

BY MARTY HART-LANDSBERG
CONTRIBUTING COLUMNIST

If you think you can rely on the courts, rather than a union, to protect your workplace rights, you better think again. Simply put, the rights of workers are being quietly and steadily whittled down.

In May 2018, the United States Supreme Court ruled, in *Epic Systems Corp. versus Lewis*, that employers can include a clause in their employment contracts requiring nonunion workers to arbitrate their disputes individually, a decision that eliminates the ability of workers to sue a company for workplace violations or use collective actions such as class-action suits. The ruling resolved three separate cases – *Epic Systems Corp. v. Lewis*, *Ernst & Young LLP v. Morris*, and *National Labor Relations Board v. Murphy Oil USA* – that were argued together in front of the court on the same day because they all raised the same basic issue.

The labor attorney Moshe Z. Marvit, writing in the newspaper *In These Times*, explained what led *Lewis* to sue *Epic Systems*:

On April 2, 2014, Jacob Lewis, who was a technical writer for *Epic Systems*, received an email from his employer with a document titled “Mutual Arbitration Agreement Regarding Wages and Hours.” The document stated that the employee and the employer waive their rights to go to court and instead agreed to take all wage and hour claims to arbitration. Furthermore, unlike in court, the employee agreed that any arbitration would be one-on-one. This “agreement” did not provide any opportunity to negotiate, and it had no place to sign or refuse to sign. Instead, it stated, “I understand that if I continue to work at *Epic*, I will be deemed to have accepted this Agreement.”

Lewis felt that he and many of his fellow workers had been unfairly classified as independent contractors, robbing them of the right to overtime pay. But when he tried to sue the company, he was told that opening his company-sent email meant that he had waived his right to sue or bring a



ISTOCK ILLUSTRATION

Gutting workers' rights with mandatory arbitration

Don't count on the courts to protect you



Martin Hart-Landsberg is a professor emeritus of economics at Lewis & Clark College.

street smart economics

Street Smart Economics is a periodic series written for Street Roots by professors emeriti in economics. Read related columns at news.streetroots.org

collective action against the company. *Lewis* took the case to the Supreme Court, where he lost again.

As the Supreme Court saw it, the case pitted the Federal Arbitration Act against the National Labor Relations Act. The former established a legal foundation for using one-on-one arbitration to settle disputes while the latter gives workers the right to work together for “mutual aid and protection.” The Court’s ruling privileges arbitration.

The labor organizer and author Jane McAlevey, also writing in the newspaper *In These Times* several months before the Supreme Court combined the cases and decided *Epic Systems Corp. v. Lewis*, made

clear what is at stake:

“As for loud liberal voices – union and nonunion – that declare unions as a thing of the past, the forthcoming SCOTUS ruling on *National Labor Relations Board v. Murphy Oil* will prove most of the nonunion “innovations” moot. *Murphy Oil* is a complicated legal case that boils down to removing what are called the Section 7 protections under the National Labor Relations Act, and preventing class-action lawsuits.

“*Murphy Oil* blows a hole through the legal safeguards that nonunion workers have enjoyed for decades, eviscerating much of the tactical repertoire of so-called Alt Labor, such as class-action wage-theft cases, and workers participating in protests called by nonunion community groups in front of their workplaces. The timing is horrific and uncanny: As women are finally finding their voices about sexual harassment at work, mostly in nonunion workplaces (as the majority are), *Murphy Oil* will prevent class-action sexual harassment lawsuits.”

The *Epic Systems* decision is a big deal, since there is a growing and already sizeable use of mandatory arbitration by employers. A study by the Economic Policy Institute found, for example, that:

- More than half – 53.9 percent – of nonunion private-sector employers have mandatory arbitration procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration

procedures.

- Among private-sector nonunion employees, 56.2 percent are subject to mandatory employment arbitration procedures. Extrapolating to the overall workforce, this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration.

- Of the employers who require mandatory arbitration, 30.1 percent also include class-action waivers in their procedures – meaning that in addition to losing their right to file a lawsuit on their own behalf, employees also lose the right to address widespread rights violations through collective legal action.

- Large employers are more likely than small employers to include class-action waivers, so the share of employees affected is significantly higher than the share of employers engaging in this practice. Of employees subject to mandatory arbitration, 41.1 percent have also waived their right to be part of a class-action claim. Overall, this means that 23.1 percent of private-sector nonunion employees, or 24.7 million American workers, no longer have the right to bring a class-action claim if their employment rights have been violated.

- Mandatory arbitration is more common in low-wage workplaces. It is also more common in industries that are disproportionately composed of women workers and in industries that are disproportionately composed of African-American workers.

Unionization offers the only effective response to this corporate strategy of required arbitration. Happily, recent polling data show that support for unions is growing rapidly, especially among younger workers. The recent wave of teacher strikes has also encouraged those already in unions to engage in more militant, rank-and-file-led activism, with strong community involvement and support. Hopefully, public awareness of the increasingly class-biased nature of U.S. laws will grow and strengthen both trends.

Missed something?

Sign up to receive our weekly news roundup, featuring Street Roots stories from the previous week and a preview of the new edition.

Go to news.streetroots.org and click on “Newsletter sign-up”