Employment Arbitration and Workplace Justice

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Let's look at the record.
Al Smith

SOME CIVIL RIGHTS lawyers look at the growth of employment arbitration and see the end of workplace justice. Others see an exciting opportunity to create workplace justice. How can this be possible? How can attorneys with the same values see the same development in diametrically opposite ways? The heart of the answer lies less in these attorneys' different perceptions of alternative dispute resolution ("ADR") than in their different perceptions of the civil justice system. Different attorneys have conflicting opinions on how well the civil justice system provides workplace justice and these opinions shape their attitudes regarding arbitration in the workplace.

Part I of this article examines civil rights lawyers' views on employment arbitration. It finds that most civil rights lawyers see the civil justice system as successful because they are generally successful in achieving justice for their employee clients. This section also explains that those lawyers who view the civil justice system as a failure tend to focus on the vast majority of employees with legitimate claims who receive no justice because financial obstacles prevent them from accessing the courts. For the latter type of lawyer, employment arbitration is seen as a great opportunity for those employees who have been denied access to courts to be heard and have a chance to be made whole.

Part II examines the empirical data concerning the outcomes of employment arbitration and employment litigation proceedings. This

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section finds that employees who arbitrate their complaints fare at least as well as those who take their disputes to court.

Part III examines the issue of access to justice. While it is difficult for many employees to obtain counsel to litigate their claims, an employee can arbitrate his or her claim with relative ease. This section finds that many more employees are able to obtain justice through arbitration than through litigation.

I. Civil Rights Lawyers' Views on Arbitration

Members of the plaintiffs' employment bar generally believe that the civil justice system is a success. And why shouldn't they? Plaintiffs' employment lawyers spend their lives filing cases on behalf of their clients against employers. Most of the time they either win the case or get substantial settlements. For them, the system works.

Viewed from this perspective, pre-employment arbitration agreements are completely unnecessary. This applies not only to pre-dispute agreements that are a condition of employment, which all civil rights lawyers agree are ethically indefensible. It also applies to voluntary pre-dispute agreements. Moreover, since pre-employment agreements are generally entered into without the advice of counsel, they have the potential to create injustice. Employees, even sophisticated ones, are seldom qualified to evaluate an arbitration system and determine if it is fair. They are unable to look at the due process protections provided and know if they are adequate. They are equally unable to examine a roster of arbitrators and determine if it is balanced. If pre-dispute agreements to arbitrate become standard practice, the potential threat to workplace justice is both real and substantial.

If the civil justice system is working, there is no reason to take these risks. The development of pre-dispute arbitration agreements is nothing but a threat, foisted upon workers by employers. It is a bad thing and must be resisted. Someone with this perspective is bound to see every aspect of current employment arbitration programs in a negative light.

Other civil rights lawyers see the world very differently. For these attorneys, ADR represents an opportunity to bring workplace justice to those to whom it is currently denied. They see not only the cases in which the private bar achieves justice, but also the cases that the private bar ignores.

In order for a member of the private bar to accept a civil case against an employer, there must be provable economic damages (not

including punitive damages) of at least $75,000.[1] The vast majority of employment cases do not meet this requirement. Employees unable to hurdle this monetary obstacle are unable to obtain counsel, they never see a courtroom, and they never receive justice. Paul Tobias, a founder of the National Employment Lawyers Association ("NELA"), testified before the Dunlop Commission[2] that the plaintiffs' employment bar turns away at least 95% of those employees who seek its help.[3] How can the civil justice system be working for employees when 95% of those with an employment dispute are never even able to obtain counsel?

From this perspective, arbitration agreements are a potential opportunity. Arbitration is far less expensive than litigation and holds the potential to bring justice within reach of most employees for the first time. This does not eliminate the risks of pre-employment arbitration agreements, but suggests that they may be worth taking, especially if ways to minimize the risks can be found.

II. Empirical Data on Employee Success Rates

A. Results from Studies on Arbitration in the Employment Context

Ultimately, the facts speak for themselves—either employment arbitration has delivered justice to employees or it has not. Fortunately, a significant body of empirical evidence is now available to demonstrate whether justice has in fact been achieved through arbitration.

1. William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 DISP. RESOL. J., Oct.–Dec. 1995, at 40, 44. Howard's data from 1995 showed a minimum level of provable damages of $60,000. Lewis Maltby estimated this figure to have increased to at least $75,000. *See* Maltby, *infra* note 9, at 926.

2. The official name of the Dunlop Commission is "Commission on the Future of Worker-Management Relations." The Commission was announced by the Secretary of Labor and the Secretary of Commerce on March 24, 1993 to report on issues involving the enhancement of workplace conditions and productivity, and the resolution of workplace problems. OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS: PREFACE (1993), http://www.dol.gov/_sec/media/reports/dunlop/preface.htm (last accessed Nov. 3, 2003).

3. Paul Tobias, Testimony Before the Commission on the Future of Worker-Management Relations: Statement on Alternative Dispute Resolution (Apr. 6, 1994) [hereinafter Tobias].

1. AAA Arbitration

The first significant work in this area was conducted by Professor Lisa Bingham of Indiana University.[4] Professor Bingham found that, in 1992, employees in arbitrations conducted by the American Arbitration Association ("AAA")[5] prevailed[6] in 73% of cases they filed against their employers.[7] Two years later, Professor Bingham examined employee win rates in AAA arbitration again for the period extending from 1993 to 1995. In this time span, employees won 63% of the time.[8]

Lewis Maltby, President of the National Workrights Institute, examined AAA records for 2000 and found that employees won 66% of the time.[9] Theodore Eisenberg, a law professor at Cornell Law School, and Elizabeth Hill, a research fellow for the Center for Law and Labor, found an employee win rate of 43% in a sample of randomly selected AAA cases from 1999 to 2000.[10]

It is difficult to completely harmonize these results. At first blush, employee success rates might appear to be declining over time. The first results, from Bingham's 1992 study (73%), are the highest of any study. The employee success rate declined to 63% in 1993-1995 (Bingham). It declined still further from 1999-2000 (Eisenberg and Hill), to only 43%. While the most recent study (Maltby 2000) shows a rebound to 63%, this is still lower than Bingham's 1992 findings. However, from a statistical perspective, this interpretation is questionable. Two declining data points followed by one raising data point does not constitute a statistically significant trend. If a fourth post-Bingham study were to be conducted, there is no way of telling whether the

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

5. The American Arbitration Association is the world's oldest and largest provider of dispute resolution services. *See* AM. ARBITRATION ASS'N, ABOUT US, *available at* http://www.adr.org/index2.1.jsp?JSPssid=15729 (last accessed Nov. 3, 2003).

6. Bingham considered an employee to have "prevailed" whenever he or she received a judgment in his or her favor. *See generally* Bingham, *supra* note 4. This is the meaning of "prevail," "won," and synonymous words that will be used throughout this article, with reference to success rates.

7. *See id.* at 378.

8. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 210 (1997).

9. Lewis L. Maltby, *The Myth of Second-Class Justice: Resolving Employment Disputes in Arbitration*, *in* How ADR WORKS 915, 921 (Norman Brand ed., 2002).

10. Theodore Eisenberg & Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison*, 2003 PUB. L. & LEGAL THEORY RES. PAPER SERIES 1, 14, http://papers.ssrn.com/sol3/papers.crm?abstract_id=389780 (last accessed Oct. 6, 2003).

resulting success rate of this study would be higher or lower than Maltby's results.

Additionally, recent arbitration history suggests that there is no reason to believe that employee success rates would continue to decline if success rate studies were conducted in the future.

The only changes that occurred in AAA arbitration during the time period in which these studies were conducted were: 1) the development and adoption of the Due Process Protocol ("Protocol");[11] and 2) the creation of a new roster of employment arbitrators by AAA. Both of these developments, however, work to the advantage of employee plaintiffs and should have the effect of increasing their win rate. The Protocol establishes minimum due process standards for employment arbitration. While AAA's pre-Protocol rules for employment arbitration are not well documented, all concerned parties, regardless of their attitudes toward employment arbitration, agree that the Protocol has improved due process for employees.

The same is true of the new rosters of employment arbitrators. These rosters were assembled with the input of all concerned communities, including the plaintiffs' employment bar and civil rights lawyers. Candidates who were not acceptable to all communities were not selected. From an employees' perspective, the resulting new rosters are better balanced than their predecessor lists.

The most logical explanation for the different success rates is that the reported variations are simply the result of chance. The number of employment arbitrations conducted by AAA in a single year is under one thousand.[12] With a volume of cases this small, the percentage of meritorious cases filed could easily change significantly from year to year. Moreover, in reaching their conclusions, none of the researchers conducting the previously discussed studies used AAA's entire employment caseload for the time periods at issue. For instance, the largest study considered only 200 cases, while the databases for the other three studies were even smaller. Based on these facts, it becomes clearer that the change in employee success rates was probably produced by chance.

The critical question is, "How often do employees prevail in arbitration?" None of these studies, taken individually, provides a clear

11. AM. ARBITRATION ASS'N, A DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES ARISING OUT OF THE EMPLOYMENT RELATIONSHIP (1995), http://adr.org/index2.1.jsp?JSPssid=15729 (last accessed Oct. 6, 2003).

12. Telephone interview with Bob Meade, Vice President, American Arbitration Association (Oct. 20, 2003).

answer to this question. Each study simply represents a different slice of the same data set and so each should be given equal weight. Therefore, aggregating the data provides the most meaningful interpretation of the data. The total number of employment arbitrations represented by all the studies was 557. Of these, employees won 346 cases, for a success rate of 62%.

2. NASD/NYSE Arbitration

Attorney Michael Delikat and Professor Morris Kleiner, from the University of Minnesota, analyzed the results of arbitrated employment disputes that were handled by the National Association of Securities Dealers/New York Stock Exchange ("NASD/NYSE") from 1989 through 2002.[13] Employees of most stockbrokers are required, as a condition of employment, to resolve their employment disputes through binding arbitration. NASD and NYSE have established their own arbitration system for handling these claims. Delikat and Kleiner found that employees prevailed in 44% of the cases they studied (572 cases).[14]

Seven years earlier, researchers Stuart Bompey and Andrea Stempel reported worse results for employees in NASD/NYSE arbitrations.[15] In a sample of 62 cases, employees won only 22, a rate of only 36%.[16] Aggregating the data in these two studies provides an employee success rate of only 43% (273 of 634). This is substantially lower than the 62% employee success rate in AAA arbitration.

Currently, no definitive explanation has been uncovered for the different employee success rates regarding AAA and NASD/NYSE cases. It appears unlikely to be the result of chance, since Delikat and Kleiner considered the entire set of NASD/NYSE employment arbitrations from 1989 through 2002, which involved some 572 cases. Some might argue that employees' lower success rates at NASD/NYSE demonstrate that the system is not as fair as AAA's system. Others, however, including some attorneys who represent employee plaintiffs

13. *See generally* Michael Delikat & Morris Kleiner, *Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?*, 6 A.B.A. SEC. OF LITIG. 1 (2003).

14. *Id.* at 9.

15. *See* Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After* Gilmer v. Interstate/Johnson Lane Corp., 21 EMPLOYEE REL. L.J. 21, 37 (1995).

16. *Id.*

in the NYSE/NASD arbitration system, find little or no systematic unfairness in the NASD/NYSE system.[17]

There is also the distinct possibility of legally significant variations regarding the fact patterns presented to each organization. NASD/NYSE arbitrations all stem from a single industry. It would not be surprising if the fact patterns involved in these arbitrations consisted predominantly of contract disputes involving contracts that are highly uniform in the security industry and distinct from the contracts used in other industries.

The best explanation for the lower NYSE/NASD employee success rates is that the cases brought to NYSE/NASD are not comparable to those handled by AAA. We know, for example, that employee success rates vary greatly depending on the legal theory upon which plaintiffs lawyers' rely.[18] AAA employment arbitration cases primarily involve contract disputes. The NYSE/NASD arbitrations studies by Bompey are exclusively statutory civil rights cases. The same is true of the arbitrations studies by Delikat. As Eisenberg has demonstrated, employee/plaintiffs with statutory civil rights claims prevail far less often in court than those with contract claims. Thus, the lower success rate for employees in NYSE/NASD arbitration appears to occur because the cases brought to this tribunal are more difficult for employees to win.

B. Results from Studies on Litigation

Employees' success rates in arbitration mean little in isolation. They only become meaningful when compared to the success rates of similar cases resolved through litigation.

Eisenberg and Hill recently demonstrated that employee success rates, both in litigation and arbitration, vary dramatically with the legal theory involved in each employment dispute.[19] Specifically, employee success rates were determined to be much higher in either forum when the case involved a contract dispute, as compared to when the case involved a violation of a civil rights statute.[20]

It is therefore critical that litigation results selected for comparison to arbitration results deal with types of cases similar to those involved in arbitration proceedings. The lion's share of AAA

17. Telephone interview with Patrick Sadler, President, Public Investors Arbitration Association (May 1, 2002).

18. Eisenberg & Hill, *supra* note 10, at 2. *See* discussion *infra* Part II.B.

19. *See* Eisenberg & Hill, *supra* note 10, at 16.

20. *Id.* at 17–19.

employment arbitrations involves contract disputes.[21] Claims that an employee's statutory civil rights have been violated are far less common.[22] As part of the research for this article, I examined the records of the thirty eight AAA employment arbitrations that formed the basis for my article, *The Myth of Second-Class Justice.*[23] Of these thirty eight cases, only five involved statutory civil rights disputes. Almost all of the others were based on contractual claims. Hill reported that, within other samples of AAA cases she studied, only 1.8% to 7% involved statutory civil rights claims.[24]

The fact that very few employment arbitrations involve civil rights disputes requires that we use litigation results from non-civil rights employment cases for comparison to arbitration results. Eisenberg and Hill analyzed the results of state court employment trials in 1996 from the Civil Trial Court Network, a project of the National Center for State Courts and the Bureau of Justice Statistics.[25] The databases of the courts of general jurisdiction, as compared to the databases of the civil rights cases from federal courts, dealt with cases that more clearly resembled AAA cases.

The success rate of employee plaintiffs in these state court employment disputes was 57%.[26] This is slightly lower than the 62% success rate achieved by employees in AAA arbitrations. It is difficult, however, to attribute any significance to this small difference. The fairest conclusion that can be drawn is that employees have as equal a chance of winning a state court trial as they do an AAA arbitration proceeding.

C. Effect of Summary Judgment

The conclusion that success rates in arbitration and litigation are equal, however, applies only when an employee plaintiff in civil court has a trial.[27] However, many employees in civil court do not receive a trial. The majority of employment cases in federal court, some 60%,

21. *See* Maltby, *supra* note 9, at 923.

22. *See id.*

23. *See id.* at 921.

24. Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777, 804 (2003).

25. *See* Eisenberg & Hill, *supra* note 10, at 7–8.

26. *Id.* at 14.

27. The conclusion that employee plaintiffs win equally as often in arbitration as in court, reached on the basis of trial and hearing results, is correct only if employees in both systems always receive a trial or receive a hearing on the merits with the same frequency.

are resolved on summary judgment.[28] Employers win 98% of these summary judgment motions.[29] In state court, the number of employment cases dismissed on summary judgment is much lower—only 15%.[30]

This does not occur in arbitration. Summary judgment in AAA arbitration is so rare as to be statistically insignificant.[31] Virtually all employees who take their disputes to AAA arbitration receive a hearing on the merits.

This additional factor—the effect of summary judgment—requires a complete rethinking of the comparison of arbitration success rates to litigation success rates. The question is not, "How do employees who go to court and get a trial fare compared to employees who use arbitration?" The real question is, "How do all employees who take their disputes to court fare compared to all employees who take their disputes to arbitration?"

Looking at the data from this perspective reveals that 62% of all employees who turn to AAA arbitration achieve a decision in their favor. To create a comparable figure for litigation, we must factor in the rate of summary judgment for those cases that are analogous to those going to arbitration. Twenty two percent of AAA's employment caseload consists of federal civil rights cases.[32] The remainder of the caseload is made up of contract claims and other legal disputes that more closely resemble state court claims. A weighted average analysis produces a rate of summary judgment in litigation, regarding those cases comparable to AAA's cases, of 25%.[33]

This has important implications for comparing AAA results to litigation results. Since 25% of litigated cases would have been dismissed on summary judgment, only 75% of these cases would have gone to

28. Inter-University Consortium for Political and Social Research Database, case category 442 jobs (July 11, 1997) (on file with author), http://www.icpsr.umich.edu/index.html (last accessed Nov. 10, 2003) [hereinafter *Inter-University Database*].

29. *Id.*

30. *Id.*

31. Maltby, *supra* note 9, at 917.

32. Telephone Interview with Bob Meade, Vice President, American Arbitration Association (June 24, 2003).

33. 78% of AAA's employment docket consists of cases that are dismissed on summary judgment by courts at a rate of 15%. *See Inter-University Database, supra* note 28. This means that 11.7% of AAA's docket would have been dismissed on summary judgment if the cases had gone to court. The remaining 22% of AAA's employment docket consists of cases that are dismissed on summary judgment, at a rate of 60%, by courts. *See id.* This means that an additional 13.2% of AAA's cases would have been dismissed on summary judgment had they gone to court. Thus, a total of 24.9% of AAA's employment would not have survived summary judgment.

trial. The 57% of cases employees were found to have won in court thus represents only 43% of the total cases brought by employees. See Figure 1.

Figure 1. Success Rates of All Employee Plaintiffs

	Arbitration	Litigation
Total Cases	100%	100%
Dismissed on Summary Judgment	0%	25%
Cases Tried	100%	75%
Win Rate	62%	57%
Wins as a % of Total Cases	62%	43% (57% of 75%)

It is critical to remember that the source of all the arbitration data used in this analysis was the AAA. The AAA is well known for maintaining a roster that includes arbitrators of the highest quality, who scrupulously follow the Protocol. While other large providers of arbitration, such as JAMS/Endispute and the National Arbitration Forum, may match AAA's quality, it is almost inconceivable that all of the hundreds of providers in this unregulated field meet AAA's high standards. The above analysis shows that arbitration can provide victory rates that are as good or even better for employees than courts can provide. It does not prove that arbitration generally provides the high victory rates reported in this article.

D. Size of Awards

Even if employees are more likely to win in arbitration proceedings than in court, this does not prove that arbitration is better for employees than litigation. Justice is not achieved merely because a deserving employee has won his or her case. Justice is served only if the amount the employee has received from a victory is fair, in terms of the harm the employee has suffered.

Initial figures on the amounts employees typically receive as the result of favorable arbitration decisions raised serious concerns. Professor Bingham found that the mean damages awarded by AAA arbitrators from January 1993 to December 1995 was $49,030.[34] By contrast, the mean damages awarded by district courts, for this same time period, was $530,611.[35] These findings seem to indicate that,

34. Lisa B. Bingham, *Unequal Bargaining Power: An Alternative Account for the Repeat Player Effect in Employment Arbitration*, 50 INDUS. REL. RES. ASS'N PROC. 33, 38 (1998).

35. *Inter-University Database, supra* note 28.

while employees win more often in arbitration than in court, arbitration judgments under-compensate prevailing employees.

Insight gained from later research indicates that this analysis is too crude to be meaningful. The cases handled by AAA are mostly contract dispute cases and so are primarily economic in nature.[36] Such cases offer very little opportunity for an arbitrator to award compensatory or punitive damages. The employment cases handled by federal district courts, in contrast, are predominantly statutory civil rights cases that frequently call for such damages.[37]

More recently, Eisenberg and Hill compared the size of the awards in AAA arbitration proceedings to the size of awards in state court employment cases. The median AAA award was $63,120, while the median state court award was an almost identical $68,737.[38] The mean awards, however, were quite different. The mean AAA award was around $153,000,[39] but the mean state court award was about $462,000.[40] This indicates that most employees who prevailed in arbitration received awards comparable to what they would have received in court, but a few employees who took their claims to court received very large awards that they would not have received from arbitration.

These large jury awards, however, are seldom received in full by prevailing employees. It is commonplace for a trial court judge to reduce the size of a jury award against an employer. It is also routine practice for employers to appeal large trial court awards and use the cost and delay of appeal as a bargaining tool. Some experienced trial lawyers have estimated this "shrinkage" to be in excess of 50%. If these estimates are correct, the difference in mean awards would be reduced greatly, and might be eliminated altogether.

III. Arbitration Provides Workers with Access to Justice

The number of people who receive justice is equally as important as the quality of justice they receive. A dispute resolution system that renders perfect justice but cannot be accessed is worthless. Unfortunately, our civil justice system is approaching this sad state, where the system has become inaccessible to people—especially employees. Paul Tobias has testified that at least 95% of employees who come to the

36. *See* Maltby, *supra* note 9, at 923.
37. *See* Bingham, *supra* note 34, at 34.
38. *See* Eisenberg & Hill, *supra* note 10, at 18.
39. *Id.*
40. *Id.*

private bar seeking help are turned down.[41] Many of these employees are rejected because they do not have a case.[42] Under the employment-at-will doctrine, an employee can be treated in a completely arbitrary and unfair manner without having a legal claim against his or her employer.[43]

In many cases, however, the employee does have a valid legal claim and cannot obtain counsel for financial reasons. Most people cannot afford to hire an attorney on an hourly basis, even when they are employed. For an attorney to accept a case on a contingency fee basis, the potential recovery and the probability of victory must be high enough to justify the substantial investment of time required to prosecute the case. A 1995 survey of plaintiffs' attorneys found that a prospective plaintiff needed to have a minimum of $60,000 in provable damages—not including pain and suffering or punitive damages—before an attorney would take his or her case.[44] With inflation, this minimum has grown to an estimated $75,000.

Most employees with valid complaints do not have individual damages claims that amount to $75,000. The average annual income of American employees is $26,500,[45] and the vast majority of people who lose their jobs are unemployed for six months or less.[46] This means that most employment claims, including those that are meritorious, involve less than $13,000 in damages. Such claims involve monetary amounts that are far below the minimum amount that the private bar can afford to accept cases upon.

Arbitration is much less expensive, allowing attorneys to accept much smaller cases, in terms of the damages involved in the cases. For example, Hill's analysis of 200 AAA cases found that the median demand in cases where the employee was represented by counsel was $75,000.[47] This is the same as the minimum demand for an attorney to take a claim to court. Since, by definition, half of any data set falls

41. Tobias, *supra* note 3.

42. *Id.*

43. HENRY H. PERRITT, JR., 1 EMPLOYEE DISMISSAL LAW AND PRACTICE § 1.1 (4th ed. 1998).

44. *See* Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 57 (1998).

45. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, 2003 EMPLOYMENT SITUATION SUMMARY, *at* http://www.bls.gov/news.release/empsit.nr0.htm (last accessed Oct. 6, 2003).

46. Lewis L. Maltby, *The Projected Economic Impact of the Model Employment Termination Act*, *in* 536 THE ANNALS OF THE AMERICAN ACADEMY OF POLITICAL AND SOCIAL SCIENCE: EMPLOYEE DISMISSAL: JUSTICE AT WORK 103, 116 (Richard D. Lambert ed. & Stuart Henry special ed., 1994).

47. Hill, *supra* note 24, at 821 tbl.19.

below the median, 50% of the employment claims attorneys took to arbitration would not have been filed in court.

Even this, however, understates the case. In litigation, attorneys routinely seek awards that are greater than their client's actual damages in order to give themselves room to negotiate. Thus, the mean actual damages in the arbitrations studied by Hill were less than $75,000. While this effect cannot be quantified, it is safe to say that the number of employees who are able to afford their day in court with arbitration (under Hill's analysis) more than doubled, as compared to the number of people who attempt to litigate their cases.

This conclusion is also supported by Maltby's analysis of all AAA employment cases decided in the year 2000.[48] This analysis revealed that the majority of arbitration claims studied involved less than the $75,000 attorneys require to take a case to court.[49] Many cases (26%) involved claims of less than $25,000. Once again, the number of employees who were able to bring their arbitration claims, compared to those who were able to litigate their claims, appears to have doubled.

Arbitration also increases access to justice in an indirect manner. Most employment arbitration proceedings represent the last step in a multi-staged process. While this process varies from company to company, these steps can include one or more rounds of internal review by executives other than the decision maker, review by other employees, and mediation. Most employment disputes that arise at companies that employ an arbitration system are resolved to the employee's satisfaction without him or her ever having had to resort to arbitration. Thus, the number of disputes that are resolved through the formal arbitration process is only a fraction of the total number of disputes that are resolved through the various initial stages of employers' ADR systems.

Conclusion

The data currently available shows that the results of quality employment arbitration compare well to the results of employment litigation. More than twice as many employees can afford to take their cases to arbitration as can afford to litigate those same cases. Moreover, employees who arbitrate their claims are 50% more likely to win than those who go to court. And the size of the award successful employees

48. *See* Maltby, *supra* note 46, at 115–17.

49. Lewis Maltby, *Arbitrating Employment Disputes: The Promise and the Peril, in* ARBITRATION OF EMPLOYMENT DISPUTES 530, 533 (Daniel P. O'Meara ed., 2002).

receive in arbitration is comparable to the judgments most prevailing employees receive in court. The only negative for employees who arbitrate their employment disputes may be that extremely large awards are less common in arbitration.

This does not mean that the civil rights community should accept employment arbitration in its present form. Arbitration as a condition of employment is wrong and should be opposed. All employee rights advocates should continue to push for legally required due process protection in arbitration.

However, it would be a terrible mistake to eliminate the use of arbitration as a tool for addressing and resolving employment disputes. Employees are more likely to have their day in court in arbitration than in litigation and are more likely to receive justice when the day is over. Employment arbitration needs to be preserved and improved, not abandoned.