In the

Supreme Court of the United States

HARRELL ALEXANDER, SR.,

Petitioner,

vs

GARDNER-DENVER COMPANY,

Respondent.

No. 72-5847

Washington, D.C.

November 5, 1973

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v.	:	No. 72-5847
GARDNER-DENVER COMPANY, Respondent.	:	

Washington, D. C.
Monday, November 5, 1973

The above-entitled matter came on for argument at 10:06 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

PAUL J. SPIEGELMAN, ESQ., Specter & Spiegelman, P. O. Box 4887, Washington, D. C. 20008; for the Petitioner.

LAWRENCE G. WALLACE, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; as amicus curiae, supporting petitioner.

ROBERT G. GOOD, ESQ., 733 Guaranty Bank Building, 817 - 17th Street, Denver, Colorado 80202; For the Respondent.

C O N T E N T S

* * *

P R O C E E D I N G S

MR. CHIEF JUSTICE: Harrell Alexander v. Gardner-Denver Company.

Mr. Spiegelman, you may proceed whenever you are ready.

ORAL ARGUMENT OF PAUL J. SPIEGELMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SPIEGELMAN: Mr. Chief Justice, and may it please the Court: My name is Paul Spiegelman, and I am counsel for the petitioner in this case.

The questions presented today are, we believe, two. First, dies the submission of a grievance to arbitration pursuant to a collective bargaining agreement deprive the federal courst of power to hear a statutory claim of racial discrimination based on the same incident which gave rise to the grievance.

Second, under what circumstances if any is it appropriate for a federal court to refuse to hear a claim of racial discrimination on its merits because the person raising the claim has pursued a contractual remedy which arose out of the same incident.

Petitioner is a black man who was hired by respondent in May of 1966. He bid on and was awarded a drill trainee job in June of 1968. He remained in that job until he was discharged on September 29, 1969, allegedly because he had

accumulated excessive scrap.

Petitioner filed a grievance on October 1, 1969. That grievance stated, "I feel that I have been unjustly discharged and ask that I be reinstated with full seniority and pay." That was the entire grievance. No mention was made of the issue of race.

The grievance was apparently brought under section 6(a) of the Collective Bargaining Agreement which provided that "No employee will be discharged, suspended or given written notice except for just cause."

The contract also contains an anti-discrimination clause which provides that the company and the union agree that there shall be no discrimination against any employee on account of race, color, religion, sex, national origin or ancestry."

Article 23 of the Collective Bargaining Agreement sets forth the procedures for handling grievances. Essentially it sets up a five-step procedure, the first four steps involving negotiation between the company and the union, and that failing to resolve the issue, a fifth step of arbitration.

Arbitration may be invoked by the union by written notice if the first four steps fail. The Collective Bargaining Agreement has no provision whatsoever for the individual to force arbitration, and there is no provision specifically indicating that anyone can withdraw a grievance from arbitration once it has been referred to arbitration by the union.

The only mention of any withdrawal or implication of withdrawal is section 6(f) of Article 23, which provides that the company may convert a discharge into suspension if the union agrees at any time prior to arbitration.

The procedures also provide that failure to meet the time limits prescribed therein will automatically make the disciplinary action taken valid. And those are the exact words of the Collective Bargaining Agreement.

The agreement further provides that the union and the company select the arbitrator. No provision is made for participation of the employee in the selection of the arbitrator. The employee is not under the agreement even technically a party to the arbitration.

The arbitrator's power is described in section 5, step five. It provides that the arbitrator shall not amend, take away, add to or change any of the provisions of this agreement, and that the arbitrator's decision must be based solely upon an interpretation of the agreement.

In this case, the company denied petitioner's grievance in the first four steps. Prior to the grievance being referred to arbitration, the petitioner filed a charge of racial discrimination with the Colorado Civil Rights Commission. And some two weeks prior to the actual arbitration hearing, the Federal Equal Employment Opportunity Commission assumed jurisdiction of its charge. On depositions, which are a part of the

record in this case, the petitioner --

Q I don't want to anticipate your agreement, but is there going to be an issue here whether in fact the issue of racial discrimination was decided by the arbitrator?

MR. SPIEGELMAN: We certainly believe that the issue of racial discrimination was not decided by the arbitrator.

Q Was not.

Q Perhaps I am under a misapprehension, but did the District Court find that it was?

MR. SPIEGELMAN: It specifically found that it did not. It indicated that the issue was raised in arbitration, but the arbitrator's award was silent as to the issue of racial discrimination. There was no mention made whatever of that, and the District Court's opinion did in fact note that.

Q But it did find that the issue was raised before that?

MR. SPIEGELMAN: Yes, sir.

Q Have you questioned that finding?

MR. SPIEGELMAN: Well, the record is not the best on that issue. I say that what the record does state is this: First, petitioner indicated the only indication of it is from the deposition of petitioner, which --

Q That is a year later?

MR. SPIEGELMAN: Which was a year later, yes. The statement of petitioner -- and that seems to be what the record

contains on this issue -- two things. One he indicated that a letter that he had written to the union was read verbatim into the transcript. That letter stated that -- and I am quoting -- "I am knowledgeable that in the same plant others have scrapped an equal amount and sometimes in excess, but by all logical reasoning I, Harrell Alexander, have been the target of preferential discriminatory treatment."

Now, the deposition indicates that Mr. Alexander a year later indicated he felt that was raising the race issue. The words, of course, did not mention the issue of race.

Q And I gather the artbirator's opinion -- that was the law school dean, wasn't it?

MR. SPIEGELMAN: Yes, sir.

Q -- makes no reference that the grievance involved racial discrimination?

MR. SPIEGELMAN: None whatever. I would point out, though, that there is in the --

Q Did he testify later at all?

MR. SPIEGELMAN: In the arbitration hearing?

Q No. Did the arbitrator testify anywhere as to this --

MR. SPIEGELMAN: No, sir. This was a summary judgment motion and it was decided on papers. I point out that the record does indicate that there was the following question and answer with respect to what happened in the deposition:

"Question: When you took the stand, did you try and water down the race issue also?"

This was a question of petitioner. He said:

"No, I didn't. I held it up and at the time I told them that I had already filed with the city commission because I could not rely on the union."

That later position makes clear that the city commission referred it to the Colorado Civil Rights Commission.

Q Had he in fact before the arbitration hearing referred this discrimination claim to the Colorado city commission?

MR. SPIEGELMAN: Yes, sir. In fact, the EEOC had this charge before the arbitrator decided.

Q There is not one word of "race" in his letter at all?

MR. SPIEGELMAN: Not one "race," unless you take preferential discriminatory treatment to mean race.

Q How in the world could you do that?

MR. SPIEGELMAN: Well, all I can say is that petitioner in his deposition did indicate that that was what --

Q But he didn't say "I was discriminated against because of race.

MR. SPIEGELMAN: No, sir.

Q He might have been discriminated against because of the way he cut his hair.

MR. SPIEGELMAN: Or his union membership or --

Q There is not a word of "race" in the arbitrator's finding. He didn't mention "race" once.

MR. SPIEGELMAN: That is correct.

Q Well, how under the sun can we assume race was before the arbitration committee?

MR. SPIEGELMAN: Well, I don't believe that the arbitrator decided it. I think the argument is that, since it was raised before the arbitrator --

Q Well, as I understand, only evidence that it was raised was this letter.

MR. SPIEGELMAN: Well, the petitioner's question and answer, which I gave you, the statement by petitioner that he said that he had filed with the Colorado Civil Rights Commission, was apparently made before the arbitrator.

Q But he didn't say "I raised it there," he said "I raised it over in the other place."

MR. SPIEGELMAN: I would agree with that.

Q Well, then, where do you suppose the Court of Appeals got the idea that --

MR. SPIEGELMAN: Well --

Q What was the basis for its finding? I am now reading from its opinion: "The issue of raciall motivated discriminatory employment practices was presented to the arbitrator and rejected."

MR. SPIEGELMAN: I don't know on what basis, unless it means by rejected that it refused to consider it. But it did not -- there is nothing in this record to indicate a rejection of the issue of race.

Q But surely you concede that the arbitrator did find that the discharge was for just cause, isn't that right?

MR. SPIEGELMAN: Yes, sir.

Q Well now, wouldn't that mean that he did find that it wasn't by reason of racial discrimination --

MR. SPIEGELMAN: No.

Q -- because that was a provision of the Collective Bargaining Agreement, as you told us?

MR. SPIEGELMAN: No, I don't think so, for this reason: The arbitrator did not touch on the issue that petitioner raised in his letter. The specific issue the petitioner raised in his letter was that others had been performing the same amount of scrap and that they had not been discharged. Now, that is an issue which, if there is a racial component, that is if whites who were performing that way were not discharge and he was, that there could have been a just cause for dismissal, but that if the practice was not to dismiss for such conduct then even though there was just cause, there could have been a racially discriminatory action in this case.

Q Well, there could have been just cause under a Collective Bargaining Agreement that provides that there cannot

be any discrimination on the basis of race if there were racial discrimination. Isn't that correct?

MR. SPIEGELMAN: Well, the arbitrator -- that is correct -- the arbitrator limited his decision very carefully to the facts that were presented to him. I note that on another issue, he was offered the statement from the union that it was company practice to send the trainee who performed poorly back to the position from which he transferred, and the arbitrator said he hadn't been given any evidence on that. There is nothing in this record to indicate that he had been given any evidence about the comparative treatment of people who were performing poorly in the drill trainee jobs, so I think it would stand on the same status.

Q Well, the issues of this case, I gather, go perhaps considerably beyond the specific facts of this particular arbitration.

Q Wouldn't your argument be the same even if they hadn't been raised?

MR. SPIEGELMAN: I believe that -- our argument is that whether or not the issue is rased, arbitration should not prevent the right to sue in federal court. Now, the District Court's decision in this case relied on the sole ground that petitioner's pursuit of his contractual remedies through arbitration barred his action under Title VII. And the court purported to rely on Dewey v. Reynolds Metals, which has been

before this Court and was affirmed by an equally divided court.

The Dewey rationale is that the submission of a grievance to arbitration prior to submitting the grievance to -- submitting a claim to the EEOC, constitutes an election against a Title VII process.

The Court of Appeals affirmed in the memorandum opinion which essentially relied on the District Court's opinion. Now, we believe that as an initial matter it is clear that the federal courts have plenary power over charges of racial discrimination, regardless of the arbitration process. Thus, if the court, the federal courts are to refrain from hearing a case, it is not because of their lack of jurisdiction but because of some other reason made by the court.

Now, the theory apparently offered under Dewey and that which apparently the District Court relies on is a theory of waiver. I submit that in this case and in all cases thus far where grievances have been filed, it is not proper to talk in terms of waiver.

First let's take the facts of this case. Petitioner manifested a direct intent not to wait. He filed charges with the appropriate federal authorities, he informed the arbitrator that he had filed those charges, he informed the arbitrator that he thought his representation in this case was inadequate, and, in short, he did everything he could to follow his federal rights. To talk in terms of an expressed waiver in this case

I don't think would be proper.

Now, can we have an implied waiver in this case? Again, I don't think that would be proper. We are talking about a fundamental civil right here, and we are talking about a layman making a decision, and I don't think that it is the custom to imply waivers of such important rights.

I would add that in the circumstances of this -- of grievance proceedings in general, we not only have the fact that the layman is making the decision, but he is making it under a very, very short time limit. That is, under this very contract in this case, he will automatically make the discriminatory discharge valid if he fails to grieve it in this contract in five days.

Q Mr. Spiegelman, are you raising another issue in the case of ineffective assistance? And, if so, do you think that could be attributed to the employer, the consequences of ineffective assistance?

MR. SPIEGELMAN: Well, I don't know --

Q Or is that an action, is that a proceeding against the union?

MR. SPIEGELMAN: Well, no, I don't think that the issue is necessarily ineffective assistance. The labor law makes it quite clear that the union has a wide variety of actions it can take. It must merely not act in bad faith in terms of its duty of fair representation under the labor law,

must not be arbitrary or in bad faith.

Now, the union and the arbitration processes is one that contemplates that in fact the union doesn't hire lawyers for these arbitration processes. Very often, the arbitration is conducted by a union arbitration man who has had no legal training. So the process itself is one that I point out is designed for the benefit of the employer as well as the union. The employer, regardless of the outcome of any grievance, gets labor peace by a no-strike clause, which is the quid pro quo through his arbitration agreement. So that no matter what happens in the grievance, whether the employer wins or loses, he has already got what he bargained for, and that is that the union will not strike over this issue, and he can enjoin such strike under Boys Market if the union does strike over such an issue.

So the employer gets what he bargains for the minute the case goes to arbitration. Now, for these reasons, we think the waiver theory is inadequate. The other theory advanced by courts and not relied upon by the District Court in this case was the theory of deferral. The deferral theory is that the arbitrator has adequately dealt with the issues and it will save judicial time and energy not to deal with these questions.

We point out that the Civil Rights Act embodies a fundamental commitment on the part of this country to end racial discrimination, and that mere judicial economy is not an over-

riding consideration as against this important a policy. Nonetheless, we believe that deferral to the arbitrator's award is not an appropriate way even in terms of judicial economy to deal with important civil rights.

Now, in doing this, I want to state very clearly that we do not need to denegrate the arbitration process as an efficient way of dealing with normal labor disputes. The arbitration process is well embodied in the labor law and is working efficiently to deal with fast, speedy, efficient relief of particular law of the shop kind of questions which are characteristically raised.

We do believe, however, that there are things about the arbitration process in racial cases which make it inappropriate to use it as a method for -- as a process to which to defer.

Q Well, this is a racial case, and part of the argument, the argument that I think you are about to make, and that is made in your brief is confined to the racial situation. Surely, the principle that you are espousing cannot be confined to racial discrimination, can it?

MR. SPIEGELMAN: No, sir.

Q It also includes discrimination based on sex, for example. And I suppose that -- how many are there, 25 million employees in the United States covered by collective bargaining agreements, something like that, over 90 percent of

them have arbitration provisions of the agreement?

MR. SPIEGELMAN: Yes, sir.

Q And over half of the grievances have to do with discharge, is that right? I think I read that somewhere in the briefs.

MR. SPIEGELMAN: Yes, in respondents.

Q And I suppose most if not all employees are either men or women, aren't they?

MR. SPIEGELMAN: Yes, sir.

Q And so wouldn't any employee who is discharged have a discrimination claim, that he was discharged because he was a man or that he was discharged because he was a woman.

MR. SPIEGELMAN: If in fact he has such a claim --

Q If she was discharged because she was a woman.

MR. SPIEGELMAN: If he or she has such a claim, they can raise such a claim. In order to bring such a case into the federal court --

Q We are talking at least potentially now about just a little bit of added burden on the courts. We are talking about a tremendous dual trial of these things, aren't we?

MR. SPIEGELMAN: I don't think so.

Q Potentially?

MR. SPIEGELMAN: Let me say first of all I think that the grievance process may in fact screen out a lot of these cases, that is they will decide a large number --

Q Well, prior to arbitration, you mean?

MR. SPIEGELMAN: Prior to arbitration and in arbitration. Often the employee wants -- all the employee wants is someone to -- someone neutral to determine this issue. The arbitrator's finding may in fact satisfy him, win or lose. Now, if he does -- if the employee does choose to follow the EEOC route, I point out that the person still has to bring the case to court, he has got to find the lawyer or be appointed counsel to bring a case to court.

Also, prior to anything getting to court, he has to go through the whole EEOC process, which is a rather time-consuming process, and also offers opportunities for conciliation by the federal authorities.

Q You referred to screening out a good many of these potential claims, they would be screened out in the grievance, and then you said also in the arbitration. But will they be screened out in the arbitration in cases where the employer prevails on your theory of this case?

MR. SPIEGELMAN: I believe they will where the employee feels that the employee has gotten a fair shake. Now, I understand that it is possible, if the employee --

Q You mean the option is to be left exclusively with the employee, then, whether he will have another bite at the apple?

MR. SPIEGELMAN: Yes, I think that even respondent in

this case has indicated that regardless of what the federal court's rule is, the employee would be able to file charges -- that is at least the respondent's position -- even if he lost the arbitration, that is the EEOC would process his claim and the EEOC could in fact go forward in this. So even under that circumstance, it would not prevent the case from getting to EEOC. The question is whether these claims in fact would come to court, will lawyers take these claims. If they are doubtful, I doubt that they will. It is tough enough to get a lawyer to handle a civil rights case that is meritorious. It seems unlikely that these individual claims will in fact be those that are largely burdening the courts.

Now, I would say that there are overriding considerations here though, and those are that the process of arbitration owes its existence to a collective bargaining agreement which itself may violate Title VII. Therefore, the union representative there has a built-in conflict of interest because the union itself may be liable on these very charges. This creates also problems because the employer and the union, not the individual, choose the arbitrator. We must remember that the union's interest acting in good faith still involve a variety of trade-offs and choices which it must make and it is representing the majority members of that union under the labor law, and perfectly good faith decisions of the union may in fact disadvantage a Title VII plaintiff.

Now, I would finally add that the arbitration process is simply not equipped to deal with the subtle issues of discrimination. This Court recently, in McDonnell Douglas had occasion to deal with the difficult questions that arise in proving even an individual case of discrimination.

For example, the Court indicated that the statistical data is relevant to determining such a claim. Now, without a discovery process -- and it is normal that there is not a discovery process -- there is no opportunity to bring this kind of evidence before the arbitrator. Also there is no cross-examination in the arbitration process. And having tried a number of Title VII cases, the fact is that the cross-examination of the company witnesses is one of the key bases for proving a case of discrimination.

For these reasons, we believe that deferral is not appropriate for Title VII cases. We would also point out that on the record in this case, the arbitrator didn't decide the race issue. He didn't say anything about it. He specifically said there was no evidence dealing with that. So I think that deferral in any case is improper in this case.

There is also the issue of the effect of the deferral on -- of allowing deferral on the grievance process itself, will discourage people from using the grievance process and in fact channel all these claims into the federal court because people are afraid of getting an arbitrator who is not sensitive

to these claims, rather than the federal court. For these reasons, we think that the decision below was improper.

With the Court's permission, I will reserve --

Q Well, are you going to deal at all, or is government counsel, with the question of, if you are right in your basic claim, that an arbitration does not wholly bar a law suit under the federal statute, what effect if any should a court give to an arbitration award?

MR. SPIEGELMAN: Well, I am anticipating that the government is going to deal with that question.

Q All right.

MR. SPIEGELMAN: Our position though is that it should use it as evidence and nothing more.

Q Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Wallace?

ORAL ARGUMENT OF LAWRENCE G. WALLACE, ESQ.,

AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. WALLACE: Mr. Chief Justice, Mr. Justice Douglas, and may it please the Court:

In the spring of 1971, when this issue was before the Court in Dewey v. Reynolds Metals Company, Solicitor General Griswold, Assistant Attorney General Leonard and General Counsel Hebert, of the Equal Employment Opportunity Commission, filed a brief and the government participated in the oral argument. That case resulted in a four-to-four division in the

Court. It involved an additional troublesome issue not present in this case.

Now, with new incumbents in all three of those offices, the government undertook a complete restudy of this question in light of the experience gained in cases decided since that time, and in light of the scholarly commentary which has been published on the Dewey case. Practically all of it, I should add, critical of the reasoning of the Court of Appeals in Dewey. And the conclusions we have reached, in the brief filed with the Court in the present case, are the same in all respects as the position that the government took in the Dewey case.

Because of the widespread availability of grievance procedures, pointed out by Mr. Justice Stewart, under collective bargaining agreements, the question presented in this case seems to us of great public interest. Its answer may well determine whether the statutory rights against discrimination conferred by Congress in Title VII, as interpreted by the courts and by the Equal Employment Opportunity Commission, whether those rights will be widely observed and even-handedly enforced or whether those rights will in substantial measure be superseded by the so-called law of the shop which is implemented by arbitrators who interpret and apply the terms of various private collective bargaining agreements.

Now, the position we take on this issue is the position that has been taken by a majority of the courts of appeals

that have addressed it. The Courts of Appeals for the Fifth, Seventh and Ninth Circuits have all held that the invocation of the arbitration process of the grievance process and its use does not bar suit under Title VII. This has proved to be workable in those circuits. They are not inundated with a large number of law suits seeking in another form to relitigate so-called the questions that have been decided in the arbitration process.

Indeed, the same question could be raised about some of the duplications of remedies that Congress specifically provided for in Title VII, where it said that the remedies available again to millions of employees -- I don't have the figures -- before state and local fair employment practices commissions should be preserved but should not bar the federal remedy, if they prove unavailing.

This is the approach that Congress used. And indeed our starting point in this case is the federal statute itself, which confers a right of individual access to the courts for its enforcement and specifies in detail the prerequisites for that right of access. Nowhere does the statute suggest that the right to a judicial determination is waived by the availability or by the use of the grievance procedure under a collective agreement. The whole background of the legislative history was that Congress meant to preserve existing remedies, such as remedies that might exist before the National Labor

Relations Board, which were specifically referred to in the legislative history, and remedies in other forms. And to add to those the newly created rights and remedies as specifically provided for --

Q Do you think the federal statute makes unenforceable the promise to arbitrate a grievance involving a racial claim?

MR. WALLACE: I don't believe it makes that unenforceable at all.

Q Well, so the employer, if he is sued in court, you think the employer can -- even if he has to go forward with the court suit, can get an order to arbitrate the claim?

MR. WALLACE: With respect to the contract issue, that is right, Your Honor. All the arbitrator decides is the issue of the contract.

Q And if the arbitrator decides some facts, such as he was not fired because he was a Negro but because he had too much scrap, has that any significance at all in the court suit?

MR. WALLACE: Well, this is the most troublesome issue, and we concluded that it should not have any significance in the court suit. It has great significance in the arbitration process. It ends the issue under the agreement, except in a very limited judicial review that there is of the arbitration award, and therefore it ends the employer's dispute with the

union, protects him against work stoppages that the whole grievance process is set up to protect him against, and this is the great value of the arbitration system both to the unions and to the employers.

Q You say the contract is enforceable, the promise to arbitrate is enforceable, but it is just a -- just doesn't have any significance if the employee wants to pursue his legal remedies in court, it does not have any significance for the court --

MR. WALLACE: To the Title VII issue, because Congress specified another way of determining Title VII claims, statutory claims of individuals that don't threaten work stoppages the way contract claims do, and --

Q Well, now why would you think that that was -- you apparently think that courts should take a different approach where a contract provides for arbitrating racial claims than where a contract provides for arbitrating disputes that might be unfair labor practices, even though Congress has provided another way also of settling unfair labor practices.

MR. WALLACE: That is correct, but that is --

Q The courts certainly will not entertain arbitrable disputes where they might be unfair labor practices, if there is a promise to arbitrate them.

MR. WALLACE: Disputes of that kind are basically disputes between the workers as a collectivity, the union that is

representing them and the employer. The union is a majoritarian institution and is, like the employer, concerned about protecting most of the workers in the shop from unnecessary disruptions of the work process, and these disputes are closely tied in with the law of the shop and the expertise of arbitrators.

Here Congress decided that rights of individual members of minority groups should be protected, rights that had proved not to be adequately protected in the majoritarian processes that prevailed in the collective bargaining process and in the adjustment of grievances. Indeed, Congress had to specify that these rights would be available against unions as well as against employers.

Q Not only minority groups, it includes discrimination, as I said earlier, on the basis of sex and surely one sex or the other must be in the majority in this country. I think it is the women, isn't it?

MR. WALLACE: The majority in the country but not in the work force.

Q But in a plant they might be in the majority.

MR. WALLACE: They might be, and it is rather unlikely that their rights won't be respected in a situation in which they are in the majority.

Q But their demands might not be.

MR. WALLACE: That is correct, Your Honor. And if a member of one of these groups can show that his statutory rights

were violated, Congress has specified that he should have a remedy.

Q Well, he doesn't need to show, he just needs to -- in order to file a complaint, he merely needs to allege, doesn't he?

MR. WALLACE: That is true in any field of law.

Q Exactly.

MR. WALLACE: It is true with respect to statutory or constitutional rights.

Q Well, you seem to make a sharp distinction, both in your brief and in your arguments, between rights arising out of the contract and rights arising out of the statute. But is it not true that this contract provides for protection against discriminatory action against employees?

MR. WALLACE: There is a simple provision in the contract relating to discrimination. Whether that is coextensive with the law under Title VII is highly questionable and is an issue which the arbitrator had no occasion to address and which ordinarily the arbitrator has no occasion to address. The law of --

Q If the arbitrator in a given case addresses himself to the claim of racial discrimination and decides it adversely to the employer, the man is reinstated, is he not?

MR. WALLACE: Yes, he is, as a matter of his contract rights.

Q Yes.

MR. WALLACE: He is reinstated as a matter of his contract rights --

Q But he has all the remedies that he can get or not?

MR. WALLACE: That depends on the terms of the collective agreement, because the arbitrator's powers are drawn entirely from the collective agreement.

Q Well, in this case he --

MR. WALLACE: And the questions of back pay and so forth that might be available under Title VII are a question of the intent of the parties to the collective agreement.

Q If he had expressly raised and vigorously pressed the claim of racial discrimination in the arbitration, would you think that the scope of the remedy would have been any less than under the statute?

MR. WALLACE: I have no reason to think it would in this case, but I couldn't know until the arbitrator expressed himself in what his powers are under the agreement --

Q The normal remedy would be reinstatement and back pay, wouldn't it?

MR. WALLACE: That would be the normal remedy, Your Honor.

Q Well, I take it, Mr. Wallace, the government's position must be that even if he prevails on a claim of racial

discrimination in arbitration, he would still have a right to pursue his Title VII claim.

MR. WALLACE: We take the position that double recovery should not be allowed.

Q That may be but he would still be permitted to pursue a statutory --

MR. WALLACE: That is our position.

Q He wouldn't have any damages.

MR. WALLACE: It may be --

Q He wouldn't have any damages.

MR. WALLACE: He wouldn't have any damages. It may be that would be reason why he would want to secure an injunction, which he has a right to under the statute, if he can prove that he is entitled to it.

Q I see. I understand.

Q There might be a different measure of damages.

MR. WALLACE: That's right, there might be a different measure of damage.

Q Incidentally, Mr. Wallace, did the legislative history -- I don't notice in your brief any reference to this -- address itself particularly to the question of --

MR. WALLACE: Not of the grievance procedures or of arbitration, no, it was not mentioned in the legislative history. It did -- there was reference to proceedings that may be available under the Railway Labor Act or the National Labor Relations

Act. Senator Clark mentioned on the floor that those would be preserved, including proceedings before the National Labor Relations Board. We do refer to that excerpt from the legislative history. Here we can deal only by analogy with the fact that the statute on its face specifies that numerous remedies are to be preserved and the new remedies are to be added to them and --

Q Incidentally, does Arguelles decide this case?

MR. WALLACE: Well, we think Arguelles is very persuasive authority. To us this case is in many respects much stronger than Arguelles because here Congress was familiar with the wide use of arbitration which was not true when the Arguelles statute was passed.

Q Yes, but Arguelles in Arguelles, he went directly into court, he hadn't gone to arbitration.

MR. WALLACE: That is correct.

Q And the court itself realizes that that is -- that Arguelles made a substantial difference. The court indicated that he could go to arbitration if he wanted to.

MR. WALLACE: Well, we think it would be contrary to the encouragement of the arbitration process that is an important part of the federal labor policy to put a premium on not invoking the grievance procedures. We don't think that should make a difference.

Q Mr. Wallace, didn't Mr. Justice Harlan make the

fifth vote in the case?

MR. WALLACE: Yes, he did.

Q And he specifically said that he has a choice, and he said the least desirable would be permitting or requiring pursuit in both courts. So Arguelles might be a very substantial authority for deciding this case against you.

MR. WALLACE: Well, the Arguelles case was one in which the statutory right was closely interwoven with the rights under the contract and with interpretation of the contract which was a major point made in your dissenting opinion in the case, Mr. Justice.

Q Well, that is not quite responsive to the issue because Mr. Justice Harlan, I would think, would have come out quite the other way if there had been a resort to arbitration and the madn had lost.

MR. WALLACE: Well, that wasn't the issue decided by the Court. On the other hand, in McKinney v. Missouri-Kansas-Texas Railroad, in 357 United States, when Mr. Hustice Frankfurter was writing for a court that was unanimous on this issue with respect to the Universal Military Training and Service Act, he said that it would be inconsistent with the purposes of that statute to insist that the veterans first exhaust other possibly lengthy and doubtful procedures. The clear implication being that the statutory remedy would be available to him even if he had first exhausted the other

remedies; so that to the extent a majority of the Court has commented on this issue, I think a majority of the Court has commented consistently with our position.

Q Well, in McKinney was there a clause in the contract which basically gave him the same rights as the Veterans Preference Act?

MR. WALLACE: I don't think there is in this case either, Your Honor.

Q Well, is that a negative implication, that you are saying no, the answer to my question is no?

MR. WALLACE: I don't know the answer there. I don't believe the collective agreement is recited in the opinion. But the Court is familiar, from cases like Griggs and McDonnell Douglas, with the great complexity of the law under Title VII, and to say that this can be equated with a single sentence in a collective bargaining agreement that will be applied by arbitrators who may or may not be lawyers, with representation by union representatives who may or may not be lawyers, may or may not be familiar with the complexities of the case law and how to develop one of these cases, which requires usually statistical proof, the processes of discovery and the various other court procedures that make such proof credible and meaningful, such as cross-examination, et cetera, I think would be doing a great disservice to the effectuation of Title VII of the 1964 Civil Rights Act.

My time is expired.

MR. CHIEF JUSTICE BURGER: Mr. Good?

ORAL ARGUMENT OF ROBERT G. GOOD, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GOOD: Mr. Chief Justice, and may it please the Court: I am Robert Good, from Denver, Colorado, representing the respondent here, Gardner-Denver Company.

Prior to submitting the company's legal position, I would like to highlight a few of the facts involving Alexander's case. He had been twice warned prior to his discharge. On the first of those occasions, the company volunteered 80 extra hours of instruction and study to Mr. Alexander. On the second of those occasions, he was disciplinarily suspended for two days. And, of course, on the third occasion he was fired.

Immediately upon his firing, he and the union invoked the four-step grievance and arbitration procedure. Early in those steps, he submitted to the union his letter which in part accused the company of discriminatory treatment. That letter was read to the arbitrator at the hearing.

The contract proscribed employment discrimination and also proscribed any discharge not based on just cause. It is true that Alexander filed with the state commission prior to the arbitration hearing, and the EEOC assumed jurisdiction also prior to the arbitration hearing. It is also true, however, that seven months after the arbitrator's award, the EEOC found

no probable cause to believe that Gardner-Denver Company had violated the act relative to Mr. Alexander's discharge.

Q Incidentally, was any reference in either of the state proceedings -- I gather the company was party, of course, both to the state proceeding and the EEOC proceeding?

MR. GOOD: This is true.

Q In either did the company make reference to the pendency of the arbitration?

MR. GOOD: It is difficult to answer that, Mr. Justice. In the state proceedings, they were terminated without explanation. And the Colorado practice is, they could very well be, explanations having nothing to do with an indication of guilt or innocence -- caseload, for instance.

EEOC assumed jurisdiction, and so we can't tell anything from the state proceedings. In the federal proceedings, the company did submit, although this is not in the appendix, did submit the arbitration award in the investigation.

Q And was the EEOC determination of no probable cause made in the light of that submission?

MR. GOOD: We do not know, Mr. Justice. Incidentally, some concern was raised here that the issue of race was not before the arbitrator. If I may briefly direct the Court's attention to some of the testimony of Mr. Alexander in that deposition -- this is contained at page 13 of the appendix -- a question of Mr. Alexander: "Now, at the arbitration, who

was it that raised the issue of race?

"A Mr. Bert."

Mr. Bert was his union representative.

"Q How did he raise that?

"A By the letter that I wrote him, explaining my position and what I had discovered."

Q Is that the same letter that is in the appendix?

MR. GOOD: I beg your pardon, Mr. Justice?

Q Is that the same letter that is in the appendix?

MR. GOOD: This is the letter that is in the appendix, yes, sir.

Q And what in that letter says race?

MR. GOOD: Nothing specifically says race. There is an allusion to preferential discriminatory treatment, and Mr. Alexander --

Q That means race?

MR. GOOD: I beg your pardon?

Q Does that mean race?

MR. GOOD: It does in the context of this case.

Q Well, when do you know in the context of these cases that a Negro got preferential treatment?

MR. GOOD: Would you repeat the question, please?

Q Where in the interest of cases like this can you name me where a Negro got preferential treatment?

MR. GOOD: Well, as you will notice from a review of

this particular letter, it was a joint draft between his pastor and himself, and you will notice that it is not in the highest of art form. The language selected, of course, is clearly layman's language. A review of that letter in several instances shows that.

Q But do you think that letter gives a basis for a claim of racial discrimination honestly?

MR. GOOD: Yes, sir, when combined with Mr. Alexander's later description when he --

Q Well, do you mind if I don't?

MR. GOOD. Not at all, sir. Incidentally, in the lower court, the employer moved, under Rule 56, on a motion for summary judgment, alleging that race was before the arbitrator and it ought not be relitigated in District Court. Interestingly enough, Alexander in the lower court never did deny that race was before the arbitrator. And, of course, as you know, under Rule 56 he can come forward with counter-affidavits or other evidence to indicate that there truly is a question of fact. He came forward with no such statement nor any statement that the arbitration proceedings were not fair and regular.

Q I gather that his position is that if at all was, that it had been there expressly, and that if it had been decided against him, nevertheless he still has the statutory claim. That is basically his position, isn't it?

MR. GOOD: Yes, sir.

Q I suppose that is the one that you have to address, isn't it?

MR. GOOD: Yes, sir.

Q Well, that is a position he has to take.

MR. GOOD: Indeed he does. The company's position, simply stated, is that an employee having statutory claim cannot be required to submit his claim to the arbitration process. He may, however, do so voluntarily if the collective bargaining agreement gives the arbitrator jurisdiction over that claim, and when he does so he must be bound, except to the extent that considering the overriding public policy considerations in the Civil Rights Act, the District Court function must be that of an overview of the arbitration, ex post facto, that is, after the arbitration. And when the Title VII is filed, the District Court should review it to determine first if the statutory issue was before the arbitrator; second, did the contract give the arbitrator jurisdiction over it; and, third, of course, did the final opinion in the award of the arbitrator offend any of the underlying policies in the Act.

If the answer is appropriate in each of those instances, deferral ought be granted.

Q This does mean that in each instance under your submission the District Court has the duty to make that much of a review?

MR. GOOD: Yes, Mr. Justice.

Q You don't at all say that the fact of arbitration bars access to the federal court under the statute?

MR. GOOD: That is correct. We say the court maintains the power --

Q And the duty to give at least that much of a review --

MR. GOOD: To give an overview.

Q -- and if the court finds that none of those conditions is met, then I gather you would say that it is the court's duty then to proceed to consider the claim under the statute.

MR. GOOD: Yes, indeed, despite the provisions of section 301 and Steelworkers trilogy because of the overriding public interest in the matter.

Q Yes, that's right.

Q Mr. Good, at the appendix page 42, where Judge Winner's opinion is found, where he is quoting from the Dewey language, it seems -- where he says, the paragraph beginning "Faced with this dichotomy of authority -- the second sentence -- "We hold that when an employee voluntarily submits a claim of discrimination to arbitration under a union contract grievance procedure -- a submission which is binding on the employer no matter what the result -- the employee is bound by the arbitration award just as is the employer." I think it would be fairly easy to read that as indicating that Judge Winner

at least had not reviewed the arbitration award at all, but had simply treated himself as being bound by it rather categorically, which sounds inconsistent with what you say the District Court should do.

MR. GOOD: I think, Mr. Justice, one could lend a different reading to your quote there. The District Court, Judge Winner, in employing this language, could be inferring we have the power to permit Alexander to proceed, but in this case, since it was a voluntary submission, the award should be considered final and binding, and --

Q Well, that is exactly how I read it. But I thought you were conceding that something more was required of the District Court, not merely a voluntary submission but that the District Court should in effect review in kind of a clearly erroneous or substantial evidence on the record basis the arbitrator's award.

MR. GOOD: Yes, that is correct. And I am saying that the District Court here conformed to that policy. You will note for several pages the District Court examined the underlying public policy of the Civil Rights Act before reaching his decision, and so he certainly was attempting to examine the arbitrator's award in light of those policies. He had already found that race was an issue before the arbitrator under the Collective Bargaining Agreement. He then, as I read it, Mr. Justice, declines to exercise the power of the court to permit

Alexander to proceed.

Q I understood you to respond to Mr. Justice Stewart that the District Court had a duty to examine the arbitrator's process to see at least that the issue of racial discrimination had been treated. Is that your position?

MR. GOOD: No, sir, only to initially determine was the statutory right before the arbitrator, and --

Q What is the difference between that and what I said?

MR. GOOD: Perhaps none, Mr. Justice.

Q And whether it was decided, that's all.

MR. GOOD: Whether it was decided.

Q Not whether it was properly decided but whether it was before the arbitrator and whether it was decided.

MR. GOOD: Precisely.

Q Is that your position?

MR. GOOD: Yes, except --

Q And that is --

Q He has one more condition.

MR. GOOD: Except to the extent that the final opinion and award cannot offend the underlying policies of this public policy statement.

Q Well, I just don't understand what that -- what review then to determine that is made by the -- of the arbitrator's award is made by the District Judge?

MR. GOOD: Yes.

Q What does he do? What is his review? What standard does he apply to determine whether or not the arbitration award offends the underlying public policy of Title VII?

MR. GOOD: On a preliminary peek he determines, as here, that in the arbitrator's award did he do anything to offend the policies of the Act and --

Q That is any different, is it, than in the case of other arbitrations? An arbitrator is not supposed to decide a case before him contrary to the Labor Act, for example. He is supposed to be consistent with the law. And if a plaintiff comes in and alleges that the arbitrator has disregarded a provision of the labor law, he can get some review, can't he?

MR. GOOD: The only review in that particular case, Mr. Justice, would be exercised, I would think, by the NLRB, and that would not be a review, it would --

Q Well, I don't know, if somebody sues in court to enforce an arbitration award and the enforcement is resisted on the grounds the arbitrator had acted illegally, is the District Court just going to order compliance without answering that question? I just wonder if you are really saying an arbitration award in this context is subject to any different review than it is anywhere else, and I don't know why you would say that.

MR. GOOD: Well, perhaps that is correct, Mr. Justice.

I have been looking at --

Q But if that is your answer to Mr. Justice White's question, Title VII gives this petitioner nothing because he could have that sort of a review of the arbitration award without the benefit of Title VII.

MR. GOOD: Well, this is true. Title VII, however, is an explicit statute designed to preserve the privileges of the minority employee. It surely would have been a foolish sounding Civil Rights Act for it to read that your employment rights are enforceable under your agreement and the final arbitrator's award shall represent the state of the law as Congress sees it.

Q But you take into consideration that the court is to be bound an arbitration where no witnesses are sworn, no cross-examination, and no discovery?

MR. GOOD: Yes, Mr. Justice, because --

Q On a statutory right.

MR. GOOD: Yes, because here the key is the consent of the employee. Title VII gave that employee a right to sue his employer, and thereiis no question about that. However, he is the possessor of that right. As the possessor, he can use it fully by filing a full Title VII class and individual action, he can use it partially, as Alexander did, by filing only an individual action; he can use it not at all, or he can submit it to another forum. The key is the consent of the employee.

Q Consent of the employer?

MR. GOOD: Employee.

Q Employee.

MR. GOOD: Yes, sir.

Q I can't conceive of that at all under Title VII. You see, my trouble is Title VII gave the employee a right of the full plenary hearing, discovery, everything under the sun that his lawyer could think up, and in place of that you say he gives up by taking arbitration where, one, he doesn't have his lawyer; two, he doesn't have a court procedure, he doesn't have sworn testimony. So he is not taking two equal forums.

MR. GOOD: I agree, Mr. Justice.

Q He is taking the lesser forum now. How do you account for the fact that while this lesser arbitration was going on he made it clear that he preferred his Title VII rights during that arbitration hearing?

MR. GOOD: If I may answerthat in two ways, Mr. Justice.

Q Well, how can you say he gave it up if he filed? He did file while it was pending, didn't he?

MR. GOOD: Yes, indeed, he did. We view that differently than counsel does. Here is a man who presses race, the racial issue before the arbitrator, and at the same time, simultaneously invokes the state procedures under the statute. When he thereafter proceeds to press the arbitration racial issue,

he is indicating, one, that he has knowledge of his statutory rights because he has already filed under the state and, two, when he presses that issue he is indicating his selection of the two areas or the two remedies.

Q This is a layman with no training in law?

MR. GOOD: Yes, sir. But you should remember here, he had access to the state civil rights agency and to the federal civil rights agency at a point prior to his submitting the racial issue to the arbitrator, and surely that indicates that he had as good advice as is available anywhere in the land today.

Q Well, the EEOC people did not advise him on the arbitration, they couldn't.

MR. GOOD: Of course, that is correct.

Q He is then in the hands of the union.

MR. GOOD: That is correct.

Q But wouldn't you think that the layman in his own mind now really was thinking that "I have my chances with both and that one is not succeeding so I had better make sure I get in on the other one." Is that what you --

MR. GOOD: I am sure he was, Mr. Justice.

Q Well, what is wrong with that? You said he waived it. That is not waiving it. He is trying to get both.

MR. GOOD: He was knowledgeable of his statutory --

Q Don't you agree that he was trying to get both?

Do you agree on that?

MR. GOOD: That he was trying to get both?

Q Yes.

MR. GOOD: He certainly is. Today he is still trying to get the other half.

Q What is wrong with that?

MR. GOOD: Well, because, Mr. Justice --

Q That is the issue in this case.

MR. GOOD: Yes. We cannot ignore certain statistics that prevail here. As stated earlier, there are 160,000 collective bargaining agreements in the United States covering 25 million employees, 94 percent of which have binding arbitration clauses, and today 69 percent of those agreements have nondiscrimination clauses. Now, Alexander's case is only the tip of the iceberg.

Q Well, what about the Fifth Circuit?

MR. GOOD: The Fifth Circuit, in Rios, recommends deferral as do we. However -- and I presume that is what the Justice is talking about, the Rios v. Reynolds Metals -- there, they recommend deferral on the seven stringent criteria. We recommend what we call the liberal deferral policy. We find the Rios deferral policy unworkable and destructive of the arbitration process. First, under the Rios deferral policy, the arbitration has to compare favorably substantively and procedurally with a hearing that the claimant would have in the

U.S. District Court. Further, the U.S. District Court, in determining whether to defer, has to hold a hearing that I think in length and complexity is greater than a normal Title VII hearing.

Q I ask, in the context, are you saying the court was going to be so inundated? Has the Firth Circuit had a great increase in these cases?

MR. GOOD: The Rios decision, Mr. Justice, is only about five or six months old, and so I cannot answer your question.

Q Is there anything in the Act that you can point to that backs you up on that point of giving away to arbitration? Is there anything in the Act or the legislative history?

MR. GOOD: There is nothing -- the Act is totally barren of any reference to prior arbitration award. I submit, Mr. Justice --

Q And you agree -- the legislative history is too, isn't it?

MR. GOOD: Yes. But I submit, Mr. Justice, when you consider the statistics I have mentioned --

Q Congress knew those figures.

MR. GOOD: Yes. They had to -- they just missed the whole point. Surely, with those tremendous statistics, whether they were to permit the arbitration to stand or to deny it enforcement, they would have said one way or the other, with

this totally pervasive structure of our industrial relations staring them in the face, they just missed the boat, and it is up to this Court to make a reasonable accommodation between these conflicting interests.

Next, Mr. Justice Marshall showed some concern that the employee is participating in a forum where the scope and the dimensions of the hearing he receives is something different than what he would receive in the U.S. District Court, and this is surely true. However, this Court has previously acknowledged that those differences do exist. This was in the Arguelles case. Those differences do exist, and they are not repugnant.

Justice Harlan, in Bulk Carriers, stated it this way: "This Court has always recognized that the choice of forums inevitably affects the scope of the substantive right to be vindicated before the chosen forum. In particular, where arbitration is concerned, the Court has been acutely sensitive to these differences."

And he goes on further, at a later point: "Normally, the impact on the substantive right resulting from the decision to remot the individual to the arbitral forum is acceptable because the parties themselves have consented to that forum." Again, consent, the key here is consent, the employee was given a right to sue his employer, he is possessor of that right, he can use it fully, partially, not use it at all, or submit it to another forum.

Q Well, he didn't file the arbitration, did he? The union filed it?

MR. GOOD: The union filed it.

Q And who represented him?

MR. GOOD: The union did.

Q And Title VII says he should have the right of action and he should have a lawyer. Now, in the context of Title VII, we have a different situation. He didn't have a lawyer, he had the union.

MR. GOOD: It was by his choice, Mr. Justice. It is not part of our premise -- or I should say part of our premise is that if an employee, if this were possible, were required by the union and the employer to process an arbitration claim that involved a Title VII issue, if he disavowed that at any point he would still have his Title VII yet available to him because he was --

Q Wasn't it disavowed when he filed his Title VII action during the arbitration? Didn't he?

MR. GOOD: But he commenced the state procedures, he filed the Title VII action after the arbitration.

Q When he started his state proceeding.

MR. GOOD: That is correct.

Q Didn't that say "I disavow this," didn't it say I don't trust this? Or what did it say?

MR. GOOD: It said --

Q It certainly didn't say he was satisfied with it.

MR. GOOD: No, sir. It says to me that I, Alexander, am aware that I have these alternate remedies, but I, Alexander, choose to press this discrimination claim in this arbitral forum.

Q In both, you said before both.

MR. GOOD: When he proceded with the arbitration, I submit, he made his selection at that point. He showed his ability to keep it, to withhold it from arbitration, he showed his knowledge of the statutory procedures. Nevertheless --

Q Wait a minute. He showed the knowledge of the statutory procedures when arbitration was filed?

MR. GOOD: Yes, he had already filed with the state agency --

Q I thought that was after arbitration had started.

MR. GOOD: No, sir, he filed with the Colorado Civil Rights Commission shortly after his discharge, and the EEOC assumed jurisdiction before the arbitration also, so both agencies had taken jurisdiction prior to the arbitration.

Q Well, what was going on with the arbitration in the meantime, it just wasn't there?

MR. GOOD: It was ascending through the grievance steps, Mr. Justice.

Q That is what I thought. That is what I thought.

MR. GOOD: Now, you recall, though --

Q And then he got dissatisfied with his

representative, the union.

MR. GOOD: He says so a year later, after he has lost the arbitration, yes.

Q So, is that good?

MR. GOOD: Well, we can't say he was dissatisfied at the point of the arbitration, which brings me to another point. Counsel stated that we ought to allow the arbitration process to take place because of what I interpret he was saying "its therapeutic value." I submit to you that it has a lot of good therapy if the employee wins, but if he loses it exacerbates his feelings of resentment and we have a Title VII action. If we doubt that, just look at all the cases we have cited in these various briefs, all on this issue. And guess what? Always, in the arbitration, he lost.

Q Your concept of his having options that you seem to be pressing, do I understand you to mean that he might -- the employee might, as a matter of choice, ignore all the grievance procedure, all of the arbitration procedure, and elect to proceed under the statute right away?

MR. GOOD: Yes, indeed.

Q And if he did that, you would not think you had any defense by way of asserting that the arbitration clause had to be exhausted?

MR. GOOD: Not at all, compared to Maddox, compare with Maddox, where the court said thou shalt exercise your

administrative remedies. That was on the contract, however. Here it is a statute with an overriding public interest.

Incidentally, in making the assertion that he cannot be forced to arbitration, we not only relied on a little words of section 706 that says you do have a right to sue your employer, we relied on U.S. Bulk Carriers v. Arguelles. And it is true in that case. Justice Harlan did say that the least satisfactory of all solutions is the necessity of suits in both forms.

Now, my opposition points out that -- or they suggest that the 1972 amendments to the Civil Rights Act indicate a clear congressional intent that no other forum was to substitute for a Title VII District Court forum. It is true that the '72 amendments direct the EEOC to give "substantial weight to final orders or decisions of state or local authorities." However, we view that as a costraint of Congress that an employee -- Congress has required to use the state procedures, their concern that an employee be required to be bound by state procedures which contain infirmities or potential infirmities. Indeed, Senator Clark, in the legislative history of the Civil Rights Act, expressed exactly that concern. He stated, "State and local fair employment laws vary widely in effectiveness. In many areas, effective enforcement is hampered by inadequate legislation, inadequate procedures or an inadequate budget."

And you will recall that now Congress requires the employee to first use those procedures. So the concern of

Congress was that no other sovereign or law or procedure require the employee to accept less than his full day in court under Title VII if he so chose.

Q Mr. Good, I just had a chance to look at Rios. Did I understand you to say earlier that this went too far or didn't go far enough, the procedure --

MR. GOOD: Insofar as it ruled deferral, it went exactly as far as we would go. Insofar as it defines the rules for the District Court under which referral was proper, it went much too far, we say, it is destructive of the arbitration process and unworkable.

Q Well, apparently -- it says first the contract must coincide with the statutory rights.

MR. GOOD: No question about that.

Q Second, it must be plain that the decision of the arbiter in no way violates the private rights vuaranteed by Title VII --

MR. GOOD: Yes.

Q -- or the public policy which adheres to Title VII.

MR. GOOD: No problem with that.

Q In addition, must be satisfied (1) the factual issues are identical to those decided by the arbiter -- right?

MR. GOOD: I begin to argue at that point, Mr. Justice.

Q I see.

MR. GOOD: And a subsequent point --

Q Secondly, the arbitrator's power under the collective bargaining agreement to decide the ultimate issue of discrimination --

MR. GOOD: Yes.

Q -- you don't have any problem with that?

MR. GOOD: I have no problem with that.

Q Third, the evidence presented at the arbitral hearing dealt adequately with all factual issues.

MR. GOOD: Yes.

Q You have trouble with that?

MR. GOOD: That one, and none of the remaining ones, Mr. Justice.

Q The arbitrator actually decided the factual issues presented to the court? Does that bother you?

MR. GOOD: Well, yes, insofar as I am bothered by the one preceding it, that is the evidence presented at the arbital hearing dealt adequately with all the factual issues --

Q Well, how about the fifth one, the arbitration proceeding was fair and regular and free of procedural infringements?

MR. GOOD: No problem.

Q So it is really the second, third and fourth then?

MR. GOOD: Yes, sir.

Q You think they give -- they interfere too much

with the arbitration process?

MR. GOOD: Yes, not only with the arbitration process but it imposes a duty on the lower court to hold a hearing that in its magnitude and complexity would go far beyond going ahead with this Title VII trial. For instance, Mr. Justice, the -- I believe you called it the third one -- the evidence presented at the arbital hearing dealt adequately with all the factual issues. Well, first the court has to determine what were all the factual issues and, secondly, what would be the factual issues if we had a Title VII trial. In other words, did the arbitrator know all the issues.

Q So, actually, then, you come down to as far as the District Court should go would be to determine that the factual issues before it are identical to those decided by the arbitrator, number one, and that the arbitration proceeding was fair and regular and free of procedural --

MR. GOOD: Would you repeat that, Mr. Justice, please?

Q Well, the first is, the factual issues before it, that is the court, are identical to those decided by the arbitrator. I thought you said you would go with that.

MR. GOOD: No.

Q No?

MR. GOOD: I disagree with that.

Q Well, all right, that eliminates one, two, three and four.

MR. GOOD: No, sir, I do not eliminate two. The arbitrator had the power to determine the issues.

Q That the court can look to.

MR. GOOD: Yes.

Q How about five, the arbitration proceeding was fair and regular and free of procedural infirmities?

MR. GOOD: No problem.

Q So it is just those two then that you think is the extent --

MR. GOOD: There is a third one.

Q Which one?

MR. GOOD: The evidence presented at the arbital hearing dealt adequately with all the factual issues.

Q Well, do you agree with that?

MR. GOOD: Not insofar as the District Court must determine that. We all know from trial experience, even in the pretrial conference, we do not agree on what all the factual issues are, and there are sub-factual issues, and always in trial other issues come up. The judge, under this burden of Rios, would have to hold a hearing that would certainly be lengthy, it would be a retrial of the arbitration hearing, and in fact the District Court would have to substitute in many instances its judgment.

Q Mr. Good, under your theory of the deferral, if the employer could come in in an action to set aside the

arbitration award, assuming it had gone in favor of the employee, and make the same sort of showing that you are talking about an employee making under a Title VII action, would the employer then be entitled to have the arbitration award set aside and a proceeding directed to that end?

MR. GOOD: If he went in under section 301, do you mean, Mr. Justice?

Q Yes -- well, whatever section you go in to have an arbitration award set aside. Say you are opposing a judicial action to confirm the award or enforce the award.

MR. GOOD: Yes. Now, I did not understand your question, Mr. Justice.

Q Well, you are talking about the showing that must be made by an employee in a Title VII case, the type of procedure the District Court should follow to decide whether or not to defer to the arbitration award.

MR. GOOD: Yes, sir.

Q Supposing that in a case not involving discrimination, an employee brings action to enforce an arbitration award in his favor, is the standard that the District Court is to employ there any different than the kind of standard you are talking about here?

MR. GOOD: Yes, in most cases, where there is no statute involved, the District Court exercises its normal function to determine did the arbitrator have jurisdiction and

whether the proceeding was fair and regular.

Q Well, so is this basically the same thing or is it something added because of Title VII?

MR. GOOD: We add one thing, and I am not so sure, after listening to Mr. Justice White that we are adding that one thing, we are at least underlining it, and that is that the court must examine the arbitrator's opinion and award to see if it patently offended the underlying policies of the Civil Rights Act.

Q Well, are you saying that the arbitrator may not just disregard the applicable substantive law?

MR. GOOD: Civil Rights law?

Q Well, yes, whatever the applicable laws are --

MR. GOOD: Yes.

Q -- in these areas.

MR. GOOD: Yes.

Q I don't suppose an arbitrator can just say, well, I don't really, in deciding whether some arbitration, if it is, a provision of the National Labor Relations Act is relevant to it, I suppose he must not decide contrary to what the law provides.

MR. GOOD: This is correct, in view of over 90 percent of the arbitrators, Mr. Justice White. There is a small minority who disagree with that.

Q Mr. Good, this sounds like what was said in Rios, 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. Didn't you say to me earlier that you agree with this?

MR. GOOD: I agree with that.

Q Well, if you do, why doesn't a judge, a district judge, to be satisfied with this, have to go through as extensive a hearing as concerns you?

MR. GOOD: Because he can tell on the face of the arbitration and some -- well, on the face of the arbitration he can tell whether it patently offends the underlying policies of the Act.

Q I see.

Q Mr. Good, thus far the Fifth Circuit stands alone in its enunciation of standards, doesn't it?

MR. GOOD: Well, except to the extent, Mr. Justice, that the District of Columbia Circuit, in the Macklin case, which was shortly after Rios, seemed to agree with Rios. However, in Macklin, the court predicated that decision on a statement that they read into the Steelworkers' trilogy, a "federal policy of deferral." Well, that is a very presumptuous reading, considering the case we are right here now talking about.

Q Are there are some cases in the courts of appeals or this Court that indicates that an arbitrator is not bound by a relevant provision of the substantive law --

MR. GOOD: No, Your Honor.

Q -- and may disregard it?

MR. GOOD: No, Your Honor. The reason I made the statement I did is that I attand all these labor law conferences and there is always an isolated arbitrator who gets up and makes the statement that we have all heard so often, "I am merely a creature of the parties" and "I am only what the parties make me, and if they tell me to violate the law and" --

Q Well, do you know, are there some cases then that say the arbitrator is bound by the substantive law? Let's assume, for example, in this case the arbitrator decided there was no racial discrimination in this case within the meaning of Title VII, whereas a decision of this Court had construed Title VII to bar precisely the conduct that was at issue before the arbitration. Now, is there some case that says the arbitrator must follow the law?

MR. GOOD: I am unaware of any that say exactly that. I am aware of this Court's assumption that an arbitrator will follow the law, especially in preemption matters where they have fought the problem.

One item mentioned in my opponent's brief, and which I think bears some response, Alexander appears1 to the sense of fairness of this Court, and he states in there that if David, in the biblical confrontation with Goliath, had two stones to a sling he would not have been unfairly armed for that confrontation, and thus by analogy, says Alexander, if Alexander, i.e.,

David, has two cracks at my client, i.e., Goliath, there is nothing wrong with that. And then at that point they go on to recite six different statutory procedures now available for an employee to proceed against his employer, all of which are free, none of which are exclusive, to all of which the employer must respond, and to which he is bound in the event of an adverse determination in any one of those four.

Take all of that, add to it the fact that the amendments now apply the act to a business having as few as 15 employees, and you have to wonder, who in the world is David and who is Goliath in this industrial civil rights confrontation.

Mr. John Pemberton, Deputy General Counsel of the EEOC, former Deputy General Counsel, even in his position, was able to show some pity for the employer in this dilemma. He describes the dilemma as follows: "...if the number of them [multiple employee remedies] is not awesome enough, the lack of finality in any decision on behalf of the respondent certainly poses a defendant's nightmare." Surely, Congress, in defining Title VII, did not intend a nightmare of litigation for anyone. It only intended to create a very powerful tool with which to eliminate employment discrimination.

For all of these reasons, we ask the Court to adopt the policy of liberal deferral, to find that the lower court did conform to that policy, and to affirm for those reasons.

Mr. Chief Justice, absent any further questions, I

submit the case on behalf of my client, Gardner-Denver Company.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Good.

Mr. Spiegelman, you have about four minutes left.

REBUTTAL ARGUMENT OF PAUL J. SPIEGELMAN, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SPIEGELMAN: I would like to first deal with the question of voluntariness, which is the cornerstone of the respondent's argument. We have a case here where the choice of arbitration was made by a union. There is nothing in the record to indicate for one instant that the petitioner had any right to withdraw that grievance once the union went ahead with it.

The point made by counsel here that EEOC advised plaintiff with respect to his rights here is contrary to the facts. The EEOC told me he had a right to sue, they issued him a right to sue letter. Moreover, as a matter of fact, when a man files a charge with the EEOC it gets put in a file and it may be six months or eight months before he ever hears anybody on that. So the notion that EEOC provided him any assistance in this case is absurd.

Now, I think that we must deal with the issues of why should there be a deferral policy. There have been a number of questions, arguments made. The government has told us that the Labor Act is ill-served by a policy of deferral, and I can tell you, as a private lawyer, if you have a deferral problem, I will

advise every one of my clients not to use the grievance machinery. The federal courts will, if anything, be inundated by a deferral rule because all the clients are going to take their case to the federal courts, where they have much more adequate proceedings.

Q I thought you told us earlier, counsel, about how difficult it was to get a lawyer in a case like this.

MR. SPIEGELMAN: I would say that, with respect to my client, I would advise him, I currently advise him to follow the grievance machinery, and if there is a deferral policy I will advise them otherwise. I think it will increase the burden of litigation.

Q You mean only in terms of Title VII cases?

MR. SPIEGELMAN: In terms of Title VII cases, that is correct.

Q Only.

MR. SPIEGELMAN: Yes.

Q Well, do you think really that if the arbitration machinery is only enforceable by one side of the contract that eventually the employer would ever be forced to go to arbitration?

MR. SPIEGELMAN: I don't know the answer to that. I would say this, that --

Q Well, your advice to your clients may be futile if the employer isn't bound to go to arbitration.

MR. SPIEGELMAN: Well, what I am saying is that with respect to labor act policies, a policy of using both remedies further serves that policy, enforces the union agreement. I would say that the employer is getting an advantage here because he already got his quid when the arbitration is filed. That is, he has got union peace. That is what he bought. He is now trying to get a license to conduct practices which the arbitrator says is okay. With respect to the law, the question you asked earlier about arbitrators and how they act, we cited three cases in our brief in which the arbitrator refused to follow Title VII concepts in making an award. Now, it may be that the arbitrator would not order illegal conduct, but he may refrain from ordering conduct that is required under the act.

Now, with respect to the economy point, I think we have indicated that economy just doesn't work. The courts can't stay out of this. Mr. Justice Stewart's question about can't they file -- they can always file, and they always have to go through the deferral process. There is no way out, bringing these cases out of federal court in the first instance, because the courts have power.

I point out further that the argument here that the courts would be inundated by a deferral policy just doesn't hold up. Bowe has been on the books for a number of years, Bowe v. Colgate. The Seventh Circuit doesn't defer at all. There is no evidence here of any deferral policy, any inundation of

the courts.

I would also point out that with respect to this issue of employers dropping their arbitration clauses, I think that is wholly speculative. We have had the Chamber of Commerce, with all its resources, come here and file an amicus brief, and the best they can do is cite statistics that there are a lot of anti-discrimination clauses.

The fact of the matter is, however, that arbitration is the way of life, it is a strong process, it is going to be used regardless of whether or not we adopt a deferral policy, and for the reasons we have indicated we believe that deferral just simply isn't proper.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Spiegelman.

Thank you, gentlemen. The case is submitted.

[Whereupon, at 11:31 o'clock a.m., the case was submitted.]

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