# DOES *GILMER v. INTERSTATE / JOHNSON LANE CORP.* COMPEL THE CONSIDERATION OF EXTERNAL LAW IN LABOR ARBITRATION?: AN ANALYSIS OF THE INFLUENCE OF THE AMERICANS WITH DISABILITIES ACT ON ARBITRAL DECISIONMAKING

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An employee has been chronically absent throughout his or her short time working for a particular employer. During this time, the employee has been warned several times, both orally and in writing, and has been suspended for absenteeism in a manner consistent with how the employer has disciplined other employees with similar records of absenteeism. Finally, the employer suspends the employee once again, adding the warning that if the employee does not improve his or her attendance record, the employee will be discharged. Despite the warning, the employee is absent again. In accordance with its prior warnings and discipline, the employer discharges the employee.

One can readily conclude that this would be a particularly easy case for the union, the employer, or any arbitrator. The employee has engaged in misconduct and failed to remedy his or her shortcomings after the employer provided due process and progressive discipline. Because the employee had not been employed for a long period of time, and in the absence of any other circumstances that might mitigate against discharge, all would probably agree that the employer discharged the employee for just cause.

Now consider some changes to this hypothetical case. First,

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assume that the facts described above are present. However, after the employer's final warning, but before the subsequent instance of absenteeism that provoked the discharge, assume that the employee informed the employer of a back ailment, or that his or her spouse has a back ailment, or that his or her child has asthma that requires the employee's absence from work for the child's continuing medical treatment.

Is this case no longer "particularly easy"? Is it merely a matter of an employee who "will inevitably . . . attempt to abuse [his or her] family and medical leave rights"?[1] Or is it a conflict between the employer's contractual right to discharge employees when there is just cause on the one hand, "and the rights, proscriptions, and duties set down in applicable law, rule, and regulation" on the other hand.[2]

Part I of this Article describes the historical debate among labor arbitrators around whether they should consider external law in resolving contractual disputes that arise under a collective bargaining agreement. Part II reviews the United States Supreme Court's changing view regarding the acceptability of arbitration as an alternative to litigation in disputes outside of labor management relations. In Part III the author considers the impact of that changing view on the external law debate. Finally, in Part IV the author reviews the decisions of labor arbitrators in cases involving excessive absenteeism due to a physical or mental disability. The author concludes that labor arbitrators have considered, either explicitly or implicitly, the external law under the Americans with Disabilities Act and have done so without harming the institution of labor arbitration or the role of the arbitrators themselves. Thus, the author concludes that in light of the changing view of arbitration and the experience in labor arbitrations involving disabilities, the external law debate should be resolved in favor of applying external law when interpreting collective bargaining agreements.

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1. Frederick L. Douglas, *Collective Bargaining Under the Family and Medical Leave Act*, 45 LAB. L.J. 102, 107 (1994).

2. Stephen L. Hayford & Anthony V. Sinicropi, *The Labor Contract and External Law: Revisiting the Arbitrator's Scope of Authority*, 1993 J. DISP. RESOL. 249, 284.

## *I. THE HISTORY AND EVOLUTION OF LABOR ARBITRATION IN THE SUPREME COURT AND THE EXTERNAL LAW DEBATE*

The Wagner Act of 1935[3] represented the government's first serious effort to regulate the employment relationship as it related to labor relations.[4] Specifically, the Wagner Act sought to protect the rights of employees to organize into unions and to prohibit employer practices that infringed on that process.[5] Significantly, the Wagner Act did not attempt to regulate union practices.[6] In fact, unions were not regarded as legal entities; therefore, no one could sue them directly for failure to honor whatever obligations they might have had.[7]

During this same period, and especially during World War II with the work of the National War Labor Board, employers and unions used arbitration to resolve disputes without disrupting war production.[8] By the mid-1940s, following the massive and successful organizational drives of organized labor under the Wagner Act, the political climate had changed. As a result, Congress passed the Taft-Hartley Act of 1947[9] which, *inter alia*, regulated union practices. The Taft-Hartley Act also amended the National Labor Relations (Wagner) Act to include section 301, which regulated suits by and against unions through jurisdiction conferred upon federal courts to enforce collective bargaining agreements.[10] In so doing, Congress attempted to maintain some degree of stability in labor relations by

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3. National Labor Relations (Wagner) Act, ch. 372, 49 Stat. 449 (1935) (current version at 29 U.S.C. §§ 151–169 (1988)).

4. 1 THE DEVELOPING LABOR LAW 27–34 (Charles J. Morris et al. eds., 2d ed. 1983) (discussing in detail the Wagner Act, including criticisms that the legislation was one-sided).

5. *Id*.

6. *Id*. at 32–35.

7. *Id*. at 35–42; *see* Mary A. Bedikan, *Riding on the Horns of a Dilemma: The Law of Contracts v. Public Policy in the Enforcement of Labor Arbitral Awards*, 1988 DET. C.L. REV. 693, 696–700; Martin H. Malin, *Labor Arbitration Thirty Years After the Steelworkers Trilogy*, 66 CHI.-KENT L. REV. 551, 552–54 (1990).

8. Martin H. Malin & Lamont E. Stallworth, *Affirmative Action Issues and the Role of External Law in Labor Arbitration*, 20 SETON HALL L. REV. 745, 745 (1990).

9. Labor-Management Relations (Taft-Hartley) Act, ch. 120, 61 Stat. 136 (1947) (current version at 29 U.S.C. §§ 141–187 (1988 & Supp. V 1993)).

10. *Id*. § 301 (current version at 29 U.S.C. § 185 (1988)) (stating in subsection (a) that "[s]uits for violation of contracts between an employer and a labor organization . . . may be brought in any district court" that has jurisdiction over the parties).

regulating the collective bargaining agreements between employers and unions.[11]

In *Textile Workers Union v. Lincoln Mills*,[12] the Supreme Court considered a section 301 action for the specific enforcement of an arbitration agreement contained in a collective bargaining agreement between the employer and the union.[13] The Supreme Court, in reviewing the matter, declared that the employer's arbitration agreement was a *quid pro quo* for the union's no-strike agreement and that industrial peace could best be achieved only through arbitration.[14]

The conclusion that labor arbitration differed from arbitration in other forums, for example in commercial matters, led to a number of significant conclusions.[15] In 1960, the Supreme Court elaborated on the *quid pro quo* doctrine and further refined those distinctions in a series of three cases known as the *Steelworkers* Trilogy.[16] In *United Steelworkers v. American Manufacturing Co.*, the Court addressed the point at which judicial intervention was appropriate.[17] The Court held that it was not the function of the courts to construe a collective bargaining agreement that was subject to arbitration because, in agreeing to arbitrate, the parties bargained for an arbitrator's determination, not a court's determination.[18] The Court further opined that even the processing of frivolous claims may have

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11. Robert Perkovich & Mark H. Stein, *Challenges to Arbitration Under Illinois Public Sector Labor Relations Statutes*, 7 HOFSTRA LAB. L.J. 191, 193 (1989).

12. 353 U.S. 448 (1957)

13. *Id*. at 450. The Union in that matter did not raise the Federal Arbitration Act, 9 U.S.C. §§ 1–16 (1994), as a primary argument in light of the federal court's historical hostility towards arbitration evidenced by its decisions under the Federal Arbitration Act. David E. Feller, *Arbitration and the External Law Revisited*, 37 ST. LOUIS U. L.J. 973, 973 (1993); David E. Feller, *Arbitration Classics: Revisiting The Three "Classics"*, PROCEEDINGS OF THE FORTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 169, 178 (BNA 1994) [hereinafter *Three "Classics"*]. Rather, the Union hoped that if section 301 of the Taft-Hartley Act were to apply, the hostility towards arbitration would not carry over to the arbitration of labor relations and that the courts would view this type of arbitration differently and more favorably. *Id*.

14. *Lincoln Mills*, 353 U.S. at 455.

15. Feller, *supra* note 13, at 974.

16. United Steelworkers v. American Mfg. Co., 363 U.S. 564 (1960); United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) [hereinafter *Steelworkers* Trilogy].

17. 363 U.S. 564 (1960).

18. *Id*. at 567–68 (stating that "[t]he courts . . . have no business weighing the merits of the grievance" because there was an arbitration agreement).

a therapeutic effect on the parties' relationship.[19]

In *United Steelworkers v. Warrior & Gulf Navigation Co.*,[20] the Court ruled that although substantive, as opposed to procedural, arbitrability was a matter properly reserved for the courts, the courts should resolve those matters with deference to the central role of arbitration under the collective bargaining agreement.[21] Therefore, in light of this public policy favoring arbitration of disputes arising under such an agreement, the Court announced that there was a presumption of arbitrability.[22] The Court went further and proclaimed that a court should not deny an order to arbitrate "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."[23]

In the third case, *United Steelworkers v. Enterprise Wheel & Car Corp.*, the Court considered the issue of judicial review of an arbitration award.[24] The Court expressed the view that because the parties had contracted for the arbitrator's judgment, the Court would not reject that judgment merely because it might have a different view of the issue.[25] Moreover, the Court held that the courts were not well-suited to determine and interpret the practices of the industry that form a part of the collective bargaining agreement.[26] Accordingly, the Court restricted the scope of judicial review of arbitrators' awards. It held that the award is deemed legitimate as long as it is based on the contract and that enforcement will be denied only when the arbitrators' awards "manifest an infidelity to this obligation."[27]

As time has passed, the extent of unionization among employees has decreased,[28] the degree of federal regulation of employ

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19. *Id*. at 568.
20. 363 U.S. 574 (1960).
21. *Id*. at 582–83.
22. *Id*.
23. *Id*.
24. 363 U.S. 593 (1960).
25. *Id*. at 599.
26. *Id*.; *see also* United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581 (1960) ("The labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts").
27. *Enterprise Wheel*, 363 U.S. at 597.
28. Anthony V. Sinicropi, *Presidential Address: The Future of Labor Arbitration: Problems, Prospects, and Opportunities*, *in* PROCEEDINGS OF THE FORTY-FIFTH ANNUAL

ment terms and conditions has increased,[29] and there is more global competition with its attendant downsizing and radical change to workers' skills such that more white collar than blue collar employees are employed.[30] Therefore, it became inevitable that the parties to a collective bargaining agreement and the arbitrators called upon to interpret those agreements would face the question of whether the arbitrators should consider the applicable regulations known as external law. Two distinguished antagonists joined the debate at the Twentieth Annual Proceedings of the National Academy of Arbitrators.[31]

Bernard Meltzer argued that where there is an "irrepressible conflict" between the collective bargaining agreement and external law, the arbitrator should ignore the law and rely upon three points.[32] First, that the Supreme Court, in defining the narrow scope of the award's review, specifically pointed out that where the arbitrator based the award solely upon his or her view of the legislation, as opposed to the language of the agreement, the arbitrator has exceeded the scope of his or her authority.[33] Second, Meltzer emphasized that parties call upon arbitrators to construe and not to destroy their agreement.[34] Moreover, because the Court relied upon the specialized competence of arbitrators in contractual matters, arbitrators would become involved in areas in which the courts had specialized competence were the arbitrators to apply external law.[35] Finally, Meltzer noted that in matters of law, the courts had plenary authority and therefore, unlike arbitrators, exercised the "coercive

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MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 5–10 (BNA 1992); *see* Katherine Van Wezel Stone, *The Legacy of Industrial Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 578–84 (1992); *see also* Malin, *supra* note 7, at 558–59.

29. *See* Malin & Stallworth, *supra* note 8, at 751.

30. Sinicropi, *supra* note 28, at 5–10; *see generally* ROBERT B. REICH, THE WORK OF NATIONS (1991).

31. Bernard D. Meltzer was a Professor of Law at the University of Chicago and a member of the National Academy of Arbitrators. Robert G. Howlett was also a member of the National Academy of Arbitrators and the Chairperson of the Michigan Labor Mediation Board.

32. Bernard D. Meltzer, *Ruminations about Ideology, Law, and Labor Arbitration*, *in* PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 1, 16 (BNA 1976).

33. *Id*. at 16–19.

34. *Id*.

35. *Id*.

power of the state."[36] Thus, Meltzer cautioned that limited judicial review of awards applying external law would be "wholly inappropriate."[37]

Robert Howlett disagreed, arguing, *inter alia*, that the separation of contractual claims and statutory claims is "impossible in many arbitrations."[38] Therefore, an award that did not consider external law might result in error, would ignore the fact that the law governs all contracts, and would require the laws to be incorporated explicitly. As a result, collective bargaining will be longer and more complex.[39] He also argued that the public policy of the land was that parties should resolve their disputes privately.[40]

The debate did not rage exclusively in the halls of the National Academy, for the Supreme Court was called upon to consider the relationship between labor arbitration and the external law as well. In *Alexander v. Gardner-Denver*,[41] a black employee filed a grievance contesting his discharge under the governing collective bargaining agreement.[42] After the arbitrator found for the employer and dismissed the grievance, the employee filed a charge with the Equal Employment Opportunity Commission under Title VII of the Civil Rights Act of 1964[43] and the Equal Employment Opportunity Act of 1972.[44] He alleged that he had been discharged because of his race.[45] The Court reviewed the lower courts' decisions which had held that the arbitrator's award was binding.[46]

The Court began by considering the provisions of Title VII. The Court pointed out that under the Act, the "final responsibility for

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36. *Id*. at 19.

37. *Id*. at 17; *see* James A. Gross, *The Labor Arbitrator's Role: Tradition and Change*, 25 ARB. J. 221 (1970); Peter Seitz, *The Arbitrator's Responsibility for Public Policy*, 19 ARB. J. 23 (1964); *see also* Feller, *supra* note 13, at 982.

38. Robert G. Howlett, *The Arbitrator, the NLRB, and the Courts*, *in* PROCEEDINGS OF THE TWENTIETH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 67, 83–87 (BNA 1976).

39. *Id*.

40. *Id*.

41. 415 U.S. 36 (1974).

42. *Id*. at 38.

43. Pub. L. No. 88-352, 78 Stat. 255 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (1988 & Supp. V 1993)).

44. Pub. L. No. 92-261, 86 Stat. 103 (amending Title VII of the Civil Rights Act of 1964).

45. *Gardner-Denver*, 415 U.S. at 42.

46. *Id*. at 42–43.

enforcement of Title VII is vested with the federal courts," and that the courts retained broad remedial powers even in those cases where the Commission determined that the allegations had no merit.[47] Thus, the Court found that "the private right of action remains an essential means of obtaining judicial enforcement of Title VII."[48] In light of this statutory scheme, the Court held that "Title VII manifests a congressional intent to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes," and that the clear inference was that Title VII was designed to supplement, not supplant, statutory rights.[49] The Court then indicated that there was a strong suggestion that an employee did not forfeit a Title VII action because he had filed a grievance over the same issue. "The distinctly separate nature" of the two actions was "not vitiated merely because both . . . [were the] result of the same factual occurrence."[50]

Specifically with regard to labor arbitration, the Court noted that the labor arbitrator's role in the "system of industrial self-government" is that of a "proctor of the bargain" between the union and the employer.[51] His or her authority is restricted to determining the parties' intention behind their agreement. The Court said that, in fulfilling his or her duty, the arbitrator therefore looks to the "industrial common law of the shop" and although looking to the law is not prohibited, the arbitrator must not base the award solely on enacted legislation, or the court will vacate the award on review.[52] Finally, the Court denied that the arbitration award could preclude the Title VII action because the arbitral process is not sufficiently similar to the judicial process. The Court based its finding on the arbitrator's role noted above, the different areas of specialized competence between that of the arbitrators and that of the courts, and the fact that arbitrators need not always explain their awards. Moreover, the Court found that the arbitrator's fact finding process is not as thorough as the court's. Finally, the Court recognized that the arbitral record is not as complete, that the rules of evidence do not necessarily apply in arbitration, and that the rules of civil pro-

47. *Id*. at 44.
48. *Id*. at 45.
49. *Id*. at 48.
50. *Id*. at 50.
51. *Id*. at 52–53.
52. *Id*. at 57.

cedure, especially those relating to discovery, are not followed in arbitration.[53]

In two subsequent cases, the Court was asked to decide whether these conclusions regarding arbitration and external law also applied in cases arising under other statutes. In *Barrentine v. Arkansas-Best Freight System, Inc.*,[54] employees filed wage claims under the Fair Labor Standards Act (FLSA)[55] after their wage claims had been arbitrated under the governing collective bargaining agreement.[56] The Court applied its holding in *Alexander v. Gardner-Denver* to the matter, adding that in labor arbitration, the concern is with collective rights while in statutory schemes under the FLSA, the concern is with individual rights.[57] Finally, in *McDonald v. City of West Branch*,[58] the Court extended the holdings in *Alexander v. Gardner-Denver* and *Barrentine* to a claim of a discharged employee that was rejected in arbitration.[59] He claimed that he had been discharged in violation of his First Amendment rights.[60]

## *II. THE SUPREME COURT'S VIEW OF ARBITRATION IN AREAS OTHER THAN LABOR RELATIONS*

As noted above,[61] in areas other than labor relations, the Supreme Court and lower federal courts demonstrated a hostility toward arbitration as a means of resolving disputes that would otherwise be the subject of litigation in the courts.[62] However, by the mid-1980s, a decided trend had formed in the other direction[63] and has continued to date.[64]

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53. *Id*. at 57–58.

54. 450 U.S. 728 (1981).

55. 29 U.S.C. §§ 201–219 (1988 & Supp. V 1993).

56. *Barrentine*, 450 U.S. at 730–32.

57. *Id*. at 744–45.

58. 466 U.S. 284 (1984).

59. *Id*. at 288.

60. *Id*. at 286. The Court stated that "*Barrentine* and *Gardner-Denver* compel the conclusion that [arbitration] cannot provide an adequate substitute for a judicial proceeding in protecting the . . . rights that § 1983 is designed to safeguard." *Id*. at 290.

61. *See supra* note 13.

62. *See* Wilko v. Swan, 346 U.S. 427 (1953).

63. Rodriguez De Quijas v. Shearson/Am. Express, Inc., 490 U.S. 477 (1989) (overruling *Wilko*).

64. *See* Allied-Bruce Terminix Cos. v. Dobson, 115 S. Ct. 835 (1995); Austin v. Owens-Brockway Glass Container, Inc., 844 F. Supp. 1103 (W.D. Va. 1994) (applying *Gilmer* to the Americans with Disabilities Act); Hirras v. National R.R. Passenger Corp.,

In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, the Court was faced with a contract that provided for arbitration of all disputes arising out of alleged breaches of contract.[65] The Court found that even though federal anti-trust law applied, breach of contract arbitration was not barred.[66] The Court declared that the era of judicial hostility towards arbitration was over and that arbitration was a welcome means of dispute resolution.[67] Thus, absent fraud or evidence of an intent to preclude the dispute in question from the arbitration clause, the arbitration clause was enforceable.[68] Two years later, in *Shearson/American Express, Inc. v. McMahon*, the Court extended its holding in *Mitsubishi* to an arbitration agreement even where there are independent statutory claims unless the statute in question evinced a congressional intention of exclusive court enforcement of the statutory claim.[69] Then, in *Gilmer v. Interstate/Johnson Lane Corp.*, the Court addressed the same issue with respect to an agreement to arbitrate statutory claims relating to employment discrimination, revisiting the *Alexander-Gardner* line of cases regarding the relationship between arbitration and external law.[70]

The plaintiff in *Gilmer* was required to register with a stock exchange as a condition of his employment contract with a brokerage house.[71] He complied, agreeing in his contract with the stock exchange "to arbitrate any dispute, claim or controversy" arising out

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39 F.3d 522 (5th Cir. 1994); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992); Saari v. Smith Barney, Harris Upham & Co., 968 F.2d 877 (9th Cir. 1992) (applying *Gilmer* to the Employee Polygraph Protection Act), *cert. denied*, 113 S. Ct. 494 (1992); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (applying *Gilmer* to Title VII claims); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991), *dismissed*, 975 F.2d 1161 (5th Cir. 1992); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991); *see also* Alison Brooke Overby, *Arbitrability of Disputes Under the Federal Arbitration Act*, 71 IOWA L. REV. 1137, 1141 (1986); Thomas J. Stipanowich, *Rethinking American Arbitration*, 63 IND. L.J. 425 (1988); Michael T. Sweeney, Note, *Arbitrability of Claims Under Age Discrimination in Employment Act Upheld Pursuant to Arbitration Agreement* — Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991), 22 SETON HALL L. REV. 540 (1992).

65. 473 U.S. 614, 616 (1985).
66. *Id*. at 640.
67. *Id*. at 638–39.
68. *Id*.
69. 482 U.S. 220, 239, 242 (1987).
70. 500 U.S. 20 (1991).
71. *Id*. at 23.

of his employment.[72] When his employer discharged him at age sixty-two, he filed a claim under the Age Discrimination in Employment Act (ADEA)[73] with the Equal Employment Opportunity Commission rather than arbitrate the matter.[74] The defendant moved to compel arbitration, and the trial court concurred.[75] The Court of Appeals for the Fourth Circuit reversed.[76]

The Court began its analysis by noting that the provisions of the Federal Arbitration Act "manifest a `liberal federal policy favoring arbitration agreements.'"[77] Then, citing its decisions in *Mitsubishi* and *Shearson*, the Court declared that "[i]t is by now clear that statutory claims may be the subject of an arbitration agreement," pointing out that in so agreeing one does not forgo the statutory right, but chooses to submit it to "`an arbitral, rather than a judicial forum.'"[78] The Court then applied the holdings of *Mitsubishi* and *Shearson* so that enforcement of the agreement to arbitrate a statutory claim for employment discrimination will be denied only when there is fraud or a congressional intention to preclude the waiver of the judicial forum. However, in determining whether either of these two conditions exist, the Court stated that "`questions of arbitrability must be addressed with a healthy regard for the federal policy favoring arbitration.'"[79]

On the issue whether there was a congressional intent to preclude arbitration in the ADEA, the Court reviewed the legislative history of the Act and its provisions and found no evidence of such an intent. Moreover, the Court went on to say that arbitration was not "inconsistent with the statutory framework and purposes of the ADEA."[80] On this point, the Court conceded that the ADEA addressed important social issues and individual rights, but that there was no contradiction between those issues and rights and arbitration, noting that in *Mitsubishi* and *Shearson*, the Court permitted

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72. *Id*.
73. 29 U.S.C. §§ 621–634 (1988).
74. *Gilmer*, 500 U.S. at 24.
75. *Id*.
76. *Id*.
77. *Id*. at 25 (quoting Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24 (1983)).
78. *Id*. at 26 (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985)).
79. *Id*. (quoting *Moses H. Cone*, 460 U.S. at 24).
80. *Id*. at 27.

arbitration of other important social policies. In addition, the Court indicated that there was no contradiction between judicial and arbitral enforcement of these policies "[s]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum."[81]

The Court then faced the adequacy of the arbitral forum as it did in *Alexander v. Gardner-Denver*.[82] It first dismissed concerns that the arbitral forum might be biased against the plaintiff. The Court pointed out that the procedural rules under which the dispute was to be arbitrated provided for rules requiring arbitrator disclosure of biographical data relating to the arbitrators and challenges to panel composition. Regarding concerns over discovery, also noted in *Alexander v. Gardner-Denver*, the Court conceded that arbitration's scope of discovery was narrower. However, the Court again analogized to *Mitsubishi* and *Shearson*. More importantly, the Court stated that when one agrees to arbitrate, he or she "`trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration.'"[83] With respect to the concern in *Alexander v. Gardner-Denver* relating to arbitration's narrower scope of relief, the *Gilmer* court responded that broader relief could be sought through claim conciliation and that the Equal Employment Opportunity Commission could take action to seek such relief without a claim from the individual discriminatee.

Finally, the Court dealt with the plaintiff's argument that when individuals negotiate employment contracts with a firm that insists on an arbitration clause, there is such an imbalance in the parties' relative bargaining power that the clause is not enforceable.[84] The Court rejected that claim saying that to invalidate the clause would require fraud or coercion.[85]

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81. *Id*. at 28 (citing *Mitsubishi Motors*, 473 U.S. at 637).

82. *Id*. at 33. The Court also distinguished *Alexander v. Gardner-Denver* on the basis that it did not involve a statutory claim arbitration agreement, but rather it involved a contractual claim arbitration agreement, and on the basis that it involved the tension between individual rights and collective representation. *Id*. at 33–34.

83. *Id*. (quoting *Mitsubishi Motors*, 473 U.S. at 628).

84. *Id*. at 32.

85. *Id*. at 33.

## *III. EVALUATING HOW THE SUPREME COURT'S CURRENT VIEW OF ARBITRATION IMPACTS THE EXTERNAL LAW DEBATE IN LABOR ARBITRATION*

The *Gilmer* court is not without its critics.[86] Specifically, the holding in *Gilmer* has been criticized because, in one commentator's view, employment discrimination law was placed in the hands of the courts in order to shift "the balance of power more equitably in favor of those who had long possessed far less bargaining power, such as consumers, employees, blacks, and women."[87] Critics have also viewed warily the asserted advantages of arbitration, stating that the expedition and inexpensiveness of arbitration is dissipating with the increasing participation of lawyers.[88] In addition, it has been asserted that the informality, privacy, and peer involvement are not really advantageous to those with unequal bargaining power.[89]

On the other hand, some commentators, although acknowledging the criticisms, believe that they can be overcome.[90] For example, it has been suggested that employment arbitrators should decide cases in accordance with the settled meanings of the statutory terms as determined by precedential court decisions and adopt a judicially

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86. "By substituting arbitration for litigation, the Court undermined the judiciary's role as a vehicle for social change . . . [and] . . . acted indifferently to the strong policy against employment discrimination and with a blind bias in favor of commercial arbitration . . . ." Maria C. Whittaker, Gilmer v. Interstate: *Liberal Policy Favoring Arbitration Trammels Policy Against Employment Discrimination*, 56 ALB. L. REV. 273, 276 (1992); *see* Christine Godsil Cooper, *Where Are We Going with* Gilmer? *— Some Ruminations on the Arbitration of Discrimination Claims*, 11 ST. LOUIS U. PUB. L. REV. 203 (1992); Samuel Estreicher, *Arbitration of Employment Disputes Without Unions*, 66 CHI.-KENT L. REV. 753 (1990); Katherine Van Wezel Stone, *The Legacy of Industrial Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575 (1992); Wendy S. Tien, Note, *Compulsory Arbitration of ADA Claims: Disabling the Disabled*, 77 MINN. L. REV. 1443 (1993).

87. Whittaker, *supra* note 86, at 276; *see* Cooper, *supra* note 86, at 220–22.

88. *See* THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? TRYING TO BE FOR LABOR WHEN IT'S FLAT ON ITS BACK 164 (1991) (calling arbitration "a lawsuit in drag").

89. John A. Gray, *Have the Foxes Become the Guardians of the Chickens? The Post-*Gilmer *Legal Status of Predispute Mandatory Arbitrations as a Condition of Employment*, 77 VILL. L. REV. 113 (1992); *see* Cooper, *supra* note 86, at 219–20, 237–39.

90. Martin H. Malin & Robert F. Ladenson, *Privatizing Justice: A Jurisprudential Perspective on Labor and Employment Arbitration from the* Steelworkers Trilogy *to* Gilmer, 44 HASTINGS L.J. 1187 (1993); *see also* Ira Jaffe, *The Arbitration of Statutory Disputes: Procedural and Statutory Concerns*, *in* PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 110, 110–33 (BNA 1992); Estreicher, *supra* note 86, at 789–91.

cautious approach to statutory interpretation. Thus, they would apply and extend current law in a relatively familiar and unsurprising way to minimize the problems some have associated with employment arbitration.[91] In fact, those who propose this type of constraint on employment arbitrators do so even if the arbitrator "believes that better law would result from a more creative interpretation."[92] Others have conceded that expanded discovery will be necessary[93] and that the skills of arbitrators may require "upgrading, [and] refinement."[94] Still another suggestion is that arbitrations of these claims be stayed pending the administrative processing of a charge by the Equal Employment Opportunity Commission. Upon completion, either the matter is arbitrated or becomes the subject of a civil action.[95] Finally, as perhaps an ultimate fail safe measure, those who defend employment arbitration assert that a wider scope of review of awards in this setting will be necessary, even to the extent that the courts should engage in *de novo* review.[96]

Still other commentators point out what they perceive to be the real advantages for the employee in arbitrating statutory discrimination claims. For example, in arbitration the employee is not subjected to the type of delay that "wears down" his or her resolve[97] and because the parties deal with the dispute in a simpler, predictable and quicker fashion there is "a greater sense of personal empowerment."[98]

The impact of *Gilmer* and its progeny have also been felt among labor arbitrators, rekindling the external law debate when a labor arbitrator is faced with the interpretation of the collective bargaining agreement.[99]

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91. Malin & Ladenson, *supra* note 90, at 1233.

92. *Id*.

93. Jaffe, *supra* note 90, at 126.

94. Stephen L. Hayford, *The Changing Nature of Labor Arbitration*, *in* PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 69, 87 (BNA 1992).

95. Estreicher, *supra* note 86, at 79–91.

96. Malin & Ladenson, *supra* note 90, at 1238; *see also* Hayford & Sinicropi, *supra* note 2, at 278.

97. Loren K. Allison & Eric H.J. Stahlbut, *Arbitration and the ADA: Do the Two Make Strange Bedfellows?*, 37 RES GESTAE 168 (1993).

98. Stephen Skrainka, *The Utility of Arbitration Agreements in Employment Manuals and Collective Bargaining Agreements for Resolving Civil Rights, Age, and ADA Claims*, 37 ST. LOUIS U. L.J. 985, 993 (1993).

99. *See* Michel Picher, Beyond Pied Piper: Reasonable Accommodation for Physical

Again, the familiar battle lines have been drawn. Those who have traditionally argued that labor arbitrators should not follow external law have of course repeated their traditional positions.[100] However, they have also contended with the Supreme Court's decision in *Gilmer*. For example, relying on the Court's exception in *Gilmer* that arbitration will be inappropriate if there is an evident congressional intention to preclude arbitration under the applicable statute, some have pointed out that there is such evidence in the Civil Rights Act of 1991[101] and the Americans with Disabilities Act.[102] More broadly, those continuing the argument against the application of external law add that if arbitrators follow external law they will open themselves to greater judicial review, go far afield of their specialized competence, and, especially in the matter of the available remedies under statutory law, will rewrite the parties' collective bargaining agreement.[103]

On the other hand, those who renew the argument in favor of applying external law in the aftermath of *Gilmer* contend that to fail to do so may cause the courts to reconsider the national policy favoring labor arbitration[104] and that labor arbitrators already strive to reconcile contractual resolutions with "the rules of conduct and societal expectations embraced in the statutes, government regulations, and case law."[105] With regard to the fears of some at the prospect of

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Disabilities in Labor Arbitration in the United States and Canada (Oct. 19, 1994) (unpublished paper presented at the Mid-year Meeting of the National Academy of Arbitrators) (asking if it is "so clear" that employers and unions, acting in good faith, would question the application of external law and asking if it is time to question whether the "fiction" of a contractual "state of nature" underlying *Enterprise Wheel* and *Gardner-Denver* can be sustained in light of the radical reshaping of the regulation of the workplace).

100. *See supra* notes 30–31 and accompanying text.

101. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

102. Pub. L. No. 101-336, 104 Stat. 331 (1990) (codified as amended at 42 U.S.C. §§ 12101–12213 (Supp. V 1993)); *see* Feller, *supra* note 13, at 979–80; Tien, *supra* note 86, at 1469–71; Joan Dolan, *Arbitration of Health-Related Issues*, PROCEEDINGS OF THE FORTY-SEVENTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 42, 47 (BNA 1994). *But see* R. Bales, *A New Direction for American Labor Law: Individual Autonomy and the Compulsory Arbitration of Individual Employment Rights*, 30 HOUS. L. REV. 1863, 1898 (1994) (stating that the congressional intent on this issue "is ambiguous at best, and hence malleable into whatever an advocate or a court wants it to be").

103. Feller, *supra* note 13, at 981–82.

104. Tim Bornstein, *Arbitration of Sexual Harassment*, *in* PROCEEDINGS OF THE FORTY-FOURTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 110, 113 (BNA 1991).

105. Sinicropi, *supra* note 28, at 13; *see also* Skrainka, *supra* note 98, at 988.

a greater scope of judicial review, one commentator has labelled the fear "a bit of a bugaboo" because current case law on the review of arbitrators' awards where there is an alleged conflict between the award and public policy[106] have already forced arbitrators to think "more imaginatively about the finality of their awards."[107]

## *IV. THE INFLUENCE OF THE AMERICANS WITH DISABILITIES ACT, AS AN EXAMPLE OF EXTERNAL LAW, ON ARBITRAL DECISIONMAKING*

This section explores the decisions of labor arbitrators, considering the physical or mental disabilities of a grievant discharged for excessive absenteeism that were issued prior to the passage of external law governing the rights of those employees, referred to as the "traditional" approach. Next, this section reviews decisions following the passage of those laws and draws conclusions from this experience with regard to the renewed debate concerning the application of external law.

### The "Traditional" Approach

Dismissing a disabled employee has long been regarded as appropriate if the employee's physical or mental disability prevents satisfactory performance or exposes the employee or other persons to the likelihood of serious risk of harm or injury.[108] Therefore, the disability itself was not viewed as the basis for the termination, but

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106. *See* Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29 (1987); *see also* W.R. Grace & Co. v. Local Union 759, Int'l Union of United Rubber Workers, 461 U.S. 757 (1983).

107. Bornstein, *supra* note 104, at 116. See also Hayford & Sinicropi, *supra* note 2, at 274, who note that in those cases where a labor arbitrator deciding a contractual claim is faced with external law defining the individual workplace-related rights of grievant employees:

> The thoughtful neutral will take care to ensure, to the extent possible, that a court, subsequently presented with the arbitral resolution of the contractual issue, will find therein an articulate and appropriate disposition of the statutory rights of the grievant sufficiently respectful of the relevant law that the court deems it worthy of concurrence.

*Id*.

108. *See* Benjamin Wolkinson, *Rights of the Handicapped or Disabled Worker*, *in* 2 LABOR AND EMPLOYMENT ARBITRATION 27-1, 27-1 to 27-5 (Tim Bornstein & Ann Gosline eds., 1994).

rather the impact of the disability formed the basis for just cause.[109] In many instances arbitrators have referred to these types of discharges as "non-disciplinary terminations."[110] The basic rationale to justify the discharge in these cases is either that the employer is entitled to expect that employees will be present for work and able to perform their work or that even if they are present and able to work that they will not expose others, including the employer, to the consequences of their disability.[111] Therefore, as long as the employer's absenteeism policy has been communicated to employees, is consistently applied, and progressive discipline has been utilized, arbitrators have found just cause for discharge.[112] Mitigating circumstances may excuse the absenteeism, but only if the period of absenteeism is "reasonable."[113]

A closer look at some individual cases illustrates these general statements. Arbitrators who have considered excessive absenteeism prior to the enactment of the Americans with Disabilities Act have generally upheld discharges when the evidence has shown that the employee is physically unable to perform the duties of the job in question or that the employer's efficiency or safety will be impaired. For example, in *City of East Providence*,[114] the grievant injured his back while at work and went on paid injury leave while he was treated by his personal physician. After the first month he was examined by the employer's physician who concurred with the first doctor's diagnosis. However, after eight months the two doctors disagreed whether the employee could return, and the grievant remained off work as suggested by his personal physician. At the end of another month the grievant returned to work only to reinjure his back after one week on the job. His personal physician recommended that he continue to work, but that he be placed on light duty, an assessment with which a third physician concurred. After two more weeks, the employer's physician suggested that the grievant take

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109. United States Postal Serv., 73 Lab. Arb. Rep. (BNA) 1174, 1180 (1979) (Garrett, Arb.). In the words of one arbitrator, "excessive absenteeism even if . . . [for] genuine disability, is . . . [dischargeable for when] an employee is recurrently absent, the point may be reached when the reasons for the absenteeism are immaterial." Pacific Bell, 91 Lab. Arb. Rep. (BNA) 653, 655 (1988) (Kaufman, Arb.).

110. Mobil Oil Corp., 81 Lab. Arb. Rep. (BNA) 1090, 1093 (1983) (Taylor, Arb.).

111. Wolkinson, *supra* note 108, at 27-5 to 27-6.

112. *Id*. at 27-7 to 27-8.

113. Louisville Water Co., 77 Lab. Arb. Rep. (BNA) 1049 (1981) (Volz, Arb.).

114. 81 Lab. Arb. Rep. (BNA) 608 (1983) (Gwaizda, Arb.).

one week off from work. When the grievant did not return at the end of that first week, the employer threatened to suspend the grievant leading to an agreement that a third doctor examine him. That physician suggested that the grievant return to work at light duty. The grievant complied, but during the next three months he was off work to an excessive degree. Finally, the employer discharged him.[115]

The arbitrator determined that the issue before him was "whether the employer demonstrated that it had sufficient grounds for concluding that the grievant was unable to perform his job."[116] In upholding the discharge the arbitrator relied upon the fact that after one year the grievant could not perform even light duty and that because his absences were sporadic they were discretionary and, unlike a total absence, did not support a finding of incapacity. More importantly, the arbitrator stated:

> the grievant knew that he could not expect the employer to carry him . . . indefinitely, and he was *obligated* to show his ability to do the light work assigned to him. Therefore, when the grievant claimed to be unable to work for reasons having to do with his back, *he knew or should have known, that he was taking the chance of being terminated*.[117]

In these types of cases and in those where the employee can perform the work but may expose the employer or others to danger, arbitrators have relied on the inherent management right to conduct the business such that it will be a thriving and profitable enterprise without endangering anyone. For example, in *National-Standard Co.*,[118] the arbitrator held that management retains the right to determine if an employee is qualified for the job in question and that the exercise of that right can be challenged only if the employer has acted in bad faith, with prejudice, or arbitrarily and unreasonably.[119]

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115. *Id*. at 614.

116. *Id*.

117. *Id*. at 615 (emphasis added); *see also* Shamrock Indus., Inc., 84 Lab. Arb. Rep. (BNA) 1203 (1985) (Reynolds, Arb.).

118. 85 Lab. Arb. Rep. (BNA) 401 (1985) (Butler, Arb.).

119. *Id*. at 403; *see also* East Ohio Gas Co., 91 Lab. Arb. Rep. (BNA) 366 (1988) (Dworkin, Arb.) (utilizing a "rational and responsible" test); Mead Corp., 82 Lab. Arb. Rep. (BNA) 546 (1984) (Statham, Arb.) (using a "good faith" test); Carnation Co., 60 Lab. Arb. Rep. (BNA) 674 (1974) (Hayes, Arb.).

In *Kost Brothers, Inc.*,[120] the arbitrator not only relied on the employer's inherent managerial right, but also held that "management has not only the right, but the *responsibility*, to take corrective action when an employee has a physical or mental disability which endangers his own safety or that of others."[121]

In some cases arbitrators have also relied on considerations of efficiency and other operational factors to uphold the discharge of an employee who is unable to report for work due to a disability.[122] One arbitrator found that even in those cases where the employee is able to work there is a legitimate concern of management regarding "the safety problems [that may] be create[d] [upon the employee's return], and the costs of absenteeism and financial liability associated with re-employment."[123]

Of course, in all of these cases the nature and impact of the employee's disability must be addressed. Facing that issue requires the assessment of medical evidence and opinion, a difficult task indeed.[124] In *National-Standard Co.*, Arbitrator Butler stated that the "overriding factor . . . is the fact that the employer is not `handcuffed' by . . . doctors . . . [who] are not familiar with the workplace and do not know specifically . . . the physical demands of the job."[125] One case, *General Mills, Inc.*,[126] presented the uncertainties of such an endeavor. There, Arbitrator Traynor, although expressing his "uneasy feeling" that he was faced with the "`friendly doctor' who . . . is willing to do a favor for a long-time patient," still reversed the discharge because the conclusions of the employer's doctors were not based on demonstrable facts. However, in doing so he admitted that "in an area of such sensitivity" the arbitrator can only bring "limited competence."[127]

Nonetheless, it appears that an exception arises in certain cases

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120. 86 Lab. Arb. Rep. (BNA) 65 (1986) (Gerquist, Arb.).

121. *Id*. at 72 (emphasis added) (citing FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 721–24 (4th ed. 1985)).

122. *See* Cleveland Trencher Co., 48 Lab. Arb. Rep. (BNA) 615, 618 (1967) (Teple, Arb.) ("efficiency and the ability to compete can hardly be maintained if employees cannot be depended upon to report for work with reasonable regularity").

123. Spang and Co., 84 Lab. Arb. Rep. (BNA) 342, 345 (1985) (Joseph, Arb.).

124. Dolan, *supra* note 102, at 52.

125. 85 Lab. Arb. Rep. (BNA) 401, 403 (1985) (Butler, Arb.).

126. 69 Lab. Arb. Rep. (BNA) 254 (1977) (Traynor, Arb.).

127. *Id*. at 262.

of mental disability. For example, in *Lever Brothers Co.*,[128] the employer discharged an employee for excessive absenteeism although the employee had been diagnosed with a "depressive reaction" to serious marital and family problems. In that case the diagnosis stated that the employee's understanding of reality was impaired and that his judgement regarding normal motivation to care for his material welfare was severely hampered. Unlike the analysis utilized in the cases described above, Arbitrator Traynor determined that in cases of mental disability the "central concern" was whether upholding the discharge foreclosed future employment. Therefore, his award turned on determining the prospect for an improvement in the employee's condition. His rationale for using this analysis was that a mental disability often is an "illness which prevents . . . a free choice . . . [and] . . . should not . . . deprive an employee of an opportunity to earn a living."[129]

Thus, a discharge for excessive absenteeism due to a disability has been traditionally upheld because of the employer's managerial rights relating to the operation of the enterprise, with the possible exception of a case involving a mental disability. However, if in exercising that right the employer acted in bad faith or in any arbitrary fashion, the discharge was reversed.

## The Relevant Statutory Provisions

With the exception of the contractual requirement that an employer may discipline or discharge employees only when there is just cause, and the duty to bargain in good faith under the National Labor Relations Act, employers have been virtually unrestricted in their ability to formulate policies to address employee absenteeism and employee needs for time off, regardless of whether the absence was required for medical or other pressing reasons.[130] Recently however, a federal law has drastically changed the way covered employers must treat employee absences from work.

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128. 87 Lab. Arb. Rep. (BNA) 260 (1986) (Traynor, Arb.).

129. *Id*. at 264.

130. Jane Howard Carey & Sandra S. Fink, *How the ADA and FMLA Interact with an Employer's Policies Concerning Absenteeism and Leave Due to Employee Medical Conditions*, *in* ALI-ABA COURSE OF STUDY, ADVANCED EMPLOYMENT LAW AND LITIGATION 269 (1993).

The Americans with Disabilities Act

The Americans with Disabilities Act (ADA) became effective on July 26, 1992,[131] for employers with twenty-five or more employees who have worked for twenty weeks in the current or preceding calendar year.[132] Employers with 15 or more employees have been covered by the ADA since July of 1994.[133] Title I of the ADA, which is enforced by the Equal Employment Opportunity Commission (EEOC), governs the employment of disabled individuals.[134] Specifically, it prohibits discrimination against qualified individuals with a disability[135] or against those who have an association or relationship with an individual with a disability.[136] The ADA defines a disability as a physical or mental impairment that substantially limits one or more of an individual's major life activities, a record of such an impairment, or being regarded as having such an impairment.[137] Major life activities are further defined as seeing, hearing, speaking, walking, breathing, performing manual tasks, learning, caring for oneself, and working.[138] To determine whether one is a qualified individual with a disability and therefore protected under the Act, it must be determined whether the individual can perform the essential functions of the position at issue with or without a reasonable accommodation.[139] However, where the individual cannot perform the essential functions of the position without a reasonable accommodation, the employer need not supply the reasonable accommodation if it would constitute an undue hardship to the employer.[140]

The impact of the effect of the ADA on absenteeism policies and the discipline and discharge of employees who have poor absenteeism records due to an impairment of major life activity is unclear. On the one hand, the Act and the regulations of the EEOC appear to honor an employer's right to enforce uniform absenteeism policies.[141]

131. Pub. L. No. 101-336, § 108, 104 Stat. 337 (1990).
132. 42 U.S.C. § 12111(5)(A) (Supp. V 1993); 29 C.F.R. § 1630.2(e) (1994).
133. 42 U.S.C. § 12111(5)(A); 29 C.F.R. § 1630.2(e).
134. 42 U.S.C. § 12111–12117.
135. *Id*. § 12112(a).
136. *Id*. § 12112(b)(4).
137. *Id*. § 12102(2).
138. 29 C.F.R. § 1630.2(i) (1994).
139. *Id*. § 1630.2(m).
140. 42 U.S.C. § 12112(b)(5)(A); *see* 29 C.F.R. § 1630.2(o), (p) (1994).
141. Carey & Fink, *supra* note 130, at 275.

For example, the EEOC states in its Technical Assistance Manual, "[a]n employer may establish attendance and leave policies that are uniformly applied to all employees, regardless of disability, but may not refuse leave needed by an employee with a disability if other employees get such leave."[142] Moreover, the Manual also states that a uniformly applied leave policy does not violate the ADA simply because it has a more severe effect on individuals with disabilities.[143]

On the other hand, as stated above, Title I prohibits discrimination in employment against qualified individuals with disabilities. This prohibition clashes with the "traditional" approach of arbitrators that turns only on the issue of whether the employee can perform the job in question despite his or her disability. To the extent that the ADA permits an analysis of an employee's ability to perform the job, it limits that analysis to whether the disability impacts the employee's ability to perform the essential functions of the job, not the employer's interest in ensuring that the tasks are completed. Although this "essential function" test for determining ADA status could be regarded as another formulation of the "traditional" approach of arbitrators, the ADA differs substantially because if the qualified individual can perform those essential functions with a reasonable accommodation that is not an undue hardship, the employer must provide the accommodation. None of these concepts is included in the "traditional" school of thought followed by some arbitrators.

The ADA regulations also prohibit an employer from asking an applicant how often the individual will require time off because of the disability.[144] Such an inquiry is not restricted when an employee takes leave for some reason not related to a disability. Further, on the issue of what constitutes a reasonable accommodation, the employer may be required to make adjustments in leave policy that may include leave flexibility and unpaid leave. As additional examples, the ADA regulations mention part-time or modified work schedules or reassignment to a vacant position.[145] These regulations

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142. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITIES ACT § 7.10 (1992).

143. *Id*. This appears to differ with well-established principles under Title VII. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424 (1971).

144. 29 C.F.R. § 1630.14(a) (1994); *see also* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *supra* note 142, § 5.5(f).

145. 29 C.F.R. § 1630.2(o)(2)(ii) (1994).

would appear to place additional restrictions on employer policies regarding absenteeism.

The Impact of the Statute

What has been the actual experience of the agency charged with enforcing the ADA? Under the ADA, the EEOC reported that in the first eleven months since the Act went into effect, 11,760, or approximately fifteen percent of all charges processed by the agency, were filed under the Act. Of the cases filed, 2,279 were resolved during that time at a cost exceeding eleven million dollars, or about $5,000 per charge. Nearly half of the charges alleged discriminatory discharge and almost one-quarter sought reasonable accommodations.[146]

Has the passage of the ADA had any impact on the way in which arbitrators have traditionally decided cases where excessive absenteeism is linked to disability or the serious health condition of the employee or his or her spouse or children?

## *V. RECENT ARBITRATION OPINIONS*

A review of recent arbitration awards both before and after the ADA[147] shows that arbitrators have moved away from the "traditional" approach to consider, either explicitly or implicitly, the external law. Of course, those who have done so have continued, as they must, to remain within the scope of their authority as defined by the governing collective bargaining agreement.[148] Thus, they have illustrated a clear and persuasive explanation how their interpretation and application of the controlling contractual language and the common law of the shop produces a result consistent with the ex-

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146. Peter Panken, *Employment Litigation Under the Americans with Disabilities Act*, *in* ALI-ABA COURSE OF STUDY, ADVANCED EMPLOYMENT LAW AND LITIGATION 163 (1993).

147. The precursor to the ADA was the Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 355 (codified as amended at 29 U.S.C. §§ 701–796 (1988)). Therefore arbitrators have struggled with the fact that public policy already, at least to the limited extent that the law applied only to federal contractors, viewed the protection of disabled employees as an important social interest. *See*, *e.g.*, Picher, *supra* note 99.

148. United Steelworkers v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); *see also* Hayford & Sinicropi, *supra* note 2, at 281 (noting that "a contractual `hook' can be identified that legitimates such an analysis").

ternal law.[149]

Some collective bargaining agreements include an express provision that arbitrators use to review discipline in this manner or, in at least one case, to consider the question of reasonable accommodation.[150] In *Snap-On Tools*,[151] the arbitrator reviewed the discharge of an employee who compiled a poor attendance record after suffering a major injury at work which brought about post-traumatic stress syndrome. In reversing the discharge the arbitrator considered the fact that post-traumatic stress syndrome causes one to avoid the environment which caused the original trauma and he contrasted the grievant's attendance record before and after the injury. He then concluded that in discharging the grievant the employer did not adequately consider the ailment and was literally "going by the books" in the manner he or she treated the employee. Thus, without reference to any law or public policy, the arbitrator simply considered the issue as he exercised his authority to rule whether there was just cause and if the penalty of discharge outweighed the fact that the employee was guilty of excessive absenteeism. In dicta the arbitrator discussed whether the employee had a duty reasonably to accommodate the grievant. After finding no such express obligation in the collective bargaining agreement, the arbitrator held that in light of the contractual prohibition of discrimination against handicapped employees the employer "probably" had a duty that arose "not only from federal or state law, [but also] from evolving principles of industrial common law."[152]

In another case, *LS-II Electrogalvanizing*,[153] the arbitrator found that the collective bargaining agreement required that the employer "will" make reasonable efforts to find alternative work or to modify the work place. When the employer failed to do so, the arbitrator reversed the discharge of an employee who suffered from

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149. Hayford & Sinicropi, *supra* note 2, at 281.

150. In 1970 only 69% of collective bargaining agreements had anti-discrimination clauses. By 1985 the number rose to 94%. *See* Martin H. Malin & Lamont Stallworth, *Grievance Arbitration: Accommodating an Increasingly Diverse Work Force*, 42 LAB. L.J. 551, 556 (1991).

151. 98 Lab. Arb. Rep. (BNA) 905 (1992) (Stallworth, Arb.).

152. *Id*. at 910; *see also* Southern Gage Co., 68 Lab. Arb. Rep. (BNA) 755 (1977) (Bowles, Arb.); Bay Area Rapid Transit Dist., 79 Lab. Arb. Rep. (BNA) 1171 (1982) (Koven, Arb.).

153. 98 Lab. Arb. Rep. (BNA) 565 (1991) (Bethel, Arb.)

epileptic fits.[154] Other arbitrators, however, have utilized a broader approach while always ensuring, of course, that their analysis is grounded ultimately on the terms of the collective bargaining agreement.[155] In *Eastwood Printing Co.*,[156] Arbitrator Winograd explicated this broader approach to these issues when he stated:

> In recent years, our industrial society has come to recognize that employers owe certain duties to their employees beyond the mere obligation to pay a day's pay for a day's work . . . . [E]mployee[s] who are physically disabled are now recognized as valuable workers who are entitled to accommodations in the workplace which permit them to be productive.[157]

And Arbitrator Kanner in *City of Dearborn Heights*,[158] squarely faced the issue of the impact of the external law, i.e. the ADA, stating:

> On the one hand, the collective bargaining agreement attempts to codify conditions of employment applicable to all members of the bargaining unit. But to the contrary, the ADA promotes individualized and disparate treatment of disabled individuals arguably in abrogation of the terms of the collective bargaining agreement. Such conflict results in tension between the ADA and the collective bargaining agreement.[159]

Arbitrator Kanner went on to say:

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154. *Id*.

155. *See* Cleveland Elec. Illuminating Co., 100 Lab. Arb. Rep. (BNA) 1039 (1993) (Lipson, Arb.) (reversing the discharge on the basis of express contractual language and requiring the employer to place a disabled employee in "any" work he could perform, and stating that he "must look to law and public policy in construing the contractual language").

156. 99 Lab. Arb. Rep. (BNA) 957 (1992) (Winograd, Arb.).

157. *Id*. at 961. Interestingly, Arbitrator Winograd reversed the discharge after finding that despite the employer's management right to discharge employees who cannot perform their jobs, the employer did not adequately investigate the permanent nature of the disability. *Id*.; *see* Memphis Light, 98 Lab. Arb. Rep. (BNA) 1123 (1992) (Goldman, Arb.) (finding that there is a duty under federal law that the employer provide affirmative action to employ the handicapped and that the duty must be weighed in deciding if the grievant was discharged for just cause, and upholding the discharge because, *inter alia*, the employer acted in good faith).

158. 101 Lab. Arb. Rep. (BNA) 809 (1993) (Kanner, Arb.).

159. *Id*. at 811–12.

> The "bothersome ambiguity" as to the weight to be given collective bargaining rights by the ADA . . . has to be resolved on a case-by-case basis. There will always be a myriad of facts and circumstances involving the "reasonable accommodation" of the disabled person in relation to his or her particular disability. Accordingly, arbitrators will be engaged in a balancing and weighing of the merits underlying each case.[160]

Despite such calls to view just cause in the context of public law and policy governing employees with disabilities and the demands of balancing work and family, some arbitrators have still adhered to the "traditional" view described earlier in this article.[161] In *Ogdem Manufacturing Co.*,[162] the arbitrator relied on the employer's inherent managerial right and, after finding that it did not abuse that right, upheld the discharge. With regard to the ADA, the arbitrator pointed out that there was no contractual obligation to enforce or follow the Act and that his discretion was limited to interpreting the parties agreed-upon obligations.[163]

It is thus apparent that with the evolving external law regarding the impact of an employee's disability on continued employment arbitrators have grafted that concept into their analysis, either explicitly or implicitly.[164] This is the result of a recognition that the legal obligations of employers and the rights of employees are changing and that incorporating those changes into the workplace is necessary, so long as it is consistent with the collective bargaining agreement. Therefore, arbitrators have moved away from a strict reliance on the employee's ability to perform the work as the pri-

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160. *Id*. at 815; *accord* Clark County Sheriff's Dep't, 102 Lab. Arb. Rep. (BNA) 193 (1994) (Kindig, Arb.).

161. *See supra* text accompanying notes 108–13. One commentator has added that if an arbitrator finds an exception to an otherwise reasonable rule governing absenteeism the arbitrator must make clear "that the conduct is still subject to the rule prohibiting it and that a legally required exception has been made." Sara Adler, *Arbitration and the Americans with Disabilities Act*, 37 ST. LOUIS U. L.J. 1005, 1013 (1993).

162. 101 Lab. Arb. Rep. (BNA) 467 (1993) (Harr, Arb.).

163. *Id*.; *accord* Altoona Hosp., 102 Lab. Arb. Rep. (BNA) 650 (1993) (Jones, Arb.).

164. In fact, at least one study has concluded that in deciding issues of religious accommodation, affirmative action, and sexual harassment, arbitrators' awards have "paralleled what would have occurred if the matter were pursued under the appropriate anti-discrimination statute." Malin & Stallworth, *supra* note 150, at 552; *see also* Michelle Hoyman & Lamont Stallworth, *Arbitrating Discrimination Grievances in the Wake of* Gardner-Denver, MONTHLY LAB. REV., Oct. 1983, at 3.

mary point of reference.

## *VI. CONCLUSION*

Whether or not external law, represented by the ADA, governs the arbitration of excessive absenteeism caused by disability, it is clear the evolution of today's diverse work force and workplace has had an impact on arbitrators' views in those cases.[165] That impact is clear when one discerns the move away from an analysis limited to a determination whether the employee can perform the work in question to include considerations of the nature of the disability, whether an employer owes a duty to employees beyond providing work and an appropriate rate of pay and other benefits, and the employee's prior record. In other words, where the "traditional" approach focused on the employer's inherent management rights, the newer approach also considers the employee's competing interests, established by external law, and attempts to balance those interests underlying each case.

The touchstone is to remember that the role of the arbitrator is to interpret and enforce the parties' mutual agreement. Therefore, when the arbitrator looks to external law he or she must do so if the agreement provides some basis, express or implied. However, one cannot ignore the emergent trend in favor of arbitration in all facets of litigation. Indeed it could be argued that in light of that strong movement the courts might very well instruct labor arbitrators to look to external law to fulfill the promise of arbitration as an effective means of conflict resolution as well as the arbitrator's role in the system of industrial self-government.

The arguments that any such role is unwise are not persuasive. The manner in which the Supreme Court dealt with the objections to arbitration in *Gilmer* will lead to a rejection of the contentions that certain statutes such as the Civil Rights Act of 1991 and the Americans With Disabilities Act evidence a congressional intention that arbitration be precluded. Rather, the Court will continue the reach of arbitration as a matter of public policy. Moreover, to decide that issue so that arbitration is precluded in some statutes, but not others, will lead to a patchwork of forums in which arbitration is

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165. Dolan, *supra* note 102, at 56–57.

permissible while it is not in others.[166] Any such result will be harmful as a matter of public policy. In addition, one might argue that in light of the continuing growth of the dockets of the nation's courts such that they find it difficult to deal with actions requiring speedy trials, the use of arbitration will present the only alternative. With regard to the "special competence" of labor arbitrators to interpret contracts, but not external law, it is clear that some arbitrators do in fact possess competence in both areas and that those who do not will find it necessary to refine their skills.[167] More importantly, the choice of arbitrator is left to the litigants who can choose an arbitrator who is capable of resolving the statutory dispute.[168] Finally, if an expanded scope of review is the "price" to be paid, then it must be done and indeed, might be a trend already underway.[169] Labor arbitrators are the servants of the parties to the process and are expected to resolve disputes brought before them so that the parties may continue their collective bargaining relationship with some degree of certainty as to their respective rights and obligations.[170] To fail to do so would impair the future of labor arbitration as the preferred means of resolution and one in which the finality needed to enable the parties to preserve and fortify their bargaining relationship would be imperiled.[171]

However, when labor arbitrators begin the journey down this path, one must consider what he or she will do when faced with external law that necessarily conflicts with his or her own view of the matter. This can be most troublesome in a case, for example, where there is a demonstrated disability causing the excessive absenteeism, but the record also demonstrates that reversal of the discharge is otherwise inappropriate.

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166. *See* Estreicher, *supra* note 86, at 789 (noting that the search for an express or implied repeal of the Federal Arbitration Act is likely to result in the drawing of arbitrary distinctions among statutes).

167. *See* Hayford, *supra* note 94, at 88–89 (noting that "labor arbitrators have always confronted challenge and embraced change . . . [and that] continued loyalty to the needs of the parties and the institution [they] serve compel similar conduct now").

168. *See*, *e.g.*, Estreicher *supra* note 86, at 777 (noting that the "legal system should not assume that the parties will be unable to select an arbitrator competent to hear the statutory claims").

169. *See* Hayford & Sinicropi, *supra* note 2, at 280–84; *see Three "Classics"*, *supra* note 13, at 179–81.

170. *Id*. at 278.

171. The criticisms of the reach of *Gilmer* in non-union settings, *see supra* notes 86–89 and accompanying text, are effectively eliminated in the unionized setting.

Perhaps the answer is that arbitrators may look to the factual issues that statutes like the ADA raise, for example, the nature and extent of the disability and the employer's efforts to reasonably accommodate, not in applying external law, but rather in exercising the arbitrator's well-established authority and discretion to consider issues such as mitigating and extenuating circumstances when considering whether a discharge was for just cause. In this way arbitrators may remain faithful to the parties' agreement without ignoring the reality of the legal environment surrounding the parties' agreed-upon obligations.

In this regard, the opinion of Arbitrator Dworkin in *Thermo King Corp.*,[172] is instructive. There the employer discharged a fourteen-year employee whose "long and virtually unbroken record of absences and tardiness" included a history of cocaine and alcohol addiction. In addition, a disabling chronic depression at one point led to a prior discharge that had been resolved by an agreement to reinstate the employee on a last-chance basis. Relying upon the testimony of the employee's counselor that there was no degree of certainty that the employee would improve his attendance record, Arbitrator Dworkin upheld the discharge. In so doing he stated:

> [T]here are limits to what the ADA and elemental fairness require. . . . [A]n employer might have to adapt for disability by creating part-time or modified work schedules, but it does not have to accept an employee's chronic, incessant absenteeism and tardiness. Similarly, arbitrators have held routinely that while employers must make allowances for disabilities, they do not have to retain employees who will not or, through no fault of their [own], cannot keep to work schedules.[173]

One can debate whether this approach is sound, but it seems unquestioned that the balancing of competing interests between the employer's managerial rights and the rights of employees with disabilities is the "usual grist for an arbitrator's mill."[174]

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172. 102 Lab. Arb. Rep. (BNA) 612 (1993) (Dworkin, Arb.).

173. *Id*. at 616–17. Interestingly, the union presented evidence to Arbitrator Dworkin that in a subsequent position the grievant had a perfect attendance record. Arbitrator Dworkin however was unmoved, noting that although the grievant's subsequent conduct was a "remarkable aspect" of the case and was a "hopeful sign," it came too late for an award of reinstatement to his former position. *Id*.

174. City of Dearborn Heights, 101 Lab. Arb. Rep. (BNA) 809, 815 (1993) (Kanner,

Arb.).