The High Costs of an Inexpensive Forum: An Empirical Analysis of Employment Discrimination Claims Heard in Arbitration and Civil Litigation

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This Article investigates the effects of mandatory employment arbitration on employees' access to justice and the quality of justice they receive. It makes an inroad into the empirical desert surrounding mandatory employment arbitration by presenting data from a recently administered survey of approximately 700 practicing employment plaintiff attorneys. Specifically, by asking employment plaintiff attorneys directly about their most recent cases taken to verdict in civil litigation and arbitration, this article represents the first systematic comparison of case characteristics and outcomes found in arbitral and civil litigation forums. Consistent with previous research, this data confirms that employee win rates and award amounts are lower in arbitration compared to those found in federal and state court. Improving on extant empirical analyses, however, I find no evidence that inferior outcomes can be explained by systematic differences in case characteristics between the forums: while the use of summary judgment is more frequent in state and federal court, employee plaintiffs in arbitration, on average, have higher salaries, are employed by organizations of comparable size, allege similar

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INTRODUCTION

Controversy has accompanied pre-dispute mandatory employment arbitration (referred to henceforth as “mandatory arbitration” or “employment arbitration”) unabatedly since the Supreme Court sanctioned its use in Gilmer.\(^1\) It is hardly surprising that this alternative dispute resolution procedure, engendered by unilaterally-drafted contracts of adhesion requiring employees to waive their right to civil litigation, has been mired in debate. And while Gilmer and subsequent Supreme Court decisions have resolved issues regarding arbitration’s legality, concluding that mandatory arbitration agreements are enforceable when certain due process criteria are met and when the employee is not in the transportation industry, policy debates pertaining to the propriety of mandatory arbitration remain as contentious as ever.\(^2\)

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Given the private nature of the forum, definitive figures on the use of employment arbitration are phantasmal. However, some commentators estimate as much as a quarter or more of all nonunion employees have signed arbitration clauses. Given these figures, mandatory arbitration coverage almost certainly exceeds that of unionization, yet our understanding of this alternative dispute resolution institution is severely underdeveloped compared to our understanding of labor-management relations and the nuances of grievance arbitration.

A landscape populated with mere saplings of empirical knowledge allowed advocates and critics to present polarized views of mandatory arbitration. Proponents praise arbitration’s speed, low cost, simplicity, and accessibility while opponents raise concerns of second-class justice, due process, arbitrator bias, and the private, for-profit nature of the forum. Researchers should continue to evaluate the variety of claims and judicial pronouncements incident to arbitration, but a growing body of empirical research suggests arbitration’s ultimate effect is to impose a diluted brand of justice on employee claimants. Indeed, while careful to note comparability concerns, empirical evidence establishes that employment disputes are resolved substantially faster in arbitration compared to litigation but employees win less often and receive smaller monetary awards in arbitration.

This Article marshals data from a recent survey of employment plaintiff attorneys to engage in one of the primary debates embroiling mandatory arbitration: whether inferior outcomes experienced by employees in arbitration can be attributed to inherent injustices embedded in the institution itself or whether they result from variation in the populations of cases being adjudicated. By surveying attorneys directly about their most recent employment discrimination cases taken to verdict in arbitration and civil litigation, I present the first systematic empirical

Inc. v. Adams, 532 U.S. 105 (2001), that the FAA applies to all employment contracts with the exception of the transportation industry.


comparison of case characteristics and outcomes between the two forums. The ability to control for the alleged discriminatory act, defendant employer size, summary judgment, and the merits of claims represents a significant improvement over previous empirical studies. Additionally, the study was designed to provide a representative sample of employment cases in all fifty states and in multiple forums. Access to this unique dataset avoids the pitfalls inherent in mandated disclosure reports and reliance on published decisions.

Part I of this Article provides a brief overview of the rise of mandatory arbitration. Next, Part II reviews the empirical research comparing arbitration and litigation, including the limitations of that research. Part III describes the methods used for data collection. Based on the data collection, Part IV presents a systematic comparison of case characteristics and outcomes between the two forums with respect to the alleged discriminatory action, size of defendant, employee salary, use of summary judgment, and merit of claims. Finally, Part V summarizes the main conclusions.

I.
THE RISE OF MANDATORY ARBITRATION

Beginning in the mid-1980s and continuing into the 1990s, a noticeable paradigm shift occurred in the Supreme Court’s interpretation of the Federal Arbitration Act of 1926 (“FAA”), laying the legal groundwork for the ascension of employment arbitration. Notably, the Supreme Court embraced a liberal interpretation of the FAA in *Gilmer* when writing: "By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."8

Despite this interpretation of the FAA, the *Gilmer* Court determined the contract in dispute was not an employment contract and refused to decide whether the FAA applied to all employment contracts. The Supreme Court resolved this issue ten years later in *Circuit City Stores, Inc. v. Adams*, in which the Court held that the exceptions enumerated in the FAA applied only to those directly involved in interstate or foreign commerce, meaning general employment contracts covering statutory claims were

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6. More precisely, the survey was designed to provide a representative sample of employment discrimination claims within the past five years that were taken to verdict by attorney members of the National Employment Lawyers Association (NELA) in arbitration, state and federal court, and administrative agencies.


arbitrable under the FAA. Circuit City is notable for removing the legal uncertainty surrounding employment arbitration. While subsequent cases have continued to clarify the law of arbitration, the premise of its general legality is no longer in dispute.

The Gilmer and Circuit City decisions may have resolved legal ambiguities, but the decisions of individual employers to adopt arbitration elevated the debate from a legal obscurity to a matter of public policy. Multiple surveys from the early 1990s through the mid 2000s show the prolific growth of arbitration in the employment context. At the same time as the Gilmer ruling, a Feuille and Chachere study found only four out of 107 firms, or 3.7%, used outside arbitration in 1991. In 1995, only four years later, the General Accounting Office ("GAO") found that 7.6% of employers with 100 or more employees practiced mandatory arbitration with the non-union workforce and half of these employers imposed mandatory arbitration as a condition of employment. A 1997 GAO publication reported that nineteen percent of private company respondents used arbitration. In a 2003 survey specific to the telecommunications industry, 14.1% of respondents indicated that they had adopted mandatory arbitration procedures. Adjusting for employer size, 22.7% of nonunion employees in that survey were covered by employment arbitration procedures.

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11. U.S. GEN. ACCOUNTING OFFICE, GAO/HEHS-95-150, EMPLOYER DISCRIMINATION: MOST PRIVATE SECTOR EMPLOYERS USE ALTERNATIVE DISPUTE RESOLUTION 22 (1995) [hereinafter GAO EMPLOYER DISCRIMINATION], available at http://www.gao.gov/archive/1995/he95150.pdf. The GAO originally reported that 9.9% of employers used mandatory arbitration, but, after they contacted employers seeking clarification and additional information pertaining to their policies, the GAO published data suggesting that the figure should be 7.6%. Precisely 9.9% of the 1,499 respondent firms reported using employment arbitration; however, 34 firms within that 9.9% indicated they "[do] not use arbitration for employment discrimination complaints by nonunion workers," producing an adjusted figure of 7.6%. See also Colvin, Empirical Research, supra note 3, at 409 (citing GAO EMPLOYER DISCRIMINATION, supra note 11, at 22).
procedures. In a 2007 survey of 757 U.S.-based nonunion companies spanning multiple industries, 46.8% of firms reported using employment arbitration. In fact, arbitration was reported to be the most common single ADR practice among the respondent firms. Finally, a survey of the US Fortune 1000 revealed that more than eighty percent of the responding companies used arbitration at least once within the past three years.

II. PREVIOUS EMPIRICAL RESEARCH AND INTERPRETIVE DIFFICULTIES

With respect to the legal and policy debates surrounding arbitration, "it makes little sense to answer empirical questions without empirical evidence." To this end, the emergence of a phalanx of empirical research has colored contemporary academic discourse on arbitration. While not without flaws, this body of empirical scholarship evaluates various claims about arbitration, including its accessibility, speed, cost, the existence of and repeat player effects, as well as the fairness of outcomes produced. Consistent with the main thrust of the present analysis, this Part summarizes empirical evidence related to employee award amounts and win rates in arbitration.

A. Win Rates

Early American Arbitration Association ("AAA") case analyses from the 1990s show surprisingly consistent, though slowly diminishing, employee win rates in arbitration. Analyzing AAA employment arbitration awards from 1992, Lisa Bingham found that employees won in seventy-eight percent of cases. In a later paper, Lisa Bingham analyzed the employee win rates in employment dispute cases heard by the AAA from 1993 to 1994, in which she found that employees won sixty-four percent of the time in cases involving "one-time player employers." Consistent with

16. See id.
17. See DAVID B. LIPSKY, RONALD SEEBER & RICHARD FINCHER, EMERGING SYSTEMS FOR MANAGING WORKPLACE CONFLICT: LESSONS FROM AMERICAN CORPORATIONS FOR MANAGERS AND DISPUTE RESOLUTION PROFESSIONALS (2003). It should be noted that this figure includes any form of arbitration, not just mandatory arbitration.
18. Sherwyn et al., supra note 2, at 1559.
Bingham’s figures, Maltby found that employees won sixty-three percent of employment disputes filed and disposed of by the AAA between 1993 and 1995.\textsuperscript{21} Though these studies produced similar results, it would be wise to question their relevance to the arbitration environment today, nearly two decades later. First, these initial studies predate the adoption of the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship ("Due Process Protocol").\textsuperscript{22} The Due Process Protocol was established in 1995 "in order to assure some measure of fairness and due process to employer-promulgated schemes for private resolution of statutory disputes."\textsuperscript{23} The Due Process Protocol recommends specific features and processes that should be present in mandatory arbitration agreements and hearings including: (1) freedom of representative choice; (2) adequate pre-hearing discovery; and (3) joint selection and compensation of arbitrators, among others. Multiple organizations endorsed the Due Process Protocol, including the National Academy of Arbitrations, the American Arbitration Association, the Society of Professionals in Dispute Resolution, the National Employment Lawyers Association, the Federal Mediation and Conciliation Service, and the American Civil Liberties Union. Theoretically, the adoption of the Due Process Protocol should make the arbitration process more friendly and fair to employees. Consequently, employee win rates, all else held constant, should be higher today than in the 1990s.

The Due Process Protocol, however, is just one reason that the cases of the early 1990s are not representative of the current employment arbitration forum. Many studies examining cases from this period include a large number of claims by highly educated employees with the power to negotiate individual contracts, typically managers and executives.\textsuperscript{24} In contrast, claims brought today are often forced upon employees as a condition of employment.\textsuperscript{25} Professor Lisa Bingham, in an analysis of 203 AAA awards from 1993 to 1995, found that employee claimants won 68.8% of the time if the cases involved employees who had negotiated their


\textsuperscript{24} Colvin, \textit{Empirical Research}, supra note 3, at 413 & n.40 (citing Bingham, supra note 18, at 13, 16).

\textsuperscript{25} Id. at 413 ("It is not clear that the types of cases represented in these AAA awards of the early 1990s are representative of the employment arbitration system that has arisen in more recent years.").
contracts individually. If, however, the arbitration agreement was written into personnel manuals or handbooks, employee claimants won only 21.3% of the time. The drastic disparity in the win rates between these two types of contracts should be considered. Individual win rates should be much lower in today's arbitration environment because the majority of claims being brought today originate from employer-promulgated mandatory arbitration agreements.

To address the changing arbitration environment, with an emphasis on the Due Process Protocol and the changing nature of arbitral cases themselves, researchers have continued mining available data on contemporary arbitrator decisions. A 2003 study found that employees won in employment arbitration 43% of the time. This overall win rate can be broken down to a 34% win rate for employees proceeding under a mandatory contract included in their hiring papers, likely to be lower-income employees, compared to a 57% rate for employees proceeding under individually-negotiated contracts, likely to be higher-income employees. A separate study examined the outcomes of fifty-nine AAA decisions between 1996 and 1997. There was an overall employee win rate of 39.7%. If the employee claimant went to arbitration as a result of an individually-negotiated contract, the employee win rate was 61.3%; if, however, a personnel handbook engendered the arbitration proceeding, the employee win rate was 27.6%. Analyzing the AAA's filings data for January 2003 through December 2007, Colvin found that the win rate for the 3,945 employment cases was only 21.4%, well below the findings from the early 1990s. Lastly, looking at a subset of AAA cases from 2008, Colvin and Pike found that plaintiff employees succeed at arbitration 24.7% of the time in cases based on employer-promulgated procedures; in cases based on individually-negotiated contracts, plaintiff employees won in 64.6% of cases.

In contrast to the research on employment arbitration, Eisenberg and Hill collected larger-scale datasets for state and federal litigation outcomes

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27. Id.
29. Id. at 11, 13.
31. Id. at 323.
32. See Colvin, Case Outcomes and Processes, supra note 5, at 5.
by using data gathered by government agencies. Their analysis of 1,430 employment discrimination cases heard in federal courts yielded an employee win rate of 36.4%. They report a slightly higher employee win rate of 43.8% in 160 state court employment discrimination cases. Cases involving non-civil rights disputes tried in state court produced an employee win rate of 56.6%. Oppenheimer reports a 59% employee win rate in a sample of 117 common law discharge cases heard in California state court. Clermont and Schwab accessed the entire universe of employment discrimination cases, 265,356 in total, heard in federal court between 1979 and 2000. They found that discrimination plaintiffs won 37.8% of the time in jury trials but only 19.3% of the time in judge-only trials. A later study using data through 2006 produced similar results.

The employee win rates in litigation provided by the Eisenberg and Hill and the Clermont and Schwab studies are higher than employee win rates based on employer-promulgated agreements, which are characteristic of the post-Gilmer environment, reported in the studies conducted by Colvin, Bingham and Sarraf, Hill, and Bingham. However, the win rates in arbitration are similar to the win rates discrimination plaintiffs experience in federal judge-only trials.

B. Award Amounts

Like win rates, available empirical evidence suggests that employee plaintiffs receive lower award amounts in arbitration relative to litigation. Colvin reports the median award amount was $36,500 and the mean was $109,858 for 1,213 AAA employment arbitrations decided between 2003 and 2007. Adjusted for inflation, the median award is $43,879 and the mean award is $132,066 in 2014 dollars. Comparatively, Clermont & Schwab report federal employment discrimination cases reaching verdicts between 1991 and 2000 receive a mean award size of $890,182, which is at least $1,106,394 in 2014 dollars when adjusting for inflation. At the state
level, Eisenberg & Hill find the median and mean award amount in state civil rights employment disputes going to trial were $206,976 and $478,488, respectively. Using inflation-adjusted 2014 dollars, the median and mean amounts are $282,195 and $652,380, respectively. Lastly, Oppenheimer reports the median of damages awarded in 117 California state court common law discharge cases decided between 1998 and 1999 was $296,991, or approximately $418,534 in inflation-adjusted 2014 dollars.

C. Interpretive Difficulties

An inherent limitation on using the above studies to make evaluative statements about outcomes in arbitration is the unknown comparability of cases in the arbitrated and litigated samples. Variation exists in award amounts and employee win rates between the different forums, but there is no natural way to make cases heard in arbitration identical in all respects to cases heard in civil litigation. Can the observed variance be attributed to inequities inherent in the arbitral forum or are there material differences in cases being adjudicated between the forums?

First, scholars advance an “appeal effect” to explain inferior outcomes observed in arbitration summary statistics. Because arbitration is presumably adopted by large employers with developed human resource practices, often as the last step in sophisticated conflict management systems, employee grievances are exposed to several opportunities for settlement. It is plausible that formal human resource practices act to filter cases, leaving only the unmeritorious to be resolved through arbitration. Differences in formal human resource practices, some scholars argue, likely bias simple comparisons of employee win rates and monetary awards.

The same informality, lack of appeal, and due process concessions at the heart of critics’ opposition to mandatory arbitration are virtues to arbitration’s proponents, who argue these characteristics create a cheaper, faster, and more accessible forum over civil litigation. Indeed, because of

43. Eisenberg & Hill, supra note 5, at 49.
44. Oppenheimer, supra note 36, at 536, 538-39.
45. See Hill, supra note 28, at 13, 15; Sherwyn et al., supra note 2, at 1565-66.
46. See supra note 40.
47. Given uniform findings from multiple studies, arbitration’s expediency cannot plausibly be questioned. Eisenberg and Hill report that it takes an average of 818 days, almost two-and-a-half years, for state courts to decide a civil rights employment dispute. Eisenberg & Hill, supra note 5, at 51. In federal court, employment discrimination claims languish on the federal docket for two years, or 709 days, on average, before they are ultimately disposed. Id. Looking at the universe of jobs cases filed in federal court from 1979 through 2000, Clermont & Schwab report mean docket time as 454 days. Clermont & Schwab, How Employment Discrimination Plaintiffs Fare, supra note 37, at 430, 457. Comparatively, Eisenberg and Hill report that civil rights employment disputes involving “lower pay employees” take only 262 days, on average, to reach disposition for employer-promulgated arbitrations conducted by the AAA. Eisenberg & Hill, supra note 5, at 51. Colvin found that the mean time to a
the lower barriers to entry compared to civil litigation, employees may be more likely to bring low value and marginally weaker claims to arbitration.\textsuperscript{48} Notably, Samuel Estreicher argued that the speed and lower costs of the arbitration forum provides a “Saturn” in a system otherwise characterized by “Cadillacs” for the few and “rickshaws” for the many.\textsuperscript{49} Where only individuals with high incomes or high-value claims have meaningful access to the civil litigation system, he argues, arbitration is more accessible for claimants with average or marginally weaker (i.e., low value) claims. If low value and meritless cases that would never have been brought to court, because of cost barriers or internal filtering, are presented in the arbitration forum, it should be expected that employee win rates and award amounts are lower in arbitration, as the average arbitration case would have less merit or lower damages than the average litigated case.\textsuperscript{50}

However, if plaintiff attorneys accept that employees succeed less frequently and receive lower awards in arbitration, they may be reluctant to represent potential clients pursuing arbitration claims, especially because they typically work on contingency fee arrangements.\textsuperscript{51} Responding to the lower expected value of an arbitration case, attorneys may only agree to represent exceptional arbitration claims: those that are clearly meritorious and involve high provable damages. Opposite the appellate effect described above, attorney case selection may result in cases of higher merit and value being presented in arbitration. The tension between these effects leaves the decision for AAA employment arbitration cases was 332 days in his 2007 research. Colvin, Empirical Research, supra note 12, at 426. In an updated 2011 study, Colvin examined employment arbitrations subject to reporting requirements under California state law and conducted by the AAA between January 2003 and December 2007. Colvin, Case Outcomes and Processes, supra note 5, at 3 & n.2; see CAL. CODE CIV. PROC. § 1281.96 (West 2014). Colvin reports the mean time to disposition was 284 days for settlements and 362—almost a year—for those disposed of by an award. Colvin, Case Outcomes and Processes, supra note 7, at 8. Employment disputes resolved by JAMS, formerly known as Judicial Arbitration and Mediation Services, Inc., during this same time period exhibit similar trends: the mean time to disposition was 285 days for settled cases and 380 days for awarded cases. Mark D. Gough, Empirical Analysis of Employment Arbitration Decisions 22 (May 2008) (unpublished Master of Science thesis), available at https://etda.libraries.psu.edu/paper/8405/3732. Taken collectively, arbitration is almost certainly faster than civil litigation. It is worth noting, however, that, though rarely mentioned in the literature, the same selection effects bedeviling the interpretation of award amount and win rate statistics need to be equally applied to empirical assessments of arbitration’s relative expediency.

49. Id. at 563.
50. See Eisenberg & Hill, supra note 5, at 46-47 (arguing that “higher paid employees are probably the class of employees most represented in court because the stakes involved in claims by lower-pay employees may be too low to attract counsel on a widespread basis…. [I]t appears that highly compensated employees dominate when it comes to those who have access to the court system in employment discrimination cases”).
51. The predominance of contingency fee arrangements in employment cases is anecdotally known to be true for plaintiffs’ attorneys. Corroborating conventional wisdom, approximately ninety percent of cases in this study involved contingent fee arrangements.
relative merits of initial cases presented in the forums theoretically unresolved.

Lastly, arbitration proponents contend that the availability of summary judgment in civil litigation excludes cases lacking merit from court summary statistics and results in deceptively inflated employee win rates. This argument is significant but simple: a large proportion of litigated cases are dismissed prior to verdict through summary judgment, and assuming motions for summary judgment are rare in arbitration, win rates at judge or jury trials are not comparable to win rates at arbitration.

In recent years, studies using randomized vignettes have appeared in the literature to address the redoubtable task of controlling for merits of cases presented to decision-makers in various forums. One such study from 2006 looked at survey responses from 140 AAA employment arbitrators, eighty-two labor arbitrators from the National Academy of Arbitrators (“NAA”), and eighty-three jurors who had served in employment discrimination cases over the last five years. The study analyzed participant responses on thirty-two hypothetical termination cases to see if there were systematic differences in the decision-making processes between the three groups. The authors conclude employee rights are likely to be affected by increased use of employment arbitration, finding that labor arbitrators are most likely to rule in favor of the employee, followed by jurors, and employment arbitrators are the least likely to rule in favor of the employee.

III. METHODS

Given the persistence of comparability concerns, how similar are cases taken to verdict in arbitration and the civil litigation system? This Article addresses this lingering issue by presenting results from a survey of approximately 1,890 attorney members of the National Employment Lawyers Association (“NELA”) about their most recent employment discrimination cases taken to verdict in arbitration and litigation. Founded in 1985, NELA is the largest organization of practicing plaintiff-side employment attorneys in the country. Full membership requires attorneys

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52. Sherwyn et al., supra note 2, at 1566.
53. Id.
55. Id. at 90.
56. NELA provided me with a comprehensive roster comprising 2,057 members. However, I excluded members who were not practicing employment attorneys and observations where contact information was invalid or incomplete. This reduced the sample size to 1,890.
to certify that a majority of their legal practice involving employment discrimination, illegal workplace harassment, wrongful termination, denial of employee benefits, and other employment-related matters is on behalf of employees.57 Data was initially collected through a web-administered survey, to which 521 practicing attorneys responded throughout October 2013. To increase the response rate, the survey was distributed by U.S. mail in December 2013 and January 2014, from which 175 additional responses were collected. This increased the overall survey response rate to thirty-seven percent.

Respondents were asked to record the following information relating to their most recent employment discrimination cases taken to verdict/award in arbitration and litigation:58 claim amount, award amount, winning party, employee salary, alleged discriminatory action, whether a motion for summary judgment was filed, defendant size, and the attorney’s fee arrangement, among other variables. Responses were restricted to employment discrimination claims because they are the most common type of employment case filed in state court, federal court, and in arbitration.59 In total, we received information on 478 employment discrimination cases reaching verdict through litigation and 208 employment discrimination cases adjudicated in arbitration.

While previous studies have reviewed large databases of employment case dispositions, this is the first study to look at a representative sample of claims across multiple states, forums, and arbitration providers. It further provides insight into the broader institution of employment arbitration beyond what the limited public disclosure statements analyzed in previous research can provide. For example, the empirical scholarship on arbitration focuses almost exclusively on one arbitration provider: the AAA. Additionally, current mandates do not require disclosure of the types or


58. Respondents were first asked, “Within the last 5 years, have you taken an employment discrimination claim to verdict/award in private arbitration (e.g. AAA)? (labor arbitration does not apply).” If respondents answered “Yes,” they were given the following instructions: “Please describe your most recent employment discrimination case taken to verdict/award through private arbitration, even if you feel the most recent case is atypical or not representative. If you cannot recall precise facts or figures, your best recollection should be recorded.” Concerning cases adjudicated through civil litigation, respondents were asked, “Within the last 5 years, have you taken an employment discrimination claim to verdict in state court, federal court, or an administrative agency within the past five years?” If respondents answered “Yes,” they were again instructed to describe their most recent employment discrimination case taken to verdict even if it is atypical or not representative.

merits of cases resolved in arbitration, and even compulsory variables, such as salary, are left unreported in many cases. Even when analyzing court documents, missing data issues persist. For example, Kotkin reports missing data issues with respect to salary information in Chicago courts, writing, "For 229 cases out of the employment discrimination dataset of 472 cases—almost exactly 50%—either no information about lost wages is entered or the amounts entered cannot be reliably interpreted because the entries simply indicate a gross dollar amount without differentiating between compensatory damages and back pay." 60 By bypassing such secondary data, the present study provides an unfiltered look at the state of employment discrimination in America as conducted across multiple forums.

IV. DATA

Based on the findings from the data collection, Part IV analyzes several factors the literature identifies as potentially affecting outcome statistics. Part IV analyzes data related to win rates, award amounts, employer size, summary judgment, employee salary, types of discriminatory acts alleged, and case merits.

A. Win Rates

![Employee Win Rates, by Forum](image)

Figure 1: Employee Win Rates, by Forum

Figure 1 offers a comparison of differences between employment discrimination plaintiff win rates found in litigation and arbitration. With respect to their most recently adjudicated employment discrimination case in both forums, attorneys were asked to respond to the following question: "Was this case adjudicated in favor of the claimant, defendant, or other?"

Of the 208 reported cases tried in arbitration, ninety-four, or forty-five percent, were adjudicated in favor of the employee claimant, 102 were adjudicated in favor of the employer defendant and in twelve cases the "Other" option was selected. Of the 478 reported cases tried in civil litigation, 299, or sixty-three percent, were adjudicated in favor of the employee claimant, 170 were adjudicated in favor of the employer defendant and in nine cases the "Other" option was selected. Employee win rates in litigation are substantially higher when compared to arbitration; precisely, employee win rates in litigation are eighteen percentage points, or over thirty percent, higher relative to arbitration.

B. Award Amounts

Figure 2: Mean and Median Award Amount, by Forum

Figure 2 presents the mean and median monetary amounts awarded to the ninety-one and 284 successful employee plaintiffs in arbitration and litigation, respectively. The average award amount rendered to successful discrimination plaintiffs is $412,052 in arbitration and $802,487 in litigation. The average award found in civil courts is ninety-seven percent higher compared to the average award in arbitration. In other words, the average award found in litigation is twice that awarded to successful plaintiffs in arbitration. This disparity is less stark when one considers median award amounts. The median amount awarded in litigation is $225,000, which is twenty percent higher than the $187,500 median award found in arbitration. The substantial difference between the mean and

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61. Several respondents selecting "Other" indicated the verdict in their case was still pending.

62. This metric does not account for nonmonetary or injunctive relief. Such relief is rare as reported by Clermont & Schwab, who show it is given in less than two percent of employment discrimination cases on the federal docket, and Kotkin, who reports injunctive relief in less than three percent of cases settled by federal magistrate judges in the Northern District of Illinois over a six-year period ending in 2005. See Clermont & Schwab, How Employment Discrimination Plaintiffs Fare, supra note 37, at 457 (noting that courts awarded injunctive relief in only 1.58% of employment discrimination cases after 1991); Kotkin, supra note 60, at 144.
median award amounts results from a right skewed distribution in both forums. The top ten percent of awards in arbitration are greater than or equal to $900,000, while the top ten percent of awards in litigation are no lower than $2,000,000.

The relationship between employee outcomes in litigation and arbitration seen in Figures 1 and 2 is consistent with existing empirical studies: employee win rates and award amounts are substantially lower in arbitration compared to those found in litigation. However, as explained in Part III, it is difficult to attribute such differences to an arbitration forum bias using raw win rates and award amounts. With this in mind, the proceeding sections—analyzing employer size, summary judgment outcomes, employee salary, types of discrimination claims, and case merits—investigate whether alternative factors can plausibly explain the statistical relationships evidenced in Figures 1 and 2.

C. Employer Size

![Figure 3: Distribution of Defending Employer Size, by Forum](image)

As discussed in Part III.C, some scholars suggest differences in the types of cases filed in arbitration and litigation may explain the differences in outcomes reported in empirical studies. Indeed, cases filed in arbitration pursuant to mandatory arbitration clauses invariably flow from employers who promulgate mandatory arbitration. Employers adopt such procedures for an array of reasons, be it litigation avoidance or as a genuine attempt to provide workers with a mechanism to voice grievances in the workplace.63 As a sophisticated dispute resolution technique, adopters of mandatory arbitration may be more likely to be larger employers with well-developed personnel policies.64 Prior to arriving at arbitration, the terminal step in

63. See Colvin, Institutional Pressures, supra note 14, at 386.
64. See Hill, supra note 28, at 15; Sherwyn et al., supra note 2, at 1566.
many conflict management systems, employees with disputes must progress through any number of lower steps which may include open door policies, ombudspersons, peer review panels, or mediation. Each step in these internal dispute resolution procedures, or the mere existence of formal human resource practices, provides an opportunity for meritorious cases to be identified and voluntarily resolved before being elevated to a legal claim. Under this reasoning, having been filtered through formal human resource procedures, the average merit of a case filed in arbitration may be lower than the typical case filed in litigation.

Again, this is a claim that can be, and should be, put to empirical scrutiny. Using employer size as a measure of formality of internal employment procedures, we can investigate whether internal filtering is likely to occur more frequently in arbitration than in litigation. I did not ask about formalization of personnel and evaluation procedures directly, rather, I exploit the well-established positive relationship between employer size and formalization reported in social science research.

Figure 3 shows there is no significant difference in the size of defending employers involved in litigated and arbitrated cases. In forty-one percent of arbitration cases and forty-four percent of litigated cases, defendants employed between one and 499 employees. In eleven percent of arbitrated cases and twelve percent of litigated cases, defending employers were reported to have between 500 and 999 employees. Finally, large defending employers, defined as those having 1,000 or more employees, were involved in forty-eight percent and forty-four percent of reported arbitrated and litigated cases, respectively.

The distribution of employer size between the forums is not statistically different, and, insofar as size is an accurate measure of formal personnel policies, it is dubious to attribute differences in outcomes to variance in internal filtering mechanisms. Perhaps an alternative conclusion


66. Respondents were asked to answer the following question with respect to their most recent employment discrimination case taken to verdict in the two forums, if applicable: "How many employees worked for the defendant? (include both full-time and part-time workers)."


68. See supra note 67 and accompanying text.
would be reached if filtering mechanisms could be directly observed, and it would be productive for future scholars to do so; however, an analysis of employer size provides no evidence that an appellate effect is biasing arbitration statistics.

D. Summary Judgment

![Figure 4: Motion for Summary Judgment Filed, by Forum](image)

In addition to appellate effects, the availability and pervasiveness of summary judgment in litigation is often given as a potential explanation for the disparate outcomes reported in empirical analyses. Contrary to claims of the "rarity of summary judgment motions in arbitration," Figure 4 shows motions for summary judgment were filed in over half of all arbitration proceedings and in four-fifths of all cases adjudicated in civil courts that reached a verdict. And though scholars have vastly underestimated the extent of summary judgment in arbitration, the motion is in fact found more often in litigation, so they are correct to identify it as a potential confounding variable.

As cases reaching verdict in litigation are more likely to have been subject to a motion for summary judgment, we might expect them to be more meritorious and experience superior outcomes compared to arbitrated cases. To test this theory, I compare win rates and award amounts restricting the comparison to only those cases that were subject to a motion for summary judgment. Of the 369 and 106 cases in litigation and arbitration, respectively, reported to have been subject to summary judgment, employees received a ruling in their favor in sixty-one percent of cases in litigation but only forty-three percent in arbitration. Even controlling for the use of summary judgment, the eighteen percentage point difference between the two forums remains. Mean award amounts for cases reaching award after having survived summary judgment are $815,542 and $322,385, while median award amounts are $250,000 and $170,000 in

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69. Sherwyn et al., supra note 2, at 1566.
litigation and arbitration, respectively. The persistence of substantial disparities even when controlling for use of summary judgment suggests that other institutional characteristics of the arbitral forum itself, not the use of summary judgment, are responsible for inferior outcomes that arbitration discrimination claimants experience.

E. Employee Salary

![Graph showing employment plaintiff salary by forum type](image)

Figure 5: Employee Plaintiff Salary, by Forum

Figure 5 offers comparisons of differences in employment discrimination plaintiff salaries. With respect to their most recently adjudicated employment discrimination case in both forums, attorneys were asked to report whether the plaintiff’s yearly salary was less than or greater than $100,000. Of the 203 cases tried in arbitration, 125, or sixty-two percent, involved employees making less than $100,000 a year and seventy-two, or thirty-six percent, involved employees making more than or equal to $100,000 a year. Of the 464 cases tried in civil litigation, 382, or eighty-five percent, involved low salary employees, while sixty, or fifteen percent, involved high-salaried employees. The data clearly shows that high-income plaintiffs represent a larger proportion of verdicts in arbitration than in litigation.

Given that compensatory damages are tied to lost wages and litigation plaintiffs are comparatively more likely to earn salaries less than $100,000, we would expect award amounts to be higher in arbitration.\(^7\) In Figure 2,

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\(^7\) This is especially true considering the rarity of punitive damages. Punitive damages are rare. See Joseph A. Seiner, The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change, 50 Wm. & Mary L. Rev. 735, 760 (2008). Seiner reports that out of over 30,000 employment cases disposed on the federal docket, only twenty-four cases between 2004 and 2005 referenced both punitive damages and Title VII. Id. The author notes what a paltry figure this is: "That only twenty-four available employment discrimination cases over a two-year-period awarded punitive damages seems somewhat low in light of Congress’s intent to provide a more effective deterrent by
however, the opposite is observed. Further, Figure 5 suggests that arbitration is not susceptible to low-value claims leading to skewed outcome statistics. In fact, Figure 5 implies that arbitration may have an undeserved reputation for accessibility; if arbitration is as accessible as proponents claim, where are the claims from employees with lower salaries?71

F. Types of Discriminatory Acts Alleged

![Figure 6: Frequency of Alleged Discriminatory Acts, by Forum](image)

Pushing the analysis further, Figure 6 contains the frequency of the specific discriminatory acts alleged in reported employment cases. If formal personnel policies, procedural differences, or barriers to entry explain variation in employee outcomes, one would likely see observable differences in the distribution of alleged discriminatory acts. However, as seen in Figure 6, there is only minor variation in the distribution of making the remedy available.” *Id.* An alternative search produced a marginally larger number of cases, but, as Seiner notes, still surprisingly small. *Id.* at 762.

71. Additional accessibility concerns are raised by data collected on attorney fee arrangements. Attorneys were asked, “What was your arrangement regarding attorney fees: Contingent, Hourly, Hybrid – Contingent and Hourly Mixed, or Other?” While five percent of claimants in litigation finance their case through hourly payments, thirteen percent of claimants in arbitration pay their attorney representative on an hourly basis. That hourly fee arrangements are almost three times more likely in arbitration than litigation calls to question arbitration’s reputation as an accessible forum. True access to justice requires access to attorney representation. And if potential employee plaintiffs’ ability to secure representation under contingency fee arrangements is frustrated by mandatory arbitration clauses, this fact should be incorporated into public policy debates. Alternatively, if employee plaintiffs are willing to enter into hourly financial arrangements in higher proportions because arbitration proceedings are more efficient, accessibility claims would be vindicated.
discriminatory acts alleged in cases between the two forums. The largest difference, eleven percentage points, appears in cases alleging a termination motivated by illegal considerations. However, we cannot say that the distributions of alleged discriminatory actions are statistically different; this provides no support for the contention that case characteristics vary between the two forums.

G. Case Merits

![Figure 7: Attorney Assessment of Underlying Merits of Adjudicated Cases, by Forum](image)

To test the proposition that there are systematic differences between the quality or merits of cases, attorneys were asked to evaluate the degree to which they agreed that individual cases were meritorious on a scale from 0 (Strongly Disagree) to 6 (Strongly Agree). As shown in Figure 7, there are no differences between attorneys' estimates of the merits of cases adjudicated in arbitration and litigation. Specifically, the median response was a six (correlating to an answer of "Strongly Agree") for cases heard in both forums and the mean response was a 5.4 and a 5.3 (correlating to an answer between "Agree" and "Strongly Agree") for litigation and arbitration, respectively.

Directly measuring the merits of the entire stock of adjudicated cases in both forums addresses the major concerns over appellate effects, procedural differences, or lower barriers to entry biasing summary statistics. As previously discussed, we should control for these effects because they may systematically affect the types and merits of cases being heard in

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72. Self-reported measures are subject to several disadvantages, including a tendency to respond in socially desirable ways, or a pattern of overestimating case merit. Any such biases, however, should not affect the results found in this Article because of the comparative nature of the study. Biases, such as over-estimation, should be present in equal proportion in the arbitration and civil litigation samples, allowing comparisons of equivalent measures between the two samples.
arbitration; however, when controlling for merits, controlling for each effect individually becomes redundant. And, using this measure of merit, the data provides no evidence that employment discrimination claims heard in arbitration are less meritorious than claims reaching verdict in litigation.

CONCLUSION

An analysis of approximately 700 contemporary employment discrimination cases shows outcomes in arbitration are starkly inferior to outcomes reported in litigation: employees are nearly forty percent more likely to win and receive average awards nearly twice as large in cases adjudicated in the civil litigation system compared to those that are arbitrated. And where previous scholars have suggested differing case characteristics could be the culprit behind such disparities, with the exception of summary judgment and plaintiff salary, the present data provides no support for the contention that case characteristics vary to any significant degree. Though plaintiffs’ salaries vary, theory suggests such variation would lead to superior outcomes being realized in arbitration. Indeed, employee arbitration-claimants on average have higher salaries than claimants found in the civil litigation system, but worked for employers of similar size and had claims evaluated as equally meritorious by their representing attorney. Further, the distribution of the alleged discriminatory acts for claims does not suggest systematic differences between cases in the two forums. And while summary judgment is more likely in litigation, the chasm between win rates and award amounts remains when controlling for this variable. Considering these findings, courts should reevaluate their permissive attitude toward mandatory arbitration procedures and acknowledge the high costs of this “inexpensive” forum.