Arbitrating discrimination grievances in the wake of *Gardner-Denver*

Some observers believed that the Supreme Court's 1974 ruling blunted the usefulness of arbitration in resolving Title VII-related grievances; a recent survey of lawyers shows that most regard arbitration as still viable but believe that changes would make the process a more effective means of redress

MICHELE M. HOYMAN AND LAMONT E. STALLWORTH

In its 1974 decision in the case of *Alexander v. Gardner-Denver Co.*,[1] the Supreme Court held that a worker who had lost a grievance alleging race discrimination in arbitration was not precluded from subsequently seeking recourse under Title VII of the Civil Rights Act of 1964.[2] The holding of the Court in *Gardner-Denver* ran counter to the conventional wisdom that the decision of a labor arbitrator is final and binding upon the employer, the grievant, and the labor organization. Many observers predicted that the Court's decision would lead to a proliferation of similar cases which would jam the dockets of courts and equal opportunity commissions, and undermine the sanctity of the union contract. This article examines empirically the state of discrimination grievance arbitration in the aftermath of *Gardner-Denver*,[3] as perceived by a sample of labor law attorneys.

A look at the issues

In the Supreme Court's landmark 1960 decision, the *Steelworkers' Trilogy*,[4] labor arbitration was endorsed as the favored mechanism for resolving labor disputes.[5] In making this pronouncement, the Court limited the scope of judicial review of arbitral awards by holding that an award is not reviewable on the merits and might be set aside only in cases of fraud or gross misconduct or in cases that are contrary to public policy. However, with the enactment of Title VII of the Civil Rights Act of 1964 there arose the possibility of conflict between a Federal labor policy which emphasizes the private resolution of industrial disputes through grievance arbitration and a national social policy which attempts to eliminate employment discrimination. Specifically, it was unclear whether an employee could commence an independent private cause of action under Title VII in addition to the grievance arbitration procedure, thereby getting "two bites at the apple."

This issue was finally resolved with the Supreme Court's 1974 *Gardner-Denver* decision, which involved Harrell Alexander, a black employee who had been a drill press trainee for the Gardner-Denver Co. After the employer fired him for producing an "excessive" amount of scrap, Alexander filed a grievance alleging that he had been discharged without just cause. He also filed a discrimination charge with the Colorado Civil Rights Commission, which referred the case to the U.S. Equal Employment Opportunity Commission. In 1969, the arbitrator found that Alexander had been "discharged for just cause." However, the arbitrator did not make any ruling in regard to the racial discrimination claim raised at the hearing.[6]

In 1970, the Equal Employment Opportunity Commission (EEOC) advised Alexander of his right to institute civil action

Michele M. Hoyman is an assistant professor of political science at the University of Missouri at St. Louis. Lamont E. Stallworth is an assistant professor of industrial relations, Institute of Industrial Relations at Loyola University of Chicago.

in Federal district court.[7] But the district court ruled that, having submitted his claim to arbitration, Alexander was precluded from relitigating the same issue in court.[8] Alexander appealed his case to the Tenth Circuit Court of Appeals which, in August 1972, affirmed the decision and reasoning of the lower court.[9] Alexander then appealed his case to the Supreme Court.[10]

The issue before the Supreme Court was whether an employee's individual statutory right to a trial *de novo* (anew) under Title VII was foreclosed by a prior submission of his claim to final arbitration under a nondiscrimination clause of a collective bargaining agreement. In a 9–0 decision, the Court reversed the lower courts' ruling, holding that neither the Federal policy favoring arbitration of employment disputes, the doctrine of election of remedies,[11] nor the waiver doctrine,[12] precluded the claimant from being awarded a trial *de novo* under Title VII.

In so ruling, the Court indicated that it was the intent of Congress that Title VII supplement rather than supplant other discrimination remedies, and that to decide otherwise amounted to asking individuals to forfeit statutory rights in favor of contractual rights. The Court further supported its reasoning by arguing that a full harmony of interest might not exist between the individual employee and the union, also noting that, because the union represents the interests of a majority of its members, the degree of protection accorded the individual's rights in arbitration would not be the same as that provided under Title VII.[13] And in responding to the election of remedies argument, the Court asserted that Title VII clearly provided for relief in several nonexclusive forums.[14]

The Court did not dismiss the role of arbitration in resolving contract disputes, but did address the comparative inappropriateness of conventional arbitration as the sole and final forum for the resolution of Title VII cases:

> Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII. This conclusion rests first on the special role of the arbitrator, whose task is to effectuate the intent of the parties rather than the requirements of enacted legislation.[15]

This basically reaffirmed the traditional role of the labor arbitrator in relation to external public law. The Court reinforced this view by stating that there are basic "infirmities" in the conventional arbitral process, including questions of the authority and the competence of the arbitrator to decide legal issues. However, rather than "sounding the death knell for arbitration,"[16] the Court set forth the amount of evidentiary weight which might be accorded by the trial courts to a relitigated Title VII-related arbitral award:

> . . . Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties and decided by the arbitrator on the basis of an adequate record.[17]

Study scope and method

Obviously, a host of significant questions remain to be answered in the wake of *Gardner-Denver*. Among the more important.

- What have been the reactions of those involved in labor relations to the *Gardner-Denver* decision? Do they agree with the practice of relitigating Title VII-related arbitral awards? What are the parties' opinions concerning the role of the arbitrator in relation to the external public law, such as Title VII?
- How much relitigation before the courts, the U.S. Equal Employment Opportunity Commission, or State antidiscrimination agencies has actually taken place following *Gardner-Denver*? How often has such relitigation resulted in a reversal of the arbitrator's decision?
- What degree of evidentiary weight have the courts accorded the arbitrator's decision in relitigated Title VII-related actions?
- Has *Gardner-Denver* resulted in any noteworthy changes to contract grievance procedures? And, are there other workable proposals for minimizing the review of Title VII-related arbitral awards?

During the spring and summer of 1981, the authors conducted a survey of attorneys who typically represent either management or labor in grievance arbitration, to address these issues. Questionnaires were sent to a random sample of persons whose names had been drawn from an American Bar Association list of labor law attorneys and from a list of attorneys who are employed directly by international unions.[18] (Attorneys for the parties were surveyed, rather than the parties themselves, because of anticipated difficulties in contacting the appropriate labor and management representatives in specific cases, and because it was felt that labor relations attorneys were best qualified to answer general questions on the subject of judicial review.) In all, 659 attorneys provided usable responses to the close-ended items on our 10-page survey form.[19]

Who supports *Gardner-Denver*?

Gardner-Denver represented a judicial policy shift from deferral to arbitration to a guarantee of review. Because this policy shift was controversial at the time, it is worth noting how much popular support the *Gardner-Denver* rationale has. The survey questionnaire included a series of items designed to elicit respondents' opinions of: (1) the *Gardner-Denver* decision itself; (2) the Court's 1981 holding in the case of *Arkansas-Best Freight*,[20] the equivalent of *Gardner-Denver* under the Fair Labor Standards Act (see box); and,

(3) the proper role of the arbitrator in relation to external law.

A majority, 60.3 percent, of the respondents disagreed with the Court's decision in the *Gardner-Denver* case. However, 71.9 percent of those attorneys who typically represent labor in the grievance process supported the decision, while only 28.2 percent of the management representatives did so. The difference between the two groups of attorneys probably is attributable to labor's traditional role as advocate of employee rights. Thus, a union would want its members to have several avenues of redress.

It was initially contemplated that those attorneys who had the experience of having a Title VII-related grievance reviewed and perhaps reversed would be less likely to support the *Gardner-Denver* decision. The data suggest that neither review nor reversal by the courts has a significant impact on the parties' attitudes toward the decision. The experience of review by the EEOC or State agencies, on the other hand, is positively and significantly associated with disagreement with *Gardner-Denver*; 75 percent of respondents who have had cases reviewed administratively opposed the decision, compared with 55 percent of the other attorneys. However, this comparison should be made cautiously, given the relatively small number of cases submitted to courts for review.

With regard to the Court's 1981 decision in *Arkansas-Best Freight*, approximately 53 percent of the respondents expressed an opinion in opposition. But, as expected, there were significant differences in attitude between labor and management representatives, with 66 percent of the labor respondents agreeing with the decision, compared with 43 percent of management respondents. Experience with administrative or judicial review or reversal did not appear to affect the opinions of the parties on the *Arkansas-Best Freight* decision.

Role of the arbitrator. Because a central issue in the *Gardner-Denver* case was whether the arbitrator's role should be solely to interpret the labor agreement or also to consider and apply external law, we questioned our respondents on this point. In the literature, there are essentially two schools of thought regarding the proper role of the grievance arbitrator. The first is represented by Bernard Meltzer of the University of Chicago Law School, who asserts that, where there is a conflict between a labor agreement and the external public law, the arbitrator is obliged to "ignore the law and apply the contract."[12] Robert Howlett represents the other school, arguing that the arbitrator should consider and "apply the law."[22]

The Court's reasoning in *Gardner-Denver* supports the Meltzer school of thought.[23] In brief, the Court defined the "arbitrator's task as effectuating the intent of the parties."[24] Quoting from the classic *Enterprise Wheel & Car Corp.* case, the Court reasoned that:

> If an arbitral decision is based solely on the arbitrator's view of the requirements of enacted legislation, rather than on an interpretation of the collective-bargaining agreement, the arbitrator has exceeded the scope of his submission and the award cannot be enforced. (*United Steelworkers of America v. Enterprise Wheel & Car Corp.* 363 U.S. at 597, 46 LRRM at 2425).[25]

Our survey results confirm the general acceptance of the Meltzer philosophy. Specifically, 41.6 percent of the sur-

The issue in *Arkansas-Best Freight*

In 1981, the Supreme Court held (7–2) that the question of an individual employee's rights under the Fair Labor Standards Act (FLSA) with respect to a wage claim was properly before the court, even after the claim had been rejected by a joint grievance committee pursuant to the provisions of a collective bargaining agreement.

Lloyd Barrentine and several other truckdrivers had filed a grievance under the labor agreement between Teamsters Local 878 and the employer, Arkansas-Best Freight System, Inc. Their grievance challenged the empolyer's refusal to pay them for time spent performing a mandatory safety inspection before each trip. The dispute was submitted to a joint labor-industry panel, which rejected the claim without explanation. The grievants then filed suit in Federal district court, claiming damages, costs, and attorney's fees under FLSA. The truckdrivers also charged that the union and its president had violated their duty of fair representation by entering into a "side deal" to end the dispute.

The Supreme Court, reversing an Eighth Circuit decision barring assertion of the wage claim, held that the FLSA grants employees broad access rights to the courts, and that the individual employee's right to a minimum wage and payment for overtime cannot be abridged or waived by the contract. Justice Brennan, writing for the Court, declares, "Not all disputes between an employee and his employer are suited for binding resolution in accordance with the procedures established by collective bargaining." Justice Brennan further declares that "while courts should defer to an arbitral decision where the employee's claim is based on rights arising out of the collective-bargaining agreement, different considerations apply where the employee's claim is based on rights arising out of a stature designed to provide minimum substantive guarantees to individual workers."

In so ruling, the Court applied to wage and hours claims the same protection granted to discrimination claims under its 1974 holding in *Alexander v. Gardner-Denver*, which had established that resort to arbitration does not prevent an employee from bringing suit under the 1964 Civil Rights Act.

veyed attorneys agreed with the Meltzer school, and another 41.4 percent agreed conditionally.[26] Only 17 percent of the respondents unconditionally support the Howlett school of thought that arbitrators should import external Title VII case law into the arbitral forum. However, the fact that even this many respondents agree with Howlett is noteworthy, particularly in light of the *Gardner-Denver* Court's express limitation on the authority of the arbitrator to "invoke public laws that conflict" with the labor agreement.[27] Our data suggest that the Meltzer-Howlett debate continues among advocates and labor arbitrators, although the majority of respondents still subscribe to the traditional role of the arbitrator.[28]

Labor and management apparently differ in their opinions about the appropriate role of the arbitrator; 58 percent of the union attorneys maintain the view that the arbitrator should apply the law, as opposed to 37 percent of the management respondents.[29] Also of interest is the way the parties' concept of the arbitrator's proper function correlates with their attitudes toward the *Gardner-Denver* decision, for although the Court's ruling reaffirmed the traditional role, respondents who said that they subscribed to the Meltzer school disagreed with the decision more frequently (65 percent) than did those who believe the arbitrator should apply the external law (53 percent).

Incidence of review and reversal

A major concern of labor relations professionals in the wake of *Gardner-Denver* was that the already crowded dockets of the EEOC and the courts would be deluged with previously arbitrated discrimination claims. Accordingly, we asked the members of our sample to quantify their experience with discrimination grievances since 1974.

Of the 1,761 unique cases handled by the respondents, 484 (27 percent) had been reviewed by the EEOC or State antidiscrimination agencies, and 307 (17 percent) had been reviewed by the courts.[30] In our opinion, this is a large amount of review activity, although it is impossible to say how much of it is directly attributable to the *Gardner-Denver* decision without baseline data for the years before 1974, during which relitigation was permitted only in very specific circumstances. While many fewer cases were heard before trial courts than before the administrative agencies, the volume of court activity was still very high, given that judicial review imposes substantial legal and court costs on the plaintiff, while administrative review generally does not.

Of greater significance is the frequency with which review results in a reversal of the arbitral decision. According to the surveyed attorneys, 77 (15.9 percent) of the 484 cases brought before the EEOC or State agencies were reversed, but only 21 (6.8 percent) of the 307 arbitral decisions reviewed by the trial courts were overturned.[31] From the point of view of the parties, it is also important to know how frequently reversal occurs out of *all* potential cases: Of the total of 1,761 arbitration cases reported by the respondents, the 77 that were reversed by the EEOC or State agencies accounted for only 4.4 percent, and the 21 reversed by the courts were a mere 1.2 percent. This means that, in the two forums to which a grievant might take his or her case, there is either a 1 of 25 chance for administrative reversal or a 1 of 100 chance of reversal by the courts.

Thus, while there has been a substantial amount of review activity since the *Gardner-Denver* decision, our study indicates that a very small fraction of all discrimination arbitration findings are subsequently reversed. It seems reasonable to conclude from this that the impact of the ruling has been felt primarily in the area of review activity rather than reversal. The decision appears to have had more procedural importance than practical substantive importance, unless review activity has provoked substantive change by increasing the cost, time, or effort involved in arbitration, or by altering the attitudes of the arbitrator and the parties toward the processing of Title VII-related grievances.

Evidentiary weight of an arbitral award

In addition to the "nagging" possibility of relitigation, a number of commentators were also concerned at the time of the *Gardner-Denver* decision with the degree of evidentiary weight which would thereafter be accorded an arbitral decision by the reviewing body. One observer believed that a "de facto deferral" policy could evolve at the trial court level,[32] while others thought that *Gardner-Denver* would bring about the end of discrimination grievance arbitration.[33] Only 7.2 percent of the attorneys responding to our survey stated that great evidentiary weight has been accorded the relitigated arbitral decision in the post-*Gardner-Denver* years, while 56.4 percent indicated that the award has been given either no weight or little evidentiary weight. However, considering the Court's strong statements concerning the plenary authority of the courts in this area, and the "comparative inappropriateness" of conventional arbitral procedures in discrimination cases, it might have been expected that even less evidentiary weight would have been accorded by the trial courts.

The surveyed attorneys also indicated their opinions concerning the degree of evidentiary weight that *should* be accorded a relitigated arbitral case. Of those responding to this question, 7.7 percent believed that no weight should be accorded the decision, while 15.3 percent felt it should receive little weight. Thus, approximately 77 percent of the respondents thought that either considerable or great evidentiary weight should be accorded the ruling.

Given the cost and time involved in preparing and presenting any grievance in arbitration, it seems reasonable that the advocate would, at a minimum, want the arbitral decision to have more than a little evidentiary value. We therefore attempted to determine whether the parties have made an effort to remedy the shortcomings of discrimination grievance arbitration as enumerated by the *Gardner-Denver* Court.

Has arbitration changed?

As stated earlier, the Court considered arbitration "a comparatively inappropriate forum for the final resolution of rights created by Title VII."[34] Specifically, the Court expressed concern over the competence of arbitrators, whose skills pertain "primarily to the law of the shop, not the law of the land"[35]; the inadequacy of the record maintained in many arbitral hearings; and the quality of the factfinding process in arbitration, as compared to judicial factfinding. The attorneys in our survey were asked what changes, if any, have been made in the arbitration process to counter the Court's criticisms.

Selecting the arbitrator. Because the Supreme Court indicated concern over the qualifications of the labor arbitrators who would decide discrimination grievances, the respondents in our study were asked to rank, on a scale of 1 ("Very important") to 4 ("Not at all important"), a set of nine characteristics that might be considered by the parties in selecting an arbitrator for such a case: age; sex; race; membership in the National Academy of Arbitrators; number of years of arbitration experience; possession of a law degree; special competence in Title VII case law; previous experience in discrimination cases; and general labor and industrial relations background. The factors that were ranked "very important" or "important" by more than four-fifths of the respondents were general labor relations background (86.7 percent); previous experience with discrimination grievances (86.4 percent); number of years of arbitration experience (83.0 percent); the holding of a law degree (81.6 percent); and special competence in Title VII law (80.6 percent). The demographic characteristics of the arbitrator and, surprisingly, membership in the National Academy of Arbitrators were not considered as important.

Beyond the elementary requirement of a labor relations background, the weight attached by surveyed attorneys to special competence in Title VII law and the holding of a law degree is particularly worth noting. Together, these observations suggest that the parties are acknowledging the fact that arbitrators have traditionally been more competent in the "law of the shop" than in the "law of the land," and today are seeking arbitrators with proficiency in the Title VII area. More important, this finding may reveal an attempt to comply with one of the "relevant factors" which the trial courts may take into consideration when determining the degree of evidentiary weight to be accorded a relitigated Title VII-related arbitral award.[36]

The arbitral record. Another concern of the *Gardner-Denver* Court was the lack of a complete record of arbitral proceedings. Our survey respondents were asked two questions in this area. The first was whether they would favor or oppose the establishment of a special grievance procedure that would require the parties to maintain an adequate record of the arbitral proceeding by using either a court reporter or a tape recording. The second asked whether the parties had actually adopted—either informally or contractually—the practice of using a formal written transcript or tape recording of the arbitral hearing in the wake of *Gardner-Denver.*

Of the responding attorneys, 84.2 percent said that they either favor or strongly favor the adoption of a special grievance procedure that would require the use of a court reporter. However, when asked if they had actually adopted the use of a formal transcript in their own dealings, only 56.4 percent of the respondents answered in the affirmative. It is equally noteworthy that even fewer of the respondents (25.9 percent) indicated that they had ever used a tape recording to maintain a complete record of the arbitral hearing. Assuming that the parties wish to address the criticisms of arbitration voiced by the *Gardner-Denver* Court, it is surprising that there has not been more use of tape recording, given the low cost of this medium relative to that of formal written transcripts.

Arbitral factfinding. The Supreme Court's concern about the relatively inferior factfinding process in arbitration is considerably more complex for the parties to accommodate. This is because it involves such critical issues as the adoption of the strict rules of evidence and the right of pretrial discovery. By implication, the Court's comments in this area suggest that trial attorneys should be used in the arbitration process.

In our survey, 55.2 percent of the respondents reported that they advise their clients always to have an attorney represent them in discrimination grievances. While it might be expected that attorneys would render such advice, it is also reasonable to conclude that both employers and unions would tend to want representation by counsel where such "thorny" contractual and statutory issues of alleged discrimination are in dispute.

The less-than-strict application of the rules of evidence has traditionally been cited as one of the advantages of arbitration, making it a relatively efficient and inexpensive means for resolving contractual disputes. (The requirement of strict rules of evidence stringently limits the types of proof that can be introduced in a judicial hearing.) In the past, parties to arbitration have sometimes enforced the strict rules of evidence, but this has been the exception rather than the rule. However, nearly a quarter (22.2 percent) of our respondents indicated that, on at least one occasion since the *Gardner-Denver* decision, they have either informally or contractually adopted the strict rules of evidence in arbitrating a discrimination grievance.

The infrequent use of pretrial discovery, the procedures by which the parties to a dispute may gain access to pertinent information held by the opposition before litigation begins, was also cited by the Court as a failing of the arbitral process. Although there are a number of existing means by which

an advocate in arbitration may obtain the benefits of pretrial discovery, these have rarely been used in the arbitral forum. Apparently the *Gardner-Denver* decision did not provoke much change in this area, for only 14.8 percent of respondents indicated that they subsequently have either informally or contractually granted pretrial discovery rights.

Is waiver the answer?

The *Gardner-Denver* Court did not extensively set forth its concern over the individual's rights in the arbitral forum along with the other perceived inadequacies of the process. However, by recognizing the fundamental thrust of Title VII, the Court raised the individual's statutory rights above those rights that may inhere in the collective bargaining agreement. The Court was particularly concerned that individual rights might be subordinated to the collective or majoritarian rights of the labor organization. Furthermore, the Court intimated that it was cognizant of the triangular type of discrimination that may exist where a claim of racial discrimination has been alleged, observing in this regard that Alexander had told the arbitrator at the hearing that he "could not rely on the union" to represent him.[37]

The volume of Title VII-related "breach of duty of fair representation" suits since *Gardner-Denver* lends support for the Court's thinking. Under this form of relitigation, which predates *Gardner-Denver*, an individual could claim, for example, that he or she had not been fairly represented by the union in the grievance process because of race, sex, or any other reason considered unlawful under Title VII. The attorneys in our survey reported having been involved in 647 such cases since 1974.

About two-thirds (430) of these cases were heard in more than one forum—that is, some combination of the National Labor Relations Board, the courts, and State or Federal antidiscrimination agencies. In 75 cases, there were conflicting outcomes concerning the discrimination claim and the duty of fair representation claim. This degree of conflict probably is attributable to the varying evidentiary standards and factfinding processes of the agencies involved, and argues strongly against the *practicality* of affording a claimant multiple avenues of redress.

It therefore seems reasonable that the parties, and particularly labor organizations, might consider granting the individual grievant greater participation in the resolution of his or her grievance. The surveyed attorneys were asked whether this "third party intervention" approach would be acceptable. There were three possible forms this could take: (1) the individual would be allowed to retain his or her own private legal counsel; (2) the individual grievant, with the advice of counsel, would participate with the union and management in the selection of the arbitrator; and, (3) enactment of a statute requiring the individual grievant and his or her counsel to agree in writing to be bound by the arbitrator's decision before a grievance is taken to arbitration. It was contemplated that this last possibility would be the *quid pro quo* for granting the grievant the right to other forms of "third party intervention" status. (In all of these situations, the questionnaire stipulated that the union had already decided to submit the discrimination claim to arbitration, and thus would retain control of the critical decision to arbitrate.)

Because the traditional notions of labor relations hold that the union and the employer, and not the individual employee, are the principal parties to the collective bargaining process and the labor agreement, it is not surprising that a sizable majority of the surveyed attorneys either oppose or strongly oppose the idea of granting the grievant unqualified third party intervention status. However, it is worth noting that 38.6 percent of the respondents either strongly favor or favor granting the grievant private legal counsel to serve as co-counsel with the representative of the labor organization. Likewise, more than a third of the respondents (35.3 percent) either favor or strongly favor the joint selection of the arbitrator by the union, management, and the employee with advice of counsel. Again, this finding is surprising, given the traditionally strong opposition to employee "self help" or third party intervention in the arbitral process.[38]

It is of considerable interest that a large proportion (71.5 percent) of respondents either strongly favor or favor granting the individual third party intervention status if the grievant would, before the arbitral hearing, sign a legally binding agreement to accept the arbitral award and waive any related future Title VII cause of action. This finding is in accord with innovations proposed by such noted labor relations experts as William Gould, Winn Newman, Alfred Blumrosen, and Arthur B. Smith,[39] and suggests that, with appropriate statutory changes, arbitration can continue to be useful in the resolution of Title VII-related grievances.[40]

THE DATA FROM OUR STUDY indicate that *Gardner-Denver* has had more of a procedural effect than a substantive effect on the arbitral process. Relitigation has not occurred in the majority of cases, and where it did occur in either the administrative or judicial forum, the determination of the arbitrator was rarely contradicted. If the frequency of relitigation and reversal is an indicator of the effect of *Gardner-Denver*, it seems reasonable to conclude that arbitration still serves as a viable dispute settlement device for the resolution of Title VII-related grievances.

Even so, we believe the volume of relitigation is unnecessarily high. Although our respondents voiced much support for certain changes in the arbitration procedure that might address the issues raised by the *Gardner-Denver* Court, there is less evidence that these changes have actually been implemented. Furthermore, the surveyed attorneys exhibit more support for procedural changes, which tend to legitimize the results of the arbitral hearing, than for substantive changes, such as the application of external Title VII law by the arbitrator or third party intervention by the grievant (in the absence of a statutory waiver provision). There re-

mains, then, the fundamental issue as to how the parties might best respond to increasing government intervention in industrial relations while still preserving their control over the collective bargaining process. □

———*FOOTNOTES*———

ACKNOWLEDGEMENT: The authors acknowledge the efforts of Leslie Christovich, Joel Fine, and Kenneth Justice, who were research assistants on this project. They also acknowledge the support given them by the National Institute of Mental Health. A special note of thanks is accorded to Professor James E. Gross and Ms. Frances Benson, New York State School of Industrial Relations, Cornell University, and to Professor William B. Gould, Stanford University Law School. The opinions and findings are soley the responsiblity of the authors.

[1] *Alexander v. Gardner-Denver Co.*, 7 FEP Cases 81 (1974).

[2] Section 704 (a) of the act provides:

> It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

For the purpose of our study, a Title VII-related grievance is a grievance which alleges discrimination based upon race, sex, national origin, color, or religion.

[3] Since *Gardner-Denver*, the Supreme Court has also held that the prior submission of a grievance to arbitration does not preclude subsequent recourse under the Fair Labor Standards Act. See *Barrentine et al. v. Arkansas-Best Freight System, Inc.*, 450 U.S. 67 L. Ed. (2d) 641, 101 S. Ct. 1437 (1981), and box p. 5 of this issue.

[4] *United Steelworkers v. American Manufacturing Co.*, U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); and *United Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). Also see *Textile Workers v. Lincoln Mills of Alabama*, 77 S. Ct. 912 (1957).

[5] Prior to the *Steelworkers' Trilogy*, the courts did not take such a favorable view of arbitration. See, for example, *International Association of Machinists v. Cutler-Hammer, Inc.*, 271 App. Div. 917, 67 N.Y.S. (2d) 317 (First Dept. 1947). The *Cutler-Hammer* doctrine has since been repudiated by statutory amendment. See N.Y. Civ. Prac. Law 7501 (1963).

[6] Alexander raised the discrimination claim for the first time at the pre-arbitration step. Prior to the actual arbitration hearing, he filed with the Colorado Civil Rights Commission on Nov. 15, 1969. He informed the arbitrator at the hearing that he had filed a claim, asserting that among other things he "could not rely on the union." On Dec. 30, 1969, the arbitrator sustained the discharge of Alexander; however, he made no finding concerning the discrimination claim.

[7] In the event the EEOC does not make a "probable cause" finding, the claimant has the right to pursue the matter independently in Federal district court. See 42 U.S.C. 2000e-5(b), (e), and (f). See also *McDonnel Douglas Corp. v. Green*, 411 U.S. at 789.

[8] *Gardner-Denver Co. v. Alexander*, 346 F. Supp. 1012, 4 FEP Cases 1205 (1971).

[9] *Alexander v. Gardner-Denver Co.*, 466 F. (2d) 1209, 4 FEP Cases 1210 (1972).

[10] *Alexander v. Gardner-Denver Co.*, 7 FEP Cases 81 (1974).

[11] That is, an individual claimant's decision to seek recourse through one forum operates to preclude him or her from subsequently or concurrently seeking recourse of the same claim in another forum.

[12] That is, an individual claimant either expressly or implicitly waives his or her rights to seek subsequent recourse of a claim in another forum. In *Gardner-Denver*, the Court suggested that a claimant could "knowingly and willingly" enter into such a waiver.

[13] In addition to noting Alexander's statement that he "could not rely on the union," the Court also referred to this problem in footnote 19 of the decision:

> A further concern is the union's exclusive control over the manner and extent to which an individual grievance is presented. See *Vaca v. Sipes*, 386 U.S. 171, 74 LRRM 2369 (1967); *Republic Steel Co. v. Maddox*, 379 U.S. 650, 58 LRRM 2193 (1965). In arbitration, as in the collective-bargaining process, the interests of the individual employee may be subordinated to the collective interests of all employees in the bargaining unit. See *J.I. Case Co. v. Labor Board*, 321 U.S. 332, 14 LRRM 501.(1944). Moreover, harmony of interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. See, e.g., *Steele v. Louisville & N.R. Co.*, 323 U.S. 192, 15 LRRM 708 (1944); *Tunstal v. Brotherhood of Locomotive Firemen*, 323 U.S. 210, 15 LRRM 715 (1944). And a breach of the union's duty of fair representation may prove difficult to establish. See *Vaca v. Sipes*, supra; *Humphrey v. Moore*, 375 U.S. 335, 342, 348-351, 55 LRRM 2031. In this respect, it is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers. See 52 USC S 2000-3-2(c).

[14] Senator Joseph Clark, one of the sponsors of the bill, had earlier introduced an interpretative memorandum on this issue. The Court noted this and other evidence of congressional intent in *Alexander v. Gardner-Denver Co.*, 7 FEP Cases (1974) at 85:

> "Nothing in Title VII or anywhere else in this bill affects the rights and obligations under the NLRA or the Railway Labor Act. . . . Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statues, if a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction." 110 Cong. Rec. 7207 (1964). Moreover, the Senate defeated an amendment which would have made Title VII the exclusive Federal remedy for most unlawful employment practices. 110 Cong. Rec. 13650-13652 (1964). And a similar amendment was rejected in connection with the Equal Employment Opportunity Act of 1972. See H.R. 9247, 92d Cong., 1st Sess. (1972), pp. 2137, 2179, 2181-2182. The report of the Senate Committee responsible for the 1972 Act explained that the "provisions regarding the individual's right to sue under Title VII, nor any of the provisions of this bill, are meant to affect existing rights granted under other laws." S. Rep. No. 415, at 24, 92d Cong., 1s Sess. (1971).

For a detailed discussion of the legislative history of the 1972 Act, see George Sape and Thomas Hart, "Title VII Reconsidered: The Equal Opportunity Act of 1972, 40 *George Washington Law Review*, July 1972, p. 824.

[15] *Alexander v. Gardner-Denver Co.*, 7 FEP Cases (1974) at 89.

[16] *Gardner-Denver Co. v. Alexander*, 346 F. Supp. at 1019, 4 FEP Cases at 1209 (1971). Both the district court and the court of appeals thought that to permit a later resort to the judicial forum would substantialy undermine the employer's incentive to arbitrate and would "sound the death knell for arbitration clauses in labor contracts."

[17] *Alexander v. Gardner-Denver Co.*, 7 FEP Cases (1974) at 90.

[18] Specifically, respondents' names were drawn from the official mailing list for the Labor and Employment Law Division of the American Bar Association and from the National Directory of Labor Organizations list of "in-house" union attorneys.

[19] There were 661 surveys completed and returned, for an overall response rate of 33.2 percent. Because two of the completed surveys could not be used, the final sample size was 659.

The majority of the respondents (67.5 percent) represented management—a total of 445 individuals. The 101 union representatives accounted for 15.3 percent. The remaining respondents included attorneys who represent individual plaintiffs in discrimination suits, EEOC or State antidiscrimination commission attorneys, National Labor Relations Board or State labor relations attorneys, law professors, part-time and full-time arbitrators,

judges, and retirees. For most of our analysis, only the responses of management and labor advocates are of concern.

[20] Supra, note 3.

[21] See, for example, Bernard Meltzer, "Ruminations about Ideology, Law and Labor Arbitration: The Arbitrator, the NLRB, and the Courts," in *Proceedings of the 20th Annual Meeting of the National Academy of Arbitrators* (Washington, Bureau of National Affairs, 1967), pp. 1–20.

[22] See Robert Howlett, "The Arbitrator, the NLRB, and the Courts," in *Proceedings of the 20th Annual Meeting of the National Academy of Arbitrators* (Washington, Bureau of National Affairs, 1967), pp. 64–74.

[23] The court cites Meltzer in support of its view. See *Alexander v. Gardner-Denver Co.*, 7 FEP Cases (1974) at 87, note 16.

[24] Id. at 87.

[25] Id. at 87.

[26] Respondents who agreed conditionally with the Meltzer school were those who believed that the arbitrator should not apply exernal Title VII law in the arbitral forum "except when the parties expressly grant such authority."

[27] *Alexander v. Gardner-Denver Co.*, 7 FEP Cases (1974) at 87.

[28] In an earlier survey of members of the National Academy of Arbitrators, it was shown that 66 percent of respondents agree with Meltzer and 33 percent agree with Howlett: See Harry Edwards, "Arbitration of Employment Discrimination Cases: An Empirical Study," in *Arbitration—1975, Proceedings of the 28th Annual Meeting of the National Academy of Arbitrators* (Washington, Bureau of National Affairs, 1974), pp. 59–92.

[29] Our study showed that 18 percent of employer attorneys agreed with Meltzer, 45.3 percent agreed conditionally, and 36.6 percent agreed with Howlett. Of labor union attorneys, 15.6 percent agreed conditionally with Meltzer and 58.3 percent agreed with Howlett.

[30] A number of the 1,761 cases may have been reviewed by the courts after investigation by the EEOC or State agencies, and thus may be included in the counts for both forums.

[31] The smaller number of reversals by the trial courts is probably attributable to two factors: (1) The previously cited costs of litigation in the courts, and (2) the fact that the evidentiary standards of trial courts are more strict than those applied by administrative agencies. In the last regard, an administrative investigation requires the establishment of a "prima facie" case or a finding of "probable cause" before proceeding to administrative hearing or trial. The evidence gathered in such investigation is not necessarily "probative" or "conclusive." However, the trial courts would not make a determination of discrimination based solely on probable cause, but would instead require a higher quality of proof and evidence.

[32] See Harry Edwards, "Labor Arbitration at the Crossroads: The Common Law of the Shop v. External Law," *Arbitration Journal*, June 1977, pp. 65–95.

[33] See, for example, David Feller, "Arbitration: The Days of Its Glory Are Numbered," *Industrial Relations Law Journal*, Spring 1977, pp. 97–130.

[34] *Alexander v. Gardner-Denver Co.*, 7 FEP Cases (1974) at 89. Interestingly, the Court noted that the same factors for which it criticizes arbitration enable arbitration to be a relatively efficient and inexpensive means for resolving contractual disputes.

[35] Supra. See also *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 at 581–83. Relying on *Warrior & Gulf Navigation Co.*, the *Gardner-Denver* Court reasoned that:

> Parties usually choose an arbitrator because they trust his knowlege and judgment concerning the demands and norms of industrial relations. On the other hand, the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proven especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts.

The Court further noted that a substantial proportion of labor arbitrators are not lawyers. See "Note, the NLRB and Deference to Arbitration," 77 *Yale Law Journal*, 1968, pp. 1191, 1194, note 28.

[36] The Court, in relevant part, stated, "We adopt no standards at to the weight to be accorded an arbitral decision, since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include . . . the special competence of particular arbitrators." *Alexander v. Gardner-Denver Co.*, 7 FEP Cases (1974) at 90, note 21.

[37] The Court noted that "harmony in interest between the union and the individual employee cannot always be presumed, especially where a claim of racial discrimination is made. . . . It is noteworthy that Congress thought it necessary to afford the protections of Title VII against unions as well as employers." See *Alexander v. Gardner-Denver Co.*, 7 FEP Cases (1974) at 89, note 19. For more discussion of the triangular type of discrimination, see William Gould, "Labor Arbitration of Grievances Involving Racial Discrimination," *University of Pennsylvania Law Review*, 1969–70, pp. 40–68.

[38] For a discussion of this issue, see William Gould, "Third Party Intervention: Grievance Machinery and Title VII," *Black Workers in White Unions* (Ithaca, N.Y., Cornell University Press, 1977), pp. 223–34; Bernard Dunau, "Employee Participation in the Grievance Aspect of Collective Bargaining," *Columbia Law Review*, June 1950, pp. 731–60; and Gregory Kamer, "Employee Participation in Settlement Negotiations and Proceedings Before the OSHRC," *Labor Law Journal*, April 1980, pp. 208–22.

One of the primary arguments against the third party intervention approach is that it runs against the concept of exclusivity established under the National Labor Relations Act. See George Schatzki, "Majority Rule, Exclusive Representation, and the Interests of Individual Workers: Should Exclusivity Be Abolished?" *University of Pennsylvania Law Review*, 1975. Having one's counsel or representative in a third party intervention procedure could also effectively operate against the grievant, because the union may choose not to cooperate in the preparation of the case. See James Atleson, "Disciplinary Discharge, Arbitration and NLRB Deference," *Buffalo Law Review*, Vol. xx, 1971; and Bernard Meltzer, "Labor Arbitration and Overlapping and Conflicting Remedies for Employment Discrimination," *University of Chicago Law Review*, Vol. 39, 1971, pp. 45–46. Another concern is that civil rights groups might attempt to intervene in such disputes without being designated by the grievant. See William Gould, "Third Party Intervention," pp. 233–34.

[39] See Harry Edwards, "Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives," *Labor Law Journal*, Vol. 27, 1976, pp. 265–77; Winn Newman, "Post-*Gardner-Denver* Developments in Arbitration—1975," in *Proceedings of the 28th Annual Meeting of the National Academy of Arbitrators* (Washington, Bureau of National Affairs, 1975); Alfred Blumrosen, "Labor Arbitration, EEOC Conciliation and Discrimination in Employment," *Arbitration Journal*, Vol. 24, no. 2, 1969, pp. 88–105; Alfred Blumrosen, "Bargaining and Equal Emloyment Opportunity," *Fair Employment Practices: Summary of Latest Developments*, 1980; and Arthur B. Smith, "The Impact on Collective Bargaining of Equal Employment Opportunity Remedies," *Industrial and Labor Relations Review*, April 1975, p. 376 at note 31.

[40] Coincidentally, Chief Justice Warren Burger has also strongly advocated the expanded use of arbitration in such civil matters, instead of litigation through the courts. See Chief Justice Warren E. Burger, "Isn't There A Better Way?" *Annual Report on the State of the Judiciary at the Midyear Meeting American Bar Association*, Chicago, Ill., Jan. 24, 1982.

In two post-*Gardner-Denver* decisions—*Lyght v. Ford Motor Co.*, 458 F. Supp. 137 (E.D. Mich. 1978) and *Strozier v. General Motors Corp.*, 442 F. Supp. 475 (N.D. Ga. 1977)—the district court noted the fact that the grievants had been involved directly in the presentation of their Title VII-related grievances, and had, to some degree, been provided with individual legal counsel or the advice of "expert personnel" as part of the arbitration procedure. The court consequently found that the claimants had "voluntarily and knowingly" waived future Title VII actions, and thus were bound by their respective arbitral awards. These holdings tend to support the viability of some form of third party intervention in Title VII-related grievances. However, the U.S. Court of Appeals for the Sixth Circuit has recently reversed *Lyght*, granting the claimant the opportunity to have his discrimination claim for backpay heard in Federal court, notwithstanding the Michigan Civil Rights Commission's written notice that the grievant's claim had been "adjusted" and the case closed. In the appellate court's opinion, "Though Title VII evinces a congressional preference for conciliation over litigation, the facts remain that a person who claims injury from discrimination in employment practices is entitled to a hearing in Federal court." *Lyght v. Ford Motor Co.*, *54 Daily Labor Report*, 1981, pp. A–8, CA6.