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Response to Theodore J. St. Antoine and Michael C. Harper

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In his excellent and thought-provoking article, Theodore St. Antoine advances three arguments concerning the changing role of labor arbitration. First, despite persuasive arguments to the contrary, he maintains that mandatory arbitration of employment-discrimination claims for nonunion employees "may well be the most realistic hope of the ordinary blue- or pink-collar claimant."¹ Second, he argues that lower courts disposed to interfere with arbitration awards with which they do not agree should realize that if the parties possess the lawful authority to do what the arbitrator directs, "the arbitral award should be upheld against public-policy claims."² Third, he argues that the Model Employment Termination Act ("META"), which prohibits the termination of employment without good cause, would, if enacted, "mark the most significant advance for employee rights in the United States since the passage of the Wagner Act."³ I fully agree with St. Antoine with respect to his second and third arguments but must respectfully disagree that mandatory arbitration of statutory discrimination claims is advantageous to nonunion employees.

I disagree with St. Antoine about the effects of mandatory arbitration of statutory claims for essentially three reasons. First, and most importantly, mandatory arbitration takes away an employee's chance to have his or her claim resolved by a jury. I believe that employees have a far better chance of prevailing on their claims and a far better chance of receiving substantial relief when their claims are tried to a jury rather than an arbitrator. Second, even though, as St. Antoine correctly points out, there are procedural hurdles in the current system that keep the claims of many employee litigants from ever reaching a jury, the possibility of a jury trial deters employers from being as callous as they might otherwise be. Thus, the prospect of a jury trial protects the interests of employees at large who never have to become litigants, because the specter of jury trials and large damage awards restrains their employers from violating their rights. Third, I believe that a system of employer-dictated, mandatory arbitration will yield results tilted in favor of the employer because of the arbitrators' need to remain acceptable to employers, who will be the repeat players in the system. A dispute-resolution system in which the decisionmaker must remain acceptable to one side for his economic survival is incompatible with the remedies of compensatory and punitive damages that are provided by the employment-discrimination statutes. An arbitrator cannot render jurylike awards, which are the type of awards contemplated by the statute, and remain acceptable to employers. Moreover, arbitrators will have to be more concerned with pleasing employers than pleasing employees, because it is employers who will have a continuous presence in the system and who will therefore be in a position to accept or reject the arbitrator in subsequent cases. Individual employees will, most likely,

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1. Theodore J. St. Antoine, *The Changing Role of Labor Arbitration*, 76 *IND. L.J.* 83, 93 (2001).

2. *Id.* at 96.

3. *Id.* at 102.

have only one case in a lifetime, and the results of that case will not affect subsequent arbitrator selection.

The issue of mandatory arbitration arises when an employer, as a condition of employment, requires a prospective employee to agree to arbitrate, rather than litigate, future employment disputes in exchange for being hired. If the job applicant is a star athlete, performing artist, or a highly talented business executive whose services are as important to the employer as the employment is to the applicant, then it is difficult to object to the arrangement because the parties possess equal bargaining power. This situation, however, is rarely if ever the case. Normally, there are no negotiations. The litigation waiver is simply a requirement that the employee must accept or continue looking for a job somewhere else. The employee needs the job more than the employer needs the employee, and the employee signs on, most likely without even understanding the implications of what he or she is giving up.

Whether and under what circumstances an employer should be permitted to use its economic power to make an end run around congressionally established procedures for vindicating employee rights is a question which is beyond the scope of St. Antoine's article. He assumes that absent the Supreme Court reversing its decision in *Gilmer v. Interstate/Johnson Lane Corp.*,⁴ arbitrators will be handling more and more of these claims in the years to come in place of the courts.⁵ I suspect that his prediction is correct, although I wish it were not. But, I think St. Antoine is wrong to suggest that the shift to the arbitration forum may be beneficial to nonunion employees.

Employers impose these arbitration arrangements for one reason and one reason only—to avoid jury trials. Assuming that employers are rational decisionmakers, their assessment that they are better off before an arbitrator should at least give us a hint as to which system is likely to favor the employees. If asked, employers would most likely claim that they do not want their conduct to be assessed by a jury because juries are subject to “emotional appeals” and can be “irrational.” I think this position ignores the fact that discrimination is still a serious problem in the workplace and evinces a serious misunderstanding of juries and the positive and fundamental role that they play in our legal system.

An employee is likely to fare better before a jury than before an arbitrator for two reasons, neither of which involves irrationality. First, because they have the advantage of having avoided legal training, juries bring to the courtroom the community's sense of fairness and honesty in human relationships that transcends technical legal requirements. For example, for over twenty years I have explained the doctrine of employment at will to prospective clients when evaluating their claims. Much more often than not, the prospective client is surprised if not in downright disbelief that the law permits an employer to terminate an employee for a bad reason or no reason at all and that an employee does not have a meritorious claim even if the termination is grossly unfair. Although these prospective clients differ from jurors in that they have an immediate employment problem of their own, I suspect that their views reflect the lay public's views at large. Most people simply do not understand

4. 500 U.S. 20 (1991).

5. St. Antoine, *supra* note 1, at 102 (“[T]he arbitration caseload for discharge cases might well quadruple or better.”).

how cold employment law really is.

I believe that because they bring to the courtroom an expectation of fairness and honesty, jurors are more likely to draw inferences in the plaintiff's favor than an arbitrator. As an illustration of this point, consider the following types of proof of discrimination and the manner in which a judge or arbitrator might interpret them compared with the manner in which a jury might. First, consider the majority opinion in *St. Mary's Honor Center v. Hicks*.⁶ The Supreme Court established that even where the plaintiff proves to the fact-finder's satisfaction that the nondiscriminatory reason articulated by the employer to explain its conduct is false, a verdict for the plaintiff, while permissible, is not required.⁷ I submit that while an arbitrator or court might find for the defendant in such a case, as did the district court in *Hicks*,⁸ it is extremely unlikely that a jury would fail to find against an employer who lied about the reasons for firing the plaintiff.

As a second example, consider the honest-belief defense that employers regularly advance and courts regularly accept.⁹ As a nondiscriminatory reason to explain its conduct, the employer states that it fired the plaintiff not because of his race but because the plaintiff engaged in some kind of specified misconduct. The plaintiff proves to the satisfaction of the fact-finder that he did not engage in the misconduct claimed by the employer. Nevertheless, the defendant will still win unless the plaintiff can disprove the employer's claim that it honestly believed that the employee engaged in the misconduct.¹⁰ In other words, the plaintiff not only has to prove that the defendant is wrong about the facts but also that the defendant is lying about what it believed. The honest-belief defense, in the hands of a legally trained individual such as a judge or arbitrator, can present an extremely difficult hurdle for plaintiffs to clear, because proving someone's state of mind is a lot more difficult than proving general facts. I suspect, however, that the defense is likely to be much less effective with a jury than with a legally trained judge or arbitrator. If a defendant states that he fired the plaintiff because she stole from the cash register and the plaintiff proves to the jury's satisfaction that she did not steal, I believe the jury is more likely to conclude that the defendant is lying about his motivation rather than that he had an honest but mistaken belief that the plaintiff was a thief. Although either inference may be permissible as a matter of logic, a decisionmaker motivated by basic concerns of fairness is more likely to draw the inference against the party that, at best, is guilty of a damaging mistake than against the party that is totally innocent. An individual, such as a judge or arbitrator who is trained in the burden of proof, the doctrine of employment at will, and employment-discrimination case law is more likely to draw the inference the other way.

6. 509 U.S. 502 (1993).

7. *Id.* at 524; *see also* *Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097 (2000). For a persuasive presentation of the counterargument, see Justice Souter's dissent in *Hicks*, 509 U.S. at 533-40.

8. *Hicks*, 509 U.S. at 502.

9. *See, e.g.*, *Pollard v. Rea Magnet Wire Co.*, 824 F.2d 557 (7th Cir. 1987).

10. *See id.* at 559 (finding for the employer where the employee proved to the satisfaction of the fact-finder that he did not attend an event that the employer had forbidden him to attend but failed to prove that the employer did not have an honest belief that he attended the event).

I believe that for plaintiffs a jury is preferable to an arbitrator because jurors bring a fresher and fairer perspective to the courtroom and, for that reason, draw inferences that are not as strained or contorted as those that may be drawn by legally trained personnel. They bring with them the community's basic sense of fairness and honesty, and they judge the question of how this employer treated this employee through that prism. For this reason plaintiffs clearly fare better with juries than they do with judges, and for that same reason they will fare better with juries than they will with arbitrators, whose perspective is closer to the judiciary's than to a lay juror's.

St. Antoine correctly points out that many plaintiffs never enjoy whatever advantages the jury system provides because their claims are thrown out of court on summary judgment.¹¹ That unfortunate fact, however, does not eliminate the deterrent effect that the possibility of a jury trial has on employer conduct. Not all claims are dismissed on summary judgment. Not all employers are aware of the extent to which courts grant summary judgment against employment-discrimination claims. Finally, the cases in which juries award large verdicts receive much more publicity than those in which summary judgment is entered against the plaintiffs.

My impression, which admittedly is not based on any empirical proof, is that employers genuinely believe that they are at risk if they violate the employment-discrimination laws because an "irrational" jury may return a multimillion-dollar judgment against them. The deterrent effect created by this fear will evaporate if employers are permitted to create a system in which they never run this risk.

Some may argue that it is impossible to prove whether or to what extent such a deterrent effect exists. In response, I would point out that employers spend millions of dollars each year either providing in-house training in equal employment opportunity laws or sending company personnel to the numerous seminars that are presented on this topic. No comparable resources are expended in training company personnel in unemployment-compensation laws. One way to explain the difference in the amount of money devoted to each topic is that in an employment-discrimination case, an employer can lose a substantial sum, whereas his liability in an unemployment-compensation case is a few thousand dollars.

As discussed above, the difference between the manner in which juries and arbitrators or judges draw inferences makes juries a more favorable forum for employees with employment-discrimination claims. So far I have attributed that difference to two factors: the legal training that produces in an arbitrator the habit of "thinking like a lawyer" and the repeated exposure to legal disputes, which can have the effect of engendering cynicism or at least dampening idealism. But, there is yet another reason for my belief that plaintiffs will fare better before juries than before arbitrators: Unlike juries, arbitrators, if they are to maintain a successful arbitration practice, must remain acceptable to the repeat-player employers who appear before them.¹²

An example makes the point. If a jury believes that an employer is guilty of

11. St. Antoine, *supra* note 1, at 92-93.

12. In arbitration under collective bargaining agreements, both the employer and the union are repeat players, so favoring either can prevent the arbitrator from being selected in future cases.

egregious conduct, it has the authority under current employment-discrimination law to award compensatory and punitive damages. Once they assess the amount of damages and deliver their verdict in open court, the jurors go home and never again have to concern themselves with the parties.

An arbitrator obviously does not have that freedom. Unlike jurors, arbitrators work only if they are selected by the parties. As St. Antoine correctly notes, a key to an arbitrator's success is maintaining acceptability to the parties.¹³ An arbitrator's difficulty in providing full statutory relief arises from the nature of the remedies permitted by the employment-discrimination laws. The power and duty to award compensatory and punitive damages are essentially inconsistent with the practical necessity of maintaining acceptability to the employer. Awarding compensatory damages for emotional distress involves greater identification with the employee than awarding back pay. Awarding punitive damages against the employer is a clear and unmistakable repudiation of the employer's conduct. Either type of award, particularly if the amounts awarded are substantial, will alienate the employer. The employer who is subject to the award will never again use the arbitrator, and other employers who learn of the award are likely to have the same reaction.

Moreover, the employer, not the employee, is going to be the repeat player in the system because individual employees are not likely to have more than a single arbitration in their lifetimes.¹⁴ The system will work on the principle of natural selection. Arbitrators who make jurylike awards will lose acceptability with the repeat-player employers and thereby become extinct while their more conservative brethren who make modest awards containing less than full statutory relief will prosper.¹⁵

One response to this argument is that compensatory and punitive damages have no place in employment litigation and will not be missed. That argument, however, ignores the fact that Congress has expressly authorized both,¹⁶ thus, adopting a system that minimizes or eliminates them is inconsistent with congressional intent.

13. St. Antoine, *supra* note 1, at 92.

14. This problem does not exist in arbitrations under a collective bargaining agreement because compensatory and punitive damages are not available. The arbitrator is restricted to issuing an award limited to contract damages. Back-pay awards exceeding \$25,000 are therefore rare. Moreover, although reinstatement is a viable part of the remedy in a collective bargaining case, I do not believe that it would work in individual arbitration cases. An employee reinstated under a collective bargaining agreement is protected from employer retaliation by the union's continuing presence in the workplace. A nonunion employee would have no such protection. Reinstatement is rare in court cases in which the employee prevails, even though all antidiscrimination laws provide for it. I believe that it would also be rare in individual arbitration cases.

15. St. Antoine suggests that an employee bar will develop so that even though the employees are not repeat players, their lawyer representatives will be. St. Antoine, *supra* note 1, at 92. I agree that in this era of specialization, it is likely that some lawyers will do enough of this type of work to have an impact on repeat business for arbitrators. I do not believe, however, that lawyers who get their cases on a haphazard basis can ever develop the same degree of clout in such a system as major corporations or unions. Certain lawyers may gain the ability to reduce the tilt in the playing field, but they will not be able to make it level.

16. See Civil Rights Act of 1991, 42 U.S.C. § 2000e-5(g) (1994).

I believe that if employers are successful in replacing jury trials with arbitration, the awards that successful employees receive will be too modest to provide meaningful relief to the employee-participants and insufficiently painful to losing employers to provide them, or the employer community at large, with any inducement to avoid discrimination in the future. Employment litigation, with all of its current imperfections, has the attention of the employer community because it is costly. When it works, it can provide a meaningful remedy. My fear is that replacing the current judicial system with arbitration will, in effect, produce a small-claims system where successful employees walk away with a few thousand dollars and where employers will worry as much about discrimination as they now worry about unemployment compensation.

Turning to Michael Harper's article, I found his rich analysis of the problems underlying the decline of the American labor movement to be extremely persuasive. As an attorney representing unions, I have, over the last twenty-five years, watched membership in my clients' organizations shrink as plants closed, strikes failed, and employers moved work offshore. I share Harper's concern that this decline is bad not only for labor unions but also for the United States.¹⁷ Although I agree with nearly all that he says concerning the nature of the problem of union decline, I find myself decidedly ambivalent about his proposed solution. Harper argues that traditional attempts at labor-law reform in the form of legislation providing for certification based on card checks, stronger penalties for unfair labor practices, interest arbitration for first contracts, and prohibitions on the permanent replacement of strikers cannot work in the long run, even if favorable political conditions were to permit initial passage.¹⁸

As an alternative to the traditional labor-law reform approach, Harper proposes a two-tier representational system for labor unions.¹⁹ Under this system, it would be much easier for unions to achieve first-tier status than it is for unions to become certified under current law. All that a union would have to do is "present verifiable authorization cards from a majority of the employees [in an] appropriate unit" or win an "immediate-certification election in which [the] employer [is not permitted to] participate."²⁰

A first-tier representative would have authority to negotiate contracts permitting discipline only for just cause and a grievance procedure resulting in binding arbitration, but it would not have the authority to strike in support of its demands.²¹ Moreover, an employer would not have the duty to bargain over wages and benefits with a first-tier union.²² The National Labor Relations Board would be given the power to impose the terms of a first contract through interest arbitration, but the contract would not contain provisions governing wages or benefits.²³

17. Michael C. Harper, *A Framework for the Rejuvenation of the American Labor Movement*, 76 *IND. L.J.* 103, 103-09 (2001).

18. *Id.* at 123-24.

19. *Id.* at 124-28.

20. *Id.* at 125.

21. *Id.* at 126-27.

22. *Id.* at 127.

23. *Id.* at 126.

For a labor union to have authority to bargain and strike over a contract containing wages and benefits, it would have to achieve second-tier status.²⁴ To do this, it would have to obtain strike authorization in a secret-ballot election in any unit it wishes to represent.²⁵ When seeking second-tier status, a union would have to delay the strike-authorization vote to permit the employer an opportunity to persuade employees not to provide the authorization.²⁶ Although first-tier status would permit a union to represent employees only at a single site, a union could seek second-tier status on a multisite and/or multiemployer basis.

My ambivalence to the structure that Harper proposes arises from the tension between my distaste for any proposal that reduces union rights, as this one clearly does at least at the first tier, and my recognition that because attempts at more palatable solutions have not worked over the last twenty-five or more years, there is no objective reason to believe they will work in the next ten. In other words, while I do not like a system that provides unions with fewer rights, I also do not like the continuing decline in union membership under the current system, and if the decline is going to continue, it may be better to take a half-loaf than to end up with none.

Harper's argument for the first-tier half-loaf is persuasively made because his analysis concerning the role of labor unions in assuring fair treatment of employees is extremely insightful. In my opinion, union representation of employees under a collective bargaining agreement that provides for binding arbitration and that protects employees from discharge or discipline except for just cause affords employees the best protection available in our legal system.²⁷ The importance of a union's continuing presence to assure fair treatment through the representation of employees in the grievance procedure is difficult to overstate. Accordingly, a system that results in the significant spread of such representation to new work places is a valuable half-loaf.

On the other hand, removal of union authority to bargain over wages and benefits is extremely unpalatable. The risk, as Harper points out, is that unions would be frozen at the first tier.²⁸ Were that to happen, I believe that there is a serious risk that unions would likely lose legitimacy, or at least status, in the eyes of the employees because of their reduced authority. Participation of current union members in the

24. *Id.* at 127.

25. *Id.*

26. *Id.*

27. Union representation of employees under a collective bargaining agreement that requires just cause for discharge is superior to the META, because the employee has an onsite representative with bargaining power that at least approaches, even if it does not equal, the employer's. *But see* St. Antoine, *supra* note 1, at 100. Because of the union's bargaining power, many discharges are overturned in the grievance procedure and never need to be arbitrated. When arbitration is required, the union's presence in the workplace provides greater access to the information necessary to properly present a case on the grievant's behalf, protection for witnesses who testify favorably for the grievant, and protection for the grievant in the event he or she is reinstated. Nevertheless, recognizing the depressingly low percentage of employees who are represented by unions, I still agree with St. Antoine that enactment of META by the states would "mark the most significant advance for employee rights in the United States since the passage of the Wagner Act." *Id.* at 102.

28. Harper, *supra* note 17, at 129.

affairs of their organizations is not overwhelming. If the unions were denied the fundamental role of participating in the establishment of wages, hours, and working conditions, employee interest would likely wane even further, and with it, union vitality.

Ultimately, my decision on the merits of Harper's proposal would depend on whether I believed that eased access to first-tier status would serve as a launching pad for expanded second-tier representation or, conversely, that the creation of the more limited first-tier status would permit employers to avoid true collective bargaining by successfully resisting the move of unions to second-tier status. Significantly, employers would also have to decide which result they think is most likely in order to decide whether they would support legislative enactment of the proposal. Both parties would support the proposal only if their analysis led them to opposite conclusions. That is, the proposal would receive the combined support of unions and employers only if unions concluded that the system would make organizing easier and produce an expansion of union membership, and if employers believed that unions would lose power and influence.

Ultimately, my impression is that because the proposal provides for a system containing elements with which neither unions nor employers have had experience, neither will be able to determine with any certainty what results the system would produce. Without confidence that the system would advance their interests, neither unions nor employers would be able to support legislation for its creation. Consequently, despite Harper's ingenuity, I very much doubt that we shall ever see his system in operation.