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### Mandatory Arbitration: Why Alternative Dispute Resolution May Be the Most Equitable Way to Resolve Discrimination Claims

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# Mandatory Arbitration: Why Alternative Dispute Resolution May Be the Most Equitable Way to Resolve Discrimination Claims

## Abstract

The number of employers that require employees to agree to mandatory arbitration of disputes as a condition of employment has increased in recent years. One particular motivating factor is an increase in the volume of discrimination claims, which has accompanied the expansion of the employee classes protected by state and federal anti-discrimination statutes. The employers' goals in requiring arbitration are to avoid the expense and time involved in litigation, as well as the specter of unreasonable jury awards. More cynically, critics of mandatory arbitration suggest that another reason that employers favor arbitration is the perception that arbitration works to the disadvantage of employees. Part of the difficulty in establishing whether one party or the other benefits more from litigation or arbitration is the inherent differences in the cases that reach one forum or the other. An analysis finds no support for the idea that arbitration necessarily favors employers. Indeed, the cost of litigation makes it unlikely that an employee with a legitimate, though small value claim would even be heard in court. Instead, contingent-fee attorneys would tend to stay away from a small claim, while state and federal agencies, notably the federal Equal Employment Opportunity Corporation, have a bias toward settling claims, regardless of the equity of that settlement. Considering that the best resolution is one that both parties achieve freely on their own, both litigation and arbitration represent a type of systemic failure. Current research has found that arbitration is faster in achieving a resolution than is litigation. There is no way to establish whether payments or damages are higher in litigation than in arbitration, and research has failed to show a bias toward either employees or employers in arbitration. Indeed, establishing bias begs the fundamental question, which is whether a system that favors one side, employees, for instance, is actually more fair than a system in which either side could prevail. Ideally, the system should provide damages for employees who actually have been hurt by discrimination, while at the same time it should provide speedy exoneration for employers who have been unfairly tarred by accusations of discrimination. The present system does neither.

## Keywords

arbitration, alternative dispute resolution, employer discrimination

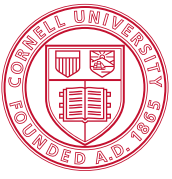
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by David Sherwyn, J.D.

# Cornell Hospitality Report





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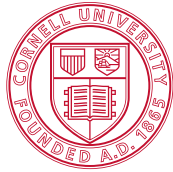
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# Mandatory Arbitration:

## Why Alternative Dispute Resolution May Be the Most Equitable Way to Resolve Discrimination Claims

by David Sherwyn

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### ABOUT THE AUTHOR



**David Sherwyn, J.D.**, is associate professor of law at the Cornell University School of Hotel Administration (dss18@cornell.edu). His primary research focus is labor and employment law issues relevant to the hospitality industry; specifically, mandatory arbitration of discrimination lawsuits and sexual harassment. Among his publications are articles in the *Stanford Law Review*, *Berkeley Journal of Employment and Labor Law*, *the Fordham Law Review*, *the University of Pennsylvania Journal of Labor and Employment Law*, and *the Cornell Hotel and Restaurant Administration Quarterly*.

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## EXECUTIVE SUMMARY

The number of employers that require employees to agree to mandatory arbitration of disputes as a condition of employment has increased in recent years. One particular motivating factor is an increase in the volume of discrimination claims, which has accompanied the expansion of the employee classes protected by state and federal anti-discrimination statutes. The employers' goals in requiring arbitration are to avoid the expense and time involved in litigation, as well as the specter of unreasonable jury awards. More cynically, critics of mandatory arbitration suggest that another reason that employers favor arbitration is the perception that arbitration works to the disadvantage of employees.

Part of the difficulty in establishing whether one party or the other benefits more from litigation or arbitration is the inherent differences in the cases that reach one forum or the other. An analysis finds no support for the idea that arbitration necessarily favors employers. Indeed, the cost of litigation makes it unlikely that an employee with a legitimate, though small value claim would even be heard in court. Instead, contingent-fee attorneys would tend to stay away from a small claim, while state and federal agencies, notably the federal Equal Employment Opportunity Corporation, have a bias toward settling claims, regardless of the equity of that settlement.

Considering that the best resolution is one that both parties achieve freely on their own, both litigation and arbitration represent a type of systemic failure. Current research has found that arbitration is faster in achieving a resolution than is litigation. There is no way to establish whether payments or damages are higher in litigation than in arbitration, and research has failed to show a bias toward either employees or employers in arbitration. Indeed, establishing bias begs the fundamental question,

which is whether a system that favors one side, employees, for instance, is actually more fair than a system in which either side could prevail. Ideally, the system should provide damages for employees who actually have been hurt by discrimination, while at the same time it should provide speedy exoneration for employers who have been unfairly tarred by accusations of discrimination. The present system does neither.

A case study of a large employer depicts the favorable effects of a program of alternative dispute resolution. Employment at the company in question grew substantially during the study period and the number of contacts to its dispute resolution program likewise expanded. However the percentage of those claims that required outside resources (either mediation or arbitration) was under 10 percent, compared to some 26 percent of claims through the federal Equal Employment Opportunity Commission that end up in court. Likewise the number of days to resolution for Employer 1 was tiny compared to the average 373 for EEOC, and claims paid by Employer 1 averaged one-third of the EEOC average.

# Mandatory Arbitration:

## Why Alternative Dispute Resolution May Be the Most Equitable Way to Resolve Discrimination Claims

by David Sherwyn

**T**he last 15 years have seen the growth of mandatory-arbitration policies in the hospitality industry. Under these policies employees agree, as a condition of employment, to waive their right to a jury trial in exchange for the right to have their case heard by an arbitrator. The attraction of arbitration policies for employers is the prospect of avoiding negative publicity, expense, and inefficiencies associated with litigation. As I explain below, this interest in arbitration has been provoked in large part by litigation connected with employment-discrimination claims.

Although many employers embrace arbitration, it also has detractors. Critics contend that a mandatory-arbitration policy may not be legally enforceable, is unfair to employees, and does not really benefit employers. In this *CHR Report*, I plan to cut through the rhetoric surrounding arbitration policies and provide employers with systemic method for evaluating whether their company should implement an arbitration policy. To that end, this report (1) explains the problems with the discrimination-adjudication system that drew employers' attention to arbitration, (2) sets forth the law of arbitration; and (3) provides empirical data comparing arbitration and litigation systems.

### A Growth Industry

Over the past 20 years, employment litigation has increased by 400 percent, primarily due to discrimination claims.<sup>1</sup>

<sup>1</sup> Stuart H. Bompay et al., *The Attack on Arbitration and Mediation of Employment Disputes*, 13 LAB. LAW. 21 (1997) (citing *Discharge Is Now Major Focus of Job Discrimination Suits*, Daily Lab. Rep. (BNA) No. 164, at A-3 (Aug. 23, 1991)).

Three major changes in the law may be responsible for this increase.<sup>2</sup> The first change is the increase in the number of protected classes. Title VII of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, national origin, religion, and sex.<sup>3</sup> Subsequent Congressional legisla-

<sup>2</sup> There may be additional explanations for the continued burgeoning federal employment-discrimination litigation caseloads. John Donohue and Peter Siegelman present several explanations including: increased unemployment rates, general economic downturn, demographic growth in the protected work force, with minorities and women taking better paying jobs, and the "integration effect." (An integrated work force is more likely to produce litigation because minorities or women who work by themselves have no benchmarks against whom they can measure their treatment and determine whether it is discriminatory.) See: John J. Donohue and Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1001 (1991); and Majorie L. Baldwin & William G. Johnson, *The Employment Effects of Wage Discrimination against Black Men*, 49 INDUS. & LAB. REL. REV. 302 (1996).

<sup>3</sup> Title VII, Pub. L. No. 88-352, 78 Stat. 253 (1964) (codified as amended at 42 U.S.C. §2000e-§2000e17 (1994)).



tion expanded the protected classes to include age,<sup>4</sup> pregnancy,<sup>5</sup> and disability.<sup>6</sup> In 1994, for instance, disability claims accounted for 22.6 percent of the total number of charges with the EEOC.<sup>7</sup> Age cases accounted for 19.9 percent.<sup>8</sup> In addition, many states, cities, and counties protect other classifications such as marital status<sup>9</sup> and sexual orientation.<sup>10</sup>

Beyond statutory classifications federal courts increased the number of causes of action available to plaintiffs by developing the legal theories of sexual harassment<sup>11</sup> and disparate impact,<sup>12</sup> and also resurrecting Section 1981 of

<sup>4</sup> The ADEA, Pub. L. No. 90-202 at 15, 18 Stat. 602 (1967) (codified as amended 29 U.S.C. § 621-634 (1994 & Supp. I 1995)), took effect in 1968. Donohue and Siegelman reported that 15.1% of 1,250 randomly selected employment civil rights cases filed in seven major cities from 1972 to 1987 were based on age discrimination. Donohue & Siegelman, *op.cit.* See also: Christine Jolls, *Hands-Tying and the Age Discrimination in Employment Act*, 74 TEX. L. REV. 1813, 1814 (1996); and George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, PAGE (1995).

<sup>5</sup> See: 42 U.S.C. § 2000e(k) (1994). Though the Pregnancy Discrimination Act did not create a new protected class, the number of complaints of discrimination under the PDA grew from 3,693 in 1981 to 5,090 in 1985. *Final Amendments to EEOC Guidelines on Sex Discrimination*, Daily Lab. Rep. (BNA) No. 78, at E-5 (Apr. 20, 1994).

<sup>6</sup> The ADA requires that covered employers make reasonable accommodations for the known disability of any "otherwise qualified individual with a disability." ADA, 42 USC § 12112(b)(5). The ADA became effective in July 1994 for employers with 15 or more employees.

<sup>7</sup> EEOC Office of Program Operations, Ann. Rep. 11-12 (1994).

<sup>8</sup> OFFICE OF PROGRAM OPERATIONS, EEOC ENFORCEMENT STATISTICS, FY 1984-1994 (Feb. 1995). Note, however, that overlapping claims may inflate the significance of these percentages. That is, some plaintiffs bring claims alleging multiple types of discrimination, such as discrimination against race, sex, and age. Donohue and Siegelman (cited in notes 2 and 4 above) filter out the overlap effect, but the EEOC statistics do not.

<sup>9</sup> For example, see: CAL. GOV'T CODE § 19572 (West 1995 & Supp. 1998); CONN. GEN. STAT. § 46a-60 (1995); D.C. CODE ANN. § 1-2512 (Supp. 1997); FLA. STAT. ANN. § 760.07 (West Supp. 1998); and HAW. REV. STAT. ANN. § 368-1 (Michie 1994).

<sup>10</sup> For example, see: MASS. ANN. LAWS ch. 151B § 4 (Law. Co-op. Supp. 1997); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 1998); N.J. STAT. ANN. § 10:5-12.5 (West Supp. 1997); R.I. GEN. LAWS § 28-5-1 to -9 (1995 & Supp. 1997); VT. STAT. ANN. tit. 3, § 961 (1995); WASH. REV. CODE ANN. § 49.60.180 (West Supp. 1998); and WIS. STAT. ANN. § 111.31 (West 1997).

<sup>11</sup> See: *Meritor Sav. Bank v. Vinson*, 477 U.S. 57 (1986), holding that a hostile environment caused by sexual conduct can create a cause of action under Title VII.

<sup>12</sup> See: *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), holding that an employment policy that is neutral on its face can constitute a Title VII violation if it creates an adverse impact. For example, the Duke Power Company required applicants for certain positions to be high school graduates. The Court examined the 1960 North Carolina census, found that 34% of states white residents were high school graduates and only 12% of the African-Americans had diplomas. This disparity, according to the Court, constituted a Title VII violation. The Civil Rights Act of 1991 ended the adverse impact debate, if there was one, by adopting the *Griggs* holding as the law. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.) (1994).

the Civil Rights Act of 1866, which protects employees and applicants from racial discrimination even if the employer is not covered by Title VII.<sup>13</sup> Finally, the Civil Rights Act of 1991 (CRA) made employment-discrimination claims more attractive to plaintiffs and their attorneys by providing for punitive damages, compensatory damages, and jury trials.<sup>14</sup> The new damages scheme increased the average amount of settlements. In particular, after the CRA of 1991, employees have an incentive to reject settlement offers of full back pay, in the hope that a jury will award them damages far exceeding the true value of the case. Thus, plaintiffs and their attorneys have incentive to turn down what had been full relief in the hopes of winning the *employment-discrimination lottery*.

### The EEOC's System: Expensive and Inefficient

As I explain in this section, the current system for adjudicating discrimination cases is so expensive and inefficient that it is unfair to both employers and employees. To file a discrimination lawsuit against an employer, an employee must first file a charge of discrimination with either the EEOC or with the appropriate state or local agency.<sup>15</sup> The agency with which employee files a charge will investigate the allegation and try to settle the matter by having the employer remunerate or reinstate the employee. If the employer and employee cannot agree on a settlement, the agency determines whether there is cause to believe that discrimination occurred. If the agency finds "no cause," it issues a "right to sue letter," and the employee can still file an action in federal or state court. If the agency finds cause it may issue the right-to-sue letter; set the case for trial before its own administrative adjudication process; or become the employee's counsel and file an action in federal court on the claimant's behalf.<sup>16</sup>

In establishing the procedures I just described, Congress attempted but failed to develop a system that would

<sup>13</sup> Section 1981 of the Civil Rights Act of 1866 prohibits discrimination against racial minorities in the "making and enforcement of contracts." In *Johnson v. Railway Express Agency, Inc.* 421 U.S. 454 (1975), the Supreme Court expanded Section 1981's prohibitions to provide damages to those who proved employment discrimination, regardless of the size of the employer. Unlike Title VII, which defines an employer as a company that has 15 or more employees, Section 1981 claims can be brought against any employer regardless of size.

<sup>14</sup> See: 42 U.S.C. § 1981a. The 1991 amendments provide for punitive and compensatory damages. Such damages, however, are "capped" based on the number of employees working at a company.

<sup>15</sup> See: 29 U.S.C. § 626(d); 42 U.S.C. § 2000e-5. Employees can choose to file with either the federal, state, or local agency. In most circumstances, the agencies have concurrent jurisdiction so that claims are cross-filed among each agency.

<sup>16</sup> One commentator notes that instead of issuing a no-cause finding, many EEOC offices inform the plaintiff of its intent to do so and afford the plaintiff an opportunity to request a right-to-sue notice. See: Michael Selmi, *The Value of the EEOC: Reexamining the Agency's Role in Employment Discrimination Law*, 57 OHIO ST. L.J. 1, 9 n.35 (1996).

eliminate employment discrimination by providing employees with an agency that investigated and resolved all charges (regardless of potential damages) without exposing employers to the high costs associated with litigation. Instead, employers accused of discrimination face outrageous costs, and employees' claims are not investigated in a thorough or timely manner.

## Expensive for Employers

When a discrimination claim is filed, employers are required to complete a questionnaire and provide the investigating agency with a position statement. This alone can cost thousands of dollars in attorneys' fees, if an employer does not have in-house counsel. But even so, the employer loses productivity of employees involved in the case, may suffer adverse publicity, and faces uncertain liability. Beyond that, the costs of defending a claim give employers a strong incentive for employers to settle a case *regardless of the worthiness of the plaintiff's claim*. I say this because of the following costs to employers: (1) between \$4,000 and 10,000 to defend an EEOC charge; (2) at least \$75,000 to take a case to summary judgment; and (3) at least \$125,000 and possibly over \$500,000 to defend a case a trial.<sup>17</sup> Moreover, the chance of an adverse verdict increases the incentive to settle.<sup>18</sup>

Administrative procedures also provide investigators with incentives to settle cases, in part because the EEOC and numerous state agencies evaluate their investigators by examining how many cases they closed per quarter.<sup>19</sup> From the time they are assigned to the case, investigators push employers and employees to settle.<sup>20</sup> In fact, it was standard operating procedure for some state investigators to attempt

to settle a case without even discussing the case's merits or reviewing the file.<sup>21</sup>

In the 1980s and early 1990s the EEOC accepted and investigated all charges.<sup>22</sup> The state agencies not only accepted and investigated all charges, but they actually helped employees "fit" their facts into criteria that would create a *prima facie* case—that is, what amounts to a guaranteed win for the employee.<sup>23</sup> The "guaranteed win" comes from what I refer to as "the *de facto* severance system" for discrimination cases. In this system, employees can file baseless discrimination charges because they know that their former employers are willing to hand over up to six months' pay to avoid the costs and aggravation that will arise in defending the allegation.

Also supporting the concept of *de facto* severance is the fact that it is simple (and inexpensive) for employees to file charges of discrimination, yet costly for employers to defend against charges. To file a charge of discrimination, employees must establish a *prima facie* case. To do so, employees need only prove: (1) that they are members of a protected class; (2) that they were qualified for the position; (3) that they were "mistreated" by their employer or potential employer; and (4) that employees who do not belong to that protected class were not mistreated.<sup>24</sup> Employees establishing a *prima facie* case do not have to provide any evidence of discrimination, do not need an attorney, and need not pay a filing fee.

## A New System Compromises Employee Claims

In 1995, the EEOC created new procedures intended to reduce the backlog of cases and to weed out frivolous cases.<sup>25</sup> These procedures included: (1) encouraging settlement at all steps of the process; (2) priority charge handling; and (3) rescission of the full-investigation policy. Instead of resolving the system's inefficiencies, however, the new policies perpetuate and exacerbate some of the problems identified above. Moreover, they effectively make it impossible for some employees to have their cases heard.

Encouraging settlement at all phases of the investigation further institutionalizes the practice of providing *de facto* severance for employees with baseless claims, while not making full payments to employees with meritorious claims.

<sup>17</sup> As estimated by Gregg Gilman, chair of the Labor and Employment Department, Davis & Gilbert, LLP, and Paul Wagner, Partner, Shea, Stokes, & Carter, LLP.

<sup>18</sup> See: Michael Barrier, *Lawsuits Gone Wild*, NATION'S BUS., Feb. 1998, at 12, who noted with *Lane v. Hughes Aircraft Co.*, 65 Cal. Rptr. 2d 889 (1997) that one jury award for \$89.5 million dollars which covered economic harm, emotional distress, and punitive damages, although the appellate court reduced the damages to \$5.8 million.

<sup>19</sup> In 1993 Linda G. Mora, the General Accounting Office's director of education and employment issues, reported that of 68,000 cases closed in 1992 the EEOC found no cause in 61% and reasonable cause in 2.4%. She stated that this disparity could be explained, in part, by the fact that EEOC investigators have quarterly quotas for case closings, and those who do not meet this quota are given lower performance ratings. See *EEOC's Performance in Handling Caseload Criticized By Witness at House Hearing*, Daily Lab. Rep. (BNA) No. 143, at D-3 (July 28, 1993).

<sup>20</sup> Gilbert F. Casellas, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION PRIORITY CHARGE HANDLING PROCEDURES 11 (June 1995) states: "Charges under investigation that do not fall within the national or local enforcement plans and that are in Categories A or B may be settled at any time by the enforcement staff, with or without consultation with legal staff, as appropriate."

<sup>21</sup> As an example, the Illinois Department of Human Rights used to assign "interim investigators" for this purpose. If the case did not settle, it would then sit for approximately two years before it was assigned to an investigator who would examine the merits.

<sup>22</sup> The "full investigation" policy was rescinded in 1995.

<sup>23</sup> The nature of this system encourages this behavior. The federal government bases the amount of funding it will provide to a state agency on the number of claims that are received.

<sup>24</sup> *McDonnell Douglas v. Green*, 411 U.S. 792 (1973).

<sup>25</sup> See: Casellas, *loc.cit.*, at 2-3; see also: E.R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 YALE L. & POL'Y REV. 219 (1995).

## The current system hurts the good actors—both employers and employees—but benefits the bad.

Instead of attempting to discover whether the employer violated law, investigators are simply trying to “make the case go away,” thus attaining efficiency at the expense of justice.<sup>26</sup>

The priority charge-handling policy effectively formalizes the procedures investigators have used for years.<sup>27</sup> Cases placed in the “A” or highest priority classification generally focus on class actions and new areas of law. In these cases, the EEOC will litigate on behalf of the employee or the class. Second-priority cases, the “B” cases, are often those that involve an allegation by one or two employees, and in the agency’s view are not likely to generate new or important issues of law. 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 falls into the “C” category. These cases are usually administratively terminated.

### Few Complaints Go to Federal Court

To file a claim in federal court, it is essential to retain competent counsel. This is expensive for employers and out of reach for employees, unless they retain an attorney who works on a contingency basis. In that regard, the EEOC’s resolution of a charge should function as a signal to plaintiffs’ lawyers regarding whether a case will be profitable to pursue. That does not occur, however, because the EEOC dismisses the overwhelming majority of cases *without regard to the merits of these cases*. By doing so, the EEOC has created a perception among plaintiffs’ lawyers that the investigation’s results are meaningless.<sup>28</sup> Thus, attorneys base their decisions to take a case on their own determination of potential back pay and the depth of the employer’s pockets, rather than the merits of the case.

The actual litigation is a heart-wrenching marathon that takes two-and-a-half years on average and can last for more than ten years.<sup>29</sup> In the process, the parties tear at each other’s character and integrity—leaving both with damaged reputations. Employees may find themselves blacklisted when they attempt to return to work,<sup>30</sup> and employers may have to rebuild their reputations even after baseless accusations.

I paint this grim picture because the current system hurts the good actors, but benefits the bad. Both employees with legitimate claims and employers falsely accused of discrimination are hurt in this process, while the actions of employers who discriminate and employees who file frivolous claims are facilitated when investigators and lawyers push settlements. To that end, they encourage innocent employers to settle frivolous cases by threatening them with the costs of investigation and litigation and pressure employees with meritorious cases to settle by threatening them with delays, the probability of a no-cause finding, and the financial and emotional costs of litigation.

The failures of the current system are clear. In place of litigation and forced settlements, arbitration could be a better alternative provided it is lawful and solves the problems associated with litigation without creating other problems. Next, I’ll set forth the law and then consider whether arbitration has been a better way to resolve claims than litigation.

### The Law of Mandatory Arbitration

The U.S. Supreme Court has issued at least five holdings regarding arbitration of discrimination claims. In addition, hundreds of Circuit Court and District Court rulings have been published, along with a similar number of law review

<sup>26</sup> Peter Albrecht, partner, Godfrey & Kahn in Madison, Wisconsin, reports that this problem occurred when the Illinois Department of Human Rights used to assign interim investigators who were charged with attempting to settle cases before they investigated.

<sup>27</sup> See: Casellas, *loc.cit.* Peter Albrecht observed that this approach provides little or no benefit for plaintiffs with B cases.

<sup>28</sup> Interviews with Chicago attorney Elizabeth Hubbard.

<sup>29</sup> While the average varies across jurisdictions, the average remains close to 2 or 3 years. See: Lois A. Baar and Michael A Zody, *Resolution Conferences Conducted by the Utah Anti-Discrimination Division: The Elements of a Successful Administrative Mediation Program*, 21 J. CONTEMP. L. 21, 28 (1995); Richard D. Wilkins, *Arbitrate or Out!*, CENT. N.Y. BUS. J., Feb. 5, 1996, at 1.

<sup>30</sup> See: Amy Saltzman, *Life After the Lawsuit*, U.S. NEWS & WORLD REP., Aug. 19, 1996, at 57.

articles on this subject.<sup>31</sup> With respect to legality of mandatory arbitration, four issues have, for the most part, dominated the arbitration discussion. Those are: (1) the role of the EEOC; (2) whether the Federal Arbitration Act (FAA) applies to employment contracts, (3) the effect of Section 118 of the Civil Rights Act of 1991; and (4) what constitutes a “fair” arbitration agreement. Only the fourth of those three issues—what is a fair arbitration policy—remains unresolved, despite the fact that there is substantial amount of judicial authority on the topic. The sections below explain the development of the law concerning each of these issues.

## Early Arbitration Law

Prior to 1991, lawyers, judges and scholars generally accepted that mandatory arbitration agreements were unenforceable with regard to cases filed under federal employment anti-discrimination statutes particularly in light of *Alexander v. Gardner-Denver*.<sup>32</sup> In 1991, however, the Supreme Court decided *Gilmer v. Interstate/Johnson Lane Corp.*, which distinguished the *Gardner-Denver* holding that led to the supposition of unenforceability as being based on collective-bargaining agreements. The *Gilmer* case arose when Robert Gilmer, a 62-year-old registered securities representative, was terminated. He alleged that the company discriminated against him because of his age. Gilmer’s employer filed a motion to compel arbitration pursuant to the FAA because Gilmer had signed an agreement with the National Association of Securities Dealers to arbitrate all disputes that arose out of his employment. Signing such an agreement was a condition of working on the New York Stock Exchange.<sup>33</sup> Gilmer contended that the agreement was unenforceable under *Gardner-Denver*. In disagreeing with Gilmer’s contention, the Court distinguished *Gardner-Denver* on its facts because in that case the arbitration occurred pursuant to a collective-

<sup>31</sup> For example, see: 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); Samuel Estreicher, *Saturns for Rickshaws: The Stakes in the Debate Over Mandatory Employment Arbitration*, 16 Ohio St. J. on Disp. Resol. 559 (2001); Delphene Hardin, *Sacrificing Statutory Rights on the Altar of Pre-Dispute Employment Agreements Mandating Arbitration*, 28 Cap. U.L. Rev. 455 (2000).

<sup>32</sup> See: *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 47 (1974); *Uitley v. Goldman Sachs & Co.*, 883 F.2d 184, 187 (1st Cir. 1989); and *Swenson v. Management Recruiters Int’l, Inc.*, 872 F.2d 264 (8th Cir. 1989).

<sup>33</sup> 500 U.S. 20 (1991). The employment application signed by Gilmer provided that the employee agrees to “arbitrate any dispute, claim or controversy” arising between the applicant and the employer “that is required to be arbitrated under the rules, constitutions or by-laws of the organizations” with which the applicant registers. Gilmer had registered with the New York Stock Exchange, which has a rule providing for arbitration of “any controversy between a registered representative and any member or member organization arising out of the employment or termination of employment of such registered representative.”

bargaining agreement as opposed to an individual contract. Following the *Gilmer* decision, lower courts extended the holding to apply to other discrimination statutes in addition to the ADEA.

Despite compelling arbitration, the *Gilmer* Court left several questions unresolved. Two of the most-debated open issues concerned the role of the EEOC and the scope and applicability of the Federal Arbitration Act (FAA) to contracts of employment. The Court finally resolved these issues in its *EEOC v. Waffle House, Inc.* and *Circuit City Stores, Inc. v. Adams* decisions.

## Development and Clarification of the EEOC’s Role

*Gilmer* raised a question of the EEOC’s role when employers required employees to arbitrate disputes. Specifically, employers needed to know whether: (1) employees could still file claims with the EEOC;<sup>34</sup> (2) the EEOC could file lawsuits on behalf of employees bound by such agreements; and (3) if so, could the EEOC seek monetary damages on employees’ behalf or would it be limited to seeking injunctive relief?

The answer to the first issue is affirmative. The Court wrote: “An individual ADEA claimant subject to an arbitration agreement will still be free to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action.”<sup>35</sup>

The Court’s answer to the question of whether the EEOC could sue was less direct. The ensuing litigation was resolved in *EEOC v. Waffle House, Inc.* in which the majority held that the EEOC has the right to sue on behalf of employees and, in answer to the third issue, may seek monetary relief.<sup>36</sup>

Although *Waffle House* represents a significant legal holding and resolved an important open question, the holding has had little effect on most employers. The EEOC litigates a minuscule fraction of the discrimination charges it receives. For example, in the year 2000, the EEOC received just under 80,000 discrimination charges and filed lawsuits in 291 cases, which is less than one-third of 1 percent of those filed.<sup>37</sup>

Furthermore, the cases litigated by the EEOC should not be arbitrated. As I explained above, the EEOC prefers to litigate cases involving novel or unsettled areas of law, or

<sup>34</sup> See, for example: *Great Western Mortgage Corp. v. Peacock*, 110 F.3d 222 (3d Cir. 1997) (New Jersey Law Against Discrimination); *Patterson v. Tenet Healthcare, Inc.*, 113 F.3d 832 (8th Cir.1997) (Title VII and state law discrimination claims); and *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (1998)).

<sup>35</sup> Indeed, Gilmer filed a charge with the EEOC in this case.

<sup>36</sup> 534 U.S. 279 (2002).

<sup>37</sup> See: *Id.*, fn. 26.

those requiring class-wide relief in the form of a class-action suit. These are precisely the types of case that belong in court because precedent-setting opinions regarding unsettled law should come from judges. In contrast, the appropriate cases for arbitrators are those that involve the application of well-established law to findings of fact.

### Plugging a Further Hole in the FAA

As a basis for enforcing *Gilmer's* arbitration, the Court cited the fact that the Federal Arbitration Act required the court to compel arbitration. *Gilmer*, on the other hand, contended that the FAA did not apply, because Section 1 of the FAA excludes from the act's coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."<sup>38</sup> The Court sidestepped this exclusion in *Gilmer*, holding that the arbitration agreement at issue was not a "contract of employment" at all, because the parties to the agreement were the New York Stock Exchange and *Gilmer*, not the "employer" and the "employee."<sup>39</sup> It took another case, *Circuit City Stores, Inc. v. Adams*,<sup>40</sup> for the Court to address the question of whether the Section 1 phrase "engaged in foreign or interstate commerce" referred to all employees or only those in the transportation industry. In this case the Court held that the exclusion was limited to the transportation industry, and that the FAA applied to arbitration agreements relating to employment in all other industries. However, the Supreme Court's holding once again failed to address a major issue, namely, the minimum due-process standards needed to allow a mandatory arbitration agreement to pass judicial muster.

### The Evolution of Due Process of Mandatory Arbitration Agreements

This matter of due process became the next point in the *Circuit City* case. On remand, bloody but unbowed, the Ninth Circuit, in what may be referred to as *Circuit City II*,<sup>41</sup> again refused to compel arbitration. This time the Ninth Circuit invoked section 2 of the FAA, which exempts from arbitration all contracts that are invalid "upon such grounds as exist at law or in equity for the revocation of any contract."<sup>42</sup> Taking a page from California contract law, the court held that the contract was unenforceable because it was both procedurally and substantively unconscionable.

<sup>38</sup> 9 U.S.C. § 1 (1994).

<sup>39</sup> *Gilmer*, 500 U.S. at 25 n. 2. This minor detail spawned hundreds of lawsuits over the past decade and cost litigants millions of dollars.

<sup>40</sup> 532 U.S. 105 (2001).

<sup>41</sup> 9 U.S.C. § 2.

<sup>42</sup> *Circuit City Stores, Inc. v. Adams* 279 F.3d 889 (9th Cir. 2002).

The key factor in determining that the *Circuit City* agreement was procedurally unconscionable is the fact that the company offered the contract on a take-it-or-leave-it basis—which the Ninth Circuit considered to indicate unequal bargaining power. That logic seems to contradict the U.S. Supreme Court's statement in *Gilmer*, that "mere inequality in bargaining power" is not sufficient to hold that arbitration agreements are not enforceable. Despite the Ninth Circuit's holding, I have not found any other circuits holding that take-it-or-leave-it arbitration agreements are procedurally unfair.<sup>43</sup> The Ninth Circuit, however, will refuse to enforce an agreement only if the agreement is both procedurally and substantively unfair. Thus, the Ninth Circuit will enforce a substantively unfair agreement that is, however, procedurally fair. Conversely, regardless of the procedure, no other circuit will enforce what it believes to be an unfair agreement.

### What Constitutes a Fair Agreement

Neither Congress nor the Supreme Court has defined what constitutes a "fair" arbitration agreement, but enough authority exists on the issue to extrapolate fairly reliable and comprehensive guidelines. In examining fairness, *Gilmer* and its progeny focus on the following seven issues: (1) how the costs of arbitration are allocated among the parties; (2) the procedures for selecting the arbitrator; (3) mutuality of terms; (4) whether the employee entered into the agreement knowingly and voluntarily; (5) available damages; (6) the method of delivering opinions; and (7) discovery limitations.<sup>44</sup>

With respect to the first three issues, one can ensure enforceability if the employer pays the entire cost of the arbitration, both parties are permitted a substantial role in selecting the arbitrator, and both sides agree that arbitration will be the exclusive forum for both parties' disputes.<sup>45</sup>

Issue number four covers take-it-or-leave-it offers. Once again, only the Ninth Circuit holds such terms to be

<sup>43</sup> Professor Sam Estreicher suggests that most employees will sign anything at the time of hire. Employers therefore may be afflicted by a perverse incentive to create unfair one-sided agreements with opt-out provisions. Such agreements: (1) will satisfy the Ninth Circuit's standards and (2) bind employees because it is unlikely they will assertively opt out of such agreements. This anomaly is specific to California law.

<sup>44</sup> The Supreme Court in *Gilmer* reiterated the so-called savings clause of § 2 of the FAA (arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the revocation of any contract"), 500 U.S. at 33; 9 U.S.C. § 2 (1994). The Court also stated that "[t]here is no indication in this case, however, that *Gilmer*, an experienced businessman, was coerced or defrauded into agreeing to the arbitration clause in his registration application."

<sup>45</sup> Requiring mutuality make not make sense because employers generally pursue a different breed of claims against their employees (typically, noncompetition or trade secret matters) than employees typically pursue against their employers (discrimination, contract, and tort claims). Appropriate relief is different for the two classes of cases.

## Because of summary judgments, a large number of employee losses are excluded from the cases reaching a trial stage of the litigation stream.

unconscionable. In the rest of the country, arbitration agreements are enforceable so long as they clearly describe the terms of the agreement (e.g., the agreements must state that discrimination claims are covered and that the document being signed is a binding legal contract) and are not hidden in an employee handbook or other long and intimidating document.<sup>46</sup>

There is conflicting authority on how arbitration agreements may limit damages available to prevailing parties. Case law and a mass of scholarly work support the argument that arbitration agreements must permit the arbitrator to award the same damages that would be available to parties had they prevailed in court.<sup>47</sup> In contrast, some cases hold and others imply that arbitration agreements are enforceable even if they limit damages compared to what might be available in court.<sup>48</sup> Finally, arbitration agreements should provide for written opinions, and agreements must allow for at least *some* discovery, even if it is limited.

### Considerations of Arbitration

Still not completely settled, the law of mandatory arbitration has evolved over the past decade such that employers in almost all jurisdictions can draft enforceable and binding broad-scope arbitration policies. Assuming that the law of arbitration continues to develop, employers will have to decide whether their company should implement an arbitra-

tion system. Arbitration advocates will say yes and contend that arbitration is private, faster, and less expensive. Critics will argue that arbitration is unfair. While it's clear that arbitration is private, whether it is faster, less expensive, and fair are empirical questions that I address below.

### Systemic Differences of Arbitration and Adjudication Systems

While the literature often sheds more heat than light on arbitration issues, enough data exist to begin an examination of the following three questions: (1) is arbitration unfair to employees?; (2) is arbitration faster than litigation?; and (3) is arbitration less expensive than litigation?

**Fairness.** To answer the question of whether arbitration is fair to employees, researchers typically compare the win-loss record and monetary awards of cases adjudicated in arbitration against those adjudicated in litigation. The problem with this type of analysis is that these cases form two different streams. If there's a disparity in outcomes, one cannot tell whether that involves the adjudication system or some other factor, such as the strength of the cases going to court or to arbitration, or a selection factor that determines which cases go to court and which cases end up in arbitration. The best way to make such a comparison would be to compare the outcome of a cases that are both arbitrated and litigated.

Unfortunately, in the real world it is impossible to find a significant number of discrimination cases that were decided in both forums.<sup>49</sup> As a second best option, researchers are limited to comparing those two distinct streams of cases. Perhaps over time the sheer volume of cases will blunt the research-design problem, but it's more likely that the stream of adjudicated and litigated cases will differ systematically.

Discrimination cases resolved through arbitration invariably flow from employers that have mandatory-

<sup>46</sup> For example, see: *Trumbull v. Century Mktg. Corp.*, 12 F. Supp. 2d 683 (N.D. Ohio 1988).

<sup>47</sup> For example, see: *Graham Oil Co. v. Arco Products Co.*, 43 F.3d 1244 (9th Cir. 1994). Additionally, in accordance with the National Rules for the Resolution of Employment Disputes, the arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would be available to the parties had the matter been heard in court. See also: JAMS, "Policy on Employment Arbitration Minimum Standards of Procedural Fairness," [www.jamsadr.com/employmentArb\\_min\\_stds.asp#two](http://www.jamsadr.com/employmentArb_min_stds.asp#two) (last visited October 23, 2002); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465 (D.C. Cir. 1997); and *Armendariz v. Foundation Health Psychare Serv., Inc.*, 24 Cal. 4th 83, 103 (Cal. 2000).

<sup>48</sup> See: *Degaetano v. Smith Barney, Inc.*, 70 Fair Empl. Prac. Case. (BNA) 401 (S.D.N.Y. Feb. 5, 1996) (upholding an arbitration agreement that prevented the arbitrators from awarding punitive damages or injunctive relief of any kind); also see: *Kinnebrew v. Gulf Insurance Co.*, 67 Fair Empl. Prac. Cas. (BNA) 189 (N.D. Tex. Nov. 28, 1994).

<sup>49</sup> 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). In any event, even where plaintiffs attempt to litigate claims that have already been arbitrated, the award will often be given substantial weight in the litigation. For example, see: *Collins v. New York City Transit Authority*, 305 F.3d 113 (2d Cir. 2002).

arbitration policies. Most of these policies have a number of internal steps to formal arbitration that perform critical filtering functions. Thus, before the cases reach formal arbitration, they have likely undergone some form of internal review often coupled with mediation by an outsider. These so-called alternative-dispute-resolution processes allow the parties to analyze the case and provide several opportunities for settlement. On the other hand, while cases in litigation may have gone through EEOC investigation, conciliation, or mediation, many cases are filed in court with only perfunctory EEOC processing.

If corporate internal review and mediation steps have any value at all, I would expect a systematic difference in the “quality” of the cases that make it to arbitration as opposed to those cases that make it into court. That is, cases in arbitration would have been carefully considered and negotiated before going to an arbitrator. The internal reviews would likely skew win–loss arbitration results in favor of employers, because it makes sense that employers would settle the meritorious cases rather than allow them to go to arbitration.<sup>50</sup>

Exacerbating this disparity in the types of case that end up in court from those going to arbitration is the rarity of summary judgment motions in arbitration. Thus, while cases that lack 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 summary-judgment motions are made by employers, the litigation record would be skewed 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.

## Prior Empirical Studies

Bearing in mind the possible fallacies in comparing litigation and arbitration outcomes, I’ll review empirical studies that make such a comparison.

## Win–Loss Rates

Conventional academic wisdom after *Gilmer* held that employees would not fare well in arbitration. Scholars asserted that juries were employee friendly, but that arbitrators were, at best, less sympathetic to employees, and, at worst, biased. The perception that employees would be at a disadvantage fueled considerable outcry against arbitration.<sup>51</sup> In response,

<sup>50</sup> For example, see: Paul D. Carrington & Paul H. Haagen, *Contract and Jurisdiction*, 1996 SUP. CT. REV. 331, 385–88; Joseph R. Grodin, *Arbitration of Employment Discrimination Claims: Doctrine and Policy in the Wake of Gilmer*, 14 HOFSTRA LAB. L.J. 1, 29 (1996); Sharona Hoffman, *Mandatory Arbitration: Alternative Dispute Resolution or Coercive Dispute Suppression?*, 17 BERKELEY J. EMP. & LAB. L. 131 (1996); and Jean R. Sternlight, *Panacea or Corporate Tool?: Debunking the Supreme Court’s Preference for Binding Arbitration*, 74 WASH. U. L.Q. 637 (1996).

<sup>51</sup> See: Sherwyn *et al.*, at 76.

a number of other scholars compared the win–loss rates in arbitration to those in litigation. In this section I report the results of six of these studies.

What seems clear from the results of these studies is that the assertions of many critics of arbitration were either overstated or simply wrong. Samuel Estreicher reported new data along with those data originally presented by Lewis Maltby and Lisa B. Bingham.<sup>52</sup> A cumulative look at these three scholars’ work finds that plaintiffs prevailed in only 12 percent of federal cases terminated (whether decided by motions, settled, or withdrawn, as opposed to those adjudicated) in 1994 and 15 percent of such cases in 1997.<sup>53</sup>

Examining employee-win rates at trial using data from cases adjudicated between June 1, 1992, and May 31, 1994, William M. Howard reported that employees prevailed 28 percent of the time.<sup>54</sup> In front of juries, employees prevailed at a rate of 38 percent, while in bench trials the employee-win rate was 19 percent. In arbitrations conducted under the auspices of the American Arbitration Association (AAA), employee claimants prevailed in 68 percent of the cases. In securities-industry arbitration cases, employees prevailed 48 percent of the time.<sup>55</sup> While Howard did not examine cases terminated, he reported trial results. This difference resulted in an almost 100-percent increase in the win rate for employees, from 15 percent (of cases terminated) to 28 percent (of cases tried).

Theodore Eisenberg and Elizabeth Hill focused on win–loss rates at trial, but not at termination.<sup>56</sup> Eisenberg and Hill analyzed data from state court trials in 1996, federal court trials in 1999, and 200 AAA arbitrations from 1999 and 2000. They separated civil-rights employment disputes from non-civil-rights cases in their arbitration and court results. 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

<sup>52</sup> Estreicher, *op.cit.*; Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998); 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); Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMPLOYEE. RTS. & EMP. POL’Y J. 189, (1997); and Lisa B. Bingham, *Is There a Bias in Arbitration of Nonunion Employment Disputes? An Analysis of Actual Cases and Outcomes*, 6 INT’L J. OF CONFLICT MGMT. 369 (1995).

<sup>53</sup> Estreicher, *op.cit.*

<sup>54</sup> William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, DISP. RESOL. J., Oct.–Dec. 1995, at 40.

<sup>55</sup> *Id.*

<sup>56</sup> Theodore Eisenberg and Elizabeth Hill, *Employment Arbitration and Litigation: An Empirical Comparison*, 2003 PUB. L. & LEGAL THEORY RES. PAPER SERIES 1, 14,

## One researcher found that resolution for employment-discrimination cases in litigation took 680 days, while the average arbitration case took 260 days to resolve.

employee must prove discrimination, a considerable shift in the burden of proof. Eisenberg and Hill also distinguished between “higher” and “lower” paid employees. In non-civil-rights AAA employment cases, highly paid employees prevailed in 64.9 percent of their cases, while low-paid employees prevailed in 39.6 percent of their cases.<sup>57</sup> Combining the results of both groups shows an employee win rate of 51 percent ( $n = 173$ ). In state non-civil-rights cases, the employee win rate was 57 percent ( $n = 145$ ). In civil-rights arbitrations, the employee win rate was 26 percent ( $n = 42$ ).<sup>58</sup> In contrast, the state-court win rate was 44 percent ( $n = 160$ ), while the employee win rate in federal court was 36 percent ( $n = 1,430$ ). The difference between the employee-win rate in arbitration and that in federal trials is not statistically significant.<sup>59</sup> 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.

Even though there is no significant difference between the employee win rate in federal court and that in arbitration, there’s a difference in summary-judgment motions. Maltby reports that in 1994 the federal courts issued definitive judgments in 3,419 cases.<sup>60</sup> Sixty percent of those judgments arose as a result of dispositive motions in which employers prevailed 98 percent of the time. (Unlike Maltby’s study, 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 apply Maltby’s 1994 percentages to the figures for 1999 and 2000, we can calculate an additional 858 cases decided by the federal courts on a dispositive motion (60% of 1,430) of which employers prevailed in 840 (98% of the 858 motions), 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 percent—slightly lower than that in arbitration.

### Repeat Players and the Due-process Protocol

In 1997, Lisa Bingham concluded that employees were significantly less successful in arbitration if their employer was a “repeat player,” defined as an employer who appeared in more than one award during the study period.<sup>61</sup> Specifically, Bingham found that while employees won 63 percent of all cases combined, they won only 16 percent of cases against repeat players. Bingham did not claim to have determined the reason for the difference in win rates, but a number of readers, including the EEOC in a 1997 policy statement, inferred that pro-employer bias plainly explained the results and used Bingham’s work to attack arbitration.<sup>62</sup>

Numerous critiques of the Bingham study ensued. Critics argued that the study was flawed because there were only 31 repeat-player cases in the study and almost all the employers were large companies that could become future repeat players. One methodological issue arose when Bingham tallied the results of an employer’s first case in the repeat-player column only after a second case from the same employer appeared. This raised the question of how the employer could be considered a repeat player in its first case. Moreover, the study’s window necessarily excluded future cases from employers that were not considered repeat players for the study’s purposes, even though they might have had cases decided outside the study period.

In her subsequent study, Bingham studied 244 arbitration cases resulting in awards and found that employees

<sup>57</sup>*Id.* at 13. It might be argued that these results reflect bias against lower paid employees, but differences in substantive law offer a better explanation. Employers seeking to terminate an express “cause” provision in the contract of a higher paid employee face a much higher hurdle than they do in cases where employees work under “at will” contracts but may have a plausible discrimination claim. See: *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

<sup>58</sup>*Id.* at 14. Although Eisenberg and Hill separate civil-rights arbitrations into high- and low-paid employees, collapsing these cells facilitated comparisons across studies.

<sup>59</sup>*Id.* Because the distributions were not normal, the non-parametric Mann-Whitney test was used to compare the federal court, state court, and arbitrations means.

<sup>60</sup>Maltby, *op.cit.*

<sup>61</sup>Bingham (1997), *op.cit.*

<sup>62</sup>For example, see: EEOC, *Policy Statement on Mandatory Arbitration*, *loc. cit.*



prevailed 61 percent of the time ( $n = 162$ ) when the employer was not a repeat player, but only 29 percent ( $n = 82$ ) when it was a repeat player.<sup>63</sup> While these results are striking, Bingham also compared the effect of an internal dispute-resolution program (DRP) to that of another path to arbitration. The results were almost identical to the breakdown of cases involving repeat players and non-repeat players. Employees prevailed 61 percent of the time ( $n = 168$ ), when there was no DRP and 30 percent of the time ( $n = 76$ ) when there was a DRP. 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 24 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 percent of the time, an employee-win rate similar to that when employers used a DRP. The complications here are that it is not clear whether the first case that the arbitrator had with the employer is in the data set, and 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. Given the small sample size and the murky methodology, we cannot use this study to test any arbitrator-bias hypothesis.

Elizabeth Hill's study of the 34 arbitration cases in her sample where the employer was a repeat player provides additional information.<sup>64</sup> In 25 of these cases, the employer had an internal DRP in place, and employees won only 24 percent of those cases. In the nine repeat-player cases without a DRP, employees won 44 percent of the time. Once again, samples of 34, 25, 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 any repeat-player effect.

## Disposition Speed

Arbitration advocates point to a shorter time period from claim to award as an important virtue of arbitration.<sup>65</sup> Again,

<sup>63</sup> Lisa B. Bingham, "Employment Arbitration Before and After the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of Employment: Preliminary Evidence That Self-Regulation Makes a Difference," in *PROCEEDINGS OF THE NYU 53<sup>RD</sup> ANNUAL CONFERENCE ON LABOR*, ed. Samuel Estreicher and David Sherwyn (2004); See also: Bingham (1997), *op.cit.*

<sup>64</sup> 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).

<sup>65</sup> 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).

the data involve cases that were actually litigated or arbitrated rather than the thousands resolved before any adjudication occurs. Unlike the controversy over win-loss ratios, 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 260 days (8.6 months) to resolve.<sup>66</sup> Again, Maltby focuses on resolutions not trials. Accordingly, his data include motions which reduce the time period for litigation.

Eisenberg and Hill compared the decision time of arbitrations to 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 ( $n = 172$ ).<sup>67</sup> Civil-rights AAA arbitration cases took, on average, 276 days ( $n = 42$ ). In contrast, the mean time for state-court non-discrimination trials was 723 days ( $n = 170$ ), state-court discrimination trials was 818 days ( $n = 163$ ), and federal-court discrimination trials was 709 days ( $n = 1,430$ ). Thus, according to Eisenberg and Hill, it takes parties more than twice as long to litigate a case than to arbitrate a case.

## Costs and Damages

As with the employee win rate, conventional wisdom suggests that arbitration would reduce employees' 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.<sup>68</sup> Before discussing the data, let me review the role of damages in employment-discrimination law.

All four federal statutes that define the employment-discrimination-law terrain use awards of back pay as a remedial scheme for employees who have experienced discrimination. To review, those statutes are (1) Title VII of the Civil Rights Act of 1964 as amended in 1991 (Title VII);<sup>69</sup> (2) the

<sup>66</sup> Maltby, *op.cit.*

<sup>67</sup> Eisenberg and Hill, *op.cit.*

<sup>68</sup> Support abounds for the general assertion that juries tilt favorably toward employees. For example, a 1993 juror poll by Dispute Dynamic, a consulting firm, found that 69 percent of the respondents agreed that for many company decision makers, an employee's age, gender, or race influence promotion decisions. See David Sherwyn, J. Bruce Tracey, and Zev J. Eigen, *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, n. 16 (1999). In contrast, conventional wisdom surrounding arbitrators' decisions focuses on their inclination to "split the baby" when it comes to awards. See: Lucy T. France and Timothy C. Kelly, *Mandatory Arbitration of Civil Rights Claims in the Workplace: No Enforceability Without Equivalency*, 64 MONT. L. REV. 449 (2003).

<sup>69</sup>42 U.S.C. § 2000e-2000e-17 (2000).

Age Discrimination in Employment Act (ADEA);<sup>70</sup> (3) the Americans with Disabilities Act (ADA);<sup>71</sup> and (4) Section 1981 of the Civil Rights Act of 1866 (1981).<sup>72</sup> The specifics of the award determination differ among the statutes. ADEA provides for liquidated damages in an amount equal to back pay for willful violations. 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.<sup>73</sup> The caps range from \$50,000 for employers with 15 through 100 employees and \$300,000 for employers with more than 500 employees. Section 1981 has unlimited punitive damages, but applies only to race (and certain ethnic ancestries). Finally, certain state and local statutes provide for punitive damages or uncapped compensatory damages.

As is the case with the win-loss data, information about damage awards may be affected by the two separate case streams, that is, litigation and arbitration. One distortion in the litigation stream arises because litigation is time-consuming and expensive. Consequently, plaintiffs' lawyers have little economic incentive to work on employment claims from low-wage employees.<sup>74</sup> Fifteen years ago, John Donohue and Peter Siegelman found that cases might not be worthwhile for plaintiffs' lawyers to handle if the employee earned less than \$450 per week.<sup>75</sup> Howard's 1995 article reports the results of a survey of 321 plaintiffs' lawyers that found the lawyers required a retainer of \$3,000 to \$3,600.<sup>76</sup> Similarly, Maltby reports a 1995 study of plaintiffs' lawyers which found that lawyers would not take a case unless the employee had a potential of at least \$60,000 in back-pay damages.<sup>77</sup> 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 em-

ployment cases.<sup>78</sup> 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.<sup>79</sup> In addition, arbitrators do not have the reputation for high verdicts that fairly or unfairly pertains to juries. Thus, there would appear, again, to be less incentive for plaintiffs' lawyers to take an arbitration case.

Although an attorney is essential in court, it is easier for a *pro se* plaintiff to prosecute his or her own claim in arbitration than in litigation. First, arbitration's informality makes it easier for unrepresented plaintiffs to pursue their cases. There are no motions to understand or defend, and less discovery to which one must respond. Moreover, if a case proceeds to arbitration, the procedure is relatively informal. Second, in many arbitration policies the employer (including the employer we analyze in the study below) will be represented by counsel in arbitration only if the employee first chooses to be represented by an attorney. If the plaintiff does not choose to be represented by counsel, a non-lawyer represents the employer. In the litigation context, however, it would be extraordinary for an employer to forgo hiring legal counsel merely because the employee did not have a lawyer.

Returning to the issue of awards as they relate to employee pay levels, if lower-paid 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. Moreover, if *pro se* plaintiffs are more likely to make it to arbitration than to trial but then lose because they do not have an attorney, one would expect that the average award per plaintiff (winners and losers) would be less in arbitration than in litigation. Finally, given that back pay is often a function of the time that has elapsed since the challenged personnel decision and given that arbitration is faster than litigation, arbitration should for this reason also result in lower awards than litigation.

The proposition that arbitration generates lower average awards than does litigation finds ample scholarly support. Eisenberg and Hill examined 70 non-civil-rights AAA arbitrations, 44 of which were pursued by relatively high-paid employees and 26 by low-paid employees.<sup>80</sup> The median award for the higher-paid employees was \$94,984, the mean was \$211,720, and the standard deviation was \$313,624. The lower-paid employees had a median award of \$13,450, a

<sup>70</sup> 29 U.S.C. § 621-634 (1994 & Supp. I 1995).

<sup>71</sup> 42 U.S.C. § 12101-12213 (2000).

<sup>72</sup> 42 U.S.C. 1981 (1994).

<sup>73</sup> See: Christine Jolls, *Accommodation Mandates*, 53 STAN. L. REV. 223, 281 (2000).

<sup>74</sup> In this instance, a "fees case" is a lawsuit in which the recoverable damages are so low that the attorneys' fees become the driving force in the case. 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. This harsh reality that it is unlikely for low wage earners ever to see the inside of a courtroom.

<sup>75</sup> See: John J. Donohue III and Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 1006 (1991).

<sup>76</sup> Howard, *op.cit.*

<sup>77</sup> 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).

<sup>78</sup> 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 justices); and arbitrators have no overcrowded docket to worry about.

<sup>79</sup> See: Herbert M. Kritzer, *Investing in Cases: Can You Profit from Contingency Fee Work?*, WIS. LAW., Aug. 1997, at 10.

<sup>80</sup> Eisenberg and Hill, at 16-19.

## The proposition that arbitration generates lower average awards for employees than does litigation finds ample scholarly support.

mean of \$30,732, and a standard deviation of \$38,723. In state non-civil rights court cases the median was \$68,737, the mean was \$462,307, and the standard deviation was \$1,291,020 ( $n = 79$ ). In state discrimination cases the median was \$206,976 ( $n = 68$ ), while in federal court discrimination cases, the median was \$150,500 ( $n = 408$ ). The state mean was \$474,488, with a standard deviation of \$761,297, and the federal mean was \$336,291. For comparison, there were only eight AAA civil-rights arbitrations in this sample: two involving high-paid employees and six initiated by low-paid employees. The higher-paid employees had a median and mean award of \$32,500. For the lower paid employees, the median was \$56,096, and the mean was \$259,795.<sup>81</sup>

However tempting it may be, it's not wise to draw conclusions from so few discrimination cases. In addition, the numbers for all cases are difficult to interpret because the standard deviations were high, a signal of wide variation in the awards. Clearly, a number of extremely high and extremely low awards greatly influenced the means and, to a lesser extent, the medians.

Bingham's study of AAA arbitration outcomes also warrants consideration.<sup>82</sup> She ran analyses that excluded outliers to reduce the standard deviation with the hope of providing a more accurate picture of average awards. 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 percent involved employees who claimed breach of contract and 18 percent involved employees who made the same claim.<sup>83</sup> Thus, over 90 percent of her sample involved contract claims, rather than statutory discrimination claims. This same issue arises with Eisenberg and Hill's 70 non-civil-rights AAA cases and the state-court non-civil-rights cases. These cases are difficult to compare with each other and nearly impossible to compare with

discrimination cases, because the damages assessed depend more on the contract than on the law.

Bingham places the final damage awards in a helpful context by also listing the amount demanded. Maltby did this several years earlier, but took this idea one step further by comparing damage demands to awards in arbitration as compared to litigation.<sup>84</sup> He then adjusted the numbers further by factoring in all plaintiffs, including those who prevailed in addition to those that received just some sort of award. Maltby compared AAA cases from 1993 through 1995 to federal court cases from 1994. The mean demand in arbitration was \$165,128, while that in federal court was \$756,738. In arbitration the mean award was \$49,030, an amount equal to 25 percent of the demand. In litigation the mean award was \$530,611, an amount equal to 70 percent of the demand. 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 percent of their demands in arbitration and 10.4 percent in litigation.<sup>85</sup>

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 the accuracy of award demands as a proxy for a case's underlying worth. For example, because of arbitrators' reputation for settling demands at a midpoint, claimants might make artificially high demands, and thus raise the prospective mean. Another source of unreasonably high demands in arbitration might come from *pro se* plaintiffs, who may not understand the damage scheme and request an unrealistic number. Because there are more *pro se* plaintiffs in arbitration, there would be more unrealistic demands in that case stream. In contrast, the fact

<sup>81</sup> *Id.*

<sup>82</sup> Bingham (1997), *op.cit.*

<sup>83</sup> *Id.* at 374-376.

<sup>84</sup> Maltby, at 48.

<sup>85</sup> *Id.*

# Cases that make it to arbitration or litigation represent failures in systems designed to conciliate and resolve disputes.

that litigation involves lawyers more heavily may raise demands in court. Lawyers in both forums may have factored their fees into the demand, because they plan to use that amount as a settlement tool. The higher costs of litigation would mean higher fees and, thus, higher demands in litigation. The most likely result of the above factors, however, is that they provide the “noise” that distorts empirical assessments of the damage question.

## Conclusions from Empirical Research about the “Fairness” of Arbitration

Despite the flaws of existing studies, I am confident of the following conclusions regarding the “fairness” of arbitration. First, there is no evidence that plaintiffs fare significantly better in litigation than in arbitration. In fact, litigation may favor employers. Second, arbitration is faster than litigation, thereby reducing the time that the parties are involved in a process that can be both heart wrenching and financially crippling. Third, the question of whether damages are higher in arbitration or in litigation is too difficult to resolve based on available data. Further research is warranted on all three factors, especially on the questions of win–loss records and damages.

Even if data will help resolve the empirical questions, certain other questions are harder to answer. For example, implicit in the assertion that arbitration is unfair to employees is the belief that higher employee-win rates and higher average damage awards mean a fairer system. My view is that a fair system means that employees who have been discriminated against are fairly compensated, while employers who are unfairly accused of discrimination are exonerated with minimal expense or damage to their reputation.

Even if we could determine that either litigation or arbitration produced “fairer” results, that system would not necessarily be the preferred method for resolving discrimination cases. As a good attorney will advise a client, the best settlement is one that the parties freely achieve on their own. The cases that make it to arbitration or litigation represent failures in systems designed to conciliate and resolve disputes. 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.

## Potential Value of Mandatory-arbitration Policies

Some management attorneys criticize mandatory-arbitration policies because they fear that the number of claims will increase and employers’ positions will be compromised by the reduced barriers to entry, relaxed rules of evidence, the likelihood that an arbitrator will 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 in arbitration that could be won in court. More cynically, some management lawyers believe that in court they can intimidate or out litigate the employee’s counsel, whereas they believe that arbitration will level the playing field. Despite this advice, a growing number of *Fortune* 1000 companies maintain alternative dispute resolution (ADR) systems culminating in arbitration for at least some of their employees.

I cannot present direct evidence on why employers adopt internal dispute systems resulting in arbitration for their non-union employees, but it’s clear that certain types of employers who face a high volume of low-value claims maintain a policy of employment arbitration. Such an employer is the subject of the empirical study presented next.

Employers with a high volume of low-value claims implement ADR programs for two main reasons. First, disputes that are not resolved quickly rack up legal expenses, decrease productivity by taking management time, damage morale, and promote turnover.<sup>86</sup> Second, employers are tired of “*de facto* severance” and wish to limit the value and incidence of nuisance settlements. In particular, once an employer develops a reputation for paying *de facto* severance, more terminated employees are encouraged to file an EEOC charge. Couple such a reputation with the overlapping patchwork of employment statutes 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.

<sup>86</sup> See Sherwyn *et al.*, at 80-83.

Moreover, many employers simply detest settling frivolous cases. While obviously averse to being called racist or sexist, many innocent employers dislike settling what they consider to be a potentially explosive, though baseless allegation. The economics of litigation, though, induce some employers into just such settlements.

As a separate point, some people compare an EEOC settlement to a settlement arising out of a union contract. I see no comparison, because collective-bargaining agreements have just-cause standards for termination. In such disputes an employer may rationalize settling a case even when the employer believed that it had cause simply because room exists for reasonable people to disagree on whether cause existed in any given case. Discrimination is a different matter from just-cause dismissal.

Mandatory arbitration arguably ends *de facto* severance, because arbitration lowers the costs of defense, including potentially adverse publicity.<sup>87</sup> 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 intimidating the employee into a withdrawal or substandard settlement. Instead, meritorious claims need quick and equitable resolution, or else the employer will face an adverse arbitration result that is expensive, albeit swift.

I contend that many employers implement mandatory-arbitration systems as the final part of a dispute resolution program so that they can avoid the negative consequences of lawsuits and other problems at the workplace.<sup>88</sup> If employers implement ADR policies for those reasons, the issues of win-loss rates, time, and damages are relevant only if many claims reach an adjudication stage. If not, researchers should compare resolutions between the two systems, capturing those claims that are resolved before they reach the formal adjudication process, whether they be in the arbitration or litigation setting. In that regard, I offer below the experience of one employer (whom I call EDP Employer 1) that faces 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.

<sup>87</sup>An arbitrator's fees could easily exceed \$1,000 (see: Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENVER UNIVERSITY LAW REVIEW 1017 (1996), at 1037); however \$1,000 may be a paltry sum in comparison with the legal fees accrued during litigation (see: Sherwyn *et al.*, at 132-133).

<sup>88</sup>A test of the hypothesis that employees and employers will almost never both choose arbitration after a dispute has arisen was based on the data from a voluntary arbitration program and survey results from a sample of over 300 lawyers. The survey found that post-dispute voluntary arbitration will rarely be accepted by both sides. See: Sherwyn *et al.*, at 132-33.

## A New Path for Empirical Research

This part of the report offers a preliminary approach for comparing the fairness and efficacy of arbitration with that of litigation that takes into account that full life history of a claim from the initial filing to resolution. Because a comprehensive data set remains to be developed, this analysis uses publicly available data on court resolutions and claims experience in the EEOC as a proxy for measuring claims experience in litigation. I compare that outcome with the claims experience at EDP Employer 1, a firm that uses an ADR system culminating in mandatory arbitration. This is as an example and not meant to be representative.

**Background information and data.** I've already explained that since most 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, 75,797 discrimination claims each year with the EEOC.<sup>89</sup> In addition, employees filed a similar number of claims with various state and local agencies,<sup>90</sup> for a total of approximately 150,000 discrimination claims each year. Various methods are used to resolve these disputes. Most states have investigation and conciliation processes, as described earlier in this report, including formal mediation or adjudication systems. Because I do not have access to the states' data, this report compares the EEOC's resolution process (and the data from federal courts) with the data from EDP Employer 1, as a representative company.

Even though the EEOC performs a triage on cases before investigation, its statistics do not separate resolutions by classification. Instead, all cases are reported in the EEOC charge statistics, which do, however, provide some insight into the fate of cases filed with the EEOC.<sup>91</sup> From 1992 through 2002, the EEOC resolved, on average, 90,138 cases per year.<sup>92</sup> The EEOC uses the following eight sometimes overlapping classifications for resolved cases (described in the box on the next page): (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. Because of the overlap, I slot such cases into two categories: (1)

<sup>89</sup>EEOC Charge Processing Statistics, at [www.EEOC.gov/stats/charges.html](http://www.EEOC.gov/stats/charges.html) (last visited November 28, 2004).

<sup>90</sup>Sherwyn *et al.*, at 76.

<sup>91</sup>Equal Employment Opportunity Comm'n, *Priority Charge Handling Procedures*, *loc.cit.*

<sup>92</sup>*Id.*

## EEOC Case Classifications

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

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

*No Reasonable Cause.* EEOC determines 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 determines reasonable cause to believe that discrimination occurred based on 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 or a FEPA 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 having a reasonable-cause determination is 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 having a reasonable-cause determination is 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.

merit resolutions and (2) non-merit resolutions (including administrative closures and findings of no reasonable cause).

From 1992 through 2002, the percentage of cases labeled as merit resolutions averaged 15.5 percent per year. The numbers from 1997 through 1999, show an uptrend in the rate of merit resolutions from 11.0 percent to 16.5 percent. In 2000, merit resolutions constituted 21.3 percent of cases, a percentage that rose to 22.1 percent in 2001, but eased to 20.0 percent in 2002.

This rise in merit resolutions is somewhat offset, however, by the rise in unsuccessful conciliations. (In such cases a "cause" finding by the agency still could not be resolved during conciliation and, thus, the employee received no benefits.) The percentage of unsuccessful conciliations in 1997

was 2.8 percent, rising to 3.3 percent in 1998, and 4.9 percent in 1999. The percentage continued to escalate between 2000, when it was 6.6 percent, and 2001, at 7.3 percent. Unsuccessful conciliations fell off slightly in 2002, at 5.2 percent.<sup>93</sup> By subtracting the percentage of unsuccessful conciliations from the merit resolutions one can calculate that between 1992 and 2003, on average, 10.9 percent of the cases filed involved "remunerated resolutions," with a mean award of \$16,993.90.<sup>94</sup> The overall per-claim figure was \$2,052.82.<sup>95</sup> Having given these averages, it's worth noting that these figures may not represent the average award for each employee, because the report is based not on the number of plaintiffs but on the number of claims, and a claim could include class actions embracing hundreds of plaintiffs.

Between 1999 and 2003, employees filed an annual average of 21,228 cases in federal court. All of them received right-to-sue letters after the EEOC found either cause or no cause.<sup>96</sup> By no means do all of these cases get to trial. In the 18,035 terminations recorded in 2003, for example, no court action ensued in 3,158 cases.<sup>97</sup>

Of those that at least went to a judge, the parties to the action and the courts resolved 10,739 cases prior to pre-trial and 3,441 cases during or after pre-trial. Only 697 (or 3.9%) of the cases made it to trial. Thus, one could say that no

<sup>93</sup> *Id.*

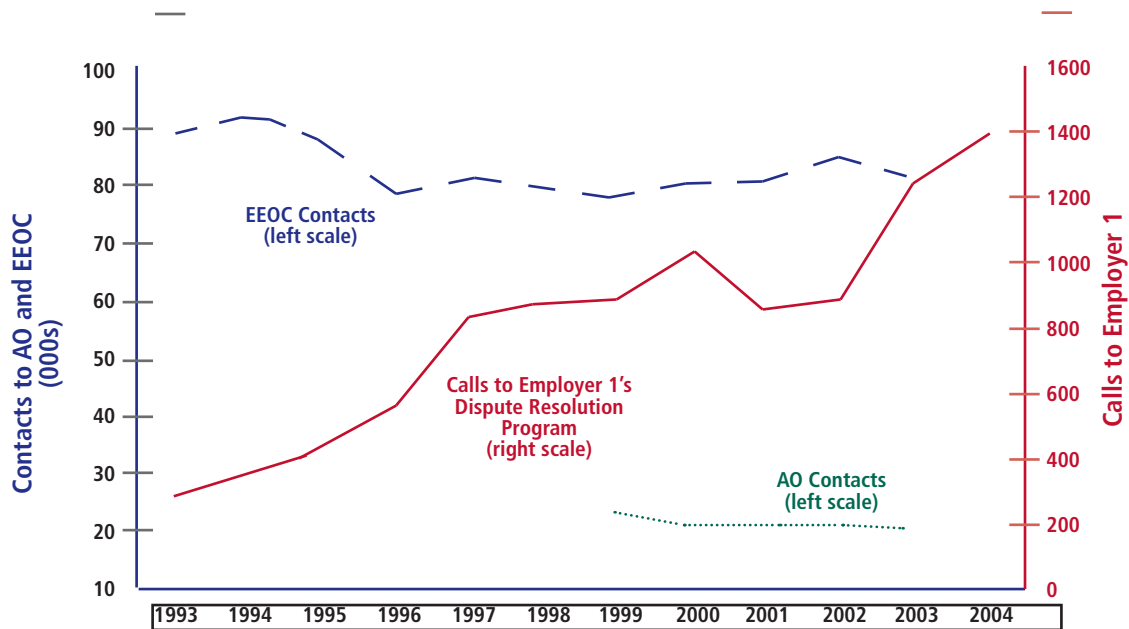
<sup>94</sup> *Id.* "Remunerated resolutions" was computed by dividing the number of remunerated cases by the total number of cases, with a mean established as the total dollars awarded divided by the number of remunerated resolutions.

<sup>95</sup> *Id.* The "per-claim" figure derived from dividing the total number of dollars awarded by the total number of charges resolved.

<sup>96</sup> Judicial Business of the United States Courts 2003 tables C-2A and C-4, ([www.uscourts.gov/judbus2003/contents.html](http://www.uscourts.gov/judbus2003/contents.html)).

<sup>97</sup> *Id.*, table C-4.

**EXHIBIT 1**  
**Contacts to EEOC, Employer 1's DRP, and AO**



more than about 10 percent of the nearly 150,000 discrimination cases filed with the EEOC each year under federal statutes resulted in any court action (for example, 14,877 in 2003). For federal court trials that year the average award per lawsuit was \$95,949, while the average award per remunerated lawsuit was \$336,291.<sup>98</sup>

**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 interfere with 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.<sup>99</sup> The EEOC and federal court data provide a plausible context to compare the results of Employer 1's arbitration policies. Before comparing results, however, let me briefly describe the employer's policies.

This employer provides the following six steps to resolving disputes: (1) an open-door policy: the employee meets with his immediate supervisor or someone higher in the chain of command; (2) an ombudsman: the employee can

talk to a confidential advisor who will advise the employee and act as a mediator or factfinder; (3) a conference: the employee meets with someone from the dispute resolution program office and chooses a method for resolving the dispute; (4) internal informal mediation: a company adviser mediates the dispute; (5) formal mediation: a 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, however, the company has an ERISA plan that provides some funds for attorneys' fees.

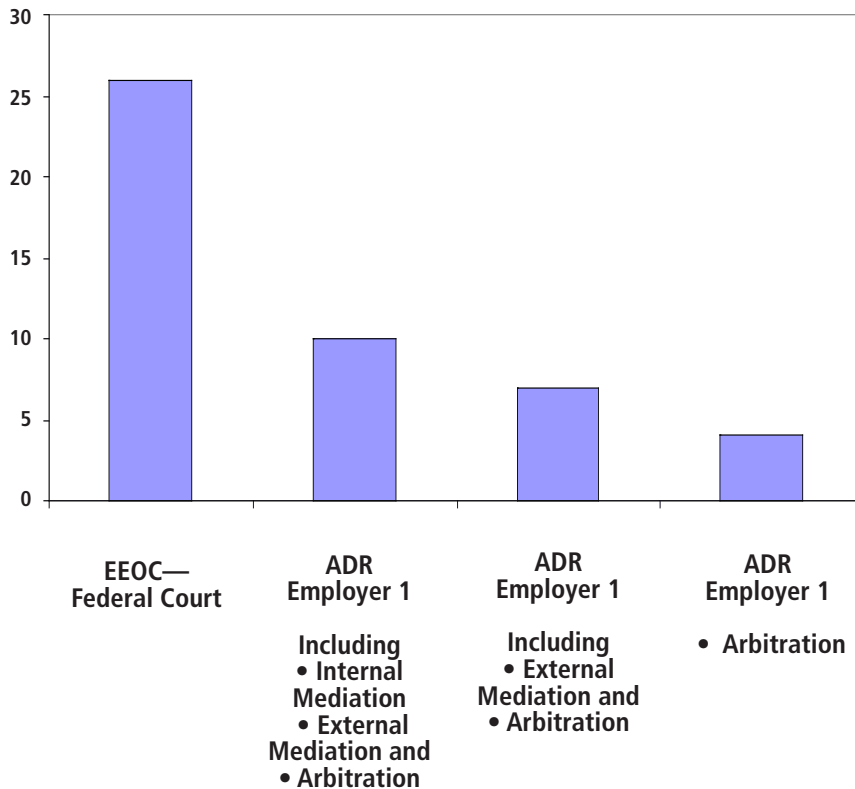
The employer's data span 1993 to 2004. As Exhibit 1 reveals, the number of calls (to the DRP) made by Employer 1's employees rose from 292 in 1993 to 1,403 in 2004. During these same years, in contrast, the number of EEOC's receipts remained relatively constant. Two factors help explain the increase in the number of Employer 1's claims. First, the company greatly expanded its operations during that time period. In 1993, the company had approximately 5,000 employees, while today it has 40,000 employees. Second, Employer 1's employees became increasingly comfortable with the DRP. As the DRP became more a part of Employer 1's corporate culture, employees' became more apt to use the system, as their comfort level and their knowledge of the system grew.

<sup>98</sup> Eisenberg and Hill, *op.cit.*

<sup>99</sup> 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.

**EXHIBIT 2**

**Percentage of Employer 1's contacts that require external resources**



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

While I do not have data on how many EEOC cases are resolved at each level, we can apply the annual average number of cases filed in federal court from 1999 to 2003 (21,228), which we used above.<sup>100</sup> 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. Even in the unlikely event that the volume of cases filed with state agencies doubled that number, 13 percent of the EEOC cases filed would use external resources. For Employer 1,

<sup>100</sup> Judicial Business of the United States Courts 2003 tables C-2A and C-4.

in contrast, fewer than 5 percent of the cases used the external resource of arbitration and under 10 percent used internal mediation, external mediation, or arbitration. What Exhibit 2 makes clear is that the percentage of cases that use external resources in the EEOC and litigation system is manifestly greater than the percentage of cases that use external resources by Employer 1. This disparity holds even under the most conservative of assumptions.

If employers implement DRP policies with a goal of resolving cases more quickly, they manifestly succeed. As Exhibit 3 makes clear, the average processing time of an EEOC case is 373 days—not including cases that end up in court and stretch on for an average 709 days. In contrast, Employer 1's cases are resolved in under two weeks, on average.

The benefits of comparatively quicker case-disposition time are so considerable that they are worth reviewing here. Decreased

case-disposition time can increase productivity, save money on outside counsel, and reduce employee turnover. Indeed, more than 75 percent of the employees who used Employer 1's DRP system remained employed after their case is resolved. At the same time, since instituting its DRP system, 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 percent of the claims are resolved in less than one week, employer back-pay liability diminishes considerably. In the experience of Employer 1, the average award per complaint is \$576, less one-third of the EEOC's \$1,996.54 per-claim average.

Of course, other factors may contribute to per-claim average differences in damage awards. The EEOC takes only those claims in which the employee has a legally cognizable claim. In contrast, Employer 1 counts any claim made to the DRP system. This increase in non-cognizable claims increases the denominator and, thus, reduces Employer 1's per-claim award average. That said, I suppose that unflagging critics of arbitration can argue that Employer 1's lower award figures support the claim that the arbitration system is unfair to employees.

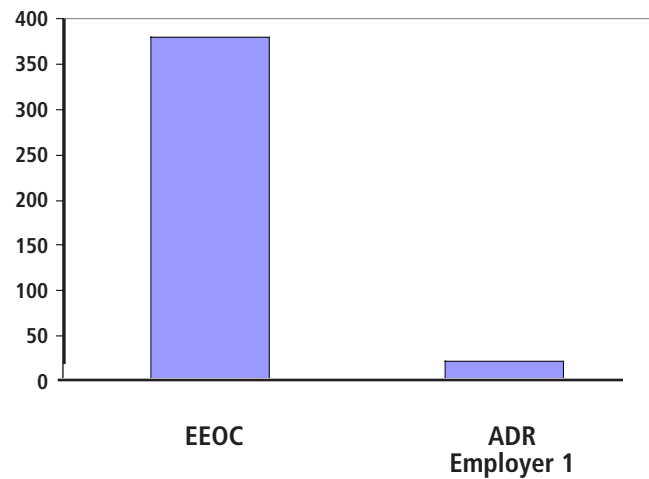


## Conclusion

The data presented here are preliminary, descriptive in nature, and involve a single employer. Consequently, I cannot claim any resolution to the rich debate on employment arbitration. Still, some conclusions seem inescapable. First, employers who wish to implement an enforceable arbitration system may do so. Second, employers who do implement such a policy can reduce turnover, reduce their outside counsel fees, and reduce the amount of time managers spend on employment-related lawsuits. In that light, I suggest that employers should consider an arbitration policy if: (1) they are publicity sensitive; (2) they have enough employee-relations personnel in place to administer a program; (3) they are confident in their ability to comply with the law and willing to recognize failures in doing so; (4) their in-house or outside counsel is comfortable practicing with the relaxed rules of arbitration; and (5) they have experienced enough discrimination charges to make the program a worthwhile expenditure. A dispute-resolution program of the type described here is not meant to be a magic bullet that prevents all claims of discrimination. Instead, the purpose of this report is to encourage employers and employees alike to resolve complaints in a manner that is equitable to all parties and, if possible, to avoid the heartache and expense of litigation. ■

### EXHIBIT 3

Average case-disposition time (days)



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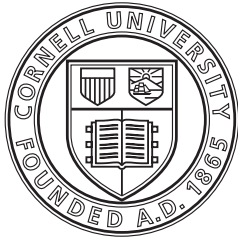
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