

The Changing Role of Labor Arbitration

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INTRODUCTION

A quarter century ago, in a provocative and prophetic article, David E. Feller lamented the imminent close of what he described as labor arbitration's "golden age."¹ I have expressed reservations about that characterization, insofar as it suggested an impending shrinkage in the stature of arbitration.² But Professor Feller was right on target in one important respect. Labor arbitration was going to change dramatically from the autonomous institution in the relatively self-contained world of union-management relations which it had been from the end of World War II into the 1970s.

When the subject matter was largely confined to union-employer agreements, arbitration could fairly be considered "part and parcel of the collective bargaining process itself,"³ and the courts were more than happy to keep hands off. When unions and employers began to make federal and state statutes part of the agenda of arbitration, however, as happened increasingly in the 1970s, it became an entirely different story. Statutory interpretation is the special province of the courts. They are not going to let some private arbitrator get away unchallenged with palpable misreadings of the legislative text.⁴ Academics like me may think a sound argument can be made that, at least as between the initial contracting parties, arbitrators' honest mistakes of law should still receive deference in the courts much like the deference accorded their honest mistakes of fact.⁵ Yet even the proponents of this view would not allow an arbitrator to mangle an individual employee's right against race or sex discrimination in violation of Title VII of the Civil Rights Act of 1964.⁶ Closer judicial scrutiny of arbitration awards involving statutory claims was inevitable.

So, the first great change in the role of arbitration was its extension into the statutory domain in the collective bargaining context. Perhaps not coincidentally, the courts about this time became more and more willing to test traditional contract awards against the vaguer standard of "public policy."⁷ Then, beginning mostly in the 1980s and accelerating sharply in the 1990s, came another major

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1. David E. Feller, *The Coming End of Arbitration's Golden Age*, in *ARBITRATION—1976, PROCEEDINGS OF THE 29TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 97 (Barbara D. Dennis & Gerald D. Somers eds., 1976).

2. See Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 *MICH. L. REV.* 1137, 1161 (1977).

3. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 578 (1960).

4. See Feller, *supra* note 1, at 121-26.

5. While the decisions are divided, there is clear authority that arbitrators may be made the final judges of law as well as fact, and awards issued under misconceptions of the law will be upheld. M.C. Dransfield, Annotation, *Right of Arbitrator to Consider or to Base His Decision upon Matters Other than Those Involved in the Legal Principles Applicable to the Questions at Issue Between the Parties*, 112 *A.L.R.* 873, 878-88 (1938).

6. 42 U.S.C. §§ 2000e to -17 (1994 & Supp. IV 1998).

7. See *infra* Part II.

development—arbitration systems established unilaterally by nonunion employers.⁸ These systems were sometimes designed to divert from the courts employee claims of “wrongful discharge” under several modifications in the traditional American doctrine of employment at will.⁹ Even more eagerly promoted by employers, however, was the use of arbitration to keep statutory discrimination claims away from civil tribunals and especially juries. This Article will treat the legal and policy implications of these various procedures and standards for dispute resolution. I shall deal briefly in turn with (1) mandatory arbitration of statutory rights, (2) judicial review of arbitration awards on public-policy grounds, and (3) arbitration of claims that there was not “good cause” for employee discharges.

I. MANDATORY ARBITRATION OF STATUTORY CLAIMS

As already indicated, the arbitration of an alleged violation of an employee’s statutory rights may arise in two quite different settings. First, the employee may be covered by a collective agreement that, as is customary, requires “just cause” or “good cause” for any dismissal. All disputes concerning the interpretation or application of the contract are subject to arbitration. A fired worker insists the real reason for the termination was race, sex, or age discrimination, and the union takes the case to arbitration. The arbitrator concludes the employee was guilty of excessive absenteeism, finds no discrimination, and denies the grievance. The employee then proceeds to file charges with the Equal Employment Opportunity Commission (“EEOC”) under Title VII or the Age Discrimination in Employment Act (“ADEA”)¹⁰ and subsequently brings an action in federal court. Naturally, the employer cries foul: “You’re trying to take two bites at the apple,” it says. “The arbitrator’s award is *res judicata*,” and so on.

In the second situation, there is no union. Individual employees apply for a job and are presented with a form to sign. It obligates employees to submit all workplace disputes to an arbitration system devised by the employer rather than to take them to court. If any applicants have the foresight and temerity to ask whether this arrangement covers statutory claims and whether they must sign if they want the job, they are told the answer is “Yes” to both questions. Later, an employee hired under these conditions is dismissed and alleges discrimination. Despite having signed the employer’s required form, the dischargee files a federal court action after having gone through the necessary EEOC procedure. This employer, too, needless to say, interposes the arbitration agreement as a bar to the suit.

Twenty-five years ago the Supreme Court appeared to lay to rest any idea that

8. See generally CHARLES G. BAKALY, JR. & JOEL M. GROSSMAN, *THE MODERN LAW OF EMPLOYMENT RELATIONSHIPS* 266-78 (Supp. 1992); WILLIAM J. HOLLOWAY & MICHAEL J. LEECH, *EMPLOYMENT TERMINATION: RIGHTS AND REMEDIES* (2d ed. 1993); HENRY H. PERRITT, JR., *EMPLOYEE DISMISSAL LAW AND PRACTICE* (4th ed. 1998).

9. See, e.g., Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 59-60 (1988); Clyde W. Summers, *Labor Law as the Century Turns: A Changing of the Guard*, 67 NEB. L. REV. 7, 12-14, 18 (1988). See generally Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118 (1976).

10. 29 U.S.C. §§ 621-634 (1994 & Supp. IV 1998).

private arbitration could displace an employee's resort to statutory procedures. In *Alexander v. Gardner-Denver Co.*,¹¹ the Court held an arbitrator's adverse decision under a collective bargaining agreement did not prevent a black employee from pursuing in court a claim that his discharge was based on racial discrimination in violation of Title VII.¹² The Supreme Court reasoned that the arbitrator was only authorized to decide the contractual issue of discrimination and not the statutory issue.¹³ Apparently the Court was untroubled that the National Labor Relations Board ("NLRB" or "Board") routinely "defers" to arbitrators' rulings regarding employees' rights under the National Labor Relations Act.¹⁴ Maybe the real reason for the result in *Gardner-Denver* was skepticism about union zeal, at least as of the early 1970s, in pressing Title VII discrimination cases in contrast to cases of anti-union discrimination.

A decade ago the Supreme Court seemed to take an abrupt turn away from the *Gardner-Denver* approach. In *Gilmer v. Interstate/Johnson Lane Corp.*,¹⁵ it held that an individual stockbroker employee was bound by a contract with the New York Stock Exchange to arbitrate a claim of age discrimination against his employer.¹⁶ The Court distinguished *Gardner-Denver* on the grounds that in *Gilmer* the arbitrator was authorized to handle statutory as well as contractual disputes.¹⁷ The earlier case was also said to involve a "tension" between union representation and individual statutory rights.¹⁸ Furthermore, the Court stressed that no loss of statutory rights occurred in *Gilmer*.¹⁹ It was only a change of forum.²⁰

Gilmer could easily have been decided on such old-fashioned grounds as the failure of the plaintiff to exhaust internal remedies. There, unlike *Gardner-Denver*, no arbitration proceedings had as yet been conducted.²¹ That makes all the more significant the Court's readiness to go out of its way to endorse arbitration as a final dispute-resolution mechanism, even when made a condition of employment. Despite this, the Court noted that the stockbroker was not precluded from filing a charge with the EEOC;²² it was only his court action that was barred.²³

11. 415 U.S. 36 (1974).

12. *Id.* at 59-60; see also *Barrentine v. Ark.-Best Freight Sys.*, 450 U.S. 728, 745 (1981) (finding employees not barred by arbitration award on wage claim under union contract from suing under Fair Labor Standards Act). In *Gardner-Denver*, the Court noted that the arbitrator's award could be admitted into evidence in subsequent court proceedings, and, if certain procedural safeguards were observed, it could be accorded "great weight." *Gardner-Denver*, 415 U.S. at 60 n.21.

13. *Gardner-Denver*, 415 U.S. at 56-57.

14. See, e.g., *Spielberg Mfg. Co.*, 112 N.L.R.B. 1080, 1082 (1955); *Olin Corp.*, 268 N.L.R.B. 573, 573-77 (1984).

15. 500 U.S. 20 (1991).

16. *Id.* at 23.

17. *Id.* at 35.

18. *Id.*

19. *Id.* at 34.

20. *Id.* at 26.

21. See *id.* at 24.

22. *Id.* at 28. The courts of appeals are divided on whether the EEOC can seek both equitable and monetary relief in the face of an individual's mandatory arbitration agreement or whether it is limited to an equitable remedy to vindicate public policy. Compare *EEOC v.*

Gardner-Denver and *Gilmer* can be distinguished in several ways, some more plausible than others. The Court's own emphasis on the authority of the arbitrator will make little difference, if unions and employers can simply empower arbitrators in the labor contract to deal with statutory issues. More recently, however, in *Wright v. Universal Maritime Service Corp.*,²⁴ the Court held that any union-negotiated waiver of an employee's statutory right to a judicial forum must be "clear and unmistakable."²⁵ On the existence of a real distinction between *Gardner-Denver* and *Gilmer*, the explanation of Judge Harry Edwards in *Cole v. Burns International Security Services*²⁶ is more convincing than the Court's. Speaking for the District of Columbia Circuit, he emphasized that in individual contracts of employment, the employee maintains control over the arbitration presentation, while the union is in control in the collective bargaining setting.²⁷

On the other hand, in terms of bargaining power, one might argue that a union's agreement to arbitrate and waive the judicial forum should be *more* acceptable—less of a contract of adhesion—than an isolated individual employee's agreement. Moreover, any concern that a labor organization might treat an employee's civil rights cavalierly should be tempered by the existence of the well-established union duty of fair representation.²⁸ Significantly, the Supreme Court in *Wright* recognized, but did not resolve, the question of whether "*Gardner-Denver*'s seemingly absolute prohibition of union waiver of employees' federal forum rights survives *Gilmer*."²⁹

Frank's Nursery & Crafts, Inc., 177 F.3d 448 (6th Cir. 1999) (both remedies available), with *EEOC v. Waffle House, Inc.*, 193 F.3d 805 (4th Cir. 1999) (no monetary award allowed), and *EEOC v. Kidder, Peabody & Co.*, 156 F.3d 298 (2d Cir. 1998) (arbitration agreement precludes monetary damages). Cf. *Merrill Lynch, Inc. v. Nixon*, 210 F.3d 814 (8th Cir. 2000) (finding state agency immune under Eleventh Amendment from employer's action to enjoin the agency from proceeding with employee's discrimination claims against employer after alleged victim had pursued claims through arbitration).

23. *Gilmer*, 500 U.S. at 28.

24. 525 U.S. 70 (1998).

25. *Id.* at 80.

26. 105 F.3d 1465 (D.C. Cir. 1997).

27. *Id.* at 1475-77. In *Wright*, Justice Scalia for the Court distinguished between "an individual's waiver of his own rights [*Gilmer*], rather than a union's waiver of the rights of represented employees [*Gardner-Denver*]." *Wright*, 525 U.S. at 80-81.

28. See, e.g., *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 329-31 (1969) (recognizing that petitioners who had alleged collusion between their union and employer to deny them civil rights need not exhaust their remedies under a collective bargaining agreement in order to maintain an action, as one lies in breach of duty of fair representation); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *Local 12, United Rubber Workers v. NLRB*, 368 F.2d 12, 17-19 (5th Cir. 1966). Applying modern "public choice" theory concerning the political power of cohesive minority groups within any organization, one scholar has predicted that unions would not agree to arbitrate statutory claims if such groups believed arbitration was not in their best interest. See Sarah Rudolph Cole, *A Funny Thing Happened on the Way to the (Alternative) Forum: Reexamining Alexander v. Gardner-Denver in the Wake of Gilmer v. Interstate/Johnson Lane Corp.*, BYU L. REV. 591, 605 (1997).

29. *Wright*, 525 U.S. at 80. For recent analyses from an academic and a union perspective, respectively, see Stuart L. Bass, *What the Courts Say About Mandatory Arbitration*, DISP. RESOL. J., Nov. 1999, at 24; Leonard D. Polletta, *What's Left After Wright?*, DISP. RESOL. J.,

The legislative history of the Civil Rights Act of 1991 ("1991 Act") contains some strong language indicating that arbitration should not displace Title VII processes, the subject of *Gardner-Denver*.³⁰ The ADEA, involved in *Gilmer*, expressly permits waivers under certain prescribed conditions.³¹ It has also been suggested that Title VII's protections against discrimination because of race, sex, religion, and natural origin implicate more sensitive rights than the right against discrimination because of age, which was at issue in *Gilmer*.³² Finally, it can be argued that job applicants like *Gilmer* have less of an equity in their jobs than an incumbent employee such as Alexander may have been in *Gardner-Denver*.

The distinction that has stood up in the eyes of most courts is between a collective bargaining agreement (*Gardner-Denver*) and an individual contract of employment (*Gilmer*). The courts of appeals have generally sustained individual agreements to arbitrate as barring court suits,³³ but have rejected employers' objections to court

Nov. 1999, at 48.

30. Although section 118 of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1081 (1991) (codified as amended at 42 U.S.C. § 1981 (1994)), "encouraged" the use of alternative dispute resolution ("ADR") "[w]here appropriate and to the extent authorized by law," the House report emphasized that ADR procedures were only intended to "supplement" and not "supplant" Title VII rights and remedies. H.R. REP. NO. 102-40, pt. 1, at 97 (1991). Two leading legislators limited or disavowed *Gilmer*. See 137 CONG. REC. 29,040 (1991) (statement of Sen. Dole) ("This provision encourages the use of alternative means of dispute resolution, including binding arbitration, where the parties knowingly and voluntarily elect to use those [alternative] methods.") (emphasis added); *id.* at 30,665 (statement of Rep. Edwards) ("No approval whatsoever is intended of . . . [*Gilmer*] v. *Interstate Johnson Lane Corp.*"); *cf.* *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182, 1194-97 (9th Cir. 1998) (holding that the 1991 Act precludes compulsory arbitration of Title VII claims). But, most courts of appeals have held the 1991 Act does not prevent the enforcement of compulsory arbitration agreements. *E.g.*, *Desiderio v. Nat'l Ass'n of Sec. Dealers*, 191 F.3d 198 (2d Cir. 1999); *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith*, 170 F.3d 1 (1st Cir. 1999); *Koveleskie v. SBC Capital Mkts.*, 167 F.3d 361 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 44 (1999); *Seus v. John Nuveen & Co.*, 146 F.3d 175 (3d Cir. 1998); *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996).

31. 29 U.S.C. § 626(f) (1994) (waiver must be "knowing and voluntary").

32. Age is not a "suspect" classification. *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 312-14 (1976).

33. See, *e.g.*, *Rosenberg*, 170 F.3d at 4 (refusing to enforce arbitration on facts of case); *Koveleskie*, 167 F.3d at 368 (consenting to arbitration waives right to an Article III forum, thus no right exists to a jury trial outside of forum); *Seus*, 146 F.3d at 185-87 (upholding contractual agreement to arbitrate employment claims); *Paladino v. Avnet Computer Techs., Inc.*, 134 F.3d 1054, 1057-58 (11th Cir. 1998) (refusing to enforce arbitration clause since damages not allowed for Title VII claims); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832, 837 (8th Cir. 1997) (holding that Title VII claims are subject to individual consensual agreements to arbitrate); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1468 (D.C. Cir. 1997) (holding unanimously that due-process standards would have to be observed and in a two-to-one decision that the employer would have to pay all the arbitrator's fees); *Rojas v. TK Communications*, 87 F.3d 745, 747 (5th Cir. 1996) (explaining that a contract to settle disputes arising out of such contract is valid); *Metz v. Merrill Lynch, Inc.*, 39 F.3d 1482, 1487 (10th Cir. 1994) (holding that Title VII claims are subject to compulsory arbitration); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305, 312 (6th Cir. 1991) (holding that arbitration agreement

actions because of an arbitration clause in a union contract.³⁴ Only the Fourth Circuit, in a two-to-one decision, concluded that *Gilmer* had superseded *Gardner-Denver* even as to collective bargaining agreements.³⁵ And the Fourth Circuit holding could also be explained on an exhaustion-of-remedies theory; there had been no recourse to the arbitration procedure provided by the union contract prior to the court suit.³⁶ Perhaps a crucial question in the collective bargaining context should be whether the union has agreed actually to *waive* employees' rights to a statutory forum or instead to *add* a contractual claim.

Two federal agencies and a couple of private bodies have weighed in against mandatory arbitration of statutory employment claims. In a July 1995 policy statement, the EEOC declared: "[P]arties must knowingly, willingly, and voluntarily enter into an ADR proceeding."³⁷ But *Gilmer* can be regarded at best as involving a "knowing" agreement on the employee's part. It was hardly "voluntary" in the EEOC sense of the word. The general counsel of the NLRB seemed ready at one point to issue unfair labor practice complaints against any effort to impose mandatory arbitration agreements, but later that was apparently limited to attempts to prevent the filing of charges with the NLRB.³⁸

The December 1994 Report of the Dunlop Commission on the Future of Worker-Management Relations ("Commission") stated: "[A]ny choice between available methods for enforcing statutory employment rights should be left to the individual who feels wronged rather than dictated by his or her employment contract."³⁹ But the Commission hinted at the possibility of more flexibility by suggesting that the issue be revisited after there was more experience with the arbitration of statutory claims.⁴⁰ Finally, the National Academy of Arbitrators ("Academy") at its May 1997 meeting expressed its opposition to "mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or

in a securities registration application was enforceable under Title VII). *Contra Duffield*, 144 F.3d at 1199 (concluding that the 1991 Act precludes individual waiver of right to sue under Title VII). For a recent overview of the cases, see Charles J. Coleman, *Mandatory Arbitration of Statutory Issues: Austin, Wright, and the Future*, in *ARBITRATION 1998: THE CHANGING WORLD OF DISPUTE RESOLUTION, PROCEEDINGS OF THE 51ST ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 134 (Steven Briggs & Jay E. Grenig eds., 1999).

34. See, e.g., *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 526-27 (11th Cir. 1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363 (7th Cir. 1997); *Vamer v. Nat'l Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).

35. See *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875, 880 (4th Cir. 1996).

36. *Id.* at 879.

37. *EEOC: Alternative Dispute Resolution Policy*, 8 Lab. Rel. Rep. (BNA) No. 405:7301, 405:7302 (July 17, 1995). In July 1997 the EEOC issued a longer and even stronger condemnation of compulsory arbitration or predispute agreements to arbitrate; declaring that "even the best arbitral systems do not afford the benefits of the judicial system." *EEOC: Mandatory Arbitration of Employment Discrimination Disputes as a Condition of Employment*, 8 Lab. Rel. Rep. (BNA) 405:7511, 405:7520 (1997).

38. See *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1479 (D.C. Cir. 1997).

39. *COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'TS OF COMMERCE & LABOR, REPORT AND RECOMMENDATIONS* 33 (Dec. 1994).

40. *Id.*

administrative forum for the pursuit of statutory rights."⁴¹ But the Academy added that, given the present state of the law, its members could serve as arbitrators in such cases.⁴² Members nonetheless were advised to observe certain guidelines as to the fairness of these procedures.⁴³ A broadly constituted task force sponsored by the American Bar Association ("ABA") took no position in a May 1995 protocol concerning the timing (predispute or postdispute) of arbitration agreements—and thus effectively their "voluntariness"—but it did agree they should be "knowingly made."⁴⁴

There has been a reasonable degree of consensus on the procedural requirements for a fair arbitration, whether voluntary or mandatory. Thus both the Dunlop Commission report and the due-process protocol of the ABA Task Force came up with very similar sets of procedural guarantees. They included

1. a jointly selected neutral arbitrator who knows the law;
2. simple, adequate discovery;
3. cost-sharing to ensure arbitrator neutrality;⁴⁵

41. Nat'l Acad. of Arbitrators, Statement of the National Academy of Arbitrators on Condition of Employment Agreements, in *ARBITRATION 1997: THE NEXT FIFTY YEARS, PROCEEDINGS OF THE 50TH ANNUAL MEETING* app. at 312 (Joyce M. Najita ed., 1998).

42. *Id.*

43. *Id.*

44. Task Force on Alternative Dispute Resolution in Employment, *A Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship*, 50 *DISP. RESOL. J.*, Oct.-Dec. 1995, at 37-38. The task force consisted of management, union, and plaintiffs' attorneys from the ABA and the National Employment Lawyers Association, and representatives of the American Arbitration Association, the American Civil Liberties Union, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the Society of Professionals in Dispute Resolution. *Id.* at 39.

45. In *Cole*, the court *required* the employer to pay all the arbitrator's fees as a condition for enforcing the employee's waiver of a judicial forum. *Cole*, 105 F.3d at 1483-85 (2-1 decision). Surely Judge Edwards, speaking for the majority, was right that the source of *payment* is not the key to arbitrator neutrality. *Id.* at 1485. Arbitrators are naturally concerned about getting their fee, but ordinarily not about where it comes from. Individual employees, of course, may feel more comfortable paying part of the arbitrator's fee, being unable to accept the notion there is no connection between the source of payment and a potential bias on the part of the decisionmaker.

The more sensitive problem, at least as a matter of appearances, is who chooses the arbitrator. Employers are far more likely to be "repeat players" in arbitration than employees. Thus, an arbitrator's continuing acceptability probably turns more on employer than employee attitudes. This is not a matter on which the source of payment is going to have much effect. One has to count primarily on the inherent integrity of the great body of arbitrators—and on their knowledge that recognition of that integrity in the labor-management community is indispensable for their capacity to practice.

Cole may have gone too far in insisting that the employer pay *all* the arbitrator's fee. Access to a court, at least initially, would ordinarily not be cost-free. Some modest but reasonable (a maximum of one week's pay?) sharing of the arbitrator's charges may serve as a realistic deterrent to an employee's filing of frivolous claims. If the employee ultimately prevails, then the arbitrator, like a court, could apportion fees and costs accordingly.

4. representation by a person of the employee's choice;
5. remedies equal to those provided by the law;
6. a written opinion and award, with reasons; and
7. limited judicial review, concentrating on the law.⁴⁶

At least three distinguished federal appellate judges have publicly extolled the advantages of arbitration over litigation in vindicating statutory rights against discrimination. These were Judges Harry Edwards of the District of Columbia Circuit, Betty Fletcher of the Ninth Circuit, and Alvin Rubin of the Fifth Circuit.⁴⁷ They stressed arbitration's merits of speed, cost savings, and relative informality. None of these endorsements dealt with mandatory arbitration. But at least they should dispose of concerns about the competency of trained arbitrators to handle the usual statutory interpretive problems in a discrimination case.

As a matter of policy, the arguments against mandatory arbitration are plain and powerful. Congress (or a state legislature) has established certain statutory rights for individual employees and has provided the procedures for their enforcement. No union should be able to trade away either the substantive or the procedural statutory rights of the workers it represents. No individual employee should be forced to choose between those rights and getting or keeping a job. The procedure or forum for redress may be almost as important in many instances as the substantive right itself. The goal of the law should not be thwarted directly or indirectly. Any predispute agreement to arbitrate is by definition not truly voluntary. Employees' whole concern at such times is being hired or pleasing the boss, and they do not appreciate what might be at stake in the future. That is not a free and knowing choice.

All these arguments against waiver are especially strong when the right in question is as sensitive as protection against discrimination because of race, sex, religion, age, disability, or the like. Permitting employers to condition employment on an employee's agreement to arbitrate rather than litigate workplace claims, including statutory rights against discrimination, seems a blatant affront to a major public policy. As might be expected, numerous scholars and public and private bodies have

46. See COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'TS OF COMMERCE & LABOR, *supra* note 39, at 30-32; Task Force on Alternative Dispute Resolution in Employment, *supra* note 44, at 38-39. The Fourth Circuit, ordinarily most receptive to arbitration in place of court litigation, nonetheless refused to enforce an agreement to arbitrate a claim of sexual harassment when the employer's unilaterally established procedures were "so one-sided that their only possible purpose [must have been] to undermine the neutrality of the proceeding." *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

47. See Harry T. Edwards, *Advantages of Arbitration over Litigation: Reflections of a Judge*, in ARBITRATION 1982, CONDUCT OF THE HEARING: PROCEEDINGS OF THE 35TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 16, 27-28 (James L. Stern & Barbara D. Dennis eds., 1983); Betty Binns Fletcher, *Arbitration of Title VII Claims: Some Judicial Perceptions*, in ARBITRATION ISSUES FOR THE 1980S, PROCEEDINGS OF THE 34TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 218, 228 (James L. Stern & Barbara D. Dennis eds., 1982); Alvin B. Rubin, *Arbitration: Toward a Rebirth*, in TRUTH, LIE DETECTORS, AND OTHER PROBLEMS IN LABOR ARBITRATION, PROCEEDINGS OF THE 31ST ANNUAL MEETING NATIONAL ACADEMY OF ARBITRATORS 30, 36 (James L. Stern & Barbara D. Dennis eds., 1979).

condemned the use of mandatory arbitration on just such grounds.⁴⁸ A forceful additional argument is that a few well-publicized pocketbook-jarring jury verdicts might do far more to promote the public policy of deterrence and hasten the end of workplace discrimination than any number of privately issued and modest arbitral awards.⁴⁹

Private arbitrators are not publicly accountable. Many of them are not all that knowledgeable about public law. And the rerouting of substantial numbers of civil rights cases from the courts to arbitration, with the consequent loss of a continuing stream of published court decisions, could have an unhealthy impact on the development of the law itself.⁵⁰

Yet there is another side to the story. It is counterintuitive and highly pragmatic. It reflects a willingness to take the professional or midlevel-management employee's opportunity to get before a jury with a rare seven, or high-six, figure claim, and trade it for the only realistic opportunity that most lower-level workers will have to recover a job and a small financial award. Experienced plaintiffs' attorneys have estimated that only about five percent of the individuals with an employment claim who seek help from the private bar are able to obtain counsel.⁵¹ One of the Detroit area's top employment specialists was more precise in a conversation with me. His secretary kept an actual count; he took on only one out of eighty-seven persons who contacted him for possible representation. Now, many of those who are rejected will not have meritorious claims. But others will be workers whose potential dollar recovery will simply not justify the investment of the time and money of a first-rate lawyer in preparing a court action. For those individuals, the cheaper, simpler process of arbitration is the most feasible recourse. It will cost a lawyer far less time and effort to take a case to arbitration; at worst, claimants can represent themselves or be represented by laypersons in this much less formal and intimidating forum.

Ideally, an employee would be offered the choice of arbitration *after* a dispute has arisen, not at some previous point in the employment relationship. If an employee has been discharged, for example, there is nothing much to lose by refusing to arbitrate, and thus any agreement is much likelier to be voluntary in the fullest sense. But there was credible testimony by management representatives before the Dunlop Commission that employers would generally not be willing to enter into postdispute

48. See, e.g., David E. Feller, *Fender Bender or Train Wreck?: The Collision Between Statutory Protection of Individual Employee Rights and the Judicial Revision of the Federal Arbitration Act*, 41 ST. LOUIS U. L.J. 561 (1997); Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER U. L. REV. 1017 (1996); see also *supra* notes 37, 39-44 and accompanying text.

49. See, e.g., Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 429-31 (1996).

50. Harry T. Edwards, *Where Are We Heading with Mandatory Arbitration of Statutory Claims in Employment?*, 16 GA. ST. U. L. REV. 293, 297 (1999).

51. Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 58 (1998); cf. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 418-62 (2000).

agreements to arbitrate.⁵² For most run-of-the-mill claims, employers will be inclined to wait them out, assuming that the great bulk will go nowhere. Workers will not have the gumption to pursue lesser claims, and they probably will not find lawyers to take their cases if they try.

For employers, the desired trade-off is the one *big* case against the many smaller ones. Even if successful, a defense before a jury may cost \$100,000 to \$200,000 or more. And a professional arbitrator will be less disposed than an emotionally aroused jury to hand out seven-figure awards. But, conversely, few employees and their lawyers will be willing to arbitrate the big case rather than take it to a jury. Thus for management the sensible strategy is to agree to arbitrate only if everything can be included, and that almost necessarily means an agreement before any dispute arises. If employers are not bluffing, therefore, the only choice for the ordinary worker with an ordinary claim may be a *pre-dispute* agreement to arbitrate—or nothing.

The EEOC will not be the salvation of the employee with a minimal case. Before a severely overburdened and underfunded EEOC resorted to its “triage” procedure a few years ago—classifying cases as A, B, or C priorities depending on merit and importance, and tossing out many charges after the briefest of investigations—its backlog had soared past 100,000 charges and it was receiving almost 100,000 new charges a year.⁵³ The situation was so bleak that one knowledgeable scholar recommended, quite understandably, that the EEOC get out of the business of handling individual charges and husband its limited resources for routing out systemic unlawful practices.⁵⁴

Even if individual claimants can get to court, mounting empirical evidence indicates most of them will fare less well there than they would before a qualified arbitrator. Several studies show that employees actually win more often in arbitration than in court and, while a *successful* plaintiff recovers more from a judge and a jury, claimants as a group get more from arbitrators.⁵⁵ That was true before the due-process protocol was adopted, and should be even truer with the protocol in effect.

Most court dockets are heavily backlogged and delay is endemic. That can be devastating for the fired worker without a job or with a much-reduced income. A considerably more conservative judiciary than existed in earlier years may be all too willing to grant summary judgment against those civil-rights plaintiffs who do manage to file suit. Traditional labor arbitrators have had to remain mutually acceptable to unions and employers, and the same is likely to become true for arbitrators in the new employer/individual-employee field as an increasingly savvy

52. See COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'TS OF COMMERCE & LABOR, FACT FINDING REPORT 118 (1994); see also Task Force on Alternative Dispute Resolution in Employment, *supra* note 44, at 37.

53. *National Enforcement Plan Tops EEOC Agenda*, 151 Lab. Rel. Rep. (BNA) 129 (Feb. 5, 1996), available at WL 151 LRR 129 d20; *EEOC Adopts Change-Priority System*, 149 Lab. Rel. Rep. (BNA) 1 (May 1, 1995), available at WL 149 LRR 1 d19.

54. Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219, 219 (1995).

55. Maltby, *supra* note 51, at 54. In a study by the American Arbitration Association, arbitral claimants prevailed sixty-three percent of the time. By contrast, plaintiffs' success rates in separate surveys of federal court and EEOC cases were only 14.9% and 16.8%, respectively. *Id.* at 46, 49.

plaintiffs' bar develops. There is no comparable check on the lifetime appointees to the federal bench or, as a practical matter, on longtime incumbents of state courts.

In view of the accumulating data about the actual experience of discrimination victims, we would be mistaken in condemning mandatory arbitration out of hand. It may well be the most realistic hope of the ordinary blue- or pink-collar claimant.⁵⁶ That assumes, I should emphasize, that the necessary due-process safeguards exist, of the sort specified by the Dunlop Commission and the ABA protocol.⁵⁷ Those would include a knowledgeable, truly neutral arbitrator in whose selection the employee has participated, with the power to provide any remedies authorized by the statute. Absent a surprising turnabout from the Supreme Court's stance in *Gilmer*, the handling of statutory discrimination charges will be a continuing challenge for the country's arbitrators in the years ahead.⁵⁸

II. JUDICIAL REVIEW AND PUBLIC POLICY

In the famous *Steelworkers Trilogy*,⁵⁹ the Supreme Court made arbitration the linchpin in the federal scheme for the implementation of collective bargaining agreements. More specifically for our purposes, the Court in one of the three cases, *United Steelworkers v. Enterprise Wheel & Car Corp.*,⁶⁰ imposed tight constraints on judicial review of arbitral awards.⁶¹ So long as the award is not the product of fraud or corruption, does not exceed the arbitrator's authority under the parties' submission, and "draws its essence" from the labor contract, a court is to enforce the award without any attempt to "review the merits."⁶² Despite these strictures, the itch of the judiciary to right seeming wrongs has compelled the Court to revisit the subject, most notably in *United Paperworkers International Union v. Misco, Inc.*⁶³

56. The National Association of Securities' Dealers Office of Dispute Resolution, which administers over 5000 arbitrations a year, recently reported that an independent survey by two college professors indicated that about ninety-three percent of the participants who answered a questionnaire (fifty-four percent were claimants) concluded their cases were handled "fairly and without bias." *NASD Arbitration Forum Overwhelmingly Praised for Fairness According to Independent Survey*, PR NEWSWIRE, Aug. 5, 1999, LEXIS, Markets and Industry Library, IACNWS File. Although the securities industry system has been much criticized for lack of impartiality, a U.S. General Accounting Office study found that employees using it won fifty-five percent of the time. Maltby, *supra* note 51, at 50.

57. See *supra* note 46 and accompanying text.

58. For more recent and more sympathetic treatments of mandatory arbitration, see Richard A. Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 LAB. LAW. 511 (1998); Samuel Estreicher, *Pre-Dispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1182 (1997); Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 221 (1997).

59. *United Steelworkers v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers v. Am. Mfg. Co.*, 363 U.S. 564 (1960).

60. 363 U.S. 593 (1960).

61. *Id.* at 597-98.

62. *Id.* at 596-99. But the arbitrator must not "dispense his own brand of industrial justice." *Id.* at 597.

63. 484 U.S. 29 (1987).

Misco dealt with the hottest current issue concerning judicial review, namely, when a court should set aside an arbitral award on the grounds that it violates public policy. The Fifth Circuit had refused to enforce an arbitrator's reinstatement of an employee whose job was to operate a dangerous paper-cutting machine, and whose car had been found to contain marijuana while in the company parking lot.⁶⁴ The Supreme Court reversed, declaring that "as long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, that a court is convinced he committed serious error does not suffice to overturn his decision."⁶⁵ The Court naturally recognized the general common-law doctrine that no contract in contravention of law or public policy will be enforced.⁶⁶ But it cautioned,

a court's refusal to enforce an arbitrator's *interpretation* of [labor] contracts is limited to situations where the contract as interpreted would violate "some explicit public policy" that is "well defined and dominant, and is to be ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'"⁶⁷

Many lower courts have still not got the message. Judges have been so offended by the reinstatement of deviant postal workers, sexual harassers, and alcoholic airline pilots that they have disregarded the directives of *Enterprise* and *Misco*.⁶⁸ Unfortunately and unaccountably, the Supreme Court has not seen fit to step in and insist that its dictates be followed.⁶⁹ Thus, the First⁷⁰ and Fifth⁷¹ Circuits have taken

64. *Id.* at 32-35.

65. *Id.* at 38.

66. *Id.* at 42.

67. *Id.* at 43 (quoting *W.R. Grace & Co. v. Local Union 759, Int'l Union of the United Rubber Workers*, 461 U.S. 757, 766 (1983) (emphasis in the original) (quoting *Muschany v. United States*, 324 U.S. 49, 66 (1945))).

68. *See infra* notes 70-71, 78-81.

69. A lawyer who successfully argued the *Steelworkers Trilogy*, has ruefully suggested that less deference may now be paid to the awards in labor arbitration than in commercial arbitration. David E. Feller, *Presidential Address: Bye Bye Trilogy, Hello Arbitration*, in *ARBITRATION 1993: ARBITRATION AND THE CHANGING WORLD OF WORK, PROCEEDINGS OF THE FORTY-SIXTH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS* 1, 9-13 (Gladys W. Gruenberg ed., 1994).

70. *See, e.g.*, *Exxon Corp. v. Esso Workers' Union*, 118 F.3d 841, 844, 852 (1st Cir. 1997) (reversing district court's decision to uphold an arbitral award for the reinstatement of a driver of a petroleum truck who had tested positive for cocaine); *United States Postal Serv. v. Am. Postal Workers Union*, 736 F.2d 822, 823 (1st Cir. 1984) (affirming district court's decision to set aside arbitral award reinstating postal worker who had embezzled \$4325 worth of money orders).

71. *See, e.g.*, *Exxon Corp. v. Baton Rouge Oil & Chem. Workers Union*, 77 F.3d 850 (5th Cir. 1996) (reversing arbitrator's award of reinstatement or back pay to a chemical plant supervisor who had tested positive for cocaine); *cf. Delta Queen Steamboat Co. v. Marine Engineers Dist. 2*, 889 F.2d 599 (5th Cir. 1989) (stating arbitrator had exceeded his contractual authority in reinstating grossly careless riverboat captain who had nearly collided with barges). *But cf. Atchison, Topeka & Santa Fe Ry. Co. v. United Transp. Union*, 175 F.3d 355 (5th Cir. 1999) (enforcing award for reinstatement of railroad employee who had tested positive for drugs); *United Food & Commercial Workers Union v. Pilgrim's Pride Corp.*, 193 F.3d 328

it upon themselves to find an award at odds with their notions of public policy, even though the action ordered, such as a reinstatement, would not have violated any positive law or established public policy if it had been taken by the employer on its own initiative. The Fourth,⁷² Sixth,⁷³ Seventh,⁷⁴ Ninth,⁷⁵ Tenth,⁷⁶ and District of Columbia⁷⁷ Circuits have been far more faithful to the *Misco* mandate. They have enforced awards reinstating grievants which, in effect, did not sustain or order conduct that would have been forbidden to the employer acting unilaterally. The Second,⁷⁸ Third,⁷⁹ Eighth,⁸⁰ and Eleventh⁸¹ Circuits have vacillated on the issue, but

(5th Cir. 1999) (upholding award requiring deduction of union dues from rehired employee who had not signed a new checkoff form authorizing deductions).

72. *See, e.g.*, *Westvaco Corp. v. United Paperworkers Int'l Union*, 171 F.3d 971, 976-78 (4th Cir. 1999) (upholding award requiring reinstatement of employee who had harassed coworker).

73. *See, e.g.*, *TVA v. Tenn. Valley Trades & Labor Council*, 184 F.3d 510, 519-21 (6th Cir. 1999) (upholding arbitrator's award for reinstatement of nuclear reactor unit operator who tested positive for marijuana); *MidMichigan Reg'l Med. Center—Clare v. Prof'l Employees Div. of Local 79*, 183 F.3d 497, 504-06 (6th Cir. 1999) (upholding arbitrator's award for reinstatement of a nurse who negligently handled equipment during cardiac emergency); *Monroe Auto Equip. Co. v. UAW*, 981 F.2d 261, 269 (6th Cir. 1992) (upholding arbitrator's award of reinstatement for installer of automobile test equipment who violated company drug policy), *cert. denied*, 508 U.S. 931 (1993).

74. *See, e.g.*, *Chrysler Motors Corp. v. Indus. Union*, 959 F.2d 685, 686-87 (7th Cir. 1992) (upholding arbitrator's award for reinstatement of male forklift operator who had sexually harassed female coworker by grabbing her breasts), *cert. denied*, 506 U.S. 908 (1992).

75. *See, e.g.*, *United Food & Commercial Workers Int'l Union Local 588 v. Foster Poultry Farms*, 74 F.3d 169, 174-75 (9th Cir. 1995) (upholding arbitrator's award for reinstatement of employees who had failed drug test, and rescinding employer's drug testing program pending bargaining with union despite state regulation mandating random drug testing); *Stead Motors of Walnut Creek v. Automotive Machinists Lodge No. 1173*, 886 F.2d 1200, 1202, 1209-17 (9th Cir. 1989) (en banc) (upholding arbitrator's award for reinstatement of auto mechanic who had repeatedly failed to tighten lug nuts on car wheels; court would vacate award on public policy grounds only if policy "specifically militates against the relief ordered by the arbitrator"), *cert. denied*, 486 U.S. 1014 (1988). *But cf.* *Garvey v. Roberts*, 203 F.3d 580, 590-92 (9th Cir. 2000) (vacating denial of baseball player's collusion claim because arbitrator's finding "is completely inexplicable and borders on the irrational" and because arbitrator dispensed "his own brand of industrial justice").

76. *See, e.g.*, *Kennecott Utah Copper Corp. v. Becker*, 195 F.3d 1201, 1205-08 (10th Cir. 1999) (upholding arbitrator's award for reinstatement of employee who had tested positive for marijuana following accident); *Communications Workers v. Southeastern Elec. Coop.*, 882 F.2d 467, 468 (10th Cir. 1989) (upholding arbitrator's award for reinstatement of electric utility lineman who in isolated incident sexually harassed customer in her home).

77. *See, e.g.*, *Northwest Airlines Inc. v. Air Line Pilots Ass'n*, 808 F.2d 76, 77-78 (D.C. Cir. 1987) (upholding arbitrator's award for conditional reinstatement of alcoholic airline pilot who had flown while intoxicated).

78. *Compare* *Local 97, IBEW v. Niagara Mohawk Power Corp.*, 196 F.3d 117, 119-21 (2d Cir. 1999) (upholding arbitrator's reinstatement of nuclear plant security officer who had failed to respond to fire alarm and then lied repeatedly during investigation), *and* *Local 97, IBEW v. Niagara Mohawk Power Corp.*, 143 F.3d 704, 706 (2d Cir. 1998) (upholding arbitrator's reinstatement of nuclear plant technician who had supplied adulterated urine sample in drug

the most recent decisions seem more in line with *Misco*.

Because I consider it one of the easier issues in arbitration, however much misunderstood by a number of courts, I shall deal brusquely with the rejection of otherwise legitimate awards on the basis of a nebulous public policy. That usually comes down to the highly subjective feelings of particular judges. For me, three estimable critics have correctly assessed the problem and arrived at the right solution. In various formulations, Judge Frank Easterbrook⁸² and Professors Charles Craver⁸³ and David Feller⁸⁴ have concluded that if the employer (or the employer in conjunction with the union) has the lawful authority to take unilaterally the action directed by the arbitrator, such as reinstatement of a wrongdoing employee, the arbitral award should be upheld against public-policy claims. That approach is entirely in keeping with the underlying notion that the arbitrator is the parties' surrogate, their designated spokesperson in reading and applying the contract. What the parties are entitled to say or do on their own, the arbitrator is entitled to say or order. That simple principle seems so self-evident, and so implicit in the Supreme Court's rulings in *Enterprise* and *Misco*, that it should become the accepted norm in the future. This

test and subsequently tested positive for cocaine), *with* *Newsday, Inc. v. Long Island Typographical Union*, 915 F.2d 840, 841-42 (2d Cir. 1990) (setting aside arbitrator's reinstatement of male employee who had harassed female coworkers), *cert. denied*, 499 U.S. 922 (1991). *Cf.* *Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 203-04 (2d Cir. 1998) (stating that arbitral award rejecting claim under the ADEA may be vacated for "manifest disregard" of law or evidence), *cert. denied*, 526 S. Ct. 1286 (1999).

79. *Compare* *Exxon Shipping Co. v. Exxon Seamen's Union*, 993 F.2d 357, 358 (3d Cir. 1993) (setting aside reinstatement of ship helmsman who tested positive for marijuana after oil tanker had run aground), *with* *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 839 F.2d 146, 146-47 (3d Cir. 1988) (upholding reinstatement of postal worker who shot at supervisor's empty, parked car).

80. *Compare* *Homestake Mining Co. v. United Steelworkers Local 7044*, 153 F.3d 678, 679-80 (8th Cir. 1998) (upholding reinstatement of mine welder who allegedly violated federal safety regulations by not shielding welding so as to avoid fire hazard), *with* *Iowa Elec. Light & Power Co. v. Local Union 204, IBEW*, 834 F.2d 1424, 1425-26 (8th Cir. 1987) (vacating arbitrator's decision to reinstate employee in nuclear power plant who defeated safety lock to take short cut to lunch).

81. *Compare* *Delta Air Lines, Inc. v. Air Line Pilots Ass'n*, 861 F.2d 665, 666-69, 675 (11th Cir. 1988) (overturning reinstatement of alcoholic airline pilot who had been discharged after flying while intoxicated), *cert. denied*, 493 U.S. 871 (1989), *and* *United States Postal Serv. v. Nat'l Ass'n of Letter Carriers*, 847 F.2d 775, 776 (11th Cir. 1988) (setting aside reinstatement of postal worker who stole mail), *with* *Fla. Power Corp. v. IBEW, Local Union 433*, 847 F.2d 680, 680-81 (11th Cir. 1988) (sustaining reinstatement of employee who was in possession of cocaine while driving drunk).

82. *See* Frank H. Easterbrook, *Arbitration, Contract, and Public Policy, in* ARBITRATION 1991: THE CHANGING FACE OF ARBITRATION IN THEORY AND PRACTICE, PROCEEDINGS OF THE 44TH ANNUAL MEETING, NATIONAL ACADEMY OF ARBITRATORS 65, 70-77 (Gladys W. Gruenberg ed., 1992); *see also* *E.I. DuPont de Nemours & Co. v. Grasselli Employees Indep. Assoc.*, 790 F.2d 611, 618-20 (7th Cir. 1986) (Easterbrook, J., concurring).

83. *See* Charles B. Craver, *Labor Arbitration as a Continuation of the Collective Bargaining Process*, 66 CHI.-KENT L. REV. 571, 604-05 (1990).

84. *See* David E. Feller, *Court Review of Arbitration*, 43 LAB. L.J. 539, 543 (1992).

would merely confirm arbitration as the "final and binding" dispute resolution procedure that the parties' contracts almost invariably denominate.

We may shortly have further enlightenment from the Supreme Court on this long-running debate. In March 2000, certiorari was granted in *Eastern Associated Coal Corp. v. United Mine Workers, District 17*.⁸⁵ This was another instance of marijuana ingestion by a worker in a hazardous occupation, here, a mobile equipment operator. In sustaining the arbitrator's reinstatement of the employee, both the trial and appellate courts acknowledged that Department of Transportation regulations expressed a "well defined and dominant public policy" against drugs on the job.⁸⁶ But the court of appeals got it exactly right when it went on to say: "[A]lthough there is a public policy against the use of illegal drugs by those in safety-sensitive positions, there is no such public policy against the reinstatement of employees who have used illegal drugs in the past."⁸⁷

In short, the key is whether the remedial action ordered by the arbitrator, not the triggering conduct of the employee, is contrary to public policy. Of course the drug-taking *employee* acted contrary to public policy. But the award-issuing *arbitrator* did not and his decision should stand. Indeed, recognizing the possibility of the rehabilitation of wrongdoers is a hallmark of a humane and caring society.⁸⁸ Despite the ominous implications of a grant of certiorari when the court of appeals did not even deign to publish its opinion, the Supreme Court should recognize the distinction and rule accordingly.

III. ARBITRATION OF WRONGFUL DISCHARGE CLAIMS

The greatest potential for the expansion of arbitration lies in the nonunion sector. The United States remains the only major industrial democracy in the world which persists in the pernicious doctrine of employment at will.⁸⁹ As stated in its purest form in a famous nineteenth century court decision, the doctrine means employers may "dismiss their employees at will . . . for good cause, for no cause or even for cause

85. 120 S. Ct. 1416 (2000). For the case below, see *E. Associated Coal Corp. v. United Mine Workers, Dist. 17*, 66 F. Supp. 2d 796 (S.D. W. Va. 1998), *aff'd per curiam*, No. 98-2527, 1999 WL 635632 (4th Cir. Aug. 20, 1999).

86. *E. Associated Coal Corp.*, 66 F. Supp. 2d at 804.

87. *E. Associated Coal Corp. v. United Mine Workers, Dist. 17*, No. 98-2527, 1999 WL 635632, at *1 (4th Cir. Aug. 20, 1997) (unpublished opinion).

88. The classic treatment in the penal context is FRANCIS A. ALLEN, *THE DECLINE OF THE REHABILITATIVE IDEAL: PENAL POLICY AND SOCIAL PURPOSE* 80-89 (1981).

89. See *supra* note 9; see also Comm. on Labor & Emp., The Ass'n of the Bar of the City of New York, *At-Will Employment and the Problem of Unjust Dismissal*, 36 RECORD 170, 175 (1981). About sixty nations now prohibit discharge without cause, including the European Union, Japan, Canada, and others in South America, Africa, and Asia. *Id.* at 175; see also INTERNATIONAL LABOUR ORGANIZATION, *TERMINATION OF EMPLOYMENT DIGEST* 384-87 (Malcolm Crotty et al. eds., 2000); Americo Pla Rodriquez, *Termination of Employment on the Initiative of the Employer*, 5 COMP. LAB. L.J. 221, 221 (1982). The International Labour Organization went on record two decades ago against unjust dismissal. Convention (No. 158) Concerning Termination of Employment at the Initiative of the Employer, June 22, 1982, 1412 U.N.T.S. 159.

morally wrong."⁹⁰

The first breach in the wall occurred when the California courts could no longer stomach such outrageous employer behavior as the firing of employees for refusing to commit perjury at the employer's behest⁹¹ or for refusing to participate in an illegal price-fixing scheme.⁹² Since then, mostly during the last twenty years, courts in about forty-five jurisdictions have used a variety of tort or contract theories to ameliorate some of the harshest rigors of employment at will.⁹³ The concepts relied on have included public policy, usually as embodied in state statutes or constitutions;⁹⁴ express or implied contract based on personnel manuals or oral assurances at the time of hiring;⁹⁵ and the implied covenant of good faith and fair dealing.⁹⁶

Welcome as they are as a first step in the right direction, judicial modifications of at-will employment suffer from several deficiencies. From the employee's perspective, they do not go far enough. The tort theory generally requires an unconscionable violation of a well-established public policy, and that is relatively rare.⁹⁷ The contract theory will be unavailable if an employer refrains from any oral or written promises of job security,⁹⁸ or rescinds a prior commitment by adequate notice to the workforce.⁹⁹ Only a handful of states accept the most expansive theory, the covenant of good faith and fair dealing.¹⁰⁰ Lastly, even if an employee has a cognizable legal claim, few rank-and-file workers will have enough money at stake to make it worth the while of a lawyer handling cases on a contingent fee.¹⁰¹

When the common law exceptions to at-will employment do apply, however, they can be devastating to unlucky employers. Juries can succumb to emotional appeals,

90. *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519-20 (1884).

91. *Petermann v. Int'l Bhd. of Teamsters Local 396*, 344 P.2d 25 (Cal. Dist. Ct. App. 1959).

92. *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330 (Cal. 1980).

93. See *Employee at Will State Rulings Chart*, 9A [Individual Emp. Rts. Manual] Lab. Rel. Rep. (BNA) 505:51 (1999).

94. See *Sheets v. Teddy's Frosted Foods, Inc.*, 427 A.2d 385 (Conn. 1980); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876 (Ill. 1981); *Brockmeyer v. Dun & Bradstreet*, 335 N.W.2d 834, 840 (Wis. 1983). *But see* *Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 89-90 (N.Y. 1983).

95. See *Toussaint v. Blue Cross & Blue Shield*, 292 N.W.2d 880, 884-85 (Mich. 1980); *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 445 (N.Y. 1982); *cf.* *Cotran v. Rollins Hudig Hall Int'l, Inc.*, 948 P.2d 412, 414 (Cal. 1998) (concluding that employer's reasonable grounds, not employee's actual conduct, are the test).

96. See *Foley v. Interactive Data Corp.*, 765 P.2d 373, 383-87 (Cal. 1988); *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1255-56 (Mass. 1977).

97. See *supra* notes 93-94 and accompanying text.

98. See, e.g., *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460-61 (6th Cir. 1986) (finding employment at will because of disclaimer in employment application).

99. See, e.g., *Bankey v. Storer Broad. Co.*, 443 N.W.2d 112, 113 (Mich. 1989); *cf.* *Enis v. Cont'l Ill. Nat'l Bank & Trust Co.*, 795 F.2d 39, 41 (7th Cir. 1986) (opining that an employee manual only creates contract rights if it is part of a preexisting contract or a modification of an employment-at-will relationship).

100. See *Employment at Will State Rulings Chart*, 9A [Individual Emp. Rts. Manual] Lab. Rel. Rep. (BNA) 505:51-505:52 (1999).

101. See *supra* note 51 and accompanying text.

and they have awarded individual employees \$20 million, \$4.7 million, \$3.25 million, \$2.75 million, \$2 million, \$1.5 million, \$1.19 million, and \$1 million.¹⁰² Studies of California cases found that a plaintiff who could reach a jury won almost ninety percent of the time.¹⁰³ Leading management lawyers inform me that even a successful defense in a jury trial may cost \$100,000 to \$200,000. On balance, the present common-law system ill serves all parties, except perhaps the plaintiffs' bar. Ultimately, I believe, legislation must provide the solution.

To date Montana is the only state that has enacted a statutory "good cause" requirement for the dismissal of covered employees.¹⁰⁴ In 1991, however, the National Conference of Commissioners on Uniform State Laws ("ULC") adopted the Model Employment Termination Act ("META") by a vote of thirty-nine to eleven of the state delegations.¹⁰⁵ META protects most full-time, nonprobationary employees—those working twenty or more hours a week after one year of service—against discharge without good cause.¹⁰⁶ The term "good cause" was chosen rather than the "just cause" customary in collective bargaining agreements to emphasize the discretion allowed management in economic decisions.¹⁰⁷ Good cause may consist of either misconduct or poor performance on an employee's part, or the employer's good faith business judgment that a particular employee is no longer needed or suitable for the job.¹⁰⁸

Unjust dismissal remains a significant problem in our society. A careful scholar has estimated that about 2 million of the 60 million at-will employees in the United States are discharged each year and that about 150,000 of these would have valid claims if they had the same protections afforded most unionized workers.¹⁰⁹

META aims at a fair and practical compromise between the competing worthy interests of employers and employees. Employers are entitled to maintain efficient and productive enterprises. Employees are entitled to be free from arbitrary treatment in the workplace. When rights are contested in legal proceedings, both employers and employees are entitled to procedures that are simple and readily accessible, swift and

102. Kenneth Lopatka & Julia Martin, *Developments in the Law of Wrongful Discharge*, in NATIONAL INSTITUTE ON LITIGATING WRONGFUL DISCHARGE AND INVASION OF PRIVACY CLAIMS vii, 13-18 (1986); see also JAMES N. DERTOUZOS ET AL., *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* (1988).

103. Cliff Palefsky, *Wrongful Termination Litigation: "Dagwood" and Goliath*, 62 MICH. B.J. 776, 776 (1983).

104. See MONT. CODE ANN. §§ 39-2-901 to -915 (1999); see also *Marcy v. Delta Airlines*, 166 F.3d 1279, 1284 (9th Cir. 1999) (2-1 decision) (holding that, under Montana statute, employer's good faith is no defense if employee was discharged under mistaken view of facts). Puerto Rico has enacted similar legislation. 29 P.R. LAWS ANN. § 185 (1985).

105. MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 428 (1991). See generally Theodore J. St. Antoine, *The Making of the Model Employment Termination Act*, 69 WASH. L. REV. 361 (1994). I should note that I served as Reporter, or principal draftsman, for META. The views stated here, however, are entirely my own.

106. MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 433.

107. *Id.*

108. *Id.* § 1(4), 7A U.L.A. 429.

109. Jack Stieber, *Recent Developments in Employment-at-Will*, 36 LAB. L.J. 557, 558 (1985).

not overly expensive. And while employees would receive broadened substantive rights under META,¹¹⁰ and the remedy of reinstatement to their jobs along with back pay,¹¹¹ employers would be relieved of the risk of crushing punitive damages.¹¹²

The preferred method for enforcing META is through professional arbitrators appointed by an appropriate state agency. The rationale is that arbitrators' experience and familiarity with the workplace should make them acceptable to both employers and employees, and their experience in handling labor disputes should produce shorter and less expensive hearings.¹¹³ The use of ad hoc arbitrators would also avoid the need to create a new permanent staff of hearing officers in state labor agencies.

Adoption of META or an equivalent throughout the country would have a galvanizing effect on arbitration. In the mid-1990s, union density in private employment was down to around ten percent, but there were still some 25,000 labor arbitration awards a year, of which about forty percent, or 10,000, were in discipline cases.¹¹⁴ Even if good cause for dismissal became a national standard, and arbitration the principal forum, I would not expect a tenfold increase in the caseload. Yet a rise in awards in discharge¹¹⁵ cases to at least 30,000 a year in the private sector would seem a reasonable expectation.

None of this is going to happen any time soon. Shortly after the ULC adopted META in 1991, it (or bills based at least in part on it) received a flurry of attention in about a dozen states.¹¹⁶ Nine years after the ULC endorsement, however, no state besides Montana has passed good cause legislation. In addition to the increasingly conservative atmosphere in state houses across the nation, there has been a lack of support from organized interest groups. Representatives of the AFL-CIO and the American Civil Liberties Union were the only spokespersons for major organizations to urge in writing that the ULC approve a model act in 1991.¹¹⁷ Even so, union lobbyists with other priorities have shown no enthusiasm for the bills introduced in various legislatures. Management representatives have commended META as a fair compromise in private comments. But it seems a quite different matter to go public

110. MODEL EMPLOYMENT TERMINATION ACT, 7A U.L.A. 429, 433 (requiring an assault, drug use, absenteeism, insubordination, substandard work, etc., on the part of a covered employee, or an honest business judgment by the employer concerning the size or nature of the workforce, to justify a dismissal).

111. *Id.* § 7(b), 7A U.L.A. 440.

112. *Id.* § 7(d), 7A U.L.A. 440.

113. *Id.* at app., 7A U.L.A. 448.

114. I have done some very rough extrapolations from the data of Dennis R. Nolan & Roger I. Abrams, *Trends in Private Sector Grievance Arbitration*, in *LABOR ARBITRATION UNDER FIRE* 42, 59, 66-69 (James L. Stern & Joyce M. Najita eds., 1997). Among my quite fallible assumptions was the notion that the proportion of private-sector arbitrations would approximate the proportion of private-sector to public-sector union membership. Furthermore, figures on discipline cases include suspensions as well as discharges.

115. META deals only with discharge or constructive discharge, not lesser discipline. Common-law court decisions have been almost universally the same.

116. Connecticut, Delaware, Hawaii, Iowa, Maine, Massachusetts, Nevada, New Hampshire, and Oklahoma, with further variants in New York and Pennsylvania. My principal sources were ULC headquarters in Chicago and Professor Stuart Henry of Eastern Michigan University.

117. *See* St. Antoine, *supra* note 105, at 380-81.

in favor of still another diminution of the employer's once sovereign prerogative to rule the workplace.

Plaintiffs' attorneys are META's most outspoken opponents.¹¹⁸ Some are undoubtedly sincere in believing that it is wrong for employees to be denied jury trials and the possibility of full compensatory and punitive damages.¹¹⁹ Others, I fear, may simply oppose the loss of the hefty contingent fees they can now collect from successful upper-middle-class clients.

I would feel much more pessimistic about the prospects of ever getting good cause legislation in this country if it were not for my experience with the ULC. The initial reaction was considerable skepticism along with some outright hostility.¹²⁰ Yet after three years of searching debate and extensive revision of the proposal, this experienced body of mainstream lawyers, judges, and legislators became convinced of the essential fairness and soundness of the model act. The final vote was an overwhelming thirty-nine to eleven approval.¹²¹ In addition, the current proliferation of actions grounded in civil rights statutes, either before courts or arbitrators, may lead in fact to an increasing emphasis upon the need for good cause to justify an employee's dismissal. As a practical matter, the best defense for any employer or union accused of some type of categorical discrimination (for example, based on race, sex, age, disability, etc.) is to demonstrate that there was a legitimate, nondiscriminatory reason for the action taken.¹²²

CONCLUSION

The grievance and arbitration system is probably collective bargaining's greatest contribution to the American working person—even more important than economic benefits.¹²³ Arbitrators have played a key role in advancing that system by being the final arbiters in most of the contract disputes that cannot be settled voluntarily by unions and management. In so doing they have promoted the interests of employers

118. See Paul Tobias, *Defects in the Model Employment Termination Act*, 43 LAB. L.J. 501, 503 & n.8 (1992).

119. *Id.* at 500-01, 503.

120. See St. Antoine, *supra* note 105, at 369. At its first reading before the ULC, META had to survive a motion to discharge the drafting committee on the grounds the whole project was a futile exercise.

121. *Supra* text accompanying note 105.

122. See, e.g., *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55 (1981) (gender discrimination); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (race discrimination); *cf.* *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 506-07 (1993) (race discrimination). If unions were more imaginative, another indirect effect of existing civil rights legislation might be its use as an organizing device, through a willingness on the part of labor organizations to represent nonunion employees with discrimination claims against employers. The American Federation of State, County, and Municipal Employees has informed me of some success with such tactics in public employment.

123. See DEREK C. BOK & JOHN T. DUNLOP, *LABOR AND THE AMERICAN COMMUNITY* 219-21, 463-65 (1970); ALBERT REES, *THE ECONOMICS OF TRADE UNIONS* 74, 89-90, 186-87 (2d ed. rev. 1977); LLOYD G. REYNOLDS ET AL., *LABOR ECONOMICS AND LABOR RELATIONS* 257-60, 541-62 (10th ed. 1991); SUMNER H. SLICHTER ET AL., *THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT* 954-61 (1960).

in uninterrupted production as well as those of employees in fair and equitable treatment.

In the halcyon days following the Second World War, labor arbitrators operated in a largely self-contained domain where the collective bargaining agreement reigned almost supreme. External civil law in the form of statutes and common-law court decisions seldom intruded. Then, as a spate of civil rights statutes and other laws aimed at protecting individual employee rights in the workplace poured forth in the 1960s and 1970s, arbitrators construing labor contracts were drawn ineluctably into the interpretation and application of this overlapping legislation. That in turn led to heightened judicial scrutiny of arbitral awards in both union and nonunion contexts.

Employers dreading the costs of litigating employees' statutory claims in court increasingly sought to channel such actions into arbitration, under both collective bargaining agreements and individual contracts. A major remaining issue is the extent to which unions and individuals may waive employee rights to pursue statutory claims in the courts, requiring submission to arbitration instead. The problem is especially acute in so-called mandatory arbitration, where the employer makes the agreement to arbitrate a condition of employment. On the face of it, such agreements would seem contrary to sound public policy. But there are pragmatic grounds for thinking rank-and-file workers may actually benefit from these arrangements. They may be able to go to arbitration when they could not afford a lawyer to bring a court action. And they may even fare better before an arbitrator than before a judge.

Not surprisingly, increased judicial review of awards dealing with statutes whetted many courts' appetites for going further and taking a closer look at the area previously left mostly to itself—awards concerning collective agreements. At least that was true of those awards which in the courts' eyes might be seen to contravene some sort of "public policy." On the few occasions when the Supreme Court has intervened, it has invariably exercised a restraining influence; judges are not to apply their own personal yardsticks of public interest in determining whether or not to enforce a particular award.

The last major development in the arbitration landscape, which holds out so much promise and which yet to date has borne so little fruit, is the use of arbitration to implement the right of employees not to be discharged without good and sufficient cause. I have speculated that if and when dismissal for cause becomes the standard in this country—as it is in every other major industrial democracy—the arbitration caseload for discharge cases might well quadruple or better. That would be a great boon for the profession of labor arbitration. Far more important, a good cause requirement would mark the most significant advance for employee rights in the United States since the passage of the Wagner Act.¹²⁴

124. Wagner Act, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1994)).