Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association

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I. INTRODUCTION

A. *The Dispute over "Mandatory" Employment Arbitration*

The dispute over "mandatory" employment arbitration is one of the most important political issues in employment relations today. The political and legal debate raised by this issue has reached the Supreme Court three times in the past decade, forcing the Court to grapple with the legality of employment arbitration agreements.[1] And the Supreme Court is just the tip of the iceberg.

Pre-dispute, binding arbitration clauses in pre-hire employment agreements, or "mandatory arbitration agreements" are generally enforceable under the Federal Arbitration Act.[2] By such clauses, the prospective employee agrees to take future work-related claims to final and binding arbitration and waives the right to go to court.[3] The use of such agreements by employers has increased dramatically over the past decade, despite strong opposition from advocates for employees, civil rights groups, and plaintiffs' lawyers.

The percentage of private employers using employment arbitration grew from 3.6% in 1991[4] to 19% in 1997.[5] Studies indicate that by 1998, 62% of large

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[1] *See* EEOC v. Waffle House, 534 U.S. 279 (2002) (pre-dispute employment arbitration agreement did not bar the EEOC from bringing suit, where the EEOC acted pursuant to a charge, and no arbitration or private lawsuit had been initiated); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001) (Section 1 of the Federal Arbitration Act covers most employment agreements); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding pre-dispute employment arbitration agreements enforceable under the Federal Arbitration Act).

[2] *Circuit City*, 532 U.S. at 109 (mandatory arbitration clauses in employment agreements generally enforceable under Federal Arbitration Act).

[3] Employment arbitration, in contrast to labor arbitrations and employee grievances brought within the context of a collective bargaining agreement, is a phenomenon of the non-unionized workforce, as are mandatory arbitration agreements. *See generally* Commission on the Future of Worker-Management Relations, U.S. Dept. of Labor and U.S. Dept. of Commerce, Report and Recommendations, GPO-CTLG, L1.2-F 98/2 (1994), *available at* http://www.ilr.cornell.edu/library/e_archive/gov_reports/dunlop/DunlopFinalReport.pdf (last accessed Mar. 26, 2003); Cole v. Burns Int'l Sec. Serv., 105 F. 3d 1465, 1473–79 (D.C. Cir. 1997) (discussing the differences between arbitration in collective bargaining contexts and in union and non-union contexts).

[4] Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 1, 27–42 (1995).

[5] U.S. GENERAL ACCOUNTING OFFICE, ALTERNATIVE DISPUTE RESOLUTION: EMPLOYERS' EXPERIENCES WITH ADR IN THE WORKPLACE, GAO/GGD-97-157, 2 (1997), *available at*

corporations had used employment arbitration on at least one occasion from 1993 to 1996.[6] The employment dispute caseload of the American Arbitration Association (AAA), the leading independent provider of private employment arbitration in the United States, doubled in three years between 1993 and 1996,[7] and the number of employees covered by AAA employment arbitration plans grew from three million in 1997,[8] to six million in 2002.[9]

Employees' advocates, civil rights' advocates, and the plaintiff's bar strongly oppose the practice. They argue that mandatory (or what I will call "promulgated"[10]) employment arbitration deprives employees of their constitutional rights to trial and due process, and gives them nothing in return but a "kangaroo court" dominated by the employers who sponsor it.[11] The debate is

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http://www.gao.gov /archive/1997/gg97157.pdf (last accessed Mar. 26, 2003) (reporting that 19% of employers surveyed were using arbitration to resolve employment disputes).

[6] David B. Lipsky & Ronald L. Seeber, *Patterns of ADR Use in Corporate Disputes*, DISP. RESOL. J. Feb. 1999, at 66, 68; *see also* David B. Lipsky & Ronald L. Seeber, *In Search of Control: The Corporate Embrace of ADR*, 1 U. PA. J. LAB. & EMP. L. 133, 137 (1998).

[7] Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 31 (1998) (citing interview with Robert Meade, Senior Vice President, American Arbitration Association, in New York, N.Y. (May 15, 1998)).

[8] AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES 1 (effective June 1, 1997) [hereinafter "AAA's 1997 Rules"].

[9] Interview with Robert Meade, Senior Vice President, American Arbitration Association, in New York, N.Y. (Jan. 14, 2002).

[10] The term "mandatory agreement" is used to describe employment arbitration agreements presented to employees by employers prior to a dispute and prior to hiring the employee, as a condition to hiring the employee. The term "mandatory" implies that the employee has no real choice but to accept the agreement, due to the superior bargaining power of the employer. The term "pre-dispute agreement" is used to describe the same agreements, but lacks the implication that the employee has no choice but to agree to arbitration. The AAA adopted the term "promulgated agreement" because the AAA takes no political position on the debate over the legality of the pre-dispute, pre-hire agreement to employment arbitration, a convention which this Article will follow.

[11] *See, e.g.*, Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637, 638 (1996); Reynolds Holding, *Private Justice*, S.F. CHRON., Oct. 8, 2001, at A15, *available at* 2001 WL 3416493; Reginald Alleyne, *Statutory Discrimination Claims: Rights "Waived" and Lost in the Arbitration Forum*, 13 HOFSTRA LAB. L.J. 381, 403, 426 (1996); Bryant G. Garth, *Tilting the Justice System: From ADR as Idealistic Movement to a Segmented Market in Dispute Resolution*, 18 GA. ST. U. L. REV. 927, 929–30 (2002); Robert A. Gorman, *The* Gilmer *Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. ILL. L. REV. 635, 669 (1995); Maltby, *supra* note 7, at 32–34.

more than ideological. Opponents of promulgated employment arbitration argue that it deprives employees of large jury verdicts and the substantial settlements provoked by them, and hands employees smaller arbitrators' awards instead.[12]

The controversy over promulgated arbitration has continued despite an apparently dispositive ruling in *Circuit City Stores, Inc. v. Adams*: the Court found employment agreements with promulgated arbitration clauses to be enforceable under the Federal Arbitration Act.[13] Since that ruling, however, the Court carved out EEOC lawsuits from the reach of exclusive arbitral jurisdiction provided in employment arbitration agreements.[14] Moreover, federal legislation has been introduced with the aim of nullifying promulgated arbitration clauses.[15] And a concerted lobbying effort has been mounted in federal and state legislatures for legislation which would curtail employment arbitration despite the ruling in *Circuit City*.[16]

B. *The Need for Empirical Data on Employment Arbitration*

The debate to date has been long and hard-fought. But it has been waged virtually without data reflecting actual experience with promulgated employment arbitration. Both sides of the debate acknowledge that there is virtually no empirical research available on employment arbitration, and both agree that the need for information is vital.[17] This empirical study is an effort to meet this need

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[12] *See, e.g.*, William Howard, *Arbitrating Claims of Employment Discrimination*, DISP. RESOL. J. Oct.–Dec., 1995, at 40, 44; Maltby, *supra* note 7, at 47–49.

[13] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).

[14] EEOC v. Waffle House, 534 U.S. 279, 287 (2002) (holding that a pre-dispute employment arbitration agreement does not bar the EEOC from bringing suit, where the EEOC acts pursuant to a charge, and no arbitration or private lawsuit has yet been initiated).

[15] S. 2435, 107th Cong. § 3(a) (2002) and H.R. 2282, 107th Cong. § 3(a) (2001) (both stating, "[a]ny clause of any agreement between an employer and an employee that requires arbitration of a dispute arising under the Constitution or laws of the United States shall not be enforceable").

[16] For example, effective July 1, 2002, California legislation requires substantially increased disclosure by arbitrators. CAL. CIV. PRO. CODE. §§ 1281.85 & 1281.9 (West 2002).

[17] *See* 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 95 (Adrienne E. Eaton & Jeffrey H. Keefe eds., 1999); *see* Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Pre-dispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL., 559, 564 (2001); David Lewin, *Dispute Resolution in Nonunion Organizations: Key Empirical Findings*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF NEW YORK

for data.

This article reports the results of a comprehensive empirical study of 200 AAA Employment Dispute Awards rendered in 1999 and 2000.[18] The study includes 20 charts representing statistical analyses of the sample, as well as additional analyses and data not reduced to chart form.[19] In short, the instant article provides a comprehensive statistical account of what actually transpires during employment arbitration proceedings conducted under the auspices of the AAA.

C. *The Particular Need for Empirical Data on the Experience of Middle and Lower Income Employees in Employment Arbitration*

Studies to date indicate that only highly-compensated employees are able to gain access to the court systems for their employment-related claims. If employees with middle and lower incomes are effectively foreclosed from the courts, then their access to and experience with employment arbitration gain in importance, as arbitration may be the sole forum for their employment-related claims. There is therefore a particular need for data on these subjects.

1. *Middle and Lower Income Employees Do Not Have Access to the Courts*

The United States Department of Labor and Commerce Commission on the Future of Worker-Management Relations, better known as "the Dunlop Commission," found that mostly highly-compensated employees pursue employment discrimination claims in the courts.[20] A recent survey by William Howard of plaintiff's lawyers' standards for accepting employment

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UNIVERSITY'S 53RD ANNUAL CONF. ON LABOR (S. Estreicher, ed., forthcoming 2003) [hereinafter "Lewin, *Nonunion Organizations*"]; Deborah R. Hensler, *ADR Research at the Crossroads*, 2000 J. DISP. RESOL. 71, 78.

[18] The awards were rendered pursuant to the AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (effective Jan. 1, 1999) [hereinafter the "AAA's 1999 Rules"].

[19] This study was unusual as a statistical study because it was undertaken without a hypothesis. Most statistical studies are undertaken to confirm a hypothesis, as were all of the prior empirical studies of employment arbitration. The result is an answer to the question posed, but not a view of the data sample as a whole. The method here was to describe the sample statistically, with as many analyses as possible.

[20] Commission on the Future of Worker-Management Relations, *supra* note 3, at 50.

discrimination cases shows that it is probable that only highly-compensated employees pursue employment discrimination claims in court.[21] The same survey indicates that it is probable that only highly-compensated employees pursue all other employment-related claims in the courts, as well. [22]

This survey of 321 plaintiff's attorneys found that these lawyers accepted only 5% of the employment discrimination cases offered to them by prospective plaintiffs.[23] The results of the survey also described the minimum parameters of an acceptable employment discrimination case.[24] Lawyers required, on average, provable damages of $60,000 to $65,000, a retainer of $3,000 to $3,600, and a 35% contingency fee.[25]

Other employment-related claims would be less attractive to the plaintiff's bar. The minimum parameters would be higher for non-discrimination cases because discrimination statutes typically provide for an award of the plaintiff's attorney's fees to plaintiff's counsel in the event that the plaintiff wins the case. Thus, an employment discrimination case intrinsically offers plaintiff's attorneys greater rewards. Since "provable damages" in an employment-related case are correlated with salary, higher minimum provable damages usually require plaintiffs of higher income. Thus, employees in court with employment-related cases other than employment discrimination cases are likely to be highly-compensated employees.[26]

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[21] Howard, *supra* note 12, at 43–44.

[22] *Id.* Another empirical study tends to confirm that the majority of plaintiffs in employment-related litigations are highly compensated employees. The study shows that managers receive the majority of compensation awarded in wrongful discharge cases. *See* David J. Jung & Richard Harkness, *Life After* Foley*: The Bottom Line,* 5 LAB. LAW. 667, 678 (1989).

[23] Howard, *supra* note 12, at 44.

[24] *Id.* Howard's survey of 321 "plaintiff's side" lawyers showed that the lawyers' mean and median rate of accepting proffered employment discrimination suits for litigation in court is 5%. In other words, on average, plaintiff's lawyers accept one out of every 20 employment discrimination matters for which employees ask for representation in court. *Id.*

[25] *Id.*

[26] Even assuming that the fee shifting provisions of the employment discrimination statutes did not increase the minimum parameters of an acceptable employment-related case, there is no reason to believe that the parameters would be less than those for employment discrimination cases. The conclusion again, is that highly-compensated employees are in court with the majority of employment-related claims. Moreover, the EEOC does not substantially alter the situation—it prosecutes only a very small percentage of charges filed with it. In 1994, for example, the EEOC prosecuted only .47% of the charges filed with it. *Id.* at 47 (stating that the EEOC, with a backlog of almost 97,000 cases, filed only 428

2. *Objectives of the Instant Study*

By all indications, employment arbitration is the primary venue for the claims of middle and lower income employees. Therefore, the cost of the forum to these employees and the due process that it affords them should be evaluated separately from an analysis of the attractiveness of the forum to all other claimants. This study makes that analysis.

While it is a widely-held belief that arbitration is affordable, there has been no empirical data confirming that belief.[27] Accordingly, this study systematically assesses the precise cost of arbitration to middle and lower income employees.

In addition, this study provides data which address criticisms leveled by employee and civil rights advocates regarding the failure of employment arbitration to satisfy the requirements of due process. Thus, this study evaluates, and tends to refute, the beliefs that: (1) employment arbitration cannot competently resolve statutory employment discrimination claims; (2) employer-sponsored arbitration is biased in favor of highly-compensated employees;[28] and (3) employer-sponsored arbitration is biased in favor of employers.

Indeed, the data here do not even support the theory that the "repeat player effect" is a failure of due process. The "repeat player effect" is the only empirically proven theory of alleged failure of due process in employment arbitration. The empirically proven fact upon which the theory is based is that employers who arbitrate frequently win arbitrations more often that those that arbitrate only once.[29]

D. *The Need for Empirical Data on Employees Arbitrating Pursuant to "Mandatory," or Promulgated, Arbitration Agreements*

As discussed above, there is vigorous opposition to "mandatory," or promulgated, arbitration agreements which are presented to the employee as a

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lawsuits in 1994).

[27] *See, e.g.*, Samuel Estreicher, *supra* note 17, at 564–65; Bingham & Chachere, *supra* note 17, at 41; Maltby, *supra* note 7, at 53–55 (all reflecting the belief that arbitration is affordable for employees); *id.* at 54 (there is no systematic data on the cost of arbitration to employees).

[28] *See, e.g.*, Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP.. POL'Y J. 189, 213–14 (1997) [hereinafter "Bingham, *The Repeat Player Effect*"].

[29] *See infra* Part II for past research regarding the repeat player effect. *See infra* Part IV.B.3. for findings regarding the repeat player effect in the instant research.

precondition to hiring.[30] The opposition focuses on the employee's loss of the right to trial.[31] If, indeed, employees are forced into arbitration, it is critical to assess the value of the rights lost and the value of the rights forced upon them. The instant study analyzed whether employees arbitrating pursuant to promulgated agreements were giving up any real, practical right of access to the courts. And it further evaluated the accessibility of employment arbitration to these employees and the due process that was available to them in arbitration. These analyses are critical to an understanding of the nature of the "mandatory" employment agreement and "mandatory" employment arbitration.

I used the designation for employees who arbitrated pursuant to promulgated agreements, "P employees," as a proxy for middle and lower income employees. Accordingly, the analyses herein are one and the same for those employees who arbitrated pursuant to promulgated agreements and those employees of middle to lower income. I used this "P employees" proxy for middle and lower income employees because I determined that the majority of P employees were of middle and lower income.[32] Accordingly, the analyses regarding middle and lower income employees must be read with an eye toward understanding "mandatory" arbitration as well as potential prejudice toward employees of middle and lower income.

II. PRIOR EMPIRICAL RESEARCH ON EMPLOYMENT ARBITRATION

Lisa Bingham of Indiana University has done five empirical studies of employment arbitration under AAA rules. Bingham's first study was based on a sample of 1992 cases governed by the AAA Commercial Rules which then governed employment disputes.[33] Bingham found that employees won 64% of the cases.[34] Bingham's second study was based on a sample of cases decided in

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[30] *See, e.g.*, Maltby, *supra* note 7, at 36–37 (reporting that the practice of making employment conditional on assent to an arbitration clause has been condemned by the Equal Employment Opportunity Commission, the American Civil Liberties Union, and National Employment Lawyers' Association); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1046–47 (1996).

[31] Maltby, *supra* note 7, at 37; Van Wezel Stone, *supra* note 30, at 1048.

[32] *See infra* Part IV.A.1. for more detail on this determination.

[33] Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT'L J. CONFLICT MGMT. 369 (1995) [hereinafter "Bingham, *Is There a Bias?*"].

[34] *Id.* at 378.

1992 under the Commercial Rules and in 1993 under the AAA's newly adopted Employment Dispute Resolution Rules (the "Employment Rules") governing employment dispute cases.[35] Bingham found no statistically significant differences in the outcomes of employment dispute cases decided before and after the AAA's adoption of the new Employment Rules.[36]

Bingham's third study, based on cases decided in 1993 and 1994 under both the Commercial and Employment Rules, provided statistical support for the "repeat player effect" theory.[37] The theory is that employers who arbitrate more than once, "repeat players," enjoy better results than employers who arbitrate just once.[38] The article also proposed possible explanations for the "repeat player effect," but did not empirically prove the proposed causes.[39] Nevertheless, one proposed explanation, the "repeat arbitrator" theory, has come to enjoy the status of fact in the legal community.[40] The "repeat arbitrator" theory holds that repeat players repeatedly select favorite arbitrators, who then return the favor with biased decisions in favor of the repeat players.[41]

The "repeat player effect," as explained by the "repeat arbitrator" theory, raises the specter of a "kangaroo court," dominated by an old boys' club of employers and puppet arbitrators. Bingham undertook, in two studies, one in 1998[42] and one in 2000,[43] to prove empirically the "repeat arbitrator" theory, but

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[35] Lisa B. Bingham, *Emerging Due Process Concerns in Employment Arbitration: A Look at Actual Cases*, 47 LAB. L.J. 108 (1996) [hereinafter "Bingham, *Emerging Due Process Concerns*"].

[36] *Id.* at 114.

[37] Bingham, *The Repeat Player Effect*, *supra* note 28, at 206, 213.

[38] *Id.* at 203–04 (citing Marc Galanter, *Why the "Haves" Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95 (1974)).

[39] Bingham, *The Repeat Player Effect*, *supra* note 28, at 213.

[40] *See, e.g.*, Maltby, *supra* note 7, at 33.

> One of the great dangers to employee-plaintiffs is the "repeat player syndrome." . . . The employer . . . is likely to be a repeat player, with the opportunity to reject arbitrators whose previous rulings displeased it. *The arbitrator thus has a financial incentive to rule in favor of the employer.* Professor Lisa Bingham of Indiana University recently examined the results of employment arbitrations in which the employer was a repeat player, and found that employees fared very poorly in such situations.

Id. (emphasis added) (citation omitted).

[41] *Id.*; Bingham, *The Repeat Player Effect*, *supra* note 28, at 214.

[42] Lisa B. Bingham, *On Repeat Players, Adhesive Contracts, and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 MCGEORGE L. REV. 223 (1998) [hereinafter "Bingham, *On Repeat Players*"].

was not successful.[44]

Bingham's third, 1997, study also found that employees earning more than $40,000 annually have better win rates and outcomes than employees earning less than $40,000 annually.[45] ("Outcome" is defined by Bingham as the amount of damages awarded divided by the amount of damages demanded.) The finding is limited because the Employment Rules have been substantially redrafted since the cases in the 1997 study were decided in 1993 and 1994.[46] The findings as to economic class distribution and win rates are further limited because the sample included only cases with demands for damages in specific dollar amounts.[47] Roughly half of any sample of AAA claims would lack demands in specific dollar amounts.[48]

Bingham's fourth, 1998, study, based on cases decided in 1993 through

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[43] Lisa B. Bingham, *Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of Employment: Preliminary Evidence that Self-Regulation Makes a Difference, in* NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR (Samuel Estreicher ed., forthcoming 2003) [hereinafter the "*2000 Study*"].

[44] Bingham states in her 2000 study that her 1998 study "found that a repeat player employer's success was related to the underlying factor[] of the . . . repeat use of a single arbitrator." *Id.* (manuscript at 10, on file with author). This statement is contradicted by the 1998 study itself. Bingham, *On Repeat Players*, *supra* note 42, at 224, 238. First, in the 1998 study she expressly included this proposition as one of her three hypotheses. But she did not include it as one of her two findings because the data did not support it. *Id.* at 224, 238. Second, Bingham's express finding as to the "repeat arbitrator" variable was that it was subsumed in the "Personnel Manual" variable. *Id.* at 238–39 ("Employees lose more frequently when the arbitrator is [a repeat arbitrator]. . . . However, these patterns largely correspond with differences in the nature of the basis for arbitration. . . . [*i.e.*] employees more frequently lose cases stemming from . . . [a personnel] manual."). Ultimately, it was the "Personnel Manual" variable only which she found to be linked to repeat player success. *Id.* at 224, 238. Regarding the 2000 study, see Bingham, *2000 Study*, *supra* note 43 ("the 'Repeat Arbitrator'[variable] was not . . . statistically significant" in increasing the chances of employer success).

[45] Bingham, *The Repeat Player Effect*, *supra* note 28, at 207, 211–12.

[46] The AAA adopted the 1997 Rules in order to implement the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship. *See infra* this section for more about these the 1997 Rules.

[47] Bingham, *The Repeat Player Effect*, *supra* note 28, at 206–13 (Note Tables: all five analyses exclude cases lacking demands for monetary damages).

[48] Roughly half of AAA Demands for Arbitration do not include a stated amount of damages demanded. Interview with Robert Meade, *supra* note 9. For example, 44.5% of the cases in this sample (89 of 200 cases) lack a demand for specific monetary damages

1995 under the Employment Rules, "finds . . . that employers arbitrating pursuant to a personnel manual *do better* than those arbitrating under an individual contract."[49]

Bingham's fifth study, done in 2000, was based on cases decided between 1993 and 1997, both before and after the AAA's adoption of its new National Rules for the Resolution of Employment Disputes, adopted in June 1997.[50] The AAA's 1997 Rules were drafted to implement the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising out of the Employment Relationship.[51] Bingham found that employer success decreased by 20% in the cases decided after the effective date of the AAA's 1997 Rules.[52] The conclusion is limited, as only 59 cases in the 265 case sample were adjudicated under the new rules.[53]

William Howard, in his 1995 article, *Arbitrating Claims of Employment Discrimination*, compares litigation, AAA arbitration, and arbitration in the securities industry.[54] The comparisons are somewhat limited by differences in the types of claims in the sample pools.

Howard compares the win rates and award amounts of plaintiffs in federal court cases terminated between 1992 and 1994, claimants in New York Stock Exchange (NYSE) and National Association of Securities Dealers (NASD) arbitrations terminated during the same period, and claimants in AAA arbitrations terminated between 1993 and 1994.[55] While the comparison between the NASD/NYSE arbitrations and the federal litigations has validity, it is difficult to draw any meaningful comparison between these three venues and the AAA. The NASD and NYSE arbitrations and the federal court cases consist

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[49] Bingham, *On Repeat Players*, *supra* note 42, at 224 (emphasis added).

[50] Bingham, *2000 Study*, *supra* note 43.

[51] The "Due Process Protocol" was created by a task force composed of individuals representing management, labor, civil rights organizations, administrative agencies, and the AAA. AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES 3–4 (effective Jan. 1, 2001). It has been endorsed by the AAA, the American Civil Liberties Union, the American Bar Association's Labor & Employment Section, the Federal Mediation and Conciliation Service, the National Academy of Arbitrators, and the National Society of Professionals in Dispute Resolution. AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES 3–4 (effective Jan. 1, 2001); Bingham & Chachere, *supra* note 17, at 110–11; Maltby, *supra* note 7, at 39.

[52] Bingham, *2000 Study*, *supra* note 43.

[53] *Id.*

[54] Howard, *supra* note 12.

[55] *Id.* at 41–42.

solely of claims of employment discrimination.[56] The AAA arbitrations, however, are of all employment-related case types.[57] Hence, Howard was comparing two different pools of cases that are not comparable: one consisting of just employment discrimination cases, and the other of every type of employment-related claim.

There is an additional factor which renders the comparison still less probative. Howard cites the Dunlop Commission's Report for its 1994 finding that the majority of plaintiffs in employment discrimination cases are "managers and professionals rather than lower-level workers."[58] Similarly, NASD employment arbitration is restricted to claimants who are relatively highly-compensated industry professionals.[59] NASD employment arbitration is available only to the "associated persons" of its members.[60] Associated persons are defined under NASD rules as persons engaged in the investment banking or securities business at a management or executive level.[61] In other words, they are uniformly financial professionals. Due to the number of NASD claims, this pool of claims is dominated by highly-compensated employees.

In contrast to federal plaintiffs and NASD/NYSE claimants, the employee-claimants in AAA arbitrations come from every economic background; therefore the claimants in the pool of AAA cases are not comparable to those in the NASD/NYSE pool or the federal case pool.[62] This factor additionally hampers the comparison between the AAA statistics and those of the NASD/NYSE arbitrations and the federal litigations.

Howard's comparison of NASD/NYSE arbitration results and federal litigation results remains a valid comparison of litigation and arbitration by highly compensated employees of employment discrimination claims only. Here,

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[56] *Id.*

[57] *Id.* at 43.

[58] *Id.* at 46 (citing the Commission on the Future of Worker-Management Relations, U.S. Dept. of Labor and U.S. Dept. of Commerce, Report and Recommendations, GPO-CTLG, L1.2-F 98/2 (1994)).

[59] Arbitration of employment-related claims before the NASD is available only to member firms and "associated persons" of member firms. NASD Code of Arbitration Procedure (eff. 7/10/01), Provision 10101 "Matters Eligible for Submission," *available at* http://www.nasdadr.com/arb_code/arb_code.asp#10101 (last updated May 1, 2003). "Associated persons" are exclusively financial professionals. NASD Rules, Rule 1011(b) Definitions, *available at* http://cchwallstreet.com/nasd (last viewed June 19, 2003).

[60] NASD Code of Arbitration Procedure, Provision 10101, *supra* note 59.

[61] NASD Rules, Rule 1011(b) Definitions, *supra* note 59.

[62] *See infra* Part I.C.1.

employees won 28% of non-jury trials, 38% of jury trials, and 48% of arbitrations.[63] Employees won a mean non-jury verdict of $167,450, a mean jury verdict of $417,178, and a mean arbitration award of $83,518.[64]

Alexander Colvin, in his 2001 article, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, studied the interaction of employers' in-house alternative dispute resolution (ADR) procedures and their external employment arbitration procedures.[65] He cites estimates which suggest that more than 50% of nonunion workplaces in the United States now have some type of formal in-house ADR procedure.[66]

Colvin conducted a survey in 1998 of 302 workplaces in the telecommunications industry, of all sizes and variety.[67] He found that 16% of the workplaces had adopted external employment arbitration procedures.[68] Of those employers which had adopted external arbitration procedures, 64% had also adopted in-house "workplace dispute resolution procedures."[69] Colvin theorized that the external employment arbitration played the role of appellate court for the in-house ADR systems, but he did not collect any data on the interaction between the internal and external procedures.[70]

David Lewin has completed four case studies of in-house, multi-step ADR programs.[71] His studies have focused on employees' decisions to appeal up through the steps of internal ADR systems. His first study was of three firms with ADR programs comprised of four steps of internal review.[72] His most recent study was of a fourth firm with ADR comprised of four steps, where the fourth

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[63] Howard, *supra* note 12, at 42–43.

[64] *Id.*

[65] Alexander J.S. Colvin, *The Relationship Between Employment Arbitration and Workplace Dispute Resolution Procedures*, 16 OHIO ST. J. ON DISP. RESOL. 643 (2001).

[66] *Id.* at 646 (citing 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) and Peter Feuille & Denise R. Chachere, *Looking Fair or Being Fair: Remedial Voice Procedures in Nonunion Workplaces*, 21 J. MGMT. 27 (1995)).

[67] *Id.* at 648–49.

[68] *Id.* at 649.

[69] *Id.*

[70] *Id.* at 662.

[71] David Lewin, *Dispute Resolution in the Nonunion Firm*, 31 J. CONFLICT RESOL. 465 (1987) [hereinafter "Lewin, *Nonunion Firm*"]; Lewin, *supra* note 17.

[72] Lewin, *Nonunion Firm*, *supra* note 71.

step was external arbitration.[73]

As to all three firms in his first study, Lewin found that 62% of the claims settled at the first step of ADR, 23% settled at the second step, 11% settled at step three, and 4% settled at the final step.[74] Lewin's findings as to a fourth corporation with external arbitration as a final step were substantially the same.[75] Considering all three firms and all four steps of the internal procedure, the probability of an employee winning a claim was 53% over all, but the probability of success increased to almost 60% at the final step.[76] Lewin did not evaluate the probability of winning at each step in his study of the fourth firm, which had external arbitration as its final step. In short, Lewin found that the employee win rate increases at the higher steps of in-house ADR.[77]

In another recent article on employment arbitration, Michael Delikat and Morris Kleiner compared 125 trial verdicts in employment discrimination cases rendered in the United States District Court for the Southern District of New York between April 1, 1997 and July 31, 2001, with 186 arbitration awards rendered in employment-related cases during the same time period in NYSE/NASD arbitration.[78] Kleiner and Delikat compared the statistics representing the two venues and found significant similarities.[79]

Kleiner and Delikat found, for example, that NASD/NYSE claimants prevailed in 46.2% of their claims, whereas federal plaintiffs prevailed in 33.6% of their lawsuits.[80] Claimants won an average award of $236,292, and plaintiffs

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[73] Lewin, *Nonunion Organizations*, *supra* note 17.

[74] Lewin, *Nonunion Firm*, *supra* note 71, at 483.

[75] Lewin, *Nonunion Organizations*, *supra* note 17.

[76] Lewin, *Nonunion Firm*, *supra* note 71, at 483.

[77] In the instant study, the employee win rate decreases at the higher steps of in-house ADR. However, the sample in this study is very different from the sample in Lewin's study. Lewin studied three employers with the final step of ADR in-house. This study includes 51 employers with the final step of ADR external, under the auspices of the AAA.

[78] Michael Delikat & Morris Kleiner, *An Empirical Study of Dispute Resolution Mechanisms for Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA: PROCEEDINGS OF THE NEW YORK UNIVERSITY 53RD ANNUAL CONFERENCE ON LABOR (S. Estreicher ed., forthcoming 2003).

[79] The comparison between the venues involves sample pools with different claim compositions. While the study also supplies data on state and federal jury verdicts rendered between 1981 and 2001 in the state of California, the data is not categorized in a manner which permits comparison with the NASD/NYSE statistics.

[80] Delikat & Kleiner, *supra* note 78.

won an average award of $377,030.[81] Claimants won a median award of $100,000, and plaintiffs won a median award of $95,554.[82] Plaintiff's average attorney's fees were $149,756, and claimant's average fees were $36,282.[83] In short, the study showed similar results for employees in both venues, although average lawyer's fees in a lawsuit were substantially higher than in arbitration.[84] These results are favorable for employment arbitration in the securities industry, however, such arbitration is largely limited to the highly compensated members of that industry.[85] There is still a need for additional information evaluating the experience of a broader range of employees and industries.

III. THE METHODOLOGY OF THE INSTANT STUDY

A. *Description of the Data*

Two hundred awards were randomly selected from the total pool of 356 AAA Employment Arbitration Dispute awards initiated during 1999 and 2000 and decided as of November 5, 2000.[86] No cases were excluded from those that were randomly selected. All of these cases involved employment disputes. Of the 200 awards, 83 were rendered in 1999 and 117 were rendered in 2000. Of the 356 total pool, 86 were rendered in 1999 and 270 were rendered in 2000. The arbitration hearings were held in 35 different states. A panel of three arbitrators, rather than one arbitrator, presided in nine of the hearings.[87]

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[81] *Id.*

[82] *Id.*

[83] *Id.*

[84] Given that the NASD is accessible solely to highly compensated employees, *see supra* notes 58–61 and accompanying text, the fact that NASD results track court results tends to confirm the prior conclusion that the courts are accessible mainly to highly-compensated individuals.

[85] *See supra* notes 58–61 and accompanying text.

[86] The awards were rendered pursuant to the AAA's 1999 Rules. AAA'S 1999 RULES, *supra* note 18. By error, one case initiated in 1997 and two cases initiated in 1998 were included in the pool. The three cases were decided in 1999 and 2000. The number of cases accidentally included in the pool is not sufficient, however, to materially affect the findings reported in this study.

[87] There were 14 challenges to arbitration in federal court. Eight challenges were brought by employees, and three were brought by employers. The identity of the petitioner is unclear in the remaining motions. Clearly, all of these challenges failed, as the awards describing the motions were rendered by AAA arbitrators.

B. *The Object of the Instant Study Was to Comprehensively Describe the Sample*

The object of the study was to describe the sample in a comprehensive manner, rather than to prove preconceived hypotheses. No data were excluded as irrelevant to a hypothesis. Instead, data were extracted from the awards and entered into a computer database according to 84 criteria.[88] The criteria were created upon review of the awards. Ultimately, some criteria related to too few awards to be descriptive of the sample as a whole and are not discussed in the instant article.

C. *How Data on the Awards Were Compiled*

Cases where the parties submitted a settlement agreement for the imprimatur of the arbitrator were assessed as a win for whichever party was to receive the settlement payment. There were three such cases. Where there was a case with an award on both the claim and counter-claim, the lesser award was subtracted from the greater, and the winner's award was entered into the database as a victory in the resulting amount.

Non-monetary equitable awards were assessed separately. Where relief was granted to the claimant or cross-claimant, the case was assessed as a win for that party. Where some relief was granted to both parties, the recipient of the greater relief was recorded as the winner, but the awards were entered for both parties. There were no cases where the relief granted was of equal weight, causing a "draw" between the parties. The magnitude of the relief was based on a common sense assessment of the award.

Similarly, monetary awards which did not state the relief in a specific dollar amount were assessed separately. An example of such an award would be "pension benefits calculated pursuant to formula B in the 401(k) Plan," where the formula is not provided in the text of the award. These claims were assessed as a general win or loss, without entering a specific amount. Such cases also did not result in any "draws."

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[88] *See infra* Exhibit A.

IV. RESULTS OF THE INSTANT STUDY

A. *The Cost of Employment Arbitration*

1. *Method of Estimating the Income of Employees*

An estimated 43.5% of the employees in this sample earned between $14,000 and $60,000. The employees will be called "P employees" in the instant article. These P employees most likely cannot gain access to the court system. As discussed above, private employment arbitration may be the only adjudicative forum which they can access as a practical matter.[89]

The AAA database uses the letters "P" and "N" to differentiate between those employees who are party to promulgated, or "P," agreements and those employees who are party to individually negotiated, or "N," agreements with arbitration clauses in them. I also use the terms "P employee" and "N employee" in this article with the same meaning. I use these terms as a short-hand for income level because 72% of the "P employees" in this sample are lower and middle-income employees who I estimate earned between $14,000 and $60,000 per year. The "N employees" I estimated earned more than $60,000 annually.

I estimated that 81% of P employees earned no more than $80,000 annually and that 50% of P employees earned between $14,000 and $40,000 annually. I made these estimates based first on earnings data in the awards. Where there were no earnings data in the awards, I looked at information in the awards describing the employee's occupation and compared the employee's occupation with the occupations and associated salaries listed in the Department of Labor's Bureau of Labor Statistics' *National Employment and Wage Data from the Occupational Employment Statistics Survey by Occupation, 2000.*[90] This survey covers nearly 80% of all job titles in the United States and supplies the national mean annual wages for the occupation.

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[89] *See supra* Part I.C.

[90] Department of Labor, Bureau of Labor Statistics, *Occupation Employment and Wages* (Nov. 2002), Table 1: National Employment and Wage Data from the Occupational Employment Statistics Survey by Occupation, 2000, Mean Annual Wages, *available at* http://www.bls.gov/news.release/ocwage.t01.htm. It is possible that more than 72% (87 of 121 cases) of the P employees earned between $60,000 to $14,000. There were nine awards which did not provide sufficient facts to determine earnings or occupation. In 21% (26 of the 121 P cases), however, the P employees earned more than $60,000.

2. *The Cost of Arbitration for Employers and All Employees*

If private employment arbitration has become the only accessible adjudicatory venue for P employees' employment-related complaints, then it is important to confirm empirically another assumption about employment arbitration: that it is indeed low cost for those who have limited resources. The data on AAA employment arbitration do generally confirm this important point.

The following Tables 1 through 3 summarize the amount of: (1) "filing fees," paid to the AAA; (2) "hearing fees," paid to the AAA for administrative costs such as the hearing room; and (3) "arbitrator's fees," paid to the arbitrator for the services of the arbitrator. These fees are paid by all the parties to the arbitrations in the sample: (1) P employees, (2) N employees, (3) all employees, and (4) employers. Following Tables 1 through 3, Tables 4 and 5 present awards of attorneys' fees to all parties and awards of attorney's fees to P employees alone, respectively.

An award of attorney's fees to a party means that the arbitrator has ordered that the party's attorney's fees will be paid by the opposing party. The size of the award indicates the cost of attorney's fees to the party receiving the award. I have presented the data on awards of attorney's fees here as evidence of the cost of attorney's fees to the party receiving the award, not as evidence of how frequently that party obtained an order that the opposing party pay their legal costs.

It is important to note that the word "award" has a meaning in the context of Tables 1, 2, and 3 different from its meaning in Tables 4 and 5. An award in Tables 1, 2, and 3 is a decision in which an arbitrator has ordered the party to pay some or all of the fees at issue. The tables indicate the amounts of the fees paid by these parties. The meaning of "Award" in this context is the opposite of the meaning of "Award" in Tables 4 and 5.

In Tables 4 and 5, an award is a decision in which an arbitrator has "awarded" attorney's fees to the party. The award in this context indicates that the opposing party has been ordered by the arbitrator to pay the fees of the party shown on the table. The tables are used to show the amounts of attorney's fees accrued by those parties.

Finally, Table 6, "Cost of Arbitration to P Employees," summarizes the allocation of fees among the 121 P employees in the sample. Each column shows the number and percentage of P employees in the sample required to pay different portions of the four possible fees (filing fees, hearing fees, arbitrator's fees, and attorney's fees) for arbitration. Then it shows the average value of the different portions of fees by referring to the average amounts of fees for P employees shown in Tables 1 though 3 and the median P attorney's fee shown in

Table 4. In this way, Table 6 gives an estimate of what each percentage group of P employees would pay for arbitration which is based, not on the average fees paid by the employees in that percentage group, but on the average fees paid by all P employees who paid those fees, or, in the case of attorney's fees, based on all awards of attorney's fees to P employees in the sample. There is no further information available regarding the cost of attorney's fees for P employees. For brevity, Table 6 uses the term "forum fees" to encompass the filing fees, the hearing fees, and the arbitrator's fees.

Tables 1 through 6 follow.

Table 1. Amount of AAA Filing Fees* Paid by Party

Party	EE-P	EE-N	All EEs	All ERs	All Parties
No. of Awards	42	47	89	111	200
Low Award	$150	$250	$150	$0	$0
Median Award	$375	$1,000	$500	$500	$500
High Award	$750	$7,000	$7,000	$9,514	$9,514
Mean Award	$376	$1,446	$941	$1,099	$1,028
Std. Deviation**	$1,44.08	$1,556.28	$1,250.73	$1,459.54	$1,369.48

** A very small number of filing fees were awarded for both parties to share, not equally, but in specified percentages, such as 25% to the employee and 75% to the employer. These fees were assessed to the parties and recorded as if shared equally, in order to prevent needless complication of this Table and other tables reporting filing fees.*

*** The "Standard Deviation" is a number which indicates the degree to which the numbers in the group are dispersed from the mean. Literally, it is the square root of the arithmetic average of the square of the deviations from the mean.*

Table 2. Amount of AAA Hearing Fees Paid by Party

Party	EE-P	EE-N	All EEs	All ERs	All Parties
No. of Awards	36	51	87	113	200
Low Award	$0	$0	$0	$0	$0
Median Award	$150	$450	$300	$355	$300
High Award	$783	$4,100	$4,100	$2,700	$4,100
Mean Award	$210	$681	$486	$575	$537
Std. Deviation	$170.09	$783.938	$650.73	$549.92	$595.948

Table 3. Amount of Arbitrator's Fees Paid by Party

Party	EE-P	EE-N	All EEs	All ERs	All Parties
No. of Awards	35	48	83	117	200
Low Award	$0	$219	$0	$0	$0
Median Award	$1,500	$2,028	$1,702	$3,841	$2,712
High Award	$4,827	$26,708	$26,708	$24,218	$26,708
Mean Award	$1,706	$3,843	$2,942	$5,022	$4,159
Std. Deviation	$1,075.60	$4,561.90	$3,679.06	$4,300.76	$4,173.108

Table 4. Amount of Attorneys' Fees Awards*

Party	EE-P	EE-N	All EEs	All ERs	All Parties
No. of Awards	12	16	28	11	39
Low Award	$2,713	$4,590	$2,713	$1,546	$1,546
Median Award	$6,248	$22,126	$14,173	$10,000	$12,575
High Award	$54,192	$300,296	$300,296	$98,000	$300,296
Mean Award	$14,464	$62,734	$42,047	$23,823	$36,907
Std. Deviation	$16,551.96	$85,187.85	$68,811.47	$29,474.16	$60,514.40

**This data represents all of the AAA's information regarding the cost of legal representation to the parties, except eight awards of "reasonable" attorneys' fees and six demands for specific amounts of fees. The demands provided little additional information, because seven were granted in the exact amount requested by seven of the awards above.*

The awards of attorney's fees listed in each party's column are awards to that party of their fees from their adversary. The amount of the awards in each party's column thus represents the amount of attorney's fees which that party owes, or has paid, to their counsel for legal services. Accordingly, Table 4 shows the low, median, high, and mean amounts which each party paid in attorney's fees for arbitration.

Tables 1, 2 and 3 indicate a mean fee for P employees. The mean P filing fee is $376. The mean P hearing fee is $210. And the mean P arbitrator's fee is $1,706.[91] These mean fees are used on Table 6 to represent the value of these fees to P employees generally. I used the median attorney's fee, rather than the mean attorney's fee as the representative value of these fees to P employees, however.

The data underlying Table 4 indicate that the median P attorney's fee, $6,248, rather than mean P attorney's fee, $14,464, is the representative attorney's fee for P employees. There were only 39 awards of a specific monetary amount of attorney's fees in this sample of 200 awards,[92] but the awards indicate that P employees paid significantly less than employers or N employees for legal fees. Table 5, below, shows each of the 12 fee awards to P employees. The data suggests that the median, $6,248, rather than the mean, $14,464, attorney's fee is the more accurate representative fee for P employees.

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[91] These three fees are combined under the heading "Forum Fees" in Table 6. The mean value of Forum Fees is $2,292, as shown in Table 6, Column 4. Tables 1 and 2 also show the maximum amount of P filing and hearing fees, $750 and $783, respectively. The maximum amount of filing or hearing fees, $783, is reflected on Table 6, Column 2.

[92] There are two characteristics of this sample which adversely affect the number of awards of attorney's fees. First, 20% of the cases in the sample were prosecuted *pro se*; and second, only 7% of the cases in the sample were *bona fide* civil rights claims, supported by allegations of fact, with the attendant statutory entitlement to attorney's fees. As a result, there was no possibility of an award in 20% of the sample, and there were only three awards of attorney's fees pursuant to Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act of 1990. 42 U.S.C. § 2000e-5(k) (2000); 42 U.S.C. § 12205 (2000).

Table 5. All Attorneys' Fees Awards to P Employees

$2,713.00
$2,976.00
$3,098.00
$4,500.00
$4,640.00
$6,248.00
$7,150.00
$9,410.00
$12,575.00
$32,578.00
$33,492.00
$54,192.00

Table 5 confirms that the mean attorney's fee, $14,464, may not be the most representative fee. The three highest awards range from $32,578 to $54,192. The lowest of them, $32,578, is $20,000 higher than the highest of the first nine fees, which is only $12,575. The mean fee, $14,464, exceeds the fourth highest fee, $12,575, and exceeds the median fee of $6,248 by $8,216. For these reasons, the median "P" legal fee, $6,248, was used as best representing the "Atty Fees" in Table 6, "Cost of Arbitration to P Employees." This figure, like the average figure, however, is not derived from a sufficient number of awards of attorney's fees to be conclusively representative of P employee's attorney's fees in employment arbitration.

3. *The Cost of Employment Arbitration for P Employees*

Table 6, "Cost of Arbitration to P Employees," below, shows the number and percentage of P employees in the sample who paid each designated part of the possible four fees (filing fees, hearing fees, arbitrator's fees, and attorney's fees) for AAA employment arbitration. The term "forum fees" is used to refer to filing, hearing, and arbitrator's fees on the chart. Each part of the possible fees paid by a P employee is described at the top of Columns 1 through 9. For example, the heading of Column 6 is "Atty Fees & ½ Arb. Fees." This heading indicates that there is a group of P employees who paid only their own attorney's fees and one half of the arbitrator's fees for arbitration. Looking at the rows on the right hand side of the table, under "Total Cases," and tracing that row over to Column 6, there is a number four under Column 6, indicating that there were four cases in which P employees paid attorney's fees and half of arbitrator's fees

for arbitration.

Secondly, Table 6 shows the average cost of the portion of fees which each designated group of P employees paid. Still looking at column six, there are four P employees who paid their own attorney's fees and half of the arbitrator's fees for arbitration. The heading of Column 7, under the description of the portion of fees paid, states, "($7,394)." This figure is the median P attorney's fees based on all awards of attorney's fees to P employees in this sample, plus 50% of the mean P filing fees, hearing fees, and arbitrators fees based on all awards in this sample. In other words, Table 6 provides the average value of the portion of fees which each group of P employees paid, based on P data from the whole sample.

Approximately one third of P employees proceeded *pro se*.[93] Accordingly, Table 6 provides the number of cases involving P employees who pay each possible portion of the four possible fees, the percentage of the total of 121 P cases comprised by that number of cases, and the number of those cases where the P employees proceeded with and without counsel. Specifically, the rows down the right hand side of Table 6 provide: (1) "Total Cases," *i.e.*, the total number of cases involving P employees who paid one of the nine different designated portions of the four possible fees; (2) "% of 121 P Cases," *i.e.*, the percentage of the 121 total cases involving P employees comprised by the number of cases where P employees paid this designated portion of fees; (3) "Cases w/Atty," *i.e.*, the number of the cases where the P employee paid this designated portion of fees and was represented by counsel; and (4) the number of the cases where the P employee paid this designated portion of fees and proceeded *pro se*.

[93] One third of the "P cases" were prosecuted *pro se*. It might be argued that the *pro se* cases should be excluded from the evaluation of attorney's fees because the *pro se* parties' inability to pay for counsel should not be interpreted as inexpensive attorney's fees. The problem with this argument is the presumption that the decision to proceed *pro se* arises from an inability to pay counsel. The available data indicate that P employees *pro se* do as well as those with counsel, and that P employees choose to hire counsel when a larger amount of money or equitable relief is at stake. *See infra* Part IV.C.4.

Table 6. Cost of Arbitration to P Employees

	Column 1	Column 2	Column 3	Column 4	Column 5	Column 6	Column 7	Column 8	Column 9	
Fees Paid By EE-P	**None**	**Less than Max Hrg./Flg Fee ($783)**	**½ Forum Fees ($1,146)**	**Forum Fees ($6,292)**	**Atty Fees ($6,248)**	**Atty Fees & ½ Arb. Fees ($6,776)**	**Atty Fees & ½ Forum Fees ($7,394)**	**Atty Fees & Arb. Fees ($7,954)**	**Atty Fees & All Forum Fees ($8,540)**	**Row Totals**
Cases *Pro Se*	29	5	5	1	0	0	0	0	0	=40
Cases w/Atty	10	2	3	0	35	4	23	2	2	=81
Total Cases	39	7	8	1	35	4	23	2	2	=121
% of 121 P Cases	32.23	5.8	6.61	.83	28.925	3.305	19	1.65	1.65	=100%

Summarizing the statistics reflected in Table 6,[94] the following are my findings as to the cost of AAA arbitration for P employees during 1999 and 2000.

The potential costs of AAA arbitration during 1999 and 2000 were the filing fee, hearing fees, the arbitrator's fees, and attorney's fees. I refer to the filing, hearing and arbitrator's fees, collectively, as "forum fees" because they comprise the cost of the arbitration forum, whereas attorney's fees are the cost of counsel.

I found that 32% of P employees paid nothing for arbitration. This group of employees paid no forum fees because the arbitrator reallocated their fees to the employer at the end of the arbitration hearing. They paid no attorney's fees because they proceeded *pro se*, or because they were awarded attorney's fees by the arbitrator.

Twenty-nine percent of P employees paid only attorney's fees for arbitration. All of their forum fees were reallocated to the employer by the arbitrator. The average attorney's fee, based on all 200 cases, was $6,776. This figure is the best estimate of their cost of arbitration. This figure needs further research, however, as there were only 12 awards of attorney's fees to P employees in the 200 case sample.

Considering the 32% group and 29% group above, we can see that both groups' forum fees were entirely re-allocated to the employer. Thus, a total of 61% of P employees paid no forum-fees. The 32% group did not then pay for counsel, while the 29% group did pay for counsel.

An additional 13% of P employees paid no attorney's fees, but did pay some or all of the forum fees in the case. In order to estimate the cost of arbitration to these employees, I calculated the average amounts of the filing, hearing and arbitrator's fees based on all 200 cases. The total of these average fees was $2,292. This is a good estimate of the most that this 13% of P employees paid for

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[94] The D.C. Circuit has ruled that for a promulgated private employment arbitration agreement to be enforceable, the employer must pay the arbitrator's fees. Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 at 1484 (D.C. Cir. 1996). This case concerned a Title VII claim under the AAA Employment Dispute Resolution Rules which provide that the parties shall share the arbitrator's fees equally. Such a rule would reduce 28.9% of the P employees' costs by $853 (2 mean arbitrator's fees), and 4% of P employees' costs by $1,706 (mean arbitrator's fees). More recently, however, the D.C. Circuit trimmed this holding to extend only to claims arising from federal statutory claims. Brown v. Wheat First Securities Inc., 257 F.3d 821 (D.C. Cir. 2001). To date, only the more liberal Ninth Circuit is invoking the original holding of *Cole*. *See* Circuit City Stores, Inc. v. Adams, 279 F.3d 889 (9th Cir. 2002) (promulgated arbitration agreement unconscionable in part due to employee's required share of arbitrator's fees).

arbitration.

The final 26% of P employees paid all of their attorney's fees, as well as some or all of the forum fees for the case. Only 2% of this 26% group paid all of their forum fees, while the remaining 24% paid only a part of their forum fees. For the 2% group, the total cost of arbitration was $8,540, based on the average attorney's fees and forum fees for the 200 case sample. For the remaining 24%, the average cost of arbitration was between $6,776 and $7,954.

Based on these figures, 55% of lower-income employees had average total arbitration costs between $6,776 and $8,540. This 55% is comprised of the 29% and 26% groups above.

4. *AAA Employment Arbitration Is Generally Affordable for P Employees*

Seventy-two percent of P employees earned between $14,000 and $60,000. Fifty percent of the P employees earned between $14,000 and $40,000.[95] Based on the figures in Table 6, 55% of P employees had average total arbitration costs between $6,776 and $8,540. Nevertheless, the costs of arbitration appear to be affordable to employees earning less than $60,000 per year, assuming that they have been working during the pendency of the arbitration. These arbitration costs are affordable because most P employees have agreed to representation on a contingency basis. Thus, attorney's fees should generally be affordable to P employees. The remaining costs of arbitration, forum fees, average only $2,292. Presumably, even P employees can afford to pay them.[96]

B. *Promulgated Agreements, the Right to Trial and the Cost of Arbitration*

As previously discussed, perhaps the main objection of employee advocates, civil rights groups, and the plaintiff's bar to employment arbitration is the use of promulgated agreements by employers.[97] The objection is that employers use

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[95] *See infra* Part IV.A.1.

[96] Effective November 1, 2002, the AAA amended its rules to limit employee's forum fees to a total of $125.00, virtually eliminating any question regarding the affordability of AAA employment arbitration. *See* AMERICAN ARBITRATION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES (effective Nov. 1, 2002). The foregoing analysis remains probative of the affordability and fairness of AAA employment arbitration prior to 2003.

[97] *See supra* Part I.D.

superior economic power to force employees to relinquish their right to trial in exchange for arbitration as a precondition to employment.[98] This argument has assumed, however, that employees had the real choice of taking their employment-related claims to court prior to signing the promulgated agreements. This study indicates that the majority of employees do not have that choice. They have no real right to trial. As demonstrated above, 72% of the employees in this sample who arbitrated pursuant to promulgated agreements were of low to middle income and did not earn enough income to gain access to the courts with an employment-related claim.

Assuming that the argument of employee and civil rights advocates is true: that employees who arbitrated pursuant to promulgated agreements were forced to arbitrate under the auspices of the AAA, it is important to determine whether AAA employment arbitration was affordable to these employees. This study does indicate that AAA employment arbitration is affordable to the employees who were allegedly forced to arbitrate under its auspices.

C. *AAA Employment Arbitration and Due Process*

1. *Statutory Employment Discrimination Cases: A Red Herring*

Statutory employment discrimination claims have been at the center of the debate over the propriety of promulgated employment arbitration.[99] The emphasis on civil rights cases may be inappropriate. Employment discrimination claims comprise only a small percentage of AAA's employment-related claims. They have comprised between 1.8% and 7% of the samples in studies of AAA employment arbitration done to date.[100] Nor are substantial numbers of civil rights claims filed with the NYSE or NASD. An average of no more than 21 employment discrimination claims were filed per year with the NYSE and

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[98] *See id.*

[99] *See, e.g.*, Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Howard, *supra* note 12; Maltby, *supra* note 7.

[100] Only 1.8% of the claims from a 1993 sample of AAA employment arbitration cases alleged employment discrimination. Bingham, *Emerging Due Process Concerns*, *supra* note 35, at 115. Only 13 of all the AAA cases filed in 1996 alleged employment discrimination. Maltby, *supra* note 7, at 49–50. Just 7% of the claims from this sample of AAA cases (or 14 of 200 cases) decided in 1999 and 2000 alleged employment discrimination. As to this sample, it should be noted that 36 cases alleged a civil rights claim, but 19 did so without alleging a single fact in support of the claim and three were time barred. These claims were not included in the 14 claim total.)

NASD combined, between 1989 and 2001.[101] These figures strongly suggest that the proper evaluation of employment arbitration should not be based, or primarily focused, on the forum's treatment of civil rights claims.[102]

Civil rights claims comprised only 7% of the instant sample, or 14 cases out of 200. Findings regarding those 14 cases would concern numbers too small to be statistically significant. In other words, the findings would not be representative of the sample or generalizable to AAA employment arbitration generally. Nevertheless, if one reads these 14 awards, they appear to have been generally properly adjudicated. There were two dispositive errors of law, but the majority of arbitrators properly applied the governing statutes and case law. In the three cases which claimants won, the arbitrators considered all statutory categories of damages. They awarded attorney's fees against the employer pursuant to statute, and considered, but ultimately rejected, awarding punitive damages.

2. *There Is No Evidence of Bias Against Employees, Employees of Middle and Lower Income or Employees Arbitrating Pursuant to Promulgated Agreements*

Two major due process concerns regarding employer-sponsored arbitration are that its arbitrators will be biased against employees in general or against middle- and lower-income employees in particular.[103] In prior studies, win/loss ratios and award/demand ratios have been employed to assess the presence of arbitrator bias.[104] The ratios for the employers have been compared with the ratios for the employees, and the inference of arbitrator bias has been drawn from a significant difference in favor of the employers.[105] The problem with this method of analysis is that there may be other inferences than arbitrator bias that

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[101] *See* Delikat& & Kleiner, *supra* note 78.

[102] It is worth noting that few P employees' civil rights claims proceed through the award stage in any venue. As discussed above, P employees cannot afford to access the courts, and the EEOC prosecutes few claims. *See supra* Part I.C.1. Very few civil rights claims reach the award stage with AAA or the NYSE over all, meaning that even fewer awards might be those of P employees. *See supra* note 100. And the NASD excludes all but highly compensated employees from its jurisdiction. *See supra* notes 59–61 and accompanying text.

[103] *See, e.g*, Bingham, *The Repeat Player Effect*, *supra* note 28; Bingham, *Is There a Bias?*, *supra* note 33; Bingham, *Emerging Due Process Concerns*, *supra* note 35.

[104] Bingham, *The Repeat Player Effect*, *supra* note 28, at 204–05.

[105] *Id.*

can be drawn from the difference between the ratios.

The results of this study pertaining to bias follow below in eight analyses. The data relevant to bias are the win rates, win/loss ratios, award amounts, award/demand ratios, and the allocation of filing, hearing, arbitrator's and attorney's fees by the arbitrator.

a. *Win Rates and Win/Loss Ratios*

Table 7. Win/Loss Ratios by Party

Party	Total Number of Cases Involving Party	Number of Cases Won	Percent of Cases Involving Party Won (Win Rate)	Number of Cases Lost	Percent of Cases Involving Party Lost	Win/Loss Ratio (cases won/ cases lost)
ER	200	114	57%	86	43%	1.3 (114/86)
EE	200	86	43%	114	57%	.75 (86/114)
EE-P	121	41	34%	80	66%	.51 (41/80)
EE-N	79	45	57%	34	43%	1.3 (45/34)

Table 8. Win/Loss Ratios in P Employee Sub-sample of Cases

	Total Number of Cases with P Parties	Number of Cases Won	Number of Cases Lost	Percent of Cases with P Parties Won (Win Rates)	Win/Loss Ratio (cases won/ cases lost)
Wrongful Discharge Cases	41	8	33	19.5%	.24
"Appellate Effect" Cases	25	6	19	24%	.32
Sub-Total	66	14	52	21%	.27
Remainder	55	27	28	49%	.96
Total P Cases	121	41	80	34%	.51

Looking at Table 7, at first blush, the win rates and win/loss ratios look inequitable for employees as compared to employers, and inequitable for P employees as compared to N employees. Employers have a win rate of 57% and a win/loss ratio of 1.3, while employees have a win rate of 43% and a win/loss ratio of .75. N employees have a win rate of 57% and a win/loss ratio of 1.3, while P employees have a win rate of 34% and a win/loss ratio of 0.51.

These disparities, however, are not the result of arbitrator bias. Table 8 permits closer examination of the nature of the P employees' claims. It shows that more than half of the claims—66 of 121—are of a type that is inherently likely to be dismissed, regardless of the predilections of the arbitrator. Table 8 shows that the P cases include 41 of the 42 wrongful discharge claims in the sample as a whole. Claims of wrongful discharge, absent allegations amounting to claims of contract or discrimination, are likely to fail because employment at-will is the law.[106] Table 8 also shows that the P cases also include all 25 cases in the sample affected by the "appellate effect." These 25 cases are also likely to be meritless and are likely to be decided against the employee for that reason.[107]

The appellate effect is an above-average win rate for an employer, caused

[106] At-will employment is no longer the law in Montana. MONT. CODE ANN. § 39-2-904 (2001).

[107] *See infra* Part IV.C.3.

by the effective functioning of the employer's in-house dispute resolution program. The program isolates and resolves claims with merit in-house, leaving meritless claims for final appeal to external arbitration with the AAA. The result is an AAA docket of meritless claims against that company, virtually all of which end up being dismissed. The cases in this sample that were subject to the appellate effect had little or no merit. There was no room for arbitrator prejudice to play a role in their dismissal.[108]

Thus, a total of 66 cases, more that 50% of the 21 P cases, are meritless cases which would be decided against the employee for reasons other than arbitrator bias, or any other bias inherent in the forum. Table 8 shows that the win rate of the 55 remaining cases is 49%, and their win/loss ratio is .96. These numbers compare favorably with the win rate of the N employees and the employers, 57%, and the win/loss ratios of the N employees and the employers, 1.3. The difference is not sufficient to indicate bias.

Just as the 66 meritless cases exerted a downward effect on the win rate and win/loss ratio of the P employees, it affected the win rate and win/loss ratio of the employees over-all, as compared to the employers. See Table 7. The original comparison between the employers' win rate, 57%, and win /loss ratio, 1.3, and the employees' win rate, 43%, and win/loss ratio, .75, however, is more favorable than the original comparison between the N and P employees' statistics. The improvement in the P sub-sample rendered by eliminating the meritless cases will improve the win rate and win/loss ratio of the overall employees' sample, making the relationship between the employees' and employers' statistics even closer. Accordingly, there is not a sufficient disparity of win rates or win/loss ratios to indicate systematic bias in favor of the employer.

This data does not show bias against employees generally, or against employees of middle or lower income. But "P employee" does not signify only an employee's income. It also indicates that an employee is arbitrating pursuant to a promulgated agreement. Accordingly, the data indicate that these employees are treated fairly.

b. *Award Data and Award/Demand Ratios*

Claimant-employee success may also be judged by looking at the amount of the awards rendered, as well as the amount of the award rendered as a percentage of the amount of damages demanded, a ratio which is sometimes called the

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[108] The appellate effect is discussed more fully at Part IV.C.

"outcome." Tables 9 and 10 provide this data.

Table 9. Amounts of Monetary Awards Awarded to Each Party

Prevailing Party	No. of Awards	Low	Median	High	Mean	Standard Deviation
ER	19	$2,000	$26,780	$357,606	$54,960	$86,017.36
EE	66	$412	$44,855	$1,732,500	$172,690	$336,396.20
EE-P	25	$412	$16,666	$1,320,531	$84,754	$260,344.70
EE-N	41	$1,746	$86,844	$1,732,500	$230,013	$370,293.60

Table 10. EE-P and EE-N Demands, Awards, and Outcomes

Prevailing Party	No. of Cases	Low	Median	High	Mean	Standard Deviation
EE-P Demands	15	$428	$10,835	$244,275	$50,593	$71,742.70
EE-P Awards	15	$412	$11,468	$158,603	$29,503	$43,418.77
EE-P Outcomes (Awds/dmds)	15	.96	1.0	.65	.58	
EE-N Demands	38	$10,000	$170,618	$4,408,500	$505,763	$839,762
EE-N Awards	38	$1,746	$71,513	$1,732,500	$242,038	$382,155
EE-N Outcomes (Awds/dmds)	38	.2	.4	.4	.48	

Briefly looking at the simple amounts of the awards alone, N employees had larger awards than P employees. See Table 9. But N demands for monetary damages are also much larger than P demands. See Table 10. N demands are larger because damages in most employment-related claims are based on salary and N employees earn larger salaries.[109] What matters for purposes of assessing relative success is that P employees were awarded, on average, 10% more of

[109] The award/demand ratio of the monetary awards should also be considered in context together with a similar comparison of the demands and awards of non-monetary, equitable relief. A significant portion of the monetary awards, 44.4%, to P employees was accompanied by non-monetary, equitable relief. The number of demands for this non-monetary equitable relief were too few, however, to render award/demand ratios of statistical significance.

their demands for monetary damages than N employees were awarded, as indicated in Table 10. The average award/demand ratio for P employees is 58%, versus 48% for N employees. Thus, the outcome data reveals that P employees won a larger percentage of their demands than N employees. There can be no inference of arbitrator bias against P employees, or other breach of due process, drawn from these facts.

There were insufficient data on employer demands to make comparisons with employer outcomes. The data from the "Award Amount" table, Table 9, however, reveal that P employees received a mean award nearly $30,000 more than the mean award to employers.

There were also too few demands for equitable relief to evaluate outcomes for equitable awards. But P employees did receive 40% of the total of 35 equitable awards granted.

In conclusion, the award and demand data as a whole does not allow for an inference of arbitrator bias against P employees, or for an inference of a breach of due process. If anything, the data would imply some bias in favor of P employees.[110]

c. *Allocation of Forum Fees in P Cases*

Perhaps the clearest manifestation of AAA arbitrators' positive attitude toward employees generally, and P employees specifically, is in the prevalence of awards of the costs of the arbitration itself to the claimants. The AAA's 1999 Rules provide that the AAA filing fee shall be borne by the claimant, who is usually the employee, and that the AAA's hearing fees and the arbitrator's fees shall be shared equally by the parties.[111] Pursuant to these same rules, however, the arbitrator has discretion to reallocate the payment of the fees in a different manner. The following Tables 11, 12 and 13 reflect the manner in which the arbitrators in the P cases reallocated arbitrator's fees, hearing fees, and filing fees, respectively, between employers and P employees.

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[110] P employees, it should be remembered, are both middle- and lower-income employees and employees in arbitration pursuant to promulgated agreements.

[111] AAA 1999 Rules, Rule 39. In just a handful of cases, allocation of fees was altered by the procedural rules of the employer's ADR plan.

Table 11. Reallocation of Arbitrator's Fees in P Cases Won and Lost

	Total Cases	Number of Cases Where ER Pays EE's 50% share ("reallocated cases")	Frequency of Arbitrator's Reallocation of Fees (reallocated cases as % of total cases)
Total P Cases with Arbitrator's Fees	121	85	70.247%
P Cases Won	40	32	80.00%
P Cases Lost	81	53	65.43%
Difference Between Frequencies of Reallocation of Fees in Cases Won and Cases Lost			14.57%

Table 12. Reallocation of Hearing Fees in P Cases Won and Lost

	Total Cases	Number of Cases Where ER Pays EE's 50% share ("reallocated cases")	Frequency of Arbitrator's Reallocation of Fees (reallocated cases as % of total cases)
Total P Cases with Hearing Fees	108	77	71.29%
Cases Won	37	30	81.08%
Cases Lost	71	47	66.19%
Difference Between Frequencies of Reallocation of Fees in Cases Won and Cases Lost			14.89%

Table 13. Reallocation of Filing Fee by P Cases Won and Lost

	Total Cases	Number of Cases Where ER Pays Some or All of EE's 100% share ("reallocated cases")	Frequency of Arbitrator's Reallocation of Fees (reallocated cases as % of total cases)
Total P Cases with Filing Fees	121	103	85.12%
Cases Won	40	38	95%
Cases Lost	81	65	80.25%
Difference Between Frequencies of Reallocation of Filing Fees in Cases Won and Cases Lost			14.74%

Perhaps the clearest manifestation of AAA arbitrators' positive attitude toward employees generally and P employees specifically is in their award of the costs of the arbitration itself. AAA employment arbitrators exercised their discretion to reallocate arbitrator's fees to the employer in 70.25% of the cases, hearing fees in 71.3% of the cases, and some or all of the filing fees in 85.12% of the cases. Thus, virtually all forum costs were reallocated to the employer in 70.25% of the cases.[112] Tables 11, 12 and 13 also show that success on the merits of the case increased the likelihood of reallocation of the fees by 14%.

The two predominant, and conflicting, views on assessing employees fees in private employment arbitration are (1) that a claim should cost something in order to prevent frivolous claims; and (2) that a claim should cost nothing, so as not to discourage the assertion of a viable claim. The data here indicate that AAA arbitration straddles the two views. The AAA Rules impose fees and an expectation of costs, while the arbitrators reallocate those fees a majority of the time, removing the expectation of costs. In any event, the reallocation of fees indicates an absence of bias against employees.

d. *Awards of Attorneys' Fees*

The number of demands and awards of attorney's fees are insufficient to form statistically significant award/demand ratios. Looking at the awards alone,

[112] Remember that the mean P employee filing fee is only $376.

the number of awards of attorney's fees, expressed as a percentage of total claims, indicate bias against the P employee. P employees received awards of attorney's fees in 13% of their total claims, N employees in 30% of their total claims, and employers in 32% of their total claims.

A closer look at the data, however, reveals that the number of awards of attorney fees should not be evaluated as a percentage of total claims. The arbitrators overwhelmingly awarded attorney's fees in cases alleging: (1) breach of contract; (2) violation of statutory civil rights; or (3) violation of other statutory rights. In other words, attorney's fees were usually awarded only where the award was contemplated by statute or written contract. Looking at the total number of awards to each party, as a percentage of the number of statutory and contract claims made by the party, provides a more accurate assessment of bias.

Table 14 evaluates the arbitrator's awards of attorney's fees to the different parties as a percentage of the parties' contract claims and statutory employment discrimination claims.

Table 14. Awards of Attorney's Fees as Percentage of Contract and Statutory Claims

	P-EE	N-EE	ER
Total Awards of Atty. Fees*	16	20	11
Total Awards of Atty. Fees in Contract Claims and Statutory Claims	12	17	11
Total Contract and Statutory Claims Asserted	64	40	55
Total Awards of Atty. Fees in C. and S. Claims as % of C. and S. Claims	19%	42%	20%

**The awards are to the party under whose column the awards are listed. The awards are of that party's fees, and against their adversary.*

P employees were awarded their attorney's fees in 19% of their contract and statutory claims. Employers were awarded attorney's fees in 20% of their contract and statutory claims. N employees were awarded attorney's fees in 42% of their contract and statutory claims. These results indicate no bias in favor of employers, but they do seem to indicate a bias in favor of N employees over P employees.

The disparity between the frequency of P and N awards, however, may have something to do with the exact breakdown of the types of claims they asserted. Of the 40 statutory and contract claims which they asserted, N employees asserted 60% contract claims, whereas only 34% of the 64 statutory and contract

claims asserted by P employees were contract claims.

3. *The Appellate Effect*

a. *The Repeat Player Effect*

As discussed above, however, there is one theory alleging a lack of due process in employment arbitration which enjoys some empirical support. The "repeat player effect" is the theory that, in a given sample of cases, an employer who arbitrates more than once will win more frequently than other employers.[113] The cause of the repeat player effect has never been established. Yet it is the cause that determines whether the effect is the symptom of a fair or unfair process.

The most popular explanation for the effect is that the repeat player employer chooses the same arbitrator repeatedly and develops a relationship with the arbitrator which causes the "repeat arbitrator" to become improperly biased in favor of the employer when deciding the employer's cases.[114] The "repeat arbitrator" theory essentially conceives of private employment arbitration as a "kangaroo court." However, the "repeat arbitrator" theory itself has no empirical support and is not supported by the data in this sample.[115]

b. *The Failure of the "Repeat Arbitrator" Theory*

In order to test the "repeat arbitrator" theory, I looked at these 200 cases for any subsequent arbitration involving an employer and an arbitrator who had previously been involved in the same arbitration. I did not limit the review to "repeat arbitrators." I also looked for "repeat arbitrations" involving any two entities present at arbitration. My theory was that a repeat appearance involving any two entities present at an arbitration might improperly influence the outcome of an arbitration. It has been proposed, for example, that the real "repeat players" in arbitration are the lawyers.[116]

Out of the 200 cases representing arbitrations decided in 1999 and 2000, the total number of arbitrations involving a second meeting between any two entities involved in arbitration—including employers, employees, arbitrators, counsel for

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[113] *See supra* Part II.

[114] *Id.*

[115] *Id.*

[116] Estreicher, *supra* note 17, at 566.

claimant or respondent, and non-lawyer representatives for claimant or respondent—was two. These two repeat appearances were between employers and arbitrators. Both times the employer did win the second case. Two, or 1% of the 200 cases, however, is not a statistically significant incidence in a sample of 200. In other words, there are no empirically cognizable "repeat arbitrators" in this sample. This study is the third failure of the "repeat arbitrator" theory to explain the "repeat player effect."[117]

Just as there is no support for the "repeat arbitrator" theory, there is no support for the idea that employment arbitration sponsored by employers is a "kangaroo court" dominated by an "old boys' network" of individuals who know one another, and that arbitrators render prejudiced verdicts for that reason. Nor is there support for the concept that the arbitrator knows the "repeat players" by reputation, and is therefore biased in their favor the first time that the arbitrator is called to arbitrate a dispute involving them. The fact that there are no repeat player employers, repeat arbitrators, or indeed, repeat participants of any kind in this sample demonstrates that AAA employment arbitration is characterized by a wide variety of parties. Moreover, the total number of arbitrators on the AAA panel in contrast to the annual number of arbitrations shows that it is unlikely that any individual arbitrator would have appeared with sufficient frequency to seek to reward "repeat player" employers. There were 560 arbitrators on the AAA's employment arbitration panel in 1999–2000.[118] And there were only 432 awards rendered in 1999 and 410 rendered in 2000.[119]

The theory of the repeat player effect as explained by the repeat arbitrator

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[117] Bingham suggests that we expand the sample of cases until we collect a sufficient number of "repeat arbitrator" cases to test the "repeat arbitrator" theory. Bingham, *2000 Study, supra* note 43. The problem with this suggestion is that even when we expand the sample, the number of "repeat arbitrator" cases that we collect must be statistically significant as compared to the sample as a whole. This sample strongly suggests that a larger sample will not produce a statistically significant number of "repeat arbitrator" cases. This problem is not a mere technicality. Expanding the sample to capture a sufficient number of "repeat arbitrator" cases to track the behavior of several "repeat arbitrators" poses the following questions: (1) Given the instant sample's results and the 560 arbitrators on the AAA employment panel, how far would we have to expand the sample to capture an adequate number of repeat arbitrators? (2) How long do we suppose the arbitrators' and employers' memories to be? (3) How many encounters create a bias?

[118] The current number of arbitrators on the AAA employment arbitration panel is 610. In 1999–2000, the number was approximately 560. Interview with Robert Meade, Senior Vice President, American Arbitration Association, in New York, N.Y. (Oct. 9, 2002).

[119] This information was provided by the computer database maintained by AAA at its Headquarters at 335 Madison Ave., New York, NY, 10017

theory has its roots in labor arbitration—a forum where the participants are, in fact, repeat players, and the arbitrators are often repeat arbitrators.[120] The participants in labor arbitrations know one another and expect to arbitrate together again. "[B]ecause both unions and employers are repeat customers of arbitration and have a hand in selecting the arbitrator . . . , arbitrators have a strong personal interest in crafting awards that will be respected as fair by both parties . . . ."[121] Reputations do not appear to accrue in this manner under the auspices of AAA employment arbitration, and the data shows that the "repeat arbitrator theory" does not explain the "repeat player effect" found herein.

c. *The Appellate Effect*

This study supports an explanation of the repeat player effect which I have named the "Appellate Effect." Repeat player employers isolate and resolve large numbers of meritorious employee claims through in-house dispute resolution programs, leaving only relatively meritless cases for appeal to AAA arbitration. The result is a AAA docket of meritless cases against that employer, which leads to an above-average win-rate for that employer. In other words, the repeat player effect is caused, not by a lack of due process, but by a fair in-house process.

d. *Data Supporting the Appellate Effect Theory*

Table 15 summarizes the data supporting the Appellate Effect Theory. It shows the win-loss ratio for all cases in the sample and the win-loss ratios for all cases in the sample (1) where the employer maintained an in-house dispute resolution program (DRP), (2) which were subject to the repeat player effect (RPE), (3) which were subject to both DRP and RPE, in other words, subject to the Appellate Effect, and (4) which were subject to RPE, but not DRP.

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[120] *See, e.g.*, Bingham, *The Repeat Player Effect*, *supra* note 28, at 192–93 (citing Cole v. Burns Int'l Sec. Serv., 105 F.3d 1465, 1476 (D.C. Cir. 1997)).

[121] *Cole*, 105 F.3d at 1475.

Table 15. The Appellate Effect Data

	All Cases Where ER uses DRP (cases with "DRP")	All Cases Where ER is "Repeat Player" (cases with "RPE")	Cases with Appellate Effect (cases with "DRP" and "RPE")	Cases with a Repeat Player Only	All Cases
Total No. of Cases	51	34	25	9	200
No. of Cases Won by ER	35	24	19	5	114
No. of Cases Lost by ER	16	10	6	4	86
ER Win/Loss Ratio (cases won/cases lost)			3.2	1.25	1.3

* *"Repeat player" arbitrations excluded first appearance of "repeat player" employer.*

In this study, 34 cases involved a repeat player employer. Eighty-eight percent of these repeat players were employers with nationally known names, which are likely to process a relatively large number of cases. [122] The employers in 74% of those cases (25 cases) maintained an in-house dispute resolution program (DRP) culminating in AAA arbitration. The win-loss ratio for this 74% of cases was 3.2, a full 190% higher than the 1.3 win-loss ratio for employers over-all. On the other hand, the remaining 26% of repeat employer cases (9 cases) involved employers who did not maintain in-house DRPs. Their win-loss ratio was only 1.25, just slightly below the 1.3 win-loss ratio for employers over-all. In short, the "repeat player effect" does not exist where the repeat player does not maintain an in-house DRP. Thus, the "Appellate Effect" appears to be the result of the selection processes of large employers' in-house DRPs, not merely the by-product of large employers' repeat appearances at arbitration.

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[122] A confidentiality agreement covers the release of the instant sample of AAA cases, and specifies that the names of parties will not be published. Accordingly, it is not possible to supply the specific names of these large employers.

The "appellate effect theory" is further confirmed by a reading of the 25 individual cases which do manifest the "repeat player effect." They are indeed, of little or merit. A reading of these awards reveals that over half, 56%, were without any merit. [123] An additional 20% had some merit, but were properly denied. Thus, a total of 76% of the claims fall into the category of no merit or little merit, supporting the theory that the DRPs of repeat player employers push cases of questionable merit to the final step of external appellate review under the auspices of AAA, producing a higher than average rate of dismissal. This "appellate effect" theory is worth further investigation.[124]

4. *Proceeding Pro Se*

One third of the P cases in this sample were prosecuted *pro se*, which raises the question of how well AAA employment arbitration works for a *pro se* litigant of low to middle income.[125] The data in this sample, however, indicate that *pro se* P employees succeed in AAA employment arbitration at the same rate as P employees with counsel.

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[123] The majority of these awards review the facts of the claimant's termination. Accordingly, the author's assessment of the degree of merit in the claim is a common-sense assessment of the facts recited in the award.

[124] Bingham attempts to discredit the Appellate Effect theory in her most recent article. Bingham, *2000 Study*, *supra* note 43. But she fails to address the data supporting the theory. She also calls the theory a mere restatement of her "employer learning theory," which is that repeat player employers learn to settle cases which they expect to lose. But even an "employer learning theory" explains the "repeat player effect" as the result of companies settling meritorious claims. Apparently even Bingham no longer clings to the claim that the "repeat player effect" is proof that arbitration lacks due process.

[125] P employees proceeded *pro se* in 33% of their cases, whereas N employees proceeded *pro se* in only 5.1% of their cases, and employers in only 4% of their cases. Accordingly, the discussion of *pro se* representation focuses on P employees, as neither of the other groups provides a sufficient number of cases for a comparison. The AAA employment arbitration rules ensure the right to counsel and offer assistance in finding counsel. AAA'S 1999 RULES, RULE 14, *supra* note *18*. But the rules also expressly contemplate *pro se* employment arbitration. *Id.*; *see also* AMERICAN ARBITRATIION ASSOCIATION, NATIONAL RULES FOR THE RESOLUTION OF EMPLOYMENT DISPUTES, RULE 14 (effective Nov. 1, 2001) RULE 14.

a. *Win Rates and Win/Loss Ratios*

Table 16. Win and Loss Data on P Employees Proceeding *Pro Se* and with Counsel

	Total Number of Cases	Number of Cases Won	Number of Cases Lost	Win/Loss Ratio (cases won/ cases lost)
Total EE-P Cases	121	40	81	.49
EE-P *Pro Se*	40	13	27	.48
EE-P with Counsel	81	27	54	.5

The win/loss ratios for P employees who proceeded *pro se* and P employees who proceeded with counsel are not significantly different. Moreover, the *pro se* employees did not face any lesser substantial group of opponents than the P employees with counsel. Specifically, the *pro se* P employees defeated 33 attorneys, six human resources representatives, and one corporate representative.

The favorable comparison between the win/loss ratios for represented and *pro se* P employees reflects well on the intelligence and sophistication of P employees and the fairness of AAA arbitrators. It indicates that they understood their cases and the AAA arbitration procedure. It also reflects well on the accessibility of the AAA rules regarding arbitration procedure to lay people.

The following table represents the overall win rates and win/loss ratios of all parties.

Table 17. Win/Loss Ratios by Party

Party	Total Number of Cases Involving Party	Number of Cases Won	% of Total Cases Which Party Won	Number of Cases Lost	% of Total Cases Party Lost	Win/Loss Ratio (cases won/ cases lost)
ER	200	114	57%	86	43%	1.3
EE	200	86	43%	114	57%	.75
EE-P	121	41	33.9%	80	66.1%	.51
EE-N	79	45	56.96%	34	43.04%	1.3

Clearly, the win rate and win/loss ratio of the P employees was lower than that of the N employees and the employers. The reasons for this disparity are discussed in Part IV.C.2.a. The fact that one third of the P employees proceeded *pro se*, however, was clearly not a cause of the relatively low P employee win/loss ratio. The data show that the win rate and win/loss ratio for those P employees who proceeded *pro se* was comparable to those who proceeded with counsel.

b. *Demand and Award Data*

The following Tables 18 and 19 show demand and award data for cases prosecuted by P employees proceeding *pro se* and with counsel.

Table 18. Demand and Award Data for P Employees *Pro Se* and with Counsel

	Total Cases	Total Awards Won	# of Awards as % of # of Cases	# Demands for Monetary Awards	# of Monetary Awards Won	# of Equitable Awards Won	# of Non-dollar Awards Won
EE-P rep'd *Pro Se*	40	13	0.325	13	6	7	0
EE-P with Counsel	81	28	0.346	24	21	5	2

* *"Non-dollar" awards means monetary awards not expressed in a specific number of dollars, such as awards of pension benefits described only as "pension benefits," etc.*

Table 19. Amounts of Monetary Demands by P Employees *Pro Se* and with Counsel

	Number of Demands	Amount of Lowest Demand	Amount of Median Demand	Amount of Highest Demand	Amount of Mean Demand	Standard Deviation
EE-P *Pro Se*	13	$3,598	$25,000	$1,845,500	$203,968	$510,946.1
EE-P *Pro Se* 2*	12	$3,598	$21,750	$500,000	$67,174	$139,353.5
EE-P with Counsel	23	$428	$75,000	$298,800	$93,448	$85,143.4

**This row of awards excludes the highest demand from the EE-P pro se group in order to arrive at a more representative mean demand.*

Table 18 shows that both the P employees who were represented by attorneys and the P employees who proceeded *pro se* won 100% of the monetary awards they sought. Again, this is an indication that P employees who proceeded *pro se* performed as well as those that proceeded with counsel. The other *pro se* findings in Table 18 are in numbers too small to be statistically significant. Nevertheless, I include them here for their value as case study material.

There were 13 demands for specific monetary relief in the *pro se* group, and 24 in the group with representation. The demand amounts are an indication that P employees chose to retain counsel when they believed they had more at stake. At first glance, the mean *pro se* demand of $203,968 is higher than the mean demand of the represented group: $93,448. See Table 19. But the larger size of the mean *pro se* demand is due to a single demand at the top of the scale for $1,845,500. This demand is an isolated instance of such a large demand. If this highest demand is removed from the group of *pro se* demands, the mean demand drops from $203,968 to $67,174. See Table 19, "*Pro Se* 2." This revised mean *pro se* demand is less than the mean demand by P employees with counsel, $93,448, and indicates that P employees chose to hire counsel when they believed they had a larger claim at stake.

In conclusion, the available data indicate that P employees who proceeded *pro se* performed as well as those that proceeded with counsel, partly due to the fact that the AAA's rules are comprehensible to lay people. Further, it appears that P employees rationally chose to retain counsel when the financial stakes of the arbitration became higher. Consequently, the data indicate that *pro se* arbitration is not a problem area in this review of due process concerns.

5. *The Speed of Arbitration*

Arbitration is commonly believed to be a relatively speedy means of dispute resolution. The average length of arbitration, measured from the filing of the demand for arbitration to the date of the award, was 8.2 months, based on this sample. However, an accurate measure of the length of arbitration cannot be based on this sample alone. As of November 5, 2000, the termination date for the lengthiest arbitration in our sample, there were many cases initiated in 1999 and 2000 which had not yet terminated. Therefore, 8.2 months does not represent the true average length for all cases initiated in those years ending in awards. We must consider all cases which terminated in awards.

The AAA supplied me with data concerning all cases initiated in 1999 and 2000 which had terminated as of September 2002, whether by award or otherwise. Based on that data, I was able to estimate the average length of all cases initiated in 1999 and 2000 ending in an award. The average length was 15.2 months.[126]

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[126] I estimated the average time from demand to award by estimating the length of the individual cases which might have been included in a sample of all awards initiated in 1999 and 2000, assuming all cases initiated in 1999 and 2000 were completed. The average time from demand to award in my pool of 200 awards was 246.97 days, or 8.2 months. My 200 awards represented the pool of 356 awards rendered from the total pool of cases initiated in 1999 and 2000 on or before November 5, 2000. Between November 5, 2000 and September 1, 2002, an additional 429 awards were rendered. Imagine that my sample were expanded to include a sample of these 429 awards. The original 200 awards comprised 56% of the 356 award pool. Therefore, the additional sample of the 429 awards would be 56% of 429, or 240 additional awards. The additional sample of 240 awards would be divided into two groups of 120 each, because I estimate that approximately half of them would have been initiated in each of 1999 and 2000. I make this estimate because 1340 cases of the total pool were initiated in 1999 and 1372 cases were initiated in 2000. I don't know when during each year these 240 cases would have been initiated, so I estimate that the initiation dates would average at the mid-points: July 1, 1999 and July 1, 2000. I don't know when these cases would have ended in awards, but I know that the awards were rendered sometime after November 5, 2000 and on or before September 1, 2002. So I chose an approximate mid-point of October 1, 2001. Therefore, I added two groups of estimated individual awards to my sample. Group one consisted of 120 cases initiated on July 1, 1999 and terminated in an award on October 1, 2001. And Group two consisted of 120 cases initiated on July 1, 2000 and terminated in an award on October 1, 2001. Averaging these two groups of estimated additional awards and my original sample, the average time from demand to award is 15.18 months. As of September 1, 2002, there were only 103 cases initiated in 1999 and 2000 that were still pending. Of the 2613 cases which were terminated as of September 1, 2002, only 34%, or 885, ended in an award. Assuming that only 34% of the pending 103 cases result in an award, there are only 35 awards outstanding. Thirty-five awards comprise less than 8% of

6. *An Opportunity to Be Heard*

Table 20 summarizes the data as to the number of days required for each arbitration hearing in the sample.

Table 20. Number of Days in AAA Employment Arbitration Hearings

Low	Median	High	Mean	Standard Deviation
0 [127]	1	12	1.85	1.56

Over 96% of the claimants in this sample received their "day in court," and "a day in court" aptly describes the arbitration hearing. Some 89% of the claims were successfully resolved after one to three days of hearings.

7. *A Decision on the Merits*

AAA rule 34 states that the arbitrator will provide the "written reasons" for the award, in keeping with due process.[128] In this sample, 89% of the awards comply with this rule. This practice compares favorably with the NYSE and NASD, neither of which require their arbitrators to provide the reasons for their decisions in their awards. While some of the awards in this sample do not rise to the level of a judicial opinion, the AAA did not intend to replace judicial opinions with its awards. The intent of the rules is merely to provide "written reasons," comprehensible to lay people, for the decisions made on the claims.[129] The majority of the AAA awards rise to this standard.

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the 440 awards supporting my estimate. Accordingly, the estimate is sound.

[127] Pursuant to AAA Rule 30, the parties may waive an oral hearing. AAA's 1999 RULES, RULE 30, *supra* note 18. Four cases were decided without a hearing on grounds sufficient for summary judgment under the Federal Rules of Civil Procedure. Two cases were wrongly dismissed based on the claimant's default. AAA Rule 23 provides that there may be no judgment based on default; a hearing must be held, and a decision must be made on the evidence. *Id*, at RULE 23. One dismissal was not explained by the accompanying award.

[128] *Id.*, at RULE 34.

[129] Interview with Robert Meade, *supra* note 9.

V. CONCLUSION

Opposition to employer-sponsored employment arbitration is widespread, strong, and based on the belief that it robs employees of the right to trial and supplants it with a "kangaroo court" dominated by employers' interests. In contrast, research shows that middle- and lower-income employees and employees who arbitrated pursuant to promulgated agreements had no real, practical right to trial. This study indicates that AAA employment arbitration offers affordable, substantial, measurable due process to employees arbitrating pursuant to mandatory arbitration agreements and to middle- and lower-income employees. Ideally, this study and more research on private employment arbitration will begin to move the political and legal debate over employment arbitration into resolution and invention.

EXHIBIT A

Categories of Data in My Final Database

No.	Field Name
1	AAA Case Number
2	My Case Number
3	Promulgated v. Negotiated
4	Claimant 1
5	Claimant 1: EE-OR
6	Claimant 2
7	Claimant 2:EE-OR
8	Claimant 3
9	Claimant 3:EE-OR
10	Attorney for Claimant
11	Other Type Representative
12	Respondent 1
13	Respondent 1:EE-OR
14	Respondent 2
15	Respondent 2:EE-OR
16	Respondent 3
17	Respondent 3:EE-OR
18	Attorney for Respondent
19	Other Type Representative
20	Arbitrator 1
21	Arbitrator 2
22	Arbitrator 3
23	Date Demand Received by AAA
24	1st Day of Hearing
25	Award Date
26	Number of Days of Hearing
27	State of Hearing
28	Date Claim Filed with Court
29	Filing Date with EEOC
30	EEOC End Date
31	EEOC Resolution
32	Filing Date with FEPA
33	End Date with FEPA

No.	Field Name
34	FEPA Resolution
35	Court Challenge to Arbitration
36	Other Related Court Suits
37	Filing Date: All Court Suits
38	Summary of Facts
39	Whether Civil Rights claim in Arbitration
40	Federal CR claim
41	State CR claim
42	Is CR Claim Meritless
43	Employee win CR claim
44	Is Decision on CR claim Wrong
45	Other (non-CR) Federal Statutory Claim
46	Other (non-CR) State Statutory Claim
47	Wrongful Discharge Claim
48	At -Will WD claim
49	Employment Handbook/Policy WD Claim
50	Other (non-WD) Common Law Claims
51	State Statutory C-Cs
52	WD C-C
53	Employment Handbook/Policy WD C-Cs
54	Other (non-WD) Common Law C-Cs
55	Who Won Arbitration: EE-OR
56	Dem: Tot. Damages Not inc.Equitable & Atty fees
57	Dem: Equitable Damages
58	Dem: damages without dollar value description
59	Dem: Punative Damages
60	Dem: Atty Fees
61	C-C Dem: Total damages not inc. Equitable & Atty fees
62	C-C Dem: Equitable Damages
63	C-C Dem: damages without dollar value description
64	C-C Dem: Punative Damages
65	C-C Dem: Atty Fees
66	Awd: Total damages not inc. Equitable. & Atty fees
67	Awd: Equitable Damages
68	Awd: damages without dollar value description
69	Awd: Punative Damages

No.	Field Name
70	Awd: Atty Fees
71	C-C awd: Total damages not inc.Equitable. & Attys Fees
72	C-C awd: Equitable Damages
73	C-C awd: damages without dollar value description
74	C-C awd: Punative Damages
75	C-C awd: Attorney Fees
76	Amount of Arbitrator Fees
77	EE-OR to pay Arbitrator Fees
78	Amt. of AAA Filing Fees
79	EE-OR to pay Filing Fees
80	Amt. of AAA Hearing Fees
81	EE-OR pay Hearing Fees
82	Whether OR maintains DRP
83	Procedural Rules at Hearing
94	Reasoned Opinion