Resolving Individual Employment Disputes in the United States

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I. Introduction

The United States deploys a variety of devices for the resolution of workplace disputes, each attuned to the vindication of specific public and private rights. As a result, it is possible to compare one with another in terms of time, cost, and outcome, at least to get a general sense of how they operate. Before doing so, however, an overview of the labor market and the legal framework should be sketched in.

1. The Labor Market

As of August, 2005, the United States had a civilian labor force of almost 150.5 million workers: 77 million were men over the age of 20, and 62 million were women over that age. Federal, state, and local government employed over 20.5 million. Of the 130 million private sector workers, 14.3 million were in manufacturing, 90.5 million in service-providing employments. Union density in the private sector, the percentage of employees eligible for union representation who are actually represented by unions, had fallen to an historical low of approximately 8%, *i.e.*, between ten and eleven million workers. Concomitantly, industrial disputes (strike activity) has declined sharply over the past twenty-five years.

What follows will address the systems available for the redress of individual rights claims arising both under collective agreements and outside the collectively bargained context. It will not concern industrial dispute resolution nor the separate civil service and like protections offered public sector employees. The focus is on the individual employee in the private sector.

2. Employee Rights

The employment law of the United States is characterized by a feature unique among advanced economies; that is, the "at-will" rule under which, absent a contract of express duration, employment is assumed to consist of a series of instantaneous, *i.e.* moment-to-moment, offers and acceptances of work and remuneration. Under this legal construction, either party is free at any moment to cease to offer or to accept. As, the courts say, the employer is free to discharge an employee at any time, for any reason or no reason at all, even a morally repugnant reason. With the exception of Montana, Puerto Rico, and the U.S. Virgin Islands,

there are no laws giving a general assurance against or compensation for wrongful discharge *per se*, though employees are eligible for unemployment compensation under state systems if the reason for termination of employment did not involve personal misconduct.

The harshness of this vestige of nineteenth century *laissez-faire* is mitigated by a patchwork of statutory and common law exceptions to the at-will rule. Since 1935, federal law, the National Labor Relations Act (NLRA), has forbidden discharge or discrimination due to union activity; since the 1960s, Congress fashioned and added to a growing menu of proscriptions on discrimination in employment—the grounds of race, sex, religion, national origin, age, and disability, being the leading categories; since the NLRA, and the Fair Labor Standards Act of 1938, specific anti-retaliation prohibitions have been appended to numerous regulatory schemes. Many of these at the federal level are given to administrative agencies to enforce. Other workplace rights have been federally legislated—regulating the use of polygraphy (lie detectors), of telephonic or electronic eavesdropping, requiring notice of mass layoff or plant closure—which are vindicated by private rights of action, *i.e.*, by lawsuits. The states have variously recapitulated or added to these categories by statutory proscription, *e.g.*, by proscribing discrimination due to marital status, by protecting whistle blowing, or by extending the judge-made law of tort to a discharge for a reason that infringes upon some public policy; the states have also applied the dignitary torts—awarding damages for defamation, invasion of privacy, and infliction of emotional distress—for wrongful workplace behavior. Many states have extended contractual coverage to employer policies that are distributed widely to the workforce via a company manual or handbook and that are positive in assuring employer adherence to progressive discipline or that limit the ground of discharge to good cause—the latter paralleling a near universal provision of collective bargaining agreements.

Some of these systems, as noted above, are procedurally cabined: The vindication of rights guaranteed by the National Labor Relations Act is given to a federal agency, the National Labor Relations Board (which will be discussed below). So, too, other statutory rights—workers' compensation and unemployment compensation claims—are given to state administrative agencies whose actions are then subject to judicial review. Others rest on enforcement via private lawsuits, *e.g.*, contract and tort claims. Others involve a mixture of the two: federal claims of employment discrimination, for example, must first be filed

with the Equal Employment Opportunity Commission (EEOC) (or an equivalent state agency), which is supposed to mediate and is authorized to bring a lawsuit thereafter, but for the most part, these claims require individual lawsuits to be brought after the statutory waiting period of 180 days has been exhausted.

Recently, employers have swept various of these federal and state employment protections, statutory and judge-made, into unilaterally-promulgated arbitration systems, substituting a private for a public forum for the vindication of both private (*i.e.*, contract) rights and public (*i.e.*, statutory and tort) labor protections. This development has generated a growing body of law and a substantial amount of doctrinal, policy, and empirical discussion centering largely on whether or not these systems are fair to those involved and beneficial for society.[1]

The following will examine four of the most prominent dispute resolution systems: the prevention of unfair labor practices by the NLRB; the vindication of collectively bargained rights, especially the right not to be dismissed except for cause, via the grievance-arbitration provisions of collective bargaining agreements, *i.e.*, by "labor arbitration"; individual lawsuits over contractual and statutory claims; and, individual arbitrations conducted under unilateral employer arbitration policies covering these same contractual and statutory claims, *i.e.*, "employment arbitration" as it has come to be called as distinct from union-management "labor arbitration."

II. Four Dispute Resolution Systems

1 Unfair Labor Practices

The National Labor Relations Act guarantees employees the right to form, join, or assist a labor organization, to engage in collective bargaining and, indeed, other forms of concerted activity for mutual aid and protection, or to refrain from such activity. If employees have selected a representative to represent them under the Act, the employer and the employees' representative are required to bargain and to bargain in good

[1] The best recent writing would include: Jean Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005); David Sherwyn, Samuel Estreicher, & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557 (2005) [hereinafter Sherwyn *et al.*]; Clyde Summers, *Mandatory Arbitration: Privatizing Public Rights, Compelling the Unwilling to Arbitrate*, 6 U. PA. J. LAB. & EMP. L. 685 (2004); and HOYT WHEELER, BRIAN KLAAS & DOUGLAS MAHONY, WORKPLACE JUSTICE WITHOUT UNIONS (2004) [hereinafter WHEELER ET AL.].

faith. It is an unfair labor practice for an employer or union to restrain or coerce employees in the exercise of these rights or to refuse to bargain in good faith.

Violation of these prohibitions are termed statutory "unfair labor practices" remedied exclusively via the procedure the statute sets out: (1) any person who believes an unfair labor practice has been or is being committed within the statute's period of limitation (six months) may file a *charge* with the NLRB; (2) the Board's agent investigates the charge; (3) if the case appears to be well founded and proves intractable of settlement, a formal *complaint* will issue, but the case can be settled or the complaint withdrawn any time before the commencement of the formal hearing; (4) the complaint is heard before an Administrative Law Judge (ALJ), who is independent of the Board—the ALJ submits a report making findings of fact and conclusions of law with a proposed remedy, if any; (5) the ALJ's decision is automatically appealable to the Board, which decides most cases on the basis of the parties' written briefs and the record made before the ALJ, usually by three-member panels. (The Board's decisions are final orders, they are reviewable before the U.S. Courts of Appeals.) Note that if a complaint issues, the entire process is run and is paid for on the employee's part by the federal government. There is no pre-trial discovery under NLRB procedures, but the burden of proof remains on the Board's counsel. Table 1.0 gives an indication of the Board's total casework.

Table 1.0 NLRB Case Load

	Charges Filed	**Withdrawn Before Complaint**	**Dismissal Before Complaint**	**Settled or Adjusted Before Complaint**	**Board Order in Contested Cases**
1990	33,833	30.3%	34.8%	30.1%	2.4%
2000	29,188	29.5%	30.8%	35.4%	1.7%
2004	26,890	29.0%	30.8%	35.8%	2.3%

Source: NLRB

The lion's share of charges filed with the Board are against employers and the bulk of these are allegations of dismissal or discrimination due to protected activity. Table 1.1 sets out the distribution of unfair labor practice charges.

Table 1.1 Distribution of Charges of U.L.P.

	Charges Against Employers	**Charges of Unlawful Discharge or Discrimination**	**As a % of Charges Against Employers**	**As a % of All Charges**
1990	21,910	11,886	54%	35%
2000	22,095	10,456	52%	35.8%
2004	19,946	9,294	50%	34.6%

Source: NLRB

Not surprisingly, the complaints issued by the Board are overwhelmingly against employers, as Table 1.2 evidences.

Table 1.2 Complaints Issued Against Employers as a Percentage of All Complaints Issued

1990	82.6%
2000	90.5%
2004	88.5%

Source: NLRB

From the foregoing it is obvious that the Board is managing a settlement system, not a litigation system. Table 1.3 indicates the number of final decisions rendered by the Board in the relevant time periods.

Table 1.3 Initial U.L.P. Decisions of the NLRB

1990	515
2000	362
2004	381

Source: NLRB

For cases that do proceed into the hearing process, the time consumed at each stage is set out in Table 1.4.

Table 1.4 Days Consumed in Unfair Labor Practice Processing

	Filing Charge to Complaint	Complaint to Close of Hearing	Close of Hearing to ALJ Decision	ALJ Decision to Board Decision	Filing to Decision	In years
1970	57	58	84	124	348	0.95
1980	46	155	158	133	484	1.33
2004	87	114	78	392	671	1.84

Source: NLRB

The Board's remedial authority is limited to so-called "make whole" relief: back pay *less* mitigation—what the employee earned (or could have earned with due diligence) after the unfair labor practice—but with accrued interest, and, possibly, reinstatement of the discharged employee. About 80% of dismissed employees who are offered reinstatement accept. As the Act requires a charge of unfair labor practice to be filed within six months of the date it occurred, absent settlement, the system is one that, for the average wronged employee, generates about 20 months' back pay (*see* Table 1.4) less what the employee earned during that period (but with accrued interest).

2. Labor Arbitration

The vast majority of collective bargaining agreements contain grievance procedures to resolve disputes concerning the application or meaning of the contract's terms. The majority of these provide that the final step of the process culminates in some form of labor arbitration: before a standing umpire selected by the parties, a tri-partite panel, or a single arbitrator selected from an agreed upon list—often on a rotating basis—or selected *ad hoc, i.e.*, for that case only. Where, for example, the agreement provides that employees will not be dismissed except for "good" or "just" cause, the employer is free to discharge and the union may take the discharge through the steps of the grievance procedure up to and through arbitration. The union may settle the grievance or decline to pursue it at any stage; but these decisions are constrained by a duty of fair representation that prohibits the union from acting out of hostility, dishonestly, in bad faith, or arbitrarily. The grievance-arbitration procedure is almost (but not quite) the exclusive means whereby unionized employees can vindicate their contractual rights. *I.e.* they can sue the employer, *e.g.*, for a discharge allegedly lacking in just cause, but only if they can prove the union breached its duty of fair representation in handling the case,

commonly, in its refusal to pursue the discharge to arbitration. (Other legal causes of action have been held to be preempted by the grievance-arbitration provision where an element of such a cause of action, though independent of the collective agreement, requires an interpretation of it: The role of interpreter—or speaker—of the contract's terms being reserved to an arbitrator.) Judicial review of the arbitrator's award is extremely limited: errors of fact, even wrongful readings of the collective agreement are none of the courts' business for it is the arbitrator's judgment that was bargained-for.

The scope of a labor arbitrator's remedial authority is one of the more controversial questions within the arbitral community. A treatise complied by the leading figures in the field puts the "majority view" this way: "Although the parties are free to make the arbitrator the equivalent of a judge formulating remedies in a contract dispute, the parties generally do not anticipate that an arbitrator will act in this fashion."[2] The arbitrator is appointed by the parties to read their collective agreement; he or she is not a judge appointed or elected to dispense public law.

There are a number of ways the parties, the company management and the employees' union, can select an arbitrator. As noted above, they may have agreed to a single umpire, or a standing panel from which arbitrators are selected as cases arise; they may agree on a person, someone they've chosen in the past, on an *ad hoc* basis; or they may proceed to one of any number of agencies, private and public, that maintain rosters of arbitrators, vetted via the agency's standards and procedures, from which a panel of candidates will be submitted to the parties and from which, by striking off the names of persons they do not want, a final selection will be made. Consequently, there is no way of knowing just how much labor arbitration is being done or by whom. Arbitral awards may be published with the consent of the parties and there are two commercial services publishing awards, but the vast majority of awards are unpublished.

The Federal Mediation and Conciliation Service (FMCS), an agency of the federal government, is a significant source of arbitral listing and selection and it does publish its statistics. From these, one can get a rough sense of the shape of the system. Table 2.0 sets out FMCS's activity, but *nota bene*, because sometimes more than one panel may be requested, the number of panels issued may exceed the number of requests made.

Table 2.0 FMCS Labor Arbitration Selection Program

	1990	2000	2004
Panel Requests	27,363	16,976	16,382
Panels Issued	32,215	19,485	18,033
Arbitrators Appointed	12,557	9,561	7,875

Source: FMCS

Although the figures for 2000–2004 are fairly stable, the decline from 1990 (indeed the figures from 1985–1990) probably reflect the decline in union density and so the reduction in labor arbitration overall.

Now to the time consumed in the process. These data are set out in Table 2.1.

Table 2.1 Days Consumed in the Labor Arbitration Process

	1985	1990	2004
Grievance to Request for Panel	109	95	159
Panel Request to Panel Sent	6	5	7
Panel Sent to Arbitration Appointed	98	71	106
Appointed to Date of Hearing	121	91	194
Hearing to Date of Award	45	65	46
Grievance to Award	379	327	512

Source: FMCS

Obviously, much of the delay experienced in 2004 compared to 1990 or even 1985 can be attributed primarily to the longer time the grievance took before a decision to notice the case for arbitration was made and, secondarily, to the greater amount of time the parties' took to set a hearing date with the arbitrator. (The former is puzzling because collective agreements customarily place a time limit on moving a grievance on to arbitration, one often asserted by employers as a procedural defense to the case being heard in the event of delay.) Even were the 2004 delay to be extraordinary, the fact remains that the time consumed from the date of discharge or discipline (consistently, discharge and discipline have been an issue in nearly half the cases decided by FMCS-selected arbitrators) until the Arbitrator's award is, on average, about a year. Like the NLRB, the arbitrator's authority in such cases is understood to be limited to reinstatement with or without back pay, but, unlike the NLRB, there is no rule requiring back pay to be adjusted for mitigation of damages. Neither does interest automatically accrue; these issues are for the arbitrator to decide.

[2] THE COMMON LAW OF THE WORKPLACE 358 (Theodore J. St. Antoine ed., 2d ed. 2005).

It is not required that lawyers be involved in the process, though they often are. There is no pre-trial discovery in arbitration (but, in discharge cases, the burden of proof to demonstrate just cause rests on the employer). Nor is a stenographic transcript of record or written post-hearing briefs a necessary element of the process, though here, too, the parties may agree to more rather than less procedure. Thus, the cost per case can be at least partially controlled by the parties; the very informality of the process conduces toward a good deal less preparation time than for litigation either in court or before the NLRB.

Customarily, arbitrators are paid on a per diem basis—for travel, hearing, study and decision time—and reimbursed for necessary expenses. In terms of the arbitrator's fees and expenses in the five-year period, 2000–2004, the average arbitrator's per diem rate grew from a little over $670 to just over $800. (In 1985 and 1990, the average per diem was $370 and $448 in 1985 and 1990 dollars respectively.) The average time cases took to be decided was a little over a day for the conduct of the hearing, and about two and a half days for study and decision. This has been a consistent figure for some decades. So, too, have arbitral expenses, *e.g.*, on average of about half a day of travel time per case. The figures are laid out in Table 2.2.

Table 2.2 Average Arbitral Fee and Expense Per Case

2000	2001	2002	2003	2004
$3,185	$3,103	$3,202	$3,412	$3,542

Source: FMCS (includes travel, hearing, study and decision time compensated on a per diem basis).

Most commonly, the parties will divide the arbitrator's fee and expenses between them.

Unions succeed before labor arbitrators in about 60% of discharge cases; unions prevail in slightly over half the cases presenting issues of contract interpretation.[3] Note that it is union's function to sift and winnow those cases it will take up to arbitration. *I.e.*, a process (on average, a lengthy one) of investigation and settlement negotiations precede the presentation of a case. But note also that management is aware before acting that it may have to defend its decision before an arbitrator. Cases may be taken up in arbitration for political reasons despite the merits: a union may take a case up because the grievant is a union officer or steward or is merely very popular with his or her coworkers; management may defend a defenseless case because it wishes to demonstrate support for an otherwise highly valued (if flawed) manager. But, in the main,

[3] Wheeler *et al*., *supra* note 1, at 52, 55.

one would expect only the more serious or arguable of cases to be presented, the easy ones being disposal of, one way or another, earlier on in the grievance settlement process.

3. Civil Litigation

This is a difficult area both to gather and to interpret the statistics. Cases may be brought in state or federal court. They can involve private, *i.e.*, contractual claims, or statutory ones. As attorney fees are not awarded to successful plaintiffs in contract cases, and as damages in such cases are limited to the current discounted value of the contract (less mitigation)—that is, unlike tort cases there is no compensation for pain, suffering, or humiliation, nor are punitive damages available—trial lawyers are unlikely to take contract cases on a contingent basis, that is, for a percentage of the judgment if they prevail, unless the sum involved is worth the gamble. Consequently, it has been argued that only the relatively well paid—executives, highly remunerated managerial and professional employees—are likely to sue for breach of contract.

Claims of employment discrimination based upon the federal Civil Rights Act must first be filed with the EEOC which, in 2004, received over 79,000 individual charges from the private sector. If these are not successfully conciliated (and if the agency doesn't sue, which it rarely does), the individual may proceed into court, state or federal. Here, too, however, it is difficult for an employee to secure trial counsel unless the sum potentially to be recovered justifies the taking of the case on a contingent basis, even though attorney fees are awardable to the prevailing party.

One study of 3,000 employment discrimination complaints filed in the United States District Court for the Southern District of New York (from 1997 to 2001), indicated that only 125 were tried to conclusion—115 by juries, 10 before judges. This is 3.8% of the total and may reflect that a good deal of settlement activity take place, delays in the trial process, or both. (Note that this statistic is congruent with the percentage of NLRB complaints that are litigated to conclusion before the NLRB.) This study found that employees won in

about a third (33.6%) of the cases going to trial with a median award of damages of about $95,600 and a median award of attorney fees of $69,400.[4]

A more exacting study was conducted by Theodore Eisenberg and Elizabeth Hill of Cornell University.[5] They disaggregated claims on the basis of the income levels of the plaintiffs (or claimants)—$60,000 per year being the cut-off distinguishing the low and medium-income employee from the more highly paid. (More on that below.) Using their sample, discrimination plaintiffs prevailed in federal court in 36.4% of cases (43.8% brought in state court) for median awards of about $150,000 in federal cases (about $50,000 more at the state level). For wrongful discharge cases the plaintiffs' win rate was 57% with the median award being about $69,000.

David Oppenheimer collected the data from several studies, mostly of California litigation, that separated wrongful discharge (in contract or tort litigation, the latter involving the public policy ground of employee protection) from employment discrimination claims, the latter disaggregated in turn by the category of discrimination the plaintiff was asserting, *i.e.*, sex, race, age, etc. He collated these studies into a general summary, part of which is abstracted as Table 3.0.[6]

[4]Michael Delikat & Morris Kleiner, *An Empirical Study of Dispute Resolution Mechanisms: Where Do Plaintiffs Better Vindicate Their Rights*, DISPUTE RESOLUTION JOURNAL 56 (Nov. 2003/January 2004). Wheeler et al., *supra* note 1, at 57 gives similar figures for such cases:

Year	Cases Terminated	Median Awarded
2000	22,553	$115,000
1999	23,721	$91,992
1998	23,606	$100,852
1997	21,492	$95,488

Source: Wheeler

Note that if about 80,000 complaints are filed with the EEOC each year and about 22,000 federal case are terminated each year, allowing for time lag, this means that only about 25% of complainants pursue their legal claim judicially (at least at the federal level).

[5] Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISPUTE RESOLUTION JOURNAL 44 (Nov. 2003/Jan. 2004).

[6] David Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U. CAL. DAVIS L. REV. 511 (2003).

Table 3.0 Summary of Individual Employment Litigation Win Rate and Median Verdict

	Plaintiff Win Rate	Median Verdict
All Common Law Wrongful Discharge	59%	$297,000
All Statutory Employment Discrimination	50%	$200,000

Source: Oppenheimer, *supra* note 6, at 536.

Oppenheimer's figures are fairly close to Eisenberg and Hill's. *I.e.*, in the latter case, discrimination plaintiffs prevailed in 44% as opposed to 50% in Oppenheimer's summary, and were awarded a median of $200,000 (at the state level), the same figure Oppenheimer gives. An aggregation of these studies will be displayed in Table 5.0, *infra*.

In terms of the procedure, the median days consumed from the filing of the judicial complaint until final disposition was 623 in federal filings and 708 in state ones. In non-civil rights cases brought into the state court, which one would assume to be primarily contract or other statutory claims, the median time consumed was 637 days.

4. Employment Arbitration

Few issues in employment law in the United States today have generated quite the controversy as the move some employers have made, abetted by the United States Supreme Court, to substitute an arbitral forum for the courts for the vindication of labor protective claims. As it has been explained, in adopting these policies, the modern corporation is offering the state a bargain predicated on the fact that small, individual claims of low and medium-paid employees are less likely to be heard in the civil justice system: if the state will stay its judicial hand, the corporation will unburden the state's courts by requiring its employees to arbitrate their legal claims.

> In this way, the jury—which is thought to be, if not biased against faceless corporations (with deep pockets), at least fickle—is eliminated. In return for greater predictability, a lessening of the potential for big damage awards, and the elimination of nuisance (or "strike") suits and of public litigation (with the attendant possibility of bad publicity), the corporation will make it practicable to hear cases that otherwise would have gone unheard.

> As a management lawyer put it, "[Arbitration is] faster, it's cheaper, and it's more manageable. If properly managed, it can provide a broader access to a neutral process."[7]

In light of experience, the argument for these systems has become more refined. It now attends to the pressure on employers to settle meritless or even frivolous claims. This, it is argued, creates a *de facto* severance pay plan, but only for the litigious or vexatious employee: mandatory arbitration thus "arguably ends de facto severance because arbitration lowers the costs of defense, including potentially adverse publicity. Instead, employers can defend those claims that they believe are baseless."[8]

Unlike labor arbitration, where both the union and the company are "repeat players" in the selection of arbitrators, under these systems only the employer is the repeat player. It is much disputed whether or not this asymmetry biases the process. Nor is much known of arbitral selection: of how persons who become listed by private listing services are then culled for the parties' consideration.

Data in this area are extremely difficult to collect and even more difficult to interpret. Eisenberg and Hill found that higher paid complainants bringing non-civil rights issues before employment arbitrators prevailed far more frequently (65% win rate) than did lower paid workers (40%) and, not surprisingly, the former had much higher median awards ($95,000) than the latter. This statistic may simply evidence the truism that the lower paid will be awarded smaller sums, especially for wrongful discharge, than the higher paid. It does not appear that the win rate is lower in arbitration for employees vis-à-vis litigation. There is some, if slender, evidence (given small sample size) that arbitration generates lower average awards than does litigation.[9] *If*, as proponents of the system originally claimed, the system will open a door to the lower paid, the lower pay-outs, if true, could be explained by the greater resort to the system by the lower paid.

It does seem to be undisputed that the time consumed in the process is significantly less than that of litigation as Table 4.0 will show. Interestingly, the time taken is even lower than in labor arbitration.

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[7] Matthew Finkin, *Modern Manorial Law*, 38 INDUS. REL. 127, 132 (1999).
[8] Sherwyn *et al.*, *supra* note 1, at 1579.
[9] *Id.* at 1576.

Table 4.0 Median Days Consumed in Employment Arbitration from Complaint to Award

Non-civil Rights Disputes	Median Number Days
by higher paid	246
by lower paid	246
Civil Rights Disputes	
by higher paid	349
by lower paid	236

Source: Eisenberg & Hill, *supra* note 5, Table 3 at p. 51.

III. Some Preliminary Thoughts in Conclusion

Hoyt Wheeler and his associates have cautioned how difficult it is to draw comparisons from these and kindred data; one is tempted to substitute "dangerous" for difficult. But surely something can be said of each of these from the perspective of the others. If a society believes that wrongful discharge from employment—per se or on some specific ground—needs to be attended to by some form of legal address, the desiderata in constructing such a system have been set out. These are:

> 1. *Full Compensation*: The employee should be fully compensated for the wrong.
> 2. *Expedition*: The wronged individual should be compensated as swiftly as possible—to maintain his or her standard of living, to secure psychological vindication, and, for the employer, to put the dispute to final rest, so also to dispel any lingering morale consequences to the remaining complement of employees. This may suggest the encouragement of a process of settlement.
> 3. *Fairness*: Where the dispute is not settled, a neutral, unbiased adjudication is required. This could be a judge, jury, an administrative hearing officer, or an arbitrator.
> 4. *Accuracy*: Only those actually wronged should be afforded a remedy; those properly discharged should not. This may require an adversary proceeding with the participation of counsel.
> 5. *Low Transaction Costs*: The costs of the system, of attorney and other fees, should be as low as possible.[10]

But the text goes on to point out that the internal conflicts in these ends make it impossible fully to effect all of them:

> The larger the compensation potentially involved, the greater the need for accuracy—certainly from the employer's perspective; the greater the need for accuracy, the greater the demand for due process—for pre-trial discovery, lengthier hearings, on the record and appellate review; the greater the demand for due process, the higher the transaction costs, especially attorney fees—and the greater the delay.[11]

[10] MATTHEW FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 191–92 (3d ed. 2004).
[11] *Id.*

Let us look at an admittedly crude overview of these systems, Wheeler's admonition notwithstanding. It is set out in Table 5.0.

Table 5.0 An Overview of the Foregoing

	Average Period from Complaint to Formal Process: Investigation & Settlement	**Average Period from Complaint to Conclusion**	**Win Rate**	**Remedy**
NLRB: Wrongful Discharge Due to Union Dismissal	87 days	584 days	N/A	REINSTATEMENT/ABOUT A YEAR'S BACK PAY LESS MITIGATION PLUS INTEREST
Labor Arbitration: Wrongful Discharge	159 days	353 days	60%	REINSTATEMENT/ABOUT A YEAR'S BACK PAY PLUS OR MINUS
Lawsuit: Discrimination	180 days (statutory minimum)	623 days	34%–50%	$95,000–$200,000 (medians)
Lawsuit: Wrongful Discharge	None required	637 days	57%–60%	$69,000–$297,000 (medians)
Employment Arbitration: Wrongful Discharge[12] (Lower Paid Only)	None required			
Civil Rights Claim		236 days	24.3%	$56,000 (median)
Non-Civil Rights Claim		246 days	40%	$13,500 (median)

1. *The NLRA.* The prohibition of § 8(a)(3), against discharge or discrimination due to union activity, expresses the core or fundamental value of the freedom of association. Most charges of its infringement are settled, presumably satisfactorily from the employees' perspective: of about 20,000 complaints filed, only about 1,200 will actually get to be heard in the adjudicative process. The cost to the employee is nil, for that is absorbed by the agency and spread to the public at large, to vindicate the public purpose. The cost to the employer is no doubt akin to litigation, though without pre-trial discovery but with

[12] Eisenberg & Hill, *supra* note 5.

extensive brief writing at both the ALJ and Board stage. There are no statistics readily available on the cost to employers to litigate such cases but, taking an estimate for the trial of a discrimination case as a base and discounting from it for these factors, a "ball park" estimate of attorney fees of $70,000–$100,000 to resist a § 8(a)(3) complaint would probably not be low.[13]

Note that the average wage in the United States in 2003 was around $42,500, and that the workers likely to invoke the Act are paid considerably less: $30,000 p.a. ($14.42/hour) for a medium paid worker (well below the $60,000 cut-off for the higher paid used by Eisenberg and Hill) would be a workable estimate. Note also that given the average duration of a section 8(a)(3) case, of twenty months from discharge to Board remedy, the wrongfully discharged would take home $50,000 at the conclusion of the process, plus interest but *less* mitigation. If he or she worked or could have worked at a job paying $11.50/hour, the make whole relief due would be about $10,000 plus interest. The devotion of legal resources on the employer's part, of, say, $75,000 or more, to resist pay-outs of such small magnitude evidence that something of more significance is going on: either the employer is so adamant about the rightness of its conduct that it is willing to incur this cost, for pure vindication, or the discharge is part of a larger scheme to avoid unionization. (Note that deterrence of meritless claims, argued in defense of employment arbitration, is inapplicable here as the NLRB staff sifts out the frivolous and patently meritless in the case handling procedure.) The prospect of paying a few tens of thousands to a handful of discharged union activists years after their discharge, and of paying lawyers a hundred thousand or so dollars to defend that action, may be a good business decision if the result is that support for a union is dissipated. *I.e.*, the pay increase a union would have demanded might, if the employer were to accede, dwarf the total cost of discharging the union's leadership. It seems fair to say of these circumstances that the NLRA's remedial scheme has rather little deterrent effect as well as under compensating the victims of unlawful behavior.

[13] This figure is arrived at by taking the following: "[I]t costs employers (1) between $4000 and $10,000 to defend an EEOC charge, (2) at least $75,000 to take a case to summary judgment, and (3) at least $125,000 and possibly over $500,000 to defend a case at trial . . ." Sherwyn *et al.*, *supra* note 1, at 1579 (references omitted) and discounting for the lack of motions, discovery, etc. and the brevity of the hearing.

2. *Labor Arbitration*. A major study of labor arbitration was undertaken by Robin Fleming more than forty years ago.[14] He was critical of the increasing cost and delay of the system, attributable to creeping legalism. That trend has continued, as Table 5.1 shows, and dramatically so, but only in the time consumed in getting to the hearing stage.

Table 5.1 Labor Arbitration Delay 1963, 1990, 2002, 2004

	Grievance to Hearing	Hearing to Decision
1963	167 days	73 days
1990	262 days	65 days
2002	383 days	85 days
2004	466 days	46 days

Source: Fleming, *supra* note 14, at 58, and FMCS.

The pre-hearing stage of the proceeding is entirely in the heads of the parties, however, and if they want to work at greater expedition they can do so. In fact, unions and companies have initiated "expedited" arbitration systems to dispose of minor disputes or to clear backlogs.

The time of arbitral disposition, hearing, decision and study time has not changed significantly in forty years. Neither is there reason to believe the time taken by management and union lawyers to prepare and present such cases has changed over time. Consequently, the cost to the parties over the past forty years has essentially kept pace with the worth of the dollar measured by the growth of the Consumer Price Index (CPI) of 6 times the 1963 dollar, or by growth of the GDP per capita, of eleven times the 1963 dollar (a useful way of comparing incomes).[15] In the early 60s, management lawyers responding to a questionnaire reported that they spent about eleven hours preparing for the "average" one day case, usually one involving the imposition of discipline or discharge, and union lawyers reported spending about seven hours. Post-hearing briefs, which had become common even them, were used in about three-quarters of the cases, took eight and seven hours respectively. The hearing itself took a "day" of time which could be anywhere from four to eight hours.

[14] R.W. FLEMING, THE LABOR ARBITRATION PROCESS (1967).

[15] *Available at* http://eh.net/hmit/compare/result.php?use%5B%5D=DOLLAR&use%5B%5D=GDPDEFLATION&use%5B%5D=UNSKILLED&use%5B%5D=GDPCP&use%5D=NOMINALGDP&amount2=400&year2=1963&year_result=&amount&year_source=.

Adjusting the hourly rate for 2005 dollars, a fair estimate of cost today per "average" case today would be about $11,000 for the company in legal fees and $7,000 for the union, each bearing another $1,750 for the arbitrator.

To return to the grievant making about $30,000: in six of every ten discharge cases, companies will face an expense of a maximum of a year's back pay for a total of $180,000 plus reinstatement—there being no way to account for cases of reinstatement with no or limited back pay, a common arbitral remedy—for a total of $110,000 in lawyer fees and $17,500 in arbitral fees. The unions will have spent about $87,500, spread across their membership. Another way to look at the system would be from the perspective of cost per case for business. From that perspective, labor arbitration, the pinnacle of a system that involves lengthy and potentially exacting pre-hearing settlement negotiations, costs American companies about $12,750 per case heard, paying out $18,000 in each case (*i.e.*, across ten cases in six of which was a remedy afforded), no fees being paid by it to the union's lawyer nor punitive damages to the grievant.

3. *Litigation*. Clyde Summers termed the litigation of wrongful discharge a "lottery."[16] Hoyt Wheeler and his co-authors term this sobriquet "arguably unfair."[17] What Summers was adverting to was not only the prospect of tort damages that drives the contingent fee system, but, in a larger sense, how the whole system works. Return to Table 5.0, to a high income employee, one making at least $60,000 a year, who sues for non-discrimination wrongful discharge. In six cases out of ten, the employee would win and receive a judgment in the median range of $70,000–$300,000: let us say $185,000 on average. Half will go to the successful plaintiffs' lawyers, $92,500 each, about a year and a half of pay. Each case had to be defended and the defendant companies' lawyers would have been paid approximately $125,000 in each case.[18] What this means is this: of every ten cases heard, in order for $550,000 to be paid out to wrongfully discharged employees, $1.8 million has to be transferred to the lawyers.[19] One cannot but conclude that the United States

[16] Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 456, 466 (1992).
[17] Wheeler et al., *supra* note 1, at 66.
[18] A 1988 study, of California, estimated the employer's legal fee per case at $97,500. Summers, *supra* note 16, at 469. That figure is obviously out of date. *See supra* note 13.
[19] $550,000 to the successful plaintiffs' lawyers plus $1,250,000 to the defendant companies' lawyers who must be paid wither they win or not.

civil litigation system, insofar as it deals with wrongful dismissal, in contract or tort, is run basically for the benefit of the trial bar.

4. *Employment Arbitration.* This is not the time or place to address the arguments—empirical, doctrinal, and ideological—for or against the privatization of public law; it is enough to say this development provides the most strongly contested terrain in U.S. labor law today.

Supporters of the system, mostly the management bar, see in it a way to make justice available to the low paid, expeditiously and at low cost. Critics see it as a denial of access to justice. Meanwhile, the courts are struggling with how to accommodate the private forum, a creature of a contract of adhesion,[20] with the public function served by labor protective law. It is too early yet to speak in definitive terms to what the outcome of this legal experiment is.

[20] *E.g.*, Jeffery Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism* , 19 OHIO ST. J. DISPUTE RESOLUTION 757 (2004).