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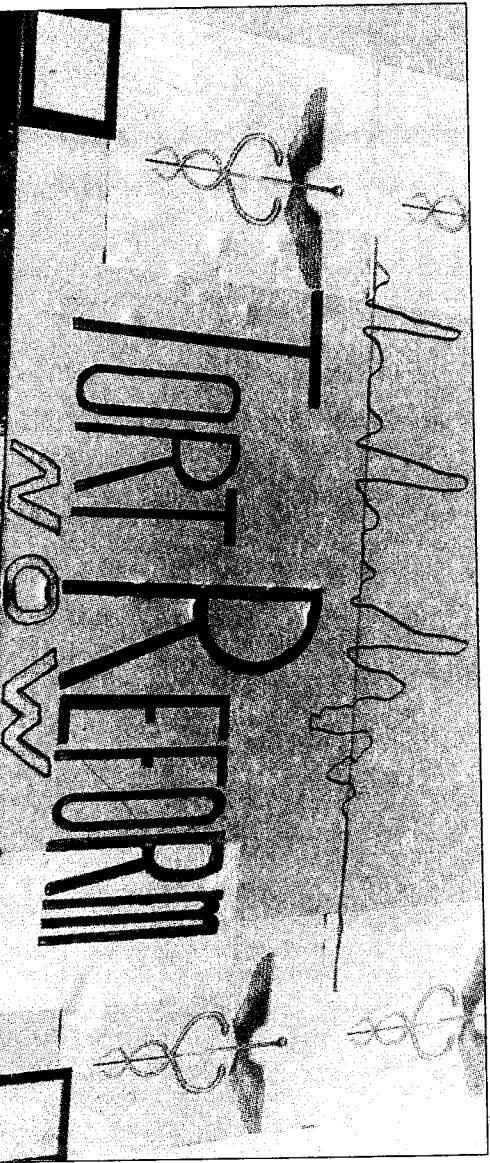
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EEOC shift debated on arbitration

A policy collides
with new case law.

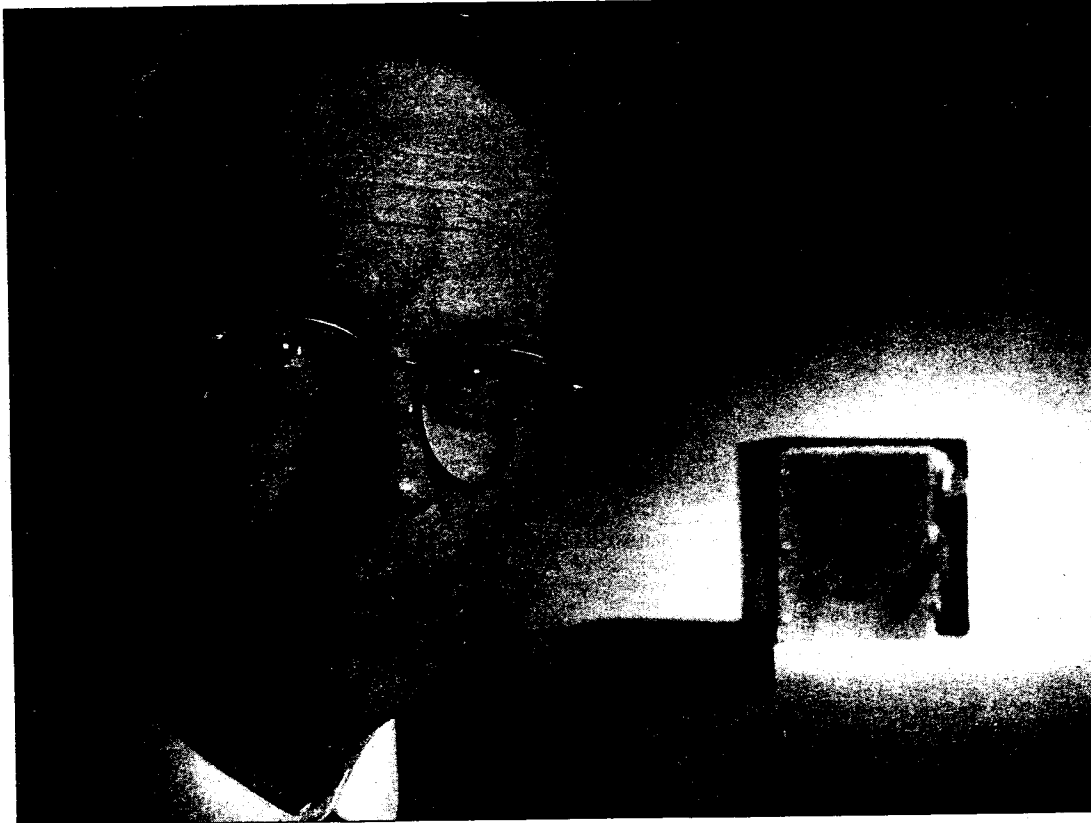
By Marcia Coyle
STAFF REPORTER

WASHINGTON—Employer and employee groups have been waging a behind-the-scenes battle at the Equal Employment Opportunity Commission (EEOC) as the agency reconsiders a Clinton-era policy opposing the use of mandatory arbitration agreements as a condition of employment.

The 1997 policy statement is the "most comprehensive, written statement documenting how

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ROBERT MULLALLY: He is scheduled to begin a 45-day jail term in a federal facility for violating a protective order.

Arkansas, Florida, Louisiana and Washington prohibit secret agreements in cases involving hazardous products. Texas has also been at the forefront of limiting the sealing of court files and secrecy in case settlements. Eleven other states have rules on when judges can seal court records, according to the Association of Trial Lawyers of America.

Mullally's attorneys tried to attack defects in the magistrate's protective order but were blocked by the collateral bar rule, which doesn't allow for the validity of such an order to be challenged once the violation has occurred.

One of Mullally's attorneys, James Weinstein, a constitutional law professor at Arizona State University, contended that the protective order was ripe to be challenged on the merits. Weinstein said there was no hearing before it was imposed and the magistrate virtually "rubber-stamped" the order drafted by the opposing attorneys. But Weinstein was barred from arguing the merits of the order both before Keller and the 9th Circuit.

"In this country, you can violate a statute and defend by saying it's unconstitutional," Weinstein said. "But you can't violate a protective order in most states and then defend by saying it's unconstitutional."

Echoes of Ellsberg

Weinstein noted that Mullally resorted to the same tactic that Daniel Ellsberg used in leaking the Pentagon Papers to the *New York Times* during the Vietnam War. But Ellsberg could challenge the law under which he was indicted, while Mullally's violation precluded a similar attack.

Mullally's prosecutor, however, said that the consultant had options other than violating the protective order. One option permitted by the order would have been for Mullally to prevail on reporter Levin and the KCBS attorneys to intervene before the magistrate and make a case for the LAPD files to be unsealed, said Assistant U.S. Attorney Thomas D. Warren, who handles public corruption and government-fraud cases in Los Angeles. Mullally acknowledges that didn't happen.

Also arguing in favor of alternatives to Mullally's act are Stephen Gillers, professor of legal ethics at New York University School of Law, and Robert Clifford, a

Chicago attorney who represents plaintiffs in commercial airline crashes and who previously chaired the American Bar Association's Litigation Section.

"You make the argument before, not after, you've violated the order," Gillers said.

Clifford asserted, "As sympathetic and empathetic

as I am to this man's plight, we are a nation that follows the rule of law, and you cannot just unilaterally disregard an otherwise valid court order."

Weinstein, Mullally's attorney, agrees in part. He added, however, that "every rule has an exception, and this was the exception.

"In cases where there is clearly public interest involved, it's imperative that judges and magistrates do balance the private and public interests," he said.

"And in cases like this, it is therefore important that the collateral bar rule does not apply so that the validity of the order can be examined after the violation," Weinstein said. ■

MARK CHRISTIAN/THE CEDAR RAPIDS GAZETTE

LEAKED DOCUMENTS

Ready to serve his time

A consultant's violation of a court order stirs a debate over sealed data.

By Arnold Friedman
SPECIAL TO THE NATIONAL LAW JOURNAL

LOS ANGELES—In 1997, a government consultant disregarded a court order and leaked documents that showed the Los Angeles Police Department (LAPD) had been shielding its officers from arrest and prosecution for domestic violence.

The leaked documents from 79 police files triggered an exposé by a television reporter and led to reforms in how the LAPD handles police officers implicated in beatings and other abuses of their wives, girlfriends or children.

Now the consultant, Robert Mullally, is losing his freedom for having released the LAPD documents. Experts say Mullally, 59, is about to become the first person in the country to be jailed for violat-

ing a protective order in a civil case. Mullally's imprisonment is bound to renew controversy over the use of judicial orders and lawsuit settlements to seal information bearing on public health and safety. On the heels of the rule adopted by South Carolina's federal judges banning secret settlements of cases involving hazardous products, medical malpractice and sexually abusive priests in their district, there now may be a push to limit the use of protective orders in cases like Mullally's.

The order that Mullally violated was imposed in a suit stemming from a 1992 incident in which an officer shot and killed his estranged wife and her

boyfriend, then turned his gun on himself. The case ended with the family of the slain wife receiving a \$2.2 million settlement from the defendant city of Los Angeles.

Mullally had analyzed the documents for the plaintiff's attorney in a civil rights suit that was settled before the files could be unveiled in trial. *Wynn v. City of Los Angeles*, No. CV 93-3026-WDK.

To make sure the public was warned of the LAPD's misconduct, Mullally said, he turned over the files to Harvey Levin, then a KCBS reporter in Los Angeles and now executive producer of the syndicated TV show *Celebrity Justice*. In doing so, Mullally ran afoul of a federal magistrate's order barring release of the files.

Mullally later admitted that he was the source of the leak.

'Above the law'

In 2001, U.S. District Judge William D. Keller found Mullally had "set himself above the law" with "continued defiance" of the magistrate's protective order.

In a nonjury trial, Keller convicted Mullally of criminal contempt. The government attorney who served as prosecutor described the offense as akin to a Class B misdemeanor and recommended probation. Keller, however, sentenced Mullally to 60 days in federal prison.

The 9th U.S. Circuit Court of Appeals affirmed the conviction but set aside the sentence, agreeing with the government attorney that imprisoning Mullally would be "extreme" and suggesting probation to Keller. Earlier, Keller had dismissed a probationary term as a "veritable toothless tiger" that would fall short of addressing the need to maintain the integrity of judicial orders. Instead, Keller

resentenced Mullally to 45 days. Mullally said it would be futile to return to the 9th Circuit, and he will begin serving his time at a federal prison in Oxford, Wisconsin.

"Jail has never seemed like much of a threat to me," he said. "What concerns me is the legal system allows evidence of felony crimes to be covered up by protective orders...as was the case with these LAPD files, and with priest abuse, Firestone tire abuse, tobacco company abuse. I think it's a serious problem for the people of this country."

Keller said he took into consideration Mullally's intent "to get out information

that he thought was of public interest and would be conducive to a more law-abiding police department." If it were not for such mitigating circumstances, Keller said, he would have been inclined to sentence Mullally to the maximum six months.

The effects of the case may outlast the jail term by

having a chilling effect on whistleblowers in lawsuits, said Erwin Chemerinsky, a constitutional and public interest law professor at the University of Southern California.

"Mullally performed such an important public service in alerting people," Chemerinsky said. "This is somebody who should be commended and rewarded, not imprisoned for what he did. He didn't do this for personal gain."

Chemerinsky called for more "sunshine in litigation" statutes on the federal level that would drastically limit the ability of courts to impose protective orders and gag orders, particularly in cases where public safety is at stake.

He revealed domestic abuse by policemen.