Draft 3/13/2012 (*forthcoming Mich. J.L. Reform*)

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

Ariana R. Levinson*

Abstract

This article contributes to the debate over mandatory arbitration of employment discrimination claims in the unionized sector, which, in light of the proposed prohibition on union waivers in the Arbitration Fairness Act, has significant practical implications. Fundamentally, the article is about access to justice. The article 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 targeting statutes of limitations, compulsory process, remedies, class actions and, in certain cases, discovery, the standard of review, and a union's duty of fair representation.

I. Introduction 2

II. Background 4

A. Mandatory and Labor Arbitration Described 4

B. The Governing Case Law Develops 6

C. The Scholars Debate Mandatory Arbitration of Employment Discrimination Claims 9

D. Proposals to Provide a Fair Forum to Discriminatees 14

III. Methodology 15

IV. Analysis 17

A. Procedural Protections in Labor Arbitration 18

1. Service Providers 18

2. Time to Resolve 20

3. Procedural Protections 21

*Assistant Professor, University of Louisville Louis D. Brandeis School of Law, J.D. Michigan Law School. This article was made possible by generous grants from the University of Louisville for research initiation and from the Jonathan N. Helfat Research Fund. The author thanks the commentators, Susan Bisom-Rapp and Michael Zimmer, on the presentation of an earlier draft at the Seton Hall Forum as well as the other participants, Deborah Brake, Jeannette Cox, Deborah Eisenberg, Tim Glynn, Tristin Green, Sachin Pandya, Elaine Shoben, Charlie Sullivan, and Michael Waterstone, for their feedback and suggestions concerning the article and future related research. The author also thanks Tony Arnold, Dennis Nolan, and Bob Sprague for comments on earlier drafts. The author thanks Becky Wenning for creating the pie charts and bar graphs, Cheri Levinson for creating the line and scatter plot graph, James Rosendale for creating the map, and Stanley Levinson for running the statistical analyses. The author thanks Kristen Staley, Megan Stewart, Ben Basil, Elisabeth Fitzpatrick, Sarah Potter, Sharon Wright, and Leah Hart for research assistance.

B. Substantive Outcomes in Labor Arbitration 29
1. Reasoned Opinions or Defensible Conclusions 31
2. Win Rates and Remedying Discrimination 35
C. Union Representation in Labor Arbitration 41
1. Union Negotiated Protections for Discriminatees 41
2. Union Understanding of Law 43
3. Union Representation of Discriminatees 44
V. Conclusion 47
Appendix 52

I. 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 individuals 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 retorted 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 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. Currently, a federal bill, the Arbitration Fairness Act (AFA), is pending in Congress.[5] The AFA would prohibit mandatory pre-dispute arbitration of employment claims altogether. The current version of the AFA explicitly states that a collective bargaining

---

[1] Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).
[2] *See e.g.*, Jean Sternlight, *Creeping Mandatory Arbitration: Is it Just?* 57 STAN. L. REV. 1631 (2005).
[3] *See e.g.*, Theodore St. Antoine, *Mandatory Arbitration: Why It's Better than it Looks*, 41 U. MICH. J.L. REFORM 783 (2008).
[4] 14 Penn Plaza v. Pyett, 556 U.S. 247 (2009).
[5] Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. (2011). *See also* Arbitration Fairness Act of 2009, S. 931, 111th Cong. (2009); Arbitration Fairness Act of 2007, S. 1782, 110thCong. (2007); Preservation of Civil Rights Protections Act of 2005, H.R. 2969, 109th Cong. (2005).

agreement (CBA) may not provide for waiver of 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 pre-dispute arbitration of employment discrimination claims by looking closely at the opinions and awards in labor arbitrations arising from collective bargaining agreements. 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. The article suggests that the process of labor arbitration of employment discrimination claims can be improved to ensure access to justice by regulating statutes of limitations, compulsory process, remedies, class actions and, at least in some types of cases, discovery, the standard of review and a union's duty of fair representation.

The article thus contributes to the debate epitomized by Jean Sternlight's seminal article, *Creeping Mandatory Arbitration: Is it Just?*, about whether mandatory arbitration is just. In reaching its conclusion, it draws on the larger body of literature on unions, collective action, and self-governance.[8] While the article attempts to make accurate mathematical representations, the article does not attempt to be a definitive empirical study.[9] And, as with most articles in the field,[10] the arbitration awards surveyed cannot claim to be a representative sample of all labor arbitration of employment discrimination claims. Instead, the article seeks to show what is happening in some labor arbitrations of some employment discrimination claims and to suggest, therefore, what is possible in others, particularly if required by regulation.

---

[6] Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. (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 e.g.* Cynthia Estlund, WORKING TOGETHER: HOW WORKPLACE BONDS STRENGTHEN A DIVERSE DEMOCRACY (Oxford U. Press 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).

[9] 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 the 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 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.

[10] *See e.g.*, Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. EMPIRICALLEGAL 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).

The article hereafter proceeds in four parts. In section two, the article provides background about labor arbitration and about mandatory pre-dispute arbitration. It describes the perceived problem mandatory pre-dispute arbitration creates in cutting off access to justice, in the form of the courts, and the resulting scholarly debate over the appropriateness of mandatory pre-dispute arbitration of employment discrimination claims in the union setting. In section three, the article describes the methodology that the research team used to acquire the arbitration awards analyzed herein.

Section four contains an analysis of the opinions and awards. Generally, section four explores three categories of concern about mandatory arbitration by examining the opinions and awards. These concerns regard 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. Finally, section five uses the analytical framework developed from a review of the cases to offer preliminary suggestions about an appropriate response to the perceived problem of mandatory pre-dispute arbitration of employment discrimination claims in the union sector.[11]

II. Background

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

A. Mandatory and Labor Arbitration Described

The term mandatory arbitration describes an arrangement where two parties considered to have unequal bargaining power agree prior to 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.[12] In the non-union employment context, some employers require an employee to sign a mandatory arbitration agreement as a condition either of hire or of continued employment. One recent study estimates that a third or more of non-union employees are subject to mandatory arbitration of employment claims.[13] Mandatory arbitration of employment claims is a relatively recent development, and the processes are governed by the Federal Arbitration Act. As discussed more extensively below, scholars have objected to mandatory arbitration of employment claims, and in particular employment discrimination claims, on a variety of grounds. The primary objection is that mandatory arbitration denies employees their "day in court."

---

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

[12] *See* William B. Gould, IV, *Kissing Cousins?: The Federal Arbitration Act and Modern Labor Arbitration*, 55 EMORY L.J. 609, 647 (2006).

[13] Colvin, *supra* note 10, at 1, 2.

The term labor arbitration describes an arrangement where a union and an employer agree in a collective bargaining agreement (CBA) to resolve disputes over the meaning of the CBA in a grievance process that culminates in binding arbitration. Similar to mandatory arbitration in the non-union sector, the arbitrator's decision and award is reviewable only upon certain limited grounds.[14] Labor arbitration of contractual disputes is a longstanding practice dating back to at least 1957.[15] 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. Recently, however, as discussed more extensively below,[16] the Supreme Court held that a union in its capacity as exclusive bargaining representative of the employees can 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 non-union 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. More than sixteen million employees are represented by unions,[17] meaning that the impact of labor arbitration in the workplace is widespread. 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. The fact that Local 32BJ, the largest Service Employees International Union (SEIU) local, arguably agreed to such a clause indicates that other unions, while they may be few in number, might also agree to such waivers. Moreover, the American Arbitration Association (AAA) recently instituted a *Pyett* panel, a panel of arbitrators with employment law experience, indicating that at least one of the primary service providers anticipates a need to arbitrate such claims.[18] Moreover, 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, as a practical matter, reach court.[19] And, even when they do, courts vary widely in the deference afforded to an arbitration decision under *Alexander v. Gardner-Denver*, discussed below.[20] Indeed, the *Pyett* decision, also discussed below,[21] may mean more judges are inclined to give great weight

---

[14] Gould, *supra* note 12, at 647.
[15] Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957).
[16] *See infra* note 48 and accompanying text.
[17] Kathryn A. Sabbeth & David C. Vladeck, *Contracting (Out) Rights*, 36 FORDHAM URB. L.J. 803, 820 (2009) (citing U.S. Dep't of Labor, Bureau of Statistics, Union Member Summary (Jan. 28, 2009), *available at* http://www.bls.gov/news.release/union2.nr0.htm.).
[18] American Arbitration Association , *Labor, Employment and Elections Update – Issue 6*, May 2011, *available at* http://www.adr.org/sp.asp?id=39673#special; 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.
[19] They may not reach court because grievants who are potential plaintiffs do not have the knowledge or funds to hire an attorney or pursue the claim.
[20] *See infra* note 23 and accompanying text. Martin H. Malin, *Revisiting the Meltzer-Howlett Debate on External 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* (unpublished student independent study paper on file with author) (2011) (outlining various ways court have treated arbitration awards in employment discrimination cases).
[21] *See infra* note 48 and accompanying text.

or even preclusive weight to an arbitration decision resolving a discrimination claim arising from the same facts.[22] Regardless of whether unions and employers explicitly waive the right to go to court, the resolution of a substantial number of discrimination claims will be effectively decided in labor arbitration. As a result, it is useful to assess labor arbitration of discrimination claims. Such an assessment can serve as a starting point for determining whether regulating labor arbitration of employment discrimination claims is necessary, and if so, in what circumstances and in what manner.

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, an issue 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 of *Alexander v. Gardner-Denver Co.*[23] The Supreme Court held that arbitration of a dispute alleging that a non-discrimination clause was violated did not preclude a later suit alleging violation of the statutory right to be free of racial discrimination.[24] The Court provided several rationales for the holding. The Court reasoned that contractual rights are separate and distinct from statutory rights[25] and that labor arbitrators interpret contracts rather than laws.[26] The Court reasoned that, based upon longstanding precedent, labor arbitration is a substitute for industrial strife and not for litigation.[27] The Court also reasoned that the labor arbitration process is not suited to deciding discrimination claims[28] and that the majoritarian tendencies of union processes would not effectively protect statutory rights.[29] Thereafter, the Supreme Court continued to hold that labor arbitration of contractual employment rights did not preclude a later suit claiming a violation of statutory rights based upon the same underlying facts.[30] The Court concluded that labor arbitration is an inadequate substitute for the courts in protecting statutory rights.[31]

In the non-union sector, until the 1990s employers rarely required mandatory arbitration of employment claims. This is because the Federal Arbitration Act (FAA) includes a provision historically interpreted to exclude employment claims from its scope.[32] However, in the 1980's and 90's, some employers began to mandate arbitration of employment claims, including

---

[22] Ann C. Hodges, *Fallout From* 14 Penn Plaza 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.").
[23] Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
[24] *Id.* at 51.
[25] *Id.* at 50-51.
[26] *Id.* at 53.
[27] *Id.* at 54-55.
[28] *Id.* at 57-58.
[29] *Id.* at 58 n.19.
[30] McDonald v. City of W. Branch, 466 U.S. 284 (1984) (§1983 action not barred by unsuccessful arbitration for termination lacking proper cause); Barrentine v. Ark.-Best Freight Sys., Inc., 450 U.S. 728 (1981) (unsuccessfully pursuing wage claim before joint labor management committee does not preclude Fair Labor Standards Act suit).
[31] McDonald, 466 U.S. at 290; Barrentine, 450 U.S. at 731 n.4.
[32] Federal Arbitration Act, 9 U.S.C. § 1 (2006). ("nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce").

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*.[33] 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.[34] The Court emphasized that arbitration was merely a change in forum and not a waiver of a substantive right.[35] The Court reasoned that the public goals of deterrence and remediation could be furthered through arbitration.[36] The Court 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.[37] The Court also rejected the contention that inequality in bargaining power renders an arbitration agreement unenforceable.[38] Gilmer's arbitration clause, however, 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 that the FAA does extend to mandatory arbitration clauses included in employment contracts.[39]

Thus, subsequent to *Gilmer*, employees in the non-union sector could be required to arbitrate their statutory employment discrimination claims despite the generally unequal bargaining power between an employer and an individual employee.[40] On the other hand, it appeared that, because of *Gardner-Denver* and the subsequent cases, employers might not be able to require their represented employees to arbitrate rather than proceed to court on statutory discrimination claims.[41] 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.[42] Bypassing the union arguably undermined the collective strength of the employees.[43]

In one jurisdiction, however, the Court of Appeals for the Fourth Circuit required, despite *Gardner-Denver*, that employees arbitrate rather than litigate the statutory discrimination

---

[33] *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991).
[34] *Id.* at 25.
[35] *Id.* at 26.
[36] *Id.* at 28.
[37] *Id.* at 31-32.
[38] *Id.* at 33.
[39] Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
[40] Sabbeth, *supra* note 17, at 819.
[41] *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, 120 S. Ct. 39, 145 L.Ed.2d 36 (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, 118 S. Ct. 2364, 141 L.Ed.2d 732 (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).
[42] 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).
[43] Emporium Capwell Co. v. W. Addition Cmty. Org., 420 U.S. 50 (1975); J.I. Case Co. v. NLRB, 321 U.S. 332 (1944).

claims.[44] Thus, by 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*.[45] The Supreme Court reaffirmed the holding of *Gardner-Denver* that including within a CBA a standard clause prohibiting discrimination on certain grounds does not waive an employee's right to proceed to court on those same grounds.[46] The Court saved for another day the issue of whether a union and an employer could require an employee to arbitrate rather than litigate a statutory discrimination claim by including within the CBA a clear and unmistakable waiver of the right to proceed to court on a statutory claim.[47]

The Court finally squarely addressed the issue in the 2010 case of *14 Penn Plaza v. Pyett*, holding that a union and an employer can, by including a clear and unmistakable waiver in the CBA require employees to arbitrate rather than litigate their employment discrimination claims.[48] The Court reasoned that an agreement to arbitrate employment claims falls within the subjects over which unions have authority to bargain.[49] The Court noted that arbitrators are capable of performing statutory interpretation and deciding complex factual issues and extolled the benefits of the streamlined process.[50] The Court 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 upon which labor law is based.[51] The Court asserted that potential conflicts of interest between unions and members are better addressed by Congress than the courts.[52] And, indeed, the Court reasons, the duty of fair representation and potential liability under Title VII protect discriminatees from unfair union treatment.[53]

Thus, currently, in the majority of situations where the parties include only a general, standard no-discrimination clause in the CBA, *Gardner-Denver* will control. 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 decision 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 of employment claims as part of a last final offer if the union and employer cannot agree during collective bargaining. The employees in units governed by a CBA containing a clear and unmistakable waiver will be bound to arbitrate rather than litigate their statutory discrimination claims unless the union elects not to pursue the claim to arbitration.[54]

---

[44] Austin v. Owens-Brockway Glass Container, Inc., 78 F.3d 875 (4th Cir.1996).
[45] Wright v. Universal Mar. Serv. Corp., 525 U.S. 70 (1998).
[46] *Id.* at 80.
[47] *Id.* at 82.
[48] *14 Penn Plaza v.Pyett*, 556 U.S. 247 (2009).
[49] *Id.* at 1464.
[50] *Id.* at 1471.
[51] *Id.* at 1472 ("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.").
[52] *Id.* at 1472.
[53] *Id.* at 1473.
[54] Veliz v. Collins Building Serv., Inc., 2011 WL 4444498, at * 4 (S.D.N.Y. Sept. 26, 2011) (dismissing discrimination claim without prejudice because CBA will be unenforceable if operates to preclude arbitration);

C. The Scholars Debate Mandatory Arbitration of Employment Discrimination Claims

Scholars and others object to mandatory labor arbitration of employment discrimination on many grounds, which can be categorized into three broad objections. The first two apply equally to mandatory arbitration of employment discrimination claims in the non-union sector, while the third applies particularly in the union sector. All three types of objections are somewhat overlapping. 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, scholars 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. Scholars argue that unions and labor arbitrators are adept at contract interpretation but are not trained in the legal analysis necessary to engage in statutory interpretation. 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. Fundamentally, the objections are 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 consuming[55] also cause arbitration to have fewer procedural protections than litigation. Some argue that cost savings are largely a result of decreased due process.[56] They point out the inapplicability of the rules of evidence and the lack of discovery, compulsory process, cross-examination, and testimony under oath.[57] Others point to "reduced statutes of limitations . . . and unavailability of class actions . . ." as hindrances to due process.[58] In particular, one study has demonstrated that, in non-union employment arbitration, the number of pro se litigants is high.[59] 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 L.C.C. v. Concepcion*, employers

---

Morris v. Temco Service Indus., 2010 WL 3291810, at *6 (S.D.N.Y. Aug. 12, 2010) (denying motion to compel arbitration where union failed to pursue discrimination claim); Kravar v. Triangle Servs., Inc., 186 L.R.R.M. (BNA) 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); Borrero v. Ruppert Hous. Co., 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"). *Cf.* Johnson v. Tishman Speyer Properties, 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 . . .").

[55] Cole, *supra* note 7, at 863.

[56] Sabbeth, *supra* note 17, at 830.

[57] Hodges, *supra* note 22, at 37; Margaret L. Moses, *The Pretext of Textualism: Disregarding Stare Decisis in* 14 Penn Plaza v. Pyett, 14 LEWIS & CLARK L. REV. 825, 846 (2010); Sabbeth, *supra* note 17, at 810.

[58] Hodges, *supra* note 22, at 37 (noting "very short statute of limitations for grievances" in labor arbitration); Sabbeth, *supra* note 17, at 831.

[59] Colvin, *supra* note 13, at 16 (finding 24.9% of plaintiffs in individual AAA administered employment arbitration were pro se).

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.[60]

As to substantive outcomes, objectors argue that, for a number of reasons, discriminatees are less likely to win in arbitration and that, when they do, the awards are lower.[61] 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.[62] Arbitrators are not empowered to grant the full range of relief available under the anti-discrimination statutes and thus damages may be limited.[63] These scholars argue that low awards resulting from mandatory arbitration remove 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.[64] Private dispute resolution is often confidential and deprives the public of information about the dispute and its resolution.[65] Scholars have argued that an important part of the fight against discrimination is public adjudication of claims.[66] Scholars argue that arbitration is not a transparent process because it is a confidential dispute resolution process which does not establish precedent.[67] Scholars argue lack of transparency for a variety of reasons, 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. Others emphasize as problematic the limited judicial review of awards.[68]

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.[69] First, these scholars assert that, in the cases of individual waivers, the employer must provide clear notice to the employee of the waiver, whereas the employee may not be aware of the provisions of the CBA.[70] Further, these scholars assert that

---

[60] AT&T Mobility L.C.C. v. Concepcion, 131 S. Ct. 1740 (2011); *But see* D.R. Horton, Inc., 357 N.L.R.B. No. 184 (Jan. 3, 2012) (holding individually negotiated class action waiver violates the National Labor Relations Act); *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 (2008) (hypothesizing that firms use arbitration clauses in consumer contracts to preclude class actions rather than to promote fair dispute resolution).

[61] Eisenberg, *supra* note 10, at 45.

[62] Samuel Estreicher & Zev J. Eigen, *The Forum for Adjudication of Employment Disputes*, at *8 (2010) *available at* http://ssrn.com/abstract=1656618.

[63] *See* Hodges, *supra* note 22, at 38 (noting "in traditional labor arbitration punitive damages and attorneys' fees are not ordered except in unusual cases"); Sabbeth, *supra* note 17, at 812.

[64] Stephen Plass, *Private Dispute Resolution and the Future of Institutional Workplace Discrimination*, 54 HOW. L.J. 45, 47 (2010).

[65] *Id.*

[66] Sabbeth, *supra* note 17, at 805.

[67] Sabbeth, *supra* note 17, at 806.

[68] Moses, *supra* note 57, at 826, 846.

[69] One article argues that 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 the accommodations will be paid for by other employees. Hyde, *supra* note 7, at 1006-007.

[70] *See* Moses, *supra* note 57, 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.").

unions have a conflict of interest. They are the exclusive representative for all employees and must juggle the interests of different groups. They may bargain away rights protected by public law to gain something of benefit to the majority of employees. Unions involve majority rule, and thus may not effectively represent the interests of minorities protected by anti-discrimination statutes.[71] Some even claim that unions poorly manage contract grievances and will be unable to effectively handle discrimination claims in addition.[72] Moreover, and somewhat overlapping with due process concerns, the labor grievance and arbitration system is designed to resolve disputes over contract interpretation and not statutory discrimination claims.[73] 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,[74] and the arbitrator is viewed essentially as an agent of the parties who understands their particular workplace and relationship rather than 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. Some have asserted that arbitrators are less skilled than judges in interpreting statutes, which arguably are more complex than contractual provisions.[75] 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 failing to vigorously pursue meritorious statutory claims to labor arbitration.

Other scholars respond that, given the savings in cost and time, a somewhat lesser level of procedural protection is acceptable. In labor arbitration in particular, 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.[76] "Human 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."[77] 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.[78] Some consider the ability to proceed pro se to be a benefit rather than exhibiting a lack of fair process.[79] 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.

---

[71] *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, 65 (2009).
[72] 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.").
[73] Sabbeth, *supra* note 17, at 820 (Employees select a union to bargain over wages and terms of conditions of employment but not to waive their rights to pursue anti-discrimination claims.).
[74] Hodges, *supra* note 22, at 35 ("union officials . . . are not trained in statutory interpretation or litigation).
[75] *See* Sabbeth, *supra* note 17, at 811.
[76] *See* 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, transcripts and post-hearing briefs are utilized.). *See also* W. Mark C. Weidemaier, *Toward a Theory of Precedent in Arbitration*, 51 WM. & MARY L. REV. 1895 (2010) (using labor arbitration as one example of an arbitration system that generates precedent).
[77] Nolan, *supra* note 76, at 7.
[78] Cole, *supra* note 7, at 863.
[79] Estreicher, *supra* note 62, at *8.

These scholars respond to substantive concerns by arguing that mandatory arbitration successfully resolves employment claims. These scholars reason that because arbitration is less costly it is more accessible to low income employees.[80] Moreover, they suspect that a large number of awards that are low but nonetheless certain may have a greater deterrent effect against employer discrimination than a lesser number of awards that are high but uncertain.[81] In favor of union arbitration of statutory employment discrimination, some scholars cite the comparable win rates in arbitration and litigation.[82] Others note that arbitrators do cite other awards as precedent.[83] Moreover, some point out that private post-dispute settlement does not result in a publicly accessible decision on the merits, but is clearly lawful, and that the courts will continue to develop precedent in employment discrimination cases.[84] In response to allegations of unfairness due to a repeat player effect, they assert that employers have an advantage when appearing multiple times in litigation as well. And they assert that arbitrators have an interest in "maintaining their established reputations for integrity and neutrality."[85] Additionally, the risk of arbitrator bias or participant expertise resulting 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.[86]

As to attacks on union waivers, even if an employer must provide an employee in the non-union setting with notice of mandatory arbitration, that employee is unlikely to refuse and risk losing his livelihood. Whereas, in the union setting, the union has a more equal relationship with the employer and possibly can decide only in instances where it truly would benefit employees to arbitrate rather than litigate statutory claims.[87] Indeed, unions could carve out certain types of claims, bargain for a different arbitration system than the traditional grievance labor arbitration system for employees with discrimination claims that contains more procedural safeguards, or provide individual grievants the right to arbitrate outside the labor arbitration process.[88] Indeed, unions should consider addressing discrimination and other statutory claims as a service that they can provide their members.[89] Professor Sarah Cole draws on the cognitive psychology literature

---

[80] *Id.*
[81] St. Antoine, *supra* note 7, at 635.
[82] Cole, *supra* note 7, at 862.
[83] *See* Nolan, *supra* note 76, at 5.
[84] Samuel Estreicher, *Predispute Agreements to Arbitrate Statutory Employment Claims*, 72 N.Y.U. L. REV. 1344, 1356 (1997).
[85] Estreicher, *supra* note 62, at *9.
[86] Cole, *supra* note 7, at 863; Colvin, *supra* note 13, at 11.
[87] 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.").
[88] 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. 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).
[89] *See* Marion Crain & Ken Matheny, *Labor's Identity Crisis*, 89 CALIF. L. REV. 1767, 1842–43 (2001). One scholar recognizes 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 &

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.[90] Some assert that arbitrators are equally as experienced and qualified as judges to interpret anti-discrimination statutes and decide such claims.[91] Indeed, to the extent that labor arbitrators are required to specialize in employment law as well as to understand the workplace, it is conceivable that they are better qualified than generalist judges to decide employment discrimination claims.[92] As a factual matter, "almost all labor arbitrators regularly face and decide legal questions . . . ."[93]

As to the possibility of union conflict with those discriminated against, some assert that unions today are "staunch advocates of traditionally underrepresented groups."[94] Some scholars have suggested the anti-discrimination laws themselves and the duty of fair representation serve as adequate safeguards.[95] Scholars have pointed out that concerns about unions refusing to process meritorious claims are satisfactorily addressed in several ways. First, the courts should hold that when a union refuses to bring a claim to arbitration, the employee may proceed with the case in court, as the Southern District of New York has done.[96] Second, a statutory claim under Title VII and the related statutes is available directly against any union that itself engages in discrimination. Alternatively, though perhaps less satisfactorily, the breach of duty of fair representation claim is available to aggrieved employees.[97]

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). It opens the door to individual bargaining in the union setting and undermines the federal policy of collective bargaining. *Id.*

[90] Cole, *supra* note 7, at 902.

[91] Cole, *supra* note 7, at 877-78; Gregory *supra* note 89, 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).

[92] *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, or engaging in formalism, but that generalist judges should be bound to formalism to reduce errors); *but see* Hyde, *supra* note 7, at 5 ("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.").

[93] Nolan, *supra* note 76, at 11.

[94] 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).

[95] Cole, *supra* note 7, at 886.

[96] Veliz v. Collins Building Serv., Inc., 2011 WL 4444498, at * 4 (S.D.N.Y. Sept. 26, 2011) (dismissing discrimination claim without prejudice because CBA will be unenforceable if operates to preclude arbitration); Morris v. Temco Service Indus., 2010 WL 3291810, at *6 (S.D.N.Y. Aug. 12, 2010) (denying motion to compel arbitration where union failed to pursue discrimination claim); Kravar v. Triangle Sers., 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); Borrero v. Ruppert Hous. Co., 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"). *Cf.* Johnson v. Tishman Speyer Properties, 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 . . .").

[97] Vaca v. Sipes, 386 U.S. 171 (1967); Steele v. Louisville & N.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. Brendan D. Cummins & Nicole M. Blissenbach, *The Law of the Land in Labor Arbitration: The Impact of* 14 Penn Plaza LCC v. Pyett, 25 ABA J. LAB. & EMP. L. 159, 171 (2010) ("The duty of fair representation risk is greater in the context of

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.[98] A few of these bills have passed, including one pertaining to certain employers. The Department of Defense Appropriations Act of 2010 prohibits the use of mandatory arbitration of Title VII and related employment claims by any employers contracting with the federal government.[99]

Most recently on May 12, 2011, Senator Al Franken introduced the Arbitration Fairness Act (AFA) in the Senate, and Representative Henry Johnson introduced it in the House. The AFA has been introduced by others in prior terms as well. The AFA would prohibit mandatory arbitration of consumer, civil rights, and employment disputes. While the AFA explicitly permits labor arbitration pursuant to a collective bargaining agreement, 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."[100] It would, thus, reverse *Pyett* and prohibit mandatory labor arbitration of employment discrimination claims.

Another proposed solution is to regulate rather than legislatively prohibit mandatory arbitration of employment claims. The first proposal along these lines was known as the Due Process Protocol (Protocol).[101] An alternative dispute resolution task force drafted the Protocol as a form of self-regulation for arbitration services and businesses to adopt. 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 non-union sector mandatory employment arbitration.[102] 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.[103] 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.[104] Currently, the AAA "is considering the possibility of supplementing its Employment or Labor

---

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. Gregory, *supra* note, at 452.

[98] Thomas V. Burch, *Regulating Mandatory Arbitration*, Utah Law Review at *27 (2011) (forthcoming) (*available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1793303).

[99] Burch, *supra* note 98, at *27.

[100] Arbitration Fairness Act of 2011, H.R. 1873, S. 987, 112th Cong. (2011).

[101] 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).

[102] American Arbitration Association, *Employment Arbitration Rules and Mediation* at *4,*available at* http://www.adr.org/sp.asp?id=32904#o3.

[103] St. Antoine, *supra* note 7, at 642.

[104] Protocol, 9A Lab. Rel. Rep. (BNA) at 534:401; *see also* St. Antoine, *supra* note 7, at 644 (describing the National Academy of Arbitrators' proposal).

Arbitration Rules" to address discrimination cases arbitrated under *Pyett*.[105] Similar proposals with additional or different procedural safeguards have been offered over the years.[106] Others have proposed that Congress mandate such procedural protections rather than prohibiting mandatory arbitration of employment claims altogether.[107]

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 or litigation, or to permit mandatory labor arbitration only if it provides certain procedural safeguards.[108]

III. 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 1992[109] and 2010.[110] 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.[111]

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 five searches were performed. 1) "ADA" "Americans with Disabilities Act" "disability discrimination" "accommodation"; 2) "Title VII" "race discrimination" "sex discrimination"; 3) "sexual harassment"; 4) "pregnancy discrimination" 5) "ADEA" "Age Discrimination in Employment Act." This article addresses the awards resulting from all of these searches with the exception of the ADEA search, which returned only 35 awards. Excluding the ADEA cases, the 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, and these are excluded from the ultimate case study thought they may shed interesting light on arbitrators' ability to interpret Title VII.[112] A few decided that the discrimination claim was for the courts, and so the claim was not resolved in arbitration; and

---

[105] American Arbitration Association, *Labor, Employment and Elections Update – Issue 6*, May 2011, at *3, *available at* http://www.adr.org/sp.asp?id=39673#special.

[106] Bales, *supra* note 101, at 343; Richard A. Bales, *Normative Consideration of Employment Arbitration at* Gilmer's *Quinceanera*, 81 TUL. L. REV. 331, 391 (2006).

[107] Burch, *supra* note, at *3, *41; Bales, *supra* note 101, at 343.

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

[109] 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.

[110] The particular database searched is the BNA Labor Relations Reporter Labor Arbitration Reports via LexisNexis Labor Arbitration Awards (Published and Unpublished).

[111] 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.

[112] Perhaps this data will serve as the basis for a future article.

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 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 non-disabled employee grieved losing some position or slot to a disabled person. From time to time, however, during the discussion of the awards, other cases involving different types of claims are mentioned and cited.

The data, of course, does not represent a complete picture of what actually occurs in arbitration. The sample cannot be considered representative and is not a reliable basis for statistical analysis, because many labor arbitration awards, while 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 by the collective bargaining agreement.[113] Others may seek permission to publish awards only when the decision relates to an open or high profile issue or regards a case that would be of use to many companies or industries. Even those who routinely seek permission to publish may not always obtain permission from both parties.[114]

Thus, this article provides a subjective case study of labor arbitration. Certainly, companies like Circuit City may continue to promulgate apparently unfair policies,[115] and, while the risk 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

[113] 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 completely polished publishable decision or because they wish to maintain the details of the case more confidential, particularly where the opinion states a particular witness was not credible. In some regions such as New England, there is a culture of non-publication. No strong hypotheses indicate that those who do not publish rule differently than those who do.

[114] 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 come up with different arguments than those that failed. Perhaps the parties have a practice of not objecting to publication. Perhaps because the arbitrator seeks permission at the outset of the arbitration before the parties know who has won. Perhaps because 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.

[115] Sabbeth, *supra* note 17, at 828 ("studies 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.").

mandatory labor arbitration of employment discrimination claims were regulated in some manner by federal legislation.

IV. Analysis

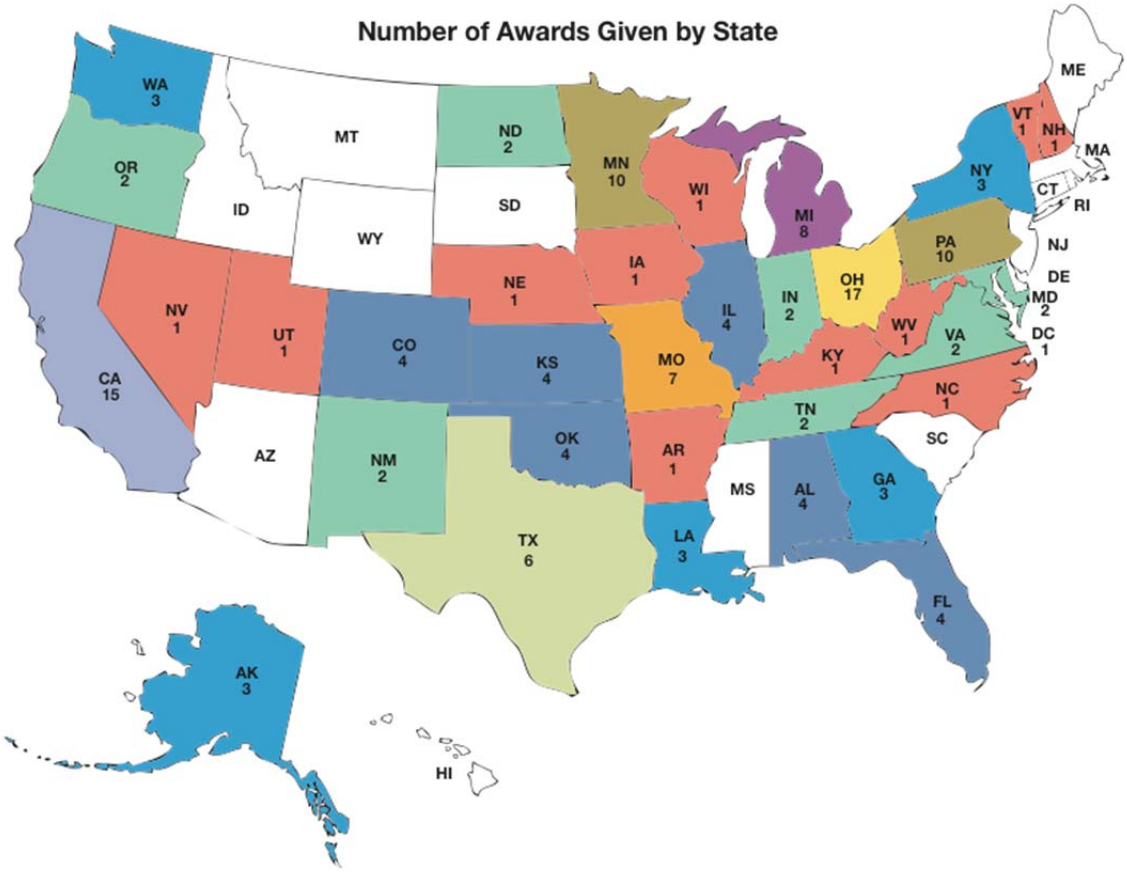
This section describes and analyzes the awards in light of the objections to mandatory labor arbitration of employment discrimination. After briefly describing the types of cases and where the hearings were held, the subsections discuss procedural concerns, substantive concerns, and concerns that labor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

Of the 101 ADA related cases, 76 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 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, 35 asserted a violation of Title VII or a similar state statute, while 24 relied only on a contractual provision.[116]

The disputes arose and were arbitrated all across the country. Thirty-six of the fifty states and the District of Columbia were represented among the 138 awards for which the location was ascertainable. Every region was represented, with Ohio accounting for 17 cases, the most of any single state.[117]

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

[117] 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 about 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

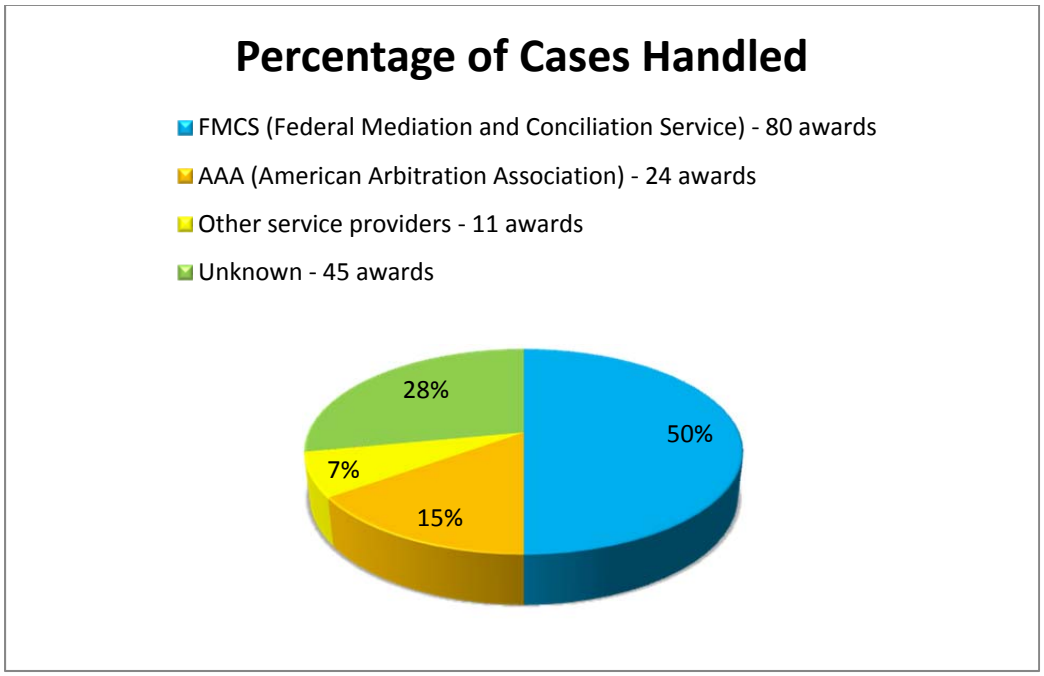
The service provider handling the greatest number of claims was the Federal Mediation and Conciliation Service (FMCS), with 80 awards, approximately 50 percent of the total.[118] As to procedural protections, the FMCS rules provide for a neutral who is not employed as an advocate,[119] an award within 60 days of the close of the record,[120] and a "fair and adequate hearing" with the opportunity to present evidence and argument.[121]

[118] Fifty-two of the ADA search related cases indicated the FMCS was the provider while 31 of the other claims did so.
[119] Part 1404 – Arbitration Services at *1404.5c., *available at* http://www.fmcs.gov/internet/itemDetail.asp?categoryID=247&itemID=17942.
[120] *Id.* at *1404.14
[121] *Code of Professional Responsibility for Arbitrators of Labor-Management Disputes of the: Federal Mediation and Conciliation Service, National Academy of Arbitrators, American Arbitration Association*, as Amended and

The AAA handled a substantial number of the claims, with 24 awards, or approximately 15 percent of the total.[122] As discussed above, the AAA rules incorporate the provisions of the Protocol.[123]

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 United States Department of Labor, Office of Labor-Management Relations, the Vermont Labor Relations Board, and the Washington Public Employment Relations Commission.[124] Together these services accounted for 11 cases, or approximately 7 percent.

In the remaining 45 cases, or approximately 28 percent, 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.[125] 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.



Effective June 2003, *available at* http://www.fmcs.gov/internet/itemDetail.asp?categoryID=247&itemID=17942.

[122] Fourteen of the ADA search related cases indicated the AAA was the provider, while twelve of the other claims did so.

[123] *See supra* Section II.D.

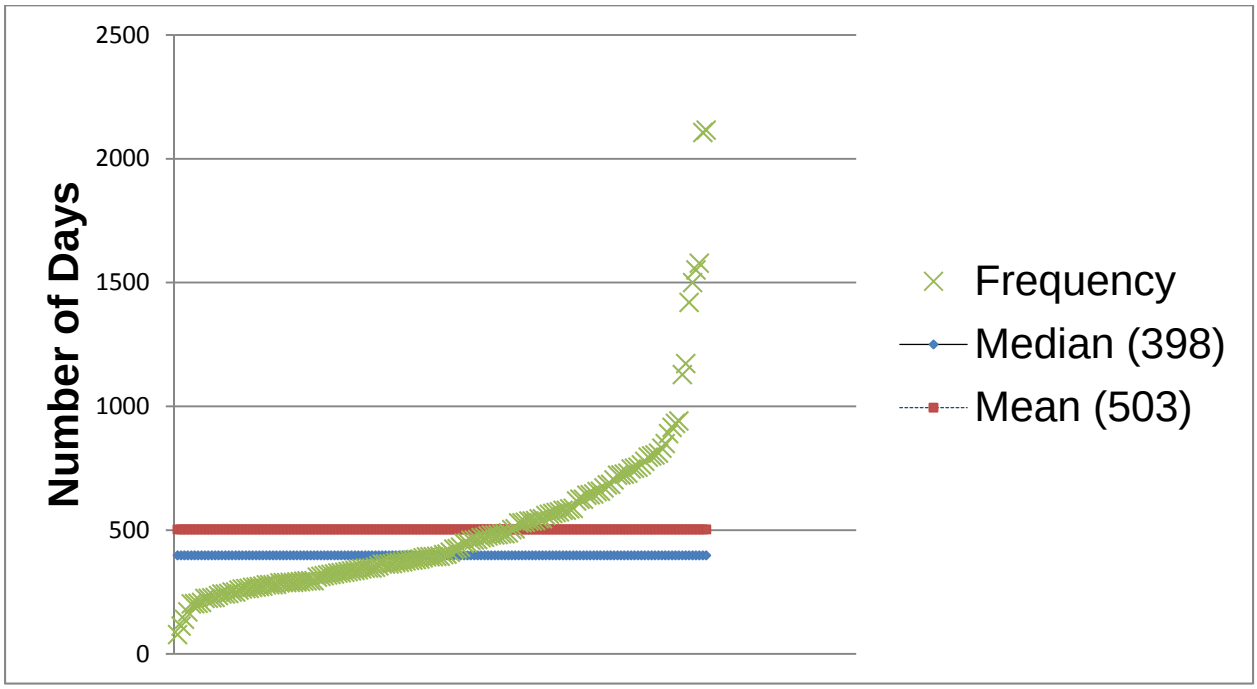
[124] The BMS, PERB, and PBM each handled two cases while all the other listed services handled one.

[125] 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.").

2. Time to Resolve

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

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 instead.[126] The average length of time to obtain a decision was approximately 503 days. The median length of time was approximately 398 days.[127] 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 1460 days; and 154, or approximately 99 percent, in less than 1825 days. Two cases took almost six years to resolve.



The 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, particularly given that a claim must first be filed with an

[126] When only the month of the triggering event was known, the time was calculated from the first day of the month.
[127] Of 99 ADA search-related cases, the average number of days to decision was approximately 480, and the median approximately 393. For the other 57 cases, the average was approximately 543 days, and the median approximately 449.

administrative agency, such as the Equal Employment Opportunity Commission (EEOC), before a complaint can be filed in court.[128] Indeed, studies have reported a longer average time from filing a suit until a court decision, and those numbers do not reflect the time between the triggering incident and the filing of the complaint.[129]

3. Procedural Protections

The cases 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, all of the awards studied were written and available via a commercial database. Eight awards, or approximately five percent, were unpublished, meaning that the large majority 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 co-workers, 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 often submitted. Indeed, 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

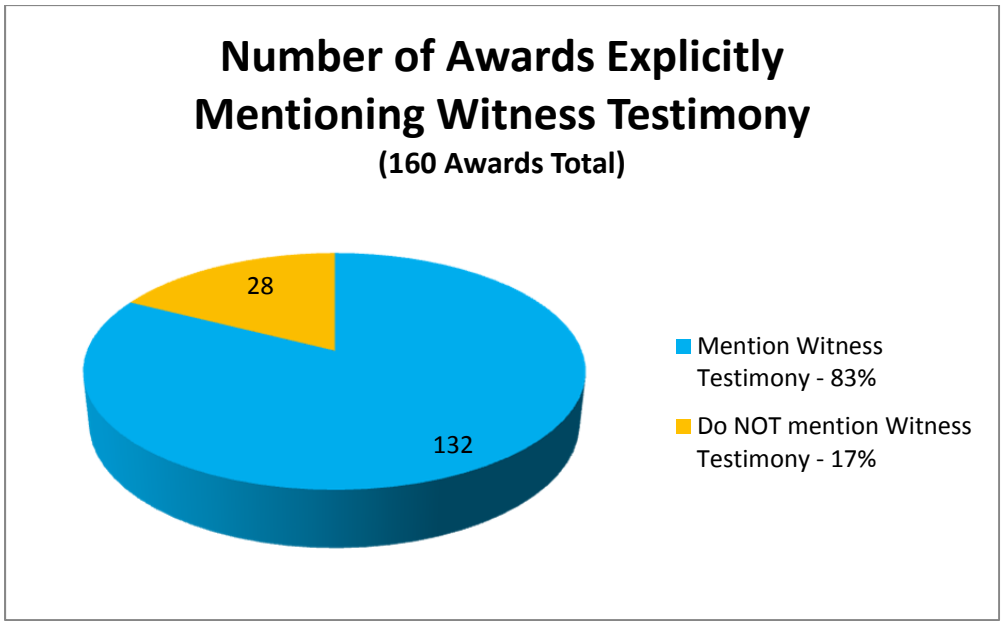
Witness testimony is standard in labor arbitration, which generally proceeds like a trial with opening statements and then the calling of witnesses. Witness testimony was expressly mentioned in 132 of the awards. Fifty-three of the opinions explicitly mentioned that the grievant testified. While most opinions did not explicitly mention that the testimony was produced under oath, six did, and swearing in the witnesses is standard practice in labor arbitration. Cross-examination is also standard in labor arbitration, and 19 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.[130]

---

[128] Colvin reports the mean time from filing to decision for employment cases. Colvin, *supra* note 13, at 8 (reporting 361.5 day mean from filing to decision in AAA individual mandatory employment of arbitration claims).

[129] Eisenberg, *supra* note 10, at 61 (reporting 709 day mean in federal court on employment discrimination claims and 723 day mean in state court on non-civil rights claims).

[130] *See infra* notes 165-166 and accompanying text. Dep't of Veterans Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571, 1573 (2007) (one witness for each side not present); L.A. Cmty. Coll. Dist., 112 Lab. Arb. Rep. (BNA) 733, 737 (1999) (employer argued not provided opportunity to cross-examine author of medical reports); John Hopkins Bayview Med. Ctr., 105 Lab. Arb. Rep. (BNA) 193, 198 (1995) (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) (first line supervisor who prepared report not available); Kaiser Aluminum & Chem. Corp., 99 Lab. Arb. Rep. (BNA) 609, 612 (1992) (employer argued could not cross examine grievant and union expert because not testifying); U.S.



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, individually and without the assistance of the union, to the Vermont Labor Relations Board.[131] Thus, none of the grievants represented themselves. As 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 union in the large majority of cases.[132] In 80 awards, or approximately 50 percent of the cases, however, the awards indicated that the unions, representing the grievant, were represented by counsel.[133] The

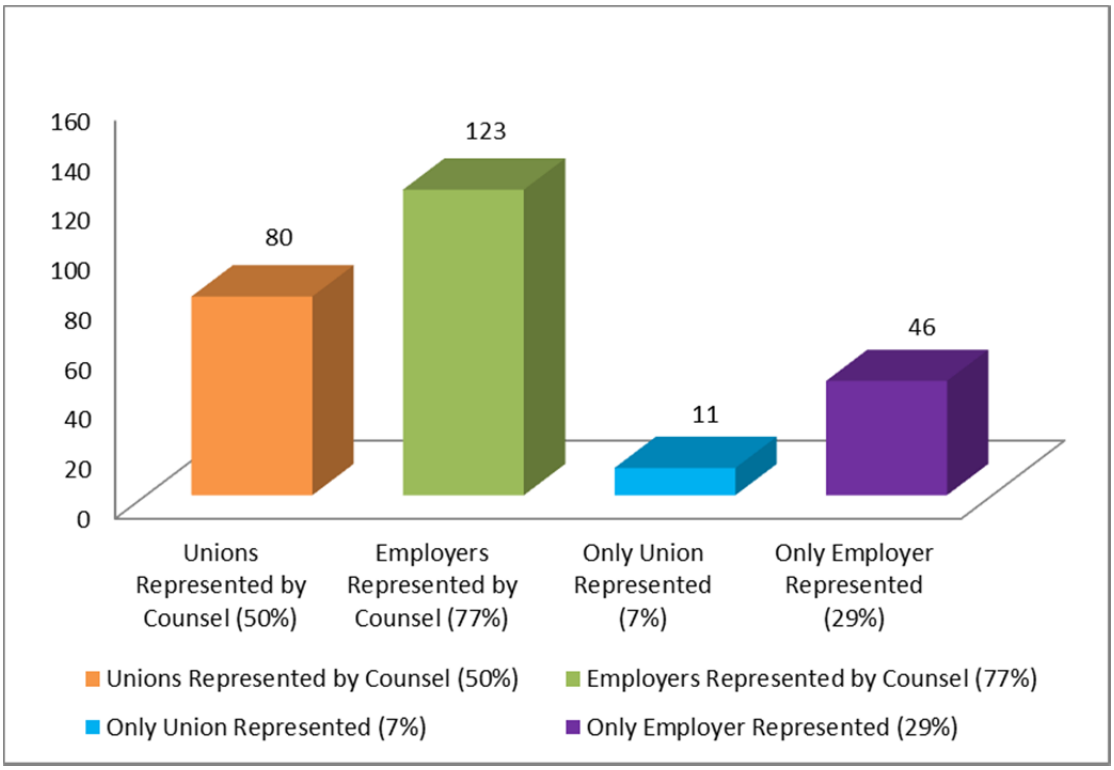
Dep't of Labor, 98 Lab. Arb. Rep. (BNA) 1129, 1133 (1992) (alleged harasser not at hearing); City of Berkeley, Cal., 94 Lab. Arb. Rep. (BNA) 1198, 1201 (1990) (decisionmaker left employment and not available).

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

[132] For instance, in one case the arbitrator notes, "In 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 (2001) (Harris, Arb.). *See also* Mich. Paving and Materials, 2007 WL 7315891, AAA Case No: 54 300 00650 06, LEXIS, BNA Labor Arbitration Decisions-Published and Unpublished, at *1 (Jan. 31, 2007) (McDonald, Arb.) (LexisNexis, BNA Labor Arbitration Decisions - Published and Unpublished) ("Both parties were ably represented and had the full opportunity of presenting testimony and exhibits."); The Garden City Union Free Sch. Dist., 2006 WL 4577848, AAA Case No.: 13 390 00417 06, LEXIS, BNA Arbitration Decisions-Published and Unpublished, at *1 (Nov. 4, 2006) (Gregory, Arb.) (LexisNexis, BNA Labor Arbitration Decisions - Published and Unpublished) ("The parties were very well represented . . . "); Cont'l Cement Co., 107 Lab. Arb. Rep. (BNA) 829 (1996) (Hilgert, Arb.) ("In his oral summary arguments, Mr. Lloyd Walters, Union International Representative and Chief Spokesman for the Union, made an eloquent plea on behalf of B, citing various reasons why the Union felt the Arbitrator should overturn the discharge action meted upon B."); Sw. Airlines, 107 Lab. Arb. Rep. (BNA) 270 (1996) (Jennings, Arb.) ("Both parties were well represented in this dispute and presented persuasive arguments.").

[133] Of the awards resulting from the first ADA related search, 48 awards indicated that the union was represented by an attorney, and 74 indicated that the employer was represented by an attorney. In cases only the union was

awards indicated that employers were represented by counsel in 123, or approximately 77 percent, of the cases.[134] Eleven awards, or approximately 7 percent, indicated only that the union was represented, while 46 awards, or approximately 29 percent, indicated that only the employer was represented.[135]



c. Transcripts and Briefs

It is common practice in most areas of the country for the parties to submit post-hearing briefs, and some parties, though not all, and 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,[136] and another indicated a tape recording was

represented by an attorney, while in 32 cases only the employer was represented. The union was represented by an attorney in 36 of the cases responsive to the other searches (excluding the case with the individual grievant), and the employer in 57 (including the case with the individual grievant). There were three cases where only the union was represented by an attorney, and 18 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.

[134] 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.

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

[136] City of Jackson, 2005 WL 1800127, No. FMCS 04-05962, LEXIS, BNA Arbitration Decisions-Published and Unpublished, at *l (April 22, 2005) (Goldberg, Arb.).

available only to the arbitrator and would be destroyed after the decision was issued.[137] One case indicated that the record consisted of the arbitrator's notes and the exhibits,[138] 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.[139] In one case, the employer submitted a post-hearing brief, but the union representative gave an oral summation in lieu of a brief.[140]

d. Evidentiary and Arbitrability Rules

The rules governing arbitration are also sometimes criticized because rules of evidence may be enforced only laxly or 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. Two cases from the early 1990's, which are earlier than the cases generally sampled, illustrate the potential problem. In one, the union objected to admission of a document comparing the merits of the grievant, who alleged sex discrimination, to the merits of the male employee who was promoted over her. The arbitrator overruled the objection, reasoning that the document was not documentary evidence but simply testimony of the managers in written form.[141] The grievance was denied. In the second, hearsay that co-workers were unable to understand the grievant, who had been demoted allegedly due to his race, was admitted. Again, the grievance was denied.[142]

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.[143] 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.[144]

Indeed, relaxed evidentiary rules possibly result in the admissibility of information favorable to the discriminatees.[145] 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.

---

[137] Boise Cascade Corp., 105 Lab. Arb. Rep. (BNA) 223 (1995) (Michelstetter, Arb.).
[138] Reister & Thermacher Co., 107 Lab. Arb. Rep. (BNA) 572, 573 (1996) (Weisheit, Arb.).
[139] Olin Corp., 103 Lab. Arb. Rep. (BNA) 481, 483 (1994) (Helburn, Arb.) (more senior employee won in claim for position over disabled junior employee).
[140] Cont'l Cement Co., 107 Lab. Arb. Rep. (BNA) 829, 836 (1996) (Hilgert, Arb.) (contract case upholding termination of alcoholic for absences).
[141] TU Electric, 97 Lab. Arb. Rep. (BNA) 1177, 1184 (1991) (Bailey, Arb.).
[142] Pac. Airmotive Corp., 95 Lab. Arb. Rep. (BNA) 777, 782 (1990) (Kaufman, Arb.).
[143] John Hopkins Bayview Med. Ctr., 105 Lab. Arb. Rep. (BNA) 193, 198 (Bowers, Arb.).
[144] Cal-Compack Foods, 105 Lab. Arb. Rep. (BNA) 865, 868 (1995) (Oestreich, Arb.).
[145] Dennis Nolan and Rick Bales discussed this possibility during the discussion group at the annual SEALS conference in 2011.

The arbitrator, however, admitted the reports because to do so is typical in arbitration, and sustained the grievance.[146] In another, the union submitted a statement from a co-worker who did not testify, and the arbitrator sustained the grievance.[147]

Employers sometimes asserted time or other bars to the grievances.[148] In the majority of these instances, arbitrators tended to find the claims arbitrable and proceeded to rule on the merits.[149] For instance, in one case, the arbitrator held that, although many acts upon which the discrimination claim was based occurred more than 30 days before the grievance was filed, the union's knowledge, after investigation of those allegations and several others within the 30 day period, of the alleged discrimination occurred within the 30 day period.[150]

In only four instances, approximately three percent of the awards, did the arbitrator actually deny a grievance based on a short time limit or similar procedural bar. In one case, the arbitrator refused to consider the allegation that race discrimination was the root cause of the grievant's having been transferred out of his position, to which he was ultimately reassigned, but at a lower grade level. Because the grievant had not filed a grievance within 15 days of his supervisor's racist remark, the later claim, which did not arise until he was denied reclassification over two years later, was barred from arbitration.[151] In another, the decision barred a claim alleging, in part, race discrimination, because the grievant had not timely filed a grievance within 10

---

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

[147] Dep't of Vet. 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).

[148] 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.

[149] *See e.g.*, City of Minneapolis, 125 Lab. Arb. Rep. (BNA) 558, 561 (2008) (Befort, Arb.) (arbitrator rejects argument that 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 untimely); Fed. Bureau of Prisons, 117 Lab. Arb. Rep. (BNA) 514 (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, 1758 (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) (Franckiewicz, 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 so arbitrable); Exxon Co., U.S.A., Baton Rouge Refinery, 105 Lab. Arb. Rep. (BNA) 846, 849 (1995) (Caraway, Arb.) (finding 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, 499, 500 (1995) (Hooper) (applying discovery rule and finding grievance within 180 days required to file with EEOC); Rodeway Inn, 102 Lab. Arb. Rep. (BNA) 1003, 1013 (1994) (Goldberg, Arb) (grievant's failure to testify in earlier steps not bar to grievance); NASA Lewis Research Ctr., 100 Lab. Arb. Rep. (BNA) 909, 911 (1993) (Minni, Arb.) (grievance timely filed).

[150] Dep't of Veterans Affairs, VA Medical Center, 101 Lab. Arb. Rep. (BNA) 731, 733, 734 (1993) (Curry, Jr., Arb.).

[151] Coastal Sys. Station (Dep't of the Navy), 119 Lab. Arb. Rep. (BNA) 540, 546, 549, 550 (2003) (Bendixsen, Arb.); *see also* Sloss Indus. Corp., 102 Lab. Arb. Rep. (BNA) 917, 918, 919 (1994) (Allen, Jr., Arb.) (barring claim alleging, in part, race discrimination because grievant had not timely filed grievance within 10 calendar days of time when facts upon which grievance was based were reasonably available).

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.[152] While the result in these cases may have been different if the union had waived the employee's right to go to court altogether unless complying with short grievance deadlines, these cases do illustrate the potential difficulty of short filing deadlines in labor arbitration. Finally, 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.[153]

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 District Court for the Western District of Virginia dismissed her discrimination suit for failure to exhaust her remedies under the collective bargaining agreement. 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 than180 days prior to 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. Additionally, 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.[154] 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 contractually agreed upon arrangement where a grievance is filed and discussed at various steps between the union and the employer. Only when a grievance cannot be resolved in the grievance process does the union resort to arbitration, which is typically the last step of the process. Typically, during the grievance process, the parties informally discover information 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, and 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 subjective reading of the opinions 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 witnesses[155] and documents,

---

[152] Allegheny Co., 121 Lab. Arb. Rep. (BNA) 1784, 1787 (2006) (Dissen, Arb.).
[153] 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 non-payment).
[154] Westvaco Corp., 111 Lab. Arb. Rep. (BNA) 887, 892 (1998) (Nicholas, Arb.).
[155] *See e.g.*, Twinsburg Bd. of Educ., 119 Lab. Arb. Rep. (BNA) 54, 55 (2003) (Chattman, Arb.) (mentioning subpoenaing witness).

enforcement is not always possible, and in some cases the witness or document subpoenaed is not available until the day of the arbitration hearing.[156]

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.[157] 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.[158] 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.

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 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."[159] 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.[160] 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." The arbitrator found that, in fact, the record includes evidence that white employees have been treated the same as grievant.[161] 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 . . ."[162]

---

[156] 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 NLRB 42, 43 (1990); Anheuser-Busch, Inc., 237 NLRB 982, 984-85 (1978).

[157] For instance, in one case the union very effectively marshaled the evidence and cited nine facts which it asserted if taken together created "a strong inference of racial discrimination." 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. City of Berkeley, Cal., 94 Lab. Arb. Rep. (BNA) 1198, 1204, 1205 (1990) (Bogue, Arb.).

[158] *See infra* Section IV.B.1.

[159] Noranda Aluminum, Inc., 119 Lab. Arb. Rep. (BNA) 217, 221 (2003) (Gordon, Arb.).

[160] *Id.* at 222.

[161] Nw. Pbl'ns, Inc., 104 Lab. Arb. Rep. (BNA) 91, 95 (1994) (Bognanno, Arb.).

[162] In re 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").

A union's failure to appreciate the strength of the employer's case due to inadequate discovery arose in another case.[163] The case was a contractual one in which no ADA claim was raised. The mentally ill grievant was discharged for an outburst which 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.[164] Despite the setback, the grievance was sustained.

A few cases also illustrate the issue of witness unavailability, possibly due to lack of enforceable compulsory process. For instance, an employer in one case submitted a first line supervisor's written description of a co-employee's report of an alleged altercation. The arbitrator stated that the supervisor was not available to testify at the hearing.[165] The arbitrator considered this 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.[166] 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 while inadequate discovery may sometimes hamper grievance arbitration, arbitrators sometimes use creativity in addressing the resulting lack of information. In one case, a co-worker 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."[167] In an attempt to rectify the situation, the arbitrator ordered that the employer take measures to ensure that the employment record of the grievant was not adversely affected by this controversy; require all persons to discontinue any investigation of the matter; assure that future investigations of racial discrimination or harassment are investigated by persons with competency for the task; and to keep the co-worker away from the grievant and order her to cease monitoring the grievant's activities.[168] In another

---

[163] In another case, the union challenged the employer's failure to provide information about the damage caused by the grievant's negligence prior to 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).

[164] AAFES Dist., 107 Lab. Arb. Rep. (BNA) 290 (1996) (Marcus, Arb.).

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

[166] 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, 154, 156 (2007) (Smith, Arb.) (union admitted past fire chiefs', who did not testify, statements and lost grievance); City of Berkeley, Cal., 94 Lab. Arb. Rep. 1198 (BNA) (1998) (Boque, Arb.) (non-binding arbitration where one decision maker not available); John Hopkins Bayview Med. Ctr., 105 Lab. Arb. Rep. 193, 198 (BNA) (1995) (Bowers, Arb.) (finding employer did not make effort to find positions for grievants because key witness not present and sustaining grievance); 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).

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

[168] *Id.* at 1145, 1156.

case, while it caused some delay,[169] the arbitrator was able to provide the union with time for discovery. At 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 answered in full. 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.[170] Ultimately, despite apparently procuring the information, the union lost the grievance.

f. Class actions

One protection that is available in litigation but often lost by agreement to arbitrate is the ability to bring a class action lawsuit.[171] Only one decision explicitly framed the case as a class action grievance, [172] 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, for 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.[173]

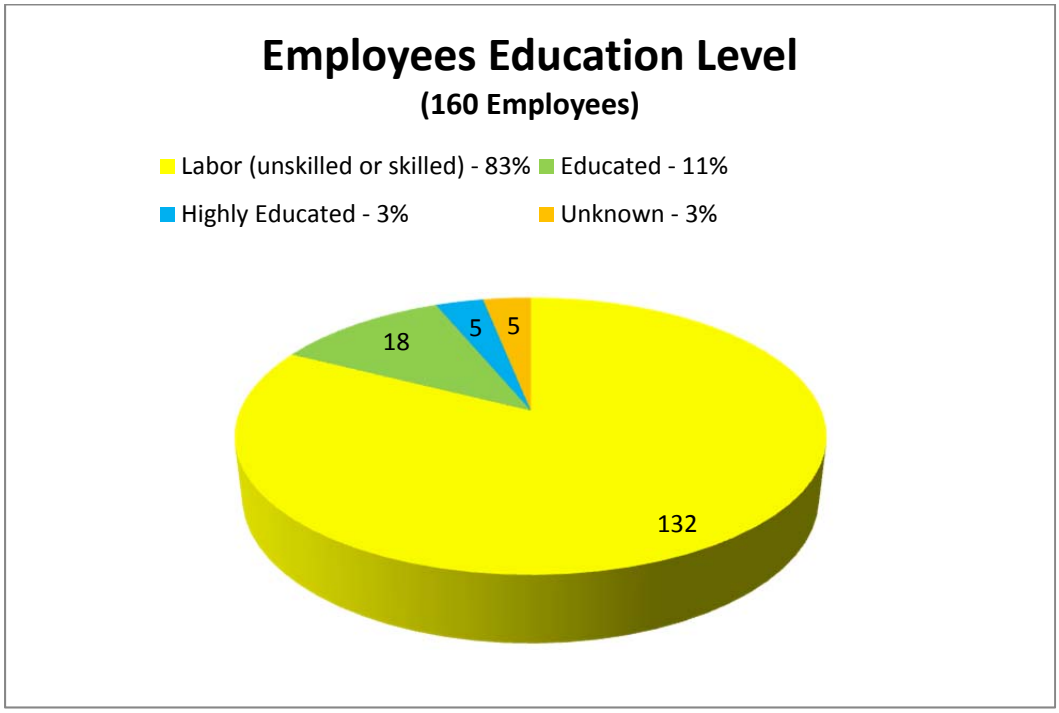
B. Substantive Outcomes in Labor Arbitration

Overall, the decisions appear to be fair and well-reasoned. Indeed, a person, or employer, who knew nothing about the ADA could certainly learn its requirements from reading the relevant decisions and awards.[174]

The positions held by the grievants indicate that many are not highly educated and probably do not make high salaries.[175] 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.[176] Only a very small minority were highly educated, such as a librarian, a math

[169] W.G. Tomko & Sons Mech. Contractors, 114 Lab. Arb. Rep. (BNA) 314, 316, (2000) (Dissen, Arb.) (over a two-year period between filing and decision, five months of which were between the initial hearing date and actual date).
[170] *Id.*
[171] Whether a union can agree to bring claims only as individual claims giving 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 (Jan. 3, 2012) (holding individually negotiated class action waiver violates the National Labor Relations Act).
[172] Del Monte Foods Pittsburgh Factory, 121 Lab. Arb. Rep. (BNA) 1100, 1101 (2005) (Miles, Arb.) (addressing claim of only one grievant despite label of class action grievance).
[173] *See infra* notes 223-237 and accompanying text.
[174] While there were not as many awards in Title VII cases, with a greater number of awards the same promises to be true.
[175] Approximately 132 or 83% of grievants fell in this category.
[176] Approximately 18 or 11% fell in this category.

professor, an English professor, and another PhD.[177] 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 in some cases probably had counsel in a related administrative proceeding or court case.[178] But a subjective view indicates that many would not have had representation without the union.[179]



Some of the cases provided complex analysis with citation to legal authority,[180] while others focused primarily on the facts, citing only the statute or no legal authority at all.[181] Of the 111

[177] In re 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 (2008) (Staudohar, Arb.) (English professor at community college); Los Angeles Cmty. Coll. Dist., 112 Lab. Arb. Rep. (BNA) 733, 735,742 (1999) (Arb., Kaufman) (math professor at community college); Cleveland Pub. Library, 105 Lab. Arb. Rep. (BNA) 781 (1995) (Smith, Arb.) (professional librarians); NASA Lewis Research Ctr., 100 Lab. Arb. Rep. (BNA) 909 (1993) (Minni, Arb.) (PhD).

[178] *See e.g.*, Westvaco Corp., 111 Lab. Arb. Rep. (BNA) 887, 891–892 (1998) (Nicholas, Arb.) (court case dismissed because grievance arbitration considered binding); U.S. Marine Corps., 110 Lab. Arb. Rep. (BNA) 955, 960 (1998) (Cornelius, Arb.). 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 counsel in these cases was hired by the union or the employee could not be ascertained from the awards.

[179] 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."); Elizabeth Hill, *AAA Employment Arbitration: A Fair Forum at Low Cost*, 58 DISP. RES. J. 9, 10 (2003) (arguing lower income employees are unlikely to show provable damages of $60,0000 necessary to procure representation in an employment discrimination lawsuit).

[180] As to precedent, some arbitrators appear to 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) (Chattman, Arb.) ("The Arbitrator cannot reach a decision in conflict with well-settled legal propositions.").

[181] Further analysis of this data and comparison to rates at which courts cite various forms of precedent might

statutory cases, 71, or approximately 64 percent, cited legal authority other than the statute.[182] Of those, 52 cited relevant case law,[183] 13 cited the EEOC guidelines or regulations,[184] and 26 cited other arbitration decisions.[185] Seventeen decisions cite a treatise or other secondary source.[186] Forty decisions cited only the relevant statute or no legal authority.[187]

Examples of well-reasoned decisions, reflected in the majority of the cases, as well as 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 the reader 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,[188] whether an employee can perform the essential job functions with accommodation, [189] whether an accommodation is reasonable, [190] claims of hostile work environment[191] and of pregnancy discrimination,[192] and the relationship between a disabled individual's right to accommodation and the seniority rights of others. [193] One case deals with the complicated provisions regarding pre-employment and post-offer medical examinations and questionnaires.[194] Another notes that

---

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*, N.C. L. REV. (forthcoming 2012) *available at* http://ssrn.com/abstract=1982144 (comparing arbitrator's use of precedent to citation practices of judges).

[182] Of the 76 statutory ADA-related cases, fifty cited legal authority. Six of these cited only the ADA. Thus, 44, approximately 58%, cited authority other than simply the statute. Twenty-seven of the 35 statutory cases responsive to the other search, cite authority, approximately 77%. There were no cases responsive to this search that cited only the statute.

[183] Twenty-nine of the cases responsive to the ADA-related search cited case law, and 23 of those responsive to the other searches did so.

[184] 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.

[185] Thirteen of the cases responsive to the ADA-related search cited arbitration awards, and 13 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.).

[186] 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.

[187] Of the 76 statutory ADA-related cases, six cases cited only the statute, and 26 cases cited no authority whatsoever. Of the 35 statutory cases responsive to the other search, eight cases cited no authority.

[188] City of Minneapolis, 125 Lab. Arb. Rep. (BNA) 558 (2008) (Befort, Arb.); Perfection Bakeries, 110 Lab. Arb. Rep. (BNA) 1043 (1997) (Stallworth, Arb).

[189] Rheem Mfg. Co. & Local 7893, 108 Lab. Arb. Rep. (BNA) 193, 195 (1997) (Woolf, Arb.).

[190] Reister & Thesmacher Co. & Sheet Metal Workers Int'l Ass'n, 107 Lab. Arb. Rep. (BNA) 572, 576 (1996) (Weisheit, Arb.).

[191] Cincinnati Bd. of Ed., 122 Lab. Arb. Rep. (BNA) 837, 844 (2006) (Murphy, Arb.).

[192] Minnegasco, Inc., 103 Lab. Arb. Rep. (BNA) 43, 48 (1994) (Bognanno, Arb.); 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).

[193] *See* Dep't of the Air Force, 109 Lab. Arb. Rep. (BNA) 989, 992 (1997) (Levy, Arb.)(finding that an employee suffering from OCD was not accommodated under the Rehabilitation Act and ordering reinstatement, backpay, and accommodation).

[194] Boise Cascade Corp., 105 Lab. Arb. Rep. (BNA) 223, 228 (1995) (Michelstetter II, Arb.).

arbitrators fairly regularly apply the notoriously difficult to teach *McDonnell Douglas* burden shifting paradigm to decide discrimination cases.[195]

Some decisions are very well reasoned, citing extensively to authority.[196] For instance, in one case the grievant could not use a pitchfork, or pike pole, which was one essential job duty of the position for which the union desired he receive 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.[197]

In another case, the arbitrator offered extensive citation to circuit court decisions in denying a grievance for sexual harassment. 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." Moreover, the company properly responded when the grievant reported some of the conduct.[198]

Other decisions focus on factual determinations, which are often quite important in discrimination cases, rather than application of precedent, but nevertheless appear well-reasoned.[199] For instance, in one case, two grievants suffered lifting restrictions due to work injuries. The employer had discontinued them in the position of Patient Escort when the lighter

---

[195] Commercial Cleaning Sys., Inc., 122 Lab. Arb. Rep. (BNA) 1383, 1391 ("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.") (2006) (McCurdy, Arb.).

[196] Perfection Bakeries, 110 Lab. Arb. Rep. (BNA) 1043 (1197) (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); GTE N. Inc., 113 Lab. Arb. Rep. (BNA) 665, 670, 674 (1999) (Brodsky, Arb.) (citing court decisions in support of reasoning that new supervisors cannot discontinue accommodating grievant). A couple of Title VII cases from 1990, before the sample, also exemplify well-reasoned decisions that provide 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, 685–687 (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, 1043–1044 (1990) (Ellmann, Arb.).

[197] Bowater, Inc. Newsprint & Directory Div., 116 Lab. Arb. Rep. (BNA) 382, 386 (2001) (Harris, Arb.).

[198] S. Nuclear Operating Co., 118 Lab. Arb. Rep. (BNA) 1227, 1232, 1233 (2003) (Baroni, Arb.).

[199] *See e.g.* Dep't of the Air Force, 109 Lab. Arb. Rep. (BNA) 989 (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 (1993) (Reynolds, Arb.) (noting that other non-disabled employees are permitted to perform only one function within their job classification); City of Selah, 2002 WL 32002271, No. 16243-A-02-1377 (2002) (Smith, Arb.) (reasoning partial hearing loss did not necessitate change in grievant's duties); *Cf.* GTE N. Inc., 113 Lab. Arb. Rep. (BNA) 665, 670, 674 (1999) (Brodsky, Arb.) (citing some precedent but focusing on factual reasoning that new supervisor cannot discontinue accommodating grievant).

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.[200]

In another contract-based case, the decision focused on the timing of the adverse action.[201] 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, either made an immediate decision not to assign her to first shift, or considered asking her to accept first shift the day before the accusation but then abruptly abandoned that and peremptorily assigned her to first shift.[202]

Some cases indicate that arbitrators may apply precedent that is favorable to discriminatees. For instance, one case 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 him to pursue a more normal life.[203] In this case, the grievant, a math professor in the community college system, was unable to walk very many steps each day before experiencing pain. He requested a transfer to a college closer to his house. The arbitrator granted the transfer.[204]

Other cases indicate that arbitrators sometimes apply the law even less restrictively than the courts in favoring discriminatees.[205] In one case, a mechanic diagnosed with clinical depression was discharged after refusing to follow a direct order for the third time. He had failed to take his medication. 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. 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.[206]

---

[200] Johns Hopkins Bayview Med. Ctr. & AFSCME, 105 Lab. Arb. Rep. (BNA) 193, 197–199 (1995) (Bowers, Arb.).
[201] 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, Cal., 94 Lab. Arb. Rep. (BNA) 1198, 1200 (1990) (Bogue, Arb.).
[202] Madison Cnty. Sheriffs Dep't, 107 Lab. Arb. Rep. (BNA) 967, 669 (1996) (Kubie, Arb.).
[203] Buckingham v. U.S. 998 F.2d 735 (1993).
[204] L.A. Cmty. Coll. Dist., 112 Lab. Arb. Rep. (BNA) 733, 735,742 (1999) (Arb., Kaufman).
[205] *See e.g.*, Flamingo Hilton-Laughlin, 108 Lab. Arb. Rep. (BNA) 545, 554 (1997) (Weckstein, Arb.) ("an 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.").
[206] Laidlaw Transit & Int'l Ass'n of Machinists & Aerospace Workers, 104 Lab. Arb. Rep. (BNA) 302, 306 (1995) (Concepcion, Arb.); *see also* Culver City Unified Sch. Dist. & CA Fed'n of Teachers, 110 Lab. Arb. Rep. (BNA) 519, 527 (1997) (Hoh, Arb.) (requiring school district to accommodate teacher with sensitivity to fragrance by providing her input on students to have lockers outside her classroom and by installing security cameras and notifying students they will be disciplined for fragrance "assaults").

In another case, the grievant suffered from only partial hearing loss. 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.[207] Indeed, one arbitrator recognized that when determining just cause, it is appropriate to consider the concept of reasonable accommodation, which is "the fundamental employer obligation" under the ADA, precisely because arbitrators had been doing so long before the ADA was enacted. The arbitrator also noted that: "If anything, arbitrators have been more permissive than ADA."[208]

Some awards, while reaching a defensible outcome, are not as well reasoned or well supported by citation to authority as would be ideal.[209] In one case, for instance, the union challenged a mandatory overtime policy as applied to individuals restricted from working overtime.[210] 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.[211]

Even in those cases where the reasoning offends notions of justice, the legal or factual ruling is one that some outlier judges would make as well. In one case, for instance, the arbitrator notes that the grievant's mental illness does not appear to be a disability covered by the ADA and that the employer does not appear to have a duty to accommodate.[212] In another, a pregnant woman was denied tenure and the arbitrator found that because she had miscarried, she was not pregnant at the time of the decision, despite evidence that she had notified the decision-makers who were aware of the pregnancy and mentioned it before the tenure meeting.[213]

---

[207] City of Selah, 2002 WL 32002271 (Dec. 23, 2002) (Smith, Arb.).

[208] Thermo King Corp. & United Steelworkers of Am., 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 ADA was enacted.").

[209] *See e.g.*, U.S. Dep't Housing & Urban Dev. 121 Lab. Arb. Rep. (BNA) 1261, 1267 (2005) (Coyne, Arb.) (implying but never explicitly stating that white employees were hired for positions black employees claimed discriminatory hiring over); Robinson Bus Serv., Inc., 116 Lab. Arb. Rep. (BNA) 372 (2001) (Cox, Arb.) (fails 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 (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 (1993) (Hilgert, Arb.) (not addressing claim of discriminatory treatment in depth).

[210] Bobcat Co., 119 Lab. Arb. Rep. (BNA) 817, 820 (2004) (Jacobowski, Arb.).

[211] *Id.*

[212] Anchorage Sch. Dist. & AK Pub. Emp. Ass'n, 119 Lab. Arb. Rep. (BNA) 1313, 1321-22 (2004) (DiFalco, Arb.) (grievant, a custodial supervisor, suffering from psychosis, rage, and depression terminated for threatening to kill five co-workers). *Cf.* Littleton v. Wal-Mart Stores, 231 Fed. Appx. 874, 878 (11th Cir. 2007) (concluding twenty-nine-year-old man with mental retardation was not individual with 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).

[213] Hartnell Cmty. Coll. Dist., 125 Lab. Arb. Rep. (BNA) 1545, 1551, 1552 (2008) (Staudohar, Arb.). *See also* City of Plymouth, 2010 WL 5575016 (Jan. 4, 2010) (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 white male with 4.4 more points than white female candidate on interviews and work references was discriminated against). 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. An officer was transferred because of her pregnancy. The representation, although by an attorney, appears inadequate, which

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 (sutures) to be able to perform 100 percent of his job duties (entering nuclear hot areas wearing a respirator) violated the ADA. The 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. The decision states that "[t]he reasonable accommodation is meant for prospective employees who want to work for the Company . . ."[214] This was, however, more than a decade ago, so 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.[215]

2. Win Rates and Remedying Discrimination

The win rate for unions appears to be low.[216] Overall, the union prevailed in 57 cases, or approximately 36 percent, and lost 103, or approximately 64 percent.[217] 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 non-religious 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

---

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. 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. 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. The disparate treatment as compared to other pregnant officers was not because of sex, but must have been for some other reason. The procedures appeared inadequate and precedent did not end up being grappled with. City of Aurora, 96 Lab. Arb. Rep. (BNA) 1196, 1203 (1990) (Snider, Arb.). The case seems to follow the logic of Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976) which was subsequently overruled by the Pregnancy Discrimination Act.

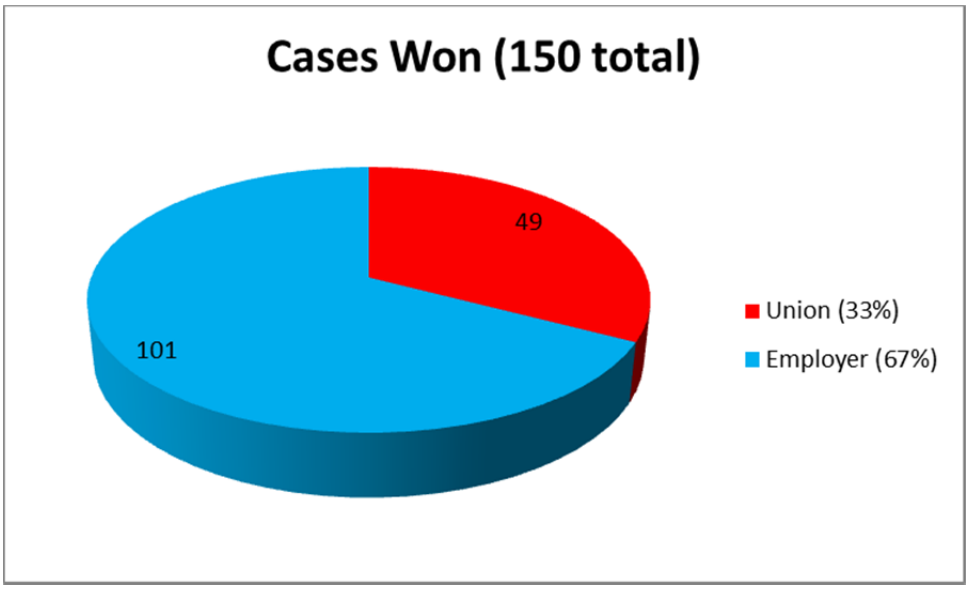
[214] Johnson Controls World Serv., 104 Lab. Arb. Rep. (BNA) 336, 342 (1995) (Goodstein, Arb.).

[215] Minnegasco & Gas Workers Union Local 340, 109 Lab. Arb. Rep. (BNA) 220, 224 (1997) (Jacobowski, Arb.) (finding union failed to prove employee with alcoholism who lost job because of DWI required accommodation, when perhaps instead reasoning that he lacked the ability to perform an essential job duty, driving, even with accommodation would have been more in keeping with the ADA).

[216] Scholars have found similarly low win rates in individual arbitration and federal court, but higher win rates in state court on non-discrimination claims. *See e.g.*, Colvin, *supra* note 13, at 5 (reporting 21.4% win rate in AAA individual mandatory employment arbitration claims); Eisenberg, *supra* note 10, at 48 (reporting 36.4 % win rate in federal court on employment discrimination claims and 56.6% 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 similarly low win rates in ADA cases in federal court. *See e.g.*, Amy L. Allbright, *2010 Employment Decisions under the ADA Titles I & V – Survey Update*, 35 MENTAL & PHYSICAL DISABILITY L. REP. 394 (2011) (reporting a 1.8% win rate in federal court cases reported in Westlaw); Ruth Colker, *Winning & Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239 (2001) (reporting a success rate in ADA appellate employment discrimination cases reported in Westlaw of 8% from 1992–1997 and of 3% from 2002–2004).

[217] The union won 39 cases responsive to the ADA-related search, and lost 62 of those. It won 18 cases responsive to the other searches, and lost 41 of those.

prevailed in 49 cases, approximately 33 percent, and lost 101 cases, approximately 67 percent.[218] Win 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.[219]



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.[220] Additionally, the win rate may be lower because summary judgment is not traditionally used in labor arbitration to dispose of losing cases.[221] Or it may be that some cases grievants might have won in court or in another venue are

[218] The difference between the unions' win rate and that of the employers, 101 of 150 cases (67%) is statistically significant with a p value of <.0001. See the appendix for complete statistical analysis. The union won 32 cases responsive to the ADA-related search, and lost 60 of those. It won 17 cases responsive to the other searches, and lost 41 of those. Disaggregating the two types of claims, thus, shows that the union won 35% of the ADA-related claims and 29% 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 216. 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 58 cases could lead to valuable information, further disaggregation is warranted in future work.

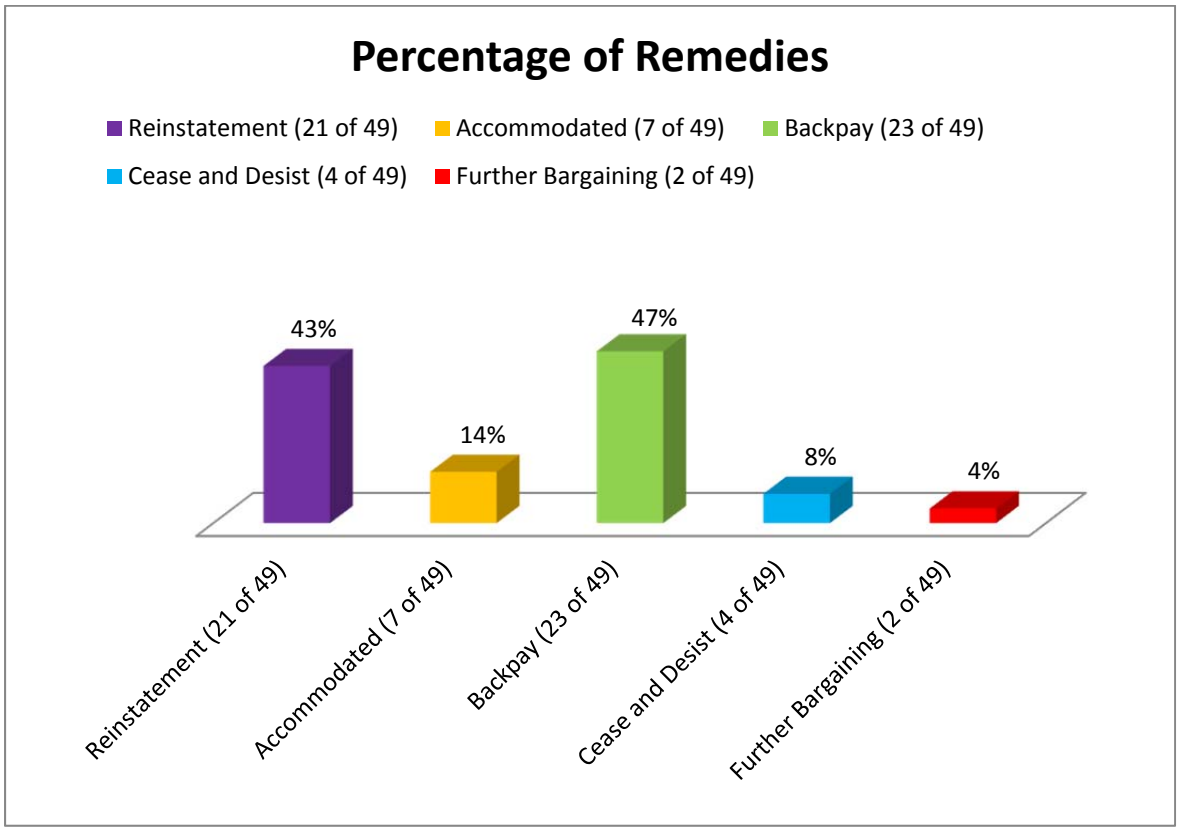
[219] Further investigation of cases where grievants won on other grounds provides a subject for additional research. It is possible that a union contract which provides the grievant other avenues of winning a claim is preferable to having to claim through protected status to the extent some scholars 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 & FREEDOM IN LATE MODERNITY, 27-29 (Princeton University Press 1995). Others have noted that unions prefer to rely on contractual claims that "pose less of a danger of dividing workers." Estreicher, *supra* note 62, at *4.

[220] *See* 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. David Weil, *Individual Rights and Collective Agents:The Role of Old and New Workplace Institutions in the Regulation of Labor Markets*, *in* EMERGING LABOR MARKET INSTITUTIONS FOR THE TWENTY-FIRST CENTURY, 13, 27 (Univ. Chicago Press 2004) *available at* http://www.nber.org/chapters/c9948.

[221] Bales, *supra* note 106, at 349.

lost in arbitration. A subjective reading suggests that more cases fall into the former category than the latter, although there are certainly cases in which grievants lost in arbitration where they might have been won in a different forum or with a different arbitrator.[222]

The types of relief awarded in the cases in which the union prevailed are limited. In 21 cases, the grievant was reinstated; in seven, the grievant was accommodated; in 23, 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.[223] 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.[224]



[222] *See supra* notes 212–213 and accompanying text. *See e.g.*, Orange Cnty., 124 Lab. Arb. Rep. (BNA) 150, 159 (2007) (Smith, Arb.) (arbitrator held employer did not have to turn temporary position into a permanent position whereas perhaps another arbitrator or court would have so required).

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

[224] 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 Sunday for religious reasons.

In some instances, arbitrators acted more like a settlement officer than a decision-maker, pushing the parties to work out a solution themselves. In more than one instance, an arbitrator remanded to the parties to determine whether a reasonable accommodation for a disability could be made and retained jurisdiction over the case.[225] Arbitrators also ordered parties to negotiate layoff rights[226] and the effect of an affirmative action policy.[227]

Arbitrators also seem not infrequently to come up with creative solutions that might not be implemented by a court of law. In one case, an employee had lung cancer and elected to claim disability over 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 90 days to oversee implementation of the award.[228] 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.[229]

In another case, the arbitrator found that a hotel owner had retaliated against the grievant for complaining of sexual harassment. The arbitrator ruled 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 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.[230]

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

---

[225] Dep't Vet. Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571, 1587 (2007) (Terrill, Arb.) (remanded to parties to determine if reasonable accommodation possible); Sherwin Williams Corp., 113 Lab. Arb. Rep. (BNA) 1184, 1192 (2000) (Statham, Arb.) (reinstated and must agree on job placement consistent with restrictions); U.S. Army Corps of Eng'rs-Tulsa Dist., 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. & Int'l Assn. of Machinists & Aerospace Workers, 102 Lab. Arb. Rep. (BNA) 463, 469 (1993) (Miller, Arb.); Waterous Co., 100 Lab. Arb. Rep. (BNA) 278, 284 (1993) (Reynolds, Arb.) (reinstated and ordered to negotiate specific job functions).

[226] Henkel Corp./Chems. Grp., 110 Lab. Arb. Rep. (BNA) 1121, 1127, 1128 (1998) (West, Arb.) (Grievant with heart disease was not substantially limited, and employer could transfer her to position she could not work. The employer could not terminate her, however, but must lay her off because work in her old position still exists, and the parties must negotiate her lay-off rights.).

[227] Mich. Dep't Pub. Health, 101 Lab. Arb. Rep. 713, 719–720 (1993) (Kanner, Arb.) (white male was determined most qualified but woman was provided the position because of affirmative action policy and arbitrator ordered parties to settle or re-contact arbitrator in 30 days).

[228] Champion Int'l Corp., 106 Lab. Arb. Rep. (BNA) 1024, 1033 (Howell, Arb.).

[229] AAFES Dist., 107 Lab. Arb. Rep. (BNA) 290 (1996) (Marcus, Arb.).

[230] Rodeway Inn, 102 Lab. Arb. Rep. (BNA) 1003, 1015–1016 (1994) (Goldberg, Arb.).

request for stress and hardship, and that no constitutional violation had been alleged. As a result, damages of $2,000,000 were deemed inappropriate.[231] 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 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 anti-discrimination provision by the terms prohibiting discrimination "as provided by law," the parties prohibit sex discrimination using different procedural and remedial mechanisms. 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.[232] 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 some employers do use arbitration to reduce the risk of punitive damages and to try to bar legitimate claims altogether. A woman suffered harassment at the hands of her supervisor.[233] 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, "It is rather interesting that the Company . . . in the case before Judge Dinsmoor . . . 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."[234] The decision finds the grievant was subjected to a hostile work environment and thus awards backpay for time missed and medical expenses. It does not, however, award any punitive damages on the theory that no retaliation was proved.

Moreover, one case indicates that the traditional focus of labor arbitration on the removal of disciplinary action and reinstatement may leave discrimination unremedied.[235] The union challenged a layoff as retaliation for reporting sexual harassment. 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 was thus not retaliatory. Having lost the dispute, the grievant received no remedy for the harassment.[236] As the company argued, the grievant could,

---

[231] Fed. Bureau of Prisons–Fed. Corrections Inst., 117 Lab. Arb. Rep. (BNA) 515, 529 (2002) (Neas, Arb.).
[232] Union Camp Corp., 104 Lab. Arb. Rep. (BNA) 295, 302 (1995) (Nolan, Arb.).
[233] El Paso Elec. Co., 109 Lab. Arb. Rep. (BNA) 1086, 1087 (1998) (Allen, Arb.).
[234] *Id*. at 1090.
[235] 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*, at *35-36 (forthcoming in LAW & SOCIETY REV.) (available at http://www.acsu.buffalo.edu/~eberrey/index_files/Berrey,%20Hoffman,%20&%20Nielsen-%20Situated%20Justice,%20August%202011.pdf). Further research comparing the rate of reinstatement in arbitration versus court and the types of cases in which it is used may be warranted.
[236] ITT Fed. Serv. Corp., 105 Lab. Arb. Rep. (BNA) 289, 296–297 (1995) (Landau, Arb.).

but had not, filed a charge with the appropriate state agency or EEOC. Perhaps if, instead, 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 the employer had failed to accommodate the grievant, and remanded to the parties to agree to a reasonable accommodation and appropriate damages. The parties settled before the additional hearing scheduled to address any remaining issues.[237]

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.[238] In the one case where the individual brought the claim, no information about who paid attorneys' fees was provided.[239]

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.[240] There was one in which the employer, as the losing party, was to pay.[241]

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.[242] There were six repeat players[243] involved in approximately eight percent of the cases. The employer won both arbitrations in two instances.[244] 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.[245] 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.[246] In one instance, the employer was represented

[237] Dep't Vet. Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571, 1585 (2007) (Terrill, Arb.).
[238] Union dues, of course, pay the fees.
[239] Vermont Pub. Safety Dep't, 100 Lab. Arb. Rep. (BNA) 370 (1993) (Toepfer, Arb.).
[240] Cincinnati St. Tech. & Comm. Coll., 114 Lab. Arb. Rep. (BNA) 153 (2000) (Heekin, Arb.); GTE N., Inc., 113 Lab. Arb. Rep. (BNA) 1047, 1052 (1999) (Brodsky Arb.).
[241] Albertson's Inc., 115 Lab. Arb. Rep. (BNA) 886, 894 (2000) (Gangle, Arb.) (grievant lost discrimination claim but prevailed on other grounds).
[242] 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.
[243] 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.
[244] Minnegasco, 103 Lab. Arb. Rep. (BNA) 43, 48 (1994) (Boganno, Arb.); Minnegasco, 109 Lab. Arb. Rep. (BNA) 220, 224 (1997) (Jacobowski, Arb.); Rheem, 108 Lab. Arb. Rep. 193, 196 (BNA) (1997) (Woolf, Arb.); Rheem, 117 Lab. Arb. Rep. (BNA) 473, 477 (2002) (Bankson, Arb.).
[245] GTE N., Inc., 113 Lab. Arb. Rep. (BNA) 665, 674 (1999) (Daniel, Arb.); GTE N., Inc., 113 Lab. Arb. Rep. (BNA) 1047, 1052 (1999) (Brodsky, Arb.); Champion Int'l Corp., 106 Lab. Arb. Rep. (BNA) 1024, 1033 (1996) (Howell, Arb.); Champion Int'l Corp., 109 Lab. Arb. Rep. 753, 761 (1997) (Giblin, Arb.).
[246] Dep't Vet. Affairs Med. Ctr., 114 Lab. Arb. Rep. (BNA) 1217, 1222 (2000) (O'Grady); Dep't Vet. Affairs Med. Ctr., 123 Lab. Arb. Rep. (BNA) 1571, 1587 (2007) (Terrill, Arb.); Henkel, Corp., 104 Lab. Arb. Rep. (BNA) 494, 501 (1995) (Hooper, Arb.); Henkel Corp., 110 Lab. Arb. Rep. (BNA) 1121, 1127–1128 (1998) (West, Arb.).

by the same attorney both times. Different unions were involved in the two arbitrations.[247] In none of the six instances involving repeat employers was the second arbitration in front of the same arbitrator. Because the same parties were involved in four of the six instances, in two instances the union had the same advocate, and in no instance was the same arbitrator used. The repeat player effect likely does not explain the employer wins. Generally, concerns as to a repeat player effect are probably lessened in the union context where the union as well as the employer tends to be a repeat player.[248]

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.[249] Additionally, the cases indicate that, in most instances, arbitrators have the ability to apply the law to the facts, not only to interpret the statute.[250] 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.[251] Negotiation of such clauses indicates that unions will negotiate on behalf of minorities.[252] In some instances, unions negotiated even greater protections than those that would be available under the law, particularly when dealing with accommodating disabled individuals.

For instance, in one case, a woman who could not work overtime because of stress resulting 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 the involuntary leave.[253]

---

[247] 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.
[248] Colvin, *supra* note 13, at 11; Cole *supra* note 7, at 863.
[249] *See supra* notes 159–162 and accompanying text.
[250] *See supra* section IV.B.1.
[251] *See e.g.*, Parkersburg Bedding, 118 Lab. Arb. Rep. (BNA) 1788 (2007) (Zobrack, Arb.); Commercial Cleaning Sys., Inc., 122 Lab. Arb. Rep. (BNA) 1383, 1391 (2006) (McCurdy, Arb.); Bobcat Co., 119 Lab. Arb. Rep. (BNA) 817 (2004) (Jacobowski, Arb.); ITT Fed. Serv. Corp., 105 Lab. Arb. Rep. (BNA) 289 (1995) (Landau, Arb.); Merrimack Co., 102 Lab. Arb. Rep. (BNA) 1096 (1994); Altoona Hosp., 102 Lab. Arb. Rep. (BNA) 650 (1993) (Jones, Arb.).
[252] A more cynical view would be that they negotiate such clauses only to comply with the law and avoid suits against the union.
[253] City of Akron, 111 Lab. Arb. Rep. (BNA) 705, 712 (1998) (Franckiewicz, Arb.).

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 "it is hardly just to deprive an individual of his livelihood because he was injured in the course of performing his job duties."[254] 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 fork-truck operator's position, which he could perform within his limitations.[255]

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 consistent example of this phenomenon arises when unions negotiate for the seniority rights of non-disabled individuals over the rights of disabled individuals to have a position, [256] even in instances where the disabled individual would be terminated.[257] 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. [258] 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. This case is the prototypical example of an instance in which a union supports a non-disabled 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. Since that time, the Supreme Court's decision in *Barnett v. U.S. Airways Inc.*[259] has indicated that the arbitrator's decision is certainly defensible as a matter of ADA interpretation.

---

[254] Techneglass, Inc., 120 Lab. Arb. Rep. (BNA) 722, 725 (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.

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

[256] Contracts, Metals & Welding, Inc., 110 Lab. Arb. Rep. (BNA) 673, 682 (1998) (Klein, Arb.) (employer violated CBA by bumping more senior employee on first shift to accommodate junior disabled employee); Alcoa Bldg. Prod. & Aluminum, Brick & Glass Workers Int'l, 104 Lab. Arb. Rep. (BNA) 364, 369 (1995) (Cerone, Arb.) (employer violated CBA by replacing grievant who successfully bid into position with disabled employee); Stone Container Corp., 101 Lab. Arb. Rep. (BNA) 943, 947 (1993) (Feldman, Arb.) (grievance by those bumped to accommodate mentally ill co-worker sustained); Mason & Hanger Corp., 111 Lab. Arb. Rep. (BNA) 60, 64 (1998) (Caraway, Arb) (upholding grievance by more senior employee assigned to swing shift when junior employee was assigned to day shift to accommodate his disability); Clark Co. Sheriff's Dep't, 102 Lab. Arb. Rep. (BNA) 193, 197 (1994) (Kindig, Arb.) (employer didn't post first shift position to diabetic employee; arbitrator ordered to post and negotiate with union over reasonable accommodation); Mead Prod. & United Paperworkers Int'l Union, 114 Lab. Arb. Rep. (BNA) 1753, 1760 (2000) (Nathan, Arb.) (employer violated CBA when it permitted disabled employee to bump non-disabled employee from her job); City of Roswell, 109 Lab. Arb. Rep. (BNA) 1153, 1159 (1998) (Wyman, Arb.) (unless union agreed to waive seniority rules, employer could not place disabled grievant in unit position).

[257] Mason & Hanger Corp., 111 Lab. Arb. Rep. (BNA) 60, 64 (1998) (Caraway, Arb.). *Cf.* Estreicher, *supra* note 62, at *3 (asserting "even when unions actively support nondiscriminatory policies, they have difficulty mediating claims of groups of workers where those claims cannot be easily resolved by a rule favoring length of service . . ..").

[258] Mead Prod. & United Paperworkers Int'l Union, 114 Lab. Arb. Rep. (BNA) 1753, 1755 (2000) (Nathan, Arb.).

[259] 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.

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 members [260] and those regulating work shifts.[261]

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 17 of the 32 cases involving a statutory claim that a grievant won, the grievant was represented by an agent rather than an attorney.[262] 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.[263] Although the union lost, this decision itself was extremely well cited and reasoned.[264] Of the 32 statutory cases the union won, in approximately 15 the union was represented by an attorney. While that number appears to be even with the number not involving an attorney, logically, 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 should 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.[265] 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.[266]

---

[260] City of Kentwood, 105 Lab. Arb. Rep. (BNA) 49, 52 (1995) (Lipson, Arb.).
[261] Cleveland Pub. Library, 105 Lab. Arb. Rep. (BNA) 781, 783 (1995) (Smith, Arb.) (enforcing requirement that religious minority work on Sunday).
[262] 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.
[263] Bowater, Inc. Newsprint & Directory Div., 116 Lab. Arb. Rep. (BNA) 382, 386 (2001) (Harris, Arb.); *see also* Thermo King Corp., 102 Lab. Arb. Rep. (BNA) 612, 616 (1993) (Dworkin, Arb.) (noting that the union, represented by a staff representative, made an impressive presentation and submitted a brief); The Garden City Union Free Sch. Dist., 2006 WL 4577848, No. 13 390 00417 06 (Nov. 4, 2006) (Gregory, Arb.) (LexisNexis, BNA Labor Arbitration Decisions–Published and Unpublished) (noting that parties were very well represented where union was represented by labor relations specialist).
[264] Bowater, Inc. Newsprint & Directory Div., 116 Lab. Arb. Rep. (BNA) 382, 386 (2001) (Harris, Arb.).
[265] U.S. Army Corps of Engineers–Tulsa Dist., 107 Lab. Arb. Rep. (BNA) 202, 205 (1996) (Moore, Arb.).
[266] *Id*. at 204, 206.

3. Union Representation of Discriminatees

Finally, the cases indicate that unions are representing discriminatees in grievance arbitration 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.[267] 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.[268] 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.[269]

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 the retaliation by terminating her. The shop steward worked as her partner, doing the work she could not perform as a result of her lifting restrictions.[270]

Indeed, in some cases, unions sought numerous and costly accommodations. In one case, the union sought measures including replacement of lockers at a cost of $13,500 and the stationing of a security officer outside the classroom door of a grievant teacher with allergies to perfume.[271]

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 sit and co-workers could perform the necessary climbing and digging without harming either the grievant or the co-workers. Previously, others complained when the grievant worked in air conditioning, but the union did not file any grievances and promised not to grieve complaints over the sitting arrangement either. Nevertheless, the arbitrator believed it would violate co-workers' rights if they did more than their fair share of aerial work.[272]

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.[273] 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 when all higher paid positions are

---

[267] Sherwin Williams Corp., 113 Lab. Arb. Rep. (BNA) 1184, 1188, 1189 (2000) (Statham, Arb.).
[268] S.F. Unified Sch. Dist., 114 Lab. Arb. Rep. (BNA) 140, 142 (2000) (Riker, Arb.).
[269] Detroit Edison Co., 96 Lab. Arb. Rep. (BNA) 1033, 1037, 1038 (1991) (Lipson, Arb.).
[270] Commercial Cleaning Sys., Inc., 122 Lab. Arb. Rep. (BNA) 1383, 1391 ("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.") (2006) (McCurdy, Arb.); *see also* Anchorage Sch. Dist. & AK Pub. Emp. Ass'n, 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").
[271] Culver City Unified Sch. Dist., 110 Lab. Arb. Rep. (BNA) 519, 527 (1997) (Hoh, Arb.) (seeking replacement of lockers at cost of $13,500 dollars and stationing security officer outside teacher member's classroom door between class periods as well as other measures).
[272] GTE N. Inc., 113 Lab. Arb. Rep. (BNA) 665, 670, 674 (1999) (Brodsky, Arb.).
[273] St. Antoine, *supra* note 3, at 795 n.58.

filled by men,[274] and some appear to believe that co-workers should not stereotype all employees of one race and gender based on the conduct of one co-worker of that race and gender.[275] These cases suggest that commentators who argue that unions can be a force against discrimination are correct.[276]

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 to permit him to bid on jobs that met his physical restrictions. In a secret ballot, voting members of the unit rejected the proposal. Ultimately, the employer simply modified the employee's current position.[277]

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.[278] 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 city firefighters. A promotion list based upon certain test scores was

[274] Empire Dist. Elevator Co., 118 Lab. Arb. Rep. (BNA) 919, 923 (2003) (Berger, Arb.) (woman in a predominately male workforce who was not qualified for position given to less senior male worker argued that with instruction and training she could have performed the job).

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

[276] *See also* Motion Picture and Television Fund, 103 Lab. Arb. Rep. (BNA) 988, 989 (1994) (Gentile, Arb.) (grieving the requirement that an employee of Mayan decent cover her nose-ring with a band-aid); United Parcel Serv., 103 Lab. Arb. Rep. (BNA) 1143, 1146 (1994) (Winograd, Arb.) (union argued that where employer offered accommodation that involved a substantial pay cut, "The employer may not require an employee to elect whether to follow his religious convictions or to feed his family."); Vicksburg Community Sch., 101 Lab. Arb. Rep. (BNA) 771, 776 (1993) (Daniel, Arb.) (decision holds that controlling Title VII law permits employer to accommodate religious leave unpaid, but that contract requires paid leave); Rheem Mfg. Co., 117 Lab. Arb. Rep. (BNA) 473, 475 (2002) (Bankston, Arb.) (union and employer used Joint Committee on Civil Rights, and union appeared to resolutely push discrimination claims that were not settled, such as an instance where an older black man was required to perform certain work in an hour-long period after having been told by group leader that he was too old and too slow); Henkel Corp., 104 Lab. Arb. Rep. (BNA) 494, 500 (1995) (Hooper, Arb.) (the union challenged a black employee's termination for theft when it was later discovered that a white employee who admitted falsifying an expense sheet rather than facing an investigation was not terminated; and the opinion notes that the "union has argued eloquently that discrimination is a way of life at the Company and that it permeates decisions about how employees are treated); Twinsburg Bd. of Educ., 119 Lab. Arb. Rep. (BNA) 54, 59 (2003) (Chattman, Arb.) (arguing for accommodation despite Ohio Civil Rights Commission's prior decision finding no disability).

[277] Fox River Paper Co., 104 Lab. Arb. Rep. 871, 874, 876 (1995) (Suntrup, Arb.); *see also* Anchor Hocking Operating Corp., 125 Lab. Arb. Rep. (BNA) 312, 316 (2008) (union pursued mentally ill grievant's claim although he testified that a co-worker 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).

[278] 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.

typically used. In this instance, four black firefighters were promoted ahead of two white firefighters who were ranked (significantly) higher on the promotion list.[279]

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 contractual language, which permitted the other member to use the device.[280]

And there are several instances in which the union representation appears to be less than adequate, either due to failure to understand the law, internal conflict, or for other reasons not precisely discernable from the decisions.[281] For instance, one decision indicates that the union argued that a provision requiring compliance 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.[282]

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, which were involuntary 24 month leave and notice of other positions with the company, were not reasonable.[283] The arbitrator pointed out that the union had acquiesced in the leave[284] that ultimately resulted in termination, and that the union had not raised the ADA claim during the grievance procedure.[285]

Another case indicates that perhaps the union could or should have presented more evidence. 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." The arbitrator found that, in fact, the record includes evidence that white employees have been treated the same as the grievant.[286]

---

[279] City of Omaha, 97 Lab. Arb. Rep. (BNA) 180, 183, 188 (1991) (Mikrut, Jr., Arb.).
[280] Delta Twp. & Firefighters Ass'n of Mich., 111 Lab. Arb. Rep. (BNA) 936, 940 (1998) (Sugerman, Arb.).
[281] 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. Cramer, Inc., 110 Lab. Arb. Rep. (BNA) 37, 41, 42–43 (1998) (O'Grady, Arb.) (union did not argue violation of the ADA where the EEOC had found claims 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 elected to fully participate. Robinson Bus Serv., Inc., 116 Lab. Arb. Rep. (BNA) 372 (2001) (Cox, Arb.).
[282] Turbine Engine Components Tech. Corp., 120 Lab. Arb. Rep. (BNA) 274, 279 (2004) (Fullmer, Arb).
[283] Safeway Corp., 2008 WL 8203229, at * 9 (April 30, 2008) (Wages, Arb.).
[284] *Id*. at *10.
[285] *Id*. at * 9.
[286] N.W. Publ'n Inc., 104 Lab. Arb. Rep. (BNA) 91, 95 (1994) (Bognanno, Arb.); *see also* U.S. Dep't Housing & Urban Dev., 121 Lab. Arb. Rep. 1261, 1268 (2005) (Coyne, Arb.) ("reliable data must support the claim"); Vet. 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, 114 Lab. Arb. Rep. (BNA) 1466, 1472 (2000) (Goldstein, Arb.) (record does not show extent of treatment); Wackenhut Serv., Inc., 112 Lab. Arb. Rep.

V. Conclusion

Does labor arbitration provide access to justice for those with employment discrimination claims? A review of these decisions 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 which advocates for the grievant's rights. The data also indicates that the average length of time to resolve a dispute is approximately 503 days. While this may be longer than ideal, it is shorter than the time reported to receive a trial in federal or state court.[287] Indeed, labor arbitration historically is considered to be less expensive, less time consuming, and, perhaps equally significantly, less emotionally draining for the parties.[288]

Moreover, labor arbitration of minimal employee rights arguably strengthens enforcement and results in a greater number of claims. [289] Without a union, employees might not bring these claims. If the claim arises during the employment relationship, such as harassment or a need for accommodation, employees may fear negative ramifications of bringing the claim. If the claim arises due to termination, such as religious, racial, gender, or disability discrimination, 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 and other individual rights statutes.[290]

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 becomes more likely. Co-worker support may be important to the successful resolution of discrimination claims.

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.

(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); Spectrulite Consortium, Inc., 101 Lab. Arb. Rep. (BNA) 1134 (1993) (Hilgert, Arb.) (only witness for union was grievant); Norman, Okla., 122 Lab. Arb. Rep. (BNA) 929 (1993) (Goodstein, Arb.) (union representative completely unprepared for pre-disciplinary hearing).

[287] Eisenberg, *supra* note 10, 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).

[288] *See* Cole, *supra* note 7, at 863.

[289] Weil, *supra* note 220, at 13, 27.

[290] *Id.*

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 increase the pie for all involved. The awards directing the parties to further bargain and implementing creative solutions illustrate this possibility.[291] Finally, while increased enforcement may appear to be a drawback for employers, the draw of less industrial strife,[292] 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, where an employee must grieve and arbitrate rather than litigate and loses the ability to pursue the claim at all if the union elects not to pursue it, is theoretically possible, but 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.[293]

The system that is currently in place in most instances pursuant to *Gardner-Denver*, when the union has not waived the right to proceed to court, might be more just than mandatory labor arbitration of employment discrimination claims. Under *Gardner-Denver*, employees have the ability to pursue arbitration of contractual claims of discrimination, and to file suit on statutory claims.[294] For the reasons discussed above, in many instances, arbitration grants the employee access to justice. Where it does not, the employee can still 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.[295] Thus, one down side of this system is the uneven weight accorded 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 technically, 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 would insure that the *Gardner-Denver* approach, with the aforementioned advantages and disadvantages, was utilized in all instances,

---

[291] *See supra* notes 225–230 and accompanying text.
[292] *Cf.* Malin *supra* note 101, 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").
[293] *But see* 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).
[294] 415 U.S. 36 (1974).
[295] *Id.*

not just in the majority of cases, because it would prohibit union agreements to arbitrate rather than litigate statutory employment discrimination claims.

Alternatively, a system where the employee must choose between arbitration and litigation but can make the selection after the dispute arises might be more just. The details of such a system could vary, but the legislation would need to be more specific than the language in the current version of the AFA. The legislation could authorize only post-dispute labor arbitration of employment discrimination claims at the election of the employee or could simply permit the employee to opt out of otherwise mandatory pre-dispute labor arbitration of employment discrimination claims. Permitting the individual to elect certainly resolves any complaint that employees are forced to use a procedurally or substantively flawed system or to rely on a representative with a conflict of interest. It would also permit the individual to use labor arbitration rather than litigation when, for the reasons enumerated above, 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 it 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.

Finally, what might be termed modified mandatory labor arbitration of employment discrimination claims might be more just. In this system, the grievant would be permitted to go to court when the union opts not to pursue the claim.[296] 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.[297] The reasons to permit the union rather than the employee to elect whether to arbitrate the claim are somewhat difficult to articulate, but are at the core of the dispute over which system is the most just. First is the strength of collective, rather than individual, control of workplace issues.[298] If everyone, or even just half of the discriminatees, elects out of the union process, the incentive for the employer to deal with the union on workplace discrimination issues is diminished. If that happens, the ability of the union to advance the interests of minorities over the long term decreases simply to increase any particular individual's chance of success in one case. To the extent that, over the long term and

[296] Bennett, *supra* note 88, at 29; Mathison, *supra* note 88, at 193.

[297] Veliz v. Collins Building Serv., Inc., 2011 WL 4444498, at * 4 (S.D.N.Y. Sept. 26, 2011) (dismissing discrimination claim without prejudice because CBA will be unenforceable if operates to preclude arbitration); Morris v. Temco Service Indus., 2010 WL 3291810, at *6 (S.D.N.Y. Aug. 12, 2010) (denying motion to compel arbitration where union failed to pursue discrimination claim); 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 the union refused to arbitrate a disability claim and the CBA, thereby, precluded the plaintiff from raising her disability claim in any forum); Borrero v. Ruppert Hous. Co., 2009 WL 1748060, at *2 (S.D.N.Y. June 19, 2009) (dismissing a complaint without prejudice "because if" plaintiff "is prevented by the Union from arbitrating his claims, the CBA's arbitration provision will not be enforceable"). *Cf.* Johnson v. Tishman Speyer Properties, 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 . . .").

[298] *Cf.* Feller, *supra* note 8, 745 ("many claims . . . carry implications for the group" and at some point a grievance arbitration process must be controlled by the union rather than the individual grievant).

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 claims rather than relying on a unitary individual rights statute, may be best.

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

In any of the three systems, however, it is possible that a large number of employment discrimination claims will 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 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. Looking at the details of the arbitration process, as this article attempts to do, and offering changes designed to address potential problems is a possible starting point toward this goal.

The 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 sanctioning arbitrators making adverse inferences when witnesses fail to appear, guaranteeing the applicability of statutory statutes of limitations when arbitrating statutory employment discrimination claims, and authorizing class actions in labor arbitration or exempting them from it 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, or whether exempting certain claims from mandatory labor arbitration would be most effective in ensuring adequate discovery.

The research further suggests that potential areas of improvement as to substantive protections: insuring relief in labor arbitration of employment discrimination cases is not limited and, to a

lesser degree, providing recourse when the arbitrator makes a clearly erroneous statement of law. 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. Further research might focus on how to address erroneous statements of law. Expanding the standard of review too broadly would increase the cost of labor arbitration and risk interfering with the self-governance aspects of labor arbitration. Yet, having no review under a *Pyett* system might result in substantively unjust outcomes. Creating a higher level of review, either through legislation or court decisions, that is clearly limited only to cases brought under agreements to arbitrate, rather than to litigate, statutory claims might be considered.[299]

Finally, the research suggests that potential areas of improvement in the labor process might require substantive changes to discrimination laws. 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. Another potential area 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 case[300] or whether some type of further recourse, perhaps similar to an action for ineffective assistance of counsel in the criminal context, might be best.[301]

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.

Also worthy of future scholarly pursuit is consideration of whether there are alternatives to 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 public access to justice. For instance, perhaps mandatory pre-dispute mediation or an administrative

---

[299] Another possibility is to further limit the standard of review under *Gardner-Denver* reducing the cost of an employee pursuing both arbitration and litigation of the same claim and providing more guidance to the lower courts on what to look for when deciding to rely on an arbitration award.

[300] Cole, *supra* note, at 888.

[301] The standard should not permit every losing grievant to sue the union or it would unduly increase litigation and would not be representative of the research results that in the large majority of cases, even where the grievant lost, the union adequately presented the case.

agency or employment court focusing on employment discrimination claims are alternatives to which to provide serious consideration.

Appendix

Wilcoxon non-parametric 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-MeanO)/Std0
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

ChiSquare	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-MeanO)/Std0
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

ChiSquare	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-MeanO)/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-MeanO)/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-MeanO)/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-MeanO)/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-MeanO)/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