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# WRONGFUL DISCHARGE: LITIGATION OR ARBITRATION?

Terry A. Bethel\*

## I. INTRODUCTION

Throughout the country, courts are scrambling to fill the void left by the rapid disappearance of the employment-at-will doctrine. As recently as twenty years ago, most courts accepted without question the adage that employers were free to terminate employees for a good reason, a bad reason, or no reason at all.<sup>1</sup> If motivated to explain this rule, the most frequent defense was that employees enjoyed comparable freedom. They, too, could abandon the relationship for whatever reason they desired.

Although the pace of reform varies from state to state, there is no doubt that the employment-at-will doctrine, in its classic form, is ailing. Discharged employees now successfully sue their former employers using theories developed under both tort and contract. The cases typically move through state courts and, quite often we are told, result in large verdicts from sympathetic juries that are ill-equipped to intrude into the employer-employee relationship.<sup>2</sup>

The developing law has brought calls for regulation from at least two quarters. First, those sympathetic to employee concerns have called for legislation that broadens the scope of protection.<sup>3</sup> Cases based on implied contract and public policy exceptions are not always easy to prove, despite the success of some plaintiffs. Perhaps more important is that such theories are more easily exploited by managers and upper income employees, to date the principal source of wrongful discharge plaintiffs, than they are by blue collar and unskilled workers.

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1. A complete review of the employment-at-will doctrine is beyond the scope of this article. Interesting and thorough discussions of the doctrine are available from many sources. See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1416 (1967); Timothy J. Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855, 858 (1983); Cornelius J. Peck, *Unjust Discharges from Employment: A Necessary Change in the Law*, 40 OHIO ST. L.J. 1, 10 (1979).

2. See, e.g., Model Employment Termination Act, *infra* note 6, Prefatory Note, Background and Summary, at 3-4.

3. See, e.g., Theodore J. St. Antoine, *Protection Against Unjust Discharge: An Idea Whose Time Has Long Since Come*, in PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 43 (James L. Stern et al. eds., 1982).

After some years of silence, organized labor has joined the call to extend protection to ordinary working people.<sup>4</sup>

The other voice for regulation comes from those who worry that the piecemeal advances of the courts will create bad law. Included, no doubt, are employer advocates who would bluish employment law actions entirely. Of equal concern is the ability of state courts to administer locally matters that have national implications. For example, large employers with employees in more than one state might face conflicting requirements, making it nearly impossible to standardize employment policies firm-wide. Such concerns have prompted suggestions for a national statute or for uniform state legislation.<sup>5</sup>

One such effort is the Model Employment Termination Act [hereinafter META], a product of the National Conference of Commissioners on Uniform State Laws.<sup>6</sup> META proposes a good cause termination standard for most employees<sup>7</sup> and allows reinstatement and the recovery of lost wages as possible remedies. It would allow neither compensatory nor punitive damages.<sup>8</sup> Especially significant is META's proposal to remove civil courts from the enforcement arena altogether.<sup>9</sup> Convinced apparently by those who argue that juries have no place in such disputes, META's drafters looked to arbitration for enforcement of its provisions.<sup>10</sup>

META is not the only proposal to substitute arbitrators for juries in the resolution of employment disputes. Arbitration under collective bargaining agreements is, after all, probably the best example of a successful alternative dispute resolution system. It is not surprising, then, that scholars and practitioners alike have suggested that the success of labor arbitration can be duplicated in other employment controversies as well.<sup>11</sup>

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4. AFL-CIO EXECUTIVE COUNCIL, THE EMPLOYMENT-AT-WILL COUNCIL 44, 48 (1987).

5. See, e.g., Clyde W. Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481, 519 (1976).

6. Copies of META can be obtained from the National Conference of Commissioners on Uniform State Laws, 676 North St. Clair Street, Suite 1700, Chicago, Illinois, 60611. A full review of META is beyond the scope of this article.

7. META, § 3(a).

8. META, § 7(b) lists the possible remedies.

9. The final draft contains an appendix that offers two alternatives, one that puts decision making authority in the hands of state hearing officers and another which leaves enforcement to the courts. Neither of these alternatives, however, is recommended by the drafters, who comment that "the preferred method for enforcing the statutory protection against termination without good cause is through the use of professional arbitrators . . ." META, Comment to the Appendix.

10. See META, §§ 5, 6.

11. See, e.g., Mary A. Bedikian, *Transforming At-Will Employment Disputes into Wrongful Discharge Claims: Fertile Ground for ADR*, 1993 J. DISP. RES. 113, 141; Mary A. Bedikian, *Safeguarding the Interests of At-Will Employees: A Model Case for Arbitration*, 1986 DET. C.L. REV. 1, 29; Alfred W. Blumrosen, *Exploring Voluntary Arbitration of Individual Employment Disputes*, 16 U. MICH. J.L. REF. 249; John C. O'Meara and Noel D. Massie, *Alternative Dispute Resolution: Some Employment Law Applications*, 64 MICH. B.J. 1040, 1041 (1985); St. Antoine, *supra* note 3, at 57; Summers, *supra* note 5, at 521.

My purpose is not to attack those who would increase the employment security of working men and women. Although I might disagree with particular provisions, proposals like META are a welcome relief from the harshness of employment-at-will, a doctrine that almost always favors the interests of employers over those of employees. My concern, then, is not with the creation of substantive rights, whether by statute, as META would have it, or by common law. Rather, my interest is an examination of the unquestioned assumption that arbitrators are better suited than judges or juries<sup>12</sup> to resolve such matters.

Even here my argument is not that arbitrators should be excluded from the fray altogether. I agree with some of the claims made about the utility of arbitration in the administration of a collective bargaining relationship. My question is whether the expertise of arbitrators in that setting — if expertise there is — can easily be transferred to other forms of employment litigation. The working assumption is that the virtues of labor arbitration will appear with equal rectitude in wrongful discharge cases. Those assumptions, however, should not be accepted without close examination.

## II. THE ADVANTAGES OF ARBITRATION

Advocates for arbitration usually claim three principal advantages. Arbitration, they say, is faster than ordinary litigation, it is less expensive, and, unlike judges and juries, arbitrators have more experience in workplace disputes, and therefore, bring considerable expertise to the task. All three factors are cited in the introduction to META: "[Arbitration] should provide much speedier, more informal, more expert, and less expensive proceedings."<sup>13</sup> My primary concern is the allegation of arbitrator expertise. Nonetheless, the claims made for speed and expense also bear examination. Because most of the strengths claimed for arbitration are based on our experience with labor arbitration, it is worthwhile to review briefly some of its legal framework.

### A. Labor Arbitration

Although arbitration is not confined to the adjudication of disputes arising under collective bargaining agreements, it is most frequently, and probably most successfully, used in that arena. Not surprisingly, participants sometimes grumble about arbitration decisions, just as litigants do in other forums. Nevertheless, labor arbitration has become a successful, some would say indispensable, part of our

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12. I do not mean this article to be a defense of the jury system. But it is not necessarily true that juries must be included in wrongful discharge litigation under every theory. In particular, since such remedies as reinstatement and back pay are ordinarily viewed as equitable in nature, cases seeking such relief under a statutory scheme might be tried to the court alone. In addition, a limitation on punitive damages could remove some of the incentive to demand trial by jury.

13. See META, Prefatory Note, at 5.

system of collective bargaining. Despite occasional notes of discord, labor arbitration enjoys wide acceptance by both labor and management and, at least as a formal matter, by the courts.<sup>14</sup>

By "labor arbitration," I mean the system of resolving disputes that arise concerning the implementation or application of collective bargaining agreements. By contrast, I refer to arbitration of employment termination claims outside collective bargaining relationships as "wrongful discharge arbitration." Not infrequently, labor arbitration cases concern whether an employee's discharge was for proper cause.

The favored status of labor arbitration under law can be traced to a series of Supreme Court decisions that began in 1957. In *Textile Workers Union vs. Lincoln Mills of Alabama*,<sup>15</sup> the Court interpreted Section 301 of the Labor Management Relations Act, which states:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.<sup>16</sup>

Justice Douglas, who figured prominently in arbitration's ascension to preeminence, interpreted Section 301 not merely as jurisdictional, but as a grant of substantive law:

Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.<sup>17</sup>

In effect, the Court read the Act to authorize judicial creation of a federal common law of labor contract enforcement, a common law that was to be fashioned from "the policy of our national labor laws."<sup>18</sup>

The first bit of that common law was fashioned by the Court in *Lincoln Mills* itself: agreements to arbitrate contained in labor contracts were specifically

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14. See, e.g., PAUL R. HAYS, LABOR ARBITRATION: A DISSENTING VIEW 117-18 (1966); Katherine Van Wezel Stone, *The Post War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

15. 353 U.S. 448 (1957).

16. 29 U.S.C. § 185 (1988).

17. 353 U.S. at 455.

18. *Id.* at 456.

enforceable. Although readily accepted today, that declaration was controversial in 1957. Not only were agreements to arbitrate not enforceable at common law, but there was a continuing dispute over whether the law had *any* role to play in the enforcement of collective bargaining agreements.<sup>19</sup>

Subsequently, the now famous Steelworkers Trilogy,<sup>20</sup> a series of cases decided on the same day in 1960, allocated responsibilities between the arbitrator and the courts, with arbitration clearly carrying the day. Except for the question of who decides what is subject to arbitration, the courts are to play a limited role. Even in those substantive arbitrability decisions, courts have little discretion. Doubts are to be resolved in favor of arbitration.

In the course of the Trilogy, Justice Douglas authored prose about arbitrators that has become accepted lore. Douglas declared that an arbitrator "performs functions which are not normal to courts" and functions which "may indeed be foreign to the competence of courts."<sup>21</sup> Then, without citation to *any* authority, Douglas asserted the peculiar competence of arbitrators in the resolution of industrial disputes:

The labor arbitrator is usually chosen because of the parties' confidence in his knowledge of the common law of the shop and their trust in his personal judgment to bring to bear considerations which are not expressed in the contract as criteria for judgment. The parties expect that his judgment of a particular grievance will reflect not only what the contract says but, insofar as the collective bargaining agreement permits, such factors as the effect upon productivity of a particular result, its consequence to the morale of the shop, his judgment whether tensions will be heightened or diminished . . . . The ablest judge cannot be expected to bring the same experience and competence to bear upon the determination of a grievance, because he cannot be similarly informed.<sup>22</sup>

Although occasionally subject to question or limitation,<sup>23</sup> the Court has generally adhered to the doctrine established in the Trilogy. In 1987, for example,

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19. See, e.g., Archibald Cox, *Some Aspects of the Labor Management Relations Act*, 61 HARV. L. REV. 274 (1948); Harry Shulman, *Reason, Contract, and Law in Labor Relations*, 68 HARV. L. REV. 999 (1955).

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

21. 363 U.S. at 581.

22. *Id.* at 582. Although he cited nothing to support his claims about arbitrators, Justice Douglas appears to have been influenced by the writings of scholar-arbitrators Archibald Cox and Harry Shulman. See generally Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482 (1959); Shulman, *supra* note 19, at 1016-24.

23. See *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

the Court again reminded the lower federal courts (which have been slow to relinquish authority) of the paramount authority of labor arbitrators in the settlement of contractual disputes under Section 301.<sup>24</sup> Douglas' praise of arbitration in general, and arbitrators in particular, has gained widespread acceptance, especially among labor arbitrators, who are quick to assert the exclusivity of their expertise. The occasional dissenting voices, for the most part, have been too shrill to be taken seriously.<sup>25</sup>

Given the assumed competence of labor arbitration, and its declared superiority over judicial litigation, it is not surprising that arbitration has been proposed as a desirable alternative to resolution of other employment disputes.<sup>26</sup> My purpose is not to assert that arbitration is inappropriate. I have some experience both as advocate and as arbitrator and I respect what arbitration has accomplished in the unionized sector. Nevertheless, I think it is important that we not exaggerate the advantages of arbitration and the competence of arbitrators and that we understand the differences between what we know as arbitration and what has been proposed.

### B. Expediency and Cost

Typically, proponents of arbitration claim three principal advantages for arbitration of wrongful discharge cases: cost, speed, and competence.<sup>27</sup> It is true that labor arbitration is usually faster and less expensive than ordinary litigation. Even the best and busiest of arbitrators can ordinarily schedule a hearing within a few months of his or her selection. It is sometimes possible to arrange a date within weeks. Indeed, some arbitration panels require that discharge cases be tried

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24. See *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987).

25. See, e.g., HAYS, *supra* note 14, at 117-18.

26. One notable commentator cites a number of advantages: Adopting the arbitration format would immediately make available the vast body of arbitral precedent that has been developed in countless decisions over the years. It would permit the use of an established nucleus of experienced arbitrators . . . . It would facilitate maximum flexibility . . . . The relative informality and speed of arbitration — though both those qualities are now often much eroded — should also appeal to rank-and file-employees.

Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads Toward Full Flower*, 67 NEB. L. REV. 56, 77-78 (1988).

27. META also asserts that arbitration is more informal than ordinary litigation. While there is no reason to question that claim, it is not clear on its face that informality contributes to the efficiency of arbitration. As I argue below, there is a significant difference between arbitration under a collective bargaining agreement and commercial arbitration of other employment claims. Informality may help foster the continuing relationship between employers and unions who are parties to a collective bargaining agreement, but the same interest does not necessarily attend litigation between individual employees and employers.

within two weeks of the termination.<sup>28</sup> Nevertheless, one should be careful not to overestimate the speed of the process.

Recent statistics compiled by the Federal Mediation and Conciliation Service (FMCS) indicate that in the 1991 fiscal year, the average arbitration case administered by that agency took 364.86 days from grievance filing to award.<sup>29</sup> Some would argue that even this is fairly expedient, as compared to the overburdened court dockets in such places as New York City and Chicago. But there is no reason to believe that large cities will host most of the employment litigation or that all communities suffer similar inefficiencies. For example, in Monroe County, Indiana, with a population of about 100,000, the average civil case filed in Superior Court, in roughly the same time period that produced the FMCS data mentioned above, took an average of 5.3 months from filing to disposition.<sup>30</sup>

This data, of course, does not include appeals, which could add appreciably to the length of the litigation. Although labor arbitration is typically not burdened with appeals, the policy arguments supporting the finality of a labor arbitrator's award cannot be made with equal force for other types of employment litigation, as I will argue in more detail below. Thus, one should expect that, unlike labor arbitration, the arbitrator's decision in a wrongful discharge case will not necessarily end the proceedings.

It is also true that parties to a labor arbitration often incur less cost than litigants in other forums. The parties are often not represented by counsel, thus obviating the need to pay attorney fees. Court reporters are typically not used and, for the most part, there are no posthearing procedures except for briefs. Although the arbitrator charges a fee, most cases can be resolved for fees of under \$2000.<sup>31</sup>

The speed with which the process works and the amount it costs are also related. It is doubtful that lawyers trying labor arbitration cases charge appreciably less for their time in that forum than they do for other types of proceedings. However, they may spend less time on arbitration cases because there is no significant discovery, there are fewer motions to argue, and less time

28. The time differences between arbitration and ordinary litigation should not be exaggerated. One of the more frequent complaints encountered from unions and employers is the delay that sometimes accompanies scheduling hearings. In addition, the parties sometimes complain about the time lag between the hearing and the arbitrator's award.

29. The average was 112.30 days from the time of the grievance until a panel request to the agency and an additional 252.56 days from the panel request to the award. *FEDERAL MEDIATION AND CONCILIATION SERVICE, ARBITRATION STATISTICS FISCAL 1991*, at 1 (1991).

30. Telephone interview with Victoria Thevenow, Administrator of the Monroe County, Indiana, Circuit Court, November 20, 1991. On July 22, 1991, Ms. Thevenow completed a study of all civil litigation in Monroe County (excluding small claims cases) filed over the previous year. The average of 5.3 months includes jury cases, in which there was a decision shortly after the trial, and judge tried cases, in which there was a time lag between the close of the trial and the decision.

31. In 1991, the average total fee for an arbitration administered by the Federal Mediation and Conciliation Service was \$1975.82. *FMCS ARBITRATION STATISTICS*, *supra* note 29, at 1. A statute authorizing arbitration might also provide that the arbitrator's fees will be paid by the state or by some form of insurance funded by employers.



is spent contesting the other side's evidence. Moreover, prehearing briefs are uncommon. These features could also accompany arbitration of a wrongful discharge action. One should recognize, however, that such an arbitration is *not* labor arbitration as we know it. As such, the body of law developed under Section 301 does not apply.

Section 301 provides for the enforcement of collective bargaining agreements. While a wrongful discharge action may be predicated on a contract theory, there are no collective bargaining agreements at issue. An agreement to arbitrate such a dispute, then, is not labor arbitration, but is ordinary commercial arbitration, conducted most likely under a state's version of the Uniform Arbitration Act.<sup>32</sup> That distinction may be more important than some commentators have pretended.

Certainly, commercial arbitration can be more expedient and more inexpensive than the litigation it replaces. Those advantages, however, should not be exaggerated. Part of the savings in labor arbitration is attributable to the absence of attorneys in some, perhaps most, proceedings. Except in extraordinary circumstances, one should expect that in wrongful discharge litigation, both sides will be represented by counsel no matter what the forum.

Even when attorneys are present in labor arbitration, parties to mature collective bargaining relationships often develop shared understandings or, at the least, possess common knowledge that expedites the hearing. A union attorney who regularly represents grievants in arbitrations with Company X, for example, is no doubt familiar with the company's organizational structure and may know enough about the business to understand what has happened and why. That familiarity may well be lacking for the plaintiff's attorney, not versed in industrial lore and jargon, who sues Company X in a wrongful discharge case. That unfamiliarity also points to another potential problem.

There is no formal discovery in labor arbitration. That does not mean that the parties try cases by ambush. In the first place, union attorneys (or representatives) have easy access to employee-members, who furnish valuable information about the employer. More important, the National Labor Relations Act mandates that employers furnish to the union relevant information that will assist it in the collective bargaining process.<sup>33</sup> Since arbitration is considered to be part of the process of collective bargaining, unions are at least entitled to information basic to the hearing.<sup>34</sup> Moreover, some collective bargaining agreements provide access to employee personnel files and to other pertinent information. Although probably not as extensive as formal discovery, these procedures allow the parties to gain some familiarity with the other side's case prior to the hearing.

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32. META provides expressly that the state's Uniform Arbitration Act "applies to proceedings under [META] as if the parties had agreed to arbitrate under that statute." See META, § 6(a).

33. See *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149 (1956).

34. See *NLRB v. Acme Indus. Co.*, 385 U.S. 432 (1967).

An individual litigant who chooses arbitration for her wrongful discharge claim has no such advantage. The Uniform Arbitration Act does not provide for discovery. Further, the National Labor Relations Act does not apply. The only right to information will be that contained in the arbitration agreement made by the parties or in the applicable state law, if any. META, for example, provides that "all forms of discovery . . . are available in the discretion of the arbitrator," who is cautioned to avoid "undue delay, expense, or inconvenience."<sup>35</sup> Even in the absence of statute, one should assume that arbitration of a wrongful discharge action will include some form of discovery. Although not commonly employed in labor arbitration, where speed is considered important, discovery is neither illegal nor unnatural in arbitration. Presumably, plaintiffs' lawyers would want *some* right to inquire into the other side's case.<sup>36</sup>

Lawyers who have not litigated with a particular employer before will undoubtedly be less familiar with the company than are union lawyers and less able to understand the discharge in context. And, while a plaintiff's lawyer can learn something from other employees friendly with the plaintiff (if any), those employees are under less pressure to cooperate than are fellow union members. Moreover, without the protection of a union, other employees may fear retaliation if their cooperation is too overt.

In the absence of META or comparable legislation, plaintiffs' attorneys may want to negotiate a right to interview or depose company officials, to discover documents, and to submit interrogatories.<sup>37</sup> None of this is objectionable in its own right. Indeed, some of it may be essential, especially in cases in which a plaintiff claims discrimination based on disparate treatment. Whatever inherent advantages arbitration may hold can be easily outweighed when a plaintiff attempts to try the case without discovery. It is important to remember, however, that time spent on discovery will not only increase the expense, it will also delay the hearing. The litigation backlog is not due solely to overworked judges. Lawyers need *some* time to take depositions, discover documents, exchange interrogatories, and, in general, understand their law suit.

In labor arbitration under a collective bargaining agreement, the continuing relationship may shortcut some of these problems. Parties who deal with each other on a regular basis may be willing to disclose information requested by the other side without significant formal proceedings. But those same advantages may well not attend a commercial arbitration over a wrongful discharge. In summary, although arbitration of a wrongful discharge action may be faster and less expensive than ordinary litigation, one should be cautious about the comparison

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35. META, § 6(c).

36. The comment to Section 6(c) of META observes that "discovery ought to be limited to what is reasonably necessary to enable both parties to prepare adequately."

37. Presumably, plaintiffs' counsel will have some considerable leverage to win such concessions since, in the absence of statute, the alternative is ordinary litigation which is attended by the full range of civil discovery.

to labor arbitration. If the arbitration is to operate efficiently, the advantages of speed and expense are likely to be muted.

### C. The Arbitrator

Perhaps the most heralded advantage of arbitration over ordinary litigation is the special competence of the arbitrator. Seldom has so much collective wisdom been attributed to any class of people. Echoing Justice Douglas' claims in the Steelworkers Trilogy, scholars have seemingly accepted the conventional wisdom that employment disputes are better resolved by arbitrators than by judges and juries.<sup>38</sup> Whether arbitrators are better able than judges to resolve disputes arising under collective bargaining agreements is a question that has not been thoroughly examined. Most scholars — many of whom are arbitrators themselves — exhort the arbitrator's expertise without any significant empirical evaluation of what arbitrators do or any meaningful comparison to other litigation forms.<sup>39</sup>

Whether labor arbitrators are better or worse than judges, however, is not the issue. Again, arbitration of wrongful discharge claims is not labor arbitration. Justice Douglas' flattering description of arbitrators was not merely an assertion that arbitrators are better decision makers than judges. Rather, he was describing how arbitration functions as part of the collective bargaining system.<sup>40</sup> At its base, labor arbitration is nothing more than a way to solve disputes about what collective bargaining agreements mean. One notable scholar has asserted that the

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38. In the Comment to the Appendix, META justifies its preference for arbitration over judicial litigation by asserting that arbitrators "have the requisite skill, training, and experience to understand the special problems of the workplace . . . ." The work of some scholars echoes Justice Douglas' undocumented assertions in the Steelworkers Trilogy. See, e.g., Kenneth C. Mennemeier, *Protection from Unjust Discharge: An Arbitration Scheme*, 19 HARV. J. ON LEGIS. 49, 75 (1982):

With the passage of time, arbitrators acquire experience at resolving a variety of labor disputes. They become acquainted with the particular needs and interests of specific bodies of employees and employers. They also gain familiarity with employment practices within a certain industry, field, or geographic region. This accumulated experience enables arbitrators to approach employment disputes from a unique and highly advantageous perspective.

Mennemeier's principal source of authority for this endorsement of arbitrator competence is Justice Douglas' opinion in *Warrior & Gulf Navigation*. *Id.* at 75 n.104. The same author asserts that judges lack the necessary expertise and perspective to deal with employment issues. *Id.* at 66.

39. See, e.g., Heinz, *supra* note 1, at 889-90. Heinz recommends arbitration of wrongful discharge claims, asserting that "[t]here is a ready source of labor arbitrators who are experts in balancing employees' rights and management interests." *Id.* at 890. In support of his claim of arbitral expertise, Heinz, himself a prominent scholar-arbitrator, cites only the passage from Justice Douglas, quoted above (see *supra* text accompanying note 22). See Heinz, *supra* note 1, at 890 n.210.

40. Justice Douglas noted that "the parties' objective in using the arbitration process is primarily to further their common goal of uninterrupted production under the agreement, to make the agreement serve their specialized needs." See *Warrior & Gulf Navigation*, 363 U.S. at 582.

arbitrator should merely be viewed as the contract reader.<sup>41</sup> As such, arbitrators' decisions are neither right nor wrong. They are simply what the contract says.

It is no doubt true that decision makers so intimately involved in contract administration would benefit from knowledge of plant customs, practices, and operations. They might also benefit from industry trends and traditions. Whether arbitrators actually have this knowledge and, perhaps more important, whether they know how to use it if they do, is debatable. The deference to arbitral authority that resulted from the Supreme Court's praise may be well vested in experienced arbitrators like Richard Mittenenthal and Theodore St. Antoine, but the same presumptions apply no matter how competent — or incompetent — the arbitrator. One need only see the deference given to the unusual arbitration award in *Misco, Inc. v. Paperworkers International Union*<sup>42</sup> to understand that the Court's support for arbitration has little to do with the arbitrator's ability.<sup>43</sup>

Even if an understanding of the common law of the shop is important in labor arbitration, it is not clear that such an understanding plays any significant role in wrongful discharge litigation. Labor arbitrators, at least if the conventional wisdom is true, preserve the collective bargaining relationship and furnish a valuable alternative to strikes. There is, though, no collective bargaining relationship to preserve in wrongful discharge litigation, nor is there any realistic possibility of a strike. Rather, the arbitration is merely a substitute for litigation. One must ask, then, why arbitration is better.

Certainly it is not better because arbitrators are superior decision makers. Judges exist to resolve disputes. While some arbitrators are busy and decide one hundred or more cases per year, most have a much more modest case load. Indeed, a great majority of arbitrators hear relatively few cases each year.<sup>44</sup> It is no doubt the case that the average trial judge has more experience listening to testimony, making credibility determinations, and resolving factual disputes than the average arbitrator.

There is, however, Justice Douglas' commonly believed assumption that arbitrators are more skilled than judges in resolving employment disputes, an

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41. See Theodore J. St. Antoine, *Judicial Review of Arbitration Awards*, 75 MICH. L. REV. 1137 (1977).

42. 484 U.S. 29, 36 (1987). For a more comprehensive review of the arbitrator's opinion, see *Misco, Inc. v. United Paperworkers Int'l Union*, 768 F.2d 739 (5th Cir. 1985).

43. There are reporting services that publish arbitration awards which allow some insight into an arbitrator's abilities. It is dangerous, however, to place much reliance on published awards. Arbitrators do not submit all of their awards for publication consideration and only a fraction of those submitted are actually published. There is no reason to assume that the awards published for a particular arbitrator are representative of that arbitrator's work or knowledge. Moreover, some of the commercial services are more concerned with arbitrators' bias rather than with their competence.

44. 1991 statistics from FMCS indicate that of the 1097 arbitrators who decided cases administered by that agency in 1991, 780 arbitrators heard fewer than five cases. Over 300 heard only one case. Only 10 decided 26 or more cases. See FMCS, *supra* note 29, at 3. The figures are similar for the American Arbitration Association, the other principal source of ad hoc arbitrator appointments. It is no doubt true that arbitrators get more work from permanent panels than they do from the A.A.A. or FMCS, but inexperienced arbitrators are not likely to be included on panels.

environment to which judges have little exposure. This claim would be more difficult to answer if one could be confident that all — or even most — arbitrators had significant experience. Even if they do, it is not clear how much that exposure is worth in wrongful discharge litigation.

Judges may have little personal experience in, or familiarity with, the industrial arena. However, judges are not expert in most of the areas in which they are called upon to decide cases. They know little about medicine, but they decide malpractice cases and other claims involving medical and scientific evidence. And most are not experts in economics, but they decide antitrust and other business disputes worth millions of dollars. It is just not fair to claim that judges are not able to adequately address the issues raised in employment litigation. They are, for the most part, experienced decision makers who are able to resolve factual disputes competently presented to them.

Arbitrators, of course, can do this too. And it may be that familiarity with industrial practice will aid the decision or, conceivably, shorten the hearing. That is, experienced arbitrators may require less evidence about industry practice or environment than a judge. But that assumes that parties are able to identify arbitrators who have such special knowledge, an assumption not warranted in every case. Despite Douglas' claim regarding arbitral expertise, it is most likely that most arbitrators are chosen not for their wisdom, but for their bias.

In short, the arbitrator's special competence, if it exists, relates to preservation of the collective bargaining relationship. Arbitrators are supposed to understand that the case they hear is but one chapter in a continuing relationship between employer, employee, and union, and that, to some extent, the relationship (and the union's responsibility in it) may transcend individual rights. Those interests, which certainly warrant protection, are not present in litigation over wrongful discharge in a nonunion work place.

But, we are told, the basic decision in wrongful discharge cases is whether an employee was fired for just cause. Arbitrators, the argument goes, are experts in just cause,<sup>45</sup> a concept they helped develop and, some assert, only *they* understand. One commentator, indeed, claims that since most arbitration awards are not published, the meaning of just cause is not known to (and presumably cannot be discovered by) any but the initiated — *i.e.*, the arbitrators. He did not explain how *new* arbitrators acquire this mysterious insight.<sup>46</sup>

I do not mean to belittle the experience of arbitrators in making just cause determinations. Some arbitrators have applied the concept to a myriad of situations and there is an industrial lore about what conduct will or will not warrant discharge. One must remember, however, that just cause is ordinarily applied in continuing relationships, often when there is some express or implied

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45. See, e.g., St. Antoine, *supra* note 3, at 57-58, where the author asserts that "arbitration is the superior method for 'just cause' determinations. Adopting the arbitration format would immediately make available the vast body of substance and procedure that has been developed in countless decisions over the years."

46. See Mennemeier, *supra* note 38, at 76.

guarantee of equal treatment. A principal inquiry in many arbitrations is how the employer has treated similarly situated employees in the past. Nonunion employers, in particular, may not wish to be saddled with previous sins or omissions and could, therefore, be reluctant to entrust a decision to someone for whom a principal inquiry will be what has happened before.

One must also question whether just cause, as developed by labor arbitrators, will have much practical application in wrongful discharge litigation. For the most part, arbitrators work in blue collar industries, the traditional stronghold of organized labor. There are, certainly, organized white collar employees, especially in state and local government. It is rare, however, to encounter in a collective bargaining unit an executive or a highly-paid employee who has significant discretion. Yet those are just the people who are most likely to become wrongful discharge plaintiffs. This area of the law, at least as of now, holds little promise for blue collar workers who are unlikely to have the same kinds of assurances of continued employment as executives.<sup>47</sup> Moreover, their potential recoveries may not be substantial enough to attract even the more altruistic of the plaintiffs' bar.

Although managers and executives are the most likely plaintiffs, the industrial concept of just cause is not easily adapted to their cases. Just cause, as we know it, is heavily steeped in the treatment afforded similarly situated employees and in insubordination. Those concepts may mean little in the termination of an executive, where decision makers may face difficult questions of abuse of discretion, range of acceptable performance, or managerial ability.<sup>48</sup> Executive

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47. One of the goals of META is to broaden the range of employees who enjoy protection from wrongful discharge. Thus, its good cause standard applies to most employees. See META § 3(a). Equally important, META allows the awarding of attorney's fees to the prevailing party, which should increase the willingness of attorneys to represent discharged employees whose cases are unlikely to produce attractive contingent fees. See META, §§ 7(b), 7(c). To date, META has not been enacted in any jurisdiction. Although the provision for attorney's fees is attractive, one might expect that employer interests will lobby against it in state legislatures. Moreover, plaintiffs' attorney organizations are sure to argue for a continuation of the contingent fee contracts and compensatory and punitive damages that have made representation of management employees so lucrative. See, e.g., William L. Mauk, *Safeguarding the Workplace, Model Employment Termination Act is Flawed*, TRIAL, June 1991, at 28. (TRIAL is published by the Association of Trial Lawyers of America, commonly identified with the plaintiffs' bar.) The point is that while META promises reform, one must be cautious in predicting that wrongful discharge remedies will become available to a wider range of employees.

48. At least one court has recognized this problem. In *Pugh v. See's Candies, Inc.*, 171 Cal. Rptr. 917 (Cal. Ct. App. 1981), the court considered the claim of a discharged executive who asserted, among other things, that he worked under an implied contract that allowed discharge only for "just cause" or "good cause." The court discussed the difficulty of defining those concepts and then said "care must be taken, however, not to interfere with the legitimate exercise of managerial discretion . . . [W]here, as here, the employee occupies a sensitive managerial or confidential position, the employer must of necessity be allowed substantial scope in the exercise of subjective judgment." *Id.* at 928. With respect to standards developed by labor arbitrators, the court observed that:

[S]ome of their work may be useful. It must be remembered, however, that [labor] arbitrators are selected by the parties and on the basis, partly, of the confidence which the parties have in their knowledge and judgment concerning labor relations matters [citing

responsibilities are more difficult to quantify than those attending typical blue collar employment and even an experienced arbitrator may find that his background is of little use.<sup>49</sup>

These differences between labor arbitration and wrongful discharge arbitration also raise questions about the applicability of another of labor arbitration's guiding principles. The judiciary's limited role in labor arbitration extends not only to the determination of the case in the first instance, but to post-award proceedings as well. Although there is some reason to question whether appellate courts have accepted the Supreme Court's pronouncements, the Trilogy excluded the courts from any substantial role in the review of arbitrators' decisions.<sup>50</sup> Generally, review is limited to whether the arbitrator displayed partiality, exceeded his jurisdiction, or violated public policy.

As I have already argued, one might legitimately question whether labor arbitrators are blessed with the wisdom attributed to them by Justice Douglas. Even if they are, however, it is not their ability that shelters awards from review. In no other form of litigation, at least, can one argue that decisions should be final because the decision maker is smart. The justification for limiting awards from review resides not in the assumed competence of the arbitrators, but in the nature of the process.

Although some of the conventional wisdom about arbitration may be more folklore than fact, one thing Justice Douglas said is true: labor arbitration is a substitute for industrial strife. The avoidance of conflict may not be the only motivation of employers and unions, but arbitration has the effect of channeling into a peaceful forum disputes that might otherwise erupt into strikes or economic action.<sup>51</sup> Unions, in fact, typically waive the right of employees to strike over grievances in favor of an agreement to arbitrate contract disputes.

The finality of awards is a necessary feature of this process. It is one thing for employees to defer economic action in favor of a procedure that takes a few months. It is quite another to demand patience while appeals meander through the courts. A principal virtue of arbitration, then, is not necessarily that it reaches the right result, or that the arbitrators are blessed with some mystical insight. Rather, the advantage of the system is that it identifies problems that are likely sources of

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*Warrior & Gulf Navigation*]. For courts to apply the same standards may prove overly intrusive in some cases.

*Id.* at 928 n.26.

49. Even experienced arbitrators, however, overlook these differences. In a recent speech to the National Academy of Arbitrators, arbitrator Stephen Hayford reviewed the "competencies" that will be required of arbitrators who hear cases based on wrongful discharge statutes like META. Among the skills needed, Hayford claims, is the ability to apply the "common law of the shop" to discipline in nonunion workplaces. His entire analysis of arbitrator competence in this area is as follows: "No problem here." See Stephen L. Hayford, *The Changing Character of Labor Arbitration*, in PROCEEDINGS OF THE FORTY-FIFTH ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 69, 84-86 (Gladys W. Gruenberg ed., 1993).

50. *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

51. It is just this feature of arbitration that has prompted criticism from critical legal studies scholars. See, e.g., Stone, *supra* note 14.

conflict and resolves them in a expeditious manner. Appeals are preempted not because the arbitrator is likely to be right, but because a delay in resolution might weaken the resolve of unions and employees to defer other action. Moreover, significant delay and an inability to resolve disputes expeditiously might undermine the continuing relationship between employer and union.

One should question whether finality will or should be a necessary feature of arbitration under statutory schemes or private submission agreements. In the typical case, there will be no threat of concerted action by employees and there is no union-employer relationship to protect. Moreover, wrongful discharge litigation will not merely involve construction of a privately negotiated agreement. Instead, the decision maker may be required to interpret statutory or common law rights, matters that are ordinarily thought to be beyond the competence (or at least the jurisdiction) of labor arbitrators. Finally, unlike labor arbitrations, an arbitrator's decision in a wrongful discharge case cannot be negotiated away in the next round of collective bargaining.

Although the META drafters opine that courts should accord deference to arbitrators' decisions in proceedings conducted under the statute, the model legislation itself includes the possibility of more expanded judicial review than is available in labor arbitration.<sup>52</sup> In states that have not adopted META, employers may be reluctant to agree to arbitration without some assurance that an arbitrator's decision can be reviewed. The point is that either because of differences in policy or by statute, wrongful discharge litigation is more likely to lead to judicial review than has typically been the case with labor arbitration. That will not only lengthen the proceedings, but make them more expensive as well.

### III. SUMMARY

This article is not a brief against the use of arbitration to resolve wrongful discharge disputes. There may well be some advantages. As noted, arbitration could be faster and less expensive. Since the parties can shape the proceeding by contract, it might be more informal and less acrimonious than other forms of litigation. And, not to be ignored, an arbitrator might be vested with more remedial authority than judges, who are typically confined to an award of damages. From the employer's perspective, arbitration might be a way to avoid punitive damages since, unless the parties so agree (or a statute allows), the arbitrator will have no authority to award them. Finally (although this is not an exclusive list), unlike ordinary litigation, an arbitration could be private, perhaps

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52. Section 8(c) provides that an arbitrator's award can be vacated or modified in cases of fraud, corruption, evident partiality, or exercise of excess power. All of these are grounds commonly asserted to vacate labor arbitrators' awards as well. META, however, also allows an arbitrator's award to be set aside where "the arbitrator committed a prejudicial error of law." The comment to Section 8 notes that this addition was necessary because the arbitrator is construing statutory, and not just contract, rights.



a significant consideration in cases involving confidential business information or allegations of embarrassing personal conduct.

Those advantages may outweigh the disadvantages. My real purpose is not to discourage the use of arbitration, but to caution potential litigants that arbitration is not paradise, despite its enthusiastic endorsement by scholars, most of whom are arbitrators themselves. Although labor arbitration has its virtues, they are not necessarily adaptable to all other forms of litigation, even if the dispute arose in the work place. Wrongful discharge arbitration is likely to cost more than labor arbitration and to take longer. Most important, the presumed expertise of labor arbitrators, questionable enough in their home forum, is not readily transferable to other kinds of employment litigation.

This does not mean that employers and employees should shun arbitration. Some labor arbitrators are experienced decision makers who could work effectively in any forum. However, I do suggest that arbitration offers less in the resolution of wrongful discharge disputes than its supporters have promised. Moreover, judges are not nearly as inept as arbitration's advocates have portrayed them. In particular, there is no reason to assume that arbitrators possess any more insight than judges or that they have any magic solutions to difficult problems.

Labor arbitrators are an important cog in a system that has served well the interests of those who are party to a collective bargaining agreement. But it is folly to assume that the system works because of the arbitrator's skill. Rather, it works because there is no reasonable alternative. The institutional characteristics that make arbitration attractive in the unionized sector, however, are not present in wrongful discharge litigation. That does not mean that arbitration is unsuitable for wrongful discharge cases; it does mean that, unlike labor arbitration, there is an alternative. In their haste to promote the use of arbitration, its advocates have unfairly disparaged the ability of courts to resolve workplace disputes and have exaggerated the utility of arbitration and the ability of arbitrators.