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"Where there is no rule of law but only the command of persons, where secrecy and arbitrariness reign, where one never knows when or why the axe will fall, there justice weeps" (Wolterstorff 2001).

Human dignity at the workplace requires the right to just treatment by those holding authority. At the crux of this is protection from arbitrary action—action that is based upon personality rather than merit, and is not predictable on any reasoned basis. When a human being is treated as merely a means to an end, a thing to be employed by others, rather than as a person deserving justice, justice does indeed weep. This is especially true where a person's job is at stake. In our society, an individual's job is not only the source of economic goods, but also an important part of how we define ourselves—and others define us—and our role in society. Where workers can be terminated from their employment for any reason, or none at all, arbitrariness reigns. Yet, this is historically the basic principle of the law of employment termination in the United States.

Corporations are social organizations arranged in a hierarchy in which those at the top exercise authority over those at the bottom. This inevitably means that control must be exerted over those who are employed by others. In such circumstances, both human nature and differing interests between the employed and the employer give rise to a situation in which an abuse of power is not only possible, but highly likely. In the workplace there are order givers and order takers. One instrument of control by order givers is the threat of termination of the relationship. Ultimately, employees who do not behave as they are ordered will be separated from the organization—fired.

Fortunately, since the days when the employment-at-will principle was adopted by American courts in the late nineteenth century, there has been a considerable erosion of it. What has occurred over a period of about 90 years is the construction of a patchwork of limitations on employment-at-will. Yet, the employer's power is still quite substantial. Arguably, it has grown significantly by virtue of some recent U.S. Supreme Court decisions approving employer-mandated arbitration (employment arbitration).

The Practice of Workplace Justice

A major development in the area of workplace justice has been the adoption of organizational justice procedures by nonunion employers. The more advanced forms of these procedures have come along relatively recently. Based on data gathered in the late 1970s, Fred Foulkes (1980) found that by far the most common employer device for handling employee grievances at that time was the open-door policy, which is a very rudimentary workplace justice procedure. More advanced forms of nonbinding policies have included 1) installing an ombudsman, a corporate employee who independently deals with worker problems; and 2) mediation, where a neutral third party works to facilitate a resolution of the dispute.

An especially interesting organizational justice procedure originated in the 1980s—peer review panels. Here, a panel of employees (and sometimes managers) makes a final decision or recommendation regarding an employee's grievance.

The management-initiated organizational justice system to most recently rise to prominence is employment arbitration. In employment arbitration, a nonunion employer requires employees to agree to submit any complaints (or sometimes any allegations of violation of law on the part of the employer) to a neutral arbitrator who will render a final and binding decision on the matter. This is by far the most controversial of these systems. The fairness of employment arbitration has been vigorously attacked on the grounds that it deprives employees of their legal right to go to court, and to a jury trial, and substitutes an employer-mandated system that is set up and controlled by the employer.

Design of the Study

There is a substantial literature on workplace justice; much of it relates to employment arbitration. However, a systematic analysis of this literature, while useful, fails to produce any solid conclusions with respect to the main questions of interest. To remedy this, we have gathered an extensive body of new data in an attempt to move toward clearer answers to the issues inherent in these systems. The empirical portion of our study has several aspects. First, in order to judge the substantive results obtained under these various procedures, we analyze overall win/loss rates by employees in a sample of termination cases in labor arbitration and employment arbitration and in a sample of cases from federal courts.

Our second and most intensive research strategy is our attempt to determine the degree to which the same result would be reached in the same cases across different types of decision makers. This is tested by posing hypothetical scenarios to labor arbitrators, employment arbitrators, managers, members of peer review panels, jurors in employment discrimination cases, and labor court judges from other countries. By analyzing the responses to these scenarios, we can compare the harshness or leniency of the systems toward

employees for different disciplinary offenses, and the criteria used to reach decisions.

Results

Existing studies that evaluate workplace justice systems by looking at the win/loss rates by employees and employers show that the results are mixed. Probably the most striking result is the low percentage of employee wins in discrimination cases in federal courts. When we analyzed data on win/loss rates from our own sample of arbitration awards and recent reports of federal court decisions, we obtained the results set out in Table 1.

Although comparing the overall win rate of employees in employment arbitration with those in the other two procedural alternatives is of some interest, the most meaningful comparisons are between results in particular categories of employment arbitration cases and other systems. Our most pertinent comparison is of court cases involving claims of discrimination in violation of a federal statute and employment arbitration cases involving that same claim.

In employment arbitration cases where a federal discrimination statute was involved, employees won 22 percent of the cases. This compares to only 12 percent in federal district courts in the most recent five-year period. Thus, the chances of an employee winning would appear to be much greater in employment arbitration than in court when the case goes to a final adjudication. However, this does not take settlements into account.

In labor arbitration cases under a collective bargaining contract, unlike court cases enforcing a federal statute, the employer has the burden of proving misconduct and the propriety of the penalty. Usually the standard is proof by a preponderance of the evidence. However, more serious cases may require proof by clear and convincing evidence, or even proof beyond a reasonable doubt.

The principal limitation on the kind of analysis described so far is that it does not hold constant the nature of the cases decided upon in the various justice systems. It is to this limitation that the most intensive portion of our research addresses itself. This stage of our study consists of developing hypothetical cases on termination of employment and asking different types of decision makers to indicate whether they would find in favor of the employer or the employee if they were deciding the case. We attempted not only to discover tendencies to decide in favor of either employees or employers, but also to determine what were the important factors that influence different decision makers. The decision makers to whom these hypothetical cases were posed included employment arbitrators, labor arbitrators, peer review panelists, human resources officers, persons who had served as jurors in discrimination cases, and labor court judges from several countries.

The results of our work on hypothetical cases are complex. One relatively simple set of findings that provides something of an overall view of the results indicates that, in response to our hypothetical cases, the percentage of cases decided in favor of employees was greatest by labor arbitrators (55 percent) and labor court judges (51 percent); lowest for employment arbitrators, both when they were deciding statutory claims (25 percent) and when they were applying a "for cause" requirement in a contract of employment (33 percent); and in between these extremes for HR managers (46 percent), peer review panelists (45 percent), and jurors (38 percent). So, holding constant the particular cases decided produces results that are quite different from the results of looking at overall win/loss rates as we do in Table 1. These bare results, although useful, should be viewed with some caution, and should be understood in the context of the complete body of results and analysis.

Table 1 Employee/Employer Win Rates

Procedure	Percent employee wins	Percent employer wins
Employment arbitration[a]		
Overall *n* = 216	33	67
Federal discrimination statute involved *n* = 59	22	78
Employment contract *n* = 52	56	44
Burden of proof on employer *n* = 57	60	40
Labor arbitration[b] *n* = 580	52	48
Federal district court[c]		
1996–2000 *n* = 26,841	12	88
1987–2000 *n* = 53,248	16	84

[a] SOURCE: Bureau of National Affairs, Labor Arbitration Reports, 1994–2002; American Arbitration Association, Employment Dispute Arbitration Reports, 1999–2000.
[b] SOURCE: Bureau of National Affairs, *Labor Arbitration Reports*, 1994–2002.
[c] SOURCE: Federal District-Court Civil Cases, 2001. See http://teddy.law.cornell.edu:8090.

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