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Assessing the Case for Employment Arbitration: A New Path for Empirical Research

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ASSESSING THE CASE FOR EMPLOYMENT ARBITRATION: A NEW PATH FOR EMPIRICAL RESEARCH

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INTRODUCTION

In *Gilmer v. Interstate/Johnson Lane Corp.*,[1] the Supreme Court held that employers could require employees to agree, as a condition of employment, to

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1. 500 U.S. 20 (1991).

arbitrate federal statutory age discrimination cases.[2] Its reasoning strongly suggested that predispute arbitration agreements covering virtually any federal and state statutory claims were also enforceable. *Gilmer* spawned a debate that resulted in a small Alexandrian library of law review articles,[3] a series of Supreme Court decisions,[4] hundreds of federal and state court opinions,[5] and various state and federal legislative proposals.[6] Scholars, judges, legislators,

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2. *Id.* at 26. Subsequent lower courts extended *Gilmer* to cover other discrimination claims, including those arising under Title VII of the Civil Rights Act of 1964 (Title VII) and the Americans with Disabilities Act (ADA). *See infra* notes 5-6.

3. *See, e.g.*, Richard A. Bales, *Compulsory Employment Arbitration and the EEOC*, 27 PEPP. L. REV. 1 (1999); Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344 (1997) [hereinafter Estreicher, *Predispute Agreements*]; Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate over Predispute Employment Arbitration Agreements*, 16 OHIO ST. J. ON DISP. RESOL. 559 (2001) [hereinafter Estreicher, *Saturns for Rickshaws*]; Paulette Delphene Hardin, *Sacrificing Statutory Rights on the Altar of Pre-Dispute Employment Agreements Mandating Arbitration*, 28 CAP. U. L. REV. 455 (2000).

4. *See* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001); *cf.* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003); Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000).

5. *See, e.g.*, Cunningham v. Fleetwood Homes of Ga., 253 F.3d 611 (11th Cir. 2001) (requiring arbitration of Title VII and state law discrimination claims); Safrit v. Cone Mills Corp., 248 F.3d 306 (4th Cir. 2001) (same); Patterson v. Tenet Healthcare, Inc., 113 F.3d 832 (8th Cir. 1997) (same); Great Western Mortgage Corp. v. Peacock, 110 F.3d 222 (3d Cir. 1997) (requiring arbitration of New Jersey Law Against Discrimination, N.J. STAT. ANN. §§ 10:5-1 to -49 (West 2002)); Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 39 F.3d 1482 (10th Cir. 1994) (holding that plaintiff's claim under the Pregnancy Discrimination Act of 1978, 42 U.S.C. 2000e(k) (2000), is arbitrable); Bender v. A.G. Edwards & Sons, Inc., 971 F.2d 698 (11th Cir. 1992) (holding that a Title VII claim was subject to arbitration); Mago v. Shearson Lehman Hutton, Inc., 956 F.2d 932 (9th Cir. 1992) (holding that sexual harassment claims under Title VII are arbitrable); Willis v. Dean Witter Reynolds, Inc., 948 F.2d 305 (6th Cir. 1991) (holding that claims of sexual harassment and sexual discrimination under KY. REV. STAT. ANN. § 344.040 (Banks-Baldwin 1997) are arbitrable); Tuskey v. Volt Info. Scis., Inc., No. 00 Civ. 7410, 2001 U.S. Dist. LEXIS 10980 (S.D.N.Y. Aug. 3, 2001); Alford v. Dean Witter Reynolds, Inc., 939 F.2d 229 (5th Cir. 1991) (holding that *Gilmer* controlled on the issue of the enforceability of a predispute agreement to arbitrate a sexual discrimination claim under Title VII); Dumais v. Am. Golf Corp., 150 F. Supp. 2d 1182 (D.N.M. 2001); Roberson v. Clear Channel Broad., Inc., 144 F. Supp. 2d 1371 (S.D. Fla. 2001); Olivares v. Hispanic Broad. Corp., No. CV00-00354-ER, 2001 U.S. Dist. LEXIS 5760 (C.D. Cal. Apr. 26, 2001); Nur v. K.F.C., USA, Inc., 142 F. Supp. 2d 48 (D.D.C. 2001); Brown v. KFC Nat'l Mgmt. Co., 921 P.2d 146 (Haw. 1996)

6. *See, e.g.*, Civil Rights Procedures Protection Act of 1997, S. 63, 105th Cong. (1997) (proposing to outlaw mandatory arbitration of all civil rights claims); Civil Rights Procedures Protection Act of 1997, H.R. 983, 105th Cong. (1997) (same). The Civil Rights Procedures Protection Act proposed to amend all key federal civil rights statutes so as to bar mandatory arbitration of claims arising under those acts. *See* S. 63; H.R. 983. For example, section 2 of the Act proposed amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (2000), to read as follows:

> Notwithstanding any Federal statute of general applicability that would modify any of the powers and procedures expressly applicable to a claim arising under this title, such powers and procedures shall be the exclusive powers and procedures applicable to such claim unless

management attorneys, and employee advocates debated whether employers should be able to require employees to sign agreements under which all employment disputes, including statutory claims, would be arbitrated and not litigated. *Gilmer* ultimately turned on an interpretation of the Federal Arbitration Act of 1925 (FAA) as establishing a federal presumption of arbitrability covering any and all disputes, both statutory and common law, arising between parties to arbitration agreements.[7] Both advocates and critics of predispute mandatory arbitration agreements (what we will henceforth call "mandatory arbitration") advanced legal and policy arguments supporting their opposing positions. Legal arguments from both sides drew on statutes and decisional law for support.[8] Critics also complained that widespread resort to arbitration would compromise the rights of employees and make it more difficult for aggrieved plaintiffs to recover.[9] Policy arguments from arbitration advocates, in contrast, dwelled on the inefficiencies of the Equal Employment Opportunity Commission (EEOC)/litigation system with its attendant costs and inequities for employers and employees.[10]

The passage of time has brought greater clarity to the legal positions advanced by arbitration critics and proponents. Fourteen years after *Gilmer*, the applicable law is relatively stable and clear: employers outside of the transportation industry[11] may require employees to agree to arbitrate all employment disputes as a condition of employment so long as certain due process requirements are met. For example, the arbitrator must be permitted to award statutory remedies in the event of a violation, and a fair procedure for selection of the arbitrator must be afforded.

Unfortunately, we have not achieved comparable stability and clarity in the underlying policy debate. Legal and policy questions incident to mandatory arbitration, many of which are intrinsically empirical, continue to attract sustained scholarly attention. At first, critics and advocates alike leveled assertions that were generally devoid of empirical support. One problem with this approach is obvious: it makes little sense to answer empirical questions without empirical evidence. The emergence of empirical research on these legal

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after such claim arises the claimant voluntarily enters into an agreement to resolve such claim through arbitration or another procedure.

S. 63 § 2; H.R. 983 § 2.

7. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24-25 (1991); *see also* 9 U.S.C. §§ 1-4 (2000).

8. *See infra* text accompanying notes 14-21.

9. *See* Kathryn Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017 (1996); Stephen J. Ware, *Employment Arbitration and Voluntary Consent*, 25 HOFSTRA L. REV. 83 (1996).

10. *See* Bales, *supra* note 3; Estreicher, *Predispute Agreements*, *supra* note 3; Michael Green, *Debunking the Myth of Employer Advantage from Using Mandatory Arbitration for Discrimination Claims*, 31 RUTGERS L.J. 399 (2000); Hardin, *supra* note 3.

11. After *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105 (2001), the FAA applies to all employment situations, except those in the transportation industry.

and policy questions has changed the pitch and tenor of the arbitration discourse.[12]

The first wave of empirical arbitration research focused on those claims that made it to the formal stages of arbitration. This initial work remains vital because one cannot evaluate the viability and fairness of a dispute resolution system without analyzing the outcomes of actual adjudications. Of course, while a greater understanding of arbitration outcomes is essential, arbitration does not operate in a vacuum. Indeed, arbitration systems are implemented partly to replace the EEOC/litigation system. Analyses of arbitration systems are necessarily comparative. Consequently, a second wave of empirical work compared arbitration and litigation outcomes.

This Article proposes a new path for empirical research in this area. We seek to expand the empirical inquiry to take into account cases that are *not* ultimately tried or arbitrated. Not all employers implement an arbitration system solely to avoid courts or even juries. Such concerns may be a principal motivator for some employers. For others, we suspect that the attraction of alternative dispute resolution (ADR) systems is that they provide a relatively low-cost alternative for resolving a high volume of relatively low-value cases, and do so in a manner that does not necessarily entail the dissolution of the employment relationship. Replacing litigation with an arbitration system allows such employers and their employees to address issues in a relatively nonadversarial, low-cost forum.[13] An important element of fairness, we submit, is promoted if adjudicative costs do not overwhelm the claim resolution process.

If our contentions are well founded, the cases that are arbitrated or tried do not capture the full value of the arbitration policy, nor are adjudicated cases the best indicator of whether either system is "fair" to employees. Instead, the cases that never make it to formal adjudication may provide a superior vantage for evaluating dispute resolution systems. Until now, it has been difficult to measure the effects of arbitration on these types of cases because arbitration systems were too new to provide any meaningful data. Now, because a significant number of large employers have administered their policies for several years, meaningful, albeit preliminary, data are available to permit tentative, though empirically grounded, conclusions.

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12. Indeed, the influence of empirical research in the mandatory arbitration field parallels the influence of empirical legal scholarship on legal scholarship generally. For a discussion, see Lee Epstein & Gary King, *The Rules of Inference*, 69 U. CHI. L. REV. 1 (2002), and Frank Cross et al., *Above the Rules: A Response to Epstein & King*, 69 U. CHI. L. REV. 135 (2002).

13. *See* David S. Sherwyn et al., *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 U. PA. J. LAB. & EMP. L. 73, 100 (1999) (indicating that some of the reasons why employers prefer arbitration to litigation include reduced costs, increased speed, greater privacy, and the elimination of juries).

One major employer provided us with longitudinal data from its dispute resolution systems (DRSs). We analyzed these data and compared them to comparable EEOC and federal court data. This Article presents results from this case study. Before examining the company's experience, however, we provide an overview of the law and briefly summarize the arguments for and against arbitration. We then assess these arguments in light of previously published empirical work as well as our new data.

I. THE LAW OF ARBITRATION

Gilmer launched the modern arbitration revolution. Before *Gilmer*, judges, practitioners, and academics widely accepted the view that predispute mandatory arbitration agreements were unenforceable to the extent arbitration was sought for statutory and other public policy—rather than strictly contractual—claims.[14] *Gilmer* changed the law, but left open a number of issues.[15] Specifically, *Gilmer* did not settle the question of whether the FAA applied to the majority of employment contracts.[16] In addition, while it

14. This position was based on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). In *Gardner-Denver*, the Supreme Court held that an employee has a right to proceed with a Title VII claim regardless of an arbitrator's prior decision pursuant to a collective bargaining agreement. *Id.* at 59-60 ("[T]he federal policy favoring arbitration of labor disputes and the federal policy against discriminatory employment practices can best be accommodated by permitting an employee to pursue fully both his remedy under the grievance-arbitration clause of a collective-bargaining agreement and his cause of action under Title VII."). The lower courts extended this holding to the nonunion setting and thus, for some years, it seemed clear that mandatory arbitration agreements for civil rights claims were unenforceable. *See, e.g.*, Utley v. Goldman Sachs & Co., 883 F.2d 184 (1st Cir. 1989) (relying on *Gardner-Denver* to hold that arbitration was inconsistent with Title VII); Swenson v. Mgmt. Recruiters Int'l, Inc., 858 F.2d 1304 (8th Cir. 1988) (relying on *Gardner-Denver* to find that Title VII was not subject to waiver through an arbitration clause). *But see* Alford v. Dean Witter Reynolds, Inc., 905 F.2d 104 (5th Cir. 1990) (relying on *Gardner-Denver* to find that Title VII was not subject to arbitration, but vacated for reconsideration in light of *Gilmer*), *vacated and remanded by* 500 U.S. 930 (1991).

15. The *Gilmer* Court based its holding (and distinguished *Gardner-Denver*) on four grounds: (1) labor arbitrators are limited to enforcing only the collective bargaining agreement that the parties asked them to interpret and have no authority to determine if the employer violated federal or state statutes; (2) labor arbitrators must enforce the collective bargaining agreement even if it conflicts with external law; (3) in labor arbitrations, the union, not the employee, "owns" the grievance and decides whether to pursue it; and (4) the FAA covered the individual arbitration agreement in *Gilmer*, but not in *Gardner-Denver*, where rights based on a collective bargaining agreement were at issue. Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 35 (1991).

16. In *Gilmer*, the Court held that the arbitration agreement at issue was not an "employment contract" because the parties to the agreement were the New York Stock Exchange and Gilmer, not the "employer" and the "employee." 500 U.S. at 25 n.2. Because the agreement Gilmer signed was not an "employment contract," the Court elected not to address the question of whether the term "engaged in foreign or interstate commerce" of section 1 of the FAA referred to all employees or only those in the transportation industry. *Id.* This question has now been resolved by *Circuit City Stores*, 532 U.S. 105.

provided some guidance, *Gilmer* did not explicitly establish procedural standards that might condition enforceability.[17] Finally, a number of courts held that *Gilmer* did not apply to claims arising under Title VII of the Civil Rights Act of 1964.[18]

Most of the legal issues left open by *Gilmer* and its progeny have been settled. In *Circuit City Stores v. Adams*,[19] the Supreme Court held that the FAA applies to all employment contracts, except those in the transportation industry. In *EEOC v. Luce, Forward, Hamilton, & Scripps*,[20] the Ninth Circuit abandoned its view—alone among the circuits—that *Gilmer* did not apply to Title VII claims. Finally, with the assistance of the American Bar Association, the American Arbitration Association, and leading plaintiff and management lawyers, a "due process protocol" was developed that has won broad judicial and academic acceptance and informs the drafting of arbitration policies satisfying due process concerns in almost every, if not actually every, jurisdiction. Thus, the law is relatively settled: courts will enforce mandatory

17. In examining fairness, *Gilmer* and its progeny addressed a number of issues: (1) the method of delivering opinions, (2) the procedures for selecting the arbitrator, (3) prehearing discovery, (4) available damages, and (5) whether the employee entered into the agreement knowingly and voluntarily. As for the first three, it is broadly agreed that arbitration agreements should provide for written opinions, that both parties must have a substantial role in selecting the arbitrator, and that agreements must provide a reasonable opportunity for discovery (though not necessarily the same as would be afforded in court). Although there is some conflicting authority as to whether arbitration agreements may limit damages available to prevailing parties, *compare, e.g.*, Graham Oil Co. v. Arco Prods. Co., 43 F.3d 1244 (9th Cir. 1994) (holding an arbitration clause unenforceable where it limited damages otherwise available under the Petroleum Marketing Practices Act), *with* Degaetano v. Smith Barney, Inc., No. 95 CIV 1616 (DLC), 1996 U.S. Dist. LEXIS 1140 (S.D.N.Y. Feb. 5, 1996) (granting motions to compel arbitration), *and* Kinnebrew v. Gulf Ins. Co., No. CA 3:94-CV-1517-R, 1994 U.S. Dist. LEXIS 19982 (N.D. Tex. Nov. 28, 1994) (same), *Gilmer*'s premise that arbitration should not result in any cutback in substantive rights, *see* 500 U.S. at 35, suggests that such agreements must permit an arbitrator to award the same damages that would have been available to parties had they prevailed in court. Finally, with respect to the knowing, voluntary waiver requirement, agreements are enforceable so long as they clearly describe their terms and are not hidden in an employee handbook or another long and intimidating document. Any general assertions that arbitration agreements are enforceable simply because they are often presented on a take-it-or-leave-it basis would seem unavailing in view of the *Gilmer* Court's statement that "[m]ere inequality in bargaining power . . . is not a sufficient reason to hold that arbitration agreements are never enforceable in the employment context." *Id.* at 33. In any event, such assertions would need to comport with the general law of contracts in the jurisdiction. *See* 9 U.S.C. § 2 (2000) (stating that arbitration agreements "shall be valid, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract"); *see also, e.g.*, Allied-Bruce Terminix v. Dobson, 513 U.S. 265 (1995); Perry v. Thomas, 482 U.S. 483 (1987).

18. *See, e.g.*, Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir. 1998).

19. 532 U.S. 105 (2001).

20. 345 F.3d 742 (9th Cir. 2003).

arbitration agreements so long as the employee is not in the transportation industry and the agreement satisfies certain due process criteria.[21]

II. POLICY ARGUMENTS FOR AND AGAINST ARBITRATION: A FIRST LOOK AT THE EMPIRICAL DATA

While legal challenges to arbitration have largely subsided, policy debates continue with undiminished force in the academy. As is often the case with controversial issues, those opposing arbitration are more vocal than those favoring arbitration. Critics insist that mandatory arbitration should be prohibited because it: (1) does not allow for the development of the law;[22] (2) is private and does not provide for public accountability;[23] (3) is unfair to employees because it can be expensive, limit damages, reduce the statute of limitations, alter the burden of proof, allow for untrained arbitrators to decide cases, limit discovery, and is biased in favor of employers;[24] and (4) is the product of contracts of adhesion and unequal bargaining power.[25] In addition to addressing these arguments, arbitration supporters maintain that arbitration is a better system for most employers and employees because it is less expensive and faster.[26]

The contract-of-adhesion argument is difficult to resolve empirically as it is principally an issue of perception. The question is whether a take-it-or-leave-it arbitration policy should be prohibited in the employment context. We have argued elsewhere that employers set numerous policies over which individual

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21. Two issues remain to be litigated: (1) whether exclusions from arbitration have to be identical for both parties, *compare, e.g.*, Armendariz v. Found. Health Psychare Servs., Inc., 6 P.3d 669, 682 (2000) (holding that an arbitration agreement lacking mutuality was unconscionable absent reasonable justifications based on business realities), *with Ex parte* McNaughton, 728 So. 2d 592, 598-99 (Ala. 1998) (rejecting this mutuality argument); and (2) whether arbitration agreements can impose forum costs on claimants that would be higher than fees charged for access to the courts, *see, e.g.*, Green Tree Fin. Corp.-Ala. v. Randolph, 531 U.S. 79 (2000); Cole v. Burns Int'l Sec. Servs., 105 F.3d 1465 (D.C. Cir. 1997).

22. *See* EQUAL EMPLOYMENT OPPORTUNITY COMM'N, EEOC POLICY STATEMENT ON MANDATORY BINDING ARBITRATION OF EMPLOYMENT DISCRIMINATION DISPUTES AS A CONDITION OF EMPLOYMENT pt. V(A)(2) (EEOC Notice No. 915.002) [hereinafter EEOC POLICY STATEMENT].

23. *Id.* pt. V(A)(1).

24. *See id.* pts. V(A)(3), V(B); Stone, *supra* note 9, at 1037-40.

25. *See generally* Stone, *supra* note 9, at 1036-37.

26. *See, e.g.*, THEODORE EISENBERG & ELIZABETH HILL, EMPLOYMENT ARBITRATION AND LITIGATION: AN EMPIRICAL COMPARISON (N.Y. Univ. Sch. of Law, Public Law and Legal Theory Paper Series, Research Paper No. 65, 2003); Estreicher, *Saturns for Rickshaws*, *supra* note 3, at 564; David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 BERKELEY J. EMP. & LAB. L. 1, 22-31 (2003); Sherwyn et al., *supra* note 13, at 129-47.

employees rarely negotiate.[27] For example, health insurance, life insurance, pension plans, as well as noncompetition agreements, vacation pay, sick time, holiday pay, and severance pay are conditions of employment that employers almost always offer to employees on a take-it-or-leave-it basis. Even in the union-represented sectors, individual employees typically give up any right to negotiate terms and conditions of employment.[28]

Unlike the contract-of-adhesion argument, the other criticisms of mandatory arbitration are not based on perception. Instead, these are empirical questions that presumably can be answered by data drawn from experience. Put simply, we can compare mandatory arbitration and the EEOC/litigation system and assess whether mandatory arbitration (1) significantly retards the development of the law, (2) precludes public accountability because of its private nature, or (3) creates an unfair dispute resolution system compromising the rights of employees. Of the critics' arguments, the first wave of empirical work primarily examined the unfairness claim, focusing on factors such as the win/loss ratio, "repeat player" effect, and damages. We summarize and evaluate this literature below. We conclude that plaintiffs do not fare significantly better in litigation, that arbitration provides a quicker resolution than litigation, and that available data do not indicate whether damages are fairer under either system.

A. *Empirical Research Limitations: Systemic Differences of Arbitration and Adjudication Systems*

The arbitration literature is fast growing, though often shedding more heat than light. We evaluate a number of representative articles that seek to marshal available data for answers to three questions: (1) Is arbitration unfair to employees?; (2) Is arbitration faster than litigation?; and (3) Is arbitration less expensive than litigation?

To answer the question of whether arbitration is fair to employees, researchers typically compare the results of cases adjudicated in arbitration against those adjudicated in litigation. Specifically, win/loss rates and monetary awards are compared across the two systems. There is, of course, a problem

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27. Sherwyn, *supra* note 26, at 30-31; Sherwyn et al., *supra* note 13, at 146-47.

28. One argument critics have made is that employees, at the time they agree to arbitration agreements, are not able properly to value the right to sue in court they are being asked to give up. *See, e.g.*, Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of* Gilmer, 14 HOFSTRA LAB. L.J. 1 (1996). It is unclear how arbitration differs in this respect from severance pay and employment-at-will provisions that are typically enforceable even if presented in take-it-or-leave-it contracts. Arbitration critics must be able to satisfy the FAA requirement that the agreements they are seeking to void are invalid under the general law of contracts of the jurisdiction. *See supra* note 17; *see generally* Estreicher, *Saturns for Rickshaws*, *supra* note 3; Sherwyn et al., *supra* note 13, at 146.

with this type of analysis: the stream of litigated and arbitrated cases differs. Consequently, one can never be sure if the reason for a disparity in outcomes, if any, involves the adjudication system or some other factor, such as the strength of the case, or perhaps a selection factor determining which cases go to court and which cases end up in arbitration.

To illustrate, assume that there were only two discrimination cases available to study. One case was adjudicated in court while the other was resolved in arbitration. The employee was successful in arbitration and the employer successful in litigation. No reasonable person would conclude from such a limited study that arbitration was more favorable for employees and litigation for employers. If, however, the same case was both arbitrated and litigated and the results were different, a tentative hypothesis about the effect of the two different systems might be possible. Still, we would be uncomfortable reaching any definitive conclusion based on a sample of two occurrences. If, however, we had a universe of one hundred cases that were both arbitrated and litigated and there was a systematic discrepancy between the employee win rates in one system over the other, we could begin to formulate tentative interpretations based on the correlations. Unfortunately, in the real world it is doubtful we could find a significant number of discrimination cases that were both arbitrated and litigated.[29]

The absence of such data poses consequential research design problems. As a second-best option, researchers are limited to comparing two distinct streams of cases: those that were arbitrated and those that were litigated. Perhaps over time the sheer volume of cases will blunt the research design problem. One might argue that if researchers selected, at random, one thousand discrimination cases filed in federal court and randomly assigned these cases to either arbitration or litigation, we could arrive at defensible conclusions about the different systems.

Critical research design concerns persist, however, as the stream of adjudicated and litigated cases is likely to differ systematically. Discrimination cases resolved through arbitration invariably flow from employers that have arbitration policies. Most of these policies have a number of internal steps that employees go through before formal arbitration begins. These internal steps perform critical filtering functions. Thus, before the cases are arbitrated they have likely undergone some form of internal review—whether by an ombudsman, peer review, or a human resources department—often coupled

29. In theory, union-represented employees may be able to both arbitrate and litigate a claim. *See* Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974). This does not, however, produce a rich data set because (1) arbitrators often do not have jurisdiction to decide statutory issues, (2) plaintiffs rarely bring the cases in both forums, and (3) the union contract and the statutory law usually have different legal standards and burdens of proof. In any event, even where plaintiffs attempt to relitigate claims that have already been arbitrated, the arbitration award will often be given substantial weight in the litigation. *See, e.g.*, Collins v. N.Y. City Transit Auth., 305 F.3d 113 (2d Cir. 2002).

with mediation by an outside neutral. These ADR processes allow the parties to analyze the case and provide several opportunities for settlement. Alternatively, while cases in litigation may have gone through the EEOC investigation, conciliation, and/or mediation, many cases are filed in court with only perfunctory EEOC processing. If the company's internal review and mediation steps have any value at all, there may well be a systematic difference in the "quality" of the cases that make it to arbitration as opposed to those cases that make it to the final stages of litigation.

Differences in internal filtering between arbitration and litigation systems likely skew win/loss arbitration results in favor of employers: Employers might use the internal filters to better determine if a case has merit and then to settle the meritorious cases.[30] Therefore, such cases would not be arbitrated. Because of the likely lower costs of pursuing a claim to arbitration—a point we develop below—cases that are arbitrated are likely to have less merit, on average, than cases that are settled, and an employer with a longstanding program featuring such filtering mechanisms will have a higher win rate than a comparable employer lacking such internal filters.

Exacerbating this disparity in the types of cases that end up in arbitration is the rarity of summary judgment motions in arbitration. Thus, while cases lacking merit, as a matter of law, are excluded from litigation outcome statistics, they may remain part of the arbitration outcome statistics. Because the vast majority of successful motions are made by employers, summary judgment motions, when granted, skew litigation trial numbers in favor of employees. Put simply, a large number of employee losses are excluded from the cases reaching a trial stage of the litigation stream. To control for summary judgment motions, some researchers include dispositive motions in the litigation win/loss rate. Others, however, do not control for motions and instead simply compare arbitration results to trial outcomes. Because arbitration systems are likely to result in "bad" cases being arbitrated and because litigation systems may result in "bad" cases not being tried, one could argue that by looking only at adjudicated outcomes, employees should fare significantly better in litigation than in arbitration.[31]

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30. To be sure, cases settle for an array of reasons, including a case's underlying merits. For a helpful discussion, see generally Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319 (1991); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113 (1990).

31. It can be argued, as N.Y.U. law student Navid Vazire has suggested to us, that prearbitration procedures usually found in employer ADR systems also weed out many cases, thus reducing the employee win rate (if viewed as a function of initiated cases) as much as dispositive motions do in litigation. Under this view, win rates in adjudicated cases may be compared across the two systems. Although further work needs to be done, we think it more likely that employees insisting on an adjudicated resolution, irrespective of the merits of their claims, are more likely to get their wish in arbitration than in court because of the lower costs of the arbitral forum and the typical absence of a mandatory screen to ferret out weak cases.

B. *Prior Empirical Studies*

We discuss in this Part the preexisting empirical literature on employment arbitration which, as a general matter, compares litigation and arbitration outcomes.

1. *Win/loss rates*

Conventional academic wisdom after *Gilmer* held that employees would not fare well in arbitration. Scholars asserted that juries were employee-friendly and that arbitrators were, at best, less sympathetic to employees, and, at worst, biased. The perception that employees would be disadvantaged fueled considerable outcry against arbitration.[32] In response, a number of other scholars compared the win/loss rates in arbitration to those in litigation. In this Part we report the results of these studies. Specifically, we examine the results of the studies reported by (1) Samuel Estreicher (our coauthor),[33] (2) Lewis Maltby,[34] (3) William M. Howard,[35] (4) Elizabeth Hill,[36] (5) Theodore Eisenberg and Elizabeth Hill,[37] and (6) Lisa B. Bingham.[38]

What seems clear from the results of these studies is that the assertions of many arbitration critics were either overstated or simply wrong. Estreicher

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32. *See, e.g.*, Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 385-88; Joseph R. Grodin, *supra* note 28, at 29; Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996); Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court's Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996); Stone, *supra* note 9, at 1040; Heidi M. Hellekson, Note, *Taking the "Alternative" out of the Dispute Resolution of Title VII Claims: The Implications of a Mandatory Enforcement Scheme of Arbitration Agreements Arising out of Employment Contracts*, 70 N.D. L. REV. 435 (1994); Mark D. Klimek, Note, *Discrimination Claims Under Title VII: Where Mandatory Arbitration Goes Too Far*, 8 OHIO ST. J. ON DISP. RESOL. 425 (1993); Judith P. Vladeck, *"Yellow Dog Contracts" Revisited*, N.Y. L.J., July 24, 1995, at 7.

33. Estreicher, *Saturns for Rickshaws*, *supra* note 3.

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

35. William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.-Dec. 1995, at 40.

36. 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 (2003).

37. EISENBERG & HILL, *supra* note 26.

38. Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE RTS. & EMP. POL'Y J. 189 (1997) [hereinafter Bingham, *The Repeat Player Effect*]; 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, *Bias in Arbitration*]; 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*].

reported new data as well as data originally presented by Maltby and Bingham.[39] A cumulative look at these three scholars' work finds that in federal cases terminated (as opposed to adjudicated)[40] in 1994 and 1997, plaintiffs prevailed in only 12% and 15%, respectively.[41]

Howard examined employee win rates at trial using data from cases adjudicated between June 1, 1992, and May 31, 1994.[42] He reported that employees prevailed 28% of the time.[43] In front of juries, employees prevailed at a rate of 38%; in bench trials, at a rate of 19%.[44] In arbitrations conducted under the auspices of the American Arbitration Association (AAA), employee claimants prevailed in 68% of the cases.[45] In securities industry arbitration cases, employees prevailed 48% of the time.[46] Howard did not examine cases that were terminated. Instead, he reported trial results. This difference resulted in an almost 100% increase in the win rate for employees, from 15% (of cases terminated) to 28% (of cases tried).

Like Howard, Eisenberg and Hill focused on win/loss rates at trial, not at termination. Eisenberg and Hill analyzed data from state court trials in 1996, federal court trials in 1999, and two hundred AAA arbitrations from 1999 and 2000.[47] They separated civil rights employment disputes from non-civil rights cases in their arbitration and court results.[48] This is an important qualification, because non-civil rights claims include breach of contract actions where the employer, for example, has to prove that it had cause to terminate the employee. Conversely, in civil rights cases, the employee must prove discrimination, an ostensibly tougher task. Eisenberg and Hill also distinguished between higher- and lower-pay employees.[49] In non-civil rights AAA employment cases, higher-pay employees prevailed in 64.9% of their cases, while lower-pay employees prevailed in 39.6% of their cases.[50]

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39. Estreicher, *Saturns for Rickshaws*, *supra* note 3.

40. Terminated cases include those cases decided by motions and those that are settled or withdrawn.

41. Estreicher, *Saturns for Rickshaws*, *supra* note 3, at 563 tbl.3.

42. Howard, *supra* note 35, at 41.

43. *Id.* at 42.

44. *Id.*

45. *Id.* at 43.

46. *Id.*

47. EISENBERG & HILL, *supra* note 26, at 6-8.

48. *Id.* at 8-12.

49. *Id.*

50. *Id.* at 13. It might be argued that these results reflect bias against lower-pay employees. It is not clear why in theory arbitrators would be more willing to rule against lower-pay employees than their higher-pay counterparts. In any event, we believe differences in substantive law offer the better explanation. Employers seeking to terminate a higher-pay employee with an express "cause" provision in his contract face a much higher hurdle than they do in cases where employees work under "at will" contracts but may have a plausible discrimination claim. Express "cause" provisions usually are interpreted to require a showing of malfeasance of some sort, whereas defendants can win discrimination cases if

Combining the higher- and lower-pay employees shows an employee win rate of 51% out of the total number of awards (N=173).[51] In state non-civil right cases, the employee win rate was 57% (N=145).[52] In civil rights disputes, the AAA employee win rate was 26% (N=42).[53] In contrast, the state court win rate was 44% (N=160), while the federal court employee win rate was 36% (N=1430).[54] The difference between the employee win rate in arbitration and the employee win rate in federal trials is not statistically significant.[55] Eisenberg and Hill do find a significant difference between employee success rates in discrimination cases that are arbitrated versus those that are litigated in state court.[56]

Even though there is no significant difference between the employee win rate in federal court and that in arbitration, the differential impact of motion practice in the forums requires discussion. Maltby reports that in 1994, the federal courts issued definitive judgments in 3419 cases.[57] Of those 3419 judgments, 60% arose as a result of dispositive motions, in which employers prevailed 98% of the time.[58] Cases decided by motion are excluded from Eisenberg and Hill's court data. Arbitration cases that could have been decided by motion, had the matter been in litigation rather than arbitration, are included in the arbitration data. If we assume, for argument's sake, that the figures for 1999 and 2000 are comparable to Maltby's figures for 1994, there were an additional 858 cases decided by the federal courts on a dispositive motion (60% of 1430) and that employers prevailed in 840 motions (98% of the 858), while employees prevailed in 18 motions. Adding an additional 840 employer victories and 18 additional employee victories results in an employee win rate of 24%—an employee win rate slightly lower than that in arbitration.

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they can show any "legitimate" business reason. *See* Tex. Dept. of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981). Even in California, the state with the most proemployee "implied contract" law, employers have been found to have "good cause" for terminating an employee as long as their decision is reasonable and made in good faith, whether or not they can establish cause in fact to the satisfaction of the trier of fact. *See* Cotran v. Rollins Hudig Hall Int'l Inc., 948 P.2d 412 (Cal. 1998).

51. EISENBERG & HILL, *supra* note 26, at 14.

52. *Id.* at 14-16.

53. *Id.* at 14. We should note that in their study Eisenberg and Hill separate civil rights arbitration into two categories: higher- and lower-pay employees. We collapsed these categories for two reasons. First, only five of the forty-two cases involved higher-pay employees. Second, collapsing these cells facilitated comparisons across studies.

54. *Id.*

55. *Id.* Because the distributions were not normal, the nonparametric Mann-Whitney test was used to compare the means for federal court, state court, and arbitrations.

56. *Id.* at 15.

57. Maltby, *supra* note 34, at 47.

58. *Id.*

2. *Repeat players and the due process protocol*

In 1997, Bingham concluded that employees were significantly less successful in arbitration if the employer was a "repeat player," defined as an employer appearing in more than one award during the study period.[59] Specifically, Bingham found that while employees won 63% of all cases combined, they won only 16% of the subcategory of cases against repeat players.[60] Bingham did not claim to have determined the reason for the difference in win rates. She hypothesized that there could be both legitimate and nonlegitimate reasons for the finding. A legitimate reason could be that repeat players were arbitrating under an arbitration policy where employees were employed at will and had to prove that the employer violated state or federal law. Repeat player employers were also arguably more experienced in the process and thus better able to identify cases likely to result in employee wins and to settle rather than arbitrate them. Conversely, non-repeat players may have been arbitrating under a for-cause contract or been less experienced in the process, and hence less successful.[61] As for possible nonlegitimate reasons, it is conceivable that arbitrators were biased in favor of employers who had hired arbitrators before (even if not the same arbitrators) and thus would be likely to hire arbitrators in the future.[62] Unfortunately, a number of readers, including the EEOC in a 1997 policy statement, inferred that proemployer bias plainly explained the results and used Bingham's work to attack arbitration.[63]

Numerous critiques of the Bingham study ensued. Critics argued that the study was flawed because (1) there were only thirty-one repeat player cases in the study, and (2) almost all the employers were large employers and, thus, could be repeat players in the future. An additional issue was the fact that an employer's first case was put in the repeat player column after a second case from the same employer appeared. The question arose: how did the arbitrator who decided in favor of the employer in the employer's first case know that this large employer would be a repeat player while other large employers would not? To illustrate this point, assume two large employers (Employers *A* and *B*) each had a case decided on June 1, 1993. Employer *A* has a second case decided on December 15, 1994, while Employer *B*'s second case is decided in 1995. Both of Employer *A*'s cases are considered that of repeat players, while Employer *B*'s first case is considered that of a single player and the second case would not be in the study. If *A* happened to win both of its cases and *B* happened to lose its cases, the 1997 Bingham study would find that a repeat player was two for two while a nonrepeat player lost its only case, when, in

59. Bingham, *The Repeat Player Effect*, *supra* note 38.
60. *Id.* at 213.
61. *Id.* at 213-14.
62. *Id.* at 214-16.
63. *See, e.g.*, EEOC POLICY STATEMENT, *supra* note 22.

fact, both employers were repeat players and they cancelled each other out in the end.

In her subsequent study, Bingham studied 244 arbitration cases resulting in awards and found that employees prevailed 62% (N=162) of the time when there was no repeat player and only 29% (N=82) when there was a repeat player.[64] While these results are striking, Bingham also examined the effect of an internal dispute resolution program (DRP) versus that of another path to arbitration. The results were almost identical to the repeat player/non-repeat player breakdown: employees prevailed 61% (N=168) of the time when there was no DRP and 28% (N=76) of the time when there was a DRP.[65] These results suggest that the availability of an internal review process and the employer's experience with employment cases likely explains the repeat player effect. Bingham found no support for arbitrator bias.

Bingham also analyzed the twenty-four cases in her sample where there was a "repeat arbitrator," defined as a second appearance by the same arbitrator, although not necessarily in a case involving the same employer. In these cases the employee prevailed 29% of the time. This win rate is similar to that of the DRP win rate. Moreover, it is not clear if the first case that repeat arbitrators had with an employer is in the data set. Similarly, we do not know the win rate for cases where arbitrators make their initial appearance, as contrasted with the win rate in their second and additional appearances. Such data could facilitate tests on a number of hypotheses: (1) an employer will choose an arbitrator who found for the company because it perceives the arbitrator as being proemployer, (2) employers will choose an arbitrator who found against the company because they believe the arbitrator will not find against their companies twice, (3) arbitrators will find against the same company twice, (4) arbitrators will not find against the same company twice, and (5) any effect of a repeat arbitrator is explained by the existence or absence of a DRP policy. Unfortunately, with only twenty-four cases and limited information on these cases, it is impossible to test the validity of any of these hypotheses.

Hill's study of the thirty-four arbitration cases in her sample where the employer was a repeat player provides additional information.[66] In twenty-five of these cases, the employer had an internal DRP in place.[67] Employees won

64. Lisa B. Bingham & Shimon Sarraf, *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* PROCEEDINGS OF THE NYU 53RD ANNUAL CONFERENCE ON LABOR 303, 323 tbl.2 (Samuel Estreicher & David Sherwyn eds., 2004); *see also* Bingham, *On Repeat Players*, *supra* note 38, at 238-39.

65. Bingham & Sarraf, *supra* note 64, at 323 tbl.2.

66. Hill, *supra* note 36, at 814-18.

67. *Id.* at 817.

only 24% of those cases.[68] In the nine repeat player cases without a DRP, employees won 44% of the time.[69] Of course, samples of thirty-four, twenty-five, and nine are too small to yield reliable conclusions, but Hill's study and Bingham's second study suggest that the presence of a DRP helps explain the repeat player effect.

Bingham also examined the effect of the so-called due process protocol.[70] Bingham studied 186 arbitration cases decided before the protocol and 58 cases decided under the protocol.[71] In preprotocol cases, employees were successful 54% (N=186) of the time.[72] With the protocol, the employee success rate was 40% (N=58).[73] Bingham did find, however, a significant interaction between a DRP and the protocol, from which she concluded that employees are better with a DRP and the protocol than without them.[74]

3. *Disposition time*

Arbitration advocates point to a shorter time period from claim to award as an important virtue of arbitration.[75] Again, the data involve cases that were actually litigated or arbitrated rather than the thousands resolved before any adjudication occurs. Unlike the win/loss comparisons, few dispute the assertion that arbitration is faster than litigation. Maltby reports that the average employment discrimination case in litigation was resolved in 679.5 days—just under two years—while the average arbitration case took 8.6 months to resolve.[76] Again, Maltby focuses on resolutions, not trials. Accordingly, his data include dispositive motions which reduce the time period in question.

Eisenberg and Hill compared arbitrations and trials. They separated civil rights cases from non-civil rights employment claims in the arbitration and state court data, but their federal court data included both. For arbitrations, Eisenberg and Hill found that the average time to adjudicate a non-civil rights AAA case was 250 days (N=172).[77] Civil rights AAA arbitration cases took, on average, 276 days (N=42). In contrast, the mean time for state court

68. *Id.*

69. *Id.*

70. Bingham & Sarraf, *supra* note 64. The due process protocol provides a mechanism through which the AAA, as a third-party administrator, may regulate an employer's otherwise unilateral structuring of employment arbitration.

71. *Id.* at 323 tbl.2.

72. *Id.*

73. *Id.*

74. *Id.* at 325.

75. For a general discussion about the relation between ADR policies and case disposition time, see Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 844-47 (2000).

76. Maltby, *supra* note 34, at 55.

77. EISENBERG & HILL, *supra* note 26, at 19-20.

nondiscrimination trials was 723 days (N=170); for state court discrimination trials, it was 818 days (N=163); and for federal court discrimination trials, it was 709 days (N=1430).[78] Thus, according to Eisenberg and Hill, it takes parties more than twice as long to litigate a case than to arbitrate. Their finding supports the accepted view that, on average, arbitration is faster than litigation.

4. *Damages*

As with the employee win rate, conventional wisdom suggests that arbitration compromises (i.e., reduces) employee damage awards. One theory is that juries are employee-friendly and will reward aggrieved employees, while arbitrators will want to "split the baby" and keep awards low.[79] Before discussing the data, we need to sketch the role of damages in employment discrimination law.

Four federal statutes inform the employment discrimination law terrain: (1) Title VII of the Civil Rights Act of 1964, as amended in 1991 (Title VII);[80] (2) the Age Discrimination in Employment Act (ADEA);[81] (3) the Americans with Disabilities Act (ADA);[82] and (4) Section 1981, initially enacted as part of the Civil Rights Act of 1866 (Section 1981).[83] All four statutes use back pay as the main component of their remedial scheme. The amount of back pay owed, where liability is established, should generally not be in dispute, although the availability of front pay (in lieu of reinstatement) complicates the inquiry. Juries can, however, increase the other damages available. The ADEA provides for liquidated damages in an amount equal to the back pay award for willful

78. *Id.*

79. Support for the general assertion that juries tilt favorably toward employees over employers abounds. For example, in 1993, Dispute Dynamics Inc., a consulting firm, launched a five-year juror poll from numerous jurisdictions nationwide and found that 69% of the respondents agreed that for many company decisionmakers, an employee's age, gender, or race influences promotion decisions. Eighty-one percent agreed that discrimination remains a problem in the workplace, and 62% felt that employee rights are not well protected in our society. Similarly, the poll revealed that 67% of the respondents felt that too many employees are treated unfairly by their employers, and 53% felt that company executives would lie to increase profits. For a discussion of the poll and its results, see Sherwyn, *supra* note 13, at 140.

In contrast, conventional wisdom surrounding arbitrators' decisions focuses on their inclination to "split the baby" when it comes to awards. *See generally* FRANK ELKOURI & EDNA A. ELKOURI, HOW ARBITRATION WORKS 688-91 (1985); Lucy T. France & Timothy C. Kelly, *Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability Without Equivalency*, 64 MONT. L. REV. 449 (2003).

80. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

81. 29 U.S.C. §§ 621-634 (2000).

82. 42 U.S.C. §§ 12101-12213 (2000).

83. Section 1981 of the Civil Rights Act of 1866 prohibits discrimination against racial minorities in the making and enforcement of contracts. *See* Act of Apr. 9, 1866, ch. 31, 14 Stat. 27 (1866) (codified as amended at 42 U.S.C. § 1981 (2000)).

violations.[84] Title VII and the ADA provide for punitive and compensatory damages, but the damages are capped according to the number of employees in the company.[85] The caps range from $50,000 for employers with fifteen to one hundred employees to $300,000 for employers with more than five hundred employees.[86] Section 1981 has unlimited punitive damages, but applies only to race (and certain ethnic ancestry) cases.[87] Finally, there are some state and local statutes that provide for punitive damages and/or uncapped compensatory damages.

Damages-award data share some of the same difficulties that limit win/loss rate data. Namely, litigation and arbitration case streams differ and, as a result, damages awards likely differ as well. Again, researchers hope that the sheer number of claims will serve as a second-best "control" for this discrepancy. Such a "control," however, is unlikely to be adequate in the win/loss context, and it is even less likely to be adequate in the damages context.

Litigation in federal and state courts requires time, and time costs attorneys money. Consequently, plaintiffs' lawyers have less economic incentive to take employment claims from low-wage employees.[88] Fifteen years ago, an article by John Donohue and Peter Siegelman suggested that cases might not be worthwhile to plaintiffs' lawyers if the employee earned less than $450 per week.[89] Howard's 1995 article reports the results of a survey of 321 plaintiffs'

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84. 29 U.S.C. § 626(b).

85. *See* 42 U.S.C. § 1981a(a)(1), (b)(3) (specifying the compensatory and punitive damages available under Title VII); *id.* § 12117 (providing that the remedies under the ADA are identical to those under Title VII). For a discussion, see Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 281 (2000) (noting that Title VII and the ADA permit an array of damages, with cap schedules geared to the defendant's size).

86. 42 U.S.C. § 1981a(b)(3).

87. *Id.* § 1981.

88. A "fees case," in our parlance, is a lawsuit in which the recoverable damages are so low, say, because the plaintiff is a modest-wage earner, that the attorneys' fees become the driving force in the case. An attorney may logically refrain from taking such cases due to the hostility that judges have toward those who litigate instead of settling low-damages cases. A plaintiff's attorney does not want to get a reputation as one who litigates fees cases. Telephone Interview with David Ritter, Chair of Labor and Employment Department, Altheimer & Grey (Mar. 12, 1998); Telephone Interview with Peter Albrecht, Partner, Godfrey & Kahn (Mar. 12, 1998). Additionally, plaintiffs' lawyers will not exceed their normal hourly rates by taking fees cases to trial, and this is the goal for lawyers working on a contingency basis. These actual and potential costs should convince plaintiffs' lawyers either to refuse to take, or not to actively pursue, cases involving low-wage earners unless the employer's liability is so clear to the lawyer, the defense, and the court that punitive and compensatory damages are available. This harsh reality results in the unlikelihood of low-wage earners ever seeing the inside of a courtroom.

89. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1008 (1991) (finding that employees earning more than $450 per week would find a lawsuit worthwhile after a cost-benefit analysis).

lawyers that found the lawyers required a retainer of $3000 to $3600.[90] Similarly, Maltby reports a 1995 study of plaintiffs' lawyers that found that lawyers would not take a case unless the employee had at least $60,000 in back pay damages.[91] These findings suggest that comparatively higher-paid employees are far more likely to find a lawyer and get their day in court.

The economic incentives for attorneys to take employment cases to arbitration are mixed. Arbitration typically consumes less time than litigation. Consequently, arbitration may lower the economic threshold for lawyers to take employment cases.[92] On the other hand, the low costs needed to defend a case reduce employers' incentive to settle for some amount below defense costs. This settlement aspect of arbitration may make a case less attractive to a plaintiffs' lawyer.[93] In addition, arbitrators do not have the reputation for high verdicts that juries, fairly or unfairly, have. Thus, there would appear, again, to be less incentive for plaintiffs' lawyers to take an arbitration case.

What is clear is that it is easier for a pro se plaintiff to prosecute his or her claim in arbitration than in litigation. First, arbitration's informalities make it easier for unrepresented plaintiffs to pursue their cases. There are no motions to defend and understand, and there is less discovery to which one must respond. Moreover, if a case proceeds to arbitration, the procedure is much less formal, with relaxed rules of evidence, no jury instructions, no motions in limine, etc. Second, in many arbitration policies the employer (including the employer we analyze in this study) is represented by counsel in arbitration only if the employee chooses attorney representation. If the plaintiff does not choose to be represented by counsel, a nonlawyer represents the employer. In the litigation context, however, it would be extraordinarily unusual for an employer to forgo hiring legal counsel because the employee chose to proceed pro se.

If lower-pay employees have greater access to arbitrations than they do to trials, it would follow that the average winner in arbitration would have lower damages than the average winner would in litigation. If pro se plaintiffs are more likely to (1) make it to arbitration than to trial and (2) lose because they do not have an attorney, then one would expect that the average award per plaintiff (winners and losers) would be lower in arbitration than in litigation. Finally, the facts that back pay is often a function of the time that has elapsed since the challenged personnel decision and that arbitration is faster than litigation also provide reasons why arbitration should result in lower awards than litigation.

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90. Howard, *supra* note 35, at 44.

91. Lewis L. Maltby, *Out of the Frying Pan, Into the Fire: The Feasibility of Post-Dispute Employment Arbitration Agreements*, 30 WM. MITCHELL L. REV. 313, 317 (2003).

92. Furthermore, lawyers can take a chance on a fees case because arbitration is a relatively quick process, arbitrators are not hostile to hearing such a case (unlike federal court judges), and arbitrators have no overcrowded docket to worry about.

93. *See* Herbert M. Kritzer, *Investing in Cases: Can You Profit from Contingency Fee Work?*, WIS. LAW., Aug. 1997, at 10.

The proposition that arbitration generates lower average awards than litigation finds ample scholarly support. Eisenberg and Hill examined seventy non-civil rights AAA arbitrations, forty-four of which were pursued by higher-pay employees and twenty-six were pursued by lower-pay employees.[94] The median award for the higher-pay employees was $94,984, the mean was $211,720, and the standard deviation was $313,624.[95] The lower-pay employees had a median award of $13,450, a mean of $30,732, and a standard deviation of $38,723.[96] The median, mean, and standard deviation in state court non-civil rights cases were $68,737, $462,307, and $1,291,020 (N=79), respectively.[97] In state and federal court discrimination cases, the medians were $206,976 (N=68) and $150,500 (N=408), respectively.[98] The means were $474,488 and $336,291.[99] The standard deviation for the state cases was $761,297.[100] There were only eight AAA civil rights arbitrations in this sample: two involving higher-pay employees and six initiated by lower-pay employees.[101] The higher-pay employees had a median and mean award of $32,500.[102] For the lower-pay employees, the median was $56,096 and the mean was $259,795.[103]

However tempting, it remains unwise to draw any firm conclusions from two, six, or even eight discrimination cases. In addition, the numbers for all cases are difficult to interpret because the standard deviations were high. High standard deviations signal wide variation in the awards. In other words, there were a number of very high and very low awards that greatly influenced the means and, to a lesser extent, the medians.

Bingham's study of AAA arbitration outcomes also warrants consideration.[104] She ran analyses that excluded outliers in order to reduce the standard deviation and hopefully provide a more accurate picture. There is, however, a problem with trying to use Bingham's study to support an argument for or against the fairness of arbitration. Of the 171 cases studied, 75% involved employees claiming breach of contract, and 18% involved employers claiming breach of contract.[105] Thus, over 90% of her sample involved contract, not statutory discrimination, claims. This same issue arises with Eisenberg and Hill's 70 non-civil rights AAA cases and the state non-civil

94. EISENBERG & HILL, *supra* note 26, at 16-19.
95. *Id.* at 18.
96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. Bingham, *Bias in Arbitration*, *supra* note 38.
105. *Id.* at 374-76.

rights cases. These cases are difficult to compare with each other and nearly impossible to compare with discrimination cases because the damages assessed are dependent more on the contract than the law.

Bingham places the damages award in a helpful context by also listing the amount demanded. This is exactly what Maltby did several years earlier.[106] Maltby, however, took this idea one step further by comparing damages demands to awards in arbitration and litigation.[107] He then adjusted the numbers further by factoring in all plaintiffs, including those who prevailed and not just those who received some sort of award. Maltby compared AAA cases from 1993-1995 to federal court cases from 1994.[108] The mean demand in arbitration was $165,128, while that in federal court was $756,738.[109] In arbitration the mean award was $49,030, an amount equal to 25% of the mean demand.[110] In litigation the mean was $530,611, an amount equal to 70% of the demand.[111] Instead of simply examining the percentage of the demand that successful plaintiffs received, Maltby calculated the percentage of the demand that all plaintiffs received. In other words, he included unsuccessful plaintiffs in this calculation. Under this adjusted outcome, plaintiffs received 18% of their demands in arbitration and 10.4% in litigation.[112]

Using award demands as a factor in the calculation is a clever attempt to help control for the problem of comparing damage awards from different case streams. The problem with using demands as a "control," however, is that it counts on the lawyer's request being an accurate reflection of the value of the case.

A number of factors degrade award demands' accuracy as a proxy for a case's underlying worth. For example, because arbitrators have a reputation for "splitting the baby,"[113] a desire to recenter the mean might induce artificially high demands. Also, pro se plaintiffs may not understand the damages scheme and may thus request an unrealistic number. Because there are more pro se plaintiffs in arbitration, there would be more of these types of unrealistic demands in that case stream. Finally, in both forums, lawyers may use the demand as a settlement tool and thus may have factored in their own fees. If fees are higher in litigation, which they should be because of time and litigation costs, then demands in litigation would be higher than comparable cases in arbitration. Of course, it is plausible that these factors work in a manner that

106. Maltby, *supra* note 34.
107. *Id.* at 48.
108. *Id.* at 49.
109. *Id.*
110. *Id.* at 48-49.
111. *Id.*
112. *Id.* at 48.
113. *See supra* note 79 and accompanying text.

cancels each other out. More likely, however, they provide the "noise" that distorts empirical assessments of the damages question.

5. Conclusions from prior empirical research

As with much empirical work, it is possible to critique and discount prior research. Still, despite the flaws, there are some conclusions about which we can be confident regarding the "fairness" of arbitration. First, there is no evidence that plaintiffs fare significantly better in litigation. In fact, the opposite may be true. Second, arbitration is faster. Because employment dispute resolution can be both heart wrenching and financially crippling, a quicker resolution is a positive. Third, the question of damages is too difficult to determine based on available data. While the strongest consensus exists with respect to disposition time, further research is warranted on all three factors, especially on the questions of win/loss records and damages. Of course, even more and better data are unlikely to provide definitive answers to all empirical questions. Moreover, data will not answer the critical nonempirical questions that greatly influence the debate.

For example, implicit in the assertion that arbitration is unfair to employees is the belief that higher employee win rates and higher average damages awards mean a fairer system. In our view, a fair system means, in large part, that employees prevail when they were discriminated against and awards provide the proper remuneration in terms of back pay and punitive and compensatory damages. On the other hand, just as it is unfair for a plaintiff who was unlawfully harassed to go without any redress, it is unfair for an employer to spend resources to settle or defend a meritless case.

Even if we could determine which forum produced "fairer" results, that system would not necessarily be the preferred method for resolving discrimination cases. As stated above, employers implement arbitration systems for a variety of reasons, not solely because they think they will fare better in arbitration or because they think damages will be lower. Whatever the precipitating motive for establishing such systems, they function as an internal process, with arbitration as the final step, designed to resolve employment disputes within a company. The cases that make it to arbitration or litigation represent failures in systems designed to conciliate and resolve. Thus, the critical question is not what happens at the final stage, but instead what happens to the claims that never make it that far.

III. MANDATORY ARBITRATION SYSTEMS: POSSIBLE REASONS FOR THEIR ADOPTION

Some management attorneys criticize mandatory arbitration policies because they fear (1) claims will increase in number, and (2) employers' positions will be compromised by the reduced barriers to entry, relaxed rules of

evidence, perceived arbitrator predilection to award some recovery in most cases, and the absence of appeals. Such attorneys are, therefore, often reluctant to recommend mandatory arbitration policies because they fear that their client will lose cases winnable in court. More cynically, some management lawyers simply know that they can "big firm" or outlitigate the employees' counsel and fear arbitration will level the playing field. Despite this advice, a growing number of Fortune 1000 companies use ADR systems culminating in arbitration for at least some of their employees.[114]

This study does not present direct evidence of why employers adopt internal dispute systems resulting in arbitration for their nonunion employees. Much of the literature focuses on the desire of companies to avoid unpredictable, potentially very high jury awards. We are certain some employers are so motivated. We suggest, however, that a discrete set of employers facing a high volume of low-value claims also opt for employment arbitration. Such an employer is the subject of the empirical study in this Part of this Article.

Employers with a high volume of low-value claims implement ADR programs for two main reasons. First, disputes that are not resolved quickly are costly on a variety of levels.[115] In addition to legal expenses, disputes decrease productivity by taking management time, negatively affecting morale, and increasing turnover.[116] These productivity drains can be reduced with a DRP. Second, employers are tired of what we call "de facto severance" and wish to limit the value and incidence of nuisance settlements. "De facto severance" is our term for what is a natural outgrowth of the EEOC/litigation system.[117] Because it costs employers (1) between $4000 and $10,000 to defend an EEOC charge,[118] (2) at least $75,000 to take a case to summary judgment, and (3) at least $125,000 and possibly over $500,000 to defend a case at trial,[119] it almost always makes good business sense to settle a case for $4000. In other words, it makes economic sense to pay an employee with a salary of $48,000 per year who is terminated for cause what amounts to one month's severance pay if the employee simply files an EEOC charge.

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114. David Lipsky et al., *An Uncertain Destination: On the Development of Conflict Management Systems in U.S. Corporations*, *in* ALTERNATIVE DISPUTE RESOLUTION IN THE EMPLOYMENT ARENA 109, 110 n.3 (Samuel Estreicher & David Sherwyn eds., 2004).

115. *See* Sherwyn et al., *supra* note 13, at 80-83.

116. *Id.*

117. *See id.* at 82 (defining "de facto severance" as "a process whereby employees file baseless discrimination charges because they know that their former employers are willing to pay a nominal amount of money in order to avoid the aggravation, costs, and losses of time, resources, and productivity that inevitably arise in defending such allegations").

118. Telephone Interview with Gregg Gilman, Chair of Labor and Employment Department, Davis & Gilbert, LLP (Nov. 7, 2004) [hereinafter Gilman Interview]; Telephone Interview with Paul Wagner, Partner, Shea, Stokes, & Carter, LLP (Nov. 8, 2004) [hereinafter Wagner Interview].

119. Gilman Interview, *supra* note 118; Wagner Interview, *supra* note 118.

For the employers in question, numerous problems flow from paying de facto severance. First, one fear derives from information coordination among employees. Once an employer develops a reputation for paying de facto severance, more terminated employees are encouraged to file an EEOC charge. Second, due to the overlapping patchwork of employment statutes—Title VII, ADEA, ADA, and relevant state and local laws—and the courts' reliance on circumstantial showings to allow a case to proceed, a fairly large percentage of employees fits into some legally protected class.[120]

Third, many employers simply detest settling frivolous cases.[121] Some people will compare an EEOC settlement to a settlement arising out of a union contract. There is, however, a major difference. Union contracts have just cause standards for termination. An employer can rationalize settling a case even where it believed that it had cause, but the employee claimed that this was not the case. Even if we put to one side arbitrator predilection to split the difference, room exists for reasonable people to disagree about whether cause existed in any given case. Discrimination is different. While obviously averse to being called racist or sexist, many innocent employers simply hate settling when the employer feels a potentially explosive, though baseless, allegation has been leveled. The economics of litigation, of course, induce some employers into just such settlements. Mandatory arbitration arguably ends de facto severance[122] because arbitration lowers the costs of defense, including potentially adverse publicity.[123] Instead, employers can defend those claims that they believe are baseless.

At the same time that arbitration reduces employers' incentive to settle baseless claims, arbitration programs reduce employers' ability to defeat meritorious claims by delaying or "big firming" the employee into a withdrawal or substandard settlement. Instead, meritorious claims need to resolve quickly and equitably or else the employer will face an adverse result that comes quickly and is expensive.

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120. Alfred Blumrosen, *Strangers No More: All Workers Are Entitled to Just Cause Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978).

121. Conversations with Clifford Penn, Partner, Laner, Muchin, Dombrow, Levin & Taminberg, LLP (Nov. 1994); Conversations with James Convery and Joseph Yastrow, Partners, Laner, Muchin, Dombrow, Levin & Taminberg, LLP (Dec. 2001); Conversations with David Ritten, Partner, Altheimer & Gray, LLP (Dec. 2001); Conversations with Paul Wagner, Partner, Stokes & Murphy, LLP (Dec. 2001).

122. Mandatory arbitration programs "are an effective means for employers to pool the risk of liability for being sued for unfounded claims and to resolve substantiated claims without fear of breaking the bank or incurring bad publicity that may drive them out of business." Sherwyn, *supra* note 26, at 21; *see also id.* ("Mandatory arbitration also simplifies the adjudication process. The parties know they must arbitrate, they know positives and negatives of such a forum vis-à-vis alternative [sic] and they, hopefully, will attempt to resolve the issue.").

123. *Compare* Stone, *supra* note 9, at 1037 (noting that the arbitrator's fees could easily exceed $1000), *with* Sherwyn et al., *supra* note 13, at 132-33 (arguing that $1000 may be a paltry sum in comparison with the legal fees accrued during litigation).

We contend that many employers implement mandatory[124] arbitration systems as the final part of a DRP designed to avoid the negative consequences of lawsuits and other problems at the workplace. These employers are not necessarily, or even dominantly, motivated by a desire to win or to undermine employee rights. Instead, employers implement such policies to avoid inefficiencies created by disputes, increase morale, and reduce turnover. An increase in the total number of claims, however, will likely offset some of these gains.

If employers implement ADR policies for the reason described above, it is clear that arbitration versus litigation comparisons with respect to win/loss rates, time, and damages are relevant only if a majority, or even a significant number, of claims reach an adjudication stage. If not, researchers should examine resolutions across the two systems, capturing those claims that are resolved before they reach the formal adjudication process, whether that adjudication would be in the arbitration or litigation setting. We offer below the experience of one employer (whom we call "ADR Employer 1") facing a high volume of low-value claims, as well as publicly available data from the EEOC and the federal courts, to provide an orientation to the type of research that is needed in this field.

IV. A NEW PATH FOR EMPIRICAL RESEARCH

In this Part of the Article, we offer a preliminary approach for comparing the fairness and efficacy of arbitration versus litigation that takes into account the full life history of a claim, from the initial filing to resolution. Because a comprehensive data set remains to be developed, our analysis utilizes publicly available data on court resolutions and claims experience in the EEOC, the principal federal administrative agency dealing with employment discrimination, as a proxy for measuring claims experience in litigation. We then compare claims experience in a major company in the restaurant industry (ADR Employer 1) that uses an ADR system culminating in mandatory arbitration.[125]

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124. Some contend that mandatory arbitration policies are not necessary and that, instead, arbitration should be offered as a voluntary option after a dispute has arisen. Such an argument blinks at the reality of litigation. In litigation each party analyzes its case and develops a strategy that will allow it to achieve its objective. Arbitration and litigation are different with respect to motion practice, juries, costs of defense, rules of evidence, and discovery. Depending on the circumstances, one forum will be better for a particular side. In a prior article we tested the hypothesis that employees and employers will almost never both choose arbitration after a dispute has arisen. Based on the data from a voluntary arbitration program and survey results from a sample of over three hundred lawyers, we showed that postdispute voluntary arbitration will rarely be accepted by both sides. *See* Sherwyn, *supra* note 26.

125. We cannot—and, therefore, do not—make any claims about the representativeness of our employer. Moreover, at the *Stanford Law Review* Symposium at

A. *Background Information and Data*

We contend that because the vast majority of cases are not resolved in arbitration or litigation, trial and arbitration results are necessarily imperfect measures of the fairness and efficacy of the two systems. A more useful barometer would focus on the resolutions of discrimination cases that take place during conciliation, mediation, and settlement negotiations.

During the last twelve years, employees filed, on average, 82,356 discrimination claims each year with the EEOC.[126] In addition, employees filed a similar number of claims with various state and local agencies.[127] Thus, there are approximately 150,000 discrimination claims filed each year. Various methods are used to resolve these disputes. Most states have investigation and conciliation processes. Some have formal mediation, and others have adjudication systems. It is beyond the scope of this Article to examine each state's resolution processes. Moreover, we do not have access to the data from any states at this time. Accordingly, we compare the EEOC's resolution process (and the data from federal courts)[128] with the data from one DRP company.

The EEOC places each case into one of three categories before any agency investigation has begun.[129] Cases placed in the "A" or highest priority classification fall within the national or local enforcement plan.[130] The national and local enforcement plans focus on class actions and new areas of law. In these cases, the EEOC will litigate on behalf of the employee or the class. An example of a Category A case is *EEOC v. Luce, Forward, Hamilton & Scripps*,[131] where the EEOC contended that mandatory arbitration agreements

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which this piece was initially presented, Jean Sternlight questioned the efficacy of comparing EEOC charges and "calls" made to the employer's internal ADR intake process. Many "employee calls," if filed with the EEOC, might be rejected for lack of subject matter jurisdiction. In addition, she noted that a number of EEOC claims could have initiated in an employer's nonbinding ADR system and ended up at the EEOC after the parties failed to resolve the dispute. Sternlight's concerns would give us greater pause if the differences in time and external resources were plausibly close. For example, under her analysis, the average award per EEOC claim should be much larger than average recovery per ADR call. As demonstrated below, we did not find significant differences in average recoveries, especially after discounting for differences in case disposition time.

126. U.S. Equal Employment Opportunity Comm'n, Charge Statistics: FY 1992 Through FY 2004, *at* http://www.eeoc.gov/stats/charges.html (last modified Jan. 27, 2005).

127. *See generally* Sherwyn et al., *supra* note 13, at 76 n.19.

128. The EEOC resolution process can conclude in federal court.

129. EQUAL EMPLOYMENT OPPORTUNITY COMM'N, PRIORITY CHARGE HANDLING PROCEDURES 11 (1995) [hereinafter EEOC PROCEDURES].

130. *See* EEOC PROCEDURES, *supra* note 129, at 4 (explaining that category A also includes "other charges where further investigation will probably result in a cause finding" and that "[c]ases should also be classified as Category A if irreparable harm will result unless processing is expedited").

131. 345 F.3d 742 (9th Cir. 2003).

cannot be enforced with respect to Title VII claims. The next category, the "B" cases, are often those cases involving only one or two employees who allege that they were not hired or were terminated based on their protected characteristic(s), and in which the employer denies that any unlawful motive played a role in the decisionmaking. One could infer that such cases, in the agency's view, are not likely to generate new or important issues of law; these cases turn on factual disputes.[132] These are the cases that are investigated and also slated for the EEOC's mediation process. Finally, cases that the EEOC determines are frivolous or outside the agency's jurisdiction fall into the "C" category.[133] These cases are, for all intents and purposes, administratively terminated.

Unfortunately, the EEOC statistics do not separate resolutions by classification. Instead, all cases are reported in the EEOC charge statistics.[134] These statistics do, however, provide some insight into the fate of cases filed with the EEOC. From 1992 through 2002, the EEOC resolved, on average, 90,138 cases per year.[135] The EEOC uses eight classifications for resolved cases: (1) administrative closure, (2) merit resolutions, (3) no reasonable cause, (4) reasonable cause, (5) settlements, (6) successful conciliation, (7) unsuccessful conciliations, and (8) withdrawal with benefits.[136] Some of these

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132. The EEOC describes these cases as follows:

> Many charges will initially appear to have some merit but will require additional evidence if one is to determine whether continued investigation is likely to result in a cause finding. In addition, in other cases it will simply not be possible to make an appropriate classification at the intake stage; additional investigation will be needed, as resources permit, to determine whether these charges should be moved into Category A and given priority status or moved into Category C and dismissed.

EEOC PROCEDURES, *supra* note 129, at 4.

133. *See id.* at 5 ("A charge may be placed in Category C and dismissed when the office has sufficient information from which to conclude that it is not likely that further investigation will result in a cause finding."). The *Priority Charge Handling Procedures* list several examples of appropriate Category C labeling: (1) where the EEOC lacks jurisdiction over an employer with less than fifteen employees because employers with less than fifteen employees are not covered by Title VII or the ADA, *see* Employee Responsibilities and Conduct, 29 C.F.R. § 1601.18 (2004); (2) charges where the allegations are not credible, including cases filed by repetitive charge filers where, based on the large number of charges, the charging party is not credible; (3) charges unsupported by any direct or circumstantial evidence of discrimination, and in which the charging party was in a position to have access to such evidence, *see id.* § 1601.19; and (4) ADEA charges filed more than 180 days after the date of violation (or 300 days in states where there is a discrimination statute). *Id.*

134. *See* U.S. Equal Employment Opportunity Comm'n, All Statutes: FY 1992-FY 2004, *at* http://eeoc.gov/stats/all.html (last modified Jan. 27, 2005) [hereinafter EEOC, All Statutes].

135. *Id.*

136. The EEOC's website defines the classifications as follows:

> *Administrative Closure*
>
> Charge closed for administrative reasons, which include: failure to locate charging party, charging party failed to respond to EEOC communications, charging party refused to accept full relief, closed due to the outcome of related litigation which establishes a precedent that

classifications overlap. A case where the EEOC finds cause and then unsuccessfully conciliates will be classified as a merit resolution, reasonable cause and unsuccessful conciliation. Because of the overlap, we slot such cases into two categories: (1) merit resolutions[137] and (2) non-merit resolutions.[138] From 1992 through 2002, the percentage of cases labeled as merit resolutions averaged 15.5% per year. There is an upward trend of merit resolutions. From 1997 through 1999, the merit resolutions rate increased from 11.0% to 16.5%. Between 2000 and 2002, merit resolutions comprised 21.3%, 22.1% and 20.0% of the cases.[139]

This rise in merit resolutions is somewhat offset, however, by the rise in unsuccessful conciliations (cases involving cause findings by the agency but which could not be resolved during conciliation and, thus, in which the

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makes further processing of the charge futile, charging party requests withdrawal of a charge without receiving benefits or having resolved the issue, no statutory jurisdiction.

Merit Resolutions

Charges with outcomes favorable to charging parties and/or charges with meritorious allegations. These include negotiated settlements, withdrawals with benefits, successful conciliations, and unsuccessful conciliations.

No Reasonable Cause

EEOC's determination of no reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. The charging party may exercise the right to bring private court action.

Reasonable Cause

EEOC's determination of reasonable cause to believe that discrimination occurred based upon evidence obtained in investigation. Reasonable cause determinations are generally followed by efforts to conciliate the discriminatory issues which gave rise to the initial charge. NOTE: Some reasonable cause findings are resolved through negotiated settlements, withdrawals with benefits, and other types of resolutions, which are not characterized as either successful or unsuccessful conciliations.

Settlements (Negotiated)

Charges settled with benefits to the charging party as warranted by evidence of record. In such cases, EEOC and/or a FEPA [Fair Employment Practices Act] is a party to the settlement agreement between the charging party and the respondent (an employer, union, or other entity covered by EEOC-enforced statutes).

Successful Conciliation

Charge with reasonable cause determination closed after successful conciliation. Successful conciliations result in substantial relief to the charging party and all others adversely affected by the discrimination.

Unsuccessful Conciliation

Charge with reasonable cause determination closed after efforts to conciliate the charge are unsuccessful. Pursuant to Commission policy, the field office will close the charge and review it for litigation consideration. NOTE: Because "reasonable cause" has been found, this is considered a merit resolution.

Withdrawal with Benefits

Charge is withdrawn by charging party upon receipt of desired benefits. The withdrawal may take place after a settlement or after the respondent grants the appropriate benefit to the charging party.

U.S. Equal Employment Opportunity Comm'n, Definitions of Terms, *at* http://www.eeoc.gov/epa/define.html (last modified May 11, 2000).

137. *See supra* note 136.

138. These include administrative closures and no-reasonable-cause findings.

139. *See* EEOC, All Statutes, *supra* note 134.

employee received no benefits). From 1997 through 1999, the annual percentages of unsuccessful conciliations were 2.8%, 3.3%, and 4.9%.[140] Between 2000 and 2002, the annual percentages of unsuccessful conciliations were 6.6%, 7.3% and 5.2%.[141] Subtracting the percentage of unsuccessful conciliations from the merit resolutions provides the percentage of cases where employees received some compensation. During 1992-2003, on average, 10.9% of the cases filed involved "remunerated resolutions."[142] As for monetary benefits, the per-claim figure was $2,052.82.[143] In addition, the average award in the remunerated resolutions was $16,993.90.[144] These figures may not represent, however, the average award that each employee or "remunerated employee" received. Because the report is based on claims, not plaintiffs, we infer that class actions that could include hundreds of plaintiffs are not classified as separate resolutions.[145]

Employees whose cases receive no-cause findings or are treated as administrative closures or unsuccessful conciliations receive "right to sue" letters and can then file cases in federal court. From 1999 through 2003 employees filed on average 21,228 cases in federal court each year.[146] The interesting question is what happens to the cases in court. In 2003, for example, there was no court action in 3158 of the 18,035 terminations.[147] The parties to the action and the courts resolved 10,739 cases prior to pretrial and 3441 cases during or after pretrial, and only 697 (or 3.9%) of the cases made it to trial.[148] Thus, even though there are anywhere from 75,000 to 150,000 discrimination

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140. *Id.*

141. *Id.*

142. *Id.* "Remunerated resolutions" was computed by dividing the number of remunerated cases by the total number of cases.

143. *Id.* The "per-claim figure" was derived by dividing the total number of dollars awarded by the total number of charges resolved.

144. *Id.* Average "remunerated resolution" is the total dollars awarded divided by the number of remunerated resolutions.

145. For example, in 1999 the EEOC settled an ADEA case with Thompson Consumer Electronics, Inc., for $7.1 million. *See* Press Release, Equal Employment Opportunity Comm'n, EEOC Settles Major Age Bias Lawsuit for $7.1 Million with Thompson Consumer Electronics and Local Unions, *at* http://www.eeoc.gov/press/8-17-99.html (Aug. 17, 1999). The press release stated that "over 800" employees would benefit. There is no evidence to suggest that each plaintiff filed a charge or that the EEOC added "over 800" charges to its intake numbers for the year. *See id.*

146. Admin. Office of the U.S. Courts, U.S. District Courts—Cases Terminated, by Nature of Suit and Action Taken, During the 12-Month Period Ending September 30, 2003, *at* http://www.uscourts.gov/judbus2003/appendices/c4.pdf (last visited Apr. 7, 2005) [hereinafter Admin. Office of the U.S. Courts, Cases Terminated]; Admin. Office of the U.S. Courts, U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 1999 through 2003, *at* http://www.uscourts.gov/judbus2003/appendices/c2a.pdf (last visited Apr. 7, 2005) [hereinafter Admin. Office of the U.S. Courts, Civil Cases Commenced].

147. Admin. Office of the U.S. Courts, Cases Terminated.

148. *Id.*

cases filed under federal statutes with the EEOC each year, of the EEOC cases terminated in 2003, only 14,877 resulted in any court action. For federal court trials the average award per lawsuit was $95,949,[149] while the average award per remunerated lawsuit was $336,291.[150]

B. *Results and Discussion*

The EEOC data and federal court data are useful for two purposes. First, an indication that a vast number of cases are either dismissed or resolved without court action undermines the argument that arbitration will negatively affect the development of the law and public accountability. The current statutory regime purports to emphasize conciliation, and the EEOC has adopted a formal mediation process.[151] The EEOC and federal court data provide a plausible context to compare the results of our employer's arbitration policies. Before we compare results, however, we briefly describe the employer's policies.

Our employer provides six options to resolve disputes: (1) open door policy—the employee meets with his immediate supervisor or someone higher in the chain of command; (2) ombudsman—the employee can simply talk to a confidential advisor who can advise the employee and act as a mediator, or even as a factfinder; (3) conference—the employee meets with someone from the DRP office and chooses a method to resolve the dispute; (4) internal informal mediation—a company advisor mediates the dispute; (5) formal mediation—an AAA mediator attempts to resolve the dispute; and (6) arbitration. With regard to arbitration, the company will not be represented by an attorney if the employee chooses to proceed without representation. If the employee wishes to bring counsel, the company has an ERISA plan that provides some funds for attorneys' fees.

Our employer data span 1993 to 2004. As Figure 1 reveals, the number of calls made by ADR Employer 1's employees rose from 292 in 1993 to 1403 in 2004. During these same years, in contrast, the number of EEOC's receipts remained relatively constant. Two factors help explain the steady increase in the number of ADR Employer 1's claims. First, the company greatly expanded its operations during that time period. In 1993, the company had approximately 5000 employees. Today it has 40,000 employees. Second, over time ADR Employer 1's employees became more comfortable with the DRP that began in 1993. As the DRP became more a part of ADR Employer 1's corporate culture,

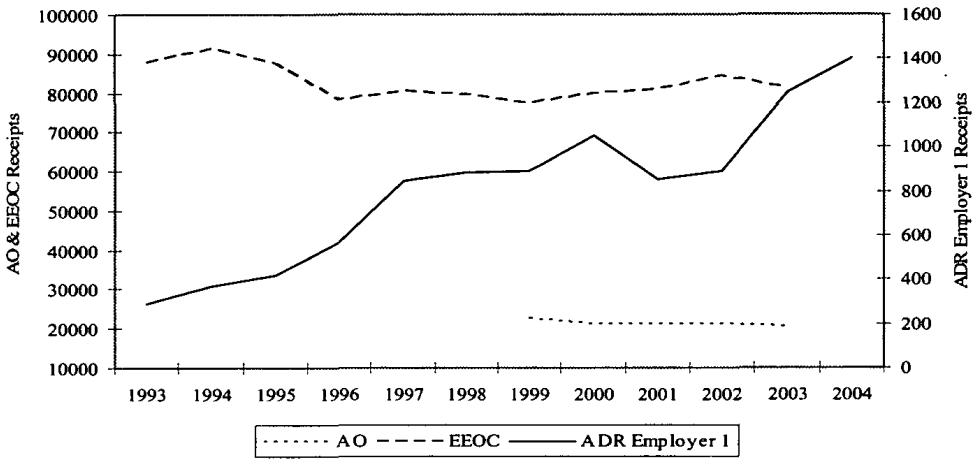
149. EISENBERG & HILL, *supra* note 26, at 16-19 (adjusted for coding errors).

150. *Id.* at 18.

151. Although we do not attempt in this Article to address the claim that widespread resort to mandatory arbitration will stymie the development of precedent necessary to provide guidance to employers and employees about their rights and obligations under public law, it is tempting to note that even under the EEOC's case handling protocol, only a small number of charges filed with the agency are likely to be resolved in a public fashion and provide formal legal precedent.

employees' comfort level, as well as their knowledge of the system, grew and they were more apt to use it.

FIGURE 1: TOTAL NUMBER OF CASES OR RECEIPTS



The second result, presented in Figure 2, offers comparisons of differences in the number of claims that use external resources. For EEOC cases, we classify cases using external resources as those that go to federal court. With regard to ADR Employer 1, one could argue that an appropriate parallel are those cases that go to arbitration. ADR Employer 1 cases that are resolved after an internal mediation arguably may be equated to those EEOC claims that are resolved during the agency's investigation/conciliation process. ADR Employer 1 cases that are resolved by external mediation are similar to those that are resolved through the EEOC's in-house mediation process.

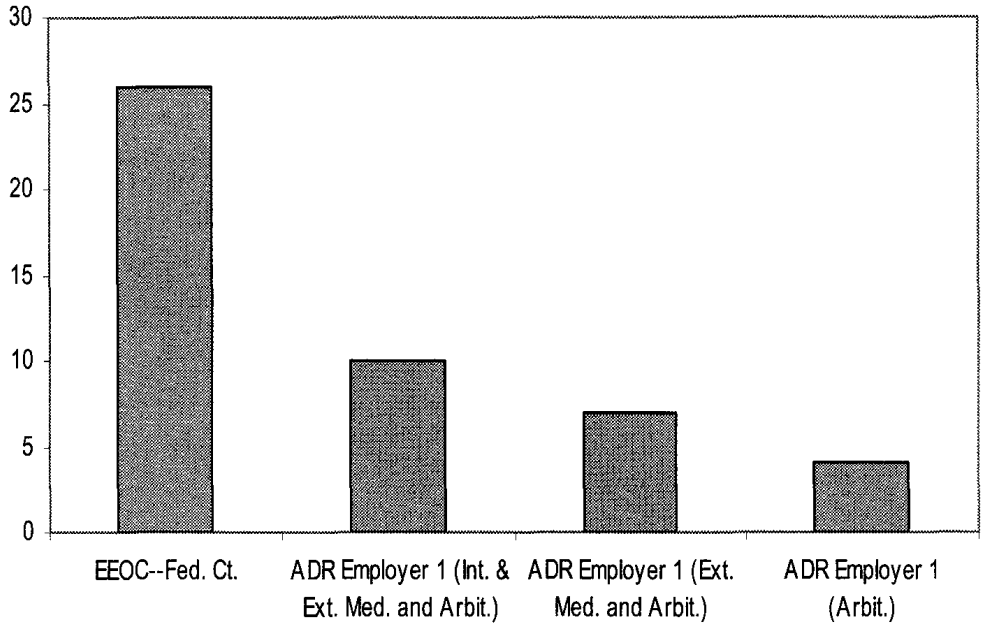
While we do not have data on how many EEOC cases are resolved at each level, we do know the number of cases filed in federal court. From 1999 to 2003, the average number of employment discrimination cases filed in federal court was 21,288.[152] If the total number of discrimination cases that could be filed in a given year is comparable to the number of cases filed with EEOC in that year, that would mean 21,288 out of 81,762 (or 26%) end up in court. If the number of cases filed with state agencies doubled that number,[153] 13% of the EEOC cases filed would use external resources. For ADR Employer 1, less than 5% of the cases used the external resource of arbitration and less than 10% used internal mediation, external mediation, and/or arbitration. What Figure 2 makes clear is that the percentage of EEOC/litigation system cases that use external resources is manifestly greater than the percentage of cases that use

152. Admin. Office of the U.S. Courts, Civil Cases Commenced, *supra* note 146.

153. This is highly unlikely because many state cases are those in which there is no federal jurisdiction or are filed in states with internal adjudication systems.

external resources provided by ADR Employer 1. This disparity holds even under the most conservative of assumptions.

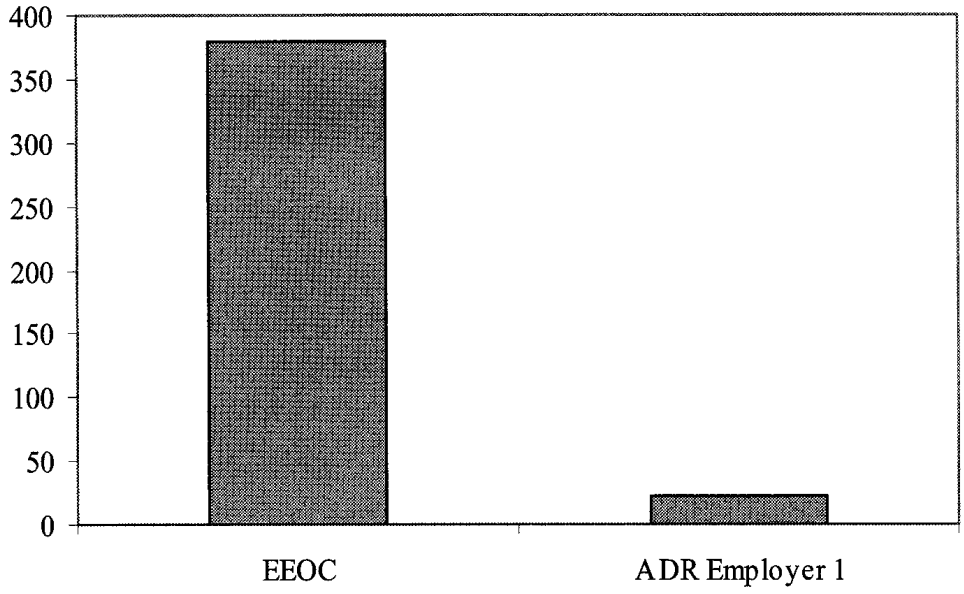
FIGURE 2: PERCENTAGE OF RECEIPTS THAT INVOLVE EXTERNAL RESOURCES[154]



If employers seek to implement DRP policies to resolve cases more quickly, they manifestly succeed. As Figure 3 makes clear, the average processing time of an EEOC claim is 373 days. Those cases that end up in court, however, are not part of that equation. As stated above, court cases that are resolved at trial average 709 days.

154. The data available for EEOC--Fed Ct. are for 1999-2003; the data available for ADR Employer 1 are from June 15, 1993 through June 30, 2004.

FIGURE 3: AVERAGE CASE DISPOSITION TIME (IN DAYS)[155]



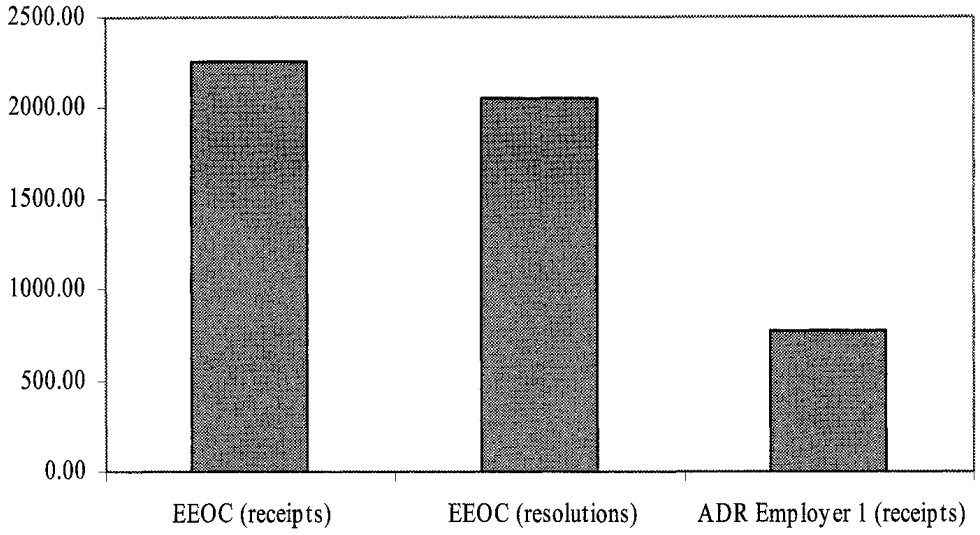
The benefits of comparatively quicker case disposition time are numerous and difficult to overstate. Decreased case disposition time can increase productivity, save money on outside counsel, and reduce employee turnover. Indeed, more than 75% of the employees who use ADR Employer 1's DRP system remain employed after the case is resolved, and since instituting its DRP system, ADR Employer 1 has cut its outside counsel fees in half.

One pivotal derivative point is that reduced case disposition time may also contribute to reduced damages. When 81% of the claims are resolved in less than one week, there is little employer back pay liability. Figure 4 suggests this: for ADR Employer 1, the average award per complaint is $576, less than one-third of the EEOC's $1,996.54 per-claim average.

Of course, other factors may contribute to per-claim average differences in damages awards. The EEOC takes only those claims in which the employee has a legally cognizable claim. Alternatively, ADR Employer 1 defines claims as claims made to the DRP system. This increase in noncognizable claims increases the denominator and, thus, reduces the ADR Employer 1 per-claim award average. Of course, unflagging critics of arbitration can argue that ADR Employer 1's lower award figures support the claim that the arbitration system is unfair to employees.

155. EEOC case-processing data comes from Maltby, *supra* note 34, at 61. ADR Employer 1 case-processing data is available for January 1, 2004 to June 30, 2004, and reflects the total number of days necessary to fully resolve a case.

FIGURE 4: AVERAGE PER-RECEIPT AWARD (IN $)[156]



CONCLUSION

The new data we present here are preliminary, descriptive in nature, and involve a single employer. Consequently, we advance no claim that we can solve the rich debate on employment arbitration. Instead, our modest point is to identify areas that would benefit from further empirical exploration. We also suggest that arbitration scholarship is now positioned to realize further advancements. Arbitration scholarship began with theoretical assertions and then moved to adjudication data. It is now time, we feel, to take another step and focus attention on resolutions at the company and EEOC level. Specifically, we recommend that scholars track one year's worth of EEOC claims and compare them to a year's worth of claims made in in-house ADR systems. We will only be able to judge the fairness and efficiency of each type of system if we can examine each claim, determine their merits, note the time they took to be resolved, know the damages (if any), determine the attorneys' fees, and ascertain the level of satisfaction of both the employers and the employees. Until then, we will either make assertions in a data vacuum or study the small number of cases in which the system fails and outside resources are

156. EEOC data are available for 1992 through 2004. *See* EEOC, All Statutes, *supra* note 134. EEOC figures reflect total amount of monetary benefits generated divided by total number of receipts. Data are available for ADR Employer 1 for June 15, 1993 through June 30, 2004. The figures here are derived by dividing the total amount of settlements and awards by the total number of cases.

used, instead of studying where the system succeeds and cases are resolved before a true adjudication process—whether an arbitration or trial—takes over.