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Deferral to Arbitration in Title VII Actions: Rios v. Reynolds Metals Company

COMMENTS

DEFERRAL TO ARBITRATION IN TITLE VII ACTIONS: RIOS v. REYNOLDS METALS COMPANY

Title VII of the Civil Rights Act of 1964 prohibits discriminatory employment practices based on race, color, religion, sex, or national origin.[1] The Act provides a procedure whereby an individual alleging employment discrimination may bring an action in a federal district court.[2] Upon a finding that an employer intentionally has engaged in discrimination prohibited by the Act, the court is empowered to enjoin the unlawful practices and to order appropriate affirmative action, including the hiring or reinstatement of employees.[3] An employee, however, is not limited to the remedies of Title VII.[4] Frequently, the

1. Section 703 of the Act provides in pertinent part:

> It shall be an unlawful practice for an employer—
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> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2(a) (Supp. 1972), *amending* 42 U.S.C. § 2000e-2(a) (1970).

2. The Equal Employment Opportunity Commission (EEOC) was established to investigate charges of violations of the Act. *Id.* § 2000e-4. If the EEOC determines that there is reasonable cause to believe that a charge of employment discrimination is true, the commission must endeavor by conference, conciliation and persuasion to eliminate the alleged unlawful employment practice. *Id.* § 2000e-5(b). The amended Act provides that if efforts at voluntary conciliation fail, the commission or, in a case where the respondent is a government, governmental agency, or political subdivision, the Attorney General may bring an action in a federal district court. However, if a charge filed with the commission is dismissed or if no action has been brought within 180 days of the filing of such charge, the commission must notify the aggrieved party that he may commence an action within 90 days of such notice. *Id.* § 2000e-5(f)(1). For a discussion of the operation of the EEOC see Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission*, 38 GEO. WASH. L. REV. 695 (1970).

3. 42 U.S.C. § 2000e-5(g) (1970).

4. The employee may have remedies under state law. In addition, the employee may seek relief from the National Labor Relations Board, claiming that the discrimination by the employer violated section 8(a)(3) of the National Labor Relations Act, 29 U.S.C. § 158(a)(3) (1970). *See* United Packinghouse Workers Int'l Union v. NLRB,

collective bargaining agreement with the employer contains grievance and arbitration provisions through which the employee may seek redress. The multiplicity of remedies for employment discrimination has proved problematic; specifically, the federal courts of appeals are divided on the question of what course of action a district court should pursue when a Title VII action is instituted after the employee has received an adverse decision in an arbitration proceeding.[5]

The Court of Appeals for the Fifth Circuit recently made a significant attempt to maintain arbitration as a viable means of resolving labor disputes involving charges of discrimination, while preserving to aggrieved employees the opportunity to have a full and complete resolution of their Title VII rights. The court held in *Rios v. Reynolds Metals Company*[6] that a district court *may* defer to a prior arbitration decision *but only* under certain limited conditions. Before examining the impact of *Rios*, a study of the cases which previously have considered the question is essential.

In *Dewey v. Reynolds Metals Co.*,[7] the Court of Appeals for the Sixth Circuit held that a Title VII suit could not be maintained after the grievance had been finally adjudicated by arbitration. The court reasoned that since the decision of the arbitrator would have been final and binding on the employer, it would be unfair to hold that the award was not binding on the employee. Noting that the parties had agreed on a mutually satisfactory arbitrator and that the arbitrator had jurisdiction to decide the grievance, the court held that where both factors of consent and jurisdiction obtain, the decision of the arbitrator should be final.[8]

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416 F.2d 1126 (D.C. Cir.), *cert. denied*, 396 U.S. 903 (1969). Finally, the employee could allege a violation of the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1970). *See* Waters v. Wisconsin Steel Workers of Int'l Harvester Co., 427 F.2d 476 (7th Cir. 1970); Sanders v. Dobbs Houses, Inc., 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); Young v. International Telephone & Telegraph Co., 438 F.2d 757 (3d Cir. 1971).

5. The Supreme Court faced the question in Dewey v. Reynolds Metals Co., 402 U.S. 689 (1971), with an equally divided Court affirming the decision of the Court of Appeals for the Sixth Circuit.

6. 467 F.2d 54 (5th Cir. 1972).

7. 429 F.2d 324 (6th Cir. 1970), *aff'd by an equally divided Court*, 402 U.S. 689 (1971).

8. The court emphasized the possible adverse effects of permitting an employee to institute a Title VII suit after an adverse arbitration decision when the same course of action would not be available to an employer. It was believed that this result would reduce the attractiveness to employers of including arbitration clauses in collective bargaining agreements and, in fact, "could sound the death knell to arbitration of labor disputes." *Id.* at 332.

Shortly after the decision in *Dewey*, the Court of Appeals for the Fifth Circuit arrived at a substantially different result in *Hutchings v. United States Industries, Inc.*[9] While conceding the importance of the policy favoring private settlement of labor disputes by arbitration, the court in *Hutchings* stressed the essential differences between the arbitration process and a court hearing and concluded that a prior arbitration decision does not deprive the federal courts of jurisdiction over Title VII actions.[10] However, the possible effect of prior arbitration was not completely rejected. The court stated that both arbitral awards and grievance determination settlements could be used as evidence in Title VII litigation. Moreover, it specifically reserved for the future "the question of whether a procedure similar to that applied by the labor board in deferring to arbitration awards when certain standards are met might properly be adopted in Title VII cases." [11]

In *Newman v. Avco Corp.*,[12] the Court of Appeals for the Sixth Circuit noted that its decision in *Dewey* was based upon the doctrine of estoppel[13] rather than an election of remedies.[14] However, the court distinguished *Dewey* and held that an aggrieved employee is not estopped to assert his Title VII claim even though that claim has been

9. 428 F.2d 303 (5th Cir. 1970).

10. The court stated: "An important method for the fulfillment of congressional purpose [of eliminating discrimination] is the utilization of private grievance-arbitration procedures. . . . Congress, however, has made the federal judiciary, not the EEOC or the private arbitrator, the final arbiter of an individual's Title VII grievance." *Id.* at 313.

11. *Id.* at 314 n.10.

12. 451 F.2d 743 (6th Cir. 1971).

13. The court noted: "This equitable doctrine holds that where the parties have agreed to resolve their grievances before 1) a fair and impartial tribunal 2) which had *power to decide them*, a District Court should defer to the fact finding thus accomplished." 451 F.2d at 747.

14. Several commentators had asserted that *Dewey* was decided on the basis of the doctrine of election of remedies. *See, e.g.* Edwards and Kaplan, *Religious Discrimination and the Role of Arbitration Under Title VII*, 69 MICH. L. REV. 599, 613, 642 (1971); Note, *Title VII, the NLRB, and Arbitration: Conflicts in National Labor Policy*, 5 GA. L. REV. 313, 344-47 (1971). The *Newman* court noted that the doctrine is applicable "only where conflicting and inconsistent remedies are sought on the basis of conflicting and inconsistent rights." 451 F.2d at 746-47 n.1. Criticizing the doctrine as having fallen into disrepute, the court further stressed that it was not applicable to *Dewey*, since there was no conflict in the facts presented in the arbitration and judicial proceedings and since the remedies sought were complementary rather than conflicting. The *Newman* court suggested that the basis of the decision in *Dewey* was "a combination of the desire for finality and the belief that arbitration is the sure and sound path to labor harmony—policies which are more accurately expressed in the themes of res judicata and collateral estoppel than in election of remedies." *Id.*

the subject of a final arbitration award. It was emphasized that since the collective bargaining agreement required that the grievance be submitted to arbitration, it could not be said that submission of the grievance was "clearly voluntary" on the part of the employee. Furthermore, the court doubted that the arbitrator had the right to make a final determination of the racial discrimination issue, since there was no provision in the collective bargaining agreement prohibiting discriminatory employment practices. Additionally, the employee's allegation that his union had participated in a "long-standing conspiracy" with the company to perpetuate racial discrimination contributed to the court's conclusion that deferral was not appropriate. These circumstances were found to represent a "fundamental attack upon the fairness and impartiality of the arbitration proceeding" and to warrant a judicial hearing under Title VII.[15]

The Court of Appeals for the Tenth Circuit recently affirmed in a per curiam decision the holding of the district court in *Alexander v. Gardner-Denver Co.*[16] After reviewing the "two diametric lines of authority" on the question of the effect of prior arbitration on a Title VII action, the district court adopted the rationale of *Dewey* and rejected that of *Hutchings*. Applying the *Dewey* rationale, the court stated: "[W]hen an employee voluntarily submits a claim of discrimination to arbitration under a union contract grievance procedure . . . the employee is bound by the arbitration award just as is the employer. We cannot accept a philosophy which gives the employee two strings to his bow when the employer has only one." [17]

It was in this context of divided authority that the Court of Appeals for the Fifth Circuit in *Rios v. Reynolds Metals Co.*[18] attempted to reach a decision which would accommodate the policy of settling labor disputes by arbitration and the policy of providing an adequate remedy for Title VII violations. Rios, a Mexican-American, had been assigned to a higher position on a trial basis but demoted to his former position after only one month. He filed a grievance pursuant to the collective bargaining agreement, claiming that he had not been allowed a reasonable trial period at the new position. At the ensuing arbitration hearing, Rios alleged that the demotion had been based in part on his national origin and that the company's action thus had violated a provision of

15. 451 F.2d at 748.

16. 466 F.2d 1209 (10th Cir. 1972), *aff'g* 346 F. Supp. 1012 (D. Colo. 1971).

17. 346 F. Supp. at 1019.

18. 467 F.2d 54 (5th Cir. 1972).

the collective bargaining agreement prohibiting discrimination on the basis of race, color, creed, national origin, or sex. Prior to the arbitration hearing, Rios had initiated a Title VII action in a federal district court. Following the arbitrator's determination that the demotion had resulted from Rios' inability to perform the new job satisfactorily, the district court granted the employer's motion for summary judgment on the ground that Rios was bound by the decision of the arbitrator.[19]

The court of appeals, while reversing the decision of the lower court, recognized that the Supreme Court[20] repeatedly has stressed that "settlement of labor disputes by arbitration is a favored national labor policy." [21] Thus, for example, where an employee brings an action in federal district court asserting a breach of a collective bargaining agreement after that claim has been submitted to arbitration, the sole inquiry for the court is whether the arbitrator had the power, under the collective bargaining agreement, to decide the issues raised. If such power is found to have existed, the court may not reexamine the merits of the claim, and the decision of the arbitrator is binding.[22]

The *Rios* court held, however, that the strong national policy against discriminatory employment practices manifested by Congress in Title VII required a departure from the traditional approach to arbitration. The remedy afforded by Title VII was said to be supplemental to, and existing apart from, other remedies provided an aggrieved employee by contract or by federal or state law. Reaffirming its decision in *Hutchings*, the court stated that even where an employee pursues one of these alternative remedies, the federal court remains the "final arbiter" of Title VII rights.

While accepting the position that the federal judiciary has the *power* to make a final adjudication in a Title VII proceeding, the court was unwilling to hold that a district court should never defer to a prior arbitration decision. The court acknowledged the arguments which had been determinative in *Dewey*[23] and stated:

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19. 332 F. Supp. 1209 (S.D. Tex. 1971).

20. *See, e.g.*, Boys Markets, Inc. v. Retail Clerks Union, Local 770, 398 U.S. 235 (1970); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957).

21. 467 F.2d at 56.

22. *See, e.g.*, United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960).

23. *See* note 8 *supra* & accompanying text.

> It does not follow, however, that the policies of Title VII require that an employee who has submitted his claim to binding arbitration must always be given an opportunity to relitigate his claim in court. In some instances such a requirement would not comport with elementary notions of equity, for it would give the employee, but not the employer, a second chance to have the same issue resolved.[24]

The court also observed that an absolute prohibition against deferral in Title VII actions would tend to frustrate the national policy favoring arbitration by removing the incentive for an employer to agree to the inclusion of arbitration provisions in the contract.

It should be noted that in *Rios* there were two factors not present in the same court's decision in *Hutchings*. First, the collective bargaining agreement placed upon the employer an obligation similar to that imposed by Title VII. Moreover, the court found that the issue decided by the arbitrator was the same as that presented in the Title VII action. The court seized upon these factors to implement the procedure it had suggested in *Hutchings*, holding that a "federal district court in the exercise of its power as the final arbiter under Title VII may follow a . . . procedure of deferral" under certain strict limitations.[25] After enumerating the conditions required for deferral, the court remanded the case to the district court to determine whether these conditions had been met.

The procedure adopted was analogous to the one employed by the National Labor Relations Board in deferring to prior arbitration decisions concerning alleged unfair labor practices.[26] Thus, it was held that a district court properly *may* defer to a prior arbitration if the following conditions of limitation are established:

> First, there may be no deference to the decision of the arbitrator unless the contractual right coincides with rights under Title VII.

24. 467 F.2d at 57.

25. *Id.* at 58.

26. In Spielberg Mfg. Co., 112 N.L.R.B. 1080 (1955), the NLRB established minimum standards which must be met before the Board, in the exercise of its discretion, will defer to a prior arbitration award involving the same issues presented in an unfair labor practice complaint. Thus, the Board will defer to arbitration findings only if "the proceedings appear to have been fair and regular, all parties have agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Id.* at 1082. The Board's deferral procedure has received the sanction of the courts. *See, e.g.*, Carey v. Westinghouse Elec. Corp., 375 U.S. 261 (1964); Lodge No. 12, Machinists v. Cameron Iron Works, Inc., 257 F.2d 467 (5th Cir. 1958).

> Second, it must be plain that the arbitrator's decision is in no way violative of the private rights guaranteed by Title VII, nor of the public policy which inheres in Title VII. In addition, before deferring, the district court must be satisfied that (1) the factual issues before it are identical to those decided by the arbitrator; (2) the arbitrator had power under the collective agreement to decide the ultimate issue of discrimination; (3) the evidence presented at the arbitral hearing dealt adequately with all factual issues; (4) the arbitrator actually decided the factual issues presented to the court; (5) the arbitration proceeding was fair and regular and free of procedural infirmities. The burden of proof in establishing these conditions of limitation will be upon the respondent as distinguished from the claimant.[27]

Clearly, the *Rios* review of arbitral awards is more rigorous than judicial review of arbitral awards in other labor law contexts. Indeed, the court stated that because of the compelling interests sought to be protected by Title VII, deferral in such cases "is not as broad as" deferral in other situations and is, in essence, "a review of the arbitration proceeding in cases involving Title VII rights." [28] It would appear that under the *Rios* test, deferral would have been proper in none of the four cases which previously had raised the issue at the court of appeals level. In *Alexander*, for example, the findings of the arbitrator did not discuss the employee's assertion of discrimination, but stated only that the discharge had been for "just cause." In neither *Dewey* nor *Hutchings* was there a nondiscrimination clause in the contract binding the employer to the obligations imposed by Title VII. Finally, in *Newman*, there were strong indications that the arbitration proceeding had not been fair and regular.[29]

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27. 467 F.2d at 58.

28. *Id.*

29. The court in *Rios* suggested that its holding "may be somewhat in line with the result which has evolved in the Sixth Circuit" in *Dewey* and *Newman*. 467 F.2d at 59 n.3. The Sixth Circuit's approach appeared to the *Rios* court to require that an aggrieved employee be permitted to pursue a Title VII action after an adverse arbitration award unless certain conditions are met. These conditions, apparently found in *Newman*, are: "[T]he arbitration proceeding must have been fair and impartial. The issue presented to the court under Title VII must be the same as the issue decided by the arbitrator under the collective bargaining agreement. The arbitrator must have had power, under the collective bargaining agreement, to decide the issues he decided." *Id.* However, in light of the fact that *Newman* did not overrule *Dewey*, and because the issue presented to the *Dewey* court was not the same issue decided by the arbitrator under the collective bargaining agreement, the Sixth Circuit's approach is not

It is submitted that the result in *Rios* represents an acceptable accommodation of conflicting policy considerations. By providing that arbitration may, under limited circumstances, be employed as a final means of determining grievances which involve Title VII rights, the court left available to the parties the opportunity to frame the collective bargaining agreement and to conduct the arbitration proceeding in such manner that a district court would find deferral appropriate.[30] This result, however, does detract substantially from the weight normally accorded the decision of an arbitrator by a federal court. In order to determine the propriety of this departure from the traditional approach to arbitration and to suggest the appropriateness of the *Rios* conditions for deferral, it is necessary to examine the nature of the rights conferred by Title VII and the comparative abilities of arbitration and judicial proceedings to protect those rights.

The Court of Appeals for the Fifth Circuit in its decisions in *Hutchings* and *Rios* acted on the premise that Title VII created rights and remedies separate and distinct from those afforded an aggrieved employee by the collective bargaining agreement. Two different rights are asserted in the arbitration and judicial proceedings—one contractual, the other statutory.[31] Viewed in this light, it is incorrect to characterize a Title VII action as an appeal from a prior arbitration award.[32] It is only when the employee's contractual and statutory rights coincide because of the inclusion of a provision in the collective bargaining agreement imposing upon the employer the obligations required of him by Title VII that it is possible to suggest that arbitration is an acceptable substitute for the judicial proceeding to which the employee is entitled by the terms of Title VII.

Moreover, even though an employee's contractual and statutory rights coincide, the remedies which the arbitrator may apply under the terms of the collective bargaining agreement may be limited. "The arbitrator . . . may consider himself constrained to apply the contract,

clear. Thus, the *Rios* court's qualification that its result "may be somewhat in line" with that of the Sixth Circuit was necessary.

30. It is obvious that the employer would seek to meet the conditions in order to reduce litigation costs resulting from having to defend in both forums. Moreover, if an employee were assured of fair treatment in the arbitration proceeding, he too would prefer to avoid a costly and time consuming court suit pursuant to Title VII. *See* Comment, *Dewey v. Reynolds Metals Co.: Labor Arbitration and Title VII*, 119 U. PA. L. REV. 684, 693 (1971).

31. *See* 10 DUQUESNE L. REV. 461, 466 (1972); 45 N.Y.U.L. REV. 1314, 1318 (1970).

32. *See* Comment, *Dewey v. Reynolds Metals Co.: Labor Arbitration and Title VII*, 119 U. PA. L. REV. 684 (1972).

and not give the types of remedies available under Title VII, even though the contract may contain an anti-discrimination provision." [33] A court in a Title VII action, however, may order affirmative action, such as reinstatement or hiring of employees with back pay, or it may enjoin the offender from further discriminatory conduct.[34]

In addition to establishing a right of the individual employee, Title VII manifests a strong public interest in the elimination of discrimination.[35] It would be possible for an arbitration award or grievance settlement to resolve the grievance of the individual employee, yet permit the employer to perpetuate a system of discrimination. The *Rios* court, in establishing the conditions which must be satisfied before a district court may defer to prior arbitration, recognized the nature of the interests which Congress sought to protect through Title VII. Thus, before deferring to prior arbitration, the district court must be satisfied that the contractual rights upon which the arbitrator based his decision coincided with the statutory rights guaranteed the employee by Title VII. Moreover, the decision of the arbitrator not only must have protected the private rights guaranteed by Title VII, but also must not have been violative of the "public policy which inheres in Title VII." [36]

However, beyond the possibility that the arbitration proceeding may not involve rights sufficiently similar to those guaranteed by Title VII, it is necessary to consider the possible inadequacies of the arbitration process to protect or enforce those rights.[37] Thus, for example, an arbitrator may not have "special training in law—let alone an expertise in the fast moving complexities of labor and civil rights law." [38] Furthermore, complete objectivity in arbitration might be difficult to achieve, especially in cases where both the union and the employer, the parties who select the arbitrator, are alleged to be guilty of discrimination.[39] In addition, arbitration hearings generally are informal;[40]

33. Hutchings v. United States Industries, Inc., 428 F.2d 303, 312 (5th Cir. 1970).

34. 42 U.S.C. § 2000e-5(g) (1970).

35. *See* Hebert & Reischel, *Title VII and the Multiple Approaches to Eliminating Employment Discrimination,* 46 N.Y.U.L. REV. 449, 467 (1971).

36. 467 F.2d at 58.

37. *See* Hebert & Reischel, *supra* note 35, at 469.

38. Gould, *Labor Arbitration of Grievances Involving Racial Discrimination,* 118 U. PA. L. REV. 40, 48 (1969).

39. *See* 44 N.Y.U.L. REV. 404, 409 (1969). Possible abuses of the union position as bargaining agent might include a refusal to include certain charges or to prosecute them to their fullest extent, such as was the case in *Newman.* There is also the possibility of settlement without the employee's consent. *Cf.* Vaca v. Sipes, 386 U.S. 171 (1967).

40. Lawyers, briefs, and transcripts of proceedings are present in less than half of

rules of evidence often are ignored, and witnesses often are not under oath.[41] The employee usually will be represented by a union official, who ordinarily is not an attorney. Generally, there is no written opinion setting forth the reasoning used to arrive at the decision.[42] Under such circumstances, the employee may be denied the procedural protection afforded him in a Title VII action.

The conditions enunciated by the *Rios* court which must be met before a district court may defer to a prior arbitration award, however, evidence a concern with the possible inadequacies of the arbitration process to protect the rights guaranteed by Title VII. Thus, apart from a broad requirement that "the arbitration proceeding was fair and regular and free of procedural infirmities," a district court, before deferring, must be satisfied that "the evidence presented at the arbitral hearing dealt adequately with all factual issues. . . ." [43] In order to satisfy this requirement, together with the condition that the factual issues before the court must be identical to those actually decided by the arbitrator, it will be almost mandatory that there be a relatively complete record of the arbitration proceeding.

There is no evidence that Congress intended that the remedies established by Title VII should be affected by the existence of other remedies available to an employee under a collective bargaining agreement or under state or federal law.[44] Consistent with this view, the Court of Appeals for the Fifth Circuit has relied on the strong national policy manifested by Title VII against discriminatory employment practices in holding that the remedies of Title VII are supplemental to other remedies, and that the federal courts, in all instances, are the final arbiters of Title VII rights. Moreover, without detracting from the policies inherent in Title VII, the court has accommodated the national labor policy favoring private settlement of labor disputes through arbitration by enumerating conditions, appropriately stringent, under which a

all arbitrations. Lev & Fishman, *Suggestions to Management: Arbitration v. The Labor Board,* 10 B.C. IND. & COM. L. REV. 763, 768 (1969). *Cf.* Dunau, *Three Problems in Labor Arbitration,* 55 VA. L. REV. 427, 437 (1969).

41. *Cf.* Lev & Fishman, *supra* note 40.

42. *See* Meltzer, *Ruminations About Ideology, Law, and Labor Arbitration,* 34 U. CHI. L. REV. 545, 555 (1967).

43. 467 F.2d at 58.

44. *See* Hebert & Reischel, *supra* note 35, at 459. *See generally* Vaas, *Title VII: Legislative History,* 7 B.C. IND. & COM. L. REV. 431 (1966); Blumrosen, *Administrative Creativity: The First Year of the Equal Employment Opportunity Commission,* 38 GEO. WASH. L. REV. 695 (1970).

federal court properly may defer to the decision of an arbitrator. The result permits the continued viability of arbitration while guaranteeing that the private and public rights created by Title VII will receive adequate protection.