Chapter 5

WORKPLACE JUSTICE WITHOUT UNIONS: SUMMARY OF A STUDY

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Where there is no rule of law but only the command of persons, where secrecy and arbitrariness reign, where one never knows when or why the axe will fall, there justice weeps.[1]

Human dignity at the workplace requires that employees be treated justly by those holding authority over them, and protection against arbitrary action is at the crux of this. Without such protection, justice does weep. Because the workplace is the location at which we earn our livelihood, and from which much of our feelings of self-worth derive, it is especially necessary that human dignity be protected there. Yet in this country, where we pride ourselves on the protection of individual liberties, the fundamental common law of employment relations is employment-at-will, where there is no protection from arbitrary treatment.

Over the years the employment-at-will principle has come to be limited by a patchwork of statutes that prohibit employment discrimination on such grounds as race, sex, religion, national origin, disability, and age. Also, employees generally cannot be terminated or disciplined for exercising legal rights, such as the right to file a workers' compensation claim. In addition, common law exceptions to the employment-at-will principle have been created by the courts. These include the public policy exception, implied-in-fact and implied-at-law contracts, and the tort of abusive termination. The most effective defense against unjust treatment

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[1]Wolterstorff. *Ivory Tower or Holy Mountain? Faith and Academic Freedom*, Academe 17–22 (Jan.–Feb. 2001).

is provided by collective bargaining agreements, but they cover fewer than 13 percent of American workers.

In this setting a variety of justice systems have been developed by non-unionized companies. There are "soft" systems, such as open door policies, ombudsmen, and mediation, that do not produce a legally binding result. There are also "hard" non-union systems—employment arbitration and peer review panels—that produce rulings that may be binding on the employer.

This paper summarizes the key findings from hard non-union systems and compares them with one another. It also compares them with labor arbitration, the American courts, and courts in several other countries, as to their favorableness to employees or employers, and on several other dimensions. The most obvious contrast between the overall U.S. system of workplace justice and the systems in other countries is that in nearly all of them employees have a general legal right not to be terminated except for reasons related to their conduct or capacities, or because they have become redundant. These countries, unlike the United States, are therefore in compliance with the International Labor Organization's Convention on Termination of Employment.[2]

Employment Arbitration

A major focus of our study[3] is employment arbitration. This is grievance arbitration in a non-union setting. Employment arbitration involves an employer requiring an employee or prospective employee, as a condition of employment, to agree to take any employment-related claims (or sometimes any claims of a violation of the law) to arbitration rather than to court. The system is one chosen or created by the employer. It is a "hard" system in that it produces a legally binding result. It is established by a predispute contract of adhesion that does not involve any bargaining over its terms.

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[2]International Labor Organization, Convention on Termination of Employment (1982), *available at* http://ilolex.ilo.ch:1567.

[3]Wheeler, Klaas & Mahony, Workplace Justice Without Unions (W.E. Upjohn Institute for Employment Research 2004).

The Law of Employment Arbitration

One reason for stressing employment arbitration in this study is that it had just been approved by the U.S. Supreme Court in the case of *Circuit City v. Adams*[4] at the time that our research was beginning. This ruling was not entirely unexpected, given the Supreme Court's reasoning in its earlier decision in *Gilmer v. Interstate/Johnson Lane*[5] (which did not deal with a contract of employment), and the rulings of federal courts of appeals subsequent to *Gilmer.*

In *Circuit City,* the Court held that agreements to arbitrate employment disputes were enforceable under the Federal Arbitration Act. Under this Act, an agreement to arbitrate can be invalid only for the same reasons as other contracts under state law. Awards can be set aside only if the arbitrator is dishonest or exceeds his or her authority. The courts have extended this to invalidate awards that are in "manifest disregard of the law."[6] Case law has also developed holding that a court can set aside an arbitration system that is "unconscionable." To be unconscionable an arbitration procedure must be flawed as to *both* procedures and substance. Procedural unconsionability is present where the contract language is unreasonably one-sided. Substantive unconsionability includes an imbalance of power between the parties, fine print, or obscure language.[7]

The law of employment arbitration continues to be in flux. Some courts have cited with approval the Due Process Protocol, which the National Academy of Arbitrators helped to write. A substantial number of courts have held that imposing more than nominal costs on the employee renders the arbitration contract unenforceable.[8] This has led the American Arbitration Association to limit employee costs to a modest filing fee.

Arguments for and Against Employment Arbitration

The merits of employment arbitration have been extensively debated. From a *public policy* perspective, arguments in favor of employment arbitration include lessening the case load of the federal courts and the Equal Employment Opportunity Commis-

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[4] *Circuit City Stores, Inc. v. Adams,* 532 U.S. 105 (2001).
[5] *Gilmer v. Interstate/Johnson Lane,* 500 U.S. 20 (1991).
[6] *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197 (2d Cir. 1998).
[7] Cooper, Nolan & Bales, ADR in the Workplace (West Group 2000).
[8] *Cole v. Burns International Security Services,* 105 F.3d 1465 (D.C. Cir. 1997).

sion (EEOC). *Employers* prefer going before an arbitrator to the risk of a jury trial. They also like the privacy, lower attorneys' fees (resulting chiefly from less discovery and a lack of appeals), and the speed of arbitration. *Employees* may have easier access to arbitration than to the courts because of the difficulty in finding attorneys to handle their court cases. This is especially a problem for low wage employees because the prospective return for a lawyer working on a contingent fee basis may be too low to justify an attorney's time.[9] The speed of arbitration is also attractive to employees. Also, it may be that they have a higher probability of success in arbitration than in court.

The arguments against employment arbitration are rather powerful. From the standpoint of *public policy*, it is undesirable for the administration of public laws to be left up to the virtually unreviewable discretion of private agents. Lessened exposure to high jury verdicts may decrease the motivation for employers to obey the law. *Employers* may find arbitration to their disadvantage because they will have a lower probability of success than in court. They also may unwittingly give up their status as employment-at-will employers. *Employees* may find themselves subject to a system created by their employer that is unfairly tilted against them. They lose their right to a jury trial. They become subject to a private legal system that may or may not apply the law properly, and from whose decisions there is no meaningful judicial review.

Comparing Justice Systems: The Basic Data

One criterion on which justice systems should be compared and judged is the *proportion of the time that they produce wins for employees or employers*. Because of differences in samples and methods, studies have shown workers winning anywhere from 18 percent to 68 percent of the cases. Our review of this literature left us undecided on this issue. Results from our own sample are shown in Table 1.[10]

[9]Maltby, *Employment Arbitration and Workplace Justice*, 38 U.S.F. L. Rev. 105–18 (2003).
[10]*Supra* note 3.

TABLE 1. Employee/Employer Win Rates

Procedure	Percent Employee Wins	Percent Employer Wins
Employment Arbitration*		
Overall n = 216	33	67
Federal Discrimination Statute Involved n = 59	22	78
Employment Contract	56	44
Burden of Proof on Employer n = 57	60	40
Labor Arbitration** n = 580	52	48
Federal District Court***		
1996–2000 n = 26,841	12	88
1987–2000 n = 53,248	16	84

*Source: Labor Arbitration Reports (1994–2001); Employment Dispute Arbitration Reports (1999–2001).

**Source: Labor Arbitration Reports (1998-2002).

***Source: Federal District-Court Civil Cases (1987–2000), *available at* http://teddy.law.cornell.edu:8090.

These data make employment arbitration look good from the standpoint of employees. Where a federal discrimination statute was involved, employees won in 22 percent of the cases employment arbitration cases, compared with 12 percent in federal courts (1996–2000). Where an individual employment contract was involved, employees won 56 percent of the time in employment arbitration, compared with 52 percent in labor arbitration cases enforcing collective agreements. However, these results have a flaw in common with nearly all of the previous studies. The flaw is that they do not take into account possible systematic differences in the cases involved. A better test would be to hold constant

the facts of the cases, and see if there are differences in decisions across decisionmakers *in the same cases*. The empirical part of our study is chiefly directed at answering this question.

Another possible criterion is the *amount recovered by employees* in cases that they win. Because the fear of large jury awards appears to be one of the motivations for employers adopting employment arbitration, it is of interest to see if juries actually do tend to award greater damages than do employment arbitrators. There have been a number of studies that have reported both the mean and median awards of employment arbitrators. Studies covering different samples and different periods come up with a range of median awards between $34,733 and $52,737.[11] Although there are some problems with the federal court data (particularly with respect to the mean of awards), there is evidence that at least the median award in the courts ($78,000 for 2000) is considerably higher than in arbitration.[12]

Cost is another criterion of interest. LeRoy and Feuille[13] found that, as a general rule, costs were lower in employment arbitration than in court, although this might not be true in particular cases. The chief cost for employers in a court case is attorneys' fees. In arbitration, the employer may also face a substantial cost for the arbitrators' fee. These run in the neighborhood of $2,000 per day, and are usually borne entirely or largely by the employer. For employees, legal costs are a percentage of their recovery, so the attorneys' fees are not affected by the greater time involved in a court case. However, especially low wage employees may find it more difficult to hire an attorney in a court case where the lawyer's time commitment would be greater than it would be in arbitration.

As to the criterion of *time*, it appears that employment arbitration has the advantage over the courts. This is partly because the extensive discovery processes that are the norm in courts can take a great deal of time to complete. A greater source of delays in court procedures is the possibility of an appeal to higher courts, which can take years. On the other hand, there is no appeal from an arbitrator's award. However, until the courts develop a clear set of standards for employment arbitration systems, there will con-

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[11]Estreicher *Saturns for Rickshaws: The Stakes in the Debate Over Predispute Employment Arbitration Agreements*, 16 Ohio St. J. on Disp. Resol. No. 3 559–70 (2001).

[12]Eisenberg & Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, Notre Dame 78 L. Rev. 1455–96 (2003).

[13]LeRoy & Feuille, *When is Cost an Unlawful Barrier to Alternative Dispute Resolution? The Ever Green Tree of Mandatory Employment Arbitration*, 50 UCLA L. Rev. 143–203 (2002).

tinue to be litigation over the validity of these systems. So, at least at present, adopting an employment arbitration system carries with it no guarantee against having to go to court.

A Thumbnail Sketch of Employment Arbitrators and Their Practices

In order to get a picture of employment arbitrators and the practices engaged in by them, we performed a national mail survey of a sample of 807 employment arbitrators.[14] We received useable responses from 176 arbitrators, for a response rate of 21.8 percent. We found that 47.7 percent of them had served as management lawyers, while only 18.2 percent had been employee advocates. Present or former judges made up 16 percent. Also, 90 percent held law degrees.

Although most of the debate about employment arbitration has to do with statutory cases, these made up only 37.6 percent of the cases. Employment contract cases made up 25.4 percent of the caseload. Nonbinding handbooks were at issue in 14.7 percent; contractual issues other than cause for termination 17.8 percent; and other cases, 4.4 percent.

As to practices in employment arbitration tribunals, we found that in 80.9 percent of the cases employees were represented by attorneys, in 8.5 percent by a co-worker or friend, and in only 10.6 percent by themselves. Discovery took place in 80 percent of the cases. Surprisingly, employees paid all of the costs in 3.7 percent of the cases, and a substantial share in 22.6 percent. Some courts would find the arbitration procedures involved in these cases to be invalid if challenged.[15] The most interesting results with regard to the arbitrators' decisionmaking processes have to do with the effects of: (1) unreasonableness of the rule that gave rise to a termination, and (2) good faith on the part of the employer. Less than half (46.6 percent) would overturn a termination for violating a clearly unreasonable rule. One-third would uphold a termination so long as the employer acted in good faith. These stand out in sharp contrast to the rules traditionally applied by labor arbitrators.

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[14] *Supra* note 3.
[15] *Supra* note 8.

Comparing the Systems: Does It Matter Who Decides?

The distinctive aspect of this study is an analysis of the responses of different types of decision makers across a number of the same cases. Only one previous study[16] has employed a similar strategy. These authors employed a smaller and less varied set of scenarios than we did, and also were interested in a different set of explanatory variables.

Our study utilized 12 scenarios that varied as to the nature of the alleged offense, the strength of the evidence of misconduct by the employee, whether the employee alleged that discrimination had taken place, the strength of the evidence of discrimination, the reasonableness of the rule, whether there was a failure of the employer to abide by its own rules, the existence of mitigating (including length of service) or exacerbating circumstances, and the presence or absence of provocation. The same case scenarios were presented to samples of employment arbitrators, labor arbitrators, peer review panelists, persons who had served as jurors in discrimination cases, human resource managers, and labor court judges from eight foreign countries. We asked them to respond on a scale that ran from 7 (highest likelihood of overturning termination) to 1 (lowest likelihood of overturning termination) to each of the case scenarios.

Our analysis began by determining whether the type of decision maker was statistically significant in accounting for differences in outcome in each of the cases. We found that this was so. We then did a broad comparison across all cases to determine which of the procedures appeared to be most favorable to employees. This analysis is shown in Table 2. Another way of looking at this is presented in Table 3.

[16]Bingham & Mesch, *Decision-Making in Employment and Labor Arbitration*, 39 Indust. Rel. No. 4 671–94 (2000).

Table 2. Percentage of Rulings Likely to Be in Favor of the Employee Across All Cases: by Decisionmaker

Decisionmaker Type	Percent of Cases Where Likely Ruling in Favor of Employee
Labor Arbitrator	55
Employment Arbitrator: Evaluating Statutory Claims	25
Employment Arbitrator: For Cause Requirement	33
Peer Review Panelist	45
Juror	38
Human Resources Manager	46
Labor Court Judge	51

A ruling was classified as likely to be in favor of the employee when a decisionmaker selected response of 5 or higher on the 7-point response scale. Scale value 5 was anchored with "likely to rule in favor of the employee."

Table 3. Likelihood of Overturning Termination Across Cases: Means and Standard Deviations (SD) by Decisionmaker

Decisionmaker Type	Mean	SD
Labor Arbitrator	4.41	1.55
Employment Arbitrator: Evaluating Statutory Claim	3.38	1.49
Employment Arbitrator: For Cause Requirement	3.70	1.42
Peer Review Panelist	3.99	1.70
Juror	3.82	1.75
Human Resources Manager	4.00	1.75
Labor Court Judge	4.37	1.76

Ratings were on a 1 to 7 scale where 7 indicates a high likelihood of overturning the termination and 1 indicates a low likelihood of overturning the termination.

Both of these tables show that the most favorable results for employees were reached by labor arbitrators and labor court judges. Human resource managers and peer review panelists were quite similar, and were the next most favorable. Jurors came next. The least favorable decisionmakers for employees were employment arbitrators

In our book,[17] we performed a pairwise analysis of the decisions made by different types of decisionmakers across all of our case scenarios. By doing this we were able to get some notion of which variations in the cases explained different results by different decisionmakers.

What do we learn when we observe the responses of the various types of decisionmakers across a variety of cases? One result that stands out is that the nonprofessional decisionmakers (jurors and peer review panelists) were more likely than the others to find for the employee in cases where the only point in the employee's favor is a weak, implausible, excuse. Bluntly put, the nonprofessionals were more likely to fall for an argument that we believe was obviously lacking in merit.

As expected, employment arbitrators evaluating statutory claims were most likely to find for the employee where there was substantial proof of discrimination. What was not expected was their giving substantial weight (although not as much as other decisionmakers) to very long tenure on the part of the employee. Employment arbitrators evaluating statutory claims gave little weight to the employee's misconduct being provoked, and the employer violating its own procedures.

Labor arbitrators tended to rule in favor of the employee substantially more often than other decisionmakers where there was provocation, the employer failed to follow its own procedures, there was an unreasonable rule, or the employee had long tenure. Work record was important to peer review panelists. Unsurprisingly, peer review panelists, whose instructions include the criterion of whether the employer has properly applied its rules, tended to favor the employee where the employer failed to follow its own procedures. All of the decisionmakers gave significant weight to

[17] *Supra* note 3.

long tenure, although this did not influence the employment arbitrators as much as it did the other decision makers.

Conclusion

It appears certain that employment arbitration is here to stay. What is still uncertain is precisely what tests employment arbitration systems and awards must meet in order to escape being declared invalid by the courts. As to the merits of employment arbitration, there are strong arguments on both sides of the issue. From an employee's standpoint, when one compares employment arbitration with filing a case in the federal courts, employment arbitration does fairly well. This is primarily because it may furnish low wage employees with greater access to a forum, a more expeditious process, and perhaps a greater chance of prevailing than he or she would have in court. However, although the evidence is far from clear on this, the amount employees would recover in employment arbitration is somewhat less than they could obtain in court.

When one compares employment arbitration, or any of the other systems, with labor arbitration, it is quite clear that labor arbitration is the best system for an employee. Having a union steward as an advocate at the earliest stage of the process, the burden of proof being on the employer, having the union provide skilled representation at the hearing without cost to the employee, and a greater likelihood of success, add up to significant advantages for an employee. From an employer's standpoint, employment arbitration carries many of the same advantages of labor arbitration—speed, economy, and an expert tribunal.

As to the interaction between the type of case and the type of decisionmaker, our analysis is suggestive of what some of the differences might be. A fuller answer to this question requires further, more sophisticated, analysis.

We believe that this study does advance our knowledge of what is going on in the non-union systems of industrial justice. However, there is much that needs to be learned in order to determine whether, and to what degree, justice is weeping in the non-union workplace.