

Workplace Justice Without Unions

Hoyt N. Wheeler
Brian S. Klaas
Douglas M. Mahony

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W.E. Upjohn Institute for Employment Research
Kalamazoo, Michigan

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Workplace Justice in the United States: An Introduction

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

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

The situation is quite different in Western Europe and nearly all other countries. In these countries, there exists a general principle of law that dictates that workers cannot be terminated without cause. This principle is enforced either in labor courts, other specialized courts, or in the general court system.

The American rule of employment-at-will—that a person can be fired at any time for any, or no, reason—has deep roots in the nation’s jurisprudence. It was announced in a legal treatise in 1877, and is known as “Wood’s rule,” named for the author of the treatise, Horace Gay Wood. He stated, “With us [in America, unlike in England] the rule is inflexible that a general or indefinite hiring is *prima facie* at will” (Willborn, Schwab, and Burton 1993, p. 15). It has remained the general rule ever since. Its practical result is that, absent a statute or contract to the contrary, workers have no right to insist upon a just cause for their termination.

If employment were simply an economic transaction where a commodity called labor is bought and sold, we would need not concern ourselves about justice. The conventional wisdom in economics takes just such a view of employment. From this perspective, employment-at-will simply reflects the reality of a market. However, it is reasonably clear that, although there are aspects of employment that are congenial to an economic view, the full reality of employment is much more than that. As David Ewing, a former editor of *Harvard Business Review*, has said: “A company is a kind of society, its management a type of government, and managements that manage justly, as employees see justness, gain potent advantages over managements that do not” (Ewing 1989, p. 3). For a society to be managed justly, the substantive rules of workplace behavior must be just, and there must be mechanisms in place that deliver procedural “due process” (Ewing 1989).

Corporations are social organizations arranged in a hierarchy in which those at the top exercise authority over those at the bottom. This inevitably means that control must be exerted over those who are employed by others. In such circumstances, both human nature and differing interests between the employed and the employer give rise to a situation in which an abuse of power is not only possible, but highly likely (Wheeler 1997). In the workplace, there are order-givers and order-takers, and a common instrument of control by order-givers is the threat of a termination of the relationship. Ultimately, employees who do not behave as they are ordered will be separated from the organization—fired.

Fortunately, since the days when Wood’s employment-at-will principle was adopted by American courts in the late nineteenth century, there has been considerable erosion of it. In fact, management attorneys have recently claimed that it is gone entirely, but the reality of the matter is a bit more complicated than that. What has occurred over a period of about 90 years is the construction of a patchwork of limitations on employment-at-will. This has been aptly described as the gradual slicing away of an entire pie of rights that at one time wholly belonged to employers, until the remainder is only a remnant of what once was (Bennett-Alexander and Hartman 2001). Yet, in truth, the employer’s portion is still quite substantial. Arguably, it has grown significantly by virtue of recent U.S. Supreme Court decisions that will be discussed later in this book.

THE HISTORICAL DEVELOPMENT OF AMERICAN WORKPLACE JUSTICE

The road to the present system of workplace justice in the United States has been long and convoluted. Perhaps the clearest starting point is the enactment of the Clayton Act, effective in 1914. Hailed as “labor’s Magna Carta” at the time, it declared that “the labor of a human being is not a commodity or article of commerce.” Although the Supreme Court’s interpretation kept the Clayton Act from being a boon to labor, at least the principle was recorded as a part of American labor policy.

With the Great Depression and New Deal came the Wagner Act in 1935, which protected workers from termination based on their union activity. Legislation adopted in the 1960s prohibited termination on the basis of race, color, national origin, religion, sex, or age (Title VII, Civil Rights Act of 1964; Age Discrimination in Employment Act of 1967). The Occupational Health and Safety Act of 1970 prohibited employers from terminating employees for seeking remedies for safety and health hazards. Based on this legislation, employees are protected against discrimination on the basis of union activity, race, color, national origin, sex, age, and their actions to ensure a safe workplace.

In the 1980s, state courts began creating exceptions to the employment-at-will doctrine. Terminations that violated public policy, implied-in-fact contracts (often based on employee handbooks or company rules), and implied-in-law contractual obligations of good faith and fair dealing were held to give rise to legal claims on the part of employees. The manner of a termination, if abusive, could make the employer liable for damages.

The 1980s and early 1990s brought a spate of employment legislation. The Immigration Reform and Control Act of 1986 prohibited employers from discriminating against legal aliens; the Employee Polygraph Protection Act of 1988 limited the use of lie detectors in firing workers; and the Worker Adjustment and Retraining Notification Act of 1988 (WARN Act) required employers to give 60 days’ advance notice of a plant closing or mass layoff.

One of the more significant changes in the law over several decades was the adoption of the Americans with Disabilities Act in 1990. It expanded protection to employees against termination for physical and

mental disabilities. This was a right that had already been granted to employees of federal contractors in the Vocational Rehabilitation Act of 1973. Another major boon, the Civil Rights Act of 1991, gave employees the right to a jury trial, and to both compensatory and punitive damages, when they were terminated for reasons of race, color, national origin, religion, or sex. Further, the Family and Medical Leave Act (FMLA) of 1993 protected workers from being terminated for taking unpaid leave for family and medical purposes.

At the same time that Congress was expanding the protection of workers against unfair terminations for *particular reasons*, two other things were occurring that gave workers a claim to just treatment as a general right. First, beginning in the 1940s, collective bargaining agreements came to commonly include a provision that workers could be discharged or disciplined only for just cause. This obligation was enforced through labor arbitration, in which a neutral third party (an arbitrator) could make a legally binding determination that the employee had been unjustly discharged. Because the courts adopted a policy of keeping their hands off this process in the Steelworkers Trilogy of cases (*United Steelworkers v. American Mfg. Co.* 1960; *United Steelworkers v. Warrior & Gulf Navigation Co.* 1960; *United Steelworkers v. Enterprise Wheel & Car Corp.* 1960), there was virtually no way that a labor arbitrator's decision could be overturned on appeal. This system has been generally viewed as highly successful, delivering justice to employees without significantly interfering with management's ability to manage effectively. Its chief limitation is that, because of the decline of unionization, it only covers a small proportion of the private sector workforce (about 8.2 percent in 2003).

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

to facilitate a resolution of the dispute (McDermott and Berkeley 1996).

An especially interesting organizational justice procedure originated in the 1980s—peer review panels. Here, a panel of employees (and sometimes managers) makes a final decision or recommendation regarding an employee's grievance (Grote and Wimberly 1993).

The management-initiated organizational justice system to most recently rise to prominence is employment arbitration. In employment arbitration, a nonunion employer requires employees to agree to submit any complaints (or sometimes any allegations of violation of law on the part of the employer) to a neutral arbitrator whose duty it is to render a final and binding decision on the matter (Clark 1997).

There are several questions that need to be answered in regard to the various management-initiated workplace justice systems. First, do they deliver substantive results that are fair and reasonably similar to those obtained in other systems, such as the courts or labor arbitration? Second, do they provide due process? Third, how do they compare to one another on these dimensions? It is these questions that the study reported in this book aims to address.

PLAN OF THE STUDY

The first task in which we engaged was a survey of the literature on nonunion justice systems. This literature is quite extensive and will be summarized both here and in Chapters 2 and 3.

The empirical portion of our study has several aspects. In order to judge the substantive results obtained under these various procedures, we analyze overall win/loss rates by employees in termination cases in labor arbitration, employment arbitration, and the federal courts. The most intensive research strategy is our attempt to determine the degree to which the same result would be reached in the same cases across different processes. This is tested by posing scenarios to labor arbitrators, employment arbitrators, managers, members of peer review panels, jurors in employment discrimination cases, and labor court judges from other countries. By analyzing the responses to these scenarios, we can compare the relative harshness or leniency of the systems toward

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

Whether each procedure provides due process can only be judged by examining them in some detail. We identify these procedures through a combination of literature search and survey questions posed to the various decision makers, and then compare them. The result is a body of data and analysis that permits us to draw some conclusions on the differences among these systems as to both outcome and procedure, and to compare them on the basis of their merits.

THE LITERATURE ON WORKPLACE JUSTICE

What do we know about workplace justice without unions? The scholarly literature is somewhat helpful in providing ideas and arguments, but is woefully lacking in empirical studies. We will work our way through the existing literature, dealing first with open door policies, ombudsmen, mediation, and peer review panels. We will then turn to the body of knowledge regarding employment arbitration, in order to consider this important and controversial process in some length.

Why Workplace Justice Systems?

As noted previously, David Ewing (1989) has written that the workplace is a kind of society. As such, it requires a justice system. This is consistent with the guiding principles that were instituted in the founding of the American Republic. According to Ewing, “More than any other procedure or device on the business scene, corporate due process brings to the workplace the humanitarian philosophy that lit up the American sky two centuries ago” (1989, p. 118). In the workplace, it means that employees are entitled to the assurance that managers are less likely to make arbitrary decisions about their lives (McCabe 2002).

Yet, these democratic political ideals have seldom been in evidence in the American workplace. This has been attributed, in part, to a philosophy of management described and prescribed by the early and influential management theorist Chester I. Barnard. Barnard (1938) held that managers were the ones best able to distribute, at their discretion,

the resources of work organizations. This is thought to justify autocratic, rather than democratic, management. “America has been described as a sea of freedom filled with islands of despotism . . .” (Scott 1988, p. 294). The American corporation has been one of the islands.

The rise of workplace justice procedures in nonunion firms has been attributed to the rising importance lent by workers to the notion of “due process” (McCabe 2002). This may amount to a revolution of expectations on the part of workers, a “second civil rights revolution” (Ewing 1977, p. 39). Additionally, there are many reasons for firms to adopt these procedures, including 1) “developing a relationship of mutual trust and respect with employees”; 2) holding unions “at bay”; 3) “reducing litigation and litigation expenses”; 4) ensuring “greater compliance with the company’s personnel policies”; 5) pressuring managers to “deal constructively with their subordinates’ complaints and solve them on the spot if possible”; 6) providing feedback on the effects of policies on employees; 7) boosting morale; and 8) attracting and retaining good employees (Ewing 1989, pp. 6–9). Spotting and solving problems at an early stage before they fester is yet another advantage (McCabe 2002).

What is Due Process in the Workplace?

Some of the requirements of workplace due process are that there must be a procedure; it must have—and follow—rules; it must not be arbitrary; and it must be known to employees, predictable so that employees know that previous decisions on worker rights will be followed, “institutionalized,” easy to use, perceived as equitable, and applicable to all employees (Ewing 1977, p. 156). It must be “timely, accessible and inexpensive,” include the right of the employee to be represented by another employee, provide the right to present evidence and rebut charges, have “as much privacy and confidentiality as is practicable,” have “a fair and impartial fact-finding process and hearing,” provide objective and reasonable decisions with appropriate remedies, and be free from retaliation against the employee (Ewing 1989, pp. 6–7). It has been argued that this should include the right to have outside arbitration or some other mutually agreed-upon process (Werhane 1985).

“Soft” Justice Systems

The justice systems which are the least intrusive upon management prerogatives are those that are considered “soft.” These are procedures that do not bind management to any particular outcome. Instead of resulting in a legally binding determination, they provide a means of working out an agreed-upon solution. They sometimes constitute the early stages of more intrusive systems, and are comprised of three different procedures: the open-door policy, mediation, and the use of an ombudsman.

Open-door policy

The most common of the corporate procedures for resolving employee complaints is the open-door policy. In its simplest form, it is a policy statement that says that employees who have a problem are free to discuss it with management. The basic idea is one of managerial openness to employee complaints, even if this involves the employee going over the head of the immediate supervisor.

A study published in 1980 (Foulkes) found open-door policies to be quite “commonplace” (p. 300). The sample of policies reported by Foulkes included some rather complex policies that utilize multiple steps in the management hierarchy. They often include statements that an employee can use the policy without fear of reprisal. Also, they commonly encourage employees to settle their problems at the lowest practicable level of supervision.

The intent of these policies is to encourage employees to talk with managers in a friendly and informal fashion. The door of even such a dignitary as the president of the company is sometimes held open, and the human resources manager may be a step in the process (McCabe 2002). Open-door policies are often broader in their scope than unionized grievance procedures, encouraging employees to raise a wide range of problems and questions (McCabe 2002).

The effectiveness of open-door policies appears to vary from company to company. The interviews with personnel staff and managers reported by Foulkes (1980) show opinions ranging from avid approval to the statement that the policy is merely a “myth” (p. 309). Many times, although the door is supposed to be open, almost no one walks

through it (McCabe 2002), or only trivial questions are raised. Employees may believe that they will not get a fair hearing because there is considerable social distance between rank and file employees and high company officials, which may discourage employees from using the procedure to its fullest extent. Perhaps most critically, it is difficult to convince employees that going over their bosses' heads will not lead to reprisals (McCabe 2002). In the case of employment termination, many upper level managers feel a necessity to support the actions of lower level managers, or employees may believe this to be the case. This makes the use of the procedure an unattractive channel for a complaint regarding a discharge.

Unfortunately, we have not been able to locate any rigorous empirical studies of open-door policies. For the purposes of studying termination of employment, however, they are probably not a particularly fruitful subject of inquiry.

Mediation

Mediation utilizes the services of a neutral third party to help the parties to a dispute resolve it. The mediator is not a decision maker; rather, mediators serve as facilitators. The use of mediation is a "soft" form of dispute resolution because it imposes on the parties no binding result. Its methods are those of "win-win" bargaining, and as such, it provides opportunities for the employer and the employee to work out a mutually agreeable solution to an employment problem in a relatively nonadversarial setting (McDermott and Berkeley 1996).

Mediation has been said to provide a forum that is more likely to facilitate settlement than the more adversarial procedures involving adjudication. It is confidential, may produce a settlement at an early stage, provides an opportunity to redirect emotions, is adaptable and flexible, and can provide feelings of personal empowerment in cases such as those involving sexual harassment (Harkavy 1999).

The increase in formal grievance procedures for nonunion employees during the 1980s and 1990s has included an increase in the use of mediation. It has been argued that the overall phenomenon of increased mediation procedures has arisen partly because of "the increased willingness of disgruntled employees to file lawsuits and administrative agency complaints," and the resulting increase in the desire of employ-

ers to resolve these complaints by some means other than litigation (Feuille 1999, p. 205). Also, the availability of punitive damages and the right to jury trial given to workers claiming discrimination by the 1991 Civil Rights Act have encouraged employers to seek alternative means of dispute resolution. The related phenomenon of the take-up of employment arbitration by employers in the wake of the U.S. Supreme Court decisions in *Gilmer v. Interstate/Johnson Lane* (1991) and *Circuit City Stores, Inc. v. Adams* (2001a), discussed in Chapter 2, has involved the increased use of mediation (Feuille 1999).

Surveys of employers conducted in the mid 1990s showed large proportions of employers, particularly among the larger corporations, using some form of alternative dispute resolution (ADR), with mediation often being the preferred form (Feuille 1999). A study of five large firms that had adopted employment arbitration by 1997 showed that three of them had various forms of pre-arbitration dispute resolution procedures, including mediation. In 1999, the Equal Employment Opportunity Commission (EEOC) started encouraging employers to use ADR in handling discrimination claims, and initial analyses of this experience yielded positive results (Feuille 1999).

While mediation is widely admired as a dispute resolving process, it may be difficult to apply in the highly stressed atmosphere of a termination case. This is especially true if, as is usually the case, it is utilized subsequent to the discharge. Nevertheless, practitioners are generally of the opinion that it can frequently be helpful and seldom harmful. Therefore, it can be an important element in a workplace justice system.

Ombudsman

The corporate ombudsman “is a neutral member of the corporation who provides confidential and informal assistance to employees in resolving work-related concerns” (Kandel and Frumer 1994, p. 587). In the mid 1990s, it was estimated that about 500 corporations, most of them with 500 or more employees, had an ombudsman system in place (McDermott and Berkeley 1996).

Two crucial elements of an ombudsman program are that the ombudsman keep communications with employees confidential, and that the ombudsman be independent of management (McDermott and

Berkeley 1996). If ombudsman programs meet these conditions, they have considerable potential for removing communication barriers and helping to resolve disputes. A problem for ombudsmen is that they are in a position that is fraught with danger for their own careers. On one hand, they need to be independent of management, while on the other, it is expecting a great deal of upper level managers to assume that they will ignore the negative effects on the company's supervisors and finances that an energetic and assertive ombudsman can sometimes produce. Therefore, it is difficult for an ombudsman to maintain independence, and to be perceived by workers as being independent (Cooper, Nolan, and Bales 2000).

“Hard” Justice Systems

There are several justice systems that, unlike the “soft” ones, may impose a legally binding decision on the employer. These are peer review, employment arbitration, and labor arbitration. Peer review is actually something of a hybrid between soft and hard systems, since it may or may not result in a final and legally binding decision, while the others always do. We will discuss it here, leaving for later consideration the purely hard systems.

Peer review, which originated in the mid 1980s, was originally intended to be primarily a union-avoidance strategy. General Electric's Appliance Park plant in Columbia, Maryland, is where it started (Grote and Wimberly 1993). Recent research (Colvin 2003) provides evidence that union avoidance remains a significant motivation for the establishment of peer review committees. These systems “shift some personnel decisions from the company to the aggrieved employee's peers” (Cooper, Nolan, and Bales 2000, p. 664).

The procedures used by peer review systems vary considerably (Cooper, Nolan, and Bales 2000). However, they follow a general pattern of having worker complaints go to a hearing-like stage where a panel that is comprised of employees makes a decision regarding the worker complaint. The panel usually includes some managers, but the majority of the panel is made up of nonmanagerial employees. The original General Electric panels consisted of three members who were fellow workers and two who were managers (Grote and Wimberly

1993), which is the same makeup used in the Marriott system (Wilensky and Jones 1994).

The Marriott system is fairly typical. In it, 10 to 15 percent of employees in each of 50 business units are trained to be peer review panelists. Their names are placed in a box and drawn by the grieving employee. The employee can draw up to six names of peers, from which the employee chooses three. The employee then draws from a box the names of up to four managers, from whom the employee chooses two. The five persons chosen then make up the panel, which is required to hear and decide the case within 10 days of their selection (Wilensky and Jones 1994).

Other features of the Marriott system that are also considered typical require that the panel only interpret and apply company policies—it does not have the authority to change or abolish company policies. Generally, a human resources professional facilitates the operation of the panel.

The Marriott panels make final and binding decisions. This last element is one in which some companies' procedures vary, as some make the panel's decision only a recommendation for management action. However, making the panel's decision nonbinding may subject it to attack under the provisions of the National Labor Relations Act (NLRA). The NLRA makes it an unfair labor practice for an employer to dominate or interfere with a "labor organization." In the case of *Keeler Brass Automotive Group* (1995), the National Labor Relations Board (NLRB) held that an employee committee of this type that did not make a final and binding decision was engaged in "dealing with" the employer over wages, hours, and terms and conditions of employment, and was therefore a "labor organization" under the law. Setting up and managing such an organization is a violation of Sec. 8 (a)(2) of the NLRA. In *Sparks Nugget, Inc.* (1977), the NLRB had decided that a panel that made a final and binding decision was legal. Interestingly, some companies have made a decision to make peer review panel decisions only recommendatory, requiring the approval of management when they uphold a termination, even though they recognize that this likely violates the NLRA. The reason for a company to ignore the law likely lies in the fact that there are no penalties for violating it, and the worst that can happen is that the NLRB can order the company to change its practice in the future.

How well do peer review panels work? It is claimed that employees like them, primarily because they deliver an objective and fair decision (Wilensky and Jones 1994). Managers tend to like peer review because it helps employees understand the management point of view, with employees being less likely to blame managers for disciplinary actions (Wilensky and Jones 1994; Cooper, Nolan, and Bales 2000). One firm found that peer review dramatically reduced employee filings with the EEOC (Wilensky and Jones 1994). In addition, there is some anecdotal evidence supporting the belief of managers that peers will be more harsh with employees than managers would be (Cooper, Nolan, and Bales 2000). A result attributed to peer review that is to the advantage of both workers and managers is that managers tend to be more careful in making decisions if they know that those decisions will be reviewed by a peer review panel (Wilensky and Jones 1994).

On its face, peer review appears to be an extraordinary delegation of power by management to rank and file employees. From the point of view of traditional analysis of management/employee relations, it is certainly an anomaly. How, then, does one explain this from the standpoint of managers' self-interest? Is it simply that they believe in empowering workers and are willing to give up authority in pursuit of this ideal? Is it that they believe that this will lead to efficiencies and profitability? Is it mainly a union avoidance technique? Or, do they believe that employees will be more severe than managers, so that they are cynically delegating an unpleasant task at no cost, given that punishments will be upheld more often by peer review committees than they would by upper management?

The answer may be some combination of several of the above considerations. The explanation cannot be based simply on ideological grounds. If management believes that satisfied workers perform better, they might favor a procedure that would increase satisfaction, hoping that this would lead to greater productivity. The prevention of litigation would lead to lower costs, thereby contributing to efficiency. The avoidance of unions is certainly among the motivations, and peer review may provide a substitute for one of the main advantages of unionism—an effective grievance system. A human resources manager was overheard to remark that her company's peer review procedure had worked well in its first test because management had won the case. This

made it fairly clear what management's criterion was for a successful program—the peer review committee denying the grievance. Also, the establishment of peer review committees has been found to be related to the adoption of more general high-performance management systems (i.e., teams and the like) (Colvin 2003). This may indicate that peer review is often just one aspect of an overall policy of employee involvement.

The most important effects from both the employer and employee perspectives may be more subtle and long-range. It may well be that supervisors take greater care with disciplinary actions when they know that a relatively objective review of these actions will be made. Clearly, this is the hope for positive effects of the “hard” processes generally—that the prospect of having a decision overturned will make for better, more objectively justifiable decisions. It is precisely this that is a prime requirement for the provision of human dignity at the workplace.

From a management perspective, it may be extremely helpful in the long run to have a group of rank and file employees (trained peer review panel members) who have a sympathetic understanding of the difficulties that managers face in discipline cases. The role of a manager is often a difficult one, and it can only be eased by making subordinates aware of this fact.

There are many questions that remain unanswered about peer reviews. Are they fair? How do their decisions compare with those reached in other “hard” processes? Are they indeed more severe than managers would be? Does the presence of managers and the participation of human resources professionals permit the co-opting of employees into accepting management decisions? Are peer review panel members truly independent of management? We attempt to deal with at least a few of these in this study.

PLAN OF THE BOOK

In the next two chapters, we will discuss the literature and evidence on the most heavily studied of the “hard” management-initiated dispute resolution procedures—employment arbitration. In the chapters that follow, we will set out the methods and samples employed in our study, the data gathered, our various analyses of the data, and some general conclusions.