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## HANDICAPPER'S RIGHTS IN PRIVATE ARBITRATION

*Barry C. Brown\**

For many years arbitration was viewed as a separate system of industrial self-government, a substitute for judicial determination, in that the process provided an autonomous resolution of workers' grievances concerning the terms and conditions of employment. The exclusivity of arbitration as a remedy or forum in employment related matters has been eroded by federal statutes such as the Fair Labor Standards Act,<sup>1</sup> the Equal Pay Act,<sup>2</sup> the Civil Rights Act of 1964,<sup>3</sup> the Occupational Safety and Health Act,<sup>4</sup> the Vocational Rehabilitation Act,<sup>5</sup> and the Employment Retirement Income Security Act.<sup>6</sup>

Faced with the dilemma of attempting to reconcile such federal statutes with the collective bargaining provision involved in the disputes before them, some arbitrators have taken the position that they must confine their decisions to the four corners of the contract before them. Others, however, believe they should apply statutory law with its concomitant criteria and policy.<sup>7</sup>

As more handicapped individuals are employed where a collective bargaining agreement is involved, arbitrators will be required to determine handicapper's rights to promotions, transfers, job security, training and special accommodations relating to their handicap. Unions will be required to fairly represent their handicapped members in these arbitration hearings and in the prior grievance steps. While the roles of employee-member-grievant, employer, union and arbitrator are regularly being clarified by court decisions in the areas of race and sex under the civil rights statutes, there is little known today about such relative rights and roles relating to the handicapped.<sup>8</sup> Thus, the question of the proper role of "external" law in arbitration

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1. 29 U.S.C. § 201 (1976).

2. 29 U.S.C. § 206 (1976).

3. 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-2 (1970).

4. 29 U.S.C. § 654 (1976).

5. 29 U.S.C. §§ 790-94 (1976).

6. 29 U.S.C. § 1001 (1976). See generally Feller, 2 *INDUSTRY REL. L.J.* (1977).

7. Block, *Legal and Traditional Criteria in the Arbitration of Sex Discrimination Grievances*, 32 *ARB. L.J.* 4 (1977); see also D. FELLER, *FUTURE OF LABOR ARBITRATION IN AMERICA* 90-92 (1976).

8. Note, *Potluck Protections for Handicapped Discriminates: The Need to Amend Title VII to Prohibit Discrimination on the Basis of Disability*, 8 *LOY. CHI. L.J.* 814 (1977).

is crucial if the Vocational Rehabilitation Act is to be fully implemented to protect employment rights of the handicapped. The purpose of this Article is to examine the changing role of the arbitrator and the growing body of private arbitration law which defines the employment rights of the handicapped. From this, trends may be predicted and advocates for handicapped employees may find new remedies for statutory violations in the labor contract grievance arbitration process.

#### ARBITRATION AS A BAR TO JUDICIAL PROCEEDINGS

The development of legislation which protects the rights of the handicapped parallels the development of the Civil Rights Act. Therefore, arbitration cases which give rise to Title VII claims provide fertile ground for analogy to arbitration cases arising under Vocational Rehabilitation Act claims. The United States Supreme Court's ruling in *Alexander v. Gardner-Denver Co.*<sup>9</sup> finally resolved the debate concerning the effect of a prior arbitration decision on employment discrimination claims under Title VII of the Civil Rights Act. The Court in *Alexander* specifically rejected the contention that private arbitration could be used as a bar to individual employment discrimination claims under Title VII.<sup>10</sup> The Supreme Court reversed two decisions which had precluded Title VII actions after unsuccessful employee claims, pursuant to their respective arbitration hearings, and stated that the doctrines of "election of remedies" and "equitable estoppel" were inapplicable.<sup>11</sup> The Court observed that Title VII involved statutory rights distinct from an employee's rights under the labor contract even when violations of both have resulted from the

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9. 415 U.S. 36 (1974).

10. 415 U.S. 36, 54. The district court decision however stated that "such a result would bring to a tragic end to . . . the now prevailing arbitration procedures. . . ." *Alexander v. Gardner-Denver Co.*, 346 F. Supp. 1012, 1019 (W.D. Col. 1971).

11. The Sixth Circuit in *Dewey v. Reynolds Metal Co.*, 429 F.2d 324 (6th Cir. 1970), *aff'd mem.*, 402 U.S. 689 (1971), relied on the doctrine of "election of remedies." This doctrine was founded on the reasoning that both the union and the employer had mutually selected an arbitrator under their collective bargaining agreement to render a final and binding decision. This election would prohibit the employer from seeking other forums; thus, the court held the arbitration decision to be binding on the employee. The court further stated that when an employee elects a remedy under the union contract, he places in the arbitrator's hands the power to determine his statutory rights as well. *Id.* at 332.

In *Newman v. Avco Corp.*, 451 F.2d 743 (6th Cir. 1971), the Sixth Circuit described *Dewey* as resting on the doctrines of "equitable estoppel" and "res judicata." *Id.* at 747. Here the grievant had made full use of the arbitration process and had accepted the fruits of the arbitrator's award (reinstatement to his job). He then sued his employer under Title VII for further compensation and other relief. The court said in *Newman* that equitable considerations under the doctrine of estoppel militate strongly against allowing one to accept the fruits of an award and then to later dispute its validity.

same factual situation. The Court made it clear that an employee does not waive his statutory remedies by processing a grievance claim under the Civil Rights Act.<sup>12</sup> Therefore, an employee who believes that he has been subjected to discriminatory employment practices may pursue remedies under an existing collective bargaining agreement and simultaneously, or subsequently, commence a Title VII action with the Equal Employment Opportunity Commission (EEOC) or in the federal courts.

The existence of a judicial remedy does not minimize the policy reasons favoring arbitration. The Supreme Court in *Alexander* reinforced the arbitration process as a means of resolving disputes under a labor contract, including claims of employment discrimination. The Court noted that the grievance and arbitration procedure has the advantage of being an inexpensive and expeditious mechanism that brings satisfactory results to both employer and employee.<sup>13</sup> The Court also noted that by making available the conciliatory process of arbitration, an employer may obviate the employees' need to resort to a judicial forum. Furthermore, both the employer and the employee would be saved the frustrations associated with litigation in federal courts.<sup>14</sup>

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12. The relevant arbitration provisions in a collective bargaining agreement usually read as follows:

Any disputes, misunderstandings, differences or grievances arising between the parties as to the meaning, interpretation and application of the provisions of this agreement, which are not adjusted as herein provided, may be submitted to the Board of Arbitration for decision. . . .

The arbitrator may interpret this agreement and apply it to the particular case under consideration but shall, however, have no authority to add to, subtract from, or modify the terms of the agreement. Disputes relating to discharges or such matters as might involve a loss of pay for employees may carry an award of back pay in whole or in part as may be determined by the Board of Arbitration.

The decision of the Board of Arbitration shall be final and conclusively binding upon both parties, and the parties agree to observe and abide by same. . . .

The Management of the works, the direction of the working force, plant layout and routine of work, including the right to hire, suspend, transfer, discharge or otherwise discipline any employee for cause, such cause being: infraction of company rules, inefficiency, insubordination, contagious disease harmful to others, and any other ground or reason that would tend to reduce or impair the efficiency of plant operation; and to lay off employees because of lack of work, is reserved to the Company, provided it does not conflict with this agreement. . . .

United Steelworkers of America v. American Manufacturing, 363 U.S. 564, 565 n.1 (1960) *citing* 1959 United Steelworkers Contract.

13. 415 U.S. at 55.

14. *Id.* at 55.

*Alexander* does not discourage the arbitration of employment discrimination claims.<sup>15</sup> Indeed, the Court took a strong position favoring arbitration:

We think . . . that the federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective bargaining agreement and his cause of action under Title VII. The federal court should consider the employee's claim *de novo*. The arbitral decision may be admitted as evidence and accorded such weight as the court deems appropriate.<sup>16</sup>

However, in a footnote, the Court in *Alexander* said:

"We adopted no standards as to the weight to be accorded an arbitral decision. . . . Where an arbitral determination gives full consideration to any employee's Title VII rights, a court may properly accord it great weight."<sup>17</sup>

#### ARBITRATOR'S APPLICATION OF EXTERNAL LAW

With the foundation laid by *Alexander*, it is necessary to consider the decision's relevancy to the rights of a handicapped employee whose grievance is to be adjudicated by an arbitrator.<sup>18</sup> Just as Title VII embodies the national policy concerning racial and gender discrimination, the Vocational Rehabilitation Act is the articulated federal policy against discriminatory employment practices as they relate to the handicapped.<sup>19</sup> Therefore, an arbitrator involved in a handicap

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15. *Id.* at 57-58.

16. *Id.* at 60. The statutory remedy provided for in the courts is in addition to and distinct from remedies found within the collective bargaining contract as determined by the arbitrator. Therefore, intervention by courts in this grievance process should not be confused with review of the arbitration decision itself. In 1960, the Supreme Court in three allied cases, defined the relative function of the courts and the arbitrator. In the *Steelworkers' Trilogy*, *United Steel Workers v. American Mfg. Co.*, 363 U.S. 564 (1960), *United Steel Workers v. Warrior Gulf Navigation Co.*, 363 U.S. 574 (1960), *United Steel Workers v. Enterprize Wheel & Car Corp.*, 363 U.S. 593 (1960), the Court held that the judicial review of an arbitrator's decision is limited. However, the employee who institutes an action under Title VII is not seeking review of an arbitrator's decision, but rather he is asserting a statutory right independent of the arbitration process.

17. *Id.* at 59-60.

18. See Edwards, *Labor Arbitration at the Crossroads: The 'Common Law of the Shop' v. External Law*, 32 ARB. J. 65 (1977); see generally Murphy, *The Impact of ERISA on Arbitration*, 32 ARB. J. 123 (1977).

19. The Vocational Rehabilitation Act is the federal government's statutory policy against discrimination in employment practices as they relate to the handicapped. Section 503 of the Act was implemented by the United States Department of Labor by the promulgation of regulations 41 C.F.R. 60.741.1-.54 (1977) (effective June 11, 1974, as amended, effective May 17, 1976). Under these regulations, government contractors must agree not to discriminate against

case should consider the Vocational Rehabilitation Act in the same way many arbitrators use Title VII in race and gender cases.<sup>20</sup> Failure to do so could result in nonenforcement of the award by the courts<sup>21</sup> because of the existence of additional statutory rights.<sup>22</sup>

Some arbitrators have consistently maintained that they are bound by applicable external law.<sup>23</sup> For example, Arbitrator Robert G. Howlett insisted that: "Arbitrators, as well as judges, are subject to and bound by law whether it be the Fourteenth Amendment to the Constitution of the United States or a city ordinance. All contracts are subject to statutes and common law; each contract includes all applicable law."<sup>24</sup> Yet, in the past, arbitrators have not consistently applied external laws such as the Fair Labor Standards Act or Title VII.<sup>25</sup> Other arbitrators have taken the position that where agencies

any physically or mentally handicapped employee with respect to any position for which the individual is "qualified." 41 C.F.R. § 60.741.6 (1977). Handicapped is defined to include among other things, cosmetic disfigurement, epilepsy, multiple sclerosis, cancer, heart disease, mental retardation and specific learning disabilities. The United States Attorney General has interpreted these regulations to include drug addiction and alcoholism. 41 C.F.R. § 60.741.2 (1977). This broad definition of a handicapped individual includes disabilities well beyond those generally regarded by laymen to be a handicap.

Furthermore, a qualified handicapped individual is defined by the regulations as a handicapped person who is capable of performing a particular job with a reasonable accommodation to the handicap. The key to this definition is "reasonable accommodations." 41 C.F.R. § 60.741.6 (1977). A government contractor must make a reasonable accommodation to the physical and mental limitations of an employee or applicant for employment unless the contractor can demonstrate that such an accommodation would impose an undue hardship on the conduct of the contractor's business. 41 C.F.R. § 60.741.6(d) (1977). Though Section 503 does not give employees of federal contractors the power to enforce its provisions by means of private lawsuit, *Rogers v Frito-Lay, Inc.*, C.A. No. 3-76-1481-C (N.D. Tex. 1977), Section 504 has been held to provide implicitly for a private cause of action. *Lloyd v. Regional Transp. Auth.* 548 F.2d 1277 (7th Cir. 1977). These regulations apply to each recipient of federal financial assistance from the Department of HEW. 45 C.F.R. § 84.3(h) (1977). These regulations, therefore, cover most public entities, including municipalities, school systems and colleges. The basic definition of a handicapped person is the same as the Department of Labor's definition. 45 C.F.R. § 84.3(k), (i) (1977).

20. Hill & Sinicropi, *Excluding Discrimination Grievances from Grievance and Arbitration Procedures: A Legal Analysis*, 33 *ARB. J.* 17 (1978).

21. See *UAW Local 985 v. Chace Co.*, 64 *L.R.R.M.*, 2098 (E.D. Mich. 1966), in which the court refused to enforce an award which required the violation of state law.

22. Note, *The False Hope of a Footnote: Arbitration of Title VII Disputes After Alexander v. Gardner-Denver Co.*, 8 *LOY.CHI. L.J.* 847 (1977).

23. Cross, *The Labor Arbitrator's Role: Tradition and Change*, 25 *ARB. J.* 221 (1970).

24. HOWLETT, *THE ARBITRATOR, THE NLRB, AND THE COURTS, PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 83 (BNA 1967); but see D. FELLER, *FUTURE OF LABOR ARBITRATION IN AMERICA* 90-96 (1976).

25. *St. Regis Paper Co. v. United Paper Workers Int'l Union*, 65 *Lab. Arb.* 802 (1975) (Young, Arb.); *Millinocket Sch. Comm. v. Millinocket Educ. Ass'n*, 65 *Lab. Arb.* 805 (1975) (Purcell, Arb.); *Pacific Gas and Elec. Co. v. Int'l Bhd. of Elec. Workers*, 65 *Lab. Arb.* 504 (1975) (O'Koven, Arb.); *Wausau Dist. Pub. Sch. v. Wausau Educ. Ass'n*, 64 *Lab. Arb.* 187 (1975) (Marshall, Arb.); *Walled Lake Consol. Sch. v. Walled Lake Educ. Ass'n*, 64 *Lab. Arb.*

or commissions have been empowered by the government to enforce certain regulations, the arbitrator may not substitute his judgment and intercede to protect statutory rights.<sup>26</sup> The nonapplication of external law is particularly prevalent when a question arises as to the application of certain state statutes.<sup>27</sup>

In summary, the existence of federal and state legislation allows the handicapped employee to pursue not only the grievance arbitration

239 (1974) (McCormick, Arb.); Merrill Area Joint Sch. Dist. No. 1 v. Merrill Area Educ. Ass'n, 63 Lab. Arb. 1106 (1974) (Schurke, Arb.); Chippewa Valley Bd. of Educ. v. Chippewa Valley Educ. Ass'n, 62 Lab. Arb. Rep. (BNA) 409 (1974) (McCormick, Arb.); Clio Educ. Ass'n v. Clio Area Sch. Dist., 61 Lab. Arb. Rep. (BNA) 37 (1973) (McCormick, Arb.).

26. Ingrahm Co., 48 Lab. Arb. Rep. (BNA) 884 (1966) (Yogoda, Arb.).

27. F. ELKOURI & E. ELKOURI, *HOW ARBITRATION WORKS* 333 (3d ed. 1973). In addition to federal legislation, state laws also have an impact upon arbitration decisions. Several states have recently enacted laws which in many ways reiterate the general obligation of those who receive federal funds covered by the Vocational Rehabilitation Act of 1973. *See, e.g.*, 134 ALASKA STAT. § 18.80.160 (Supp. 1974); CAL. LAB. CODE §§ 1410-33 (West Supp. 1976); CONN. GEN. STAT. ANN. §§ 31-122 to 128 (Supp. 1977); HAW. REV. STAT. .78-1 to 10 (Supp. 1977); ILL. REV. STAT. ch. 48, §§ 851-867 (1976); IND. CODE ANN. §§ 22-9-1 to 13 (Burns Supp. 1976); ME. REV. STAT. tit. 5, §§ 4561-4613 (West Supp. 1976); MD. ANN. CODE art. 49B, §§ 17-20 (Supp. 1976); MASS. GEN. LAWS ANN. ch. 149 § 24K (West Supp. 1977) (Michie Law Co-op 1976); MICH. COMP. LAWS ANN. §§ 395.301-307 (1976); MINN. STAT. ANN. §§ 363.01-14 (West Supp. 1976); NEV. REV. STAT. §§ 613.310-.430 (1973); N.H. REV. STAT. ANN. §§ 354-A:1-14 (Supp. 1975); N.J. STAT. ANN. §§ 10:5-1 to 38 (West 1976); N.C. GEN. STAT. §§ 128-15.3 (Supp. 1973); OR. REV. STAT. §§ 659.400-435 (1975); PA. STAT. ANN. tit. 43 §§ 951-63 (Purdon Supp. 1976); R.I. GEN. LAWS ANN. §§ 28-5-1 to 39 (Supp. 1976); TENN. CODE ANN. §§ 8-4131 AND 4132 (Supp. 1976); VT. STAT. ANN. tit. 21 § 497 (1967); VA. CODE § 40.1-28.7 (1976); WASH. REV. CODE ANN. §§ 49.60-010-320 (Supp. 1975); W. VA. CODE §§ 5-11-1 to 19 (Supp. 1976); WIS. STAT. ANN. §§ 111.31-37(1974). One example, the state of Michigan Handicappers Civil Rights Act of 1976. MICH. COMP. LAWS ANN. §§ 37.1101-37.1605 (West Supp. 1977); MICH. STAT. ANN. §§ 3.550 (101) (Callaghan 1977); is a comprehensive state law which protects handicapped persons. It encompasses employment, union membership, housing, education, public services and public accommodations. The earlier Michigan Law (Barrier Free Design Act) MICH. COMP. LAWS ANN. §§ 125.1351-125.1389 (West 1976 and Supp. 1978) MICH. STAT. ANN. § 3.447 (121) (Callaghan 1977); affects new construction and remodeling to guarantee accessibility. The Michigan law substantially reflects the pre-existing federal legislation. This statute will be enforced by the Michigan Civil Rights Commission under parallel procedures utilized under the Michigan Civil Rights Act, MICH. COMP. LAWS ANN. §§ 125.1351-125.1389 MICH. STAT. ANN. §§ 3.447 (121) (Callaghan 1977); for race, sex, religion, etc. There are no current rules, regulations or guidelines established for the Michigan law, but it is realistic to anticipate that the state guidelines will follow the previously discussed Department of Labor and HEW regulations. Though thirty-six other states have enacted comparable laws, there are only a few omnibus civil rights acts for the handicapped now in effect. *See, e.g.*, CAL. LAB. CODE § 1420 (West Supp. 1975); IOWA CODE ANN. § 601 A 7 (West 1975); ILL. ANN. STAT. ch. 38, § 13-2 (1972); WIS. STAT. ANN. § 111.31 (West 1974). *See also* Calif. Dep't of Rehabilitation, *Digest of State Laws, Relating to the Disabled* (1977). This had been the subject of critical comment by other legal authors. *See Note, Abroad in the land: Legal Strategies to Effectuate the Rights of the Physically Disabled*, 61 GEO. L.J. 1501 (1973); Achtenberg, "Crips" United to Enforce Symbolic Laws: *Legal Aid for the Disabled: An Overview*, 4 U. SAN FERN. V. L. REV. 161 (1975); ten Broek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CALIF. L. REV. 841 (1966).

route and to simultaneously file a claim with a state or federal agency, but also provides a judicial forum if he fails to achieve his objective by arbitration. Although many employers are generally covered either by a federal or state law which protects the rights of the handicapped,<sup>28</sup> the advocate will have to carefully consider the applicable law for each specific employment situation.

#### UNION'S DUTY OF FAIR REPRESENTATION

Another issue is the impact of the Vocational Rehabilitation Act on the union's duty to represent a handicapped employee in the grievance arbitration process. Faced with a grievance of a handicapped member charging discrimination under the collective bargaining agreement, the union may consider several courses of action. The union might refuse to carry the grievance forward through the grievance procedure, thus requiring the individual employee to seek a remedy in the federal or state courts. However, while refusing to process the grievance under the agreement, the union could instead assist the member in a claim either under federal or state law, or both. If the union chooses to process the grievance under the agreement, it could pursue the case up to and through arbitration, or stop short of arbitration. A final alternative would be to elect to process the grievance through the grievance procedure including arbitration and, if necessary, through the federal courts.<sup>29</sup>

It is arguable, however, under the mandate of the Supreme Court in *Steele v. Louisville & N.R.R. Co.*<sup>30</sup> that a union has a statutory obligation to represent *all* members of the bargaining unit through the grievance procedures. The obligation implies that the union make an honest effort to serve the interests of each member without hostility to any, in spite of alternative remedies that may be open to a particular member. Furthermore, under the standard set forth in *Vaca v. Sipes*,<sup>31</sup> a breach of statutory duty of fair representation occurs when the union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. Therefore, a union representative should carefully consider a decision not to follow

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28. In one case an arbitrator did decide that a contract prohibited discrimination on the basis of race, color, creed, national origin, sex, age, union-membership or activity, *In re Metropolitan Dist. Comm'n and American Federation of State, County, Municipal Employees, Local 184*, 64 Lab. Arb. Rep. (BNA) 1088 (1975) (Blum, Arb.).

29. See generally Hill, *The Union's Duty to Process Discrimination Claims*, 32 Lab. Arb. J. 180 (1977).

30. 323 U.S. 192 (1944).

31. *Vaca v. Sipes*, 386 U.S. 171, 193 (1967).

through with the grievance because it might be construed as a failure to follow all avenues, both in arbitration and litigation, and, therefore be considered a breach of its duty of fair representation.

ANALYSIS OF RECENT ARBITRATION DECISIONS  
INVOLVING HANDICAPPED EMPLOYEES

In a grievance proceeding involving the rights of handicapped employees, arbitrators are more likely to consider company problems than are the courts or administrative agencies.<sup>32</sup> In addition, arbitration decisions rendered since the enactment of the Vocational Rehabilitation Act illustrate that arbitrators have ignored all statutes concerning the rights of the handicapped. In some cases, such as *Hycos, Inc.*,<sup>33</sup> the result probably would have been the same, even if the statutory provisions had been applied. In that case, an epileptic employee, after a seizure, was given a second chance on a safer job. The arbitrator appears to have required the employer in this case to make a "reasonable accommodation." However, if the arbitrator had reached the opposite result, an alternative method could involve action by a civil rights agency urging the employer to rehire the discharged epileptic employee even though he had lost his arbitration case. If the case were pursued in a judicial forum, a court would not have to defer to the arbitrator's decision. Moreover, it is arguable that if the arbitrator did not consider the standards set forth in the federal regulations or relevant state laws, a result sustaining a discharge of the epileptic might be reversed.

Similarly, in a recent arbitration case, *Greyhound Lines, Inc.*,<sup>34</sup> an arbitrator determined that a bus driver who had suffered a heart attack, and whose neutral physician had concluded he was qualified to return to work, could be precluded from returning to his assignment because of the company's concern for the public's safety. Again, though it seems clear that the employer here was the recipient of federal funds as a contractor, there was no consideration given to the

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32. See Northrup, *Antidiscrimination Legislation*, Labor Relations and Public Policy Series, Wharton School, U. Penn. (1976); See also Edwards, *Arbitration of Employment Discrimination: an Empirical Study*, cited in ARBITRATION-1975, PROCEEDINGS OF THE 28TH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 59-92 (BNA 1976).

33. *Hycos, Inc.*, 76-1 Lab. Arb. Awards (CCH) 5379 (1976) (Nichols, Arb.). But see Birmingham Sch. Dist., 95 A.I.S. 6 (1977) (Groty, Arb.) for a contrary result in a situation clearly covered by section 504. See also *White Cap Inc. v. International Ass'n of Machinists & Aerospace Workers*, 75 Lab. Arb. Awards (CCH) 4260 (1975); Kovarsky & Vern Hauck, *Arbitration and the Epileptic*, 28 LAB. L.J. 597 (1977).

34. *Greyhound Lines, Inc. and Council of Greyhound Divisions*, 77-2 Lab. Arb. Awards (CCH) 4561 (1977) (Turkus, Arb.).

Vocational Rehabilitation Act. The arbitrator did, however, consider public policy as it related to regulations promulgated by the Department of Transportation. Nonetheless, the public policy as it related to the employment of the handicapped appears to have received no consideration.<sup>35</sup> Pursuant to the *Alexander* Court's rationale, the affected driver should still be able to file a complaint with HEW alleging employment discrimination. He may also be able to file suit in the federal courts. His claim might not be sustained since the employer could defend on the basis that the presence of a heart condition legitimately disqualified the employee from driving a bus. A favorable court decision on behalf of the employee would allow the employee to return to his job in spite of an arbitrator's decision to the contrary.<sup>36</sup>

In another case, *United States Postal Service (Miami, Florida)*,<sup>37</sup> the demotion of a postal employee for reasons of his handicap was sustained by the arbitrator. This case is another example of the arbitrator's failure to consider the question of whether the employer had a duty to make a reasonable accommodation within his regular job classification rather than to demote the handicapped employee. The arbitrator appeared to focus entirely on the requirements of the labor agreement. Under the *Alexander* analogy, by pursuing a simultaneous or subsequent review of his rights in court under the governing federal statutes, one could achieve a different result from that gained through arbitration.

In another case involving a bus company,<sup>38</sup> the arbitrator did order reinstatement of a bus driver who had been terminated for a failure to fully disclose certain information on his pre-employment application about a previously sustained neck injury. Even though HEW and the Department of Labor regulations limit an employer's right to ask pre-employment questions related to physical handicaps,<sup>39</sup> the arbitrator never considered these regulations. Certainly, pre-employment

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35. *Id.*

36. *Hodgson v. Greyhound Lines Inc.*, 499 F.2d 859 (7th Cir. 1974), is an analogous case. In *Hodgson* an age discrimination issue was raised with regard to a policy which refused to consider applications for inter-city bus drivers from individuals age 35 or older. The carriers relied on the theory that the policy fell within an exception to the Age Discrimination in Employment Act of 1967, § 4(f)(1), 29 U.S.C. § 623(f)(1) (Supp. 1978). The company contended that age was a bonifide occupational qualification related to the likelihood of risk of harm to passengers. The court found that it was the carrier's burden to establish the existence of a rational correlation between drivers over the age of 35 and potential risk to passengers.

37. 6 L.A.I.G. 1720 (1976) (Kelliher, Arb.).

38. *Chicago Transit Auth. and Amalgamated Transit Union*, 6 L.A.I.G. 1723 (1976) (Kelliher, Arb.).

39. 41 C.F.R. § 60.741.6 (c) (1977).

application questions having to do with race, age, religion, color, or national origin have been closely reviewed by the EEOC for many years.<sup>40</sup> It could be expected that an arbitrator is likely to react negatively if an employer posed improper questions about an applicant's race, and then dismissed an employee who did not answer the questions fully. The arbitrator in this case determined that the grievant should be returned to work, but his award was not premised upon federal regulations governing appropriate pre-employment questions. One can only speculate as to the result in a judicial forum if the arbitrator had sustained the discharge.

In a final example, *Weber Manufacturing Co.*,<sup>41</sup> the arbitrator found that the employer was justified in discharging an epileptic following his second epileptic seizure while at work in a company plant. The arbitrator determined that the employer was reasonable in contending that it was unsafe for the grievant and others if he continued on his job.<sup>42</sup> The employee's doctor could not say that the grievant would not have subsequent seizures even though he took his prescribed medicine. Furthermore, the employer claimed there was not another position within the bargaining unit that the grievant was able to fill without the alleged hazard. The question of "reasonable accommodation" under the law was not taken into account by the

40. The EEOC Guidebook for employers states the following:

b. *Application Forms and Pre-Employment Inquiries.*

EEOC and the courts have found that many common pre-employment inquiries disproportionately reject minorities and females and usually are not job related.

Some of these questions have been explicitly prohibited by courts where they have been shown to have discriminatory effect; the exact legal status of other questions is still to be determined.

Use these pragmatic guidelines: "Does this question tend to have a disproportionate effect in screening out minorities and females?" "Is this information necessary to judge this individual's competence for performance of this particular job?" "Are there alternate, non-discriminatory ways to secure necessary information?"

Major questions which should be eliminated from pre-employment inquiries (application forms and interviews) or carefully reviewed to assure that their use is job related and non-discriminatory in effect, include:

*Race, National Origin, Religion.* Pre-employment inquiries about race, color, religion or national origin, do not constitute per-se violations of Title VII,\*\* but such inquiries or recording such information in personnel files will be examined very carefully should discrimination charges arise.

1 EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, AFFIRMATIVE ACTION AND EQUAL EMPLOYMENT 40 (1974).

41. *Weber Mfg. Co., Inc. v. International Woodworkers of America, Local IV-322*, 63 Lab. Arb. Rep. 56 (BNA) (1974) (Yeager, Arb.); see generally 45 C.F.R. § 84.11 (a) (4) (1977). See also *Greenlee Bros. & Co. v. International Ass'n of Machinists, Unity Lodge 1553*, 67 Lab. Arb. Rep. (BNA) 847 (1976) (Wolff, Arb.); *Bethlehem Steel Corp. v. United Steelworkers of America Local 2609*, 64 Lab. Arb. Rep. (BNA) 447 (1975) (Reel, Arb.).

42. 63 Lab. Arb. 56, 59-60 (BNA) (1974).

arbitrator.<sup>43</sup> Possibly, this employer was not subject to federal law and there was no relevant state law. If that were the case, there would be no forum for a further review. If there were governing statutes, however, the union's failure to argue the statutory rights of its handicapped member or its failure to assist him in his claim with the proper government agency could be deemed to be a failure to fairly represent a member in a subsequent lawsuit.<sup>44</sup>

### CONCLUSION

Arbitrators in the future should be cognizant of the statutory rights of the handicapped as they analyze cases involving a demotion, transfer, failure to promote, discharge or any other employer action affecting wages, hours and conditions of work of handicapped employees. Arbitrators have not considered the statutes protecting the handicapped in the past and, based on their slow reaction to Title VII rights, it will take time to bring about a change.<sup>45</sup> The handicapped community should be certain that unions, employees and arbitrators alike are aware of the law. Members of unions and employees who are handicapped must be given the fullest protection under state and federal laws in order to gain employment which is free of discrimination. The broad definition of who is handicapped and the concept of reasonable accommodations, concepts with which unions, employers and arbitrators have been unfamiliar, need to be applied in the administration and enforcement of collective bargaining agreements. A broad application of the *Alexander* and *Vaca* decisions

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43. For examples of cases in which arbitrators have given consideration to the requirement of "reasonable accommodations", see *Mason & Hanger—Silas Mason Co. v. International Ass'n of Machinists & Aerospace Workers*, Lodge 1010, 59 Lab. Arb. Rep. (BNA) 197 (1972) (Davis, Arb.) (arbitrator withheld the final decision on discharge of an emotionally unstable employee, pending investigation of alternative job possibilities); *Carnation Co. v. International Brotherhood of Teamsters Local 274*, 60 Lab. Arb. Rep. (BNA) 674 (1973) (Hayes, Arb.) (employer violated the contract by discharging a truck driver discovered to have defective vision instead of assigning an alternative job based on seniority).

44. Indeed, such is the employer's duty under 41 C.F.R. § 60-7414 (e) (1977).

45. For three earlier cases see *Nat'l Fireworks Ordinance Corp. v. Int'l Assoc. of Machinists*, Lodge 502, 23 Lab. Arb. 349 (1954) (Larson, Arb.) (employer rightfully required an employee to undergo surgery to correct a hernia); *Int'l Shoe Co. v. United Shoe Workers of America, Local 128-A*, 19 Lab. Arb. Rep. (BNA) 253 (1950) (Waller, Arb.) (management may reassign an employee to a less hazardous job to protect the health and safety of the employee); *Consol. Vultee Aircraft Corp. v. Int'l Ass'n of Machinists, Aeronautical Industrial District Lodge, 776*, 10 Lab. Arb. Rep. 951 (BNA) (1948) (Aaron, Arb.) (employer has the right to take precautions against contingent liability for injuries by requiring as a condition of rehiring that the employee sign a waiver with respect to a minor handicap).

should result in both fair representation and complete and meaningful arbitration hearings on employment complaints of handicapped employees working under union contracts.