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The Relationship between Employment Arbitration and Workplace Dispute Resolution Procedures

Abstract

The Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.* set in motion one of the most dramatic shifts in the governance of employment relations of recent times. Whereas employment arbitration procedures were present in a mere handful of workplaces at the beginning of the 1990s, they had expanded to as many as ten percent of companies in a 1995 GAO study and sixteen percent of establishments in a survey I conducted in 1998 that I will describe in more detail later in this article. Assuming these trends are continuing, perhaps as many as twenty percent or more of employers may now have adopted employment arbitration procedures. Although still covering a minority of employees, employment arbitration procedures have now clearly become a major component of the governance structure of employment relations. Indeed, by way of comparison, union members now represent only 13.9 percent of all employees, making employment arbitration arguably a more widespread feature of the contemporary workplace than unions and collective bargaining.

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**THE RELATIONSHIP BETWEEN EMPLOYMENT ARBITRATION
AND WORKPLACE DISPUTE RESOLUTION PROCEDURES**

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I. INTRODUCTION

The Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*¹ set in motion one of the most dramatic shifts in the governance of employment relations of recent times. Whereas employment arbitration procedures were present in a mere handful of workplaces at the beginning of the 1990s,² they had expanded to as many as ten percent of companies in a 1995 GAO study³ and sixteen percent of establishments in a survey I conducted in 1998 that I will describe in more detail later in this article. Assuming these trends are continuing, perhaps as many as twenty percent or more of employers may now have adopted employment arbitration procedures. Although still covering a minority of employees, employment arbitration procedures have now clearly become a major component of the governance structure of employment relations. Indeed, by way of comparison, union members now represent only 13.9 percent of all employees,⁴ making employment arbitration arguably a more widespread feature of the contemporary workplace than unions and collective bargaining.

Much of the debate relating to employment arbitration has focused on its role as a substitute for litigation, examining issues such as the extent of due process provided by arbitration as compared to litigation.⁵ These debates have looked at arbitration as an alternative to litigation through the courts and considered the relative accessibility and

¹ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

² Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 27 (1995).

³ U.S. GENERAL ACCOUNTING OFFICE, LETTER REP. NO. GAO/HEHS-95-150, EMPLOYMENT DISCRIMINATION: MOST PRIVATE-SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION, 7 (1995).

⁴ BUREAU OF NATIONAL AFFAIRS, UNION MEMBERSHIP AND EARNINGS DATA BOOK: COMPILANIONS FROM THE CURRENT POPULATION SURVEY 11 (2000).

⁵ E.g., RICHARD A. BALES, COMPULSORY ARBITRATION: THE GRAND EXPERIMENT IN EMPLOYMENT (1997); JOHN T. DUNLOP & ARNOLD M. ZACK, MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES (1997); 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; Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow-Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996)

advantages of each type of procedure for employees and employers.⁶ In contrast, in this article, I look at a different aspect of the impact of the expansion of employment arbitration procedures by examining the relationship between employment arbitration and dispute resolution in the workplace. Indeed, one of the more striking features of employment arbitration is that many companies do not simply have employment arbitration as a stand-alone procedure, but rather incorporate arbitration into multi-step dispute resolution procedures that include various other types of workplace dispute resolution procedures as prior steps. These workplace procedures incorporate a range of different types of procedures, such as review of complaints by higher levels of management, internal appeals boards composed of managers who hear employee complaints, peer review panels, mediation, and ombudsmen. My argument will be that to more fully understand the impact of employment arbitration on the workplace it is necessary to consider the relationship between arbitration and these other types of workplace procedures that are often incorporated into a single multi-step procedure.

II. WORKPLACE DISPUTE RESOLUTION PROCEDURES

Before examining the relationship between employment arbitration and workplace procedures it is useful to begin by describing the landscape of workplace dispute resolution procedures. Historically, the primary focus of consideration in workplace dispute resolution has been the well-developed grievance and arbitration procedures of unionized workplaces.⁷ Indeed, until recent years, workplace dispute resolution procedures could be characterized by a relatively simple dichotomy. On one side were unionized workplaces with strong institutional grievance-arbitration procedures, in which the union represented employees who brought grievances, and in which final resolution of disputes was provided by arbitration before neutral labor arbitrators applying the collective agreement negotiated between the union and management. On the other side, nonunion workplaces were characterized by the general

⁶ BALES, *supra* note 5; DUNLOP & ZACK, *supra* note 5; Schwartz, *supra* note 5; Stone, *supra* note 5.

⁷ *E.g.*, DAVID LEWIN & RICHARD B. PETERSON, THE MODERN GRIEVANCE PROCEDURE IN THE UNITED STATES (1988).

absence of formal dispute resolution procedures and the resolution of employee complaints resting at the discretion of management.⁸ Despite the significant changes that have occurred in many areas of industrial relations, union grievance and arbitration procedures have exhibited a high degree of continuity and stability. Overall, on the union side of the dichotomy, relatively little has altered.⁹ In contrast, on the nonunion side, the picture of workplace dispute resolution has changed substantially. The most striking characteristic on the nonunion side is no longer the absence of formal procedures, but rather significant variation in the adoption of procedures and a marked degree of diversity in the structure of workplace dispute resolution procedures. In a colorful analogy, the world of nonunion dispute resolution has been described as the "Wild West" in comparison to the staid "back East" of unionized dispute resolution procedures.¹⁰ Whereas many nonunion workplaces continue to have no formal procedures for the resolution of employee complaints or grievances, estimates suggest that over half of

⁸ Compare the following descriptions from the classic 1960 work, SUMNER H. SLICHTER ET AL., THE IMPACT OF COLLECTIVE BARGAINING ON MANAGEMENT (1960):

In a broad sense the formal grievance procedures found in various labor agreements are very similar. Since they are appeal procedures, there are always several steps involved. Usually there are two lower steps and one or two higher steps followed by arbitration. The lower steps are the first line supervision step and one appeal.... The one or two higher steps in the grievance procedure allow appeal to top management officials, line, or staff, or both, and to higher local and international union officials....

Id. at 721-22.

It is extremely difficult for management to operate a grievance procedure effectively in nonunion plants. In these 'plants a few individuals may voice complaints or suggest changes, but in general the employees are not heard from, and their complaints rarely go beyond the foremen. Attempts to set up arrangements for handling grievances in plants where there are no unions have generally failed. Many managements [sic] have tried it, some by establishing employee representation plans to handle grievances. The employee committees were intended to be safety valves-to prevent the building up of discontent by giving workers a regular and management-approved procedure for bringing their problems to the attention of supervision. A high proportion of them failed.... Of the employee representation plans that survived, most remained in existence only because management went out of its way to stimulate interest in them."

Id. at 692-93 (citations omitted).

⁹ ADRIENNE E. EATON & JEFFERY H. KEEFE, EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 8 (1999).

¹⁰ *Id.* at 2.

nonunion workplaces now do have some type of formal dispute resolution procedure.¹¹ Among nonunion organizations that do have some type of formal procedure, there is also substantial variation in the structure of procedures used.¹² The most basic workplace procedures simply formalize the employee's ability to present complaints to management. In the absence of formal dispute resolution procedures, many nonunion workplaces have "open door" policies that often simply state that managers' doors are always open to employee concerns and complaints.¹³ The most rudimentary workplace dispute resolution procedures formalize these policies by providing a basic appeal structure indicating to the employee to whom a complaint or grievance can be directed and to whom an employee can next appeal if the dispute is not satisfactorily resolved.¹⁴ A weakness of this type of management appeal procedure is that the employee is often appealing up a chain of command in which higher-level managers will feel pressure to support and affirm the decisions of the lower level managers and supervisors who are their subordinates. As a result, one type of variation on the basic management appeal procedure is inclusion of a provision for review of the employee's grievance by a manager outside the chain of command leading from the employee.¹⁵ A more elaborate variant on review outside the chain of command is the use of an appeal board on which a group of three or more managers sit to hear employee grievances.¹⁶ Each of the different types of workplace procedures discussed so far involves managers hearing and deciding employee complaints or grievances.

¹¹ See Casey Ichniowski & David Lewin, *Characteristics of Grievance Procedures: Evidence from Nonunion, Union and Double-Breasted Business*, in PROCEEDINGS OF THE FORTIETH ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION (1988); Feuille & Chachere, *supra* note 2.

¹² See DAVID W. EWING, *JUSTICE ON THE JOB: RESOLVING GRIEVANCES IN THE NONUNION WORKPLACE* (1989); DOUGLAS M. MCCABE, *CORPORATE NONUNION COMPLAINT PROCEDURES AND SYSTEMS* (1988); ALAN F. WESTIN & ALFRED G. FELIU, *RESOLVING EMPLOYMENT DISPUTES WITHOUT LITIGATION* (1988).

¹³ Peter Feuille & John T. Delaney, *The Individual Pursuit of Organizational Justice: Grievance Procedures in Nonunion Workplaces*, 10 RESEARCH IN PERSONNEL AND HUMAN RESOURCES MGMT. 187 (Gerald R. Ferris & Kendrith M. Rowland eds., 1992).

¹⁴ Feuille & Delaney, *supra* note 13; Alexander J.S. Colvin, *Citizens and Citadels: Dispute Resolution and the Governance of Employment Relations* (1999) (unpublished Ph.D. dissertation, Cornell University).

¹⁵ Colvin, *supra* note 14.

¹⁶ EWING, *supra* note 12; Colvin, *supra* note 14.

Each of the different types of workplace procedures discussed so far involves managers hearing and deciding employee complaints or grievances. Employees may naturally be suspicious that managers will tend to sympathize with and support the decisions of their fellow managers and supervisors and be unfavorably disposed toward employee complaints.¹⁷ To counteract employee perceptions of bias in workplace dispute resolution procedures, some nonunion employers have introduced peer review panels in which employees sit on panels that review and decide grievances.¹⁸ The composition of peer review panels varies, with some composed entirely of employees who are peers of the complainant and others composed of a mixture of peer employees and managers; however, the essential feature of peer review panels is that the peer employees constitute a majority of the members of the panel.¹⁹ Although peer review panels remain a management designed and -administered procedure, research suggests peer employees are viewed by their fellow employees as more favorable decision makers for reviewing employee grievances.²⁰

Other types of workplace procedures alter not the decision-maker, but rather the process of dispute resolution. Some organizations use what have been described as "investigator" type procedures.²¹ One of the most elaborate of these is the procedure used by IBM, which evolved from the simple Open Door policy maintained by Thomas Watson, Sr., in the early years of the company.²² Under IBM's procedure, a senior manager from outside the chain of command involved in the dispute is assigned to investigate the employee's complaints and prepare a report recommending a resolution to the Chairman's Office.²³ Although perhaps at first sight unremarkable, the procedure is noteworthy in that it involves the assignment of relatively senior personnel at substantial cost to investigate disputes and provides tight

¹⁷ Brian S. Klaas & Daniel C. Feldman, *The Evaluation of Disciplinary Appeals in Non-Union Organizations*, 3 HUM. RES. MGMT. REV. 49 (1993).

¹⁸ EWING, *supra* note 12; Colvin, *supra* note 14.

¹⁹ *Id.*

²⁰ Klaas & Feldman, *supra* note 17.

²¹ EWING, *supra* note 12.

²² *Id.* at 149-59.

²³ *Id.*

timetables for the investigation to ensure rapid resolution of complaints.²⁴ Another type of procedure used in a number of larger organizations is an ombudsman's office. Ombudsmen's offices provide an alternative mechanism for employees to resolve disputes in the workplace, serving not as adjudicators of disputes, but rather as neutrals within the organization, available to assist employees or managers in the resolution of disputes.²⁵ An ombudsman can investigate employee complaints, act as an informal advocate for an employee subject to unfair treatment, or serve as an informal mediator between an employee and a manager or even between employees.²⁶ The effectiveness of an ombudsman is dependent on the ability to maintain the status as a neutral within the organization, separate from regular management. Organizations sometimes attempt to promote this neutral status by measures such as having the ombudsman report directly to the CEO or the Chairman of the Board of Directors and locating the Ombudsman's Office in a place where employees can have access to the ombudsman without compromising confidentiality. Yet an ombudsman remains an employee of the company, resulting in a tension between the desire to promote confidentiality and neutrality and the responsibility of the ombudsman to the company. The Eighth Circuit identified this tension as a factor in its refusal to extend to a corporate ombudsman a privilege covering communications related to efforts to settle a dispute analogous to a mediator's privilege.²⁷ More formal mediation procedures using third party neutrals are a recent innovation in some workplace procedures. As I will discuss in more detail below, these mediation procedures are commonly introduced in conjunction with employment arbitration procedures and have a similar focus on the resolution of potential legal claims.

²⁴ *Id.*

²⁵ Mary P. Rowe, *The Corporate Ombudsman: An Overview and Analysis*, 3(2) NEGOT. J. 127 (Apr. 1987); Mary P. Rowe, *The Ombudsman's Role in a Dispute Resolution System*, 7 NEGOT. J. 353 (July 1991).

²⁶ Lisa B. Bingham & Denise R. Chachere, *Dispute Resolution in Employment: The Need for Research*, in EMPLOYMENT DISPUTE RESOLUTION AND WORKER RIGHTS IN THE CHANGING WORKPLACE 104-05 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999).

²⁷ *Carman v. McDonnell Douglas*, 114 F.3d 790 (8th Cir. 1997).

III. LINKAGES BETWEEN EMPLOYMENT ARBITRATION AND WORKPLACE PROCEDURES

A. Survey Evidence

What is the relationship between employment arbitration and these various types of workplace procedures I have described? An initial component of answering this question is to examine the degree to which we find workplace procedures being used in the same organizations in which employment arbitration procedures are also adopted. In this section, I will describe some empirical findings on this question based on the results of a survey I conducted in the Fall of 1998 of dispute resolution procedures used by establishments in the telecommunication industry.²⁸ The establishment in this context means a single workplace, such as a calling center or a telephone repair garage. Use of an industry-specific study design is a common technique in organizational research designed to control for extraneous sources of variation.²⁹ Overall, sixteen percent of the 302 establishments that responded to this survey had adopted employment arbitration procedures. This is a somewhat higher rate of adoption than some earlier estimates, such as the ten percent adoption rate found in the GAO's 1995 study of federal contractors.³⁰ The higher rate I found was within a single industry, which may not be representative of other industries.¹ However, it also included a relatively broad range of organizations, from giant telecommunications companies to a number of smaller employers such as comparatively tiny Internet service providers, which makes it more representative in this respect. The survey results indicated that establishments with employment arbitration procedures typically also had some type of workplace dispute resolution procedure. Sixty-four percent of establishments with employment arbitration procedures also had some type of

²⁸ Colvin, *supra* note 14.

²⁹ E.g., HARRY C. KATZ, TELECOMMUNICATIONS: RESTRUCTURING WORK AND EMPLOYMENT RELATIONS WORLDWIDE (1997); Jeffrey B. Arthur, *The Link Between Business Strategy and Industrial Relations Systems in American Steel Minimills*, 45 INDUS. & LAB. REL. REV. 488 (1992); John Paul MacDuffie, *Human Resource Bundles and Manufacturing Performance: Organizational Logic and Flexible Production Systems in the World Auto Industry*, 48 INDUS. & LAB. REL. REV. 197 (1994).

³⁰ GENERAL ACCOUNTING OFFICE, *supra* note 3.

formal workplace procedure in place. In addition, establishments with employment arbitration had significantly higher rates of adoption of workplace procedures than establishments without employment arbitration procedures.³¹ Features of workplace dispute resolution procedures that were significantly more likely to be present in establishments that had employment arbitration included the following: review of employee complaints by managers outside the chain of command; review of complaints by management appeal boards; and peer review panel procedures.³² Establishments with employment arbitration were also significantly more likely to have mediation and ombudsman procedures.³³ Many of the organizations that adopted employment arbitration likely had pre-existing workplace procedures. These workplace procedures are introduced for a variety of reasons such as helping avoid unionization, enhancing employee commitment and reducing turnover, and in general to reduce conflict in the workplace.³⁴ However, the significantly higher prevalence of workplace procedures among establishments that had adopted employment arbitration raises the possibility that some of these workplace procedures may have been adopted in conjunction with the introduction of employment arbitration. Why might we expect to find a linkage in some organizations between the adoption of both employment arbitration and workplace dispute resolution procedures? There are two reasons that help explain this connection.

The first reason is concern among management that adoption of arbitration procedures may lead to an increase in the number of claims brought by employees.³⁵ This will obviously depend on the accessibility of the arbitration procedure and especially the degree to which the employer pays for the costs of arbitration. However, if arbitration is somewhat more accessible than the courts and, in particular, if the company is paying the costs of arbitration, companies

³¹ The difference in adoption rates between the two groups was statistically significant at a 95% confidence level (calculated based on a chi-square test: $X^2(1) = 4.85$).

³² Each of these features of workplace procedures was statistically more likely to be present in organizations with employment arbitration procedures at a 95% confidence level.

³³ Each of these features of workplace procedures was also statistically more likely to be present in organizations with employment arbitration procedures at a 95% confidence level.

³⁴ See Colvin, *supra* note 14; Feuille & Delaney, *supra* note 13.

³⁵ Colvin, *supra* note 14.

may fear that employees will make frequent use of arbitration, thereby increasing the costs of the procedure for the employer. Employers may adopt workplace dispute resolution procedures as preliminary steps before arbitration in order to try to increase the rate of settlement of disputes prior to arbitration. The second reason derives from the reality that organizations do not make changes on a continual basis. There is often significant organizational inertia limiting any kind of change in policies and procedures.³⁶ If employment arbitration procedures are being introduced this may provide an occasion to examine the question of changes to workplace dispute resolution procedures in general.

B. Case Study Evidence

What do procedures that combine employment arbitration and workplace procedures look like? What is the structure of these procedures and what is the relationship between the workplace procedure steps and the employment arbitration step? In this section, I will describe two examples of companies that have adopted extensive workplace procedures in conjunction with employment arbitration.³⁷

The first is the aerospace- and automobile-parts manufacturing company TRW.³⁸ TRW introduced employment arbitration in January 1995.³⁹ The most unusual feature of employment arbitration at TRW is that arbitration is mandatory but non-binding for the employee.⁴⁰ Following arbitration, the employee can decline to accept the arbitrator's decision and instead proceed to litigate the dispute.⁴¹ TRW management decided to make arbitration

³⁶ *Id*

³⁷ The description of these examples is based on qualitative case study research I conducted in 1997 and 1998, including interviews with key informants in the companies and review of documents describing the procedures. Further details of the research methodology are described in Colvin, *supra* note 14.

³⁸ TRW's employment arbitration procedure was among those profiled by in a 1997 GAO study. U.S. GENERAL ACCOUNTING OFFICE, LETTER REP. No. GAO/GGD-97-157, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE (1997) [hereinafter EMPLOYERS' EXPERIENCES].

³⁹ Colvin, *supra* note 14, at 122-66.

⁴⁰ See EMPLOYERS' EXPERIENCES, *supra* note 38; Colvin, *supra* note 14, at 122-66.

⁴¹ Colvin, *supra* note 14, at 122-66.

nonbinding out of concern that adopting a binding procedure would be viewed by employees as an anti-employee measure that could undermine the company's human resource strategy of promoting a high level of employee commitment and trust.⁴² In other respects, employment arbitration at TRW is less unusual, though paralleling the provisions of the Due Process Protocol more closely than some procedures. Arbitration is before a single arbitrator, jointly chosen from a list supplied by the American Arbitration Association.⁴³ The company pays for the costs of arbitration, apart from a small filing fee.⁴⁴ The employee is allowed to have representation by counsel.⁴⁵ Pre-arbitration discovery is provided for, but limited to discovery of documents plus a single deposition for each side unless expanded by the arbitrator.⁴⁶

When employment arbitration was introduced at TRW, a number of divisions of the company already had in place existing workplace dispute resolution procedures.⁴⁷ Some of these workplace procedures were simple open door or management review procedures, but some parts of the company had already developed more elaborate peer review panel procedures. Employment arbitration did not replace, but rather was introduced as an additional procedure on top of these previously existing workplace procedures. In addition, in conjunction with the adoption of employment arbitration some divisions introduced new and expanded workplace procedures that provided steps prior to arbitration for the resolution of disputes. Each division of the company was able to adopt its own workplace procedure so long as it terminated in employment arbitration conducted in accordance with TRW's general corporate policy.

One of these procedures combining employment arbitration with workplace procedures is that adopted in TRW's Systems Integration Group (SIG).⁴⁸ The SIG procedure begins with

⁴² *Id.* at 136-37.

⁴³ *Id.* at 137-38.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.* at 140-41.

review of complaints by management at the local level. The first step in the procedure is for the employee to attempt to resolve the dispute with his or her supervisor. If the employee requests, the local human resource representative can also be present at the meeting where the employee and the supervisor discuss the dispute. Assuming that the dispute is not resolved at this initial stage, the employee can proceed to the next step in the management review process, which is to appeal to a more senior manager. Again, the local human resource representative can be present at the meeting where the employee and the senior manager discuss the dispute. If no resolution is reached in the first two stages of the procedure, the employee then has the option of proceeding to the third step in the procedure, which is a hearing before an appeals board that is a type of peer review panel. The appeals board is composed of five members, all of whom are regular peer employees, three selected by the employee and two by management. This appeals board will then sit to review and decide the employee's complaint. The employee has the option of skipping this appeals board stage and proceeding directly to the next step in the procedure.

Following completion of the local management review and appeals board stages, the dispute does not proceed directly to arbitration as the next step.⁴⁹ Instead, mediation is included as the penultimate step in the procedure. Mediation is conducted before a single outside, third-party mediator with all costs being paid for by the company. Finally, arbitration is the last step in the procedure, after the dispute has proceeded through local management review, an appeals board if opted for by the employee, and mediation. An exception is made for disputes involving allegations of sexual or racial harassment or discipline or termination for having committed sexual or racial harassment, in which case the employee skips the local management review and appeals board stages and proceeds directly to mediation and arbitration.

⁴⁹ *Id.*

Other divisions within TRW have also adopted procedures that utilize various workplace procedures as preliminary steps before arbitration.⁵⁰ In the Vehicle Safety Systems Division, which is a major producer of air bags for the automobile industry, initial management review, peer review, and mediation procedures are all used as prior steps in the procedure before arbitration. The Valve Division, another part of TRW's automotive group, has also adopted both peer review and arbitration procedures. Although the non-binding nature of employment arbitration at TRW is highly unusual, this combination of workplace procedures and employment arbitration in the TRW procedures is less unusual. Indeed, there are some strong similarities in this regard between the TRW procedures and those adopted at Muftico, the second example I will describe.

The second is a large diversified manufacturing company that I will refer to here as Multico.⁵¹ At the division of Multico -that I will focus on here, employment arbitration was introduced in 1996 in response to an increase in litigation following downsizing in the early 1990s.⁵² Production employees in the division are unionized, so employment arbitration only covered exempt professional and managerial employees. However, due to the large number of engineering-and other professional employees in the division, this amounted to several thousand employees and included around forty percent of the total workforce. Although some nonunion production employees in other parts of Multico were already covered by peer review procedures, prior to the introduction of employment arbitration no worker procedures covered these professional and managerial employees. However, when employment arbitration was adopted, Multico Aerospace also introduced workplace procedures that established a series of dispute resolution steps to be used before arbitration.

The procedure adopted by Multico Aerospace consists of four steps.⁵³ In the first step, the employee and the employee's immediate supervisor meet to review and discuss the

⁵⁰ *Id.*

⁵¹ *Id.* at 97-109.

⁵² *Id.*

⁵³ *Id.*

complaint. The employee or the supervisor may request to have a human resource representative present at the meeting. If the dispute is unresolved at this meeting, the employee can proceed to the second step of the procedure, in which the employee meets with a higher-level manager to discuss the complaint, again with a human resource representative present at the meeting. These first two stages are intended to provide relatively informal forums for the discussion of the dispute and provide a structure for management review of the complaint. Meetings are restricted to two hours in length and, more significantly, employees are not permitted to bring representatives, such as counsel, to these meetings in the first two stages of the procedure. Employees are entitled to review their own personnel records, but provision of, any additional information to the employee is at the discretion of management and the employee is prohibited from gathering additional information on his own, for example, by asking questions of other employees about the dispute.

Employees are allowed to bring any dispute through the first two stages of the procedure; however, to proceed to the third and fourth stages the employee's complaint must involve a potential legal claim.⁵⁴ The third step in the procedure consists of mediation by a mediator selected jointly by the employee and management from a list provided by the American Arbitration Association (AAA), conducted under the mediation rules of that organization. The company pays for the costs of mediation. In contrast to the previous steps in the procedure, the employee is permitted to have representation from counsel at the mediation stage. If the complaint is resolved at mediation, the company will reimburse the employee for up to \$2,500 in attorney fees and other related expenses. As in the previous stages, any provision of discovery at this stage is at the discretion of the company. If mediation is unsuccessful in resolving the dispute, the final step in the procedure is binding arbitration before an Arbitrator jointly selected from a list provided by the AAA.⁵⁵ The company pays for the costs of arbitration and the employee is also permitted representation at this stage. In contrast to the mediation stage, there is no provision for reimbursement of the employee for

⁵⁴ *Id.*

⁵⁵ *Id.*

attorney fees and other expenses at arbitration. There is a specific provision for discovery at the arbitration stage, albeit with limitations. Each side is entitled to depose two witnesses from the other side. Each side is also allowed up to ten written interrogatory questions to the opposing side. Requests for documentary discovery are allowed, but must be made at least thirty days in advance of arbitration and are limited to five documents and to documents requiring no more than eight hours to produce. However, the arbitrator is allowed under the procedure to order additional discovery and depositions and provision is made for a preliminary hearing to be conducted by telephone to make such a determination.

Despite their differences, both the TRW and Multico procedures share a number of common features. In each case, the initial steps in the procedure consist of some form of management review in which the employee discusses the dispute with either a supervisor or a higher-level manager. With some of the TRW procedures, a peer review hearing to review the complaint follows these initial steps. However, in both the TRW and Multico procedures, the next stage prior to arbitration consists of mediation conducted by an outside mediator. In each case, the final step in the procedure is arbitration.

In regard to due process protections, these employment arbitration procedures contain both significant deficiencies and strengths. They are subject to the general arguments for and against employment arbitration, albeit with the important proviso that some of the concerns over employment arbitration are substantially reduced in the TRW case by the non-binding status of arbitration allowing employees to proceed to the courts. However, simply looking at the employment arbitration procedures only tells part of the story of dispute resolution in the organizations. The striking similarity in both organizations is the inclusion of a series of workplace procedures that constitute the initial steps in the process of dispute resolution. This raises the question of what is the impact of these workplace procedures on the resolution of disputes. The next section will turn to examining this question.

IV. RESOLUTION OF DISPUTES THROUGH WORKPLACE PROCEDURES

A. Accessibility

One of the greatest potential strengths of workplace procedures is their accessibility and relative ease of usage. Typically, employees do not have to pay in order to file a complaint under a workplace procedure.⁵⁶ Procedural steps involved in proceeding with a complaint are also relatively simple under workplace procedures. Under both the TRW and Multico procedures described earlier, employees can initiate complaints by submitting a relatively simple form stating the nature of the employee's complaint or grievance.⁵⁷ Procedures are also relatively informal in nature, allowing for greater ease of usage by employees. This is particularly the case for management appeal procedures, where steps in the procedure often consist of the arrangement of a meeting between the employee and a higher-level manager to review and discuss the resolution of the complaint. However, even with the more formal hearings used in peer review panel procedures, the hearings are conducted without the formality of a court or even an arbitration proceeding.⁵⁸ Finally, under investigator and ombudsman procedures, the burden of carrying forward the complaint shifts to the investigator or ombudsman once the complaint is made, reducing the burden on the employee in bringing a complaint.

Accessibility and speed of resolution are particularly important features in the resolution of many employment disputes due to the ongoing nature of the employment relationship. In an ongoing relationship, an unresolved dispute has the potential to cause continuing damage to the relationship between the parties. For employees, this may include damage to working relationships and career prospects. For employers, lingering unresolved

⁵⁶ Neither the TRW nor the Multico procedures described earlier require employees to pay any type of fee to file a complaint. Similarly, the numerous workplace procedures described by EWING, *supra* note 12; MCCABE, *supra* note 12; and WESTIN & FELIU, *supra* note 12, did not require employees to pay any type of filing fee.

⁵⁷ Colvin, *supra* note 14.

⁵⁸ *Id.*

disputes may damage employee trust and commitment, reducing productivity. To the degree that workplace procedures can produce fast, efficient resolution of disputes, they hold the potential for reducing the impact of the dispute on the ongoing employment relationship for both parties. The importance of speed and accessibility may even be heightened in the context of some disputes over terminations, which might at first glance seem to be situations where the dispute is outside the ongoing relationship context.

If there is no possibility that reinstatement and continued employment will be a possible outcome of resolving the dispute, then the concern over speed of resolution is reduced. However, if reinstatement and continued employment is a possible resolution of the dispute over a termination, then time becomes the enemy of such a resolution. The longer the employee has to wait after termination before resolution of the dispute, the harder it will be to reintegrate the employee into the workforce and continue employment without seriously diminished future prospects. An employee seeking to have a termination decision overturned and to continue his employment has a significant advantage for a workplace procedure such as a peer review hearing that might be held within a couple of weeks as compared to either an arbitration hearing that may take months to be held or a court hearing that could take years.

B. Due Process Protections

If we turn to the question of due process protections under workplace procedures, the picture becomes less encouraging. Significant debates over due process have surrounded employment arbitration during the 1990s and have led to efforts to develop standards for these procedures, most notably the "Due Process Protocol."⁵⁹ In contrast, issues of due process in workplace procedures have received little public debate, and discussions of the development of due process standards remain largely limited to within the academic community.⁶⁰ Yet the concerns over due process protections in employment arbitration are compounded when one

⁵⁹ JOHN T. DUNLOP & ARNOLD M. ZACK, *MEDIATION AND ARBITRATION OF EMPLOYMENT DISPUTES* 93-118, 171-78 (1997).

⁶⁰ E.g., Richard L. Epstein, *The Grievance Procedure in the Non-Union Employment Setting: Caveat Employer*, 1 EMPLOYEE REL. L.J. 120 (1975); Feuille & Chachere, *supra* note 2.

considers workplace procedures. The advantages of the accessibility of workplace procedures within the organization come with the corresponding danger of management domination and an absence-of due process. Similarly, the concerns about the private nature of 'employment arbitration in comparison to the courts is compounded with workplace procedures in which the functioning of the procedures within companies is almost invariably invisible from the public eye. In this section, I will address two of the most important due process concerns in regard to workplace procedures: the neutrality of the decision makers and representation of the employee.

A basic due process deficiency of virtually all workplace procedures is the lack of a neutral third-party decision-maker.⁶¹ Lack of independence and neutrality are most obviously problematic in management appeal procedures, in which members of management retain decision-making authority. Indeed, much of the variation in workplace procedures is a product of efforts to produce procedures that present a greater degree of independence a neutrality in decision-making. Even management appeal board procedures that use panels of senior managers, such as managers from other divisions of the company or corporate level executives, represent a type of procedure that uses decision-makers generally less directly involved in the particular dispute.

Both peer review procedures and ombudsman offices represent more elaborate attempts to achieve independence and neutrality in workplace procedures, yet without involving decision-makers from outside of the organization. In peer review procedures, this is achieved through using decision-maker employees who are peers of the complainant and, therefore, arguably more sympathetic to the complainant's position rather than approaching the dispute with a managerial perspective. Similarly, the idea of an ombudsman's office is that it should serve as a "neutral" party within the organization that an employee can turn to in order to get independent help in resolving a dispute. Yet each of these types of procedures face

⁶¹ Bingham & Chachere, *supra* note 26 at 114-15; Feuille & Chachere, *supra* note 2.

challenges in achieving true neutrality within the organization. Peer employees may provide a more neutral perspective than managers on an appeals board, but they remain employees of the company and may tend to identify with the practices and rules of the organization rather than providing a truly independent perspective. For example, one of the focuses of the training provided to panel members under TRW's peer review procedures is to emphasize the role of the panel as being to apply rather than alter company rules and procedures. Similar concerns exist with the role of an ombudsman, who may be designated as a "neutral" within the organization, but who also remains an employee of the company.

Another major due process deficiency in many workplace procedures is the lack of provision for representation of employees in presenting complaints.⁶² Employers continue to exhibit a marked reluctance to allow representation of employees under workplace procedures, particularly when the representative is from outside the company. This reluctance is often stronger in respect to workplace procedures, which are perceived as internal matters, than for employment arbitration, in which representation by counsel is a right recognized even in those procedures that are seriously deficient in other aspects of due process.⁶³ For example, the Multico procedure described above recognizes the employee's right to representation by counsel at mediation and arbitration, but bars any form of representation in the workplace procedures that constitute the initial two steps in the procedure.⁶⁴

Some workplace procedures do attempt to address this weakness by allowing for representation of the employee. These forms of representation under workplace procedures show a surprising degree of diversity.⁶⁵ Some procedures limit employees to representatives from within the organization, whereas others allow employees to use non-employee

⁶² EWING, *supra* note 12; Feuille & Chachere, *supra* note 2.

⁶³ For example, even the procedure examined in *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999), which was deficient in many other areas of due process and described by expert witnesses as the worst procedure they had ever seen, did allow for employee representation by counsel.

⁶⁴ Colvin, *supra* note 14.

⁶⁵ David Lewin, *Workplace Dispute Resolution*, in THE HUMAN RESOURCE MANAGEMENT BOOK 197, 211-13 (David Lewin et al. eds., 1997).

representatives. In some cases this non-employee representation may come in the relatively conventional form of an attorney the employee has retained. However, other types of non-employee representatives who have been involved include spouses or other relatives of the employee and even an employee's clergyman, in one case brought under a TRW procedure.⁶⁶

Representatives drawn from within the organization also come in a number of different forms. For example, under the procedure used in one division of TRW, some employees have had a fellow employee who is more senior in the organization assist them in presenting their complaint.⁶⁷ Another type of representation occurs in some workplace procedures in which a human resource representative is assigned to assist the employee in presenting his case. Both TRW and Northrop, which also has a well-developed and long-standing workplace procedure culminating in arbitration, allow for human resource representatives to assist employees in presenting their complaints.⁶⁸

The idea of someone from the company's human resource department representing the employee in a complaint against management may seem incongruous and perhaps of little value. However, if the human resource representative takes this role seriously and puts significant effort into representing the employee, she may actually be a relatively effective representative, due to her extensive inside knowledge of company rules and procedures. Ultimately the effectiveness of this type of representation from within the organization depends in large measure on the bona fides of the management of the company in implementing and administering the procedure.

C. Resolution of Legal Claims under Workplace Procedures

The ability to have representation may significantly influence the employee's ability to present their complaint effectively under a workplace procedure. It may have even more

⁶⁶ Colvin, *supra* note 14.

⁶⁷ *Id.*

⁶⁸ EWING, *supra* note 12 at 281-97; Colvin, *supra* note 14; Lewin, *supra* note 6.8.

serious implications where the complaint involves potential legal claims. The danger is that the conduct of the claim through the workplace procedure may have implications for subsequent mediation or arbitration proceedings that will not be recognized by an employee lacking representation by counsel. In particular, information may emerge and admissions be made in the workplace procedure that will be relevant to a potential legal claim. If the workplace procedures provide the initial stages in attempting to resolve a potential legal claim, it is hard to imagine an employee's attorney not wanting at least the possibility to represent the employee in these procedures. Many of the non-attorney types of representatives used in workplace procedures may be relatively effective at dealing with routine problems concerning, specific internal company issues, but they are ill equipped to deal with any legal issues that may potentially arise.

A similar problem arises when we consider the ability of decision makers under workplace procedures to deal with potential legal issues. Most decision-makers under workplace procedures have no specialized legal knowledge or training. More elaborate procedures such as peer review panels and ombudsman's offices may enhance neutrality, but are not directed at providing greater legal expertise. In an intriguing study of managers responsible for reviewing employee complaints, Lauren Edelman found that these managers tended to conceptualize and recast the complaints as issues of poor management practice, rather than treating them as legal claims.⁶⁹ This is also reflected in the criteria under which many workplace procedures direct decision-makers to consider employee complaints. These typically instruct the decision-maker to consider only whether or not the company's rules and procedures were applied fairly and limit the decision-maker from modifying the company's rules and procedures in any respect. This type of instruction precludes the decision-maker from even considering many legal claims, i.e., any claim based on the legality of the company's rules and procedures.

⁶⁹ Lauren B. Edelman, *Legal Ambiguity and Symbolic Structures: Organizational Mediation of Civil Rights Law*, 97 AM. J. Soc. 1531 (May 1992).

In general, a major question mark needs to be placed over the role of workplace procedures in resolving potential legal claims. These procedures are generally not designed for resolving legal claims, and those involved in administering workplace procedures do not approach them with a focus on the legal aspects of disputes. Although, as has been described, workplace procedures and employment arbitration are often incorporated into a single multi-step procedure, there remains a major disjuncture between the two types of procedures. Employment arbitration is motivated by and oriented toward the resolution of potential legal claims; workplace procedures are primarily directed at the fairness of application of management decisions within the organization and not specifically directed at the application of legal standards.

In this respect, mediation in both the TRW and Multico procedures described earlier is much more closely associated with the employment arbitration stage of the procedures than with the workplace procedures that form the initial steps in the procedures. In these procedures, mediation is directed at the resolution of potential legal claims, permits representation of the employee by legal counsel, and involves consideration of legal claims arising from the dispute. Mediation in these procedures can be viewed as a preliminary settlement stage for legal claims that is conducted prior to arbitration. In contrast, the workplace procedures that provide the initial steps in attempting to resolve disputes are relatively ill-suited to the resolution of legal claims.

This then brings us back to the question of what is the relationship between employment arbitration and workplace procedures. One possible approach to conceptualizing this relationship would be to view workplace procedures as providing preliminary stages in the process of resolving potential legal claims. Taking this approach, we would evaluate workplace procedures by whether or not these procedures improve the resolution of legal claims that would otherwise be resolved in arbitration. Put alternatively, the focus would be on the impact of workplace procedures on employment arbitration.

If we take this route and try to make workplace dispute resolution procedures as more effective preliminary stages leading up to employment arbitration for resolving legal claims, we would need to try to correct some of the weaknesses of workplace procedures in regard to legal issues. The right to counsel would need to be guaranteed in workplace procedures. Access to information through discovery might be relevant. It would be important to ensure appropriate legal standards were observed in resolving claims. More broadly, the types of standards set out in the Due Process Protocol would need to be applied to workplace procedures.

The danger of this approach is that it may turn workplace dispute resolution procedures into a more cumbersome process that sacrifices some of the benefits of having a procedure more connected to the workplace. In addition, a question could be raised about whether workplace procedures could be turned into effective procedures for resolving legal claims and whether employers would ever adopt procedures following such a model.

However, if workplace procedures are relatively ill-suited for the resolution of potential legal claims, then it seems inappropriate to conceive of their function as primarily serving as pre-hearing settlement mechanisms for claims that are going to proceed to employment arbitration. If we say instead that the primary value of workplace procedures is on enhancing the fairness of management decision-making and the application of organizational rules and procedures, we need to address a different question: whether employment arbitration enhances or detracts from the effectiveness of workplace procedures. It is to this question that I will turn in the next section.

V. THE EFFECT OF EMPLOYMENT ARBITRATION ON WORKPLACE PROCEDURES: APPELLATE AND DETERRENT ROLES

How does employment arbitration affect the operation and effectiveness of workplace procedures? In this section I will describe two different ways in which employment arbitration

can affect workplace procedures. I will refer to these as the appellate and deterrent roles. These two roles represent different aspects of how the operation of workplace procedures is influenced by having employment arbitration as the final stage in a multi-step procedure that has workplace procedures as the initial steps. I will argue that these two roles have different implications for the relative advantages of arbitration compared to litigation in enhancing the effectiveness of workplace procedures.

A. The Appellate Role

As the final stage in multi-step dispute resolution procedures, employment arbitration has a role in some respects analogous to that of an appellate court in the judicial system. In this role, employment arbitration serves as an appellate body to which the employee can take a complaint if unsuccessful in the earlier stages of workplace procedures. By taking a complaint to arbitration, an employee can obtain review and potentially reversal of a decision made under a workplace procedure. Ideally, the arbitrator should serve as a neutral, third-party guarantor of the integrity of workplace procedures, providing regular review of decisions made under the workplace procedures and issuing awards that provide guidance for future decisions. An arbitrator with knowledge and experience in the area of employment law could perform a particularly useful function in remedying some of the weaknesses of workplace procedures in dealing with legal claims. In this picture, employment arbitration could exert a positive influence on the functioning of workplace procedures through its appellate role in multi-step procedures. However, there are reasons to question whether employment arbitration as currently constituted can actually fulfill this role of providing effective and regular review of decisions made under workplace procedures.

An initial concern is that the effectiveness of the appellate role of employment arbitration with respect to workplace procedures will be highly dependent on the due process protections contained in the employment arbitration procedure itself. For example, requirements that employees pay substantial arbitration fees in order to bring claims in arbitration may hinder access to arbitration, limiting usage, and weakening the appellate role of

employment arbitration. Similarly, if arbitrators are not expected to provide written reasons for the awards they issue, then any guidance that might be provided as to how future complaints under workplace procedures should be handled will be limited. In general, to the degree to which due process deficiencies, such as the absence of adequate provisions for discovery, hinder the ability to present an employee's case at arbitration, the likelihood that arbitration will serve an effective appellate role in reviewing complaints initially brought under workplace procedures will be diminished.

A broader problem with expecting employment arbitration to fulfill an effective appellate role with respect to workplace procedures is the mismatch noted earlier between these different types of procedures. Whereas employment arbitration is directed at resolving employment law disputes, workplace procedures are focused primarily on reviewing the fairness of management application of company rules and procedures. As a result, many complaints under workplace procedures alleging unfairness in the application of company rules and procedures that do not give rise to legal claims are unable to be reviewed under employment arbitration procedures that limit arbitration to potential legal claims. If employment arbitration is only reviewing a small segment of complaints brought under workplace procedures, it will only provide a relatively weak appellate function with respect to these procedures.

Even if employment arbitration does have substantial weaknesses in fulfilling an appellate role with respect to workplace procedures, it might be argued that it does no worse and likely at least somewhat better than litigation in this role. Indeed, it would be a stretch to describe litigation as having anything equivalent to this role with respect to workplace procedures. Only an extremely small proportion of complaints brought under workplace procedures will end up in litigation in the absence of an employment arbitration agreement precluding access to the courts. Furthermore, the court system with its elaborate procedures ensuring high standards of due process hardly provides an appropriate structure for the routine review of the many specific disputes that arise under workplace procedures. However, the

more important test in comparing the impact of the courts and employment arbitration on workplace procedures is not which one provides a more amenable structure for reviewing an individual complaint that has been brought under a workplace procedure. In the long term, the more serious impact of employment arbitration on the functioning of workplace procedures derives from its ability or inability to fulfill a deterrent role with respect to workplace procedures.

B. The Deterrent Role

The judicial system plays a relatively small direct day-to-day role in regulating employment relations. Despite concerns over burgeoning employment litigation, the actual number of cases filed each year, let alone the number that eventually reach some type of hearing, are miniscule in comparison to the overall size of the workforce. Yet avoiding litigation provides a powerful motivation for many employers in deciding how to manage their employees. Studies have found managers' fear of litigation extends far beyond the actual extent of protections provided to employees under current employment law and vastly exaggerates the actual probability of successful litigation by employees.⁷⁰ This fear of litigation among managers gives the legal system a powerful deterrent role with respect to how organizations treat their employees that far outweighs the direct effect of individual cases in reviewing and correcting individual management misdeeds.

This powerful deterrent role provided by employment litigation derives not from the certainty or regularity of employee recourse to the courts, but rather from the uncertainty and potentially severe consequences of employment litigation. The strength of the motivation for companies to take steps to reduce the chance of becoming involved in litigation is heavily influenced by the relatively small, but nonetheless non-zero, probability of involvement in a case in which a jury awards an employee very large damages.⁷¹ One of the critiques of the

⁷⁰ E.g., Lauren B. Edelman et al., *Professional Construction of Law: The Inflated Threat of Wrongful Discharge*, 26 LAW & Soc'Y REV. 47 (1992).

⁷¹ The high risk and potential mega-verdict environment of employment litigation that American organizations face is examined through an insightful cross-national study. Laura Beth Nielsen, *Paying*

litigation system, particularly from an alternative dispute resolution perspective, is that jury trials are lengthy, expensive procedures that produce uncertain outcomes with the danger of a runaway jury award of massive punitive damages against an employer. However, from the perspective of the deterrent role of employment litigation, the chance of such very high jury awards is not a pathological aspect of the system, but rather the aspect that provides strength to the deterrent effect. Absent the possibility of juries imposing massive punitive damages against an employer, the incentive on management from employment litigation would be substantially reduced. Put alternatively in terms drawn from international conflict, the effectiveness of deterrence depends on the ability to impose massive costs on the opposing party.⁷² This retaliation does not actually need to be used; indeed, the logic of deterrence is that the goal should be to avoid actually using the retaliatory power, but the possibility of such retaliation does have to be credible for the deterrent effect to work.

The deterrent role of employment litigation can have an important effect on workplace procedures by providing a strong incentive for management to enhance the fairness of operation of these procedures. A general weakness of workplace procedures is that they are highly dependent on the good will of management in establishing and administering these procedures. Some organizations may establish procedures that provide employees with effective recourse in disputes concerning unfair treatment in the workplace, while other organizations' procedures may provide employees with only the appearance of fairness and little actual prospect of obtaining redress for their complaints. The danger for management in following the latter course and turning workplace procedures into a sham is that disputes may go unresolved and end up leading to litigation with the attendant uncertainty and risks of that

Workers or Paying Lawyers: Employee Termination Practices in the United States and Canada, 21 Law & POL'Y 247 (1999).

⁷² The most familiar example of deterrence being used as a strategy is likely the mutually assured destruction that was the foundation of nuclear strategy in the Cold War. However, the notion of "conventional deterrence" has been used to describe the ability to deter aggression through the capability of inflicting substantial damage on a potential attacker in a variety of other international conflicts. JOHN J. MEARSHEIMER, CONVENTIONAL DETERRENCE (1983).

process. This creates an incentive for companies to enhance the level of fairness with which workplace procedures operate in order to reduce the danger from employment litigation.⁷³ As with other areas, in the administration of workplace procedures, the behavior of management will be influenced by the deterrent role of the judicial system and the potential for employment litigation.

This leads to the question of whether employment arbitration can play a similar deterrent role with respect to workplace procedures. If arbitration provides a more accessible forum for employees to pursue employment law claims, it is possible that this might strengthen its deterrent role. A greater volume of claims could lead to an increased perception by managers that they need to be more scrupulously fair in their behavior to avoid the danger of being the subject of a claim. The extent of this effect will depend on the relative accessibility of arbitration compared to litigation for employees to bring claims. However, both litigation and employment arbitration contain substantial barriers to accessibility that constrains employee usage.

While concerns are often expressed over the explosion of employment litigation, employees who desire to bring claims through the court system will encounter substantial barriers to accessibility. Although court filing fees are relatively low, to proceed with litigation an employee will almost invariably need to be able to convince an attorney to accept the case. Contingency fee arrangements allow plaintiffs' attorneys to accept the financial burden and risk of bringing cases; on behalf of employees, but introduce the limitation that the case will need sufficient prospects of success and potential for damages for the attorney to be able to proceed with the case. As a result, plaintiffs' attorneys are only able to assume the burdens involved in

⁷³ The influence of the legal system on the managerial operation of workplace procedures is detailed in Lauren B. Edelman et al., *The Endogeneity of Legal Regulation: Grievance Procedures as Rational Myth*, 105 AM. J. OF Soc. 406 (1999). Interestingly, the authors suggest that organizations rely on grievance procedures as a defense against litigation to a far greater extent than the actual value of these procedures in the event of litigation would support. This finding suggests that the deterrence role of employment litigation is even greater than would otherwise be expected, due to the development of rationalized myths based on the exaggerated threat of litigation that justifies managerial actions.

litigation for a limited percentage of all the employees who might wish to bring claims through the legal system. In addition to the limitations on financing cases, the indirect costs to employees from the lengthy time periods required by litigation constitute a substantial barrier to accessibility.

Although employment arbitration is sometimes advocated as a way to reduce the barriers to accessibility of the court system, as currently constituted, employment arbitration also contains substantial limitations on accessibility. Arbitration fees continue to be a concern in access to employment arbitration. In *Cole v. Burns International Security Services*,⁷⁴ the D.C. Circuit asserted a limitation on the ability of employers to require employees to pay arbitrator fees. Similarly, a provision requiring employees to pay half of all arbitrators' fees was one of the reasons given by the Fourth Circuit for refusing to enforce the arbitration agreement in *Hooters of America, Inc. v. Phillips*.⁷⁵ Some companies now do pay all arbitration costs or, at most, require an employee to pay a minimal filing fee equivalent to court filing fees,⁷⁶ but it is unclear how general this practice has become, particularly in circuits where the courts have not yet considered this issue.

Apart from the issue of the direct costs of arbitration, additional barriers to accessibility may arise from the cost to the employee of retaining counsel. Employment arbitration proceedings may be simpler and more informal than court proceedings, but presentation of an employment arbitration case is still likely to require the employee to retain counsel to effectively proceed with a claim. Plaintiffs' attorneys can effectively finance court cases on behalf of employees through contingency fee arrangements, but it is a major question whether such an approach will be possible in employment arbitration. Debates exist over the degree to which employee win rates are higher under arbitration or litigation; however, one of the major differences, that is an important motivation for employers to introduce employment

⁷⁴ *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997).

⁷⁵ *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933 (4th Cir. 1999).

⁷⁶ Colvin, *supra* note 14.

arbitration, is the significant reduction in the danger of very large punitive damage awards. Although such large damage awards are often seen as a pathological aspect of the court system, they do serve an important function in the contingency fee system by allowing plaintiffs' attorneys to finance a large number of cases that might not otherwise be able to be presented in court. If arbitration eliminates the large punitive damage awards, the question becomes whether plaintiffs' attorneys will be able to finance arbitration cases on contingency fee arrangements. If plaintiffs' attorneys find they have to switch to charging fees on an ordinary hourly basis for employment arbitration cases, this will substantially increase the costs to employees of bringing claims to arbitration and create a major barrier to accessibility.

Given these barriers to usage with respect to both systems, the relative advantages of litigation and employment arbitration deriving from accessibility in fulfilling the deterrent role are unclear. However, accessibility is only one factor influencing the effectiveness of the deterrent role. As noted earlier, a large measure of the strength of the deterrent role of employment litigation derives from the chance, albeit small, of a jury making a very large damage award against an employer. Whatever the effect of employment arbitration on the employee's chances of success compared to litigation, or its impact on average outcomes, one area where employment arbitration can be expected to change outcomes is in reducing or even eliminating the danger of massive punitive damage awards that employers fear from juries. Indeed, avoiding the danger of such massive jury awards provides one of the strongest motivations for organizations to introduce employment arbitration. However, if we recognize these jury awards as not being a pathology of the system, but rather a foundation of the deterrent role of employment litigation, then we need to be concerned about the danger that employment arbitration will undermine the effectiveness of this deterrent. Rather than enhancing the functioning of workplace procedures, it may well be that in the long run employment arbitration will undermine the effectiveness of workplace procedures by weakening the crucial deterrent role provided by employment litigation.

VI. CONCLUSION

In this article I have examined the relationship between employment arbitration and workplace dispute resolution procedures. One of the important characteristics of employment arbitration is that it is frequently introduced by organizations that also have various types of workplace procedures. In many instances, employment arbitration and workplace procedures are combined into multi-step dispute resolution procedures that use workplace procedures as the initial stages for resolving disputes with employment arbitration providing the final stage in the procedure. Examining the role of workplace procedures suggests that these procedures offer some important benefits for resolving employment disputes. Most notably, their proximity to the workplace and relative accessibility allow for greater employee usage and speed of resolution of disputes. These characteristics of speed and accessibility are particularly valuable in the employment context due to the ongoing nature of employment relationships, which may be damaged by lingering unresolved disputes. The major weaknesses of workplace procedures lie in their limited due process protections. In large measure the fairness of dispute resolution under workplace procedures rests on the good will of management in administering the procedures.

When employment arbitration serves as the final stage in a multi-step procedure, it might potentially increase the fairness of workplace procedures by allowing for a type of "appellate" review of decisions made in the earlier stages of dispute resolution under workplace procedures. However, at present, employment arbitration is relatively ill suited to providing this appellate role with respect to workplace procedures. Indeed, despite being included together in multi-step procedures, the focus of employment arbitration on substituting for the litigation process is significantly mismatched with the focus of workplace procedures on addressing issues of fairness in the application of organizational rules and procedures. As a result, it is unlikely that employment arbitration as currently constituted can fulfill an effective appellate role through regular review of decisions made under workplace

procedure.

Of even greater concern, employment arbitration may actually reduce the effectiveness of workplace procedures for employees by reducing the incentives on management behavior created by the deterrent role of employment litigation through the court system. By insulating employers from the uncertainty and potential for large jury awards of litigation, employment arbitration may in fact undermine the deterrent role of employment law and reduce the incentives that help promote fairness in the management of workplace procedures.