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Employment Arbitration 2011: A Realist's View

LAURA J. COOPER*

Nearly two years ago, when this symposium was organized, its title, asking whether the Obama administration might offer an opportunity for "hope and change" in labor and employment law, was a question that might seriously be addressed, rather than posed only sarcastically. Barack Obama had been inaugurated in 2009 after campaigning on a legislative platform to enact new worker-protection rights.[1] On inauguration day, the president could look down Pennsylvania Avenue from the White House with a realistic expectation that Democratic majorities in the House of Representatives and Senate would enact his labor and employment law agenda.[2] At first, it appeared that the legislative agenda might be quickly on the road to enactment. The very first piece of any kind of legislation that the new president signed was the Lilly Ledbetter Fair Pay Act of 2009. The Ledbetter Act overruled a Supreme Court decision and extended the statute of limitations for claims of discriminatory compensation so that it commenced upon discovery of discrimination rather than upon the date on which the disparity arose (possibly unknown to the would-be plaintiff).[3] In retrospect, however, the Ledbetter Act turned out not to be the first law in a wave of Obama administration worker-protection legislation. Instead, it proved nearly as much the end as the beginning. Opposition to the president's health care initiative resulted in a lengthy and embittering battle that consumed Congress's attention and the administration's focus and energy.[4] After passage of the health care law it seemed possible that Congress would return to a progressive agenda for worker-protection legislation. Any such possibility, however, was securely foreclosed by the November 2010 midterm election, when Republicans gained control of the House, and when the Democratic majority in the Senate significantly narrowed.[5] Even the most optimistic workers' rights advocate now must abandon hope for legislative change for the foreseeable future.

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1. *See Politics: High Priority in Democrats' 2008 Platform Is "Good Jobs with Good Pay and Benefits,"* 168 Daily Lab. Rep. (BNA) A-7 (Aug. 29, 2008).

2. Derrick Cain & Larry Swisher, *Legislation: Congress Gears Up with Large Job-Creation Package, Pay Equity, Card Check Bills*, 15 Daily Lab. Rep. (BNA) S-5 (Jan. 27, 2009).

3. Pub. L. No. 111-2, § 181, 123 Stat. 5 (2009) (overruling Ledbetter v. Goodyear Tire & Rubber Co., Inc., 550 U.S. 618 (2007)).

4. Derrick Cain, *Labor Law: Consideration of EFCA on Hold in Senate as Health Care, Other Bills Given Priority*, 168 Daily Lab. Rep. (BNA) A-11 (Sept. 2, 2009).

5. Derrick Cain, Amber McKinney & Stephen Lee, *Legislation: House Republican Agenda Likely to Stymie Various Labor-Related Bills Such as EFCA*, 212 Daily Lab. Rep. (BNA) AA-1 (Nov. 3, 2010).

Among the legislative initiatives that we must move to the list of "not now, likely never" is the Arbitration Fairness Act (AFA).[6] Section 4 of the proposed Act would have amended the Federal Arbitration Act (FAA),[7] to add: "No predispute arbitration agreement shall be valid or enforceable if it requires arbitration of . . . an employment, consumer, or franchise dispute . . . or . . . a dispute arising under any statute intended to protect civil rights."[8] What should be the role of academics at such a moment? Is this the time for academics to continue to fight, against all odds, the "good fight" for enactment of the AFA? Is this the time for academics entirely to abandon the debate over ideal procedural structures for the resolution of employment disputes and instead propose new substantive rights for employees that are even less likely to be enacted? Or is this the time to abandon support for the abolitionist objective of the AFA in favor of a more modest legislative proposal of structural and procedural mechanisms that might enhance the fairness of mandatory predispute arbitration? This panel includes three presentations on employment arbitration—by David S. Schwartz;[9] by Zev J. Eigen, Nicholas F. Menillo, and David Sherwyn;[10] and by Martin H. Malin.[11] The presentations each pursue one of these directions.

I begin with the assumption that all of the presenters on this panel proceed in good faith from the proposition that workers who have legitimate legal claims arising from state and federal statutes and from state common law should have a realistic opportunity to pursue their claims in an adjudicatory forum that will offer fair consideration of the facts of their case in light of the governing law and that will offer remedies to the extent afforded by those laws. Beginning with that objective, however, each of the presenters encourages legislators to pursue that objective by different means.

Professor David S. Schwartz, in his essay in this symposium, *Claim-Suppressing Arbitration: The New Rules*, advocates overruling the line of Supreme Court cases, beginning with *Rodriguez de Quijas v. Shearson/American Express, Inc.*[12] that have interpreted the FAA to compel enforcement of arbitration provisions contained in adhesion contracts against consumers and employees seeking to enforce statutory

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6. Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

7. 9 U.S.C. §§ 1–16 (2006).

8. S. 931 § 4; H.R. 1020. If enacted, the Arbitration Fairness Act would have invalidated a large number of existing predispute employment arbitration agreements. As of 2003, the American Arbitration Association reported that it alone was administering arbitration plans covering six million American workers. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, DISP. RESOL. J., May/July 2003, at 8, 10.

9. David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239 (2012).

10. Zev. J. Eigen, Nicholas F. Menillo & David Sherwyn, *Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment & Implement a "Mandatory Arbitration Act,"* 87 IND. L.J 271 (2012).

11. Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289 (2012).

12. 490 U.S. 477 (1989).

claims in court.[13] Schwartz calls for enactment of the AFA.[14] His agenda is thus entirely legislative and abolitionist.

Schwartz seeks to define the ground rules for the debate over whether mandatory arbitration of employment claims can, on balance, yield positive results for employees when examined from the perspective of the workforce as a whole, rather than from the perspective of employees with claims that would likely yield a higher damage award in court than in arbitration. Among the ground rules he proposes is that no one should be able to claim that mandatory arbitration is outcome neutral until its advocates are able to prove it so by "rigorous, methodologically sound research."[15] Such a ground rule, however, is itself not neutral as this may well be a case in which empiricism cannot supply the answer. In the absence of a mechanism for assigning large numbers of employment cases randomly either to arbitration or to litigation—an experimental design that could not legally be created consistently with due process—claims about the effect of the forum on outcome simply cannot be tested by "rigorous, methodologically sound research." In short, by imposing the burden of persuasion on advocates of mandatory arbitration, Schwartz is, by fiat, both opening and closing the empirical debate in his favor. Such a ground rule not only cuts off a legitimate debate, based on the world as it can be known, but it seeks to defend a position entirely contrary to the world that actually exists. We must acknowledge that the status quo is not a world in which mandatory employment arbitration is an open public policy question, but rather it is a world in which mandatory employment arbitration is the law, and furthermore a law that is not going to be altered by legislative enactment.

Apart from proposing his empirical ground rule, Schwartz bases his attack on mandatory arbitration on two principles: (1) that arbitrators cannot be neutral decision makers when they have a financial stake in continued business; and (2) that an adjudication procedure cannot be fair if the wealthier and more powerful party has exclusive control over those procedures.[16] While these propositions may have validity in the abstract, one may surely question the factual basis that such conditions exist in the reality of employment arbitration. The claim that arbitrators lack sufficient integrity to decide cases on their merits because of their self-interest in being selected for future cases is an old one. It was prominent in the criticism that Judge Paul R. Hayes directed at labor arbitrators in the 1960s.[17] The empirical test of that proposition, as applied to labor arbitration, is whether the union and management consumers of labor arbitration, or the courts in considering cases raising duty of fair representation claims or reviewing labor arbitration awards have, since Hayes's criticism, abandoned labor arbitration or sought to change its basic structure. It is obvious that they have not.[18] It is no fairer to assert that

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13. Schwartz, *supra* note 9, at 243–44.
14. *Id.* at 240.
15. *Id.* at 249.
16. *Id.* at 245.
17. PAUL R. HAYES, LABOR ARBITRATION: A DISSENTING VIEW 112 (1966).
18. Further evidence that parties in labor arbitration have faith in the integrity of labor arbitrators is shown by the fact that although such parties have the right to have a court determine the substantive arbitrability of a particular grievance, United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 n.7 (1960), it is not uncommon for

arbitrators in nonunion employment cases lack integrity simply as a result of the structure of the process.[19] Moreover, if one is to speculate about whether considerations external to the immediate dispute may influence decision making, one ought to be able to observe, for comparative purposes, that federal judges may have some self-interest in granting pretrial motions in individual employment cases in order to focus on what they may view as more worthy criminal caseloads and large commercial litigation.

The notion that employers have exclusive control over procedures in employment arbitration is just not factually accurate. Courts long ago struck down the worst abuses and inequities in employer-promulgated procedures[20] and most employment arbitration cases are today conducted under rules like those of the American Arbitration Association, which mandate a fair procedure including reasonable discovery.[21]

In *Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment & Implement a 'Mandatory Arbitration Act,'* authors Zev. J. Eigen, Nicholas F. Menillo, and David Sherwyn, take a somewhat unexpected turn in the academic debate about mandatory arbitration.[22] Although Sherwyn and Eigen are long-time advocates for mandatory arbitration,[23] in this paper, they and their coauthor, law student Nicholas F. Menillo, seek to put aside that debate, arguing that neither postdispute arbitration agreements, nor the alternative process for employment discrimination claims—a mix of agency procedure and litigation—are ideal structures for adjudicating statutory employment disputes. While Sherwyn and Eigen reassert here their advocacy for a model Mandatory Arbitration Act in which the federal government would establish fair procedures for employment arbitration and license, select, and monitor arbitrators,[24] their new focus is not on the arbitration debate at all, or at least not directly. They contend that the answer to the inadequacies of the legal process that combines agency procedure and litigation to resolve employment discrimination claims is replacing it with not just an alternative procedural mechanism but an alternative substantive right, which they describe as elimination of the doctrine of at-will employment.

They propose that an employee in interstate commerce should only be subject to termination for cause, or an offer of severance pay.[25] The severance pay would be

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parties to permit labor arbitrators to decide substantive arbitrability issues. *See FY 2010 Arbitration Statistics*, FED. MEDIATION & CONCIL. SERV., http://www.fmcs.gov/internet/itemDetail.asp?categoryID=196&itemID=22840 (illustrating types of issues arbitrated).

19. Professor Malin cites the Supreme Court's decision in *Ward v. Village of Monroeville*, 409 U.S. 57 (1972), for a much narrower proposition. Professor Malin does *not* suggest that merely because employment arbitrators are paid by the parties they are rendered incapable of fairly deciding most employment issues. Instead, he asserts that the Supreme Court should not have vested employment arbitrators, because of financial self-interest, with the authority to decide a specific issue—whether the agreement to arbitrate all claims arising from the employment relationship is valid. Malin, *supra* note 11, at 304–05 & n.104.

20. *See, e.g.*, Hooters of Am., Inc. v. Phillips, 173 F.3d 933 (4th Cir. 1999).

21. *Employment Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N (2009), http://www.adr.org/sp.asp?id=32904.

22. Eigen et al., *supra* note 10, at 285–87.

23. *Id.* at 271–72 nn.4–5.

24. *Id.* at 280–82.

25. *Id.* at 285. The coauthors do not attempt in their article to propose a statutory

equal to two weeks' pay for each year of employment, with a minimum of two weeks' pay and a maximum of one year's pay.[26] Employers not claiming that the employee was discharged for cause would have to offer the statutory severance payment. Employees who accept the severance payment would be precluded from pursuing a discrimination claim. Employees who refuse the severance payment could proceed to a hearing before an administrative law judge (ALJ). If the ALJ finds no cause for termination, the employee is awarded severance pay, costs, and fees, and the right to file a discrimination case in court. If the ALJ finds cause, the employee goes away empty-handed, without any severance pay, and without the right to file a discrimination claim.

This proposed system, combining potential severance payments to all employees discharged without cause and creating a government adjudicatory system to adjudicate cause, would require significant additional expenditures by both employers and the government, and impose additional burdens on employees with valid discrimination claims. Employers would be required to provide severance payments to employees discharged in circumstances not satisfying the statutory definition of cause. Employers would incur the cost of defending determinations of cause in ALJ proceedings. In some not insignificant number of cases, the employer would still continue to have to pay litigation costs in addition to these administrative costs. The government would incur the cost of establishing and funding an agency to process and hear "for cause" cases, and the government would have to pay for counsel to represent some employees in the ALJ proceedings. Another problem with the proposal is demonstrated by comparing the circumstances of two employees. Employee *A* claims wrongful discharge as well as discrimination. Employee *B* claims wrongful discharge but makes no claim of discrimination. Employee *A* would have to forego immediate receipt of severance payments in order to pursue the discrimination claim while Employee *B* would be entitled to immediate receipt of the payments. Thus, Employee *A*, the most wronged employee, unlike Employee *B*, the one not discriminated against, would be left with limited resources for ordinary living expenses and would incur, as a result, greater difficulty in securing private counsel to pursue the discrimination claim. Moreover, employees with potential discrimination claims would find judicial relief further postponed as they would need first to complete the administrative adjudicatory process to determine cause.

The combination of these inequities and the overwhelming costs the proposed statute would impose on employers and the government makes this scheme profoundly unlikely to be enacted. Far more modest proposals, such as the Model Employment Termination Act,[27] have failed to achieve legislative success in more than one state.[28] The likelihood of passage of such a cost-increasing statute as the coauthors propose is especially unlikely at the present time when governments are making radical reductions in existing programs in order to reduce budget imbalances, and when legislators are especially hostile to legislation that would increase employers' costs and discourage hiring of additional workers.

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definition of "cause." *Id.* at 286.

26. *Id.* at 286.

27. MODEL EMP'T TERMINATION ACT, 7A U.L.A. 300 (2002).

28. The exception is Montana's Wrongful Discharge from Employment Act, Mont. Code Ann. §§ 39-2-901 to 915 (2009).

Professor Martin H. Malin, in his symposium article, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, takes what he describes as the "middle ground" in the debate over the Arbitration Fairness Act, neither favoring mandatory arbitration as it exists nor calling for its abolition.[29] Professor Malin does an admirable job in neutrally collecting, surveying, and assessing the empirical evidence about whether the arbitration process disadvantages employment law plaintiffs.[30] Ultimately, however, he concludes that even if, to some extent, employees are disadvantaged by having to pursue their employment claims in arbitration, the better remedy is to eliminate the specific sources of that disadvantage, rather than to prohibit arbitration entirely.[31] Malin asserts that the system of employment arbitration that has emerged and evolved in the wake of *Gilmer v. Interstate/Johnson Lane Corp*.[32] and *Circuit City Stores, Inc. v. Adams*[33] has failed to provide adequate internal mechanisms of self-regulation to assure procedural fairness and that the judiciary has failed to fill the void.[34] He contends that legislative reform is necessary.[35]

First, Professor Malin recommends legislation to require that employment arbitration meet minimum standards of due process.[36] These, he suggests, include assuring employees the right to representation by counsel, granting arbitrators the authority to order necessary discovery and full statutory remedies, and precluding employers from truncating statutory limitations periods for filing claims.[37] Second, he proposes reforms directed not to changing arbitration procedures, but rather to the structure of the arbitration system itself.[38] He calls for requiring arbitration-appointing agencies to use neutral, objective criteria for listing arbitrators on their rosters, requiring such agencies to use random methods for appointing arbitrators to arbitration panels, and requiring arbitrators to disclose to the parties prior dealings with the parties, their counsel, and their counsels' law firms.[39] These structural proposals are modest, indeed so modest that they, even if enacted, might make little noticeable difference in the arbitration process as experienced by employees mandated to use it as their only recourse for workplace justice.

Third, Malin addresses the phenomenon of employers using arbitration agreements as a vehicle to force employees to waive their right to bring class action employment claims.[40] Here, Malin's recommendation is more radical and fundamental. Rather than suggesting that the law should preclude such waivers within arbitration agreements, he contends that the arbitration process is so ill-

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29. Malin, *supra* note 11, at 290.
30. *Id.* at 291–96.
31. *Id.* at 312.
32. 500 U.S. 20 (1991).
33. 532 U.S. 105 (2001).
34. Malin, *supra* note 11, at 312.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. *Id.* at 313.
40. *Id.* at 314.

suited to class claims that legislation should preclude any waivers of employees' ability to submit class actions in a judicial forum.[41]

Thus, in these papers—by David S. Schwartz;[42] by Zev J. Eigen, Nicholas F. Menillo, and David Sherwyn;[43] and by Martin H. Malin[44]—we have three alternative proposals for better protecting the substantive and procedural rights of American workers, each of which looks to legislation for the desired reforms. In light of the preemptive role of the FAA, which precludes states from regulating arbitration affecting interstate commerce,[45] and the desired universality of the authors' proposals, when these authors seek legislation, they necessarily mean legislation by the U.S. Congress. A realist, however, must immediately recognize that even the most modest of these proposals is not going to be enacted in today's political environment, or even one that we can presently envision on the distant horizon.

Realistic hope for improving procedural justice for workers should now be directed not at the legislature but at the judiciary. Recent history teaches an important lesson. The plaintiffs' lawyers who chose, for too long, to defend the extreme position that all mandatory predispute employment arbitration agreements should be unenforceable, ended up ceding the design of arbitration procedures largely to the courts and to the employers without the leavening guidance that plaintiffs' attorneys might have provided. Academics who focus on grand ideas with no chance of legislative enactment similarly may be losing the opportunity to play an affirmative role in the courts to develop a better process for workplace justice. While opportunities to persuade legislators by broad policy arguments may no longer be available, individual judges still can be shown real cases of real workers in which the employment arbitration process or its outcomes are patently unfair.

There are many battles that can still be won in the courts. Let me identify a few. Attention should be paid to the standards that the courts are applying to judicial review of employment arbitration awards. Plaintiffs are entitled to realize *Gilmer*'s promise that arbitration provides an alternative procedure, not a lesser body of substantive statutory rights.[46] Academic writers need to draw the courts' attention to those instances in which procedural limitations interfere with realizing statutory rights.[47] Commentators need to highlight for the judiciary distinctions between

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41. *Id.*

42. Schwartz, *supra* note 9.

43. Eigen et al., *supra* note 10.

44. Malin, *supra* note 11.

45. Southland Corp. v. Keating, 465 U.S. 1, 14–15 (1984).

46. *Gilmer*, 500 U.S. at 26 ("[W]e recognized that '[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.'" (second alteration in original) (quoting Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 628 (1985))).

47. Professor Malin advances that objective with the section in his paper identifying recent lower court decisions declining to intervene when confronted with apparently unfair procedural limitations on the ground that arbitrators may subsequently remedy the unfairness. Malin, *supra* note 11, at 302–08.

precedents governing judicial review of labor arbitration and those governing employment arbitration awards to put an end to the casual borrowing of deferential labor arbitration precedents when reviewing awards arising in the quite different context of employment arbitration. The employment arbitration setting warrants more aggressive judicial review, both because statutory rights are at stake, and because the greater inequality of power and resources casts doubt on procedural and substantive fairness.

Academics risk irrelevance if they devote their effort and creativity to proposing legislative reforms that lack any possible chance of enactment. A realist asks what incremental improvement might be achieved in the struggle for workplace justice if academics would instead focus on the world as it is and help the judiciary see the real injustices that arise in individual cases that cry out for new precedents to better protect the rights of workers.