personal thoughts and opinions, which were viewed by the courts as inappropriate and reflective of bias and insensitivity in the face of the national public policy against sexual (and racial) harassment in the workplace. The expressions and decisions in *Newsday* and *Stroehmann Bakeries, Inc.*, pale, however, in comparison to the inappropriate and "sexist" expressions used by the arbitrator in *F.O.P. Fort Pitt Lodge No. 1 and City of Pittsburgh*. The facts and the language used in this case were recently reported in the *Chronicle of the National Academy of Arbitrators*.[57]

The dispute involved the discharge of a police officer for being out of his assigned area during which time he had a sexual liaison with a woman. The matter

During the next decade, people of color, white women and immigrants will account for 85% of new growth in the U.S. labor force.

was submitted to a tripartite panel of arbitrators. The neutral arbitrator's opinion received wide public criticism, focusing more on his offensive language than on the decision to reinstate the officer.

The arbitrator stated:

> The grievant did not rape or sexually assault the alleged victim. He did engage in the pursuit of personal "interest" on the employer's time . . . and did contest for her "favors" . . . It wound up in an act of sexual intercourse.
>
> He is not the first man to lose his head over a piece of tail; a stiff penis has no brains. In today's sexual climate, it is not the offense it once was. He did engage in conduct that no police force can countenance, and he did prejudice the good reputation of the police force and the City of Pittsburgh.
>
> The grievant has paid a high price in the loss of time and great embarrassment. Discharge would be excessive punishment.

As one National Academy member opined, "This case is an extreme example of an arbitrator's biases impacting the arbitration process. While we may all agree this arbitrator was stupid in failing to cloak his bias, the phenomenon is not an aberration. We have all read decisions which have made us cringe."[58]

The Academy member continued:

> As stated in the Code, "essential personal qualifications of an arbitrator include . . . impartiality . . . in labor relations matters." Arbitrators are required to provide "a fair and adequate hearing which assures that both parties have sufficient opportunity to present their respective evidence and argument."
>
> My concern is too many arbitrators view their responsibilities under these and other provisions of the Code too narrowly as only applying to the parties who selected them and the bottom line, not to the entire process. Our obligation to provide a fair hearing extends to all participants in the process. This means treating each person with respect, at the hearing and in the award. It means intervening, if necessary. Intervention may consist of a raised eyebrow, steely glance, or not participating in laughter. If someone is made to "feel small" because of jokes, callous or disrespectful treatment, or the language used by the arbitrator or the parties, then the hearing for that person was not a fair hearing and the arbitrator has failed in his/her responsibility under the Code.
>
> More problematic, and damaging to the professions in my view, is how arbitrators contend with their more generalized biases, biases which often mirror the prejudices of society at large. In the cited case, a most extreme and atrocious example, the arbitrator clearly made no attempt to rein in his bias or to consider whether the arbitration process was "fair" with respect to the complaining witness.
>
> With the changing workforce, arbitrators must be sensitive to these issues, our continuing credibility depends on it.[59]

The concerns expressed by this Academy member should be heeded. As professional organizations such as the Society of Professionals in Dispute Resolution and the National Academy of Arbitrators are contemplating their respective roles in the evolving private employment dispute resolution arena, third-party bias will definitely retard, if not thwart, the potential development of dispute resolution in this area. No self-respecting civil rights organization can or will ever embrace alternative dispute resolution if neutrals are perceived to be insensitive and biased.

ADR in a Statutory World

We have seen that the increased diversity in the workforce requires that arbitrators broaden their concerns for fairness, impartiality and the appearance of procedural propriety.[60] Whereas traditionally, arbitrators' concerns were focused on union and management perceptions, they now should concern themselves with the perceptions of all parties involved, including individual grievants and complaining witnesses. Concern for conducting the hearing and language used in the arbitral award, however, is not sufficient. The evolving nature of workplace disputes will force arbitrators to consider an increasing number of statutory-related issues. Here, too, arbitrators will have to broaden their focus.

Traditionally, arbitrators have focused on the facts and the contract, and have interpreted the contract in light of the parties' intent. Even when considering external law in resolving contractual grievances, the arbitrator's focus remains on the parties. Specifically, the arbitrator's interpretation of external law, even if erroneous, becomes merged with the contract and is subject to further party control, through modification of the contract. As Judge Harry Edwards has explained:

> When construction of the contract implicitly or directly requires an application of "external law," *i.e.*, statutory or decisional law, the parties have necessarily bargained for the arbitrator's interpretation of the law and are bound by it. Since the arbitrator is the "contract reader," his interpretation of the law becomes part of the contract and thereby part of the private law governing the relationship to the contract. Thus, the parties may not seek relief from the courts for an alleged mistake of law by the arbitrator. . . . The parties' remedy in such cases is the same remedy they possess whenever they are not satisfied with the arbitrator's performance of his or her job: negotiate a modification of the contract or hire a new arbitrator.[61]

A consequence of the arbitrator's traditionally narrow focus on the contract is the individual's ability to relitigate the dispute *de novo* in court under the statute. As the Supreme Court recognized in *Alexander v. Gardner-Denver Co.*:

> In submitting his grievance to arbitration, an employee seeks to vindicate his contractual right under [the] collective bargaining agreement. By contrast, in filing a lawsuit under Title VII, an employee asserts independent statutory rights accorded by Congress. The distinctly separate nature of these . . . rights is not vitiated merely because both were violated as a result of the same factual occurrence.[62]

In light of *Gardner-Denver*, Edwards has suggested that arbitration is an appropriate vehicle for resolving issues of workplace diversity, or more specifically, statutory-based employment discrimination disputes, that are factual in nature and require only the application of established law. According to Edwards, employment discrimination cases raising unsettled issues of public law, however, should be left to the courts and administrative agencies. He cautions that the use of arbitration and other forms of ADR should not be allowed to sanction the replacement of public forums. Further, many issues of public law require a choice between conflicting public values. Such conflicts should be resolved by judges and other officials charged with lawmaking in the public interest, rather than by private dispute resolvers.[63] Judge Edwards also has noted that a collectively bargained grievance and arbitration procedure may be ill-suited as a forum for resolving complex employment discrimination issues. If arbitrators stray far outside the boundaries of traditional contract interpretation, according to Edwards, their awards may not command the high level of deference they currently receive from the courts. He further has suggested that arbitration procedures are best used for, and perhaps should be confined to, claims that an employer's conduct violated both the employment contract and the law.[64]

These concerns reflect the limited role that arbitrators play in our system of justice. Arbitrators are part of a private system in which they are accountable to the parties. When interpreting a contract, that accountability runs to the drafters of the governing document.[65] The parties have the capacity to reverse any arbitration award by amending the express language of the contract. When interpreting a statute, however, arbitrators' accountability does not run to Congress. They remain accountable to the private parties who selected them. Courts, in contrast, are publicly accountable and their decisions are subject to ultimate reversal by Congress. Indeed, much of the history of employment discrimination law consists of statutory amendments designed to

The . . . court . . . recognized the need for sensitivity and awareness in a trier of fact, particularly in hostile environment disputes.

overturn court decisions, such as the Pregnancy Discrimination Act, Older Workers Benefit Protection Act and Civil Rights Act of 1991.[66]

Unfortunately, arbitrators are not likely to have the luxury of having all statutory-related grievances confined to individual factual claims of discrimination as suggested in *Gardner-Denver* and by Judge Edwards. Unions that refuse to bring discrimination or other grievances because they raise complicated legal issues may find themselves liable for discrimination or breach of their duties of fair representation.[67] Even if the parties want to screen their diversity-related grievances to limit them to individual factual discrimination claims, there will still be unanticipated legal issues bound to arise some of the time.

Arbitrators should be guided by a personal normative constraint of exercising judicial caution in interpreting and applying external law, even if they believe that a more radical interpretation would better develop the law.

What's an arbitrator to do? If arbitrators confine themselves to their traditional roles, responsive to the parties' expectations and intent, they maximize the likelihood that *de novo* statutory litigation will undermine the finality of their awards. Instead, the arbitral determination must give full consideration to an employee's EEO statutory rights. Recognizing this, however, merely begs the question: How is a "privately accountable" arbitrator to interpret and apply public law?

Because arbitrators lack the public accountability and availability of congressional oversight that judges have, they lack the institutional competence to make public law. This is in marked contrast to their institutional competence to make private law.[68] Thus, in resolving issues of public law, arbitrators must draw on the institutional competence of publicly accountable judges and administrative agencies. To do this, we submit, arbitrators may not confine themselves to the authority cited by the parties. Rather, they must educate themselves with respect to the settled meaning of statutory language as interpreted in administrative rulings and judicial decisions. To the extent that there is precedent which would be binding on judges in the jurisdiction in which the arbitrator sits, the arbitrator should be bound also. To the extent that no such directly binding precedent exists, arbitrators should look to the weight of judicial and administrative authority on the issue. In gray areas where judges have yet to tread, arbitrators should avoid novel interpretations and instead extend the law in relatively unsurprising ways. In other words, arbitrators should be guided by a personal normative constraint of exercising judicial caution in interpreting and applying external law, even if they believe that a more radical interpretation would better develop the law.[69]

A normative philosophy of judicial caution maximizes the likelihood that the arbitral award will be consistent with the public law and minimizes the incentives for the aggrieved individual to relitigate *de novo*. It also imposes a broader responsibility on the arbitrator than under traditional models of arbitral decision-making. It requires that arbitrators be qualified and competent in relevant statutory and case law and may impose an ethical obligation on arbitrators who do not feel sufficiently qualified to decline statutory-related cases. Acceptance of such a norm of arbitral decision-making will help maintain arbitration's vitality in the "statutory world" in which we work.

What About the Parties?

The vitality of the grievance arbitration procedure in a statutory world lies not only in the hands of the arbitrator, but also in the hands of the parties. Arbitration remains solely a creature of the contract and the parties continue to control the procedures and the arbitrator's authority. The parties should exercise their authority in these areas to assure procedures which facilitate the resolution of statutory claims in arbitration and to assure that the arbitrator is authorized to resolve those claims in full accordance with public law. Specifically, the parties can improve the process as follows:

1. The individual claimant-employee must be fairly and adequately represented. This may mean a right to private counsel or a grant of third-party standing in the conventional arbitration process, with the opportunity to have input on the selection of the arbitrator. This would be applicable both under traditional labor arbitration and individual private agreements to arbitrate or mediate.[70]

2. There must be an adequate record of the arbitral proceeding, *e.g.*, by the use of a court reporter or tape recording. This would be applicable both under traditional labor arbitration and individual private agreements to arbitrate.

3. The fact-finding process must be improved. Some form of pretrial or hearing discovery may be called for. This would be applicable both under traditional labor arbitration and individual private agreements to arbitrate or mediate.

4. The parties should expressly stipulate that the factual issue of discrimination to be decided arises both under the contract and the applicable EEO statute(s). This would be applicable both under traditional labor arbitration and individual private agreements to arbitrate or mediate.

5. For the arbitral award to be final and binding on the claimant-employee and, consequently, constitute a waiver of future EEO-related causes of action, the claimant-employee must "voluntarily and knowingly" enter into a settlement or agreement to arbitrate (implicitly acknowledging that the right to take a claim to arbitration is in itself a settlement of one aspect of the EEO dispute). This would be applicable both under traditional labor arbitration and individual private agreements to arbitrate or mediate.

6. Where the claimant is not represented by an attorney, the claimant should be afforded a reasonable period of time to consult an attorney concerning any agreement to arbitrate or tentative settlement agreement as a condition of such agreements being considered final and binding and enforceable in court. Similar conditions are provided under the Older Workers Benefit Protection Act.[71] This would be applicable both under traditional labor arbitration and individual private agreements to arbitrate or mediate.

7. The grievant should be made aware of his or her right to seek recourse under both the contract and the applicable EEO statute(s). This would be applicable both under traditional labor arbitration and individual private agreements to arbitrate or mediate.

8. The grievant should be advised that the mere filing of a grievance does not toll the statutory claim. This would be applicable both under traditional labor arbitration and individual private agreements to arbitrate or mediate.

9. The collective bargaining agreement should not exclude the arbitration of statutory-related discrimination grievances. In fact, labor and management may be well advised to have a special arbitration procedure for such disputes.[72]

10. In seeking a remedy for an alleged discrimination, the disputants and their representatives should be mindful of the remedies to which the alleged discriminatee would otherwise be entitled under the Civil Rights Act of 1991.

Arbitration remains solely a creature of the contract and the parties continue to control the procedures and the arbitrator's authority.

Conclusion

From the employee-plaintiff perspective, the evidence is clear that there is general displeasure with and distrust of the EEO's administration and litigation process. In one survey of EEO complainants, claimants expressed a preference for an alternative method for resolving their complaints.[73] Interestingly, satisfaction was more related to the process than the outcome of the litigation.

Grievance arbitration traditionally has been a primary vehicle for the exercise of employee voice in the unionized workplace. It can and should continue to be so. For this to occur, arbitrators should broaden their concerns for fairness and the appearance of procedural propriety by being sensitive, not only to the perceptions of union and management, but also to the perceptions of the increasingly diverse individuals drawn into the process. Arbitrators should also broaden their focus in resolving grievances which raise statutory-related issues to encompass the external law. In interpreting the external law, arbitrators should be guided by a norm of judicial caution and respect for established precedent. The parties should evolve their process to better accommodate individual statutory claims procedurally and to clarify arbitral authority to resolve such claims fully in accordance with statutory law. Together, the parties and the arbitration profession can ensure that arbitration (and perhaps other ADR methods) will retain its vitality in a workplace characterized by increasing statutory regulation and an increasing number of conflicts arising from a diverse workforce. ■

A young woman sorts bars of soap in a hot warehouse.

ENDNOTES

[1] In addition to mediation and arbitration, other dispute resolution processes include fact-finding, conciliation, early neutral evaluation, judicial arbitration, summary jury trials, guaranteed fair treatment program (peer review). There are also judicial and administrative agency ADR programs. See, "Cost of Litigation, *Gilmer* Decision Encourages Alternative Dispute Resolution," *Daily Labor Rep.*, No. 243 at A8-10 (Dec. 18, 1991). Recently, it has been suggested that mediation will be used more often than arbitration, Pollock, "Arbitrator Finds Role Dwindling as Rivals Grow," *Wall St. J.*, April 28, 1993 at B-1.

[2] Compare *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974) with *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

[3] See for example, Westin and Feliu, *Resolving Employment Disputes Without Litigation* (BNA Books, 1988); McCabe, *Corporate Nonunion Complaint Procedures and Systems: A Strategic Human Resources Management Analysis* (Praeger, 1988).

[4] Fraser, "A New Diversity In The Workplace," in *Arbitration 1991: The Changing Face of Arbitration in Theory and Practice. Proceedings of the Forty-Fourth Annual Meeting National Academy of Arbitrators* (BNA Books, 1991).

[5] *Id.* at 143-44. *See also* Johnston & Packer, *Workforce 2000* (Hudson Institute, 1987); Jamieson and O'Mara, *Managing Workforce 2000: Gaining the Diversity Advantage* (Jossey-Bass Publisher, 1991); Abraham & Flippo, *Managing a Changing Workforce* (Commerce Clearing House, 1991).

[6] *Supra*, note 4, at 146.

[7] *Id.* at 147.

[8] See for example, Gottesman, "A Union Viewpoint: New Diversity in the Workplace," in *Arbitration 1991: The Changing Face of Arbitration in Theory and In Practice: Proceedings of the Forty-Fourth Annual Meeting National Academy of Arbitrators* 166-60 (BNA Books, 1991).

[9] For further discussion, see, Sheppard, Lewicki & Minton, *Organizational Justice: The Search for Fairness in the Workplace* (Lexington Books, 1992); Ewing, *Justice on the Job* (Harvard Business School Press, 1989); Deutsch, *Distributive Justice: A Social-Psychological Perspective* (Yale University Press, 1985); Lind & Tyler, *The Social Psychology of Procedural Justice* (Plenum Press, 1988).

[10] Interview with Joseph Boyce, editor *Wall Street Journal* on National Public Radio "Morning Edition" (May 23, 1992).

[11] Boyce: We could talk about overcharges of the rents and mortgages sometimes that the blacks have to contend with simply because their housing choices are limited in areas where housing discrimination is practiced. It's the higher cost of doing business sometimes in black communities because of high insurance rates, high crime rate, high rates for loans to do business. That is if one assumes that the people who are the victims of these high prices because of security insurance are not the same people who are doing the pilfering in the stores. And I think that's a safe assumption.

[12] United States Merit Systems Protection Board, *Sexual Harassment in the Federal Government: An Update II* (1988).

[13] Federal Bureau of Investigation, *Uniform Crime Reports for 1988* 16 (1989).

[14] 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." Interestingly, at the conclusion of the war, state protective labor laws were reinstated, thus, removing "Rosie the Riveter" from the workplace in many instances.

[15] Phelps Dodge Corp., Case No. 2123-CS-D (Feb. 19, 1942). In *Phelps Dodge*, 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. See Malin and Stallworth, "Grievance Arbitration: Accommodating an Increasingly Diversified Workforce," 42 *Lab. L. J.* 551, 552 (1991).

[16] McKelvey, "Presidential Address: Sex and the Single Arbitrator" in *Arbitration and the Public Interest: Proceedings of the Twenty-Fourth Annual Meeting National Academy of Arbitrators* 1-29 (BNA Books, 1971).

[17] Robertshaw Controls Co., 48 LA 101 (Shister 1967). Similarly, in a pre-Title VII award, the arbitrator stated that despite the absence of any Mississippi statute limiting weights for females, it was the duty of the company to protect the health and safety of its female employees even though they were willing to perform the jobs. Mengel Co., 18 LA 392 (Klamon, 1952).

[18] See for example, Republic Steel Corp., 17 LA 71 (P. Marshall 1951).

[19] The critical role which the federal courts have played in eliminating the legal basis for demographic-based separation and unequal treatment in our society is illustrated in *Steele v. Louisville-Nashville Railroad*, 325 U.S. 483 (1944); and Rosenfeld v. Southern Pacific Co., 444 F.2d 1219. (9th Cir. 1971).

[20] The so-called "Twinkies Case" is an actual dispute; however, the parties have not granted permission for it to be published.

[21] See Abramson and Snow, "Alcoholism and Kleptomania: Looking at the Legal Inconsistencies," 7 *Employee Rel. L. J.* 619 (1982).

[22] In *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993), the Supreme Court held that to be actionable, harassment creating a hostile environment need not affect the victim's psychological well-being. The Court stated that conduct is not actionable under Title VII if a reasonable person would not find it hostile or abusive. The Court conceded that this test was imprecise and declined to answer all questions that it raised. One such question not addressed is whether the reasonable person is one in the position of the victim.

[23] 924 F.2d 872 (9th Cir. 1991).

[24] 477 U.S. 57. See Peterson and Massengill, "Sexual Harassment Cases Five Years After Meritor Savings Bank v. Vinson," 18 *Employee Rel. L. J.* 489 (1992–93).

[25] 924 F.2d at 874.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 880, citing *King v. Bd. of Regents*, 898 F.2d 533, 537 (7th Cir. 1990); *EEOC Compliance Manual* (CCH) § 615, ¶ 3112 at 3242 (1988).

[29] *Id.*, citing *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 898 (1st Cir. 1988) ("A male supervisor might believe, for example, that it is legitimate for him to tell a female subordinate that she has a 'great figure' or 'nice legs'. The female subordinate, however, may find such comments offensive"); *Yates v. Avco Corp.*, 819 F.2d 630, 637 n.2 (6th Cir. 1987) ("men and women are vulnerable in different ways and offended by different behavior"); Ehrenreich, "Pluralist Myths and Powerless Men: The Ideology of Reasonableness in Sexual Harassment Law," 99 *Yale L. J.* 1177, 1207–1208 (1990) (men tend to view some forms of sexual harassment as "harmless social interactions to which only overly-sensitive women would object"); Abrams, "Gender Discrimination and the Transformation of Workplace Norms," 42 *Vand. L. Rev.* 1183, 1203 (1989) (the characteristically male view depicts sexual harassment as comparatively harmless amusement).

[30] 924 F.2d at 879. In a footnote, the court quoted favorably from Abrams, "Gender Discrimination and the Transformation of Workplace Norms," 42 *Vand. L. Rev.* 1183, 1205 (1989):

> While many women hold positive attitudes about uncoerced sex, their greater physical and social vulnerability to sexual coercion can make women wary of sexual encounters. Moreover, American women have been raised in a society where rape and sex-related violence have reached unprecedented levels and a vast pornography industry creates continuous images of sexual coercion, objectification and violence. Finally, women as a group tend to

hold more restrictive views of both the situation and type of relationship in which sexual conduct is appropriate. Because of the inequality and coercion with which it is so frequently associated in the minds of women, the appearance of sexuality in an unexpected context or a setting of ostensible equality can be an anguishing experience."

[31] *Id.* at 879–80.

[32] 765 F. Supp. 1509 (D. Me. 1991).

[33] *Id.* at p. 1515.

[34] *Id.* at p. 1517.

[35] *Id.* at 1515.

[36] *Id.* at 1515–16.

[37] *Id.* at 1516. The Court cautioned that it did not mean to imply that there is unanimity of perspective among black Americans. See for example, J. Scales-Trent, "Black Women and the Constitution: Finding Our Place, Asserting Our Rights," 24 *Harv. C.R.-C.L. Rev.* 9 (1989) (discussing how black women suffer discrimination of a different form, quality, and intensity than that experienced either by black men or white women). The appropriate standard to be applied in hostile environment harassment cases is that of a reasonable person from the protected group of which the alleged victim is a member. In this instance, because Plaintiffs are black, the appropriate standard is that of a reasonable black person, as that can be best understood and given meaning by a white judge.

[38] 915 F.2d 840 (2d Cir. 1990).

[39] 969 F.2d 1436 (3d Cir. 1992), *aff'ing*, 762 F. Supp. 1187 (M.D. Pa. 1991), *refusing to enforce*, 98 L.A. 873 (Sands, 1990).

[40] AAA No. 55-390-0297-92 (Leahy, 1992) (unpublished decision).

[41] See Neumeier, "Lend Me Your Ear: An Open Forum for Members" in *National Academy of Arbitrators: The Chronicle* (April 1993) p. 5.

[42] See generally Grinstead, "The Arbitration of Last Chance Agreements," 48 *Arb. J.* 71 (Mar. 1993).

[43] *Id.* at 843.

[44] *Ibid.*

[45] *Id.* at 845.

[46] See *United Paperworkers v. Misco, Inc.*, 484 U.S. 29 (1987).

[47] 969 F.2d at 1438–39. See *Weingarten, Inc. v. NLRB*, 420 U.S. 251 (1975) where the Court held that an employee is entitled to union representation in an investigatory interview which may result in discipline or discharge.

[48] 98 L.A. at 873.

[49] *Ibid.*

[50] *Ibid.*

[51] *Id.* at 876.

[52] 762 F. Supp. at 1189.

[53] 969 F.2d at 1440.

[54] *Id.* at 1442.

[55] *Id.* at 1446.

[56] Interestingly, the arbitrator in *Alexander v. Gardner-Denver*, 415 U.S. 36 (1974), also failed to address the grievant's assertion of racial discrimination. There, the Supreme Court found *inter alia* that the grievant was not precluded from concurrently or subsequently seeking timely recourse under applicable federal antidiscrimination law, thereby giving the grievant effectively "two bites" at the apple. A similar result is arguably obtained under *Misco* review, except that it is the employer who gets the second bite.

[57] See Neumeier, *supra*, note 41; "All Share Blame for Leahy, Schott," *South Hills* (December 13, 1992), "Blunt Wording of Arbitrator's Ruling in Police Sex Case Angers City Officials," *Allegheny Bulletin* (undated) at A6.

[58] Neumeier, *supra*, note 41 at 5.

[59] *Ibid.*

The evidence is clear that there is general displeasure with and distrust of the EEO administration and litigation processes.

[60] Another critical aspect of arbitral handling of diversity grievances involves witness credibility. For example, in some cultures, to look directly into someone's eyes is generally considered inappropriate. However, in our society, a witness' reluctance to look directly into the eyes of the questioner or trier of fact may detract from the witness' credibility. Consequently, triers of fact should be aware of these cultural differences. Similar sensitivity should be recognized where, for example, a young African-American male may testify in a rather defiant fashion, not intending to be disrespectful or belligerent.

[61] *American Postal Workers Union v. United States Postal Serv.*, 789 F.2d 1, 6 (D.C. Cir. 1986).

[62] 415 U.S. at 49.

[63] Edwards, "Alternative Dispute Resolution: Panacea or Anathema?" 99 *Harv. L. Rev.* 668, 671–72 (1986).

[64] Edwards, "Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives," 27 *Lab. L. J.* 265, 273 (1976).

[65] Of course, arbitrators are publicly accountable to the very limited extent that their awards are subject to being denied enforcement as contrary to public policy. See for example, *United Paperworkers International Union v. Misco, Inc.*, 484 U.S. 29 (1987).

[66] For further elaboration on the different roles of arbitrators and judges and the implications of those roles for arbitral decision making in statutory matters and judicial review of arbitration awards see Malin and Ladenson, "Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the Steelworkers Trilogy to Gilmer," 44 *Hastings L.J.* 1187 (1993).

[67] See for example, *Goodman v. Lukens Steel Corp.*, 482 U.S. 656 (1987).

[68] See for example, Meltzer, "Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination," 39 *U. Chi. L. Rev.* 30, 31–32 (1971); Meltzer, "Labor Arbitration and Discrimination: The Parties' Process and the Public's Purposes," 43 *U. Chi. L. Rev.* 724, 728 (1976); Meltzer, "Arbitration and the Courts: Is the Honeymoon Over? After the Arbitration Award: The Public Policy Defense," in *Arbitration 1987 The Academy at Forty, Proceedings of the Fortieth Annual Meeting National Academy of Arbitrators* 39–61 (BNA Books, 1987).

[69] For further discussion see Malin and Ladenson, *supra*, note 66.

[70] It should be noted that this paper has primarily concentrated on dispute resolution pursuant to contractual grievance arbitration procedures. Notwithstanding, a number of the recommendations made here may also be applicable to the private resolution of diversity/statutory-related disputes not arising under traditional collective bargaining agreements.

[71] Also see *Lynn's Food Stores, Inc. v. U.S.*, 679 F.2d 1350 (11th Cir. 1982) where in a case involving the settlement of Fair Labor Standards Act dispute, the court refusing to enforce the settlement noted that, "There is no evidence that any of the employees consulted an attorney before signing the agreements. Some of the employees who signed the agreement could not speak English." The court also noted that the transcription of the settlement negotiations provided a "virtual catalog of the sort of practices which the FLSA intended to prohibit." It should be recalled that the *Gardner-Denver* court suggested that a transcript be taken in Title VII-related arbitrations. *Lynn's Stores, Inc.* underscores the rationale for the *Gardner-Denver* court's concern with procedural safeguards.

Concerning the issue of "knowing and willing" waiver also see King, Jr., Nager, Noble and Young, "Agreeing to Disagree on EEO Disputes," *Lab. Law.* 98, 118–20 (1993).

[72] See for example, Jaffee, "The Arbitration of Statutory Disputes: Procedural and Substantive Considerations," in *Proceedings of the Forty-Fifth Annual Meeting National Academy of Arbitrators* 111–48 (BNA Books, 1992).

[73] Christovich and Stallworth, "The Equal Opportunity Act and Its Administration: The Claimant's Perspective," *38th Annual Proceedings of the Industrial Relations Research Association*, 473–477 (1985).