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Mandatory Employment Arbitration: Keeping it Fair, Keeping it Lawful

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ESSAY

MANDATORY EMPLOYMENT ARBITRATION: KEEPING IT FAIR, KEEPING IT LAWFUL

Theodore J. St. Antoine[†]

INTRODUCTION

President Obama's election and the Democrats' takeover of Congress, including what was their theoretically filibuster-proof majority in the Senate, have encouraged organized labor and other traditional Democratic supporters to make a vigorous move for some long-desired legislation. Most attention has focused on the Employee Free Choice Act (EFCA).¹ As initially proposed, the EFCA would enable unions to get bargaining rights through signed authorization cards rather than a secret-ballot election,² and would provide for the arbitration of first-contract terms if negotiations fail to produce an agreement after four months.³ The EFCA would apply to the potentially organizable private-sector working population; at their

[†] James E. & Sarah A. Degan Professor Emeritus of Law, University of Michigan. This Essay is an expanded version of the Rush McKnight Labor Law Lecture, which was delivered on November 19, 2009 at the Case Western Reserve University School of Law. Much of the research for this Essay was derived from an earlier article by Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783 (2008).

¹ S. 560, H.R. 1490, 111th Cong. (2009).

² *Id.* § 2(a).

³ *Id.* § 3.

height, unions represented about 35% of that group.⁴ This Essay will deal, however, not with the EFCA but with another controversial, if less publicized, proposal: the Arbitration Fairness Act (AFA).⁵ The AFA would have a much broader impact than the EFCA. It could affect the whole of the nonunion work force, currently about 92.8% of private-sector employment.⁶ It would amend the Federal Arbitration Act (FAA)⁷ to prohibit most pre-dispute agreements to arbitrate employment claims or civil rights claims. Some background is necessary to understand what is at stake.

THE PROBLEM

Suppose you are a blue-collar or pink-collar employee, used to making \$15 an hour, a trifle more than twice the federal minimum wage, or some \$30,000 a year, which amounts to about 75% of the national average individual income.⁸ You have been laid off during the current recession and have been actively seeking work for a couple of months. You hear of a job paying \$12.50 an hour, a step down but far better than nothing. You apply and are accepted. The personnel director presents you with the usual set of forms to fill out, plus one that states: "All disputes between the Company and the Employee arising out of this employment relationship, including statutory claims, shall be resolved through the arbitration system established by the Company, and the Employee waives all right to bring any action on such claims against the Company in federal or state court." If you have the effrontery to inquire what happens if you do not agree to this, you will be told curtly, "You do not get the job." So you sign. Later you are discharged, supposedly for inadequate performance, but you are convinced it is because of your age, race, or sex. Can you sue? If you do, can the Company demand that you arbitrate instead?

THE PRESENT LEGAL ANSWER

In *Gilmer v. Interstate/Johnson Lane Corp.*,⁹ the U.S. Supreme Court held that an individual stockbroker employee was bound by a

⁴ See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, HANDBOOK OF LABOR STATISTICS 1978, at 507 tbl.150 (1979) (illustrating that 1954 was the year of highest union representation).

⁵ S. 931, H.R. 1020, 111th Cong. (2009).

⁶ See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, RELEASE NO. USDL 10-0069, UNION MEMBERS IN 2009, at 1 (2010).

⁷ 9 U.S.C. §§ 1-16 (2006).

⁸ See *infra* note 37 and accompanying text.

⁹ 500 U.S. 20 (1991).

contract with the New York Stock Exchange to arbitrate a claim of age discrimination against his employer.¹⁰ The stockbroker was not precluded, however, from filing a charge with the Equal Employment Opportunity Commission (EEOC); only his own court action was barred.¹¹ The Court also emphasized that the stockbroker had suffered no loss of substantive rights; it was only a change of forum.¹² Moreover, the agreement in *Gilmer* plainly authorized the arbitrator to handle statutory claims as well as contractual claims.¹³ The arbitral procedures simply had to be such that they did not impair the employee's capacity to vindicate his statutory rights.¹⁴ How did this notion of substituting private arbitration for statutorily authorized court suits ever arise?

DEVELOPMENT OF MANDATORY ARBITRATION

During the 1980s, a series of court decisions, which would eventually include all but a few states, imposed significant qualifications on the traditional American common-law doctrine of "employment at will."¹⁵ The exceptions were based on such theories

¹⁰ *Id.* at 23.

¹¹ *See id.* at 28. The Court has since held that an individual's agreement to arbitrate employment disputes does not prevent the EEOC from seeking victim-specific relief in court, including reinstatement, back pay, and damages. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 285–88 (2002). The EEOC does not have the resources, however, to litigate all meritorious cases and must leave many to the charging parties to pursue on their own. *See, e.g.*, Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219 (1995) (arguing that none of the EEOC's strategies have been effective in fighting discrimination or in processing individual charges).

¹² *Gilmer*, 500 U.S. at 26–28.

¹³ *See id.* at 23, 26.

¹⁴ *See id.* at 28, 30–32. In an earlier case, the Supreme Court held an arbitrator's adverse decision under a collective bargaining agreement did not prevent a black employee from pursuing his claim in court that his discharge was racially discriminatory in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2006). *See Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 59–60 (1974). There the Court concluded that, unlike in *Gilmer*, the arbitrator was not authorized to deal with statutory claims. *See id.* at 53–54. *Gilmer*, however, noted that *Gardner-Denver* involved a "tension" between union representation and individual statutory rights. *Gilmer*, 500 U.S. at 35. More recently, in *14 Penn Plaza v. Pyett*, 129 S. Ct. 1456 (U.S. 2009), the Supreme Court held, in a sharply divided five-to-four decision, that employers could enforce a provision in a collective bargaining agreement that clearly and unmistakably required employees to arbitrate statutory age discrimination claims. *See id.* at 1474.

¹⁵ *State Rulings Chart*, 9A Lab. Rel. Rep. (BNA) 505:51 to :52 (Feb. 10, 2009) (illustrating that Florida, Louisiana and Rhode Island were the holdouts). Under the at-will employment doctrine, employers may lawfully "dismiss their employes [sic] at will, . . . for good cause, for no cause or even for cause morally wrong." *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 519–20 (1884), *overruled on other grounds by Hutton v. Watters*, 132 Tenn. 527 (1915); *see also* H. G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT 272–74 (1877) ("Where a person is employed at a yearly salary, at the option of the employer as to the duration of service, the contract creates a mere hiring at will, which may be put an end to by the master at any time . . .").

as public policy (a tort),¹⁶ express or implied contract (oral promises or personnel manuals),¹⁷ and, much less often, the covenant of good faith and fair dealing.¹⁸ Judges and juries awarded substantial damages to employees who were found to be victims of wrongful discharge. For example, several studies showed that plaintiffs in California won about 75% of the discharge cases that went to juries, with the average award being around \$450,000.¹⁹ Nationwide, individual wrongful discharge plaintiffs received jury awards for actual and punitive damages as high as \$20 million, \$4.7 million, \$3.25 million, \$2.57 million, \$2 million, and \$1.5 million.²⁰ Even

¹⁶ See, e.g., *Tameny v. Atl. Richfield Co.*, 610 P.2d 1330, 1335–37 (Cal. 1980) (holding that an employee who was allegedly fired for refusing to join a price-fixing conspiracy could maintain a tort action for wrongful discharge against his employer); *Sheets v. Teddy's Frosted Foods*, 427 A.2d 385, 389 (Conn. 1980) (holding that a quality-control manager's allegation that he was fired for insisting that the employer comply with state law was sufficient for a cause of action in tort for wrongful discharge); *Palmateer v. Int'l Harvester Co.*, 421 N.E.2d 876, 879–80 (Ill. 1981) (holding that *Palmateer* had stated a cause of action for retaliatory discharge by alleging that he was fired for informing law enforcement that a coworker might be violating the law and for agreeing to gather further evidence implicating that coworker). *But see, e.g., Murphy v. Am. Home Prods. Corp.*, 448 N.E.2d 86, 89–90 (N.Y. 1983) (declining to recognize a cause of action in tort for wrongful discharge of an at-will employee).

¹⁷ See, e.g., *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917, 924–28 (Ct. App. 1981) (holding that a wrongful termination action could be based on the violation of the employer's implied promise not to act arbitrarily toward the employee, which was evidenced by the totality of the parties' relationship, including the fact that the employee had worked for the employer for thirty-two years); *Toussaint v. Blue Cross & Blue Shield of Mich.*, 292 N.W.2d 880, 885 (Mich. 1980) (holding that the plaintiff's allegations were sufficient for a jury to find that their employers had orally agreed to fire them only for cause, even though the term of their employment was indefinite); *Woolley v. Hoffmann-LaRoche, Inc.*, 491 A.2d 1257, 1264 (N.J. 1985) (holding that a jury could find that termination policies printed in the employer's personnel manual constituted an enforceable implied promise to fire employees only for cause), *modified*, 499 A.2d 515 (N.J. 1985); *Weiner v. McGraw-Hill, Inc.*, 443 N.E.2d 441, 442 (N.Y. 1982) (holding that employee pleaded a recognizable cause of action for breach of contract where he was allegedly discharged without just cause and the employer failed to follow the rehabilitative efforts specified in the personnel handbook).

¹⁸ See, e.g., *Buysse v. Paine, Webber, Jackson & Curtis, Inc.*, 623 F.2d 1244, 1249 (8th Cir. 1980) (applying Minnesota law and holding that, without a finding of bad faith, an at-will employee generally may be fired for any or no reason); *Foley v. Interactive Data Corp.*, 765 P.2d 373, 398–99 (Cal. 1988) (recognizing solely contractual remedies for a breach of the implied covenant of good faith and fair dealing in the context of employment termination); *Fortune v. Nat'l Cash Register Co.*, 364 N.E.2d 1251, 1256–57 (Mass. 1977) (holding that the requirement of good faith and fair dealing applies to at-will employment contracts). *But see, e.g., Am. Home Prods. Corp.*, 448 N.E.2d at 91 (holding that there is no implied requirement of good faith and fair dealing in the context of at-will employment contracts).

¹⁹ See JAMES N. DERTOUZOS ET AL., *THE LEGAL AND ECONOMIC CONSEQUENCES OF WRONGFUL TERMINATION* 24–26, 33–37 (1988) (discussing trial outcomes of California jury cases from the 1980s and post-trial adjustments to those jury verdicts); Cliff Palefsky, *Wrongful Termination Litigation: "Dagwood" and Goliath*, 62 MICH. B.J. 776, 776 (1983) (discussing a 1982 study of California discharge cases that went to juries, which showed that 90% resulted in plaintiff verdicts, with the average verdict being \$450,000); *California Wrongful Discharge Verdicts Averaged \$424,527 in 1986 Jury Trials*, Daily Lab. Rep. (BNA) A-4 (Feb. 24, 1987).

²⁰ Kenneth T. Lopatka & Julia A. Martin, *Developments in the Law of Wrongful Discharge*, in ABA DIV. FOR PROF'L EDUC., *LITIGATING WRONGFUL DISCHARGE AND*

winning was not cost-free for business. By the end of the 1980s, the fees and expenses for a successful defense of a discharge case before a jury could range between \$100,000 and \$150,000 in major midwestern cities, and amount to around \$200,000 on the coasts.²¹

Many employers reacted to the new causes of action and costly litigation by imposing so-called “mandatory arbitration,” conditioning employment on a worker’s agreement to arbitrate all job disputes with the employer rather than taking them to court. The mandatory arbitration was meant to apply even to claims arising under federal or state civil rights legislation prohibiting discrimination against employees because of race, sex, religion, ethnicity, age, disability, and so on.²² Mandatory arbitration plainly raises numerous legal and policy questions. That is especially true with regard to attempts to prevent plaintiffs from resorting to the courts for the vindication of statutory rights.

ARGUMENTS FOR AND AGAINST MANDATORY ARBITRATION

One can easily imagine the arguments against mandatory arbitration, and they are most appealing on their face. For example, Congress, or some other legislative body, has prohibited various types of employment discrimination and has prescribed certain procedures for the enforcement of those rights. In a given case, the specified procedures, sometimes including the right to a jury trial, may be almost as important as the substantive rights. No employer should be able to force an employee to waive the statutorily provided forum, procedures, and remedies as the price for getting or keeping a job. Conditioning employment on the surrender of statutory entitlements would seem a blatant affront to public policy.

An employer dealing with an individual employee, opponents contend, is the “repeat player” against the one-timer, and arbitrators may be affected by knowing who the much likelier source of future

INVASION OF PRIVACY CLAIMS, at vii, 13–18 (1986).

²¹ Figures are based on conversations between the author and management attorneys at the 1992 Midwinter Meeting of the ABA Labor and Employment Law Section’s Committee on Individual Rights and Responsibilities in the Workplace on April 8–9, 1992.

²² See, e.g., Age Discrimination in Employment Act, 29 U.S.C. §§ 621–634 (2006); Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e–2000e-17 (2006); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12117, 12201–12213 (2006). A number of state statutes and municipal ordinances extend the protected categories beyond the federal coverage. Thus, employment discrimination may be prohibited because of marital status, sexual orientation, gender identity, HIV or AIDS, and genetic testing. See *Comparison Chart of State FEP Laws*, 8A Lab. Rel. Rep. (BNA) (Fair Emp. Prac. Manual) 451:51 to :53 (July 13, 2009); *State Fair Employment Practice Laws*, 8A Lab. Rel. Rep. (BNA) (Fair Emp. Prac. Manual) 451:1 to :5 (Dec. 19, 2005).

business is.²³ Some sizable, well-publicized jury verdicts could do considerably more, it is said, to deter workplace discrimination than any number of smaller, confidential arbitration awards.²⁴ An employer's provision for arbitration is arguably a not-so-subtle antiunion device, because a grievance and arbitration system is regarded as one of the principal benefits of unionization and collective bargaining. For these and other reasons, several scholars, two federal agencies, and two prestigious private bodies have gone on the record as opposing mandatory arbitration of statutory employment claims.²⁵

²³ See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189 (1997).

²⁴ 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) (arguing that the private nature of arbitration and the incentives for the arbitrator to favor the employer strip arbitration of the deterrent value associated with remedial statutes). Arbitral awards are customarily not published unless all parties consent. But many decisions are published by the American Arbitration Association, the Bureau of National Affairs, and Commerce Clearing House.

²⁵ See, e.g., Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 2 (1996) (arguing that diversion of employment discrimination disputes to arbitration "threatens the effective implementation of antidiscrimination policy, and poses serious questions of fairness to individual claimants"); David S. Schwartz, *Enforcing Small Print to Protect Big Business: Employee and Consumer Rights Claims in an Age of Compelled Arbitration*, 1997 WIS. L. REV. 33, 37 (arguing that substituting arbitration for adjudication reduces the legal liability of corporate defendants); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1020 (1996) (arguing that the trend toward mandatory arbitration could deprive workers of their statutory rights altogether); *EEOC: Alternative Dispute Resolution Policy*, 8 Lab. Rel. Rep. (BNA) (Fair Emp. Prac. Manual) 405:7301 to :7303 (Feb. 1997) (stating that ADR programs in EEOC field offices should ensure fairness, which should be indicated by voluntariness, neutrality, confidentiality, and enforceability). In July 1997, the EEOC issued a longer and even stronger condemnation of compulsory arbitration and pre-dispute 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) (Fair Emp. Prac. Manual) 405:7511, 405:7520 (July 1997). According to the court in *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), the NLRB General Counsel has been prepared to issue unfair labor practice complaints on the issue. *Id.* at 1479 n.6; see also COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, REPORT AND RECOMMENDATIONS 33 (1994) [hereinafter DUNLOP COMMISSION] (recommending that employers be forbidden from requiring employees to agree to arbitrate public-law claims as a condition of employment); NAT'L ACAD. OF ARBITRATORS, ARBITRATION 1997: THE NEXT FIFTY YEARS: PROCEEDINGS OF THE FIFTIETH ANNUAL MEETING 312 (Joyce M. Najita ed., 1998) ("The National Academy of Arbitrators opposes mandatory employment arbitration as a condition of employment when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights."). The NAA softened its opposition somewhat on May 20, 2009, stating that "voluntary arbitration is always preferable, and that it is desirable for employees to be allowed to opt freely, post-dispute, for either the courts and administrative tribunals or arbitration." See Nat'l Acad. of Arbitrators, Policy Statement on Employment Arbitration (May 20, 2009), www.naarb.org/du_process/du_process.html.

These arguments against mandatory arbitration are impressive, but they are not dispositive. One study, for example, indicates that the greater success of the repeat player is simply the result of employer experience, not arbitrator bias.²⁶ Any repeat-player advantage that may exist will diminish with the increasing growth of a plaintiffs-claimants bar. The deterrent effect of some large jury verdicts may well be assumed, and yet it is widely thought that the certainty of sanctions is more of a deterrent than their severity.²⁷ The history recounted above indicates that employers' resort to mandatory arbitration in the 1980s was triggered far more by the size of jury verdicts and the cost of litigation than by efforts to stymie union organization.²⁸ Concerns that private arbitration will hinder the development of judicial doctrine in the civil rights area seem ill-founded in light of the very large federal caseload dealing with employment discrimination.²⁹

Post-dispute arbitration agreements are undoubtedly fairer to workers than mandatory, pre-dispute agreements. As in my hypothetical of the laid-off worker seeking a new job, pre-dispute agreements are usually executed when employees are predisposed to sign any document placed before them. The post-dispute agreement is more likely to be truly voluntary, since it is entered into when the relevant facts are mostly known, and the employee can make an informed judgment about whether to arbitrate or go to court.³⁰ If a worker has been discharged, he or she has little or nothing to lose by refusing to go along with an employer's offer of arbitration.

Yet the attractiveness of the post-dispute agreement to arbitrate may be mostly a chimera. Management representatives testified before the Dunlop Commission that employers would generally not

²⁶ See David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1571 (2005).

²⁷ See, e.g., Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After Booker*, 47 WM. & MARY L. REV. 721, 731 (2005) (stating, in the context of white-collar sentencing, that "reduced predictability might undercut general deterrence"); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 380 (1997) (observing that, for criminal punishment, "certainty of conviction plays a much bigger role in discouraging all manner of crime than does the severity of punishment").

²⁸ Except for a short-lived spurt during the Korean War, union density had been in steady decline since 1947, when the Taft-Hartley Act was passed. See sources cited *supra* notes 4 & 6.

²⁹ Filings of civil rights employment claims in federal court averaged about 15,500 cases a year from 2004 through 2008. That is about twice the average total of cases under all labor laws, excluding ERISA (the Employee Retirement Income Security Act). See ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2008 ANNUAL REPORT OF THE DIRECTOR: JUDICIAL BUSINESS OF THE UNITED STATES COURTS 147-48 tbl.C-2A (2009), available at <http://www.uscourts.gov/judbus2008/JudicialBusinesspdfversion.pdf>.

³⁰ See COMM'N ON THE FUTURE OF WORKER-MGMT. RELATIONS, U.S. DEP'TS OF COMMERCE AND LABOR, FACT FINDING REPORT 118 (1994).

be willing to enter into such arrangements.³¹ Employers will wait out most smaller claims, knowing that employees will usually not be able find a lawyer to bring suit. Conversely, employees and their lawyers are unlikely to agree to arbitrate the big case rather than take it before a judge and jury. As a result, pre-dispute agreements to arbitrate, when no one knows what the future holds, may be the most sensible course for both parties.³² In my mind that gets to the core of this long-running debate. Employers generally believe they are better off with arbitration than with costly court suits before emotionally aroused juries. What about our ordinary rank-and-file worker with a relatively small monetary claim but with a job and its related benefits at stake? What better serves him or her in actual operation: a mandatory arbitration system, with its admitted defects, or the statutorily provided access to federal or state court? Here, facts speak louder than abstract theories, and I believe we should listen.

ACCESS TO A TRIBUNAL

All the statutory (or contractual) rights in the world mean nothing if they cannot be enforced. Both personal anecdote and more systematic studies indicate that access to the courts will not be easy for the usual lower-paid worker with an employment claim. One of Detroit's leading employment lawyers told me his secretary kept court. He agreed to represent one out of eighty-seven persons who sought his services.³³ The overall figures are not quite that dismal. At a meeting of plaintiffs' attorneys, the estimate was that about 5% of the individuals with an employment claim are able to obtain private counsel.³⁴ In what is perhaps the most comprehensive recent survey of empirical studies of employment arbitration, Professor Alexander Colvin declared that "one of the key potential advantages of employment arbitration over litigation is that the relatively high costs of litigation inhibit access to the courts by lower to mid-income ranges [of] employees."³⁵ Another study concluded that while most

³¹ See *id.* (noting that post-dispute arbitration is rarely agreed to because "the employer and the employee each prefer to take quite different kinds of cases to court").

³² For an elaboration of this position, see Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559, 567-68 (2001).

³³ For a discussion of similar statistics by practitioners, see Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 58 (1998).

³⁴ See William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40, 45; Maltby, *supra* note 33, at 58.

³⁵ Alexander J.S. Colvin, *Empirical Research on Employment Arbitration: Clarity Amidst the Sound and Fury?*, 11 EMP. RTS. & EMP. POL'Y J. 405, 419 (2007) (citing Estreicher, *supra* note 32, at 559, 564-64, 567-68); see also Theodore Eisenberg & Elizabeth Hill, *Arbitration*

employees below the \$60,000 income level cannot get into court, arbitration remains a realistic alternative.³⁶ The last available U.S. Census Bureau figures show the median income of all full-time, year-round workers was \$41,224.³⁷

Lewis Maltby, President of the National Work Rights Institute, has long opposed mandatory arbitration.³⁸ Yet at a spring 2007 conference sponsored by the National Academy of Arbitrators in Chicago, he related an unhappy experience he had while director of the ACLU's Task Force on Civil Liberties in the Workplace. Many persons approached him with stories of wrongful treatment in their jobs. Although Maltby concluded that most of the cases were unwinnable, he believed a couple dozen or so were deserving and should be taken to court. He placed many calls asking lawyers for assistance. Despite Maltby's expert prescreening of the claims, he could find representation for only a single employee.³⁹

Naturally, many, and maybe even most, of those who cannot obtain legal representation 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 working on a contingent fee. 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.

Individual employees with discrimination claims or contractual claims will secure little help from the EEOC or small claims court. The EEOC is so underfunded and understaffed that one knowledgeable scholar has recommended, quite sensibly, that the Commission get out of the business of handling individual charges, and husband its limited resources for routing out systemic unlawful

and Litigation of Employment Claims: An Empirical Comparison, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44, 47 (discussing how middle and lower-income employees have less access to the courts than higher-paid employees).

³⁶ See Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May–July 2003, at 8, 10–11.

³⁷ U.S. Census Bureau, *Current Population Survey: 2008 Annual Social and Economic Supplement*, http://pubdb3.census.gov/macro/032008/perinc/new01_028.htm (last visited Feb. 23, 2010).

³⁸ See Maltby, *supra* note 33, at 37 (“Allowing employers to make arbitration a condition of employment is not only wrong in principle, it undermines due process as well.”).

³⁹ Lewis Maltby, Nat'l Work Rights Inst., *Discussion at the National Academy of Arbitrators 2007 Spring Educational Conference: Beyond the Due Process Protocol: The Future of Due Process in Workplace Dispute Resolution* (Apr. 13–14, 2007). The author attended this conference.

practices.⁴⁰ At best, the Commission tends to concentrate on the big case or the test case. Small claims courts will ordinarily not be an answer either. They generally are authorized only to issue damage awards in a limited amount, typically on the order of \$5,000. Even more important, they customarily do not exercise the equitable jurisdiction to provide what may be most desired—an order restoring the employee's job.

COMPARATIVE RESULTS IN ARBITRATION AND IN COURT

The proof of the pudding is in the eating. We now have the results of several reputable empirical studies comparing employment cases in arbitration and in the courts (when employees can get into court). It is true that some early inquiries did not distinguish between higher-paid employees, who had individually negotiated arbitration agreements, and lower-paid workers subject to employer-imposed arbitration systems. That exaggerated the employee success rate. Nonetheless, the figures are enlightening and impressive. In one study, the American Arbitration Association found a winning rate of 63% for arbitral claimants.⁴¹ Another study, conducted by the U.S. General Accounting Office, found that in a much-criticized system operated by the securities industry, employees still prevailed 55% of the time.⁴² By contrast, plaintiffs' success rates in separate surveys of federal court and EEOC trials were only 14.9% and 16.8%, respectively.⁴³ As might be expected, *successful* plaintiffs obtained larger awards from judges or juries. But claimants as a group recovered more in arbitration.⁴⁴

It is true that when more refined analyses took account of differences between individually negotiated and employer-mandated arbitration, the success rates varied significantly. In two separate studies, Professor Lisa B. Bingham found that employees won 68.8% and 61.3% of the claims based on individual contracts, but only 21.3% and 27.6% of the claims based on personnel manuals.⁴⁵ A later

⁴⁰ See Munroe, *supra* note 11, at 278–79.

⁴¹ Maltby, *supra* note 33, at 46.

⁴² *Id.* at 50; see also HOYT N. WHEELER, BRIAN S. KLAAS & DOUGLAS M. MAHONY, *WORKPLACE JUSTICE WITHOUT UNIONS* 48 (2004) (discussing the winning percentages for employees in arbitration cases in the securities industry).

⁴³ Maltby, *supra* note 33, at 46. Professor Wheeler and his colleagues found a 12% employee win rate in federal district court, as contrasted with 33% in arbitration. WHEELER ET AL., *supra* note 42, at 54 tbl.3.2.

⁴⁴ See Maltby, *supra* note 33, at 54.

⁴⁵ Lisa B. Bingham, *An Overview of Employment Arbitration in the United States: Law, Public Policy and Data*, N.Z. J. INDUS. REL., June 1998, at 5, 16; Lisa B. Bingham & Shimon Sarraf, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment: Preliminary Evidence that*

report on 200 American Arbitration Association arbitral awards from 1999 and 2000 showed an employee win rate of 34% in cases based on employer-mandated plans as against an overall win rate of 43% for all claims.⁴⁶ But arbitration's superiority to, or at least its equivalence with, court actions remained.

Professor Theodore Eisenberg and Elizabeth Hill analyzed 215 American Arbitration Association cases resolved in the 1999 to 2000 period, 1430 federal court trials of that period, and 160 state court trials from 1996.⁴⁷ In non-civil rights employment disputes, higher-paid employees (most likely operating under individual contracts) won 64.9% of the arbitrations and lower-paid employees (most likely operating under employer-promulgated plans) won 39.6%, while state court trials resulted in a 56.6% win rate for plaintiffs, who were probably mostly higher-paid employees.⁴⁸ In civil-rights employment cases, the winning percentages in arbitrations were 40.0% for higher-paid employees and 24.3% for lower-paid employees, 43.8% for plaintiffs in state court trials, and 36.4% in federal court trials.⁴⁹ Especially if one assumes that most plaintiffs in court actions were higher-paid employees, the differences in result were negligible. Also significant, of the 215 arbitral resolutions, only 42, or 19.5%, dealt with employment discrimination claims.⁵⁰ The great majority dealt with claims based on individual contracts, personnel manuals, and the like. This sharply reduces the argument that arbitration, mandatory or otherwise, is having a deleterious effect on the enforcement of civil rights legislation.

A final point is that pre-trial settlements may somewhat skew the comparative figures between court judgments and arbitration awards. Since employers win the vast majority of summary judgments in federal court employment cases, and since employers naturally try to buy out the stronger employee cases during preliminary proceedings in litigation, decent arguments can be made either way about whether trial results exaggerate or depress employee win rates, at least in federal court.⁵¹

Self-Regulation Makes a Difference, in ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR 303, 323 (Samuel Estreicher & David Sherwyn eds., 2004).

⁴⁶ Hill, *supra* note 36, at 11, 13.

⁴⁷ See Eisenberg & Hill, *supra* note 35, at 48 tbl.1.

⁴⁸ *Id.* Employees earning less than \$60,000 a year were classified as "lower-paid." *Id.* at 46.

⁴⁹ *Id.* at 48 tbl.1.

⁵⁰ *Id.* at 49.

⁵¹ See Colvin, *supra* note 35, at 417-18. For a serious critique of the methodology in the

Comparisons of employee win rates in *employment* arbitration (generally nonunion) and traditional *labor* arbitration (between unions and employers) are rare.⁵² Most disinterested observers would probably regard the latter as the gold standard of arbitration. Yet many persons (including me) would be surprised by the results of an examination I made of the outcomes of 200 discharge arbitrations filed from 1999 to 2007 in one of the country's oldest and most respected union-management arbitration systems. The issue was whether there was "just cause" or "proper cause" for the discharges under the parties' collective bargaining agreement. Employees were either reinstated or received other substantial relief in only 46 instances, or 23% of the 200 arbitrations.⁵³ That is a lower winning percentage than in all but one of the employment arbitration studies previously discussed.

Insofar as a comparison between employee win rates in employment arbitration and those in either court litigation or traditional labor arbitration is any guide, it cannot be said that mandatory arbitration in actual practice is detrimental to the individual employee. For most lower-paid workers, it may in fact be their only feasible option. Most important, then, is the accessibility to the forum that any kind of arbitration, including mandatory pre-dispute arbitration, offers such employees. After the initial contrary outcry from scholarly critics, an increasing number of them now seem more favorably disposed.⁵⁴ Ironically, however, the former

foregoing empirical studies, see David S. Schwartz, *Mandatory Arbitration and Fairness*, 84 NOTRE DAME L. REV. 1247 (2009). Professor Schwartz is seemingly opposed to empirical studies in this area, apparently considering mandatory arbitration inherently "unfair," *see id.* at 1247, and thus offers no systematic figures of his own based on how it actually operates.

⁵² Comparisons of the way employment arbitrators and labor arbitrators treat *hypothetical* scenarios, however, have been conducted. *See* Lisa B. Bingham & Debra J. Mesch, *Decision Making in Employment and Labor Arbitration*, 39 INDUS. REL. 671 (2000); Brian S. Klaas, Douglas Mahony & Hoyt N. Wheeler, *Decision-Making About Workplace Disputes: A Policy-Capturing Study of Employment Arbitrators, Labor Arbitrators, and Jurors*, 45 INDUS. REL. 68 (2006). Both studies found employment arbitrators significantly less likely to rule for employees than labor arbitrators. But Bingham and Mesch found that the employment-labor distinction was not statistically significant if the occupation of the arbitrator was taken into account. Bingham & Mesch, *supra*, at 686. Attorney arbitrators were less favorable toward employees than full-time arbitrators or professor-arbitrators. *Id.*

⁵³ The relatively low employee/union success rate is probably attributable to the company's extensive experience with the type of discharges that will be upheld and the union's willingness to let grievants have their "day in court." Earlier studies indicated that union grievants generally won in whole or in part at least half the time in labor arbitrations. *See, e.g.,* Bingham, *supra* note 45, at 10–11.

⁵⁴ *See, e.g.,* Richard A. Bales, *Creating and Challenging Compulsory Arbitration Agreements*, 13 LAB. LAW. 511 (1998) (examining the minimum requirements for enforceable compulsory arbitration agreements and providing recommendations to the courts about what such requirements should be); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory*

employer enthusiasm for mandatory arbitration may be waning, as management recognizes the success employees have had under this system.⁵⁵ At a recent meeting of labor and employment lawyers in Michigan, I could not find a single top management attorney who was currently advising clients to start or retain a mandatory arbitration program. There were three reasons: (1) employees win too often; (2) summary judgment is seldom available in arbitration; and (3) the full right of appeal is also not available. Nonetheless, I still like to think that arbitration, mandatory or otherwise, will turn out to be a win-win situation. Employees, particularly those at the lower end of the pay scale, will find readier access to effective relief, and employers will find fewer devastating jury verdicts and lower litigation costs.

DUE PROCESS IN MANDATORY ARBITRATION

For me, the critical problem in mandatory employment arbitration is ensuring due process for the employees affected. In the mid-1990s, both the Dunlop Commission on the Future of Worker-Management Relations and a broadly sponsored Task Force on Alternative Dispute Resolution in Employment, which drafted a Due Process Protocol, produced very similar lists of necessary procedural guarantees in employment arbitration.⁵⁶ These included:

1. A jointly selected neutral arbitrator who knows the law;
2. Simple, adequate discovery;

Employment Claims, 72 N.Y.U. L. REV. 1344 (1997) (concluding that arbitration is a proper forum for the resolution of statutory employment claims); Susan A. FitzGibbon, *Reflections on Gilmer and Cole*, 1 EMP. RTS. & EMP. POL'Y J. 221 (1997) (arguing that mandatory arbitration of statutory claims of unrepresented employees will not necessarily have a detrimental impact on employee rights).

⁵⁵ Cf. Michael Z. Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399, 418-67 (2000) (examining why mandatory arbitration creates disadvantages for both large and small employers); Daniel B. Tukel, *To Arbitrate or Not to Arbitrate Discrimination Claims: That Is Now the Question for Michigan Employers*, 79 MICH. B.J. 1206, 1207-08 (2000) (describing the pros and cons of arbitration for employers).

⁵⁶ See DUNLOP COMMISSION, *supra* note 25, at 30-32; TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES (1995), *reprinted in* 9A Lab. Rel. Rep. (BNA) IERM 534:401 to :402 (Mar. 1996) [hereinafter DUE PROCESS PROTOCOL]. The Task Force consisted of management, union, and plaintiffs' attorneys from the American Bar Association and the National Employment Lawyers Association, as well as 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. DUE PROCESS PROTOCOL, *supra*, at IERM 534:404.

3. Cost-sharing to ensure arbitrator neutrality;⁵⁷
4. Right to 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.

With a highly diverse membership, it is not surprising that the Task Force that produced the Due Process Protocol was not able to take a position on the acceptability of pre-dispute, as distinguished from post-dispute, agreements to arbitrate—and thus effectively on their “voluntariness”⁵⁸—but it did agree they should be “knowingly made.”⁵⁹ In contrast, the more homogeneous Dunlop Commission (consisting mostly of academics and neutral persons) could declare: “[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.”⁶⁰ Significantly, however, Professor Paul Weiler, who served as counsel to the Commission, told me he had reservations about this position on the grounds that even mandatory arbitration provides employees with access to relief they might not otherwise have when there is employment wrongdoing.⁶¹ The Commission itself suggested that this issue should be revisited after there was more experience with arbitration of employment claims.⁶² My view is that experience has shown that so-called “mandatory arbitration,” if properly conducted, can provide employees, especially lower-income workers, with a fair

⁵⁷ In *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997), the court required the employer to pay all the arbitrator's fees as a condition for enforcing an individual employee's waiver of a judicial forum. *Id.* at 1468. Judge Harry Edwards, who spoke for the 2–1 majority, was surely correct that the *source* of payment is not the key to arbitrator neutrality. *See id.* at 1485. Arbitrators are naturally concerned about getting their fee but ordinarily not about where it comes from. *Id.* Individual employees, of course, may feel more comfortable paying part of the arbitrator's fees, fearing that whoever pays the piper may also call the tune. *Cole* may have gone too far, however, in insisting that the employer pay *all* of the arbitrator's fee. *See id.* at 1484. Access to a court, at least initially, would normally not be cost-free.

⁵⁸ *See supra* text accompanying notes 30–31.

⁵⁹ *See* DUE PROCESS PROTOCOL, *supra* note 56, at IERM 534:402.

⁶⁰ DUNLOP COMMISSION, *supra* note 25, at 33.

⁶¹ Conversation with Paul Weiler, Henry J. Friendly Professor of Law, Emeritus, Harvard University (1995).

⁶² *See id.*

hearing of their claims that they otherwise would not be able to obtain.

Building on the work of the Dunlop Commission and the Due Process Task Force, various groups and individuals have arrived at something close to a consensus on the standards of fairness required for legitimacy in mandatory arbitration. Major advances were made by such scholars as Professors Richard A. Bales and Martin H. Malin in papers presented at the 2007 conference sponsored by the National Academy of Arbitrators on “Beyond the Protocol: The Future of Due Process in Workplace Dispute Resolution.”⁶³ Proposals for going beyond the Protocol include prohibitions on: (1) bans on class actions that would hinder employees in vindicating certain legitimate interests (such as small monetary claims that would not be worth individual pursuit); (2) shortening the applicable statutory limitations period; (3) scheduling arbitration hearings at times or places that would be inconvenient for employees or their representatives or witnesses; and (4) charging arbitrator fees and expenses to employees that would be greater than the filing fee required by the court where an action would be brought on such a claim. Some courts have made salutary advances in these directions, but there is still a long way to go.⁶⁴

The National Academy of Arbitrators consists of about 630 leading labor arbitrators from the United States and Canada. In the interests of preserving its neutrality, the Academy has had a long-standing policy not to take “any official position on the question of whether there should or should not be statutory regulation of voluntary labor dispute arbitration, but that the Academy could, consistently with this policy, indicate its judgment as to the desirable content of regulatory statutes.”⁶⁵ At its most recent national meeting in October 2009, the Academy’s Board of Governors accordingly declined to express any opinion on whether the Arbitration Fairness Act should or should not prohibit pre-dispute agreements to arbitrate

⁶³ See generally Richard A. Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 EMP. RTS. & EMP. POL’Y J. 301 (2007) (describing how the Due Process Protocol could be updated to provide guidance to employers, courts, and arbitrators on a set of rules designed to ensure arbitral fairness); Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL’Y J. 363 (2007) (analyzing the evolution of judicial policing of due process in employment arbitration). See also Nat’l Acad. of Arbitrators, Policy Statement on Employment Arbitration, Guidelines for Employment Arbitration (May 20, 2009), http://www.naarb.org/due_process/due_process.html (promulgating guidelines aimed at ensuring procedural fairness in workplace arbitrations).

⁶⁴ See, e.g., Bales, *supra* note 63, at 320–30, 335–37; Malin, *supra* note 63, at 386–96.

⁶⁵ NAT’L ACAD. OF ARBITRATORS, CRITICAL ISSUES IN LABOR ARBITRATION: PROCEEDINGS OF THE TENTH ANNUAL MEETING 201 (1957).

or other mandatory arbitration agreements.⁶⁶ But the Board did recommend that any legally permissible form of mandatory arbitration should be required to include a comprehensive list of due process protections for employees who are covered by it. The Academy would expressly exclude from this regulation arbitration provisions contained in collective bargaining agreements and arbitration agreements that are individually and freely negotiated, such as those with a national TV anchor or top business executive.⁶⁷

My personal view is that the proposed Arbitration Fairness Act brings a hammer to bear on mandatory arbitration when the need is for a scalpel. Total prohibition of pre-dispute agreements to arbitrate, or any other ban on agreements conditioning a job on an employee's acceptance of arbitration instead of court actions to resolve employment disputes, would satisfy some persons' sense of rightness and would confirm their a priori approach to the problem. But it would pose a major obstacle to the real-life fulfillment of the purposes of antidiscrimination legislation for many, if not most, of the intended beneficiaries. What is called for is not prohibition but a set of statutory guarantees that these arbitration proceedings, however initiated, will be conducted fairly and impartially.

CONCLUSION

For me, all of this ultimately comes down to a choice between a noble but abstract principle (no one should be forced to forgo sensitive statutory rights and procedures as the price for getting a job) and certain harsh realities, namely, that most lower-paid workers cannot gain access to those statutory procedures. Even the fortunate few who do get into court generally do not fare significantly better than the employees "compelled" to arbitrate. In such circumstances, I go with the facts and let the theoretical principles be adjusted accordingly. For all its apparent conceptual failings, mandatory arbitration, subject to appropriate due process requirements, now appears to be the most practical recourse for the ordinary rank-and-file employee seeking to vindicate either a statutory or contractual claim. I fervently hope that the Congress, and the concerned public, will respond with that finding foremost in mind.

⁶⁶ On October 13, 2009, Academy President William H. Holley, Jr., wrote Senator Russ Feingold, who had introduced the Arbitration Fairness Act, setting forth the Academy's position. A general press release followed on December 8, 2009. A copy of the press release, including the Feingold letter and its attachments, is on file with the Case Western Reserve Law Review.

⁶⁷ The author chaired the committee reporting on this issue to the Academy's Board of Governors.