

WHAT THE AWARDS TELL US ABOUT LABOR ARBITRATION OF EMPLOYMENT- DISCRIMINATION CLAIMS

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This Article contributes to the debate over mandatory arbitration of employment-discrimination claims in the unionized sector. In light of the proposed prohibition on union waivers in the Arbitration Fairness Act, this debate has significant practical implications. Fundamentally, the Article is about access to justice. It examines 160 labor arbitration opinions and awards in employment-discrimination cases. The author concludes that labor arbitration is a forum in which employment-discrimination claims can be—and, in some cases, are—successfully resolved. Based upon close examination of the opinions and awards, the Article recommends legislative improvements in certain cases targeting statutes of limitations, compulsory process, remedies, class actions, discovery, and a union’s duty of fair representation.

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INTRODUCTION

Equal access to justice is one of the fundamental bases upon which our legal system is founded. Ever since the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corporation*,¹ scholars have criticized the Court's employment-law jurisprudence for denying employees access to courts. As a result of decisions in *Gilmer* and related cases, employers may require employees to sign an agreement to arbitrate any dispute that later arises with regard to their employment. Scholars have objected to this mandatory arbitration policy on a variety of grounds, including unequal bargaining power between employees and employers and lack of transparency in arbitration proceedings.² Others have responded that arbitration, being less costly, actually provides employees more access to justice.³

A microcosm of this larger dispute arises in the unionized sector. The Supreme Court recently decided in *14 Penn Plaza v. Pyett*⁴ that unions can waive individual employees' rights to file claims for statutory violations in court. This means, for instance, that an individual claiming racial discrimination against an employer may have to arbitrate the claim in an informal grievance-arbitration proceeding rather than have a day in court. Understandably, the

1. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

2. See e.g., Jean R. Sternlight, *Creeping Mandatory Arbitration: Is It Just?*, 57 STAN. L. REV. 1631 (2005).

3. See e.g., Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 41 U. MICH. J.L. REFORM 783, 810 (2008).

4. *14 Penn Plaza v. Pyett*, 556 U.S. 247, 274 (2009).

decision has caused much uproar, and union and plaintiffs' attorneys alike have condemned the decision.

Legislative fixes for the perceived problem of unfair mandatory employment arbitration have been proposed. A federal bill, the Arbitration Fairness Act (AFA), is currently pending in Congress.⁵ The AFA would prohibit mandatory predispute arbitration of employment claims altogether. The current version of the AFA explicitly states that a collective bargaining agreement (CBA) may not waive an employee's right to seek judicial enforcement of a statutory right.⁶

Amidst this debate, little study has been devoted to the opinions of labor arbitrators deciding employment-discrimination claims in the union sector.⁷ This Article contributes to the body of scholarship on the mandatory predispute arbitration of employment-discrimination claims by looking closely at the opinions and awards in labor arbitrations arising from CBAs. It examines 160 opinions and awards of labor arbitrators involving disability or other discrimination claims. The Article concludes that labor arbitration can, and sometimes does, ensure access to justice in employment-discrimination cases. It also suggests that the process of labor arbitration of employment-discrimination claims can be improved to ensure access to justice by regulating, in some cases, statutes of limitations, compulsory process, remedies, class actions, discovery, and a union's duty of fair representation.

This Article thus contributes to the debate epitomized by Jean Sternlight's seminal article, *Creeping Mandatory Arbitration: Is It Just?*⁸ In reaching its conclusion, this Article draws on the larger body of

5. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); see also Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2007, S. 1782, 110th Cong. (2007); Preservation of Civil Rights Protections Act of 2005, H.R. 2969, 109th Cong. (2005).

6. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. § 402(b)(2) (2011); Arbitration Fairness Act of 2011, S. 987, 112th Cong. § 402(b)(2) (2011).

7. Cf. Sarah Rudolph Cole, *Let the Grand Experiment Begin: Pyett Authorizes Arbitration of Unionized Employees' Statutory Discrimination Claims*, 14 LEWIS & CLARK L. REV. 861, 863 (2010) (noting that there are fewer studies of labor arbitration than individual employment arbitration); Alan Hyde, *Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO ST. J. ON DISP. RESOL. 975, 1014 (2010) ("In fact, there are very few studies of labor arbitration of statutory issues."); Theodore J. St. Antoine, *Mandatory Employment Arbitration: Keeping It Fair, Keeping It Lawful*, 60 CASE W. RES. L. REV. 629, 640 (2010) (comparing win rates in labor just-cause cases to employment arbitration and citing studies comparing how labor and employment arbitrators treat hypothetical scenarios).

8. See Sternlight, *supra* note 2.

literature on unions, collective action, and self-governance.⁹ While it attempts to make accurate mathematical representations, the Article does not aim to be a definitive empirical study.¹⁰ And, as with most articles in the field, the arbitration awards surveyed cannot claim to be a representative sample of all labor arbitration of employment-discrimination claims.¹¹ Instead, the Article seeks to show what is happening in some labor arbitrations of some employment-discrimination claims and to suggest what is possible in others, particularly if required by regulation.

The Article proceeds in four parts. Part I provides necessary background, including a description of the perceived problem that mandatory predispute arbitration creates in cutting off access to justice, the governing case law, and the resulting scholarly debate over the appropriateness of mandatory predispute arbitration of employment-discrimination claims in the union setting. Part II describes the methodology that the research team used to acquire the arbitration awards analyzed herein. Part III analyzes these opinions and awards, exploring three categories of concerns about mandatory arbitration by examining the opinions and awards. These categories are procedural protections, substantive outcomes, and the union and its processes. The analysis is largely subjective, although some indicators, such as win/loss rates, are reported in a systematic numerical manner. Section IV uses the analytical framework developed from a review of the cases to offer preliminary suggestions about an appropriate response to the perceived problem of

9. See, e.g., CYNTHIA ESTLUND, *WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY* (2005); Archibald Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1 (1958); David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CALIF. L. REV. 663 (1973).

10. Collaboration with a social scientist or statistician to review this data would be an opportunity for further fruitful research. For instance, a sociological study examining the different education and training that labor and employment arbitrators receive, and how that training and the different processes affect outcomes under the employment discrimination statutes, may be warranted. Cf. Shauhin A. Talesh, *How Organizations Shape the Meaning of Law: A Comparative Analysis of Dispute Resolution Structures and Consumer Lemon Laws* (work in progress) (comparing how different training and processes used for arbitration of lemon law claims affect outcomes). A study integrating data on the labor arbitrator's characteristics, such as gender, race, religion, and educational background, including J.D., might also be warranted. Additionally, exploration of other data on labor arbitration of discrimination claims (such as from the CCH or AAA databases) might support or contradict the conclusions drawn herein.

11. See e.g., Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICAL LEGAL STUD. 1, 2 (2011); Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, 58 DISP. RESOL. J. 44, 45 (Nov. 2003/Jan. 2004); see also Part II, *infra*.

mandatory predispute arbitration of employment-discrimination claims in the union sector.¹²

I. BACKGROUND

This Part provides the background necessary to understand the Article's analysis on the debate over requiring unionized employees with discrimination claims to proceed to labor arbitration. It first contextualizes the debate by providing general information about labor arbitration and mandatory predispute arbitration and describing the perceived problem of lack of access to justice in court. Next it describes the major court decisions permitting mandatory arbitration of employment disputes. This Part then fleshes out the contours of the scholarly debate over the appropriateness of mandatory predispute arbitration of employment-discrimination claims in the union setting. Finally, this Part describes proposals for legislative fixes or self-regulation.

A. Mandatory Arbitration and Labor Arbitration Described

“Mandatory arbitration” describes an arrangement where two parties considered to have unequal bargaining power agree before any dispute to arbitrate claims rather than take them to court. The agreement provides that the arbitrator's opinion and award will be binding and reviewable only upon certain limited grounds.¹³ In the nonunion context, some employers require an employee to sign a mandatory arbitration agreement as a condition of either hire or continued employment. One recent study estimates that a third or more of nonunion employees are subject to mandatory arbitration of employment claims.¹⁴ Such arbitration is a relatively recent development. The Federal Arbitration Act governs its processes.¹⁵ As discussed more extensively below, scholars have objected to

12. This framework may serve as the foundation for further exploration and explication of these preliminary recommendations in a subsequent article.

13. See William B. Gould, IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 647 (2006) (describing grounds for review).

14. Colvin, *supra* note 11, at 1–2.

15. The Federal Arbitration Act (FAA) governs employment relationships outside the union context. In the union setting, Section 301 of the Labor Relations Management Act (LRMA) generally governs. The interplay of these two acts in cases of mandatory arbitration of employment-discrimination claims remains to be seen. See Michael H. LeRoy, *Irreconcilable Differences? The Troubled Marriage of Judicial Review Standards Under the Steelworkers Trilogy and the Federal Arbitration Act*, 2010 J. DISP. RESOL. 89, 91–92 (2010).

mandatory arbitration of employment claims, particularly employment-discrimination claims, on a variety of grounds. Their primary objection is that mandatory arbitration denies employees their day in court.

The term labor arbitration describes an arrangement where a union and an employer agree in a CBA to resolve disputes over the meaning of the CBA in a grievance process that culminates in binding arbitration. The initial steps of the process are often informal exchanges between the union and the employer with informal document exchange and discussion of the meaning of the contract. Similar to mandatory arbitration in the nonunion sector, the arbitrator's decision and award is reviewable only upon certain limited grounds.¹⁶ Labor arbitration of contractual disputes is actually a longstanding practice dating back to at least 1957.¹⁷ Historically, however, an employee could file a statutory employment-discrimination claim in court as well as grieve a contractual violation stemming from the same facts.¹⁸ Recently, however, as discussed more extensively below,¹⁹ the Supreme Court held that a union, as the exclusive bargaining representative of the employees, may agree with the employer that employees will arbitrate their employment-discrimination claims rather than take them to court. Similar to the objections to mandatory arbitration in the nonunion sector, scholars have objected to what might be termed "mandatory labor arbitration" of employment disputes.

Labor arbitration of employment-discrimination claims warrants study for several reasons. Unions represent more than sixteen million employees in the United States,²⁰ meaning that labor arbitration in the workplace has a widespread impact. Because unions and employers may clearly and unmistakably agree that employees must arbitrate rather than litigate statutory employment-discrimination claims, it is useful to assess labor arbitration of discrimination claims. Local 32BJ, the largest Service Employees International Union (SEIU) local of property service workers, arguably agreed to such a mandatory arbitration clause, indicating

16. Gould, *supra* note 13, at 647.

17. See *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957) (holding that specific performance of an agreement to arbitrate between a union and an employer was properly granted).

18. A contractual violation is a claim that an employer has violated a clause of the collective bargaining agreement, typically the no-discrimination clause. A statutory claim contends that an employer has violated a statute.

19. See *infra* note 53 and accompanying text.

20. Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 820 (2009) (citing *Union Member Summary*, U.S. DEP'T OF LABOR (Jan. 28, 2009), available at <http://www.bls.gov/news.release/union2.nr0.htm>).

that other unions, while they may be few in number, might also agree to such waivers.²¹ Moreover, the American Arbitration Association (AAA) recently instituted a *Pyett* panel—a group of arbitrators with employment law experience—indicating that at least one of the primary service providers anticipates a need to arbitrate such claims.²²

Even if the large majority of unions and employers do not agree to waive employees' rights to go to court on statutory discrimination claims, many such claims will continue to be processed through the grievance arbitration procedure. These claims may never reach court.²³ And, even when they do, courts vary widely in the deference afforded to an arbitration decision under *Alexander v. Gardner-Denver Co.*,²⁴ discussed below.²⁵ Indeed, the *Pyett* decision, also discussed below,²⁶ may mean more judges are inclined to give great weight—or even preclusive weight—to an arbitration decision resolving a discrimination claim that arises from the same facts.²⁷ Regardless of whether unions and employers explicitly waive the right to go to court, the resolution of a substantial number of discrimination claims will effectively be decided in labor arbitration. As a result, it is useful to assess labor arbitration of discrimination claims as a starting point for determining whether regulating such arbitration is necessary and, if so, in what manner and circumstances.

21. 14 Penn Plaza v. Pyett, 556 U.S. 247 (2009); *Who We Are*, 32BJ SEIU, <http://www.seiu32bj.org/who-we-are/> (last visited Mar. 14, 2013).

22. AM. ARB. ASS'N, LABOR, EMPLOYMENT AND ELECTIONS UPDATE—ISSUE 6 (May 2011), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_007039; Daily Labor Report: News Archive June 1, 2011, 105-DLR C-3, available to subscribers at http://news.bna.com/dlln/display/batch_print_display.adp.

23. Claims may not reach court, because grievants who are potential plaintiffs do not have the knowledge or funds to hire an attorney or pursue a claim.

24. *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974).

25. See Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External Public Law in Labor Arbitration: Is it Time for Courts to Declare Howlett the Winner?*, 24 LAB. LAW. 1, 20 (2008) (“Subsequent lower-court decisions, however, have substantially eroded *Gardner-Denver*’s holding that an employee who loses the grievance is entitled to de novo review on the statutory claim.”); Courtney Lamont Phelps, *Lifting Gardner-Denver Footnote 21: The Heavy Burden to Give “Appropriate Weight” to Arbitration Decisions on Subsequent Judicial Review* (2011) (unpublished student independent study paper) (on file with author) (outlining various ways courts have treated arbitration awards in employment discrimination cases); *infra* note 28 and accompanying text.

26. See *infra* note 53 and accompanying text.

27. See Ann C. Hodges, *Fallout From 14 Penn Plaza, LLC v. Pyett: Fractured Arbitration Systems in the Unionized Workplace*, 2010 J. DISP. RESOL. 19, 51–52 (2010) (“A few lower courts have read *Pyett* broadly, precluding litigation or deferring to the arbitration, in contradiction to *Gardner-Denver*, which refused to do either.”) (footnote omitted).

B. The Governing Case Law Develops

CBA's often contain provisions that prohibit employers from discriminating on the basis of union membership or activity or on statutorily protected grounds including race, sex, and religion. The shorthand term "no-discrimination clause" is often used to refer to such provisions. After the enactment of the Civil Rights Act, a question arose as to whether labor arbitration of an employment-discrimination dispute precluded an employee from thereafter proceeding to court with a related statutory claim.

The Supreme Court addressed the issue in the 1974 case *Alexander v. Gardner-Denver Co.*²⁸ It held that arbitration of a dispute alleging that a nondiscrimination clause was violated did not preclude a later suit alleging violation of the statutory right to be free of racial discrimination.²⁹ The Court provided several rationales for the holding. The Court noted that contractual rights are separate and distinct from statutory rights³⁰ and that labor arbitrators interpret contracts rather than laws.³¹ The Court reasoned that, based upon longstanding precedent, labor arbitration is a substitute for industrial strife and not for litigation.³² The Court concluded that the labor-arbitration process is not suited to deciding discrimination claims³³ and that the majoritarian tendencies of union processes would not effectively protect statutory rights.³⁴ Thereafter, in other cases, the Supreme Court continued to hold that labor arbitrations of contractual employment rights did not preclude later suits claiming a violation of statutory rights based upon the same underlying facts.³⁵ The Court concluded that labor arbitration was an inadequate substitute for the courts in protecting statutory rights.³⁶

In the nonunion sector, until the 1990s, employers rarely required mandatory arbitration of employment claims. This is

28. 415 U.S. 36 (1974).

29. *Id.* at 51-52.

30. *Id.* at 52.

31. *Id.* at 53.

32. *Id.* at 54-55.

33. *Id.* at 57-58.

34. *Id.* at 58 n.19.

35. *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284 (1984) (holding that a Section 1983 action was not barred by unsuccessful arbitration of an alleged wrongful termination); *Barrentine v. Ark.-Best Freight Sys., Inc.*, 450 U.S. 728 (1981) (holding that unsuccessfully pursuing a wage claim before a joint labor management committee does not preclude a Fair Labor Standards Act suit).

36. *McDonald*, 466 U.S. at 290; *see Barrentine*, 450 U.S. at 731 n.4.

because the FAA includes a provision historically interpreted to exclude employment claims from its scope.³⁷ But in the 1980s and 1990s, some employers began to mandate arbitration of employment claims, including discrimination claims.

The issue of whether such mandatory arbitration agreements were enforceable reached the Supreme Court in 1991 in the case of *Gilmer v. Interstate/Johnson Lane Corp.*³⁸ The Supreme Court held that the FAA did not exclude arbitration of statutory employment disputes from its scope. The policy of enforcing arbitration agreements embodied within the FAA required that Gilmer arbitrate his statutory age-discrimination claim rather than proceed to court.³⁹ The Court emphasized that arbitration was merely a change in forum and not a waiver of a substantive right,⁴⁰ reasoned that the public goals of deterrence and remediation could be furthered through arbitration,⁴¹ and noted that the security-industry arbitration under which Gilmer's dispute would be determined involved impartial arbitrators, adequate limited discovery, written publicly available awards, and unrestricted relief.⁴² The Court also rejected the contention that inequality in bargaining power renders an arbitration agreement unenforceable.⁴³ Gilmer's arbitration clause was contained in a securities-registration application, not an employment contract, leaving open the possibility that arbitration under an employment contract would not be mandated by the FAA. The Supreme Court subsequently held, however, that the FAA does extend to mandatory arbitration clauses included in employment contracts.⁴⁴

Thus, after *Gilmer*, employees in the nonunion sector could be required to arbitrate their statutory employment-discrimination claims despite the generally unequal bargaining power between an employer and an individual employee.⁴⁵ On the other hand, because of *Gardner-Denver* and subsequent cases, it was unclear whether employers could require their represented employees to arbitrate rather than proceed to court on statutory discrimination

37. Federal Arbitration Act, 9 U.S.C. § 1 (2006) (“[N]othing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.”).

38. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).

39. *Id.* at 25.

40. *Id.* at 26.

41. *Id.* at 28.

42. *Id.* at 31–32.

43. *Id.* at 33.

44. See *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 109 (2001) (holding that only contracts for employment of transportation workers are exempted from the FAA's coverage).

45. *Sabbeth & Vladeck*, *supra* note 20, at 819.

claims.⁴⁶ This led to a situation where represented employees, who had more equal bargaining power with their employers, arguably could not agree through their exclusive representative to mandatory arbitration of employment claims. It also led to a situation where, in at least one jurisdiction, employers could bypass the exclusive representative and require individual employees in the union sector to enter into mandatory arbitration agreements.⁴⁷ Bypassing the union arguably undermined the collective strength of the employees.⁴⁸

The Court of Appeals for the Fourth Circuit required that employees arbitrate rather than litigate statutory discrimination claims, despite *Gardner-Denver*.⁴⁹ Then, in 1998, the issue of whether a union could waive employees' rights to proceed to court on a statutory claim of discrimination reached the Supreme Court in *Wright v. Universal Maritime Service Corp.*⁵⁰ The Supreme Court reaffirmed the holding of *Gardner-Denver* that a CBA's inclusion of a standard clause prohibiting discrimination on certain grounds does not waive an employee's right to proceed to court on those same grounds.⁵¹ The Court saved for another day the issue of whether a union and an employer could include a clear and unmistakable waiver within a CBA that would bind an employee to arbitrate rather than litigate a statutory discrimination claim.⁵²

The Court finally squarely addressed the issue in the 2009 case of *14 Penn Plaza v. Pyett*, holding that, by including a clear and unmistakable waiver in the CBA, a union and an employer can require employees to arbitrate rather than litigate their employment-discrimination claims.⁵³ The Court reasoned that an agreement to

46. See *Rogers v. N.Y. Univ.*, 220 F.3d 73 (2d Cir. 2000); *Bratten v. SSI Servs., Inc.*, 185 F.3d 625, 630–32 (6th Cir. 1999); *Albertson's, Inc. v. United Food & Commercial Workers Union*, 157 F.3d 758, 760–62 (9th Cir. 1998), *cert. denied*, 528 U.S. 809 (1999); *Brisentine v. Stone & Webster Eng'g Corp.*, 117 F.3d 519, 522–27 (11th Cir. 1997); *Harrison v. Eddy Potash, Inc.*, 112 F.3d 1437, 1451–54 (10th Cir. 1997), *vacated on other grounds*, 524 U.S. 947 (1998); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 363–65 (7th Cir. 1997); *Varner v. Nat'l Super Mkts., Inc.*, 94 F.3d 1209, 1213 (8th Cir. 1996).

47. *Air Line Pilots Ass'n, Int'l v. Nw. Airlines, Inc.*, 199 F.3d 477 (D.C. Cir. 1999), *enforced on reh'g en banc*, 248 F.3d 1312 (2000).

48. See *Emporium Capwell Co. v. W. Addition Cmty. Org.*, 420 U.S. 50, 70 (1975) (noting that a union has a legitimate interest “in not seeing its strength dissipated and its stature denigrated” by subgroups bypassing the union's collective bargaining front); see also *J.I. Case Co. v. NLRB*, 321 U.S. 332 (1944) (discussing the negative impact of individual contracts on the bargaining power of the union).

49. *Austin v. Owens-Brockway Glass Container, Inc.*, 78 F.3d 875 (4th Cir. 1996).

50. *Wright v. Universal Maritime Serv. Corp.*, 525 U.S. 70 (1998).

51. *Id.* at 80.

52. *Id.* at 82.

53. 556 U.S. 247 (2009).

arbitrate employment claims falls within the subjects over which unions have authority to bargain.⁵⁴ It noted that arbitrators are capable of performing statutory interpretation and deciding complex factual issues and extolled the benefits of the streamlined process.⁵⁵ The Court also addressed the argument regarding union conflicts of interest by pointing out that the principle of majority rule, resulting in collective strength, is the central premise of labor law.⁵⁶ It asserted that potential conflicts of interest between unions and their members are better addressed by Congress than the courts.⁵⁷ And, indeed, the Court reasoned that the duty of fair representation and potential liability under Title VII protect discriminatees from unfair union treatment.⁵⁸

Currently, *Gardner-Denver* controls the majority of situations where the parties include only a general, standard, nondiscrimination clause in the CBA. Many employees in the union sector will go to court on their statutory discrimination claims. But many others may, as a practical matter, use labor arbitration to resolve disputes over employment discrimination. Some will proceed in both forums, and if arbitration precedes litigation, the weight the courts accord the arbitration opinion and award will continue to vary. In other situations, however, the union and the employer will include a clear and unmistakable waiver in the CBA. It is also possible, albeit unlikely, that an employer would be permitted to unilaterally implement mandatory labor arbitration as part of a last final offer if the union and employer cannot agree during collective bargaining. Employees in units governed by a CBA that contains a clear and unmistakable waiver will be bound to arbitrate rather than litigate their statutory discrimination claims unless the union elects not to pursue their claims in arbitration.⁵⁹

54. *Id.* at 256.

55. *Id.* at 268–69.

56. *Id.* at 271 (“Respondents’ argument that they were deprived of the right to pursue their ADEA claims in federal court by a labor union with a conflict of interest is therefore unsustainable; it amounts to a collateral attack on the NLRA.”).

57. *Id.*

58. *Id.* at 271–72.

59. *See e.g.*, *Veliz v. Collins Bldg. Serv., Inc.*, No. 10 Civ. 06615 (RJH), 2011 WL 4444498, at *4 (S.D.N.Y. Sept. 26, 2011) (dismissing without prejudice a discrimination claim for failure to attempt arbitration because the CBA would be unenforceable if it operated to prevent plaintiff from asserting his statutory rights in arbitration); *cf.* *Johnson v. Tishman Speyer Properties, L.P.*, No. 09 Civ.1959(WHP), 2009 WL 3364038, at *4 (S.D.N.Y. Oct. 16, 2009) (dismissing a discrimination claim and compelling arbitration where an employee “concedes that he declined to pursue his grievance”).

C. Scholarly Debate on Mandatory Arbitration of Employment-Discrimination Claims

Scholars and others object to mandatory labor arbitration of employment-discrimination claims on many grounds, which can be categorized into three broad areas. The first two apply equally to mandatory arbitration of employment-discrimination claims in the nonunion sector, while the third applies particularly in the union sector. All three types of objections somewhat overlap. First, scholars object that procedural due process in arbitration is inadequate or, at the very least, that there is no requirement that a fair process be utilized in arbitration. Second, they object that the substantive outcomes in arbitration are less advantageous to discriminatees than those in litigation. Third, scholars make particular objections to the use of the labor-arbitration process to resolve employment-discrimination claims. They argue that unions and labor arbitrators are adept at contract interpretation but are not trained in the legal analysis necessary to interpret statutes. They also object that unions have a history of discrimination and therefore should not be relied upon to represent the interests of minority employees, or that the majoritarian process upon which collective bargaining and the grievance process rest will systematically serve majority interests over minority interests.⁶⁰ Fundamentally, the objections express that arbitration deprives employees of equal access to justice.

As to procedural due process, scholars point out that the practices that make arbitration more efficient and less time consuming⁶¹ also cause arbitration to have fewer procedural protections than litigation. Some argue that cost savings are largely a result of decreased due process.⁶² They point out the inapplicability of the rules of evidence and the lack of discovery, compulsory process,

60. Mark Berger, *A Step Too Far: Pyett and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV. 55, 84 (2009) (“The law allows claims to be dropped for reasons related to the larger interests of the collective bargaining unit as a whole, including the union’s need to conserve scarce resources.”); Alan Hyde, *Labor Arbitration of Discrimination Claims After 14 Penn Plaza v. Pyett: Letting Discrimination Defendants Decide Whether Plaintiffs May Sue Them*, 25 OHIO ST. J. ON DISP. RESOL. 975, 1016 (2010) (“While some, perhaps most, unions are vigorous opponents of employment discrimination, some still engage in the practice.”); Deborah A. Widiss, *Divergent Interests: Union Representation of Individual Employment Discrimination Claims*, 87 IND. L.J. 421, 424 (2012) (“However, discrimination in the workplace—by unions as well as by employers—remains real and common.”).

61. Cole, *supra* note 7, at 862 & n.5.

62. Sabbeth & Vladeck, *supra* note 20, at 830; David S. Schwartz, *Claim-Suppressing Arbitration: The New Rules*, 87 IND. L.J. 239, 241–42 (2012).

cross-examination, and testimony under oath.⁶³ Others point to reduced statutes of limitations and unavailability of class actions as hindrances to due process.⁶⁴ In particular, one study has demonstrated that in nonunion employment arbitration, the number of pro se litigants is high.⁶⁵ Lack of legal representation may inhibit discriminatees' success in pursuing meritorious claims, particularly when the employer is represented. Additionally, in light of the Supreme Court's recent decision in *AT&T Mobility LLC v. Concepcion*, employers may be able to include class-action waivers in mandatory arbitration clauses, thereby depriving employees of the ability to pursue low-value claims in arbitration or, indeed, at all.⁶⁶

As to substantive outcomes, objectors argue that discriminatees are less likely to win in arbitration, and that when they do, the awards are lower.⁶⁷ They may be less likely to win because employers who engage in arbitration multiple times have a knowledge advantage or because arbitrators tend to favor employers who appear before them multiple times.⁶⁸ Arbitrators are also not empowered to grant the full range of relief available under the antidiscrimination statutes, and thus damages may be limited.⁶⁹ These scholars argue that low awards resulting from mandatory arbitration remove

63. See, e.g., Suzette M. Malveaux, *Is it the "Real Thing"? How Coke's One-Way Binding Arbitration May Bridge the Divide Between Litigation and Arbitration*, 2009 J. DISP. RESOL. 77, 84 (2009); Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in 14 Penn Plaza v. Pyett*, 14 LEWIS & CLARK L. REV. 825, 846 (2010).

64. Hodges, *supra* note 27, at 37; Malveaux, *supra* note 63, at 84.

65. Colvin, *supra* note 11, at 16 (finding 24.9 percent of plaintiffs in individual AAA administered employment arbitrations were pro se).

66. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); cf. Theodore Eisenberg, Geoffrey P. Miller & Emily Sherwin, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. MICH. J.L. REFORM 871 (2007) (hypothesizing that firms use arbitration clauses in consumer contracts to preclude class actions rather than to promote fair dispute resolution). But see D.R. Horton, Inc., 357 N.L.R.B. No. 184 (2012) (holding that individually negotiated class action waiver violates the National Labor Relations Act).

67. See Eisenberg & Hill, *supra* note 11, at 45 (noting that objectors claim that employees win less often and receive lower awards in arbitration but presenting empirical evidence that this is not true).

68. See Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 EMP. RTS. & EMP. POL'Y J. 189, 214 (1997); Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29, 33 (1998); Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes* 9 (N.Y.U. Sch. of Law, Pub. Law Research Paper No. 10-51, 2010), available at <http://ssrn.com/abstract=1656618>; see also 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, 239-44 (1998) [hereinafter Bingham, *On Repeat Players*] (cataloguing potential explanations for repeat-player effect).

69. See Hodges, *supra* note 27, at 38 (noting "in traditional labor arbitration punitive damages and attorneys' fees are not ordered except in unusual cases") (footnote omitted); Sabbeth & Vladeck, *supra* note 20, at 812 (noting how arbitrators are often powerless to grant certain types of relief, such as liquidated damages, costs, or attorney's fees); see also Katherine

an incentive for employers to refrain from discriminating. They contend that arbitrators are not qualified to decide issues of public law and that the development of laws intended to benefit the public should not be left to private dispute resolution,⁷⁰ which is often confidential and deprives the public of information about the dispute and its resolution.⁷¹ Scholars have therefore argued that an important part of the fight against discrimination is public adjudication of claims,⁷² and that arbitration is not a transparent process because it is confidential and does not establish precedent.⁷³ Scholars assert for a variety of reasons that transparency is lacking, including that “statutes . . . play a minimal role in arbitrators’ decisions”; even written decisions “by and large remain unpublished and unavailable”; and, even when publicly available, decisions are heavily redacted.⁷⁴ Others argue that the limited judicial review of awards is problematic.⁷⁵

Some scholars believe that permitting a union to waive an employee’s right to proceed to court on a statutory discrimination claim is even more problematic than permitting individuals to waive their own right to litigate.⁷⁶ First, these scholars assert that, in the case of individual waivers, an employer must provide clear notice to an employee of the waiver, whereas the employee may not be aware of the provisions of the CBA.⁷⁷ Further, these scholars assert that unions have a conflict of interest.⁷⁸ They are the exclusive representative for all employees and must juggle the interests of different

Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 DENV. U. L. REV. 1017, 1039–40 (1996).

70. See Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 HOW. L.J. 45, 47 (2010) (arguing that the private, confidential nature of arbitration removes much of the deterrent effect that a public lawsuit has on workplace discrimination); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557, 1563 (2005).

71. Plass, *supra* note 70, at 47.

72. Sabbeth & Vladeck, *supra* note 20, at 805.

73. *Id.* at 806–07.

74. *Id.*

75. Malveaux, *supra* note 63, at 84; Moses, *supra* note 63, at 826, 846; Stone, *supra* note 69, at 1048–50.

76. One article argues that Americans with Disabilities Act (ADA) claims are particularly ill-suited for labor arbitration. First, unions push employers to benefit the median rather than marginal worker. Second, they are not competent to prove individuals are disabled and have no expertise in proposing reasonable accommodations. Finally, they have a conflict of interest when other employees are paying for any accommodations. Hyde, *supra* note 7, at 1006–07.

77. See Moses, *supra* note 63, at 837 (“CBAs are contracts between the union and management and, until *Pyett*, had never been interpreted to require an individual employee, who is not a party to the contract, to give up the statutory right . . . to bring a claim . . . in court.”).

78. Deborah A. Widiss, *Divergent Interests: Union Representation of Individual Employment Discrimination Claims*, 87 IND. L.J. 421, 421 (2012) (“My fear is that often, even for unions

groups. Unions are governed by majority rule, and thus may not effectively represent the interests of minorities protected by antidiscrimination statutes.⁷⁹ They may bargain away rights protected by public law to gain something of benefit to the majority of employees. Some even claim that unions poorly manage contract grievances and will be unable to effectively handle the added burden of discrimination claims.⁸⁰

Moreover—and somewhat overlapping with due process concerns—the labor-grievance-and-arbitration system is designed to resolve disputes over contract interpretation, not statutory discrimination claims.⁸¹ The initial steps are often informal exchanges between the union and the employer, with informal document exchange and discussion of the meaning of the contract. Unions and labor arbitrators are considered experts in contract interpretation,⁸² and the arbitrator is viewed essentially as an agent of the parties who understands their particular workplace and relationship, rather than as a source of uniform law. Indeed, scholars point out that many labor arbitrators do not have legal training and are not skilled at statutory interpretation.⁸³ Some have asserted that arbitrators are less skilled than judges in interpreting statutes, which arguably are more complex than contractual provisions.⁸⁴ Finally, some worry that unions, which have historically discriminated against minorities, women, and others protected by statutory employment laws, will continue to do so by not vigorously pursuing meritorious statutory claims to labor arbitration.

Other scholars respond that arbitration saves cost and time⁸⁵ and provides an adequate level of procedural protection. Particularly in

acting in good faith, the interests of unions and individual employees will diverge—and that individual employees who are victims of discrimination will be the losers.”).

79. See Mark Berger, *A Step Too Far: Pyett and the Compelled Arbitration of Statutory Claims Under Union-Controlled Labor Contract Procedures*, 60 SYRACUSE L. REV. 55, 83–84 (2009).

80. Hyde, *supra* note 7, at 1013 (“Unions are beleaguered and can hardly maintain competent levels of processing grievances limited to violations of collective bargaining agreements.”).

81. See Sabbeth & Vladeck, *supra* note 20, at 820 (noting that employees select a union to bargain over wages and conditions of employment but not to waive their rights to pursue antidiscrimination claims).

82. See Hodges, *supra* note 27, at 35 (“[U]nion officials . . . are not trained in statutory interpretation or litigation.”).

83. See William B. Gould IV, *A Half Century of the Steelworkers Trilogy: Fifty Years of Ironies Squared*, in *ARBITRATION 2010: THE STEELWORKERS TRILOGY AT 50, PROCEEDINGS OF THE SIXTY-THIRD ANNUAL MEETING OF THE NATIONAL ACADEMY OF ARBITRATORS 65–66* (Paul D. Staudohar & Mark I. Lurie eds., 2011) (citing lack of training in interpreting Title VII for National Academy of Arbitrator members); Stone, *supra* note 69, at 1036.

84. See Sabbeth & Vladeck, *supra* note 20, at 811.

85. Sherwyn, *supra* note 70, at 1578; Theodore J. St. Antoine, Gilmer *in the Collective Bargaining Context*, 16 OHIO ST. J. ON DISP. RESOL. 491, 499 (2001); see also David B. Lipsky,

labor arbitration, awards are generally accompanied by a supporting opinion; parties are represented, though not always by an attorney; witness testimony and documentary evidence are presented; witnesses are cross-examined; post-hearing briefs are often submitted; and transcripts are sometimes made.⁸⁶ Furthermore, “[h]uman resources representatives and union business agents are almost as likely as their lawyers to use transcripts and briefs, to challenge evidence, and to cross-examine witnesses.”⁸⁷ It is arguably less expensive for employees, who do not have to hire independent counsel to represent them, since the service is provided as part of the cost of union dues.⁸⁸ Some consider the ability to proceed *pro se* to be a benefit rather than exhibiting a lack of fair process.⁸⁹ In any event, in labor arbitration, the union is likely to cover the cost of the attorney or to provide a union representative who is versed in workplace law. As to concerns about limited discovery, one scholar suggests that unions are able to negotiate adequate discovery⁹⁰ while others recognize that legislation permitting limited discovery⁹¹ and requiring no reduction of periods prescribed in statutes of limitations⁹² is warranted.

These scholars respond to substantive concerns by arguing that mandatory arbitration successfully resolves employment claims.⁹³ They reason that low-income employees can access arbitration

Ronald L. Seeber & J. Ryan Lamare, *The Arbitration of Employment Disputes in the Securities Industry: A Study of FINRA Awards, 1986–2008*, 65 DISP. RESOL. J. 12 (2010).

86. See WILLIAM H. HOLLEY, KENNETH M. JENNINGS & ROGER S. WOLTERS, *THE LABOR RELATIONS PROCESS* 483 (10th ed. 2011) (noting the use of cross-examination in labor arbitration); Dennis R. Nolan, Disputatio: “*Creeping Legalism as a Declension Myth*,” 2010 J. DISP. RESOL. 1, 5 (2010) (parties are often represented by attorneys, arbitrators cite other awards as precedent, objections to testimony and exhibits are made, and transcripts and briefs are utilized); St. Antoine, *supra* note 85, at 509 (arguing that most labor arbitrators write reasoned opinions “even in ordinary contract disputes”) (footnote omitted); see also W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895, 1910–11 (2010) (using labor arbitration as one example of an arbitration system that generates precedent).

87. Nolan, *supra* note 86, at 7 (footnote omitted).

88. See Cole, *supra* note 7, at 863.

89. Estreicher & Eigen, *supra* note 68, at 9 (recognizing as positive the ability to proceed *pro se* and suggesting revising protocol to ensure level playing field); see also Sherwyn et al., *supra* note 70, at 1575.

90. See Cole, *supra* note 7, at 872 n.67.

91. David Sherwyn, J. Bruce Tracey & 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, 147 (1999); see also Martin H. Malin, *The Arbitration Fairness Act: It Need Not and Should Not Be an All or Nothing Proposition*, 87 IND. L.J. 289, 312 (2012).

92. Malin, *supra* note 91, at 312; see also Sherwyn et al., *supra* note 91, at 135–36 (discussing the Model Arbitration Act).

93. See 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,

more easily because it is a less costly option.⁹⁴ Moreover, they suspect that a large number of awards that are low but certain may have a greater deterrent effect against employer discrimination than a lesser number of awards that are high but uncertain.⁹⁵ In favor of union arbitration of statutory employment discrimination, some scholars cite the comparable win rates in arbitration and litigation.⁹⁶ Others note that arbitrators do cite other awards as precedent.⁹⁷ Some also point out that although private post-dispute settlement does not result in a publicly accessible decision on the merits, it is clearly lawful, and the courts will continue to develop precedent in employment-discrimination cases.⁹⁸ In response to allegations that unfairness results from a repeat-player effect, they assert that employers have an advantage when appearing multiple times in litigation as well.⁹⁹ And they assert that arbitrators have an interest in “maintaining their established reputations for integrity and neutrality.”¹⁰⁰ Additionally, the risk that arbitrator bias or participant expertise will result in a repeat-player effect in labor arbitration is lower than with individual arbitration because unions, like employers, are likely to appear multiple times in employment-discrimination disputes.¹⁰¹ At least one scholar supportive of mandatory labor arbitration recognizes that changes are necessary

784, 805 (2003) (indicating her data tends to refute claims that employment arbitration cannot competently resolve discrimination claims); *cf.* Lipsky, *supra* note 85, at 59 (finding no FINRA [Financial Industry Regulatory Authority] cases in a large sample where the arbitrator “failed to adequately weigh employee claims of discrimination”).

94. Hill, *supra* note 93, at 803–04; *see also* Gould, *supra* note 83, at 57 (“[L]ow income employees are screened out of plaintiffs lawyers’ offices in both wrongful discharge and fair employment practice actions.”).

95. St. Antoine, *supra* note 7, at 635.

96. Cole, *supra* note 7, at 862–63; *see* Sherwyn, *supra* note 70, at 1567–69.

97. *See* Nolan, *supra* note 86, at 5 (noting, in a different context, the commonly known fact that labor arbitrators cite precedent).

98. Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1356 (1997); *cf.* Christopher R. Drahozal, *Is Arbitration Lawless*, 40 LOY. L.A. L. REV. 187, 209 (2006) (“[I]t is the rare case that contributes to the development of the law in a significant way.”) (footnote omitted).

99. *See* Stephen J. Ware, *The Effects of Gilmer: Empirical and Other Approaches to the Study of Employment Arbitration*, 16 OHIO ST. J. ON DISP. RESOL. 735, 752 (2001) (“The most important point about the repeat-player effect, however, is that this effect may be at least as prevalent in litigation as in arbitration.”) (footnote omitted).

100. Estreicher & Eigen, *supra* note 68, at 9.

101. Cole, *supra* note 7, at 863; Colvin, *supra* note 11, at 11; Maltby, *supra* note 68, at 33; Richard A. Bales, *The Discord Between Collective Bargaining and Individual Employment Rights: Theoretical Origins and a Proposed Solution*, 77 B.U. L. REV. 687, 752–53 (1997); *see also* St. Antoine, *supra* note 85, at 506.

to ensure that full statutory remedies are available,¹⁰² while another acknowledges that expanding limited review is warranted.¹⁰³

As to attacks on union waivers, even if an employer must provide an employee in the nonunion setting with notice of mandatory arbitration, that employee is unlikely to refuse and risk losing his livelihood.¹⁰⁴ On the other hand, a union has a more equal relationship with the employer and might decide to arbitrate, rather than litigate, only in instances where doing so truly would benefit employees.¹⁰⁵ Indeed, unions could carve out certain types of claims, bargain for a different arbitration system with more procedural safeguards, or provide individual grievants the right to arbitrate outside the labor-arbitration process.¹⁰⁶ They could even consider addressing discrimination and other statutory claims as a service that they can provide to their members.¹⁰⁷

Professor Sarah Cole draws on the cognitive-psychology literature to argue that employees are better off relying on unions than on themselves to make decisions about whether to waive a court forum and what procedures to use in discrimination claims.¹⁰⁸ Some assert

102. St. Antoine, *supra* note 85, at 508–09; *see also* Malin, *supra* note 91, at 312.

103. Cole, *supra* note 7, at 879; *cf.* Laura J. Cooper, *Employment Arbitration 2011: A Realist's View*, 87 IND. L.J. 317, 323–24 (2012) (arguing courts should impose more aggressive judicial review in nonlabor employment arbitration).

104. *See* St. Antoine, *supra* note 85, at 503–04.

105. *See* St. Antoine, *supra* note 85, at 491. An employer should not be able to unilaterally implement arbitration without the union's agreement. *Waiver of Right to a Federal Forum*, 123 HARV. L. REV. 332, 340 (2009) ("The Court has already held that traditional grievance arbitration provisions cannot be implemented to impasse, and this doctrine seems easily applicable in the context of arbitration of statutory rights.") (footnote omitted).

106. Authors have recognized that the type of arbitration procedure may affect the adequacy of the grievance-arbitration process to handle discrimination claims. For instance, whether the individual employee has the ability to proceed to arbitration when the union declines to do so, as the employees did in *Pyett*, is an important consideration. *See* Steven C. Bennett, *Arbitration of Employment Discrimination Claims: Impact of the Pyett Decision on Collective Bargaining*, 42 TEX. TECH. L. REV. 23, 29 (2009); Mark S. Mathison & Bryan M. Seiler, *What 14 Penn Plaza LLC v. Pyett Means for Employers: Balancing Interests in a Landscape of Uncertainty*, 25 A.B.A. J. LAB. & EMP. L. 173, 193 (2010); *see also* Michael Z. Green, *Reading Ricci and Pyett to Provide Racial Justice Through Union Arbitration*, 87 IND. L.J. 367, 412–13 (2012) (proposing process with racially diverse, experienced arbitrator pool).

107. *See* Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1843 (2001); Green, *supra* note 106, at 413. Scholars recognize that while it will be a challenge for unions to devote time and resources to discrimination claims, to do otherwise abdicates their responsibility to bargain over terms and conditions of employment. David L. Gregory & Edward McNamara, *Mandatory Labor Arbitration of Statutory Claims, and the Future of Fair Employment: 14 Penn Plaza v. Pyett*, 19 CORNELL J.L. & PUB. POL'Y 429, 452 (2010). Leaving agreements to arbitrate to individual employees rather than the recognized union opens the door to individual bargaining in the union setting and undermines the federal policy of collective bargaining. *Id.*

108. Cole, *supra* note 7, at 902; Hill, *supra* note 93, at 784 (indicating her data tends to refute claims that employment arbitration cannot competently resolve discrimination claims).

that arbitrators are equally as experienced and qualified as judges to interpret antidiscrimination statutes and decide such claims.¹⁰⁹ Indeed, to the extent that labor arbitrators are required to specialize in employment law and understand the workplace, it is conceivable that they are better qualified than generalist judges to decide employment-discrimination claims.¹¹⁰ As a factual matter, “almost all labor arbitrators regularly face and decide legal questions.”¹¹¹

As to the possibility of union conflict with those discriminated against, some assert that unions today are “staunch advocates of traditionally underrepresented groups.”¹¹² Some scholars have suggested that the antidiscrimination laws themselves and the duty of fair representation serve as adequate safeguards.¹¹³ Others have pointed out that concerns about unions refusing to process meritorious claims may be satisfactorily addressed in several ways. First, the courts should hold, as has the Southern District of New York, that when a union refuses to bring a claim to arbitration, the employee may proceed with the case in court.¹¹⁴ Second, a statutory claim under Title VII and the related statutes is available directly against

109. Cole, *supra* note 7, at 877–78; Gregory & McNamara, *supra* note 107, at 451; *see also*, Patricia A. Greenfield, *How Do Arbitrators Treat External Law?*, 45 INDUS. & LAB. REL. REV. 683, 686 (1992) (citing studies finding that labor arbitrators are aware of and comply with Title VII); *cf.* Malin, *supra* note 91, at 313 (proposing regulating arbitration services’ process for neutrals).

110. *See* Cass R. Sunstein & Adrian Vermeule, *Interpretation and Institutions*, 101 MICH. L. REV. 885 (2003) (arguing that expert administrative agencies should be given freedom to depart from statutory language and from engaging in formalism, but that generalist judges should be bound to formalism to reduce errors). *But see* Hyde, *supra* note 7, at 984 (“There is no reason to think that labor arbitration can suddenly turn into a kind of labor court, or master labor institution to resolve statutory and common law claims beyond its competence or experience.”) (footnote omitted).

111. Nolan, *supra* note 86, at 11.

112. Cole, *supra* note 7, at 864; *see also* Hyde, *supra* note 7, at 1016 (conceding that most unions vigorously oppose discrimination but noting that some still discriminate).

113. *See* Cole, *supra* note 7, at 886.

114. *Veliz v. Collins Bldg. Serv., Inc.*, No. 10 Civ. 06615(RJH), 2011 WL 4444498, at * 4 (S.D.N.Y. Sept. 26, 2011) (dismissing discrimination claim without prejudice because CBA will be unenforceable if it operates to preclude arbitration); *Morris v. Temco Serv. Indus., Inc.*, No. 09 Civ. 6194(WHP), 2010 WL 3291810, at *6 (S.D.N.Y. Aug. 12, 2010) (denying motion to compel arbitration where union failed to pursue discrimination claim); *Borrero v. Ruppert Hous. Co., Inc.*, No. 08 CV 5869(HB), 2009 WL 1748060, at *2 (S.D.N.Y. June 19, 2009) (dismissing complaint without prejudice “because if” plaintiff “is prevented by the Union from arbitrating his claims, the CBA’s arbitration provision will not be enforceable.”); *Kravar v. Triangle Serv., Inc.*, 186 L.R.R.M. 2565 (S.D.N.Y. May 19, 2009) (denying a motion to compel arbitration because union refused to arbitrate disability claim, and the CBA, thereby, precluded the plaintiff from raising her disability claim in any forum); *cf.* *Johnson v. Tishman Speyer Prop., L.P.*, No. 09 Civ. 1959(WHP), 2009 WL 3364038 (S.D.N.Y. Oct. 16, 2009) (dismissing discrimination claim and compelling arbitration where employee “concedes that he declined to pursue his grievance”).

any union that itself engages in discrimination.¹¹⁵ Alternatively, though perhaps less satisfactorily, the breach of duty of fair representation claim is available to aggrieved employees.¹¹⁶

D. Proposals to Provide a Fair Forum to Discriminatees

To address the problems recognized by scholars who oppose an unregulated arbitration process, many bills have been introduced in Congress that would prohibit mandatory arbitration, including mandatory arbitration of employment claims.¹¹⁷ A few of these bills have passed, including The Department of Defense Appropriations Act of 2010, prohibiting the use of mandatory arbitration of Title VII and related employment claims by any employers contracting with the federal government.¹¹⁸

Most recently, on May 12, 2011, Senator Al Franken introduced the AFA in the Senate, and Representative Henry Johnson introduced the same measure in the House.¹¹⁹ The AFA would prohibit mandatory arbitration of consumer, civil rights, and employment disputes.¹²⁰ While the AFA explicitly permits labor arbitration pursuant to a CBA, it provides that “no such arbitration provision shall have the effect of waiving the right of an employee to seek judicial enforcement of a right arising under a provision of the Constitution of the United States, a State constitution, or a Federal or State statute, or public policy arising therefrom.”¹²¹ It would thus reverse

115. St. Antoine, *supra* note 85, at 504–05.

116. *Vaca v. Sipes*, 386 U.S. 171 (1967); *Steele v. Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944). Unions are concerned that more employees will bring duty of fair representation claims if they agree to waive statutory rights. See Brendan D. Cummins & Nicole M. Blissenbach, *The Law of the Land in Labor Arbitration: The Impact of* 14 Penn Plaza LLC v. Pyett, 25 ABA J. LAB. & EMP. L. 159, 171 (2010) (“The duty of fair representation risk is greater in the context of civil rights claims than for ordinary grievances not only because of the sensitive subject matter but also because of the complexity of the legal claims. The risk may also be heightened when the union has agreed to foreclose alternative remedies.”). Some scholars maintain, however, that with or without the waiver, unions remain susceptible to these claims. See Gregory & McNamara, *supra* note 107, at 452.

117. See E. Gary Spitko, *Exempting High-Level Employees and Small Employers from Legislation Invalidating Predispute Employment Arbitration Agreements*, 43 U.C. DAVIS L. REV. 591, 597 (2009); Thomas V. Burch, *Regulating Mandatory Arbitration*, 2011 UTAH L. REV. 1309, 1132.

118. Burch, *supra* note 117, at 1334. The Dodd-Frank Wall Street Reform and Consumer Protection Act prohibits mandatory arbitration of securities whistleblower provisions. See Malin, *supra* note 91, at 289.

119. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011).

120. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011).

121. Arbitration Fairness Act of 2011, H.R. 1873, 112th Cong. (2011); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011). The AFA had been introduced in prior terms as

Pyett and prohibit mandatory labor arbitration of employment-discrimination claims.

Another proposed solution is to regulate rather than prohibit mandatory arbitration of employment claims. The first proposal along these lines was known as the Due Process Protocol (Protocol).¹²² An alternative-dispute-resolution task force drafted the Protocol as a form of self-regulation for arbitration services and businesses to adopt.¹²³ It has been partially implemented by the AAA, one of the primary service providers for both employment and labor arbitration. The AAA provides procedural protections consistent with the Protocol in nonunion-sector mandatory employment arbitration.¹²⁴ The Protocol provides certain safeguards, such as a jointly selected arbitrator, discovery, representation of the grievant's choosing, remedies equivalent to those statutorily provided, and a written decision.¹²⁵ The Protocol, however, excludes the unionized sector from due-process regulation, and so does not govern a situation in which a union agrees to arbitrate discrimination claims rather than bring them to court.¹²⁶ Currently, the AAA "is considering the possibility of supplementing its Employment or Labor Arbitration Rules" to address discrimination cases arbitrated under *Pyett*.¹²⁷ Similar proposals with additional or different procedural safeguards have been offered over the years.¹²⁸ Others have

well, but not always containing the same language regarding union waivers of public law rights.

122. TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, DUE PROCESS PROTOCOL FOR MEDIATION AND ARBITRATION OF STATUTORY DISPUTES (1995), reprinted in 9A Lab. Rel. Rep. (BNA) IERM 534:401 to :402 (Mar. 1996); see also Richard A. Bales, *Beyond the Protocol: Recent Trends in Employment Arbitration*, 11 EMP. RTS. & EMP. POL'Y J. 301 (2007); Martin H. Malin, *Due Process in Employment Arbitration: The State of the Law and the Need for Self-Regulation*, 11 EMP. RTS. & EMP. POL'Y J. 363 (2007).

123. Bingham, *On Repeat Players*, *supra* note 68, at 229.

124. *Employment Arbitration Rules and Mediation Procedures*, AM. ARB. ASS'N, available at http://www.adr.org/aaa/faces/rules/searchrules/rulesdetail?doc=ADRSTG_004366&_afzLoop=1536493419432992&_afzWindowMode=0&_afzWindowId=tz95kvrf0_92#%40%3F_afzWindowId%3Dtz95kvrf0_92%26_afzLoop%3D1536493419432992%26doc%3DADRSTG_004366%26_afzWindowMode%3D0%26_adf.ctrl-state%3Dtz95kvrf0_144 (last visited Dec. 30, 2012).

125. St. Antoine, *supra* note 7, at 641–42.

126. TASK FORCE ON ALTERNATIVE DISPUTE RESOLUTION IN EMPLOYMENT, *supra* note 122, at 534:401; see also St. Antoine, *supra* note 7, at 644 (describing the National Academy of Arbitrators' proposal).

127. See AM. ARB. ASS'N, LABOR, EMPLOYMENT AND ELECTIONS UPDATE—ISSUE 6, at 3 (May 2011), available at http://www.adr.org/aaa/ShowPDF?doc=ADRSTG_007039.

128. See Richard A. Bales, *Normative Consideration of Employment Arbitration at Gilmer's Quinceanera*, 81 TUL. L. REV. 331, 391 (2006); Margaret M. Harding, *The Limits of the Due Process Protocols*, 19 OHIO ST. J. ON DISP. RESOL. 369, 438 (2004) (suggesting possibility of external third party monitors); Bales, *supra* note 122, at 343; Malin, *supra* note 91, at 401–02 (urging arbitrators to enforce statutes of limitations and refuse to enforce clauses that reduce the time a party has to file a claim).

proposed that Congress mandate procedural protections rather than prohibiting mandatory arbitration of employment claims altogether.¹²⁹

Thus, the options are to leave the law as it is, permitting largely unregulated mandatory labor arbitration of employment-discrimination claims; to prohibit such arbitration altogether, thereby reverting to a system where an employee may choose to pursue labor arbitration and litigation; or to permit mandatory labor arbitration only if it provides certain procedural safeguards.¹³⁰ While any of these options has its benefits and drawbacks, this Article, after reviewing 160 arbitration opinions and awards, suggests the latter approach is probably best. This Article also provides preliminary suggestions for potential regulatory safeguards and proposes further research to assess these potential safeguards.

II. METHODOLOGY

This Article contributes to the literature on mandatory arbitration of employment claims by providing a case study of labor-arbitration awards published by the Bureau of National Affairs, Inc. (BNA) between 1992¹³¹ and 2010.¹³² The research team searched the database to find awards addressing claims under the Americans with Disabilities Act or Title VII of the Civil Rights Act, or discrimination claims, including disability accommodation claims. The following four searches were performed: (1) “ADA” “Americans with Disabilities Act” “disability discrimination” “accommodation”; (2) “Title VII” “race discrimination” “sex discrimination”; (3) “sexual harassment”; and (4) “pregnancy discrimination.”¹³³ The

129. See Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 403 (2005); Bales, *supra* note 122, at 343; Burch, *supra* note 117, at 1348; Malin, *supra* note 91, at 311.

130. Of course, something other than arbitration or litigation might provide more satisfactory outcomes for all involved.

131. 1992 was selected as the start date because the effective date of the ADA was January 26, 1992. The research team searched for Title VII and discrimination claims as far back as the database permitted, with the earliest award dated 1981, but the author has not compiled that data.

132. The BNA database is one of two large commercial databases that are traditionally used by attorneys representing parties in labor arbitration and by the neutrals to research their cases. The particular database searched is the BNA Labor Relations Reporter Labor Arbitration Reports via LexisNexis Labor Arbitration Awards (Published and Unpublished). The research team also searched the CCH database, the other large commercial provider of arbitration awards, but the author has not yet compiled that data, which may provide the basis for a future similar article.

133. A fifth search “ADEA” “Age Discrimination in Employment Act” was also run but returned only 35 awards, which are not relied on by this Article.

research team retrieved 684 awards, 225 of which were responsive to the first ADA-related search.

The author then sifted through the summaries provided by the research assistants reading awards that appeared as though they might be on point. Many of the awards retrieved involve cases where the grievant was terminated for sexual harassment rather than a grievant bringing a claim of discrimination; these are excluded from the ultimate case study, although they may shed light on arbitrators' ability to interpret Title VII.¹³⁴ A few opinions decided that the discrimination claim was for the courts, and so the claim was not resolved in arbitration. These are excluded as well. Many other cases were off point, containing search terms only because they were part of quoted contractual language and not because they formed the basis of the claim. Other off-point cases were excluded because they contained search terms but were completely unrelated to the arbitration of discrimination claims.

Ultimately, the case study relies primarily on 160 awards, 101 of which result from the first ADA-related search. These cases involve claims for discrimination, retaliation, or failure to accommodate, including claims for reverse discrimination and also claims in which a nondisabled employee grieved losing some position or slot to a disabled person. From time to time during the discussion of the awards, other cases involving different types of claims are mentioned and cited.

The data, of course, do not represent a complete picture of what actually occurs in arbitration. The sample cannot be considered representative, and it is not a reliable basis for statistical analysis because many labor-arbitration awards, although likely involving a written decision, are not published by BNA. BNA relies on arbitrators to seek permission from the parties and send awards to BNA for publication. While unlikely, some labor arbitrators may not be aware of the opportunity for BNA publication. Some arbitrators elect not to publish any awards unless required to by the CBA.¹³⁵ Others may seek permission to publish awards only when the decision relates to an open or high-profile issue, or concerns a case that

134. Perhaps this data will serve as the basis for a future article.

135. They possibly do so because they rule more often for employers or for unions and do not wish that information to be publicly available. Because, however, both management and union-side attorneys have networks of other attorneys that share unpublished decisions and information about the reputation of arbitrators, the arbitrators likely do not have such a motive. More likely, they may do so because they do not wish to charge for the time necessary to write a polished, publishable decision or because they wish to keep the details of the case confidential, particularly where the opinion states a particular witness was not credible. In some regions, such as New England, there is a culture of nonpublication. No strong hypotheses indicate that those who do not publish rule differently than those who do.

would be useful to many companies or industries. Even those who routinely seek permission to publish may not always obtain permission from both parties.¹³⁶

Thus, this Article provides a subjective case study of labor arbitration, and the conclusions reached are, therefore, tentative. Certainly, some companies may continue to promulgate apparently unfair policies,¹³⁷ and, while the risk they will do so is lower with union representation, certainly it is not outside the range of probability. However, this case study does demonstrate what is happening in a cross section of cases from different providers and regions in labor arbitration of employment discrimination cases. Moreover, this case study provides a view of what is realistically possible in labor arbitration, particularly if mandatory labor arbitration of employment-discrimination claims was regulated in some manner by federal legislation.

III. ANALYSIS: WHAT THE AWARDS TELL US

This Part describes and analyzes the above-mentioned awards in light of the previously discussed objections to mandatory labor arbitration of employment-discrimination claims.¹³⁸ After briefly describing the types of cases and where the hearings were held, the following subsections discuss procedural concerns, substantive concerns, and concerns that labor arbitration is even more ill-suited for deciding employment-discrimination claims than mandatory employment arbitration.

Of the 101 ADA-related cases, seventy-six asserted a violation of the ADA or a similar state statute either solely as a statutory violation or, in the majority of cases, because the statute was

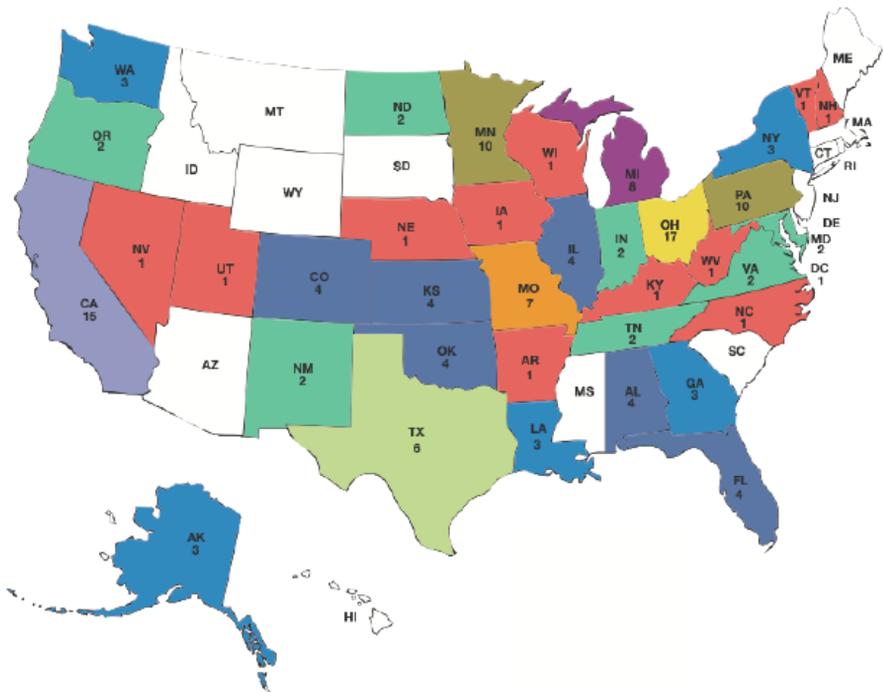
136. When would a party elect not to publish? Perhaps employers who lose do not want a discrimination finding to be publicized. Perhaps, but less likely, because grievant names are often redacted, a grievant does not want private facts about losing a harassment or discrimination claim publicized. Why would a losing party ever agree to publication? Perhaps precisely because the losing party or the party's attorney wishes the arbitrator's decision and rationale to be widely available to others thinking of bringing or defending a similar case so that they do not waste money doing so or so they can come up with different arguments than those that failed. Perhaps the parties have a practice of not objecting to publication, the arbitrator seeks permission at the outset of the arbitration before the parties know who has won, or the arbitrator provides a form at the outset, which asks the parties to object to publication within thirty days after the award, and the parties forget to object.

137. See Sabbeth & Vladeck, *supra* note 20, at 828 (“[S]tudies relying on data from the American Arbitration Association . . . will necessarily under-represent unscrupulous employers or egregiously unfair arbitration provisions, because the AAA is a relatively reputable organization, which as a matter of practice refuses to arbitrate under rules it deems unfair.”) (footnote omitted).

138. See discussion *supra* Part I.C.

incorporated into the CBA. Twenty-five, including the ten cases where an employee complained of a disabled employee's benefit, asserted only a violation of a contractual provision such as a no-discrimination clause, a just cause provision, or a seniority provision. Of the fifty-nine remaining discrimination cases, thirty-five asserted a violation of Title VII or a similar state statute, while twenty-four relied only on a contractual provision.¹³⁹

NUMBER OF AWARDS GIVEN BY STATE



The disputes arose and were arbitrated all across the country. Thirty-six of the fifty states and the District of Columbia are represented among the 138 awards for which the location was ascertainable. Every region is represented, with Ohio accounting for seventeen cases, the most of any single state.¹⁴⁰

139. In these cases as well, the types of contractual clauses relied on were no-discrimination clauses, just cause provisions, and seniority provisions.

140. The breakdown of the 138 cases was as follows. AL(4), AK(3), AR(1), CA(15), CO(4), FL(4), GA(3), IL(4), IN(2), IA(1), KS(4), KY(1), LA(3), MD(2), MI(8), MN(10), MO(7), NE(1), NV(1), NH(1), NM(2), NY(3), NC(1), ND(2), OH(17), OK(4), OR(2), PA(10), TN(2), TX(6), UT(1), VT(1), VA(2), WA(3), WV(1), WI(1) & DC(1).

A. Procedural Protections in Labor Arbitration

This section reviews the process of labor arbitration of discrimination claims. It first reports the selection process for arbitrators, which relates to which provider's rules, if any, governed the dispute. Second, it reports the length of time taken to settle the dispute, which relates to the efficiency and cost of the process. Finally, it reports data related to specific due-process protections.

1. Service Providers

The service provider handling the greatest number of claims was the Federal Mediation and Conciliation Service (FMCS) with eighty awards, approximately 50 percent of the total.¹⁴¹ As to procedural protections, the FMCS rules provide for a neutral arbitrator who is not employed as an advocate,¹⁴² an award within sixty days of the close of the record,¹⁴³ and a "fair and adequate hearing" with the opportunity to present evidence and argument.¹⁴⁴

The AAA handled a substantial number of the claims, with twenty-four awards, or approximately 15 percent of the total.¹⁴⁵ As discussed above, the AAA rules incorporate the provisions of the Protocol.¹⁴⁶ Other services that handled at least one arbitration were the California State Mediation and Conciliation Service, the Michigan Employment Relations Commission, the Minnesota Bureau of Mediation Services (BMS), the New York Public Employees Relation Board (PERB), the Pennsylvania Bureau of Mediation (PBM), the U.S. Department of Labor's Office of Labor-Management Relations, the Vermont Labor Relations Board, and the

141. Fifty-two of the ADA search-related cases indicated the FMCS was the provider, while 31 of the other claims did so.

142. See FMCS Arbitration Services, 29 C.F.R. § 1404.5(c) (2011).

143. See *id.* § 1404.14.

144. *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the: Federal Mediation and Conciliation Service, National Academy of Arbitrators, American Arbitration Association*, FED. MEDIATION & CONCILIATION SERV. (June 2003), available at <http://www.fmcs.gov/internet/itemDetail.asp?categoryID=247&itemID=17942>.

145. Fourteen of the ADA-search-related cases indicated the AAA was the provider, while twelve of the other claims did so. Further exploration of the effect, if any, of different service providers on outcomes or opinions may be warranted as may be exploration of any differences between public and private sector unions' claims.

146. See *supra* Part I.D.

Washington Public Employment Relations Commission.¹⁴⁷ Together, these services accounted for eleven cases, or approximately 7 percent of the total.

In the remaining forty-five cases, or approximately 28 percent of the total, it was not possible to discern which service, if any, was used. Unions and employers sometimes agree to a permanent board or panel of arbitrators for the term of the contract.¹⁴⁸ It is possible that many of these cases were handled by a neutral selected from such a permanent panel and that others were mutually agreed upon by the parties during the grievance process leading up to the arbitration.

2. Time to Resolve

Arbitration is touted as a more efficient and less time-consuming procedure for settling disputes than litigation.¹⁴⁹ The opinions and awards do not reflect the number of hours clients and their representatives spent attempting to settle the dispute during the grievance process or preparing for the arbitration. The conventional wisdom is that fewer hours would be spent preparing for and arbitrating a case than would be spent in litigation, the required administrative processes preceding litigation, and at trial.¹⁵⁰

Except in four instances, the decisions do reflect the length of time it took to decide the dispute. For each dispute, the research team calculated the number of days between the triggering incident—such as termination, suspension, request for accommodation, or harassment—and the date of the award. In three instances, the date of the triggering incident was not reflected in the opinion, and the date of the filing of the grievance was used

147. The BMS, PERB, and PBM each handled two cases while all the other listed services handled one.

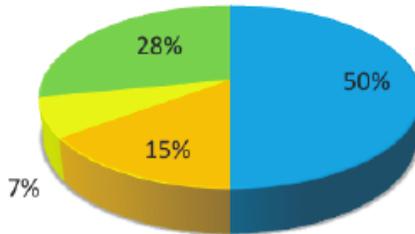
148. See Thomas H. Oehmke & Joan M. Brovins, *Arbitrator Selection and Service*, 97 AM. JUR. TRIALS 319, § 8 (2005) (“Some collective bargaining agreements (in the automotive and steel industries, for instance) name a permanent panel of umpires who serve during the contract term to resolve worker grievances. Other labor agreements might provide a list of arbitrators, one of whom must decide the dispute. The practice of using one or more permanent arbiters has extended to some large, complex commercial construction projects where disputes must be resolved quickly.”).

149. JAY FOLBERG ET AL., *RESOLVING DISPUTES: THEORY, PRACTICE, AND LAW* 540 (2010) (“As compared to litigation, arbitration has traditionally been touted as a more efficient, speedy, and inexpensive path to justice.”).

150. Eisenberg and Hill, *supra* note 11, at 51.

PERCENTAGE OF CASES HANDLED

- FMCS (Federal Mediation and Conciliation Service) - 80 awards
- AAA (American Arbitration Association) - 24 awards
- Other service providers - 11 awards
- Unknown - 45 awards



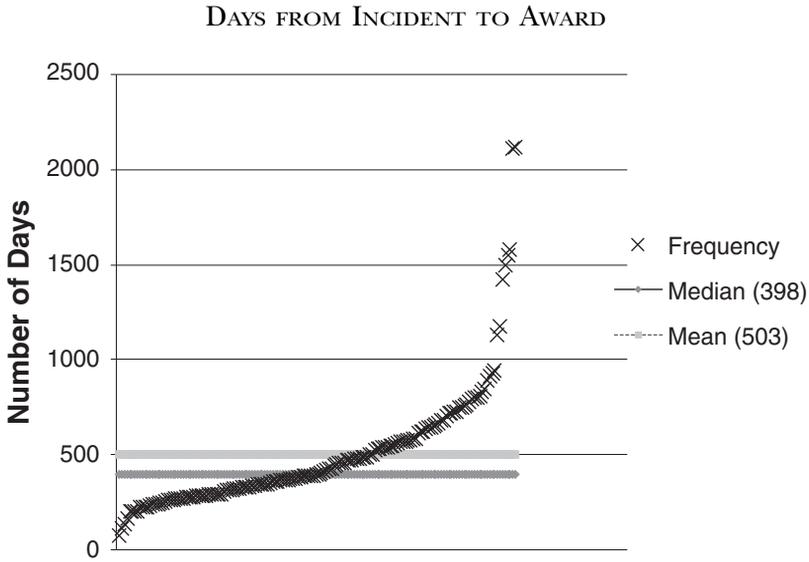
instead.¹⁵¹ The average length of time to obtain a decision was approximately 503 days. The median length of time was approximately 398 days.¹⁵² Sixty-three cases, or approximately 40 percent, were decided in less than 365 days; 132, or approximately 85 percent, in less than 730 days; 148, or approximately 95 percent, in less than 1095 days; 151, or approximately 97 percent, in less than 1,460 days; and 154, or approximately 99 percent, in less than 1,825 days. Two cases took almost six years to resolve.

This average length of time is somewhat longer than ideal for an expedited system. Yet the length of time between a termination or other triggering incident and a court decision is probably, on average, longer. This is particularly true given that a claim must first be filed with an administrative agency such as the Equal Employment Opportunity Commission (EEOC) before a complaint can be filed in court.¹⁵³ Indeed, studies have reported a longer average time from filing a suit until a court decision, and that average does not

151. When only the month of the triggering event was known, the time was calculated from the first day of the month.

152. Of ninety-nine ADA search related cases, the average number of days to decision was approximately 480, and the median approximately 393. For the other fifty-seven cases, the average was approximately 543 days, and the median approximately 449.

153. Colvin reports a mean time of 361.5 days from filing to decision in AAA individual mandatory employment arbitration claims. Colvin, *supra* note 11, at 8.



reflect the time between the triggering incident and the filing of the complaint.¹⁵⁴

3. Procedural Protections

The cases studied lend support to the generally held understanding that labor arbitration provides a number of due-process protections. Generally, the practice in labor arbitration is to issue written opinions and awards. Because of the database selected (BNA), all of the awards studied were written and available via a commercial database. Eight awards, or approximately 5 percent, were unpublished, meaning that a large majority of the awards studied are available not only electronically but also in hard copy in many law libraries. Labor arbitration appears to be relatively transparent, with the name of the employer never being redacted. The names of coworkers, supervisors, and members of management also are sometimes published, although the grievant is typically identified only by an initial.

In labor arbitration, witnesses generally testify under oath and are subject to cross-examination, parties are often represented by counsel, grievants are almost always represented by some union agent, transcripts are sometimes taken, and post-hearing briefs are

154. See Eisenberg & Hill, *supra* note 11, at 51 (reporting 709 day mean in federal court on employment-discrimination claims and 723 day mean in state court on non-civil rights claims).

often submitted. Overall, a review of these cases indicates that the process appears to be fair. The evidentiary and arbitrability rules and lack of compulsory process do not appear to pose significant hurdles to discriminatees. The lack of discovery, however, even if not apparently unfair from a review of the opinions, does raise some concern. The awards shed little light on the availability of class-action procedures.

a. Witness testimony

Witness testimony is standard in labor arbitration, which generally proceeds like a trial with opening statements and then the calling of witnesses. Witness testimony was expressly mentioned in 132 of the awards. Fifty-three of the opinions explicitly mentioned that the grievant testified. While only six opinions explicitly mention that the testimony was produced under oath, swearing in witnesses is standard practice in labor arbitration. Cross-examination is also standard in labor arbitration, and nineteen cases explicitly mentioned that the witnesses were subject to cross-examination. A minority of cases, discussed further below, indicated that because a witness was unavailable, the opposing party did not have the opportunity to cross-examine the witness.¹⁵⁵

b. Representation

In all cases except one, the union controlled the grievance process and was the party represented at arbitration. In one case, an employee, represented by counsel, alleged a violation of the CBA to the Vermont Labor Relations Board without the assistance of a union.¹⁵⁶ Thus, none of the grievants represented themselves. As

155. See Dep't of Veterans Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571, 1573 (2007) (Terrill, Arb.) (one witness for each side not present); L.A. Cmty. Coll. Dist., 112 Lab. Arb. Rep. (BNA) 733, 737 (1999) (Kaufman, Arb.) (employer argued it was not provided opportunity to cross-examine author of medical reports); Johns Hopkins Bayview Med. Ctr., 105 Lab. Arb. Rep. (BNA) 193, 198 (1995) (Bowers, Arb.) (arbitrator notes that the employer relied on hearsay because a witness did not testify); Cal-Compack Foods, 105 Lab. Arb. Rep. (BNA) 865, 867 (1995) (Oestreich, Arb.) (first-line supervisor who prepared report not available); Kaiser Aluminum & Chem. Corp., 99 Lab. Arb. Rep. (BNA) 609, 611–12 (1992) (Goldberg, Arb.) (employer argued could not cross examine grievant and union experts because not testifying); U.S. Dep't of Labor, 98 Lab. Arb. Rep. (BNA) 1129, 1133 (1992) (Barnett, Arb.) (alleged harasser not at hearing); City of Berkeley, 94 Lab. Arb. Rep. (BNA) 1198, 1201 (1990) (Bogue, Arb.) (decision maker left employment and not available); *infra* notes 196–197 and accompanying text.

156. Vt. Pub. Safety Dep't, 100 Lab. Arb. Rep. (BNA) 370, 371 (1993) (Toepfer, Arb.).

discussed further below, a subjective reading of the cases indicated that, almost invariably, the grievants were well represented by the union. If one were not paying close attention while reviewing the cases, one might surmise, based upon the competent representation, that attorneys represented the unions in the large majority of cases.¹⁵⁷ In only eighty awards, or approximately 50 percent of the cases, however, the awards indicated that the unions, representing the grievant, were represented by counsel.¹⁵⁸ The awards indicated that employers were represented by counsel in 123, or approximately 77 percent, of the cases.¹⁵⁹ Eleven awards, or approximately 7 percent, indicated only that the union was represented, while forty-six awards, or approximately 29 percent, indicated that only the employer was represented.¹⁶⁰

c. Transcripts and briefs

It is common practice in most areas of the country for the parties to submit post-hearing briefs. Some parties, though perhaps not a large number, ordinarily have the hearing transcribed. While most of the awards did not indicate whether a transcript was taken or whether post-hearing briefs were filed, some did. Four awards indicated that a transcript was available, one explicitly indicated no transcript was taken,¹⁶¹ and another indicated a tape recording was available only to the arbitrator and would be destroyed after the

157. For instance, in one case the arbitrator noted, “[i]n a presentation and brief which display an excellent grasp of these legal principles, the Union asserts that the Grievant was wrongfully denied ‘three main jobs.’” *Bowater, Inc.*, 116 Lab. Arb. Rep. (BNA) 382, 386 (2001) (Harris, Arb.).

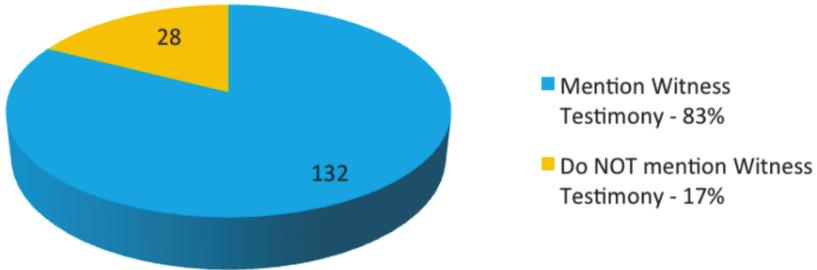
158. Of the awards resulting from the first ADA-related search, forty-eight awards indicated that the union was represented by an attorney, and seventy-four indicated that the employer was represented by an attorney. In eight cases only the union was represented by an attorney, while in thirty-two cases only the employer was represented. The union was represented by an attorney in thirty-six of the cases responsive to the other searches (excluding the case with the individual grievant), and the employer in fifty-seven (including the case with the individual grievant). There were three cases where only the union was represented by an attorney, and eighteen where only the employer was represented by an attorney. These numbers reflect that representation by an attorney was indicated; it is possible that an attorney was present in some of the cases where the award did not explicitly so indicate.

159. The difference in representation rates is statistically significant with a p value of < .0001. A p value of < .05 is considered statistically significant. A p value of .05 means the difference could only happen by chance one in 20 times. See the appendix for the full statistical analysis.

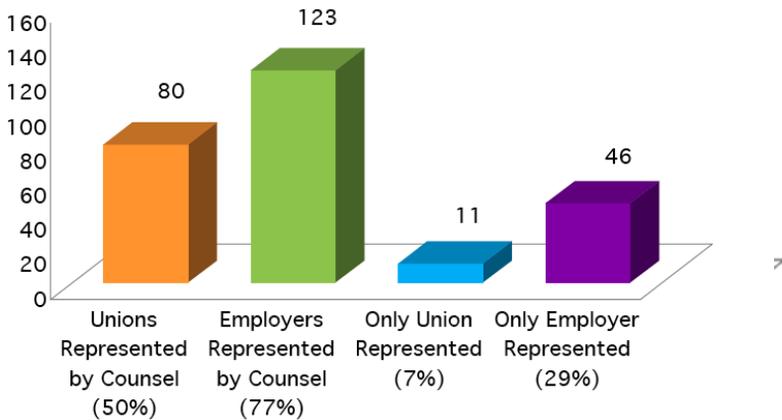
160. The difference is statistically significant with a p value of < .0001. See the appendix for the full statistical analysis.

161. See *City of Jackson*, No. FMCS 04-05962, 2005 WL 1800127, at *1 (Apr. 22, 2005) (Goldberg, Arb.).

NUMBER OF AWARDS EXPLICITLY MENTIONING WITNESS TESTIMONY
(160 AWARDS TOTAL)



REPRESENTATION BY COUNSEL



decision was issued.¹⁶² One case indicated that the record consisted of the arbitrator's notes and the exhibits,¹⁶³ from which it can be inferred that no transcript was made. Forty awards explicitly indicated that the parties submitted briefs. One award indicated that the parties waived the submission of briefs and provided oral summations instead.¹⁶⁴ In one case, the employer submitted a post-hearing brief, but the union representative gave an oral summation in lieu of a brief.¹⁶⁵

162. See *Boise Cascade Corp.*, 105 Lab. Arb. Rep. (BNA) 223, 224 n.1 (1995) (Michelstetter, Arb.).

163. *Reister & Thermacher Co.*, 107 Lab. Arb. Rep. (BNA) 572, 573 (1996) (Weisheit, Arb.).

164. *Olin Corp.*, 103 Lab. Arb. Rep. (BNA) 481, 483 (1994) (Helburn, Arb.) (holding that a more senior employee won in a claim for a job position over a disabled junior employee).

165. *Cont'l Cement Co.*, 107 Lab. Arb. Rep. (BNA) 829, 834-36 (1996) (Hilgert, Arb.) (upholding termination of alcoholic employee for absences).

d. Evidentiary and arbitrability rules

The rules governing arbitration are also sometimes criticized because rules of evidence may be enforced only loosely or short statutes of limitations may be applied strictly. While it is not apparent from the decisions whether the rules of evidence were used at the hearing, the evidence generally appears to be of the type that would be admitted at trial. There are some instances in which relaxation of the evidentiary rules is apparent.

While there may sometimes be issues involving admission of unreliable or prejudicial evidence in arbitration, no such evidentiary problems were apparent in the majority of the cases surveyed. Two cases from the early 1990s, which are earlier than the cases sampled, illustrate the potential problem. In one, the union objected to the admission of a document comparing the merits of the grievant, who alleged sex discrimination, to the merits of the male employee who was promoted instead.¹⁶⁶ The arbitrator overruled the objection, reasoning that the document was not documentary evidence but simply testimony of the managers in written form.¹⁶⁷ The grievance was denied.¹⁶⁸ In the second, hearsay indicating that coworkers were unable to understand the grievant, who had been demoted allegedly because of his race, was admitted.¹⁶⁹ Again, the grievance was denied.¹⁷⁰

Two cases illustrate the way in which arbitrators often address potential evidentiary problems by drawing inferences against the employer with regard to evidence that is not in highly reliable form. For instance, in one case, the employer relied on hearsay as to what measures were taken to help the grievants find appropriate positions. The arbitrator determined that, because the employer relied on hearsay, it had not actually tried to find jobs and sustained the grievance.¹⁷¹ In another case, the employer submitted a written report by a first-line supervisor who did not testify. The arbitrator considered that the union was unable to cross-examine the supervisor and sustained the grievance.¹⁷²

166. TU Elec., 97 Lab. Arb. Rep. (BNA) 1177, 1184 (1991) (Bailey, Arb.).

167. *See id.* at 1184.

168. *See id.*

169. Pac. Airmotive Corp., 95 Lab. Arb. Rep. (BNA) 777, 782 (1990) (Kaufman, Arb.).

170. *See id.* at 784.

171. John Hopkins Bayview Med. Ctr., 105 Lab. Arb. Rep. (BNA) 193, 198 (1996) (Bowers, Arb.).

172. Cal-Compact Foods, 105 Lab. Arb. Rep. (BNA) 865, 868 (1995) (Oestreich, Arb.).

Indeed, relaxed evidentiary rules possibly result in the admissibility of information favorable to the discriminatees.¹⁷³ For instance, in one case, the employer objected to medical reports submitted by the union because the employer had no opportunity to cross-examine the doctor. The arbitrator, however, admitted the reports on the basis that to do so is typical in arbitration. Ultimately the arbitrator sustained the grievance.¹⁷⁴ In another, the union submitted a statement from a coworker who did not testify, and the arbitrator sustained the grievance.¹⁷⁵

Employers sometimes asserted contractual time bars or other limits on grievances.¹⁷⁶ In the majority of these instances, arbitrators tended to find the claims arbitrable and proceeded to rule on the merits.¹⁷⁷ For instance, in one case, the arbitrator held that although many acts upon which the discrimination claim was based occurred more than thirty days before the grievance was filed, the

173. Dennis Nolan and Rick Bales discussed this possibility during the discussion group at the annual SEALS conference in 2011.

174. L.A. Cmty. Coll. Dist., 112 Lab. Arb. Rep. (BNA) 733, 737 (1999) (Kaufman, Arb.).

175. Dep't of Veterans Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571, 1583 (2007) (Terrill, Arb.); see also Rohm & Hass Tx. Inc., 113 Lab. Arb. Rep. (BNA) 119, 122 (1999) (Woolf, Arb.) (admitting statement of foreman for purpose of assessing credibility).

176. Some claims were barred because the arbitrator believed an administrative agency or court was the appropriate venue rather than arbitration. These are not included in the sample.

177. See e.g., City of Minneapolis, 125 Lab. Arb. Rep. (BNA) 558, 561 (2008) (Befort, Arb.) (arbitrator rejects argument of untimely refusing to elevate form over substance); Cincinnati Bd. of Educ., 122 Lab. Arb. Rep. (BNA) 837 (2006) (Murphy, Arb.) (finding employer waived argument that grievance was untimely); Fed. Bureau of Prisons, 117 Lab. Arb. Rep. (BNA) 515 (2002) (Neas, Arb.) (not time barred because continuing violation); Laporte Pigments, 114 Lab. Arb. Rep. (BNA) 1, 3-4 (2000) (Marino, Arb.) (rejecting employer's waiver argument); Mead Prods. Div., 114 Lab. Arb. Rep. (BNA) 1753, 1757-58 (2000) (Nathan, Arb.) (rejecting employer's waiver argument); Stark Cnty. Sheriff, 112 Lab. Arb. Rep. (BNA) 1045, 1050 (1999) (Fullmer, Arb.) (finding grievance arbitrable); El Paso Elec. Co., 109 Lab. Arb. Rep. (BNA) 1086, 1090 (1998) (Allen, Arb.) (grievance timely); City of Akron, 111 Lab. Arb. Rep. (BNA) 705, 709 (1998) (Frankiewicz, Arb.) (rejecting argument that untimely because oral meeting at step one sufficed); City of Tampa, 111 Lab. Arb. Rep. (BNA) 65, 73-74 (1998) (Hoffman, Arb.) (arbitrator considers claim despite untimeliness); Reister & Thesmacher Co., 107 Lab. Arb. Rep. (BNA) 572, 575 (1996) (Weisheit, Arb.) (modification of grievance at step two not a bar); Balt. Sun Co., 107 Lab. Arb. Rep. (BNA) 892, 895 (1996) (Liebowitz, Arb.) (uncertainty in language arbitrable); Exxon Co., U.S.A., Baton Rouge Refinery, 105 Lab. Arb. Rep. (BNA) 846, 849 (1995) (Caraway, Arb.) (finding that because union presented evidence of sex discrimination, a claim involving termination due to disability was arbitrable); City of Kentwood, 105 Lab. Arb. Rep. (BNA) 49, 53 (1995) (Lipson, Arb.) (arbitrable despite management rights clause); Henkel Corp., 104 Lab. Arb. Rep. (BNA) 494, 498-500 (1995) (Hooper, Arb.) (applying discovery rule and finding grievance timely filed within required 180 days); Rodeway Inn, 102 Lab. Arb. Rep. (BNA) 1003, 1013 (1994) (Goldberg, Arb.) (grievant's failure to testify in earlier steps was not bar to grievance); NASA Lewis Research Ctr., 100 Lab. Arb. Rep. (BNA) 909, 911 (1993) (Minni, Arb.) (grievance timely filed).

union's knowledge of the alleged discrimination—after investigation of those allegations and several others within the thirty-day period—occurred within the thirty-day period.¹⁷⁸ In only four instances—approximately 3 percent of the awards—did the arbitrator actually deny a grievance based on a short time limit provided for in a CBA or a similar procedural bar. In one case, the grievance concerned the failure to promote the grievant to a higher grade, meaning a higher paid level. The arbitrator refused to consider the allegation that race discrimination was the root cause of the grievant's earlier transfer from his position at the higher grade level to a position at a lower grade level. The union grieved once he was transferred back to his original position, but at a lower grade level. Because the grievant had not filed a grievance within fifteen days of his supervisor's racist remark resulting in the original transfer, the grievance, which did not arise until he was denied the reclassification over two years later, was barred from arbitration.¹⁷⁹ In another, the decision barred a claim alleging race discrimination because the grievant had not timely filed a grievance within ten calendar days of the time when the facts upon which the grievance was based were reasonably available. In a case alleging refusal to accommodate a disability, the grievance was filed fifty days after the grievant was denied reinstatement, rather than within the requisite five working days.¹⁸⁰ If the unions in these cases had waived the employee's right to go to court altogether, the arbitrators may not have enforced the short grievance deadlines. Nevertheless, these three cases do illustrate the potential difficulty of short filing deadlines in labor arbitration. In the fourth case, the decision found a claim for unequal pay barred because it had not been sufficiently raised by the union in the grievance steps leading up to arbitration.¹⁸¹

Additionally, one case actually applied the longer 180-day statutory limitation to bar much of a sex-discrimination claim. The grievant was required to arbitrate her claim after the United States

178. Dep't of Veterans Affairs, VA Med. Ctr., 101 Lab. Arb. Rep. (BNA) 731, 733-34 (1993) (Curry, Jr., Arb.).

179. Coastal Sys. Station (Dep't of the Navy), 119 Lab. Arb. Rep. (BNA) 540, 546, 549-50 (2003) (Bendixsen, Arb.); *see also* Sloss Indus. Corp., 102 Lab. Arb. Rep. (BNA) 917, 918-19 (1994) (Allen, Jr., Arb.) (barring claim alleging, in part, race discrimination because grievant had not timely filed grievance within ten calendar days of time when facts upon which grievance was based were reasonably available).

180. Allegheny Co., 121 Lab. Arb. Rep. (BNA) 1784, 1787 (2006) (Dissen, Arb.).

181. U.S. Dep't of Labor, 98 Lab. Arb. Rep. (BNA) 1129 (1992) (Barnett, Arb.); *see also* Burnett & Sons, 102 Lab. Arb. Rep. (BNA) 743, 748 (1994) (Concepcion, Arb.) (finding that grievant waived claim to pay by failing to record dates of alleged nonpayment).

District Court for the Western District of Virginia dismissed her discrimination suit for failure to exhaust her remedies under the CBA. While the union had not earlier filed a sex-discrimination claim, the employer permitted it to do so, and the statutory claim was arbitrated. The arbitrator declined to consider any evidence of discrimination occurring more than 180 days before the filing of the EEOC claim and found the sole incident during the permitted period not sufficiently severe or pervasive to create a hostile work environment. And, while evidence of race discrimination was presented, the decision found the union had waived the claim by failing to raise it in a grievance or with the EEOC in a timely manner.¹⁸² Of course, a court in the Fourth Circuit possibly would have ruled in substantially the same manner.

e. Discovery and compulsory process

Generally, labor arbitration is the culmination of a contractual arrangement in which a grievance is filed and discussed between the union and the employer at various steps. Only when a grievance cannot be resolved earlier in the grievance process does the union resort to arbitration, which is typically the last step of the process. During the grievance process, the parties typically discover information informally and exchange documents. In the private sector, the National Labor Relations Act provides a right to information pertaining to terms and conditions of employment, including grievances.¹⁸³ Unions often make a written request for information to the employer, which is enforceable by filing a charge with the National Labor Relations Board. While exact numbers were not compiled, a reading of the opinions studied indicates that in the large majority of the cases, the lower steps of the grievance process were used. The type of information gathered in those lower steps generally is not apparent from the opinions. Presumably, some of the exhibits admitted by unions were obtained during the process.

While information requests resemble requests for production of documents, other discovery tools widely used in litigation, such as interrogatories and depositions, are not generally available in labor arbitration. Similarly, while labor arbitrators can subpoena witnesses¹⁸⁴ and documents, enforcement is not always possible. In

182. Westvaco Corp., 111 Lab. Arb. Rep. (BNA) 887, 892 (1998) (Nicholas, Arb.).

183. NLRB v. Acme Indus. Co., 385 U.S. 432 (1967).

184. See, e.g., Twinsburg Bd. of Educ., 119 Lab. Arb. Rep. (BNA) 54, 55 (2003) (Chatman, Arb.) (mentioning subpoenaing a witness).

some cases the witness or document subpoenaed is not available until the day of the arbitration hearing.¹⁸⁵

Generally, the lack of discovery and difficulties with compulsory process did not have an obvious effect on the evidence admitted—which appeared to be comparable to the types of evidence admitted in courts—or on the opinions and awards.¹⁸⁶ In particular, the ADA-related opinions reflect that the union and union witnesses were generally able to provide information about the essential job requirements and potential accommodations. As discussed in more detail below, most opinions appear defensible under the governing law and contract, even when the author may not agree with the outcome.¹⁸⁷ In some limited instances, however, an opinion does leave the reader with the uneasy sense that more extensive discovery might have strengthened the union's case on behalf of the grievant.¹⁸⁸

One case in particular supports the notion that discovery may sometimes be inadequate when the employer controls the relevant information. The union argued that employees younger than the

185. There is evidence of restricted discovery procedures. In one case, an arbitrator admitted a prior statement written by the grievant but only with the admonition that it did not set a precedent for “one party to compel the other party to hand over such written statements during the investigative stage of the grievance disputes.” *Rohm & Hass Tx. Inc.*, 113 Lab. Arb. Rep. (BNA) 119, 122 (1999) (Woolf, Arb.). The NLRB has interpreted the NLRA to permit employer refusal to provide unions statements obtained during the course of an investigation of employee misconduct where the employer assured the witness that the statement would remain confidential. *N.J. Bell Tel. Co.*, 300 N.L.R.B. 42, 43 (1990); *Anheuser-Busch, Inc.*, 237 N.L.R.B. 982, 984–85 (1978).

186. For instance, in one case the union very effectively marshaled the evidence and cited nine facts, which it asserted created “a strong inference of racial discrimination” if taken together. *City of Berkeley*, 94 Lab. Arb. Rep. (BNA) 1198, 1200 (1990) (Bogue, Arb.). Despite the union's efforts, however, the arbitrator disaggregated each piece of evidence and refuted each one by one, which is not dissimilar to how a court might address the claim. *Id.* at 1204–05.

187. See *infra* Part IV.B.1.

188. Some authors have argued that in the nonunion context employer adopted dispute resolution systems create symbolic compliance with antidiscrimination principles but do not necessarily effectively remedy discrimination. See Lauren B. Edelman, Howard S. Erlanger & John Lande, *Internal Dispute Resolution: The Transformation of Civil Rights in the Workplace*, 27 *LAW & SOC'Y REV.* 497, 508, 530 (1993). Further, they argue courts tend to defer to these inadequate procedures. See Lauren B. Edelman et al., *When Organizations Rule: Judicial Deference to Institutionalized Employment Structures* at 63 (Sept. 2010), available at http://www.americanbarfoundation.org/uploads/cms/documents/judicial_deference_edelman.pdf. Others argue that internal dispute resolution systems are necessary to combat second-generation discrimination, recommending judicial oversight by “offering affirmative defenses for well-planned processes and liability for subjective criteria.” See Whitney Roth, *Second Generation Discrimination: The Need for a New Approach to Combat Subconscious Discrimination in the Workplace* (seminar paper on file with author) (citing Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 *COLUM. L. REV.* 458, 465 (2001)). Examination of these ideas in the union context may be warranted.

grievant with similar heart conditions were permitted to work. The decision states that the record “contains no evidence about the age, classifications or precise medical conditions of other employees and no showing that anyone else was in a materially similar situation.”¹⁸⁹ Nevertheless, the union prevailed because the decision held that an independent third doctor, rather than the company doctor, should have made the decision as to whether the grievant could work.¹⁹⁰ In a second case indicating that discovery may have been inadequate, the outcome may indeed have been affected. The decision states: “The Grievant presented a scattering of evidence that she simply did not receive the same treatment as whites in the workplace. However, the Grievant did not present sufficient credible evidence that whites were indeed treated more favorably than her.”¹⁹¹ The arbitrator found that, in fact, the record included evidence that white employees had been treated the same as the grievant.¹⁹² In a third case, the arbitrator found that while only two of 125 faculty members were African-American, there was not “a scintilla of evidence in the record of race discrimination.”¹⁹³

Yet another case highlighted a union’s failure to appreciate the strength of the employer’s case because of inadequate discovery.¹⁹⁴ The case was a contractual one in which no ADA claim was raised. The mentally ill grievant was discharged for an outburst that was the first indication of her illness and for which she was subsequently treated. During her treatment, a psychiatrist informed the employer that she had made threats against two supervisors. The grievant and union did not learn of this notification until the day of the arbitration hearing, when the warning letters were admitted into evidence.¹⁹⁵ Despite this setback, the grievance was sustained.

A few cases also illustrate the issue of witness unavailability, possibly due to the lack of enforceable compulsory process. For instance, an employer in one case submitted a first-line supervisor’s written

189. *Noranda Aluminum, Inc.*, 119 Lab. Arb. Rep. (BNA) 217, 221 (2003) (Gordon, Arb.).

190. *Id.* at 222.

191. *Nw. Publ’g, Inc.*, 104 Lab. Arb. Rep. (BNA) 91, 95 (1994) (Bognanno, Arb.).

192. *Id.*

193. *Lakeland Cmty. Coll.*, 127 Lab. Arb. Rep. (BNA) 1238, 1239, 1248 (2010) (Cohen, Arb.); *see also* *U.S. Dep’t Housing & Urban Dev.*, 121 Lab. Arb. Rep. (BNA) 1261, 1267 (2005) (Coyne, Arb.) (finding “not the slightest trace of age or race discrimination”).

194. In another case, the union challenged the employer’s failure to provide information about the damage caused by the grievant’s negligence before the hearing, which, while not related to the discrimination claim, illustrates the potential issue of lack of adequate discovery. *MSX Int’l, Inc.*, 125 Lab. Arb. Rep. (BNA) 652, 656 (2008) (Suardi, Arb.); *see also* *Lansing Sch. Dist.*, 96 Lab. Arb. Rep. (BNA) 749, 755 (1991) (Roumell, Arb.) (union in reverse discrimination case objected to exhibit produced only at hearing).

195. *AAFES Dist.*, 107 Lab. Arb. Rep. (BNA) 290, 292 (1996) (Marcus, Arb.).

description of a coemployee's report of an alleged altercation. The arbitrator stated that the supervisor was not available to testify at the hearing.¹⁹⁶ The arbitrator considered that fact in ruling for the union. In another case, the official who made the decision to discharge the grievant was not available as a witness because he had retired.¹⁹⁷ It is likely that in litigation he would have been subpoenaed to testify even if he had retired. Again, however, the grievance in this case was sustained.

Finally, several cases demonstrate that although inadequate discovery may occasionally hamper grievance arbitration, arbitrators sometimes use creativity in addressing the resulting lack of information. In one case, a coworker apparently reported to a parent that the grievant, a high-school security specialist, was engaging in sexual conduct with her daughter. He believed this false accusation was part of a pattern of discrimination against and harassment of black males, since a prior principal was terminated for engaging in sexual conduct with a student. The union failed to produce sufficient evidence to prove discrimination, and the arbitrator stated: "The union's effort to meet its burden of proof was undoubtedly hampered by the way in which the employer conducted its investigation."¹⁹⁸ In an attempt to rectify the situation, the arbitrator ordered that the employer take measures to ensure that the employment record of the grievant would not be not adversely affected by this controversy, to require all persons to discontinue any investigation of the matter, to assure that future investigations of racial discrimination or harassment would be investigated by persons with competency for the task, and to keep the coworker away from the grievant and order her to cease monitoring the grievant's activities.¹⁹⁹ In another case, although it caused some delay,²⁰⁰ the arbitrator was able to provide the union with time for discovery. At

196. Cal-Compack Foods, 105 Lab. Arb. Rep. (BNA) 865, 866 (1995) (Oestreich, Arb.).

197. Dep't. of Veterans Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571, 1580 (2007) (Terrill, Arb.); *see also* Orange Co., Fla., 124 Lab. Arb. Rep. 150, 153-54, 156 (2007) (Smith, Arb.) (union admitted statements of past fire chief, who did not testify, and lost grievance); City of Berkeley, 94 Lab. Arb. Rep. 1198 (BNA) (1998) (Boque, Arb.) (nonbinding arbitration where one decision maker not available); John Hopkins Bayview Med. Ctr., 105 Lab. Arb. Rep. 193, 198 (BNA) (1995) (Bowers, Arb.) (sustaining the grievance because the employer did not make an effort to locate positions for grievants and because the key witness was not present); U.S. Dep't of Labor, 98 Lab. Arb. Rep. (BNA) 1129, 1133 (1992) (Barnett, Arb.) (arbitrator drew adverse inference against employer because harasser supervisor failed to appear).

198. Seattle Sch. Dist., 119 Lab. Arb. Rep. (BNA) 1145, 1154 (2004) (Elinski, Arb.).

199. *Id.* at 1156.

200. W.G. Tomko & Sons Mech. Contractors, 114 Lab. Arb. Rep. (BNA) 314, 315 (2000) (Dissen, Arb.). There was over a two-year period between filing and decision, five months of which were between the initial hearing date and actual date. *Id.*

an initial hearing, the union indicated that it intended to present evidence of a pattern of racially discriminatory conduct in the employer's layoff practices, and that its prior request for records from the employer had not been fully answered. The hearing was continued, and the union apparently obtained sufficient records, because expert testimony based upon union records concerning the hiring and length of employment was entered into evidence.²⁰¹ Ultimately, despite apparently procuring the information, the union lost the grievance.

f. Class actions

One protection that is available in litigation, but often lost through agreements to arbitrate, is the ability to bring a class-action lawsuit.²⁰² Only one decision explicitly framed the case under consideration as a class-action grievance,²⁰³ and all the cases proceeded on behalf of only one or a handful of named grievants. Some of the grievances, if sustained, would certainly have had a prospective effect—somewhat similar to injunctive relief or declaratory judgment—on those employees in the bargaining unit. For instance, claims to enforce seniority over disability accommodation, to accommodate lifting restrictions or limited hours of work, to eliminate English-only rules, to address reverse discrimination, or to prohibit physical-abilities tests or required Sunday work certainly impact a group of employees. The issue of making legal recourse available to a group with limited individual damages, however, was not raised in the cases. In part, this is explained by the limited damages awarded in these cases, discussed below.²⁰⁴

B. Substantive Outcomes in Labor Arbitration

Overall, the decisions appear to be fair and well-reasoned. Indeed, an employer or other person who knew nothing about the

201. *Id.*

202. Whether a union can agree to bring claims only as individual claims, and accordingly, give up the right to class actions without violating the National Labor Relations Act is an open issue. *D.R. Horton, Inc.*, 357 N.L.R.B. No. 184 (2012) (holding an individually negotiated class action waiver violates the National Labor Relations Act).

203. *Del Monte Foods Pittsburgh Factory*, 121 Lab. Arb. Rep. (BNA) 1100, 1100–02 (2005) (Miles, Arb.) (addressing claim of only one grievant despite label of class action grievance).

204. See *infra* notes 263–282 and accompanying text.

ADA could certainly learn its requirements from reading the relevant decisions and awards.²⁰⁵ The positions held by the grievants indicate that many are not highly educated and probably do not earn high salaries.²⁰⁶ The majority worked in manufacturing production positions; others worked as custodians, office workers, grocery checkers, warehouse workers, drivers of vehicles, mechanics, housekeepers, security officers, and patient escorts. Only a minority held positions requiring more education, such as teachers, firefighters, police officers, and computer assistants.²⁰⁷ Only a very small minority was highly educated, such as a librarian, a math professor, an English professor, and another Ph.D.²⁰⁸ Fee-shifting statutes and the possibility of punitive damages in discrimination cases make it possible that some of these cases might have been taken by attorneys, even without the availability of the grievance-arbitration process. In fact, the employee grievant in some cases probably had counsel in a related administrative proceeding or court case.²⁰⁹ But a subjective view indicates that many would not have had representation without the union.²¹⁰

205. While there were not as many awards in Title VII cases, with a greater number of awards, the same promises to be true.

206. Approximately 132, or 83 percent, of grievants fell in this category.

207. Approximately 18, or 11 percent, fell in this category. The data was not sorted to determine whether there were noticeable differences in win rates or remedies based on education level.

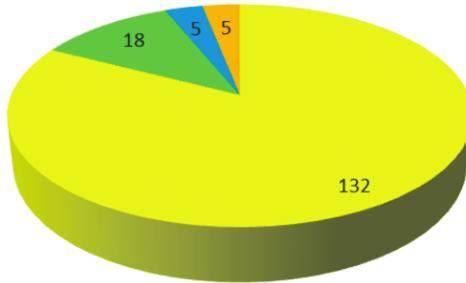
208. Lakeland Cmty. Coll., 127 Lab. Arb. Rep. (BNA) 1238, 1239, 1248 (2010) (Cohen, Arb.) (English professor at community college); Hartnell Cmty. Coll. Dist., 125 Lab. Arb. Rep. (BNA) 1545, 1545 (2008) (Staudohar, Arb.) (English professor at community college); L.A. Cmty. Coll. Dist., 112 Lab. Arb. Rep. (BNA) 733, 734 (1999) (Kaufman, Arb.) (math professor at community college); Cleveland Pub. Library, 105 Lab. Arb. Rep. (BNA) 781, 782 (1995) (Smith, Arb.) (professional librarians); NASA Lewis Research Ctr., 100 Lab. Arb. Rep. (BNA) 909, 909 (1993) (Minni, Arb.) (PhD and engineer).

209. See e.g., U.S. Marine Corps, 110 Lab. Arb. Rep. (BNA) 955, 957 (1998) (Cornelius, Arb.) (explaining that the grievant hired counsel to represent him in the case, but was represented by the union in the arbitration proceeding); Westvaco Corp., 111 Lab. Arb. Rep. (BNA) 887, 888 (1998) (Nicholas, Arb.) (explaining that the court case was dismissed because the grievance arbitration procedure had not been exhausted). The author did not specifically track which cases indicated that there was a related proceeding in which counsel was likely utilized, though doing so might reveal interesting data. In any event, whether the union or the employee hired counsel in these cases could not be ascertained from the awards.

210. Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RESOL. J. 9, 10 (2003) (arguing that lower income employees are unlikely to show the \$60,000 worth of provable damages necessary to procure representation in an employment discrimination lawsuit); St. Antoine, *supra* note 7, at 636 ("Both personal anecdote and more systematic studies indicate that access to the courts will not be easy for the usual lower-paid worker with an employment claim.").

EMPLOYEES' EDUCATION LEVEL

■ Labor (unskilled or skilled) - 83%
 ■ Educated - 11%
■ Highly Educated - 3%
 ■ Unknown - 3%



Some of the cases provided complex analysis with citations to multiple legal authorities,²¹¹ while others focused primarily on the facts, citing only a statute or no legal authority at all.²¹² Of the 111 statutory cases, seventy-one, or approximately 64 percent, cited legal authorities other than the statute.²¹³ Of those, fifty-two cited relevant case law,²¹⁴ thirteen cited the EEOC guidelines or regulations,²¹⁵ and twenty-six cited other arbitration decisions.²¹⁶ Seventeen decisions cited a treatise or other secondary source.²¹⁷

211. As to precedent, some arbitrators rely on relevant court decisions treating them as though they are mandatory authority. *Twinsburg Bd. of Educ.*, 119 Lab. Arb. Rep. (BNA) 54, 59 (2003) (Chatman, Arb.) (“[T]he Arbitrator cannot reach a decision in conflict with well-settled legal propositions.”).

212. Further analysis of this data and comparison to rates at which courts cite various forms of precedent might provide useful information regarding the ability of labor arbitration to create precedent. *Cf.* W. Mark C. Weidemaier, *Judging-Lite: How Arbitrators Use and Create Precedent*, 90 N.C. L. Rev. 1091 (2012) (comparing arbitrator’s use of precedent to citation practices of judges).

213. Of the seventy-six statutory ADA-related cases, fifty cited legal authority. Six of these cited only the ADA. Thus, forty-four, approximately 58 percent, cited authority other than simply the statute. Twenty-seven of the thirty-five statutory cases responsive to the other search, cite authority, approximately 77 percent. There were no cases responsive to this search that cited only the statute.

214. Twenty-nine of the cases responsive to the ADA-related search cited case law, and twenty-three of those responsive to the other searches did so.

215. Twelve of the cases responsive to the ADA-related search cited EEOC or other agency regulations, and one of those responsive to the other searches did so.

216. Thirteen of the cases responsive to the ADA-related search cited arbitration awards, and thirteen of those responsive to the other searches did so as well. As mentioned in one decision, “While recognizing that arbitration awards do not have the same weight as relevant decisions handed down by the legal system, there is an industry-wide recognition of the acceptance of prior arbitrators decisions when they relate to similar subject matter.” S.F. Unified Sch. Dist., 114 Lab. Arb. Rep. (BNA) 140, 143 (2000) (Riker, Arb.).

217. Ten of the cases responsive to the ADA-related search cited a treatise or other secondary source, while seven of those responsive to the other searches did so.

Forty decisions cited only the relevant statute or no legal authority.²¹⁸

Examples of well-reasoned decisions, reflected in the majority of the cases, and examples of less well-reasoned decisions are discussed in more detail below. The win-loss rates and related information also are reported.

1. Reasoned Opinions or Defensible Conclusions

The majority of cases reach outcomes that appear defensible under the governing law, even if one does not agree with the outcome. Some cases engage in relatively complex analysis. For example, decisions address whether a grievant is substantially limited in a major life activity,²¹⁹ whether an employee can perform essential job functions with accommodation,²²⁰ whether an accommodation is reasonable,²²¹ claims of hostile work environment²²² and of pregnancy discrimination,²²³ and the relationship between a disabled individual's right to accommodation and the seniority rights of others.²²⁴ One case deals with the complicated provisions regarding pre-employment and post-offer medical examinations and questionnaires.²²⁵ Another notes that arbitrators fairly regularly apply the notoriously difficult-to-teach *McDonnell Douglas* burden-shifting paradigm to decide discrimination cases.²²⁶

218. Of the seventy-six statutory ADA-related cases, six cases cited only the statute, and twenty-six cases cited no authority whatsoever. Of the thirty-five statutory cases responsive to the other search, eight cases cited no authority.

219. *City of Minneapolis*, Pub. Works Dep't, 125 Lab. Arb. Rep. (BNA) 558, 562 (2008) (Befort, Arb.); *Perfection Bakeries, Inc.*, 110 Lab. Arb. Rep. (BNA) 1043, 1047 (1997) (Stallworth, Arb.).

220. *Rheem Mfg. Co.*, 108 Lab. Arb. Rep. (BNA) 193, 196 (1997) (Woolf, Arb.).

221. *Reister and Thesmacher Co.*, 107 Lab. Arb. Rep. (BNA) 572, 576 (1996) (Weisheit, Arb.).

222. *Cincinnati Bd. of Educ.*, 122 Lab. Arb. Rep. (BNA) 837, 844 (2006) (Murphy, Arb.).

223. *Garden City Union Free Sch. Dist.*, 2006 WL 4577848, No. 13, 3900041706 (Nov. 4, 2006) (Gregory, Arb.) (LexisNexis, BNA Labor Arbitration Decisions—Published and Unpublished); *Minnegasco, Inc.*, 103 Lab. Arb. Rep. (BNA) 43, 48 (1994) (Bognanno, Arb.).

224. *Mead Products*, 114 Lab. Arb. Rep. (BNA) 1753 (2000), *Contracts, Metal & Welding, Inc.*, 110 Lab. Arb. Rep. 673 (1998); *City of Dearborn Heights*, 101 Lab. Arb. Rep. (BNA) 809 (1993).

225. *Boise Cascade Corp.*, 105 Lab. Arb. Rep. (BNA) 223, 228 (1995) (Michelstetter II, Arb.).

226. *Commercial Cleaning Sys., Inc.*, 122 Lab. Arb. Rep. (BNA) 1383, 1391 (2006) (McCurdy, Arb.) ("While *McDonnell Douglas* applies to civil actions under Title VII of the Civil Rights Act of 1964, as amended, it is commonly used in labor-management arbitration.").

Some decisions are very well reasoned, citing extensively to legal authorities.²²⁷ For instance, in one case the grievant could not use a pitchfork or pike pole, an essential job duty of his position for which the union sought accommodation. The arbitrator reasoned that having someone else clear jammed wood chips for him was not the type of restructuring the ADA required. The arbitrator further reasoned that, although the employer had previously provided a light-duty job, it did not need to do so permanently to accommodate the grievant. The arbitrator emphasized that clearing wood jams is an essential function rather than a marginal one because trucks were unloaded every 9.6 minutes, and a failure to quickly clear a jam could have harmful consequences. The arbitrator cited extensively to case law in denying the grievance.²²⁸

In another case, the arbitrator offered extensive citations to circuit court decisions in denying a grievance for sexual harassment.²²⁹ The decision reasoned that the supervisor's suggestive comments and offers to buy things for the grievant did not rise to the level of sexual harassment. Additionally, a manager's casual touching and prying into her personal business did not constitute sexual harassment. The conduct did not interfere with the grievant's work performance, "nor did it exceed the limits of 'intersexual flirtation' so as to rise to the level of 'severe or pervasive' sexual harassment."²³⁰ Moreover, the company properly responded when the grievant reported some of the conduct.²³¹

Other decisions focus on factual determinations, which are often quite important in discrimination cases, rather than application of

227. GTE N., Inc., 113 Lab. Arb. Rep. (BNA) 1047, 1052 (1999) (Daniel, Arb.) (citing court decisions in support of reasoning that new supervisors cannot discontinue accommodating grievant); Perfection Bakeries, Inc., 110 Lab. Arb. Rep. (BNA) 1043, 1049 (1997) (Stallworth, Arb.) (citing Circuit Court of Appeals decisions and EEOC regulations in support of reasoning that grievant was not substantially limited in a major life activity). A couple of Title VII cases from 1990, before the sample, also exemplify well-reasoned decisions that cite legal authority. One case dealing with the BFOQ (bona fide occupational qualification) defense to sex discrimination, extensively cites and discusses authority, including other arbitration cases, and distinguishes court precedent. *W. Sch. Dist. Bd. of Educ.*, 94 Lab. Arb. Rep. (BNA) 681, 685–87 (1990) (Kanner, Arb.). In the other, the arbitrator applied Title VII, the PDA, and governing case law to determine that a company's refusal to pay pregnancy leave benefits under a disability leave policy was discriminatory. *Kalamazoo Label Co.*, 95 Lab. Arb. Rep. (BNA) 1042, 1043–44 (1990) (Ellmann, Arb.).

228. *Bowater, Inc., Newsprint and Directory Div.*, 116 Lab. Arb. Rep. (BNA) 382, 386–90 (2001) (Harris, Arb.).

229. *S. Nuclear Operating Co.*, 118 Lab. Arb. Rep. (BNA) 1227, 1232–33 (2003) (Baroni, Arb.).

230. *Id.*

231. *Id.*

precedent. Nevertheless, these decisions appear well reasoned.²³² For instance, in one case, two grievants suffered lifting restrictions due to work injuries.²³³ The employer hospital had discontinued their employment as patient escorts when the lighter-duty work they had been performing was replaced by new technology. The arbitrator noted that the employer acted as though it had a legal obligation to find a suitable position for the grievants. Thus, the arbitrator determined that although lifting was an essential function of the position, the employer had violated the ADA by not reassigning them to a patient-aid position and providing the necessary training for that position—an accommodation that would not have caused an undue hardship to the employer.²³⁴

In another contract-based case, the decision focused on the timing of the adverse action.²³⁵ The grievant had asked her boss whether her gender was the reason she had not received a promotion. The arbitrator was convinced that the employer, in retaliation for the grievant's implied accusation of sex discrimination, took one of two impermissible actions when it assigned her to an unfavorable shift. The employer either made a decision immediately after her accusation to assign her to the first shift, or the employer considered asking her to accept first shift the day before the accusation but then abruptly abandoned that plan and peremptorily assigned her to the first shift.²³⁶

Some cases indicate that arbitrators may apply precedent that is favorable to discriminatees. For instance, one case²³⁷ follows a Ninth Circuit opinion in which the court stated in dicta that even when an employee can already perform the essential functions of the job, reasonable accommodation may be required if it enables

232. See, e.g., *City of Selah v. Gen. Teamsters Local 524*, No. 16243-A-02-1377, 2002 WL 32002271, at *3 (Dec. 23, 2002) (Smith, Arb.) (reasoning that a partial hearing loss did not necessitate a change in grievant's duties); *Dep't of the Air Force*, 109 Lab. Arb. Rep. (BNA) 989, 992 (1997) (Levy, Arb.) (relying on the fact that employer failed to tell new supervisors of grievant's restrictions); *Waterous Co.*, 100 Lab. Arb. Rep. (BNA) 278, 282 (1993) (Reynolds, Arb.) (noting that other nondisabled employees are permitted to perform only one function within their job classification).

233. *Johns Hopkins Bayview Med. Ctr., Inc.*, 105 Lab. Arb. Rep. (BNA) 193, 197–99 (1995) (Bowers, Arb.).

234. *Id.*

235. *Madison Cnty. Sheriff's Dep't*, 107 Lab. Arb. Rep. (BNA) 967, 967–69 (1996) (Kubie, Arb.). In another decision from 1990, outside the scope of the relevant data set, the decision addressed nine facts, which the union asserted, together created “a strong inference of racial discrimination.” The arbitrator disaggregated each piece of evidence and refuted each one by one, which is not dissimilar to how a court might address the claim. *City of Berkeley*, 94 Lab. Arb. Rep. (BNA) 1198, 1200, 1203–05 (1990) (Bogue, Arb.).

236. *Madison Cnty. Sheriff's Dep't*, 107 Lab. Arb. Rep. (BNA) at 967–69.

237. *L.A. Cmty. Coll. Dist.*, 112 Lab. Arb. Rep. (BNA) 733, 735, 742 (1999) (Arb., Kaufman).

him to pursue a normal life.²³⁸ In this case, a math professor in the community college system was unable to walk very far before experiencing pain.²³⁹ He requested a transfer to a college closer to his house.²⁴⁰ The arbitrator granted the transfer.²⁴¹

Other cases indicate that arbitrators sometimes apply the law even less restrictively than the courts in favoring discriminatees.²⁴² In one case, a mechanic diagnosed with clinical depression was discharged after refusing to follow a direct order for the third time because he had not taken his medication.²⁴³ The arbitrator reasoned that he met all three of the definitions of disability because (1) his untreated depression prevented him from working, so he was substantially limited in a major life activity; (2) he had a record of impairment because there was a record of his depression; and (3) he was regarded as disabled because he was regarded as having clinical depression.²⁴⁴ The arbitrator also found that the employer's failure to take the grievant's illness into account before terminating him for insubordination constituted a failure to accommodate.²⁴⁵

In another case, the grievant suffered from only partial hearing loss.²⁴⁶ The arbitrator nevertheless found the employer had discriminated against him by relieving him of certain duties even though his hearing loss posed no safety threat.²⁴⁷ Indeed, one arbitrator recognized that when determining just cause, it is appropriate to consider the concept of reasonable accommodation—"the fundamental employer obligation" under the ADA—precisely because arbitrators had been doing so long before the ADA was enacted.

238. *Buckingham v. United States*, 998 F.2d 735, 740 (9th Cir. 1993).

239. *L.A. Cmty. Coll. Dist.*, 112 Lab. Arb. Rep. (BNA) at 735, 742.

240. *Id.*

241. *Id.*

242. *See, e.g., Flamingo Hilton-Laughlin*, 108 Lab. Arb. Rep. (BNA) 545, 554 (1997) (Weckstein, Arb.) ("[A]n employee who suffers a knee injury and has a degenerative joint disease of his right knee which prevents him from kneeling, stooping, bending, crawling, or heavy lifting does have a physical impairment that substantially limits a major life activity, i.e., working.").

243. *Laidlaw Transit, Inc.*, 104 Lab. Arb. Rep. (BNA) 302, 306 (1995) (Concepcion, Arb.); *see also Culver City Unified Sch. Dist.*, 110 Lab. Arb. Rep. (BNA) 519, 520, 526–27 (1997) (Hoh, Arb.) (requiring school district to accommodate teacher with sensitivity to fragrance by giving her input on which students may have lockers outside her classroom and by installing security cameras and notifying students that they will be disciplined for fragrance "assaults").

244. *Laidlaw Transit, Inc.*, 104 Lab. Arb. Rep. (BNA) at 306.

245. *Id.*

246. *City of Selah*, No. 16243-A-02-1377, 2002 WL 32002271, at *3 (Dec. 23, 2002) (Smith, Arb.).

247. *Id.*

The arbitrator also noted that, “[i]f anything, arbitrators have been more permissive than ADA.”²⁴⁸

Some awards, while reaching a defensible outcome, are not as well reasoned or well supported by citations to authority as would be ideal.²⁴⁹ In one case, for instance, the union challenged a mandatory overtime policy as applied to individuals physically restricted from working overtime.²⁵⁰ The arbitrator found that those with valid restrictions were being accommodated and that the policy itself did not violate the ADA. Such an outcome is certainly within the range of reason. The arbitrator, however, was not explicit about which cases he relied on or how the actual accommodations related to the finding that the ADA was not violated.²⁵¹

Even in those cases where the reasoning offends notions of justice, some outlier judges might make the same legal or factual ruling. In one case, the arbitrator noted that the grievant’s mental illness did not appear to be a disability covered by the ADA and that the employer did not appear to have a duty to accommodate.²⁵² In another, a pregnant woman was denied tenure. The arbitrator found that because she had miscarried, she was not pregnant at the time of the tenure decision, despite evidence that she had notified college decision makers, who were aware of the pregnancy and who mentioned it before the tenure meeting.²⁵³

248. Thermo King Corp., 102 Lab. Arb. Rep. (BNA) 612, 615 (1993) (Dworkin, Arb.) (“The right of handicapped people to hold jobs they can perform was a societal value long before Congress made it a law. Arbitrators expressed it decades before [the] ADA was enacted.”).

249. See, e.g., U.S. Dep’t of Hous. & Urban Dev., 121 Lab. Arb. Rep. (BNA) 1261, 1267 (2005) (Coyne, Arb.) (implying, but never explicitly stating, that white employees were hired for positions over black employees); Robinson Bus Serv., Inc., 116 Lab. Arb. Rep. (BNA) 372 (2001) (Cox, Arb.) (failing to cite case law, such as Faragher v. City of Boca Raton, 524 U.S. 775 (1998) and Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998), in support of employer defense); Meijer, Inc., 103 Lab. Arb. Rep. (BNA) 834, 840 (1994) (Daniel, Arb.) (providing no citation for proposition that it is doubtful that a mentally ill grievant is disabled under ADA if the grievant fails to seek treatment and take medication); Spectrulite Consortium, Inc., 101 Lab. Arb. Rep. (BNA) 1134, 1140 (1993) (Hilgert, Arb.) (failing to address the claim of discriminatory treatment in depth).

250. Bobcat Co., 119 Lab. Arb. Rep. (BNA) 817, 817–18 (2004) (Jacobowski, Arb.).

251. *Id.* at 820.

252. Anchorage Sch. Dist., 119 Lab. Arb. Rep. (BNA) 1313, 1321–22 (2004) (DiFalco, Arb.) (grievant, a custodial supervisor, suffering mental health and substance abuse problems, terminated for threatening to kill five coworkers); cf. Littleton v. Wal-Mart Stores, 231 Fed. App’x 874, 877–78 (11th Cir. 2007) (concluding that twenty-nine-year-old man with mental retardation was not an individual with a disability); Heisler v. Metro. Council, 339 F.3d 622, 628–30 (8th Cir. 2003) (depressive disorder is not a disability under ADA where plaintiff supervised others at work).

253. Hartnell Cmty. Coll. Dist., 125 Lab. Arb. Rep. (BNA) 1545, 1551–52 (2008) (Staudohar, Arb.); see also City of Plymouth, No. 09-PA-0847, 2010 WL 5575016 (Jan. 4, 2010)

In another case, the outcome was not affected by a misunderstanding of the law. The arbitrator was called upon to decide whether requiring a temporarily ill employee, who had sutures, to be able to perform 100 percent of his job duties—entering nuclear hot areas wearing a respirator—violated the ADA. The decision states that “[t]he reasonable accommodation is meant for prospective employees who want to work for the Company.”²⁵⁴ This description of the law is suspect, although the determination that such employees would not be substantially limited and therefore not covered under the ADA, is probably correct. This was, however, more than a decade ago. Today’s arbitrators are probably familiar with the coverage requirements of the ADA.

Finally, some arbitrators do not even appear to apply the ADA requirements, focusing instead on the union’s failure to prove that the Act requires an accommodation for the grievant’s condition or problem.²⁵⁵

(Daly, Arb.) (grievant did not complete paperwork verifying her disability and explaining her limitations so the ADA was not applied); Mich. Dep’t Pub. Health, 101 Lab. Arb. Rep. (BNA) 713 (1993) (Kanner, Arb.) (holding that white male with 4.4 more points than white female candidate in employment selection process was discriminated against when he was denied promotion in favor of her). One case that is earlier than those cases relied on in the research sample appears to illustrate the inadequacies of labor arbitration to address sex discrimination. A police officer was transferred because of her pregnancy. City of Aurora, 96 Lab. Arb. Rep. (BNA) 1196, 1199–1200 (1990) (Snider, Arb.). The representation, although by an attorney, appears inadequate, which may have been due to lack of discovery because certain information, like the maternity leave policy, was not produced until post-hearing briefs were filed. *Id.* at 1200–01. The arbitrator would not consider whether the pregnant grievant’s transfer was discriminatory unless the argument could be tied to a particular contract provision, and would not consider the maternity leave policy because it was not timely raised. *Id.* at 1201–03. A footnote, however, did reason that the woman was not discriminated against on the basis of pregnancy as compared to males on disability because they were not covered by the maternity leave policy. *Id.* at 1202 n.12. The footnote reasoned that the disparate treatment as compared to other pregnant officers was not because of sex, but must have been for some other reason. *Id.* The case seems to follow the logic of *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which was subsequently overruled by the Pregnancy Discrimination Act.

254. Johnson Controls World Services, Inc., 104 Lab. Arb. Rep. (BNA) 336, 342 (1995) (Goodstein, Arb.).

255. Minnegasco, 109 Lab. Arb. Rep. (BNA) 220, 224 (1997) (Jacobowski, Arb.) (finding that the union failed to prove that employee with alcoholism who lost job because of DWI required an accommodation). In this case, the arbitrator could have instead reasoned that the employee lacked the ability to perform an essential job duty, driving, even with accommodation. This would have been more in keeping with the ADA.

2. Win Rates and Remedying Discrimination

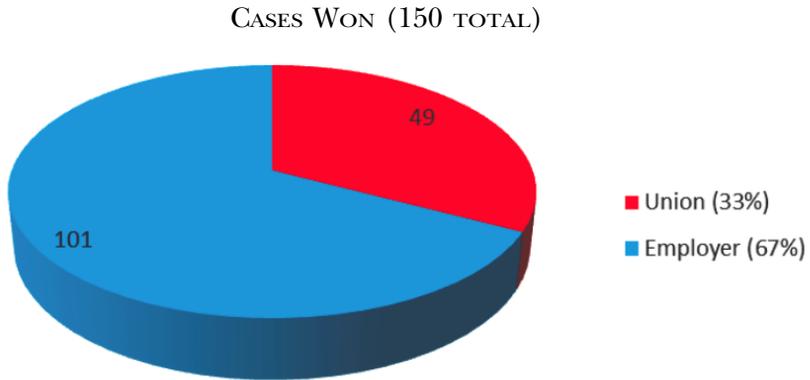
The win rate for unions appears to be low.²⁵⁶ Overall, the union prevailed in fifty-seven cases, or approximately 36 percent, and lost 103, or approximately 64 percent.²⁵⁷ Excluding cases where the union grieved on behalf of a group of senior employees against a policy benefiting a disabled employee or on behalf of the nonreligious majority in favor of a policy requiring the religious minority to work on Sundays, the sample size is reduced to 150 cases. Of those, the union prevailed in forty-nine cases, or approximately 33 percent, and lost 101 cases, or approximately 67 percent.²⁵⁸ Win

256. Scholars have found similarly low win rates in individual arbitration and federal court, but higher win rates in state court on nondiscrimination claims. *See, e.g.*, Colvin, *supra* note 11, at 5 (reporting 21.4 percent win rate in AAA individual mandatory employment arbitration claims); Eisenberg & Hill, *supra* note 11, at 48 (reporting 36.4 percent win rate in federal court on employment-discrimination claims and 56.6 percent win rate in state court on non-civil rights claims). The difference in win rates between labor arbitration reported in this research and AAA employment arbitration based on Colvin's research is statistically significant. The p value is .0019. The difference in win rates between labor arbitration reported in this research and state court based on Eisenberg & Hill's research is also statistically significant. The p value is <.0001. There is no statistically significant difference in win rates between labor arbitration reported in this research and federal court based on Eisenberg & Hill's research. The p value is .3911. See the appendix for the full statistical analyses. Scholars have also found low win rates in ADA cases in federal court. *See e.g.*, Amy L. Allbright, *2010 Employment Decisions under the ADA Titles I and V—Survey Update*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 394 (2011) (reporting a 1.8 percent win rate in federal court cases reported in Westlaw); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 248 (2001) (reporting a success rate in ADA appellate employment discrimination cases reported in Westlaw of 12 percent); *see also* Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 131 (2009) (finding employment discrimination plaintiffs have lower success rates by settlement, during pretrial adjudication, and at trial).

257. The union won thirty-nine cases responsive to the ADA-related search, and lost sixty-two of those. It won eighteen cases responsive to the other searches, and lost forty-one of those.

258. The difference between the unions' win rate and that of the employers, 101 of 150 cases (67 percent) is statistically significant with a p value of <.0001. See the appendix for complete statistical analysis. The union won thirty-two cases responsive to the ADA-related search, and lost sixty of those. It won seventeen cases responsive to the other searches, and lost forty-one of those. Disaggregating the two types of claims, thus, shows that the union won 35 percent of the ADA-related claims and 29 percent of the other discrimination claims. With a p value of .4894, the different win rates were not statistically significant. See appendix for complete statistical analysis. For both categories the win rate appears higher than that found for individual AAA employment arbitration and lower than that found in federal court. *See supra* note 256. The author did not further disaggregate the cases by categories such as sexual harassment, religious discrimination, and race discrimination, but assuming the small sample of fifty-eight cases could lead to valuable information, further disaggregation is warranted in future work. *See* Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185, 202–07 (2011) (qualitatively analyzing nineteen AAA individual employment arbitration racial harassment cases).

rates include a partial win on a statutory or contractual discrimination claim but do not include a claim where the union lost a discrimination claim but prevailed on an unrelated contract claim.²⁵⁹



The low win rate may be attributable to opportunities during the grievance process for employers to resolve cases in which grievants are likely to prevail, and to the fact that a union may thereafter knowingly bring a losing case, either to give voice to the dispute or to avoid a lawsuit claiming breach of its duty of fair representation.²⁶⁰ Additionally, the win rate may be lower because summary judgment is not traditionally used in labor arbitration to dispose of nonmeritorious cases.²⁶¹ Or it may be that some cases that grievants might have won in court or in another venue are lost in arbitration. A subjective reading suggests that more cases fall into the former category than the latter, although there are certainly cases that

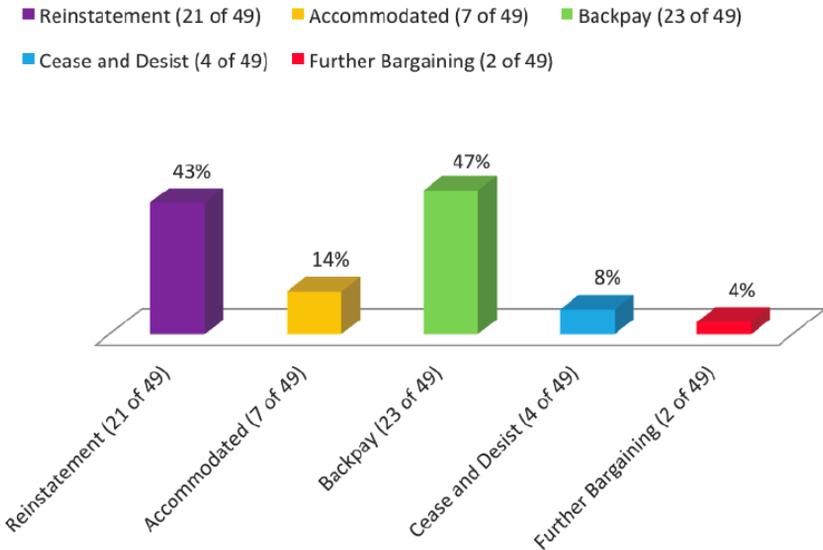
259. Further investigation of cases where grievants won on other grounds provides a subject for additional research. It is possible that a union contract which provides the grievant other avenues of winning a claim is preferable to having to claim through protected status, given that some scholars have argued that there is a psychic harm in being forced to claim through protected status. See, e.g., WENDY BROWN, *STATES OF INJURY: POWER AND FREEDOM IN LATE MODERNITY* 27–29 (1995) (arguing that resolving discrimination through litigation burdens victims' personal and public identities by permanently marking them as victims of discrimination). Others have noted that unions prefer to rely on contractual claims that "pose less of a danger of dividing workers." Estreicher & Eigen, *supra* note 68, at 4.

260. Cf. St. Antoine, *supra* note 7, at 639. Indeed, it is possible that there is actually a higher level of enforcement of potential discrimination claims with a union in the workplace than without. See David Weil, *Individual Rights and Collective Agents: The Role of Old & New Workplace Institutions in the Regulation of Labor Markets*, in *EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY* 13, 27 (2004), available at <http://www.nber.org/chapters/c9948>.

261. Bales, *supra* note 128, at 348.

grievants lost in arbitration but that they might have won in a different forum or with a different arbitrator.²⁶²

PERCENTAGE OF REMEDIES



The types of relief awarded in the cases in which the union prevailed are limited. In twenty-one cases, the grievant was reinstated, in seven the grievant was accommodated, in twenty-three the grievant received back pay or lost wages, in four cases the award ordered the employer to cease and desist from specific conduct or to engage in a specific policy, and in two the parties were ordered to engage in further bargaining.²⁶³ Other remedies included severance pay, payment of medical costs, promotion, shift assignment, training, creation of new positions and bestowal of “super-seniority,” removal of documents from personnel files, priority consideration for a position, transfer, medical examination, recall rights, and, in one case, a posted apology, assurances that employees could complain of discrimination, and a meeting with the union representative.²⁶⁴

In some instances, arbitrators acted more like settlement officers than decision makers, pushing the parties to work out a solution

262. See *supra* notes 252–253 and accompanying text; see, e.g., Orange Cnty., 124 Lab. Arb. Rep. (BNA) 150, 159 (2007) (Smith, Arb.) (holding that employer did not have to turn temporary position that included an exemption from required physical activity into a permanent position for employee with muscular dystrophy).

263. The data was not sifted to ascertain how many cases seeking reinstatement, as opposed to accommodation or back pay for a suspension, resulted in reinstatement, though doing so may provide further insight into the adequacy of the remedies in labor arbitration.

264. This summary does not include the seniority cases and the one case where a grievant challenged a policy favorable to those who could not work on Sunday for religious reasons.

themselves. In more than one instance, an arbitrator remanded the case to the parties to determine whether a reasonable accommodation for a disability could be made, but retained jurisdiction over the case.²⁶⁵ Arbitrators also ordered parties to negotiate layoff rights²⁶⁶ and the effect of an affirmative action policy.²⁶⁷

Arbitrators also seem not infrequently to come up with creative solutions that might not be implemented by a court. In one case, an employee had lung cancer and elected to claim disability instead of wearing a dust mask, but then sought to return to work when the disability application was denied. The employer refused reinstatement for the grievant's own safety. The arbitrator ordered a medical exam and a reasonable accommodation based upon the exam, and retained jurisdiction for ninety days to oversee implementation of the award.²⁶⁸ In another case, involving the termination of a grievant for outbursts and threats, the arbitrator ordered reinstatement conditioned upon the grievant continuing her treatment and medication. The arbitrator ordered that the grievant consent to the employer having access to the grievant's medical records and that the employer maintain that information in confidence.²⁶⁹

In another case, the arbitrator found that a hotel owner had retaliated against the grievant for complaining of sexual harassment. The arbitrator ruled that reinstatement was not appropriate because of the grievant's volatile relationship with the owner, and awarded severance pay instead. Additionally, cognizant of the chilling effect of retaliation, the arbitrator required the employer to

265. See Dep't of Veterans Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571, 1587 (2007) (Terrill, Arb.) (remanding to parties to determine if reasonable accommodation was possible); Sherwin-Williams Co., 113 Lab. Arb. Rep. (BNA) 1184, 1192 (2000) (Statham, Arb.) (reinstating employee subject to conditions, including that job placement is consistent with medical restrictions); U.S. Army Corps of Eng'rs, 107 Lab. Arb. Rep. (BNA) 202, 206 (1996) (Moore, Arb.) (directing parties to discuss applicability of ADA and retaining jurisdiction to conduct hearing if no satisfactory solution reached); Multi-Clean, Inc., 102 Lab. Arb. Rep. (BNA) 463, 469 (1993) (Miller, Arb.) (remanding to parties to determine if reasonable accommodations possible); Waterous Co., 100 Lab. Arb. Rep. (BNA) 278, 284 (1993) (Reynolds, Arb.) (reinstating employee and ordering parties to negotiate specific job functions).

266. Henkel Corp., 110 Lab. Arb. Rep. (BNA) 1121, 1127-28 (1998) (West, Arb.) (finding that a grievant with heart disease was not substantially limited and could be laid off, but not fired, after being transferred to a position that she could not work, though the parties would have to negotiate her layoff rights).

267. Mich. Dep't Pub. Health, 101 Lab. Arb. Rep. (BNA) 713, 719-20 (1993) (Kanner, Arb.) (determining white male was most qualified for a position that was awarded to a woman because of affirmative action policy, and ordering parties to settle within 30 days or submit briefs on subject of an appropriate award).

268. Champion Int'l Corp., 106 Lab. Arb. Rep. (BNA) 1024, 1033 (1996) (Howell, Arb.).

269. AAFES Distribution, 107 Lab. Arb. Rep. (BNA) 290, 297 (1996) (Marcus, Arb.).

post a formal notice containing an apology to the grievant, a statement setting forth the full order in the case, and specific assurances to employees that they may protest employment practices among themselves or to their union without fear of discipline or other retaliatory conduct. The award further ordered that the union representative would conduct a one-hour meeting with employees on company time to review the notice and answer questions.²⁷⁰

In some cases, the unions requested remedies that might have been available in court, but were denied by the arbitrators. For example, in one case, the employer prohibited the grievant, the union president, from wearing scrubs to work when female employees were permitted to do so. The union sought damages. The arbitrator found no evidence to support the \$500,000 damage request for stress and hardship. The arbitrator also found no constitutional violation had been properly alleged and, as a result, deemed damages of \$2 million for such violation inappropriate.²⁷¹ A court allowing this claim may not have made a large award but might well have awarded some damages. The arbitrator ordered only that the grievant be permitted to wear scrubs.

In another case, the grievants brought a sexual harassment claim and sought remedies that the arbitrator reasoned were not available in labor arbitration. The decision held that the arbitrator does not have authority, based on arbitral precedent, to order discipline of a supervisor because the supervisor is outside the bargaining unit. An arbitrator can order that conduct cease, but cannot even order an apology from the supervisor. Additionally, where Title VII is not fully incorporated into the contractual no-discrimination clause by terms prohibiting discrimination “as provided by law[.]” the parties prohibit sex discrimination using different procedural and remedial mechanisms.²⁷² The decision reasoned that arbitrators generally should not award damages for mental distress, and, even if they could, would need proof of the amount of harm, such as missed work, psychosomatic illness, or evidence of medical bills.²⁷³ Because this arbitrator mentions the difference between such an agreement and one that adopts the full statutory scheme, the result might be different under an express waiver post-*Pyett*, permitting an award of damages for mental distress, if proven.

Another case indicates that some employers use arbitration to reduce the risk of punitive damages and to try to bar legitimate claims

270. *Rodeway Inn*, 102 Lab. Arb. Rep. (BNA) 1003, 1015–16 (1994) (Goldberg, Arb.).

271. *Fed. Bureau of Prisons*, 117 Lab. Arb. Rep. (BNA) 515, 530 (2002) (Neas, Arb.).

272. *Union Camp Corp.*, 104 Lab. Arb. Rep. (BNA) 295, 301 (1995) (Nolan, Arb.).

273. *Id.* at 302.

altogether. A woman suffered harassment at the hands of her supervisor.²⁷⁴ She filed a court case, but the judge ordered the matter to arbitration upon the employer's motion. In arbitration, the employer argued that the union had not made a timely demand for arbitration. The arbitrator noted that "[i]t is rather interesting that the Company . . . was the party interested in forcing the dispute back to arbitration. . . . Now the Company raises the claim that the grievance is not timely . . . in an attempt to avoid arbitration as well. It is an interesting maneuver."²⁷⁵ The decision found that the grievant was subjected to a hostile work environment and thus awarded back pay for time missed because of the harassment and medical expenses. It did not, however, award any punitive damages, on the theory that no retaliation was proved.²⁷⁶

Moreover, one case indicates that the traditional focus of labor arbitration on reinstatement and the removal of disciplinary action may leave discrimination unremedied.²⁷⁷ The union challenged a layoff as retaliation for reporting sexual harassment.²⁷⁸ The arbitrator found that a supervisor had indeed sexually harassed the grievant for two years, but that a different manager had made the layoff decision, which the arbitrator reasoned was thus not retaliatory.²⁷⁹ Having lost the dispute, the grievant received no remedy for the harassment.²⁸⁰ As the company argued, the grievant could file a charge with the appropriate state agency or EEOC, but had not done so. Perhaps if the case had arisen post-*Pyett* under an explicit waiver, the arbitrator would have awarded some remedy for the harassment.

Finally, in one case, the union sought damages and attorneys' fees for a failure to accommodate a bipolar grievant. The arbitrator found that the employer had failed to accommodate the grievant and remanded the case to the parties to agree to a reasonable accommodation and appropriate damages. The parties settled before

274. El Paso Elec. Co., 109 Lab. Arb. Rep. (BNA) 1086, 1087 (1998) (Allen, Arb.).

275. *Id.* at 1090.

276. *Id.* at 1093.

277. On the other hand, in many cases reinstatement may be precisely the remedy a grievant most desires. *See, e.g.*, Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness & Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1, 26–27 (2012). Further research comparing the rate of reinstatement in arbitration versus court and the types of cases in which it is used may be warranted.

278. ITT Fed. Serv. Corp., 105 Lab. Arb. Rep. (BNA) 289, 294 (1995) (Landau, Arb.).

279. *Id.* at 295–96.

280. *Id.* at 297.

the additional hearing scheduled to address any remaining issues.²⁸¹

As the represented party, the union typically pays attorneys' fees. Thus, it is likely that the discriminatees in these cases did not bear any costs for attorneys' fees.²⁸² In the one case where the individual brought the claim, no information about who paid attorneys' fees was provided.²⁸³ As to the arbitrator's fee, the union and employer often split that cost. Some cases explicitly indicate this either in the quoted contract language or in the award. In a minority of cases, the losing party pays the arbitrator's fee. There were two cases in which the union, as the losing party, was to pay the fee.²⁸⁴ There was one in which the employer, as the losing party, was to pay.²⁸⁵

As to the concern about repeat players and the argument that, for a variety of reasons, the arbitral process may advantage them, only a few employers were involved in more than one arbitration.²⁸⁶ There were six repeat employers²⁸⁷ involved in approximately 8 percent of the cases. The employer won both arbitrations in two instances.²⁸⁸ In both of these instances, the same union was the opposing party. In one, the same advocate represented the employer in both arbitrations. The union in that case had the same advocate in both proceedings as well. The employer lost the first arbitration but won the second in two instances.²⁸⁹ The same union was involved in one instance and was represented by the same advocate.

The employer won the first arbitration but lost the second in two instances.²⁹⁰ In one instance, the employer was represented by the

281. Dep't of Veterans Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571 (2007) (Terrill, Arb.).

282. Union dues, of course, pay the fees.

283. Vermont Pub. Safety Dep't, 100 Lab. Arb. Rep. (BNA) 370 (1993) (Toepfer, Arb.).

284. Cincinnati State Tech., 114 Lab. Arb. Rep. (BNA) 153, 154 (2000) (Heekin, Arb.); GTE N., 113 Lab. Arb. Rep. (BNA) 665, 674 (1999) (Brodsky, Arb.).

285. Albertson's, Inc., 115 Lab. Arb. Rep. (BNA) 886, 894 (2000) (Gangle, Arb.) (holding that grievant lost sexual harassment claim but prevailed on other grounds).

286. I have excluded a case involving the same grievant that went to the same arbitrator two times, after the employer terminated the grievant a second time.

287. I included the Department of Veterans Affairs Medical Center as the same employer, even though it was a different center in two different states, under the assumption (possibly erroneous) that the Department of Veterans Affairs is a nationwide employer.

288. Rheem Mfg. Co., 117 Lab. Arb. Rep. (BNA) 473, 477 (2002) (Bankston, Arb.); Minnegasco, 109 Lab. Arb. Rep. (BNA) 220, 224 (1997) (Jacobowski, Arb.); Rheem Mfg. Co., 108 Lab. Arb. Rep. 193, 196 (BNA) (1997) (Woolf, Arb.); Minnegasco, Inc., 103 Lab. Arb. Rep. (BNA) 43, 48 (1994) (Bognanno, Arb.).

289. GTE N., Inc., 113 Lab. Arb. Rep. (BNA) 1047, 1052 (1999) (Daniel, Arb.); GTE N., 113 Lab. Arb. Rep. (BNA) 665, 674 (1999) (Brodsky, Arb.); Champion Int'l Corp., 109 Lab. Arb. Rep. 753, 761 (1997) (Giblin, Arb.); Champion Int'l Corp., 106 Lab. Arb. Rep. (BNA) 1024, 1033 (1996) (Howell, Arb.).

290. Dep't of Veterans Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571, 1587 (2007) (Terrill, Arb.); Veterans Affairs Med. Ctr., 114 Lab. Arb. Rep. (BNA) 1217, 1222 (2000)

same attorney both times. Different unions were involved in the two arbitrations.²⁹¹ In none of the six instances involving repeat employers was the second arbitration in front of the same arbitrator. The repeat player effect thus likely does not explain why an employer wins. Generally, concerns as to a repeat player effect are probably lessened in the union context where both the union and the employer tend to be repeat players.²⁹²

C. Union Representation in Labor Arbitration

As previously discussed, the grievance-arbitration process appears suitable for handling the majority of the cases, although some concern about discovery remains.²⁹³ Additionally, the cases indicate that in most instances, arbitrators have the ability to apply the law to the facts, not only to interpret CBA's.²⁹⁴ This section addresses additional concerns about the suitability of the labor-arbitration process to address discrimination claims, particularly the possibility that union conflicts will result in inadequate representation for discriminatees. It first discusses instances in which unions have negotiated greater or lesser protections for discriminatees. It then turns to whether union representatives are able to understand the law well enough to represent discriminatees, and, finally, to union representation of discriminatees more generally.

1. Union-Negotiated Protections for Discriminatees

In many instances, the union had negotiated a no-discrimination clause that formed one basis of the grievance.²⁹⁵ Negotiation of

(O'Grady, Arb.); Henkel Corp., 110 Lab. Arb. Rep. (BNA) 1121, 1127-28 (1998) (West, Arb.); Henkel Corp., 104 Lab. Arb. Rep. (BNA) 494, 501 (1995) (Hooper, Arb.).

291. In one instance, a Texas local and a North Carolina local affiliated with the same international union were involved, and were treated as different parties because they likely function as separate entities.

292. See Cole, *supra* note 7, at 863; Colvin, *supra* note 11, at 11.

293. See *supra* notes 189-193 and accompanying text.

294. See *supra* Part IV.B.1.

295. See e.g., Commercial Cleaning Sys., Inc., 122 Lab. Arb. Rep. (BNA) 1383, 1384, 1391 (2006) (McCurdy, Arb.); Parkersburg Bedding, 118 Lab. Arb. Rep. (BNA) 1788, 1789 (2003) (Zobrak, Arb.); ITT Fed. Serv. Corp., 105 Lab. Arb. Rep. (BNA) 289, 293 (1995) (Landau, Arb.); Merrimack Cnty. Dept. of Corr., 102 Lab. Arb. Rep. (BNA) 1096, 1097 (1994) (McCausland, Arb.); Altoona Hosp., 102 Lab. Arb. Rep. (BNA) 650, 651 (1993) (Jones, Arb.).

such clauses indicates that unions will negotiate on behalf of minorities.²⁹⁶ In some instances, unions negotiated even greater protections than those that would be available under the law, particularly when dealing with accommodating disabled individuals.

In one case, a woman who could not work overtime because of stress that resulted in high blood pressure, abdominal pain, back pain, dizziness, bile disorder, and insomnia was placed on involuntary leave. The Ohio Civil Rights Commission stated in a no-probable cause finding that her “various medical conditions” did not constitute a qualified disability under the ADA. The union, nevertheless, grieved her claim under the contract, and the grievance was sustained such that she was made whole for the loss of pay during her involuntary leave.²⁹⁷

In another case, an employee was injured on the job and accommodated for several years. His position was later consolidated with another position that had functions he could not perform. The union argued that “[i]t is hardly just to deprive an individual of his livelihood because he was injured in the course of performing his job duties.”²⁹⁸ The arbitrator reasoned that the CBA required more than the ADA, and ordered that the employer provide any possible accommodation, not just any reasonable one. The remedy was to offer the grievant the training and opportunity to certify for a forklift operator’s position, which he could perform within his limitations.²⁹⁹

In a minority of cases, however, a union had negotiated provisions on behalf of the majority that worked to the detriment of the minority. One example of this phenomenon consistently arises when unions negotiate for the seniority rights of nondisabled individuals over the rights of disabled individuals to have a position,³⁰⁰

296. A more cynical view would be that they negotiate such clauses only to comply with the law and avoid suits against the union.

297. City of Akron, 111 Lab. Arb. Rep. (BNA) 705, 712 (1998) (Franckiewicz, Arb.).

298. Techneglass, Inc., 120 Lab. Arb. Rep. (BNA) 722, 725 (2004) (Dean, Arb.). Further exploration of whether grievants who won the dispute in disability cases were injured on the job or had congenital disabilities would be an interesting subject for further research.

299. See also Waterous Co., 100 Lab. Arb. Rep. (BNA) 278, 284 (1993) (Reynolds, Arb.) (contract requiring no discrimination because of physical impairment required reinstatement of a grievant with a back injury where nonimpaired employees were permitted to perform only some functions of the job classification).

300. See e.g., Contracts, Metals & Welding, Inc., 110 Lab. Arb. Rep. (BNA) 673, 683 (1998) (Klein, Arb.) (employer violated CBA by bumping more senior employee on first shift to accommodate junior disabled employee).

even in instances where the disabled individual would be terminated.³⁰¹ In one case, for instance, the union initially agreed with the employer that the employer could let a disabled employee bump another employee who was not the least senior, and then let that employee bump the least senior employee.³⁰² When the bumped employee complained, however, the union filed a grievance on her behalf, citing its responsibility pursuant to the duty of fair representation. The union argued that a disabled employee must go to the layoff pool rather than bump a more senior employee.³⁰³ This case is the prototypical example of an instance in which a union supports a nondisabled individual over a disabled individual, even where both retained their jobs and the least senior employee was laid off instead. Interestingly, however, the arbitrator upheld the grievance, relying on several circuit court cases.³⁰⁴ Since that time, the Supreme Court's decision in *U.S. Airways, Inc. v. Barnett*³⁰⁵ indicates that the arbitrator's decision is certainly defensible as a matter of ADA interpretation.³⁰⁶

Other cases indicate that seniority provisions are not the only ones that unions negotiate that sometimes work to the detriment of minority employees. Others include provisions restricting work to unit members³⁰⁷ and those regulating work shifts.³⁰⁸

2. Union Understanding of Law

The fact that unions pursued approximately 50 percent of these cases without an attorney indicates that union agents do understand legal claims well enough to pursue them through the grievance and arbitration processes unassisted. In approximately seventeen of the thirty-two cases involving a statutory claim that a grievant won, the grievant was represented by an agent rather than

301. *Mason & Hanger Corp.*, 111 Lab. Arb. Rep. (BNA) 60, 64 (1998) (Caraway, Arb.); cf. *Estreicher & Eigen*, *supra* note 68, at 4 (asserting “[e]ven when unions actively support non-discriminatory policies, they have difficulty mediating claims of groups of workers where those claims cannot be easily resolved by a rule favoring length of service”).

302. *Mead Prod.*, 114 Lab. Arb. Rep. (BNA) 1753, 1755 (2000) (Nathan, Arb.).

303. *Id.* at 1755.

304. *Id.* at 1759–60.

305. 535 U.S. 391 (2002). Arguably, union conflict with disabled minorities contributed to the Court's ruling because unions filed briefs in support of the seniority system.

306. *Id.* at 393 (“As we interpret the statute, to show that a requested accommodation conflicts with the rules of a seniority system is ordinarily to show that the accommodation is not ‘reasonable.’”).

307. *City of Kentwood*, 105 Lab. Arb. Rep. (BNA) 49, 52 (1995) (Lipson, Arb.).

308. *Cleveland Pub. Library*, 105 Lab. Arb. Rep. (BNA) 781, 783 (1995) (Smith, Arb.) (enforcing requirement that member of religious minority group work on Sunday).

an attorney.³⁰⁹ One arbitrator explicitly noted that the union agent had the ability, even without an attorney, to understand the legal rules governing discrimination claims. The arbitrator stated that the union's presentation and brief displayed "an excellent grasp" of the legal principles governing an ADA dispute.³¹⁰ Although the union lost, this decision was extremely well cited and reasoned.³¹¹ Of the thirty-two statutory cases the union won, in approximately fifteen the union was represented by an attorney. While that number appears to be similar to the number not involving an attorney, when a union receives advice from an attorney during the grievance process and is represented by an attorney at arbitration, its ability to understand and pursue statutory claims on its own should logically increase. Part of legal training is learning to bring statutory claims and to represent parties in litigation-like proceedings.

In a minority of instances, however, union representatives did not appear to be sophisticated enough to understand the statutory claims. An employee in one case listed a violation of the ADA as the basis for her grievance, but the parties did not discuss reasonable accommodation in detail during the grievance process.³¹² After setting forth the basic requirements of the ADA—that an employer make reasonable accommodations for an employee known to have a qualified disability—the arbitrator directed the parties to discuss the applicability of the ADA and any appropriate accommodation. The arbitrator retained jurisdiction to conduct a hearing if no satisfactory resolution was reached. The union's attorney actually argued that the union representative during the grievance process was inexperienced, and it appears that without the attorney, the grievant would not even have been aware of her rights under the ADA.³¹³

309. All instances when it was not indicated that the representative was an attorney were included, although in some minimal instances the representative may have been an attorney and the decision failed to so note. Further analysis comparing the win rate in those cases where a union was represented by an attorney to the win rate in those cases where a union was not represented by an attorney might reveal additional pertinent information.

310. *Bowater, Inc.*, 116 Lab. Arb. Rep. (BNA) 382, 386 (2001) (Harris, Arb.); *see also* *Garden City Union Free Sch. Dist.*, 2006 WL 4577848, No. 13, 3900041706 (Nov. 4, 2006) (Gregory, Arb.) (LexisNexis, BNA Labor Arbitration Decisions—Published and Unpublished) (noting that the parties were very well represented where union was represented by labor relations specialist); *Thermo King Corp.*, 102 Lab. Arb. Rep. (BNA) 612, 616 (1993) (noting that the union, represented by a staff representative, made an impressive presentation and submitted a brief).

311. *See Bowater, Inc.*, 116 Lab. Arb. Rep. (BNA) at 386.

312. *U.S. Army Corps of Eng'rs*, 107 Lab. Arb. Rep. (BNA) 202, 205 (1996) (Moore, Arb.).

313. *Id.* at 204, 206.

3. Union Representation of Discriminatees

Finally, the cases indicate that unions are representing discriminatees in grievance arbitrations and are doing well enough to prevail in a significant minority of them. Many examples illustrate that unions assert the rights of minority employees. For instance, in one case, the union successfully argued, in part based upon EEOC findings, that men had been accommodated with light-duty placements whereas the female grievant had not.³¹⁴ In another case, the union asserted that a deaf teacher should be entitled to teach phonics with accommodation, particularly where she was more senior than teachers assigned to do so.³¹⁵ In a third case, the union asserted that a test for physical strength had a disparate impact on women, therefore unjustly disqualifying the female grievant from a position.³¹⁶

In another case, the shop steward and union had supported the female janitor's sexual harassment claim, resulting in the transfer of the alleged harasser. The union then grieved the failure to accommodate the grievant and her retaliatory termination. The shop steward had worked as her partner, doing the work she could not perform as a result of her lifting restrictions.³¹⁷ Indeed, in some cases, unions sought numerous and costly accommodations. In one case, the union sought measures that included replacement of lockers at a cost of \$13,500 and stationing a security officer outside the classroom door of a grievant teacher allergic to perfume.³¹⁸

Some cases demonstrate that some unions will support minority employees even in the face of complaints from the majority. In one case, for example, the union argued that a disabled grievant could work while sitting and coworkers could perform the necessary climbing and digging without harming either the grievant or the coworkers. Previously, others complained when the grievant worked in air conditioning, but the union did not file any grievances and

314. *Sherwin-Williams Co.*, 113 Lab. Arb. Rep. (BNA) 1184, 1188–89 (2000) (Statham, Arb.).

315. *S.F. Unified Sch. Dist.*, 114 Lab. Arb. Rep. (BNA) 140, 142 (2000) (Riker, Arb.).

316. *Detroit Edison Co.*, 96 Lab. Arb. Rep. (BNA) 1033, 1037–38 (1991) (Lipson, Martin, Dopke, Arb.).

317. *Commercial Cleaning Sys., Inc.*, 122 Lab. Arb. Rep. (BNA) 1383, 1391 (2006) (McCurdy, Arb.); *see also Anchorage Sch. Dist.*, 119 Lab. Arb. Rep. (BNA) 1313, 1318 (2004) (DiFalco, Arb.) (union representative whom grievant had threatened to kill testified that she was not afraid of grievant, having dealt with him on many occasions where “nothing untoward happened”).

318. *Culver City Unified Sch. Dist.*, 110 Lab. Arb. Rep. (BNA) 519, 526 (1997) (Hoh, Arb.).

promised not to grieve complaints over the sitting arrangement either. The employer refused to agree to the sitting accommodation, and the union grieved on the disabled grievant's behalf. Nevertheless, the arbitrator believed it would violate coworkers' rights if they did more than their fair share of aerial work, and denied the grievance.³¹⁹

Finally, some cases demonstrate that unions will aggressively push interpretation of the contract and law on behalf of minority employees. In other contexts, unions push cases to arbitration, even though they know they are likely to lose, to permit employees to tell their side of the story and to make a strong point to the employer that certain conduct is unacceptable in the eyes of the employees.³²⁰ Perhaps unions are also pushing the boundaries of the law to let employers know that certain actions resulting in apparent discrimination are not acceptable. For example, some unions appear to believe women should be given training to foster advancement when all higher paid positions are filled by men,³²¹ and some appear to believe that coworkers should not stereotype all employees of one race and gender based on the conduct of one coworker of that race and gender.³²² These cases suggest that commentators who argue that unions can be a force against discrimination are correct.³²³

There are, however, cases in which unions have declined to pursue certain claims or remedies for a discriminatee because of conflict with the majority. For instance, in one case, the union held a meeting to see if "super seniority" could be provided to an employee disabled as a result of a work injury. Such status would permit him to bid on jobs that met his physical restrictions. In a

319. GTE N. Inc., 113 Lab. Arb. Rep. (BNA) 665, 670, 674 (1999) (Brodsky, Arb.).

320. Cf. St. Antoine, *supra* note 3, at 795 n.58.

321. Empire Dist. Elec. Co., 118 Lab. Arb. Rep. (BNA) 919, 923 (2003) (Berger, Arb.) (woman grievant argued that with instruction and training, she could have performed the job that was given to a less senior male worker).

322. See Seattle Sch. Dist., 119 Lab. Arb. Rep. 1145, 1154 (BNA) (2004) (Elinski, Arb.) (unidentified pattern of harassment and negative comments about black males, after principal was discharged for having inappropriate sexual relationship with a student, is not enough to show pattern of discrimination).

323. See Twinsburg Bd. of Educ., 119 Lab. Arb. Rep. (BNA) 54 (2003) (Chattman, Arb.) (arguing for accommodation despite Ohio Civil Rights Commission's prior decision finding no disability); Vicksburg Cmty. Sch., 101 Lab. Arb. Rep. (BNA) 771, 776 (1993) (Daniel, Arb.) (holding that the controlling Title VII law permits an employer to accommodate an unpaid religious leave, but that the employee's contract requires paid leave).

secret ballot, voting members of the unit rejected the proposal. Ultimately, the employer simply modified the employee's current position.³²⁴

There are also examples of unions pursuing claims on behalf of the majority that disadvantage minority members. For example, in a 1991 case not included within the sample, the union filed grievances on behalf of two white firefighters who had been denied promotions.³²⁵ This certainly supports the proposition that unions might support majority members over minority members. In reliance on then-governing Supreme Court precedent and an Eighth Circuit decision upholding the City of Omaha's affirmative action plan, the arbitrator denied the grievance by these white firefighters. A promotion list based upon certain test scores was typically used. In this instance, four black firefighters were promoted ahead of two white firefighters who were ranked significantly higher on the promotion list.³²⁶

One arbitrator noted that cases in which a grievant challenges the promotion of another union member place the union in a no-win situation. The arbitrator in that case found that the member who used a spell-checker during a firefighter test was not disabled under the terms of the ADA, but the grievant still lost the case on the basis of the CBA's contractual language, which permitted the other member to use this feature.³²⁷

And there are several instances in which union representation appears to be less than adequate because of failure to understanding the law, internal conflict, or for other reasons not precisely discernible from the decisions.³²⁸ For instance, one decision indicates that the union argued that a provision requiring compliance

324. Fox River Paper Co., 104 Lab. Arb. Rep. (BNA) 871, 874 (1995) (Suntrup, Arb.); *cf.* Anchor Hocking Operating Co., 125 Lab. Arb. Rep. (BNA) 312, 316 (2008) (union pursued mentally ill grievant's claim although he testified that a coworker who was also a union representative was the person who most harassed him); Interstate Brands Corp., 113 Lab. Arb. Rep. (BNA) 161, 166 (1999) (Howell, Arb.) (union steward's testimony that grievant frightened him supported just cause for termination).

325. City of Omaha, 97 Lab. Arb. Rep. (BNA) 180, 183 (1991) (Mikrut, Jr., Arb.). In two other cases, not included in the sample because they were not framed as discrimination cases, unions represented employees complaining of loss of a position to a woman who was given a position after being sexually harassed.

326. *Id.*

327. Delta Twp., 111 Lab. Arb. Rep. (BNA) 936, 939-40 (1998) (Sugerman, Arb.).

328. In a couple of other case, the union's failure to focus on the discrimination claims might be because of the availability of the EEOC to address the claims. *See, e.g.,* Cramer, Inc., 110 Lab. Arb. Rep. (BNA) 37, 41-42 (1998) (O'Grady, Arb.) (union did not argue violation of the ADA where the EEOC had found that the claims were without merit). In one case, the Illinois Department of Human Rights advised the grievant that she did not have to answer questions at arbitration, but after consulting with her attorney and the union steward, she

with handicap laws was violated. The decision stated that it was unclear whether the grievant's learning disabilities were "handicaps" within the meaning of the law because the union did not cite to applicable statutes, regulations, or court decisions. Also, the decision states that the union did not proffer any accommodations that would be reasonable, and that having someone do the necessary reading and math for the grievant would not be a reasonable accommodation.³²⁹

In another case, the arbitrator found that the grievant was not substantially limited. But the arbitrator also noted that the record was insufficient to determine that the accommodations provided—involuntary twenty-four-month leave and notice of other positions with the company—were not reasonable.³³⁰ The arbitrator pointed out that the union had acquiesced in the leave³³¹ that ultimately resulted in termination, and that the union had not raised the ADA claim during the grievance procedure.³³²

Another case indicates that perhaps the union could or should have presented more evidence. The decision states that "[t]he Grievant presented a smattering of evidence that she simply did not receive the same treatment as whites in the workplace. However, the Grievant did not present sufficient credible evidence that whites were indeed treated more favorably than her." The arbitrator found that the record included evidence that white employees had been treated the same as the grievant.³³³

elected to fully participate. *See* Robinson Bus Serv., Inc., 116 Lab. Arb. Rep. (BNA) 372, 373 (2001) (Cox, Arb.).

329. Turbine Engine Components Techs. Corp., 120 Lab. Arb. Rep. (BNA) 274, 279 (2004) (Fullmer, Arb.).

330. Safeway Corp., No. 08-50449, 2008 WL 8203229, at *8 (Apr. 30, 2008) (Wages, Arb.).

331. *Id.* at *10.

332. *Id.* at *9.

333. Nw. Publ'n Inc., 104 Lab. Arb. Rep. (BNA) 91, 95 (1994) (Bognanno, Arb.); *see also* City of Norman, 122 Lab. Arb. Rep. (BNA) 929, 930 (2006) (Goodstein, Arb.) (union representative completely unprepared for predisciplinary hearing and employee was subsequently discharged); U.S. Dep't of Hous. & Urban Dev., 121 Lab. Arb. Rep. (BNA) 1261, 1268 (2005) (Coyne, Arb.) ("[C]laims of this nature must be supported by reliable data."); Veterans Affairs Med. Ctr., 114 Lab. Arb. Rep. (BNA) 1217, 1220 (2000) (O'Grady, Arb.) (union did not put on sufficient evidence to show a handicapping alcohol condition); Keystone Steel & Wire Co., 114 Lab. Arb. Rep. (BNA) 1466, 1472 (2000) (Goldstein, Arb.) (union did not provide sufficient evidence of employees in similar situations receiving different treatment); Wackenhut Servs., Inc., 112 Lab. Arb. Rep. (BNA) 798, 800 (1999) (Crider, Arb.) ("The race discrimination claim, a frivolous afterthought raised for the first time in arbitration, is dismissed."); Minnegasco, Inc., 103 Lab. Arb. Rep. (BNA) 43, 48 (1994) (Bognanno, Arb.) (union must present competent evidence of similarities to show disparate treatment); Speculite Consortium, Inc., 101 Lab. Arb. Rep. (BNA) 1134, 1138, 1140 (1993) (Hilgert, Arb.) (only witness for union was grievant, and there was insufficient evidence of discrimination).

IV. PRELIMINARY SUGGESTIONS FOR LABOR ARBITRATION OF EMPLOYMENT-DISCRIMINATION CLAIMS

Does labor arbitration provide access to justice for those with employment-discrimination claims? A review of these opinions and awards suggests that in many instances, it does. It often provides a procedure with due-process protections, a decision maker who interprets the law and the contract as applied to the facts, and a union that advocates for the grievant's rights. The data also indicate that the average length of time to resolve a dispute is approximately 503 days. While this may be longer than is ideal, it is shorter than the time reported to receive a trial in federal or state court.³³⁴ Indeed, labor arbitration is historically considered to be less expensive, less time consuming, and—perhaps equally significantly—less emotionally draining for the parties.³³⁵

Moreover, labor arbitration of minimum employee rights arguably strengthens enforcement and results in a greater number of claims.³³⁶ Without a union, employees might not bring these claims.³³⁷ If a claim such as harassment or a need for accommodation arises during the employment relationship, employees may fear negative ramifications of bringing the claim. If a claim such as religious, racial, gender, or disability discrimination arises because of termination, employees may not have the knowledge or resources to pursue the claim. The broad range of job positions involved in the cases reviewed lends some support to this theory, which has been explored in the context of the Occupational Safety and Health Act (OSHA) and other individual-rights statutes.³³⁸

Labor arbitration may also make it more likely that a successful relationship between the parties will continue. Reinstatement is a common, though not universal, remedy in labor arbitration. Awarding reinstatement indicates that the presence of the union as a mediating force between the employer and the grievant makes salvaging the relationship more likely. Because the parties work together on a regular basis, the potential to resolve ongoing issues also increases. Coworker support may be important to the successful resolution of discrimination claims.

334. Eisenberg & Hill, *supra* note 11, at 51 (reporting average of 709 days to trial in federal court for employment-discrimination claims and 723 days to reach trial in state court for non-civil rights employment claims).

335. See Cole, *supra* note 7, at 863.

336. See ESTLUND, *supra* note 9, at 166 (“The presence of an independent collective employee voice enhances the enforcement of regulatory standards.”) (footnote omitted); Weil, *supra* note 260, at 27.

337. See Bales, *supra* note 101, at 753 (discussing advantage to low-income employees).

338. Weil, *supra* note 260, at 27.

Labor arbitration is also tailored to address workplace problems. The union brings expertise to the table, as does the arbitrator. They should ideally understand the particular workplace as well as the broader context of work in the country.

If labor arbitration provides access to justice for employees with employment-discrimination claims, what benefits does it have for employers? For the employer, less expense and saved time are clear positives of labor arbitration. Like the employee, the employer sometimes benefits from having ongoing relationships rather than having to serially retrain employees. The employer may also benefit from the expertise of the union and the arbitrator, potentially resulting in solutions that benefit all involved. The awards directing the parties to further bargain and implementing creative solutions illustrate this possibility.³³⁹ Finally, while increased enforcement may appear to be a drawback for employers, the draw of less industrial strife,³⁴⁰ which results in monetary loss and employee turnover, operates as another reason labor arbitration of employment-discrimination claims is just for employers as well as employees.

But what about mandatory labor arbitration of employment-discrimination claims? Does it provide access to justice? Absolute mandatory labor arbitration of employment-discrimination claims is theoretically possible. But a system where an employee entirely loses the ability to pursue the claim if the union elects not to pursue it is unlikely to develop as a practical matter. Most would agree that the employee would have no access to justice when the union elects not to pursue the claim.³⁴¹

What might be termed modified mandatory labor arbitration of employment-discrimination claims may, however, provide access to justice. In this system, the grievant would be permitted to go to court when the union opts not to pursue the claim.³⁴² This is the system currently developing under *Pyett* and being used in that small number of cases in which unions agree to arbitrate rather than litigate employees' statutory claims.³⁴³

339. See *supra* notes 265–270 and accompanying text.

340. Cf. Malin, *supra* note 122, at 372 (stating that grievance arbitration, unlike arbitration of statutory claims, “is not so much a substitute for litigation as it is a substitute for strikes and other job actions”).

341. See *e.g.*, *Safrit v. Cone Mills Corp.*, 248 F.3d 306 (4th Cir. 2001) (granting employer summary judgment where employee failed to arbitrate because union advised employee to litigate instead of grieving).

342. Bennett, *supra* note 106, at 29; cf. Mathison & Seiler, *supra* note 106, at 194.

343. See, *e.g.*, *Kravar v. Triangle Servs. Inc.*, 186 L.R.R.M. 2565 (S.D.N.Y. 2009) (holding that a CBA's arbitration provision would not be enforced where the union had refused to arbitrate a disability claim); *Johnson v. Tishman Speyer Props., L.P.*, No. 09 Civ.1959(WHP),

If the data examined by this Article were representative, it, along with other sources, would tentatively suggest that modified mandatory labor arbitration of employment-discrimination claims can provide access to justice, particularly if targeted legislative reforms are enacted. The data support retaining the status quo where *Gardner-Denver* governs the majority of instances of labor arbitration of employment-discrimination claims. They also support permitting mandatory labor arbitration in the minority of the cases for which it is bargained by clear and unmistakable waiver, governed by such reforms.

The system that is currently in place in most instances pursuant to *Gardner-Denver*, where the union has not waived the right to proceed to court, provides access to justice in many cases. Under *Gardner-Denver*, employees have the ability to pursue arbitration of contractual claims of discrimination and to file suit on statutory claims.³⁴⁴ For the reasons discussed above, in many instances, arbitration grants the employee access to justice. Where it does not—perhaps because of short statutes of limitations or inadequate remedies—the employee can still proceed instead to court or go to court after having lost in arbitration. While this seems ideal for employees, in many cases, the court may simply use the arbitration award to rule against the employee. While *Gardner-Denver* requires de novo review, it permits the court to give the arbitration decision appropriate weight, leaving wide discretion to the court.³⁴⁵ Thus, one downside of this system is the uneven weight accorded to an arbitration award. Another is that the employee and employer may expend resources in arbitration and in court only to have the court largely reaffirm the arbitration award. Indeed, for the employer, the additional injustice is that it appears to grant the employee two bites at the apple—though, realistically, given that the contract claim is arbitrated, and the statutory claim is litigated, there are not two bites at the same apple. Enacting the AFA will insure that the *Gardner-Denver* approach, with the aforementioned advantages and disadvantages, will be utilized in all instances because it will prohibit union agreements that mandate arbitration rather than litigation of statutory employment-discrimination claims.

In the individual employment context, some have proposed a system where the employee must choose between arbitration and

2009 WL 3364038 (S.D.N.Y. Oct. 16, 2009) (dismissing discrimination claim and compelling arbitration where employee “concedes that he declined to pursue his grievance”).

344. See 415 U.S. 36 (1974).

345. *Id.* at 60.

litigation but can make this selection after the dispute arises. If implemented in the unionized sector, individual post-dispute election certainly will resolve any complaints that employees are forced to use a procedurally or substantively flawed system or to rely on a representative with a conflict of interest. It will also permit the individual to use labor arbitration rather than litigation when it would provide them access to justice. While in other contexts, employers might be unwilling to agree to only post-dispute arbitration, in the labor-arbitration context, employers may find post-dispute election more appealing than the current system under *Gardner-Denver*. The election would eliminate cost, time, and emotion spent on both arbitrating and litigating employment-discrimination claims.

However, the *Gardner-Denver* approach and modified mandatory arbitration governed by targeted legislative reform are probably preferable for reasons that are somewhat difficult to articulate but are at the core of the dispute over which system is the most just. The modified mandatory-arbitration framework differs from the proposed individually controlled post-dispute election only in that it leaves the election in the union's, rather than the individual's, hands. The strength of collective control of workplace issues supports such an approach.³⁴⁶ If all discriminatees, or even just half of them, elect out of the union process, the incentive for the employer to deal with the union on workplace-discrimination issues is diminished.³⁴⁷ Thus, providing the individual, rather than the union, with the ability to elect whether to pursue a particular dispute in arbitration undermines the ability of the union to advance the interests of minorities over the long term. To the extent that over the long term and in the greater number of cases, collective rather than individual action is likely to solve problems of discrimination in the workplace, this suggests unions should control these issues, as they do other workplace issues.

Another question is whether self-governance will better address issues of discrimination than outside regulation. A system that permits variance across employers and creativity to solve problems in light of the particular employer may better resolve discrimination claims. If so, then giving the union the opportunity to pursue

346. Cf. Feller, *supra* note 9, at 745 (“[M]any claims . . . carry implications for the group.”). At some point, a grievance arbitration process must be controlled by the union rather than the individual grievant. *Id.*

347. Cf. Cox, *supra* note 9, 24 (allowing individual claims “discourages” cooperation between the employer and the union “which is normally the mark of sound industrial relations”).

claims rather than relying on a unitary individual-rights system may be best.³⁴⁸

The system under *Gardner-Denver*, to some extent, provides collective strength and self-governance because discrimination claims can be brought by the union under the contract and by the individual in court. It thus permits the union to have force on discrimination issues and also allows individuals to sometimes pursue their claims in their own way. It is because of the power of collective action and self-governance that the *Gardner-Denver* and *Pyett* systems are perhaps preferable to a system permitting individual election. The current system embraces both *Gardner-Denver* and *Pyett*.

The modified mandatory-arbitration system developing under *Pyett* does, however, remove all individual ability to elect between arbitration and litigation, and thus vests in a union all control of employment-discrimination cases, even when the union may have conflicts of interest or simply be an inadequate representative. It also requires use of an arbitration system, which may have inadequately short statutes of limitation or inadequate remedies, as well as other potential problems. To address these concerns, this Article provides a starting point for considering legislative reforms to ensure that when the modified mandatory system is used, the system provides equal access to justice.

This research suggests that potential areas for improvement in procedural protections are access to greater discovery and, to a lesser degree, compulsory process. To a limited extent, short statutes of limitations may pose problems. Legislation that sanctions arbitrators who make adverse inferences when witnesses fail to appear, guarantees the applicability of statutory statutes of limitations when arbitrating statutory employment-discrimination claims, and authorizes class actions in labor arbitration or exempts class actions from mandatory labor arbitration could be considered. As to discovery, legislating the availability of a certain amount of discovery in labor arbitration of employment-discrimination claims probably would unduly increase the cost of the procedure in all cases, even when increased discovery is not needed. Further research might focus on whether discovery could be required in certain cases, such as those involving claims of systemic discrimination rather than claims for accommodation or for claims seeking a certain amount of damages. It might also focus on whether exempting certain claims from

348. Cf. Stephen J. Ware, *Consumer and Employment Arbitration Law in Comparative Perspective: The Importance of the Civil Jury*, 56 U. MIAMI L. REV. 865, 866–67 (202) (summarizing reasons against uniformity that support the United States' outlying approach of mandatory arbitration).

mandatory labor arbitration would be most effective in ensuring adequate discovery.

This research further suggests that the primary potential area of improvement as to substantive protections is insuring relief in labor arbitration of employment discrimination cases.³⁴⁹ Legislation commanding that labor arbitrators consider the full range of remedies available under the applicable statute when deciding employment-discrimination claims might easily increase the availability of remedies in labor arbitration of employment-discrimination claims.

Another question for further research would be to consider whether a claim for breach of duty of fair representation, as currently embodied, provides adequate protection against a union failing to put on a strong case³⁵⁰ or whether some type of further recourse, perhaps similar to an action for ineffective assistance of counsel in the criminal context, might be best.³⁵¹

Because the research is based on a limited universe of awards, it remains possible that some labor arbitrations are conducted more like kangaroo courts than like meaningful forums for just dispute resolution. Such a possibility might justify additional areas of regulation of the labor arbitration process in *Pyett* cases. Of course, increasing regulation of labor arbitration, whether by legislation or court decision, increases the cost of the process and reduces the possibility of self-governance, thereby potentially decreasing its value to employees. With this in mind, working out low-cost means of addressing these potential areas of improvement would be worthy of future scholarly endeavor.

Moreover, in any of the three systems—*Gardner-Denver*, *Pyett*, or individual election—a large number of employment-discrimination claims may be effectively decided in labor arbitration. Under *Gardner-Denver*, the employee may elect only to arbitrate or the subsequent court proceeding may rely heavily on an arbitration

349. While other data may suggest difficulty with the appellate standard of review, this data did not indicate that arbitrators were often, if ever, making clearly erroneous legal statements or conclusions.

350. See Cole, *supra* note 7, at 888.

351. The standard should not permit every losing grievant to sue the union. Such a standard would unduly increase litigation and would not be representative of the research indicating that in the large majority of cases, even where the grievant lost, the union adequately presented the case. To the extent that the research suggests that there are conflicts between discriminatees' interests and other employees' interests, substantive changes to discrimination laws might be necessary. For instance, to the extent readers are troubled when unions pursue the rights of more senior employees at the expense of the disabled, clarification of the ADA to require accommodating a disabled individual by bumping a more senior employee, perhaps unless that would result in termination of the more senior employee, would be necessary.

award; under *Pyett*, the union may elect to arbitrate many of the claims; and under the individual election system, the discriminatee may often elect labor arbitration over litigation. Thus, under any of these possibilities, though certainly most significantly under *Pyett*, improving access to justice through labor arbitration is a worthy goal.

Also worthy of future scholarly pursuit is consideration of whether there are alternatives to modified mandatory labor arbitration of employment-discrimination disputes that further the same goals—such as greater access to justice for those of lower education and income, more efficient and less costly procedures, collective action, and self-governance—yet provide more consistent or publicly visible access to justice. For instance, perhaps mandatory pre-dispute mediation, or an administrative agency or employment court focusing on employment-discrimination claims, are alternatives worthy of serious consideration.

CONCLUSION

The 160 labor arbitration awards examined show that labor arbitration is a forum in which employment-discrimination claims can be, and in many instances are, successfully resolved. These claims were resolved, on average, in 503 days. The grievants worked in diverse positions that probably do not command high salaries, and all were represented by an attorney or union agent at the arbitration hearing. While more research certainly remains to be done, if the data were representative,³⁵² they would tentatively suggest that modified mandatory labor arbitration of discrimination claims can provide access to justice, particularly if targeted legislative reforms are enacted. Potential legislative reforms include mandating greater discovery in certain cases, sanctioning arbitrators making adverse inferences when witnesses fail to appear, guaranteeing the applicability of statutory statutes of limitation, and commanding that labor arbitrators consider the full range of statutory remedies. Ultimately, whatever system of labor arbitration develops, improving access to justice through labor arbitration remains a worthy goal.

352. The data are not representative. See *supra* Part II.

APPENDIX

Wilcoxon nonparametric test performed with JMP version 3 SAS Institute Cary, NC by Stanley Levinson.

REPRESENTATION BY COUNSEL				
Wilcoxon /Kruskal-Wallis Tests (Rank Sums)				
Level	Count	SCORE SUM	SCORE MEAN	(MEAN-MEAN _O)/STD _O
Employers	160	22240	139.000	-4.983
Unions	160	29120	182.000	4.983

2-Sample Test, Normal Approximation			
	S	Z	PROB>IZI
	29120	4.98264	<.0001

1-way Test, Chi-Square Approximation			
	CHI SQUARE	DF	PROB>CHISQ
	24.8339	1	<.0001

ONLY ONE PARTY REPRESENTED BY COUNSEL				
Wilcoxon /Kruskal-Wallis Tests (Rank Sums)				
Level	Count	SCORE SUM	SCORE MEAN	(MEAN-MEAN _O)/STD _O
Unions	160	28560	178.500	5.215
Employers	160	22800	142.500	-5.215

2-Sample Test, Normal Approximation			
	S	Z	PROB>IZI
	22800	-5.21504	<.0001

1-way Test, Chi-Square Approximation			
	CHI SQUARE	DF	PROB>CHISQ
	27.2061	1	<.0001

COMPARATIVE WIN RATES IN LABOR AND EMPLOYMENT ARBITRATION				
Wilcoxon /Kruskal-Wallis Tests (Rank Sums)				
Level	Count	SCORE SUM	SCORE MEAN	(MEAN-MEAN0)/STD0
Colvin AAA	1213	837484.5	690.424	3.098
Levinson	150	92081.5	613.877	-3.098

2-Sample Test, Normal Approximation			
	S	Z	PROB>IZI
	92081.5	-309820	0.0019

1-way Test, Chi-Square Approximation			
	CHISQUARE	DF	PROB>CHISQ
	9.5998	1	0.0019

COMPARATIVE WIN RATES IN LABOR ARBITRATION AND STATE COURT				
Wilcoxon /Kruskal-Wallis Tests (Rank Sums)				
Level	Count	SCORE SUM	SCORE MEAN	(MEAN-MEAN0)/STD0
Eisenberg State	141	17935.5	127.202	-4.195
Levinson	149	24259.5	162.815	4.195

2-Sample Test, Normal Approximation			
	S	Z	PROB>IZI
	17935.5	-4.19546	<.0001

1-way Test, Chi-Square Approximation			
	CHISQUARE	DF	PROB>CHISQ
	17.6088	1	<.0001

COMPARATIVE WIN RATES IN LABOR ARBITRATION AND FEDERAL COURT				
Wilcoxon /Kruskal-Wallis Tests (Rank Sums)				
Level	Count	SCORE SUM	SCORE MEAN	(MEAN-MEAN0)/STD0
Eisenberg Federal	1430	1125920.5	787.357	-0.858
Levinson	149	121489.5	815.366	0.858

2-Sample Test, Normal Approximation			
	S	Z	PROB>IZI
	121489.5	0.85766	0.3911

1-way Test, Chi-Square Approximation			
	CHISQUARE	DF	PROB>CHISQ
	0.7358	1	0.3910

UNION AND EMPLOYER WIN RATES COMPARED				
Wilcoxon /Kruskal-Wallis Tests (Rank Sums)				
Level	Count	SCORE SUM	SCORE MEAN	(MEAN-MEAN0)/STD0
Employer	150	18675	124.500	-5.994
Union	150	26475	176.500	5.994

2-Sample Test, Normal Approximation			
	S	Z	PROB>IZI
	26475	5.99366	<.0001

1-way Test, Chi-Square Approximation			
	CHISQUARE	DF	PROB>CHISQ
	35.9332	1	>.0001

WIN RATE IN DISABILITY CASES AND IN OTHER CASES COMPARED				
Wilcoxon /Kruskal-Wallis Tests (Rank Sums)				
Level	Count	SCORE SUM	SCORE MEAN	(MEAN-MEAN0)/STD0
ADA	92	6800	73.9130	-0.691
Other	58	4525	78.0172	0.691

2-Sample Test, Normal Approximation			
	S	Z	PROB>IZI
	4525	0.69123	0.4894

1-way Test, Chi-Square Approximation			
	CHISQUARE	DF	PROB>CHISQ
	0.4811	1	0.4879