Congress Was Wrong: Arbitration Is More Plaintiff-Friendly Than Litigation, and We Can Make It Even More Just

Harry C. Katz, David Sherwyn** & Paul Wagner****

Introduction

In March of 2022, Congress passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA)[1]—a law that made pre-dispute arbitration agreements unenforceable, regardless of whether the agreements were entered into voluntarily by the employee or were a mandatory condition of employment. In describing the new law, commentary by Professor Deborah Widiss in the newsletter of the ABA Section of Labor and Employment Law stated:

> A growing body of empirical research suggests that workers are disadvantaged by being forced into arbitration. As #MeToo has highlighted the ongoing pervasiveness of sexual harassment, advocates have argued that forced arbitration and nondisclosure policies may contribute to the problem by shuttling complaints into private arbitrations rather than public court filings.[2]

We disagree. The "empirical evidence" referenced in the ABA newsletter's assertion suggesting that employees are "disadvantaged" by mandatory or voluntary arbitration is fatally flawed. We, instead, demonstrate that employees in civil rights cases enjoy significantly

---

* Harry C. Katz is the Jack Sheinkman Professor of Collective Bargaining and the Director of the Scheinman Institute at Cornell University's School of Industrial and Labor Relations.

** David Sherwyn is the John and Melissa Ceriale Professor of Hospitality Human Resources & Law, and the Director of Cornell Center for Innovative Hospitality Labor and Employment Relations at Cornell University's Nolan School of Hotel Administration / JCB College of Business.

*** Paul Wagner is a shareholder at Stokes Wagner and an Adjunct Professor at Cornell University's Nolan School of Hotel Administration / JCB College of Business.

1. Pub. L. No. 117-90, 136 Stat. 26 (2022).

2. Deborah A. Widiss, Commentary, *New Law Limits Mandatory Arbitration in Cases Involving Sexual Assault or Sexual Harassment*, Lab. & Emp. L. Newsletter (Nov. 22, 2022), https://www.americanbar.org/groups/labor_law/publications/labor_employment_law_news/fall-2022/new-law-limits-mandatory-arbitration-in-cases-involving-sexual-assault-or-harassment/#:~:text=In%20March%202022%2C%20Congress%20enacted,)%2C%20went%20into%20effect%20immediately [https://perma.cc/3SGF-GZTR].

greater results in arbitration than in litigation. Put simply, the research relied upon by the authors of the bill, the ABA newsletter's description of the new law, and numerous academics, commentators, and pundits, inexplicably fail to include dispositive motions in their analysis. When these critical data are included, plaintiffs prevail in 19% of the resolved cases[3] in arbitration and only 1% in litigation. While there are several other reasons to scrutinize arbitration (*e.g.* mandatory vs. voluntary; the effect on the development of the law; class action waivers), we contend that: (1) most of these perceived flaws can be fixed; and (2) the main reason for the criticism—the lack of employee success—is actually illusory. If Congress's intent in passing the EFASASHA was to increase employee rate of success in sexual harassment claims, it should have sought to further regulate the arbitration process to render it even more accessible and fair to employees, not prohibit it altogether.

Having studied Alternative Dispute Resolution (ADR) for more than a quarter century, we believe that ADR is something that all employees and employers seeking a positive employment culture should favor, and that society should not only allow but should encourage. We also believe, however, that in order to create a system that is efficient, fair, and positive for employees, employers, and society, Congress must pass a statue incorporating the best of ADR polices and correcting a number of flaws currently allowed by law. Following, we give a quick overview of the current legal status of ADR and then set forth our arguments summarized as follows: (1) The current system of adjudicating employment claims is untenable and unfair to employees, demonstrating why ADR is necessary to achieve a fair and effective way to settle workplace disputes: (2) The academic research that has fueled much of the backlash against employment arbitration is simply wrong; and (3) our Dispute Resolution Proposal offers a model for future ADR legislation.[4]

I. Legal Background

Over the last forty years, alternative dispute resolution (ADR), as a method to resolve employment disputes, has undergone a remarkable transition from a pro-employee concept favored by progressives to "forced arbitration"—a perceived employer tool to take away employee rights. The transition has been fueled by academic scholarship, intense lobbying from the National Association of Trial Lawyers, and some

3. By resolved cases, we mean cases not settled and instead resolved by a judge, jury, or arbitrator.

4. We must address the fact that this paper discusses non-union arbitration. In many ways, the systems are similar, but there are two major differences: in union arbitration, (1) unions and employers are relatively equal in their access to, and knowledge of, the arbitration system, and (2) the sides split the costs (as opposed to the employer paying the full cost). *See* Julius Getman, *Labor Arbitration and Dispute Resolution*, 88 YALE L.J. 916, 919–20 (1979).

questionable practices by certain members of the business community. The slow and inconsistent development of federal and state case law regulating arbitration initially added chaos and uncertainly, creating a “Wild West” scenario where employers were left to develop policies that undermined the intended protections of federal and state legislation.[5] In the last twenty years, however, the law has been clarified, and the so-called due process protocols[6] have addressed some major concerns previously raised about employment arbitration.[7] Today the law is clear: employers, who are not in the transportation industry, may implement pre-dispute mandatory arbitration policies to cover all employment-related claims, except sexual harassment and sexual assault, as long as the polices meet the due process protocols developed by the courts over the past twenty-five years.[8] The due process concerns of the early 1990s are no longer relevant because the necessary protections have been largely imposed by the courts. This fact, however, has not stopped the criticism of pre-dispute mandatory arbitration as the final step in the dispute resolution process. This criticism, which has been motivated primarily by trial lawyers’ self-interest and buoyed by inaccurate research, has gotten traction on both sides of the political aisle.

For over twenty years, the Democratic Party has proposed legislation to outlaw pre-dispute mandatory arbitration. In the fall of 2021, Congress held hearings and proposed legislation to limit, or even eliminate, pre-dispute mandatory arbitration through federal legislation, state legislation, or a presidential executive order, although the latter would only affect government contractors.[9] The anti-arbitration forces

---

5. *See generally* Katherine Stone, *Rustic Justice: Community and Coercion Under the Federal Arbitration Act*, 77 N.C. L. Rev. 932 (1999).

6. *See* Am. Arb. Ass’n, Employment Due Process Protocol (1995), https://www.adr.org/sites/default/files/document_repository/Employment%20Due%20Process%20Protocol_0.pdf [https://perma.cc/98D9-YE4A]; *The Fairness Issue: Due Process*, Nat’l Arb. & Mediation (NAM) (2023), https://www.namadr.com/practice-areas/employment-area/the-fairness-issue-due-process [https://perma.cc/Z2PT-NLW8].

7. *See* Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018)*; see also* Samuel Estreicher, Opinion, *Court Ruling Might Help Workers After All*, Virginian-Pilot (May 29, 2018 12:00 AM), https://www.pilotonline.com/opinion/columns/article_18a01a6f-eb64-5a9f-b22d-f62c38193880.html [https://perma.cc/86CU-VLRR].

8. *See Epic Sys. Corp.*, 138 S. Ct. at 1621–22 (2018); *see also* Estreicher, *supra* note 7.

9. *See* John Andrew Schaffer & Marla N. Presley, *In the Crosshairs: U.S. Congress Again Takes Aim at Arbitration Agreements in Employment Context*, Nat’l L. Rev. (Aug. 20, 2021), https://www.natlawreview.com/article/crosshairs-us-congress-again-takes-aim-arbitration-agreements-employment-context [https://perma.cc/4GJ7-3P2V]; Press Release, Jerrold Nadler, Chairman, H. Judiciary Comm., Chairman Nadler Statement for the Markup of H.R. 963, the Forced Arbitration Injustice Repeal Act (Nov. 3, 2021), https://democrats-judiciary.house.gov/news/documentsingle.aspx?DocumentID=4775 [https://perma.cc/M9K7-8W4U]; Douglas Wigdor, *Senate Committee Takes Aim at Forced Arbitration of Sexual Harassment Disputes*, Forbes (Nov. 15, 2021, 3:07 PM EST), https://www.forbes.com/sites/douglaswigdor/2021/11/15/senate-committee-takes-aim-at-forced-arbitration-of-sexual-harassment-disputes [https://perma.cc/9YL6-46ZW].

in Congress were partially successful in their pursuit to ban arbitration when they passed the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act (EFASASHA). The passing of the EFASASHA was bipartisan. The vote in the House was 335–97.[10] In the Senate, the bill passed by a bipartisan voice vote.[11] Following the passage of the bill, politicians on both sides of the aisle congratulated themselves for their efforts. For example, one of the bill's sponsors, Kirsten Gillibrand (D-N.Y.), stated:

> This bill represents one of the most significant workplace reforms in American history. It will help us fix a broken system that protects perpetrators and corporations and end the days of silencing survivors. . . . The arbitration process not only allows the corporations to hide sexual harassment and assault cases in this secretive and often biased process, but it shields those who committed serious misconduct from the public eye.[12]

Senate Majority Leader Charles E. Schumer (D-N.Y.) called the bill "painfully overdue" and said that, for decades, mandatory arbitration "perpetuated cultures of abuse and unaccountability" in workplaces. Co-sponsor, Senator Lindsey Graham (R-S.C.), stated: "It does not hurt business to make sure that people who are harassed in the workplace get treated fairly," Graham said. "It's better for business."[13]

The bipartisan support for the EFASASHA legislation, the comments by legislators on both sides of the aisle, and the surrounding news coverage of the law would lead a casual observer to two conclusions: (1) private arbitration is fundamentally flawed and, thus, unfair to employees; and (2) the default process for resolving employment disputes is a positive process for employees that yields them much better results than arbitration. In fact, both conclusions are demonstrably wrong. Below we critique the current system that the legislation perpetuates and that its sponsors and supporters implicitly endorse. We contend that this system is untenable for the majority of "good actor" employees, while benefiting "bad actor" employers and employees alike, as well as plaintiffs' lawyers. Arbitration of employment claims offers a more just way forward.

---

10. *Roll Call 33 | Bill Number: H.R. 4445*, U.S. H.R. Clerk (Feb. 7, 2022, 7:24 PM), https://clerk.house.gov/Votes/202233 [https://perma.cc/DYM6-NQMS].

11. Amy B. Wang, *Senate Passes Bill to End Forced Arbitration in Sexual Assault, Harassment Cases*, Wash. Post (Feb. 10, 2022, 2:59 PM EST), https://www.washingtonpost.com/politics/2022/02/10/senate-sexual-assault-forced-arbitration [https://perma.cc/7Z7H-764M].

12. *Id.*

13. *Id.*

II. ADR Is Necessary Because the Current System Is Unfair and Unruly

The current system for resolving non-union workplace disputes is inefficient, inaccessible, and ineffective. Moreover, the current system is perceived as being unfair by both employers and employees, and that system tilts decidedly in favor of employers.[14] The current system for resolving employment claim emanates from a tort-based litigation system. The theory of tort-based litigation is that high damage awards for those who are injured will incentivize property owners, product manufacturers, and professionals to avoid injuring the public. This theory should not be the basis for employment disputes because it does not fit with many features of workplace disputes. Unlike torts, employment disputes are not only inevitable, but they are also, in some ways, healthy. Disputes can raise issues that need to be corrected at the workplace. Sometimes the conduct at issue is egregious, although it may not be. When the dispute is not egregious, academic research and practical experience suggest that disputes are best resolved at the lowest level with minimal involvement from outsiders (e.g., lawyers, government agencies, etc.).[15]

The grievance and arbitration system that exists in the union sector provides some clear lessons. While unions and management often conflict, almost all will agree that grievance and arbitration procedures facilitate conflict resolution in an efficient and effective manner.[16] Indeed, the National Labor Relations Board (NLRB) defers cases to

---

14. For an extensive study concluding that employers and employees, regardless of whether or not they prevail, find the current discrimination litigation system unfair, see Ellen Berrey, Steve G. Hoffman & Laura Beth Nielsen, *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 L. & Soc'y Rev. 1 (2012).

An obvious question is whether those who do not favor pre-dispute mandatory arbitration would also contend that the EEOC litigation system is inefficient, ineffective, and inaccessible. Simply put, we do not know. We have studied the literature and those who argue against arbitration do not compare the two systems against each other. Instead, as described *infra* Part III, those who do not favor arbitration compare litigation results to arbitration results in terms of win/loss, time, and expenses. While, as explained, *infra* Parts IV and V, there is no dispute that arbitration is faster and less expensive, the only scholars who actually examine the two systems include Sam Estreicher, Ted St. Antoine, and the authors herein, who favor arbitration. Those that do not favor arbitration (e.g., Alex Colvin, Mark Gough, Kathy Stone, David Schwartz, Lisa Bingham) do not use EEOC or dispositive motion data in their studies.

15. *See generally* Harry C. Katz, Thomas A. Kochan & Alexander J.S. Colvin, An Introduction to U.S. Collective Bargaining and Labor Relations (5th ed. 2017).

16. Every union contract that the authors have ever studied has a grievance arbitration procedure offered in exchange for a no-strike clause. Of course, the union grievance arbitration system has two parties of relatively equal power, while there is no organization representing the individual employee in employment arbitration. For a critical comparison, see Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contract of the 1990s*, 73 Denv. U. L. Rev. 1017 (1996).

Collyer Insulated Wire Co., 192 N.L.R.B. 837, 839–40 (1971).

arbitration if (1) an arbitration agreement is part of the collective bargaining agreement (CBA); and (2) if alleged violations of the National Labor Relations Act (NLRA) are factually parallel to the grievance filed under the CBA.[17]

The tort-based litigation system that operates in the non-union sector, however, provides the opposite of effective dispute resolution. Instead of being based on cooperation and problem solving, the system is adversarial with an emphasis on remuneration. This adversarial system has created an industry of government workers and legal professionals (on both the employee and employer side) whose livelihoods depend on it. Indeed, thousands of people are employed by the Equal Employment Opportunity Commission (EEOC), state agencies, employment law firms, in-house lawyers, Human Resources (HR) consultants, in-house HR professionals, etc. While their work is interesting, lucrative, and vital to make the system work, we contend below that the current system is broken.

The two major types of workplace disputes are discrimination and wage and hour violations.[18] For wage and hour claims, a major consideration is the "class action waiver."[19] Class actions are fundamentally different than non-class action claims. The amount of litigation necessary to obtain class certification often exceeds the entire single-plaintiff case. In addition, class actions often feature very technical applications of the Fair Labor Standards Act (FLSA) and state laws. Finally, because many arbitration policies have class action waivers,[20] it is difficult, if not impossible, to analyze arbitration versus litigation in these types of cases. The authors intend to do a study in the future on the effect of class action waivers by exploring the costs of the litigation, the attorneys' fees, the basis for settlements, and the percentage of damages that the plaintiffs in the class receive. While these same factors may be relevant in discrimination cases, the nature of such class actions is different and the frequency of class actions is much lower.[21] Because the sort of analysis necessary to address class actions is beyond the scope of this paper, our litigation discussion will focus exclusively on

17. *Id*. at 841–42.

18. The major court decisions on arbitration come from these kinds of cases. *E.g.*, Morgan v. Sundance, Inc., 596 U.S. 411 (2022); Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612 (2018); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991).

19. This was the issue in *Epic Systems Corp.*, 138 S. Ct. 1612, for example, which upheld enforcement of mandatory class action waivers.

20. ALEXANDER J.S. COLVIN, ECON. POL'Y INST., THE GROWING USE OF MANDATORY ARBITRATION 2, 11–12 (2018), https://files.epi.org/pdf/144131.pdf [https://perma.cc/XCJ4-59CC]

21. *See* Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 353–54 (2011) (explaining the narrow circumstances in which a discrimination class action can be brought and rejecting it in the absence of a facially discriminatory policy).

discrimination cases, where few cases are class actions, and we will not wrestle with appropriate public policy regarding class action waivers. As stated previously, we are gathering information on class actions and hope to add to that discussion at a later date.

A. Discrimination Claims

The problem with the current system for resolving discrimination claims is that it is slow, expensive, inaccessible, and unfair to most aggrieved parties. To file a charge of discrimination, an employee must first file a claim with the EEOC or a corresponding state agency.[22] In the last decade, the EEOC averaged 89,402 charges filed per year. [23] The range was 72,675–99,947.[24] In the last decade, the EEOC averaged 97,388 resolutions per year.[25] The range was 80,806–112,499. [26] The higher average and range reflect the fact that the EEOC has had a backlog of cases for decades. The number of charges is not the problem. The problem is the way the EEOC processes claims and the results.

---

22. We use discrimination cases because they are the most prevalent types of cases and because the EEOC data is readily available. The arbitration cases are limited to statutory claims, which are, for the most part, discrimination cases because wage and hour cases (the second most prevalent type of case) are almost always litigated as class actions. These are outside of the arbitration forum under almost all employer promulgated polices, a practice that was held lawful by *Epic Systems Corp.*, 138 S. Ct. 1612. We avoid arbitration contract cases because the burden of proof is on the employer instead of the employee, and proving cause is much more difficult than defending a discrimination claim. For a discussion of contract versus statutory claims in arbitration, see J. Ryan Lamare & David B. Lipsky, *Resolving Discrimination Complaints in Employment Arbitration: An Analysis of the Experience in the Securities Industry*, 72 ILR Rev. 158, 158–84 (2018).

23. *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2022*, EEOC, https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022 [https://perma.cc/4SH8-ZJZF]. We noticed that charges seem to be a lot higher during Democratic administrations than Republican administrations. The reasons for that pattern are not clear. Unfortunately, similar data is not available from the state agencies. State agencies have different names (e.g., Illinois Department of Human Rights, Michigan Department of Human Rights, New York State Division of Human Rights, etc.), and they have different formats. For example, Illinois has its own adjudication forum, the Illinois Commission of Human Rights, while other states, like California, adjudicate their cases in state courts. It is beyond the scope of this paper to collect the relevant data from the forty-seven different states with different systems prohibiting employment discrimination in the private sector; thus, we use the federal system.

24. *Id.*

25. *Id.*

26. *Id.*

Discrimination Claims Over the Last Ten Years

Charges filed per year	
Average	89,402
Range	72,675–99,947
Charges resolved per year	
Average	97,388
Range	80,806–112,499

Before examining the EEOC process, we must emphasize that our criticism is not directed at the EEOC's administrators or investigators. Through our work in the field, the authors have had the opportunity to work with several EEOC commissioners and the former EEOC General Counsel. We have found the commissioners, both Democrats and Republicans, and the General Counsel to be consummate professionals who are committed to enforcing the law and working to eliminate discrimination in the workplace. Nonetheless, as explained below, the system, as it has evolved over the last fifty-plus years, provides a poor way to resolve disputes in the workplace. Below, we explain how the system works and why we urge its replacement.

Discrimination charges begin with the filing of a charge with the EEOC or a corresponding state agency.[27] Cases can be initiated by employees, the EEOC, or, in some states, the state agency. The EEOC or state agency where the employee filed will enforce both state and federal law. It should be noted, however, that some states have expanded protected classes (e.g., family status) and/or expanded coverage (e.g., employers with fewer than fifteen employees). The EEOC will not, for example, investigate a charge of discrimination against an employer with fewer than fifteen employees or a claim of family status discrimination; they will instead refer that case to the appropriate state agency.[28] A small number of states (e.g., North Carolina and Georgia) do not have state discrimination laws enforceable in the private sector, and, consequently, they do not have state agencies.[29] We have already cited EEOC data and will continue to do so throughout the paper. We do not cite state agency data simply because that data are not readily

27. 42 U.S.C. § 2000e-5; *Filing a Charge of Discrimination*, EEOC, https://www.eeoc.gov/filing-charge-discrimination [https://perma.cc/4WUP-38CK].

28. *Filing a Charge of Discrimination*, *supra* note 27. The EEOC "dual files" charges with state agencies as a matter of course, so when the EEOC dismisses charges over which it lacks jurisdiction, the charge remains filed with the state agency. *See id.*

29. North Carolina has a law, N.C. Gen. Stat. § 143-42.2 (2022), but no enforcement mechanism. Alabama, Georgia, and Mississippi generally only prohibit discrimination in the public sector, not the private sector, although Alabama does prohibit age discrimination in the private sector. Ala. Code §§ 25-1-21, 25-1-30, 29-4-3 (2022); Ga. Code Ann. §§ 45-19-29, -19-22, -19-28, 34-1-2, 34-5-3 (2022); Miss. Code Ann. §§ 25-9-149, 33-1-15 (2022).

available. Accordingly, we focus exclusively on the EEOC; the term "Agency" hereinafter refers to the EEOC.

B. The EEOC Process

To begin a charge of discrimination, an employee must first file a case with the EEOC. The EEOC, upon receiving the charge, labels the case an A, B, or C case.[30] "A cases" make up 10–20% of the charges, "B cases" represent 60–70%, and "C cases" are the remaining 10–20%.[31] The C cases are those that the EEOC determines to be untimely, jurisdictionally barred, or frivolous.[32] The EEOC will notify the employer that no action is required, essentially ending the charge. The B cases are the garden variety cases that do not fit into the EEOC's then-current national enforcement plan.[33] The vast majority of cases are labeled as B cases,[34] and they are routinely assigned to investigator. The A cases fit into the Agency's enforcement plan and, thus, consume most of its resources.[35] The EEOC, however, simply does not have sufficient resources to litigate the majority of these cases. From 2010 to 2019, the EEOC, on average, litigated 191 A cases per year.[36] That amounts to only 0.21% of the total cases filed, and between only 1.1 and 2.2% of the A cases. That means that the EEOC does not litigate more than 97% of the cases that fit into its national enforcement plan. This fact begs the more significant question, namely, what happens to 99.7% of the total cases, 97.8% of the A cases, and 100% of the B cases? The answer is that 10–20% of the cases, the C cases, are simply put on the shelf, and the remaining 79.8–89.8% of the cases go through the "regular" EEOC process.

---

30. EEOC Regional Attorneys' Manual, at 1.III.A (2005), https://www.eeoc.gov/regional-attorneys-manual/introduction-commission-policies [https://perma.cc/RA87-FVQN].

31. *The ABCs of EEOC*, DLA Piper: Lab. Dish (Mar. 3, 2014), https://www.labordish.com/2014/03/the-a-b-cs-of-eeoc [https://perma.cc/82YU-N4BE].

32. *See* EEOC Regional Attorneys' Manual, *supra* note 30, at 1.III.A.

33. For 2017–2021, the national enforcement plan included segregation, harassment, trafficking, pay, retaliation, and other policies and practices against vulnerable workers, including immigrant and migrant workers, as well as persons perceived to be members of these groups, and against members of underserved communities. *See* U.S. Equal Employment Opportunity Commission Strategic Enforcement Plan Fiscal Years 2017–2021, EEOC (2016), https://www.eeoc.gov/us-equal-employment-opportunity-commission-strategic-enforcement-plan-fiscal-years-2017-2021 [https://perma.cc/A6HR-EWSX].

34. *Id*. at II.E.1.d.

35. *See* EEOC Regional Attorneys' Manual, *supra* note 30, at 1.III.A.

36. *See EEOC Litigation Statistics, FY 1997 Through FY 2022*, EEOC, https://www.eeoc.gov/data/eeoc-litigation-statistics-fy-1997-through-fy-2022 [https://perma.cc/K4U7-AVVQ].

Discrimination Cases Filed With the EEOC Process by Type (2010–2019)

Case Type	Percentage of total discrimination charges received	Percentage of total cases litigated
A	10–20%	1.1–2.2%
B	60–70%	0%
C	10–20%	0%

The regular EEOC process is focused on pragmatic resolutions and not necessarily on justice for all claimants. Upon receiving an EEOC charge, the Agency will contact the employer and ask it to reply to a relatively long questionnaire and to write a "statement of position" explaining what happened and allowing the employer to argue why it has not violated the law.[37] The EEOC will then assign an investigator to the case. Because of budget limitations, it often takes the EEOC as long as one year to simply assign an investigator.[38] From the time of their assignment, the investigator will seek to have the parties settle. In these initial discussions, the investigator rarely, if ever, discusses the merits of a case. Instead, the focus is on identifying what the employer will pay to settle the case and what the employee will accept. If the parties cannot agree on settlement terms, the EEOC will schedule a fact-finding conference where the EEOC investigator moderates a discussion between the parties.[39] The parties may ask each other questions through the investigator. Again, the investigator uses this time to try to get the parties to settle. If the parties do not settle, the EEOC will, in B cases, encourage a mediation.[40] Mediation is the culmination of the EEOC's ADR program. Before or after mediation, the EEOC will endeavor to resolve the case and end its involvement in the dispute.

According to data we collected from the EEOC, between 2010 and 2019, the EEOC resolved, on average, 97,388 charges per year.[41] The EEOC categorizes each case resolution into one of two broad categories: merit resolutions and non-merit resolutions. Merit resolutions

37. *See What You Can Expect After a Charge Is Filed*, EEOC, https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed [https://perma.cc/XTG8-WG7Y]; EEOC RESPONDENT PORTAL USER'S GUIDE (2016), https://www.eeoc.gov/employers/eeoc-respondent-portal-users-guide [https://perma.cc/HG2M-XA62].

38. *See What You Can Expect After a Charge Is Filed*, *supra* note 37 (noting that the average length of an investigation was ten months in 2015). The employee may request a right to sue after six months when the EEOC has not resolved the case. 42 U.S.C. § 2000e-5.

39. *See* 29 C.F.R. § 1601.15; *What You Can Expect After a Charge Is Filed*, *supra* note 37.

40. *What You Can Expect After a Charge Is Filed*, *supra* note 37.

41. *See Charge Statistics (Charges Filed With EEOC) FY 1997 Through FY 2022*, *supra* note 23.

consist of (1) settlements;[42] (2) withdrawal with benefits (basically a settlement);[43] and (3) a finding of reasonable cause.[44] After a finding of reasonable cause, the parties engage in either (3a) a successful conciliation (another term for settlement)[45] or (3b) an unsuccessful conciliation.[46] In three of the above categories (1, 2, and 3a), the parties settle, and the case is over. In 3b, unsuccessful conciliations, the employee gets a "right to sue" letter allowing them to pursue litigation to settle the dispute.[47] Non-merit resolutions consist of "administrative closures"[48] and findings of "no reasonable cause,"[49] and, in these cases, the employee also receives a right to sue letter. Over the last decade, the breakdown of cases was as follows:

Merit Resolutions	**Average**	**Range**
Settlements	8.0%	6.1–9.3%
Withdrawal with Benefits	5.0%	4.9–6.1%
Reasonable Cause	3.1%	2.9–4.7%
Successful conciliations	1.3%	1.2–1.5%
Unsuccessful conciliations	2.2%	1.8–3.5%
Total Merit resolutions	17.0%	14.8–19.2%
Non-Merit Resolutions	**Average**	**Range**
Administrative Closures	14.2%	14.2–16.9%
No Reasonable Cause	67.3%	64.3–70.6%
Total Non-Merit Resolutions	83%	80.8–85.2%

42. **Negotiated Settlements:** Charge is settled during investigation with benefits to the charging party.

43. **Withdrawal with Benefits:** Charge is withdrawn, at the request of charging party, who will receive benefits through a separate agreement with the employer.

44. **Reasonable Cause:** EEOC's determination based upon the evidence obtained in the investigation that it believes discrimination did occur. Reasonable cause determinations are followed by efforts to conciliate the discriminatory issues which gave rise to the initial charge.

45. **Successful Conciliation:** Charge with reasonable cause determination closed after resolution of the charge through voluntary efforts, whereby EEOC is a party to the agreement.

46. **Unsuccessful Conciliation:** Charge with reasonable cause determination closed after failure to resolve the charge through voluntary efforts. Because "reasonable cause" has been found, this resolution is considered a merit resolution.

47. Right to sue letters are required to bring a case in federal court. 42 U.S.C. § 2000e-5. The EEOC will grant them when it concludes a case or, upon request, after six months and sometimes prior. *Id.*

48. **Administrative Closure:** Charge closed for administrative reasons without a determination based on the merits, which include lack of jurisdiction due to untimeliness, insufficient number of employees, or lack of employment relationship; charging party requests withdrawal without receiving benefits or requests the notice of right to sue.

49. **No Reasonable Cause:** EEOC's determination based upon the evidence obtained in the investigation that it believes discrimination did not occur; the determination does not certify that the respondent is in compliance with the statute. The charging party may exercise the right to bring private court action.

Based on EEOC data, 85.8% of the cases in the 2010s resulted in the employee being issued a right to sue letter and then having to obtain a lawyer to begin the (court) litigation process. On average, that means that 83,559 of those whose charges were resolved each year had to pursue court litigation to obtain any type of relief or compensation for their claim. From 2015 to 2020, employees, on average, filed 12,234 discrimination lawsuits per year.[50] To put this into perspective, the EEOC resolves on average 97,388 cases per year; 13,927 of those cases settle, and the aggrieved party receives some amount of compensation as part of the settlement, and 191 fortunate employees have the EEOC use its offices to take their case and pursue relief for their claim. Thus, 14.3% of those who made an EEOC claim got relief via EEOC procedures, and another 12.6% of aggrieved parties pursued relief by filing their cases in court. The remaining 73.1% (71,191 claimants) received no compensation and, essentially, walked away from their claims.

EEOC Claim Compensation Rates

Average Number of Discrimination Lawsuits Filed with EEOC Per Year	Relief Received with EEOC Procedures	Pursued Relief Filing Case with Court	No Compensation Received
97,388	14.3%	12.6%	73.1%

More concerning is the fact that it is unknown what percentage of the 27.1% of the charging parties that either settled or filed lawsuits (approximately 26,353 of the charges filed) received a significant remedy. First, a large percentage of settlements provide little relief to aggrieved employees. EEOC investigators use the uncertainty associated with litigation and the cost of litigation to cajole employers and employees into settling on often modest terms. For example, it is common practice for mediators and investigators to tell employers that, regardless of the merits, summary judgment will cost the employer more than $100,000 and a trial more than $500,000, so they should settle.[51] Similarly, the investigators tell employees that they should accept pennies on the dollar because so few employees ultimately prevail at trial after years of litigation. EEOC-induced settlements commonly range from $100 to more than $100,000 depending on the employees' salaries, the cost of attorneys' fees, and other idiosyncratic factors.[52]

50. ADMIN. OFF. OF THE U.S. CTS., JUDICIAL BUSINESS tbl. 4.4 (2019), https://www.uscourts.gov/sites/default/files/data_tables/jff_4.4_0930.2019.pdf [https://perma.cc/8DPQ-D73F].

51. *Update: EEOC Enforcement/Litigation Statistics Belie Common Statements EEOC Mediators Make*, EEO LEGAL (Dec. 2, 2013), http://eeolegalsolutions.com/behind-closed-doors-what-eeoc-mediators-say-to-make-employers-pay [https://perma.cc/GYB2-LE2J].

52. Anecdotally, one of the authors, Sherwyn, settled his last case prior to joining the Cornell faculty. An all-female newspaper (owner and all employees) laid off several employees based on seniority. One of the laid-off employees filed a sex discrimination

Unfortunately, there is no available data on settlements for us to analyze. This leaves us without answers to the following questions about the efficacy of the EEOC's process: (1) what percentage of settlements reflect a real violation of the law?; (2) what percentage of loss was recovered by the employee with a compensable loss?; (3) were the parties were satisfied with the result?; and (4) was the resolution just?

The next question is what happens to the 12,000-plus discrimination cases filed in court each year. Several years ago, Laura Beth Nielsen and her co-authors, conducted a study where they collected a random sample of employment civil rights cases filed in federal courts between 1988 and 2003 in seven regionally diverse federal districts: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco.[53] The final sample consisted of 1,672 cases.[54] We cite this study because, unlike most others studies, it examines the entire lifespan of each case from filing to disposition. The study grouped cases according to a chronology:

- Early dismissal (i.e., 12(b)(6) motions to dismiss): 19%;
- Early settlement: 50%;
- Summary judgment: 18% (for a total of 37% of the cases dismissed by motion);
- Settled post summary judgment: 8% (and 57% of the cases that survived summary judgment); and
- Tried to verdict: 6% of the total cases and 43% of the cases that survived summary judgment.
- Plaintiffs prevailed in 33% of the cases that went to verdict (or 2% of the total cases).[55]

---

charge and demanded $50,000. By the time the case got to a fact-finding hearing, the newspaper was purchased by another group and then shut down. When the investigator offered a settlement of $250, Sherwyn, billing at $300 per hour, realized it was more cost effective to agree than to keep fighting for an hour—this case was classified as a merit resolution and settlement.

53. *See* Laura Beth Nielsen, Robert L. Nelson & Ryon Lancaster, *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post Civil Rights United States*, 7 J. Empirical Legal Stud. 175 (2010).

> These districts contain about twenty percent of all filings, capture variation in legal and social context, and, for cost considerations, are located close to federal records depositories. Three hundred cases were drawn from the list of all civil employment discrimination cases (classified as nature of suit code "442") in these districts from 1988 to 2003. They were compiled by the Administrative Office of the U.S. Courts (AOUSC) in each city, yielding a sample of 2,100 total cases. We derived sampling weights by district based on the total number of employment discrimination case filings in each district. This article examines only closed cases (N = 1,805) with all required key variables for this analysis, producing a final sample for analysis of 1,672 cases.

Id. at 181.

54. *Id.*

55. *Id.* at 184–87.

Plaintiffs prevailed in 4.5% of the cases where either a judge (by motion or verdict) or jury decided the case. Including the settlements, the plaintiffs were compensated in 60% of the cases. We call the first number, 4.5% (plaintiff victories divided by total number of cases decided by a court, be it in motions or at trial), the "effective win rate." We call the second number, 60% (settlements plus pro-plaintiff trial verdicts), the "plaintiff compensation rate." Unfortunately, the voluminous existing academic research uses neither the plaintiff compensation rate nor the effective win rate to judge the effectiveness of litigation. As we explain below, although the plaintiff compensation rate would be very instructive of the role of litigation, because of a lack of data, it cannot be computed from prior research. Alternatively, the effective win rate could be easily calculated from the data available in prior studies and would be informative for comparisons of the fairness and consequences of employment arbitration versus litigation comparisons. However, the effective win rate is not reported in most prior research.

III. Prior Academic Research on Employment Arbitration Uses a Flawed Design and Thus Provides Misleading Results

Academics have been studying ADR and comparing the results from arbitration and litigation for more than two decades.[56] While much of the scholarship has been extremely informative, the research is almost all fundamentally flawed and, thus, should not be used to drive public policy.

It is important to note that none of the current or objectively designed studies can actually reveal which resolution method is more just. To determine justice, we need to know not only who "won" a case, but also who *should have* won. In a fair system, should plaintiffs win 50% of their cases, 90%, or 10%? We simply do not know the answer, and thus it is impossible to judge the systems for fairness. In the studies we rely on for this article, plaintiffs won about 25% of their cases in arbitration and 25% before judges, while they won approximately 35%

56. One of the authors, Sherwyn, has been part of this cadre of scholars. Most of those who study litigation results can limit their cases to "civil rights" cases. Employment arbitration may include wage and hour claims. Unfortunately, the arbitration data often does not break the studies down by topic. Another flaw in the studies is that, despite the fact that the majority of the cases in both arbitration and litigation settle, there is no clear data concerning where the settlements are the most just. There are multiple reasons for this, including, but not limited to the following: (1) most settlements are private; (2) since arbitration is faster than litigation, there may be less backpay; (3) the cases that make it to either forum may be different in terms of the employees' salary and job title, etc. Thus, despite numerous attempts to find relevant data, we have not found any study that provides a clear picture of where there are more just settlements.

of their cases before juries.[57] While those studies imply that juries are more employee-friendly than judges and arbitrators, they do not reveal which system is more likely to produce the just answer, and they suffer from the fact that juries may be seeing different, and possibly more worthy, cases as compared to the other forums.

How could we fully assess whether litigation or employment arbitration is fairer? First, identify a substantial sample of cases. Second, determine via objective investigation if discrimination occurred. Third, put all those cases through the EEOC/litigation process and the applicable ADR system and determine which system provides the most efficacious results. This method, however, is impossible because (1) the required investigation and determination is not possible, and (2) parties will not likely go through the time and expense of double adjudication for the purposes of providing interested stakeholders an answer to their assessment of the fairness of litigation versus that of employment arbitration.[58]

Given that this sort of study remains impossible to achieve, most commentators, scholars, judges, and academics default to general statistics regarding trial win/loss rates in federal court.[59] Of the studies relying on this data, nearly all ignore the plethora of federal court claims that are dismissed via dispositive motions, which, if considered, drastically reduces the effective win rate of plaintiff employees in federal court. Many of the same studies do not even attempt to ascertain the plaintiff's compensation rate.

Next, we examine two recent employment arbitration studies, one led by Professor Alex Colvin, and the other from our own data set. We then calculate an effective win rate and a plaintiff's compensation rate

---

57. *See* Samuel Estreicher, Michael Heise & David Sherwyn, *Evaluating Employment Arbitration: A Call for Better Empirical Research*, 70 Rutgers Univ. L. Rev. 375 (2018); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 Stan. L. Rev. 1557 (2005).

58. Because, as seen below, settlements account for anywhere from 58% to 75% of resolutions in the studies that we examine, the value of the settlements and the time involved should be taken into account. Unfortunately, there is no reliable data on settlements.

59. This is not to say there is no value in studying litigation versus arbitration statistics. Indeed, as we proved in David Sherwyn, *Because It Takes Two: Why Post-Dispute Voluntary Arbitration Programs Will Fail to Fix the Problems Associated with Employment Discrimination Law Adjudication*, 24 Berkeley J. Emp. Lab. L. 1 (2000), counsel for both employers and employees use the choice of forum to their advantage, and that is why post-dispute voluntary arbitration is ineffective. Thus, if a party knew that their case would not settle, the litigation versus arbitration verdict would be very relevant. Moreover, if the parties were to settle, the expected value of the case would clearly be impacted by the litigation versus arbitration results. Our argument is as follows: since fewer than 1% of all EEOC cases go to verdict, and, in our study of an employer's policy, fewer than 5% of all cases even filed for arbitration, *see generally* Sherwyn, Estreicher & Heise, *supra* note 57, using litigation versus arbitration to judge the entire system is inappropriate.

to determine if the EEOC/litigation path is better for plaintiffs and thus should form the basis for public policy.

In their article, *Saturn and Rickshaws Revisited: What Kind of Employment Arbitration Has Developed*,[60] Alex Colvin and Kelly Pike used American Arbitration Association (AAA) data to study 449 arbitration cases and a larger data set of California arbitration cases.[61] The authors were also given access to the complete files from 217 of the 449 cases mentioned above. Colvin and Pike explained the breakdown of varying resolutions from these arbitration cases: (1) 26.9% resulted in an actual decision after hearing; (2) 59.5% resulted in a settlement prior to a decision; and (3) 13.3% were dismissed by the arbitrator prior to a hearing or withdrawn by the plaintiff.[62] The AAA data combined voluntary withdrawals (*i.e.*, the plaintiff decided to no longer pursue the case) with motions to dismiss and summary judgment motions (which are dispositive motions).[63] Since we do not know the percentage breakdown of withdrawals versus dismissals, we propose two calculations. First, we assume that 100% of the cases in this category were dismissed by dispositive motion. We then do a second calculation where we assume that 50% were dismissed by motion and 50% by voluntary withdrawal. Our first calculation results in arbitration being as unfriendly as possible when factoring in motions/withdrawals. Our second calculation results in arbitration being more plaintiff friendly.

The Colvin and Pike study provides more information using the data set of 217 cases compared to the larger data set. Unfortunately, even in this more extensive study, it is unclear from the article if this data set includes settlements or withdrawals. Still, Colvin and Pike conclude that 11.5% of the 217 cases, and 14.1% of the 149 cases that arose from employer policies as opposed to individual arbitration contracts, were dismissed on dispositive motions.[64] Since the dispositive

60. Alexander J.S. Colvin & Kelly Pike, *Saturns and Rickshaws Revisited: What Kind of Employment Arbitration System Has Developed?*, 29 OHIO STATE J. ON DISP. RESOL. 59 (2014). There are numerous other studies to use, and Sherwyn, Estreicher, and Heise have compared most of these studies in their Stanford and Rutgers articles. Estreicher, Heise & Sherwyn, *supra* note 57; Sherwyn, Estreicher & Heise, *supra* note 57. For a full discussion of the numerous studies, see for example Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003/Jan. 2004, at 44. We focused on Colvin & Pike and Nielsen, Nelson & Lancaster herein because the purpose of this paper's empirical discussion is not to analyze every study, but instead to develop two new measures for analyzing the forums and to create a new system for ADR. The previous papers provide a full literature of the relevant studies.

61. Colvin & Pike, *supra* note 60, at 61–62.

62. *Id.* at 71.

63. *See id.* at 72.

64. *Id.* at 72–73.

motion data is ambiguous in the Colvin and Pike study, we once again have to perform multiple calculations to determine the possible effective win rates. It should be noted, in each of these calculations, arbitration turns out to be more employee friendly than litigation. We do the multiple calculations to try and be as fair and transparent as possible. Thus, for the Colvin and Pike data set, we calculate the effective employee win rate with four different assumptions about dispositive motions, which represent our best guesses of what their data showed to provide the range of possible assessments.

Colvin and Pike reported the percentages of types of resolutions in their data set of 449: 267 (59.5%) cases were settled, 121 (26.9%) cases went to award, 29 cases (24.7% of those cases that went to award) resulted in the plaintiff prevailing; and either 27 (6.2%), 54 (13.3%), 52 (11.5%), or 63 (14.1%) cases concluded with an arbitrator granting a dispositive motion.[65] The effective plaintiff win rate (*i.e.*, the number of cases the plaintiff won divided by the number of cases that the plaintiff lost plus the number of cases dismissed by a dispositive motion) results in the following effective employee win rates: 19.6%; 16.6%; 16.8%; and 15.8%. Our plaintiff compensation rate, the percentage of cases where the employee either settled or prevailed, when applied to Colvin and Pike's study, is 65.9%. This means that plaintiffs either prevailed or settled in 296 out of 449 cases.

Our own study of 7,316 AAA employment arbitration cases resolved from 2012–2017 produced the following results: 5,538 (75.7%) cases were settled; 847 (11.6%) cases went to award; in 189 (22.4%) of these cases, the plaintiff prevailed; and in 931 (12.7%) of the cases were either withdrawn or dismissed by a dispositive motion.[66] Again, because the AAA combines withdrawals and dismissals, we first calculate the effective win rate as 100% and then consider that 50% of these 931 cases were dismissed by motion. The effective plaintiff win rate in our study is 10.6% and 14.4%. The plaintiff compensation rate in our study is 78.3%, which means that plaintiffs either prevailed or settled in 5,727 cases out of 7,316. Thus, the range for the effective win rates for plaintiffs in the two arbitration studies was 10.6%–19.6%, and the range for the plaintiffs' compensation rate was 65.9%–78.3%. In Nielsen's litigation study described above, the plaintiffs' effective win rate was 4.5% and the plaintiffs' compensation rate was 60%. When applying our standards to all the cases filed with the EEOC, the effective employee win rate in those cases is 0.3% and the plaintiff compensation rate is 23.8%.

65. *Id.* at 71, 74; *see* 72–73,

66. The data from the authors' own study is on file with the authors.

	Colvin & Pike Study	Our Study
Resolution types	**Percentage of arbitration cases**	**Percentage of arbitration cases**
Arbitration Award	26.9%	11.6%
Settlements	59.5%	75.7%
Withdrawn/Dismissed	13.3%	12.7%

A. New Data Confirms That Motions Are Not Only Relevant—They Are Determinative

While we do believe that using the Colvin & Pike study, the Nielsen study, and our own prior data set is comprehensive and does make the case, we were concerned about relying on arbitration and litigation data from sources other than ourselves.[67] Thus, the authors here joined a research group consisting of Lew Maltby,[68] Professor Emeritus Ted St. Antoine,[69] and Professor Tom Kochan.[70] Like the authors here, Maltby, a longtime employee advocate with decades of practical experience, could not understand why prior work excluded motions and felt the need to create a more comprehensive study of arbitration versus litigation results. Our data sources were all AAA employment arbitrations from 2019–2020 and all federal employment cases from the same years.

The settlement rates in the two forums were both significant. The arbitration settlement rate was 80%, while the litigation settlement rate was 72%. These numbers are very relevant because one of the arguments against using motions in such studies was that litigation plaintiffs who survived summary judgment motions leveraged their victory to extract settlements from employers who lost.[71] Because settlements are almost always confidential, we focused on cases that were concluded by a ruling from either a court or arbitrator. In arbitration, there were 811 such cases. Of these cases, 323 were dismissed by an arbitrator pursuant to a motion (40%) and 488 cases were resolved after a hearing (60%). In litigation there were 14,654 such cases. Of these cases, 7,862 were dismissed after a motion to dismiss and 6,378 were dismissed after a summary judgment motion, for a total of 14,240 cases (97%) decided by a judge on motion. There were 414 cases decided by

67. We have the utmost respect for the methods and integrity of Professors Colvin, Pike, Nielsen, Nelson, and Lancaster, but felt we needed to also produce our own study.

68. Lew Maltby is the President of the National Workrights Institute and former head of the ACLU's Civil Rights Division.

69. Ted St. Antoine is the James E. and Sarah A. Degan Professor Emeritus of Law at the University of Michigan School of Law.

70. Tom Kochan is the George Maverick Bunker Professor of Management at the MIT Sloan School of Management where he is a professor of industrial relations, work and employment.

71. *See* Mark Gough, *Employment Discrimination Outcomes in Arbitration and Civil Litigation: A Tale of Two Forums*, 74 INDUS. LAB. RELS. REV. 875, 880 (2020).

a jury or judge after a trial (3%). In post-trial litigation, the employees prevailed 40% of the time. In post-hearing arbitration, the employees prevailed 31% of the time. Previous articles interpreted these numbers to conclude that litigation is more advantageous to employees than arbitration by a 40% to 31% win rate. When dispositive motions are factored in, however, the arbitration employee net win rate adjusts to 19%, while the litigation employee net win rate drops to a staggering 1% (arbitration employees won 152 out of 811 cases; litigation, employees won 164 out of 14,654 cases.

Table I
Comparative Results of Employment Arbitration and Employment Litigation
All Cases
Arbitration (2019–2020)

Decided After Hearing	**Employee Wins**	**Employer Wins**
488	152 (31%)	336 (69%)
Decided on Pre-Hearing Motions	**Employee Wins**	**Employer Wins**
323	0 (0%)	323 (100%)[72]
Total	**Employee Wins**	**Employer Wins**
811	152 (19%)	659 (81%)

Court Litigation (2019–2020)

Decided After Trial	**Employee Wins**	**Employer Wins**
414	164 (40%)	250 (60%)
Decided on Motion to Dismiss[73]	**Employee Wins**	**Employer Wins**
7,862	0 (0%)	7,862 (100%)
Decided on Summary Judgment	**Employee Wins**	**Employer Wins**
6,378	0 (0%)	6,378 (100%)
Total	**Employee Wins**	**Employer Wins**
14,654	164 (1%)	14,490 (99%)

72. In theory, either party can request that a case be resolved on a pre-hearing motion. In practice, however, cases decided on motions are virtually always decided in favor of the employer.

73. A motion to dismiss argues that, even if the other party can prove its allegations, the party filing the motion is entitled to a judgment in its favor as a matter of law. A motion for summary judgment is filed after discovery. Such a motion argues that the evidence produced in discovery is legally insufficient to submit the claim to a jury. With either type of motion granted, the case is dismissed. While in theory either party can file such a motion, in practice they are granted virtually exclusively to employers.

No rational justification exists for comparing arbitration and litigation results without including dispositive motions. After years of considering this issue, we have settled on an appropriate analogy. Let's suppose a professor has accepted at appointment at Cornell, and she is basing her decision on where to live—Lansing, a suburb north of Ithaca, or Ithaca—on the success of the softball program. The professor wants to compare the win/loss records of the two schools over twenty-five years where each team played 500 games. The professor hires a researcher to calculate both teams' winning percentages. Ithaca has 40% winning percentage, and Lansing has a 31% winning percentage, so the professor chooses Ithaca. What the professor did not know is that, in New York State, leagues employ the "slaughter rule," which halts a seven-inning game after five innings if one team is ahead by ten or more runs. The researcher decided to exclude slaughter rule games from the analysis. Using the same percentages as that of our study with the slaughter rule acting as dispositive motions, we point to the facts that our softball-obsessed professor should have considered. If 97% of all Ithaca games were decided by the slaughter rule, then Ithaca would have won only six out of 500 seven-inning games for a winning percentage of 1.2% Conversely Lansing, where only 40% of the cases were decided by the slaughter rule, boasted a seven-inning winning percentage of 18.6%.

Why do so many scholars exclude dispositive motions from their analysis? We contend that dispositive motions are like the slaughter rule—the game is so lopsided that it ends early and the players do not even get to finish. For employment plaintiffs in cases decided by motion, they do not get to testify or cross-examine the employer. When we compare employment arbitration to the entire EEOC litigation system, we conclude that employment arbitration is considerably more favorable to plaintiffs.[74]

B. Most of the Prior Work Fails to Even Mention Dispositive Motions

Most of the scholarship opposing arbitration simply ignores dispositive motions. At least one scholar, Mark Gough,[75] discusses dispositive motions and provides an argument to justify their exclusion. We commend Professor Gough for addressing the issue, but respectfully disagree with his contentions. Relying on the Nielsen et al. paper discussed above,[76] Gough argues that it is reasonable to exclude dispositive summary judgment motions in analyzing arbitration and litigation because

74. Using Colvin & Pike, Neilson, Nelson & Lancaster, and our own AAA data set leaves gaps. We do not have the data on whether the employees had counsel, what their salaries, education, and job titles were, what the quality of the evidence was, etc. It is possible that any of these factors could affect our effective win and compensation rates. In our defense, neither Colvin nor Neilsen had the data to control for these factors either.

75. Gough, *supra* note 71.

76. Nielson, Nelson & Lancaster, *supra* note 53.

(1) the parties use summary judgment motions to strategize whether to settle before a motion is filed or after the case survives the motion, and (2) summary judgment is on the rise in employment arbitration.[77] We are unpersuaded by Gough's argument for several reasons. First, Colvin and Pike's study found a settlement rate in employment arbitration of around 59.5%, our first arbitration study found a rate of 75%, and our recent study found a settlement rate of 80%. Nielsen's litigation study found a 58% litigation settlement rate while our study found a settlement rate of 72%. We fail to see why summary judgment should be ignored because it likely plays a role in facilitating settlements in litigation when the parties settle as much, or more often, in arbitration than litigation. Like any other factor (e.g., the facts of the case, the costs of litigation, the type of business, media attention, etc.), dispositive motions are part of the calculus involved in the decision whether to settle. Moreover, since costs are often a primary factor in the decision to settle and since the costs of litigation greatly outweigh the costs of arbitration, it is curious both to exclude a relevant data point because it may affect settlement, and to not even try to control for the disparity on costs. Consequently, it is simply not appropriate to ignore the elimination of 37% of the cases and 97% of cases terminated by a court—all plaintiff dismissals—from a study. Second, the argument that surviving summary judgment facilitates settlements ignores the fact that, in Nelson's study, 50%, and our study, 55% of the motions that end the case are motions with motions to dismiss—where the employer proves that, even if the facts alleged in the complaint are true, no legal violation exists. This is less settlement strategy and more elimination of frivolous cases. No justification exists for ignoring 19% of cases in one study, and 54% of the cases decided by a court in our study, all of which constitute plaintiff losses. The simple effect of doing so skews the data in favor of the litigation win rate compared to arbitration, and, secondly, it ignores a central benefit of employment arbitration: win or lose, plaintiffs are far more likely to get their case heard in arbitration.

The nature of litigation and arbitration may explain why motions are so much more prevalent in litigation than in arbitration. Cases end upon the granting of a motion. Arbitrators, who are paid by the day, have a financial incentive *not* to grant motions and can justify any such decision by saying that while it may be a close call, the employee deserves their day in hearing.[78] Alternatively, judges, who are not paid by the case, have an incentive to reduce their docket. This contrast is illustrated by two anecdotal occurrences and an analysis of AAA data.

77. Gough, *supra* note 71, at 880.

78. This information is pulled from a conversation with Gregg Gilman, who stated that arbitrators routinely state that even if the case may not have merit, they will not dismiss the case by motion because they want to provide the employees with an opportunity to tell their stories.

One of the authors' former teaching assistants clerked for a district court judge, sitting in the Fourth Circuit, who ordered his clerks to find a way to grant dispositive motions against discrimination plaintiffs because the judge did not want these cases clogging his docket.[79] Similarly, while practicing, author Professor Dave Sherwyn found judges to be openly hostile to low-wage employee claims because they considered them to be "attorneys' fees" cases (i.e., cases where the attorneys' fees outweighed the potential employee loss or outweighed the judgment).[80]

As Professors Colvin and Grough correctly state, motions are on the rise in arbitration. Our research group was very surprised that 40% of the non-settled, non-withdrawn cases ended in a motion. In fact, we were so surprised that we sought to get a better understanding of the type of cases that were being dismissed by arbitrators on pre-hearing dispositive motions. We randomly selected thirty AAA cases where arbitrators dismissed the claims by dispositive motion. Of the thirty dismissals, twenty-four of the cases were untimely and, thus, did not comply with the statute of limitations. Of the remaining six, four alleged violations of classes not protected by law, and only two were judged by the merits. Based on this very small sample size, it appears that most arbitrations dismissed by motions would be dismissed in court by motions to dismiss. We contend that further research to examine motions and settlements is warranted.

We also would agree with Professors Colvin and Grough that cases decided by motion would not be relevant if the forums had the same or very similar percentages. They do not, though. Depending on the study, there are anywhere from 2.5 to 5 times the number of cases decided by dispositive motion in litigation over arbitration. This disparity is too great to ignore, even if arbitration's motion practice continues to rise.

The key point is that there are several plausible and debatable ways to address motions. Ignoring motions leads to results suggesting that litigation is fairer to employees as compared to employment arbitration. Therefore, our view is that public policy decisions should not depend on the findings of any existing study. Rather, policy decisions should recognize what is clearly apparent: namely, that under the right conditions, mediation and arbitration can help produce fair and effective dispute resolution.

79. This information was derived from a conversation with a former student, Steven Mutkowski, while he was clerking for a district court judge in the Fourth Circuit in December 1998. He reported to us that the judge ordered his clerks to "find a way to grant the motion."

80. Sherwyn can still feel the sting of Northern District of Illinois Judge Marovich who literally screamed that he would not allow attorneys' fees cases to proceed in his court.

IV. Other Comparisons Between Employment Arbitration and Litigation

Along with plaintiffs' win/losses, scholars also compare the time, cost, and damage awards in various procedures. The evidence is clear with regard to time: arbitration is faster. When analyzing the average length of time between the filing of a claim and disposition, one study found 260 days for employment arbitration and 679 days for litigation.[81] Colvin, in a 2011 paper, determined that litigation took 2.5 years from filing to trial, while arbitration took just under one year (361.5 days).[82] We have found no study that concludes that arbitration is as costly as litigation. With limited discovery, less time, fewer motions, no juries to pick, and limited appeals, there is simply no way for a plaintiff's arbitration costs and fees to be close to that of litigation.

The last issue that scholars examine is awards. While a number of studies examine costs, there exists no good way to judge awards in the two forums against each other because (1) settlements take so many high- and low-damage award cases out of the mix; (2) damages are based on back pay—employment arbitration is faster, so less back pay has accrued; (3) the lower costs of arbitration in terms of time and money could result in lower value cases making it into the mix; (4) awards as a percentage of demands is based on lawyers' demands, which are often motivated by pushing settlement and are not grounded in the actual losses;[83] and (5) litigation almost always involves relatively high wage earners,[84] and they are more likely to have extended

---

81. Using this data raises a question as to why we contend that it is inappropriate to use verdict results for win and loss and then to use them for time. Sadly, there is no data set that we know of that tracks the time of EEOC filings to resolution. We do know the following: the EEOC allows employees to avoid EEOC investigation after six months and start the litigation process, and it generally takes approximately one year to even assign an investigator to examine a case. *See* David S. Sherwyn, J. Bruce Tracey & Zev J. Eigen, *In Defense of Mandatory Arbitration of Employment Disputes: Saving the Baby, Tossing out the Bath Water, and Constructing a New Sink in the Process*, 2 Univ. PA. J. Lab. Emp. L. 73, 98–99 (1999). Conversely, in our prior study of one company, 81% of the cases were resolved in less than one week, fewer than 10% used outside resources (e.g., mediation), and fewer than 5% of the cases resulted in an arbitration being filed. *See generally* Sherwyn, Estreicher & Heise, *supra* note 57. Thus, in our one study of an employer, 81% of the cases are resolved in one week, while, at the EEOC, it takes one year to get an investigator assigned and, at best, employees seeking to avoid the EEOC need to wait six months. We therefore contend that any data set of the entire system would show exasperated differences between litigation and arbitration on timing.

82. Alexander J.S. Colvin, *An Empirical Study of Employment Arbitration: Case Outcomes and Processes*, 8 J. Empirical Legal Stud. 1, 8 (2011).

83. Indeed, we recently examined a multi-million-dollar demand letter for the termination of a $120,000 per year employee.

84. *See* John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983, 1007–08 (1991) (finding that the costs of litigation are so high that it simply makes no sense for an attorney to take a case for an employee who earned under $450 per week unless the liability was so clear and the conduct so egregious that it was a guaranteed win). In the third quarter of 2021, the median weekly earnings of the nation's 115.3 million full-time wage and salary workers

back pay because it takes longer to secure high wage employment versus low wage employment.

V. Research Findings Regarding Employment Arbitration Versus EEOC/Litigation

From the data and arguments described previously, several conclusions emerge: (1) we simply do not know which system is more just in the sense that it yields the correct result (i.e., a finding for the employee or the employer); (2) the EEOC litigation process is not clearly more employee friendly than employment arbitration; (3) under plausible assumptions, analyzing the effective win rate and the plaintiff compensation rate with available data, employment arbitration is more plaintiff friendly than litigation; (4) to truly measure the two systems, we need to study a universe of EEOC claims and employer claims;[85] (5) the EEOC/litigation model is not the best way to resolve disputes; (6) the current employment arbitration system is not the best way to resolve disputes; and (7) we can create a hybrid program that will be significantly better for employees and employers than the current EEOC/litigation and employment arbitration systems. Below, we describe that suggested system.

A. How Workplace Disputes Should Be Resolved

Numerous ways exist to settle workplace disputes. Indeed, other countries have tribunals, work councils, and various dispute resolution forums. In an attempt to be practical, we will not propose a system that completely alters the current method. With that in mind, we have several thoughts that drive our proposal:

1. Workplace disputes have been a major vehicle for social change, and thus the system must allow the law to evolve;
2. Some workplace disputes are so egregious that they need to be public with substantial penalties to prevent similar future behaviors;
3. Most employees, and all employers, wish that their disputes would remain private;
4. Many employees have been led to believe that they have more rights than they are afforded by law, which often results in unrealistic expectations with regard to lawsuits and other employment actions;

---

were $1,001—a number higher than the median income for black men and women, Hispanic men and women, and barely higher than that for white women ($912). *See* News Release, Bureau of Lab. Stat., U.S. Dep't of Lab., Usual Weekly Earnings of Wage and Salary Workers Third Quarter 2021 (Oct. 18, 2023), https://www.bls.gov/news.release/pdf/wkyeng.pdf.

85. Some may argue that different research design could yield accurate results. After studying this topic for almost thirty years, the authors believe that studying random samples is not as effective as taking all the cases from one jurisdiction in one year versus all the cases filed with an arbitrator provider in that year. This is because each case is different and because even large random samples will not account for these differences. Of course, this is open to debate.

5. Employees should be educated about the rights granted by the government or by contract with their employer;
6. Most workplace disputes are best resolved at the lowest possible level with little or no outside legal intervention;
7. The ideal solution to most disputes is satisfaction without employment termination;
8. The concept of "procedural justice," where employees have the opportunity to be fully heard, is vital;
9. The system should be accessible and efficient.

B. Our Proposal Includes a Role for Pre-Dispute Employment Arbitration

Before we begin describing our proposal, we need to address the argument that there should be no pre-dispute regulations and that both parties, or just employees, instead, should be able to choose their forum when the case is ripe. In an earlier article,[86] we showed that voluntary post-dispute arbitration is not useful. In our study, all parties who had cases before the Illinois Human Rights Commission over a period of several years were given the opportunity to choose to litigate or arbitrate their cases. In the more than 2,000 cases in the study, there were numerous instances where the employer or the employee chose arbitration, but there were no instances where both sides did so. Simply put, the forums are different, and the facts of the case, as well as other circumstances, will dictate attorney strategy. Since the fallback was litigation, the post-dispute option effectively provided no change or benefit. In other words, because both sides needed to choose arbitration in order for the case to be resolved outside of litigation and because there was not one instance when both sides chose arbitration, the entire exercise was pretty much useless, and the parties were left with the default option—litigation. If the employee could unilaterally dictate the choice of forum, a substantial increase in arbitrations would have resulted because employees elected arbitration in a large number of instances. To that end, there are some who contend that employer polices should allow the employee to have a choice of forum.[87] The question then arises: Why should (or would) an employer subject itself to a system where the choice of forum is based on what benefits the employee most? This makes little sense. Instead, the employer would prefer to use the EEOC/litigation path as the standard and only consider employment arbitration if requested by the employee. As indicated by the data reviewed above, however, if requested by the employee, arbitration is unlikely to be considered a viable option by the employer.

Our second threshold issue concerns the poignant relevance of our concept. Do we truly believe that upcoming legislation will either outlaw or modify ADR in the employment space? Prior to the passage of the

86. Sherwyn, *supra* note 59.
87. This is the position taken by very well-regarded plaintiffs' lawyer Doug Wigdor.

EFASASHA, we believed that proposing legislation was, at best, unrealistic. Now, with the law predicated on what we contend to be faulty research, Congress should revisit the efficacy of arbitration. Even if this is not the case, employers can implement our proposals on their own.[88] While the EEOC does not defer to arbitration, under current law employer-promulgated policies prevent any litigation other than that initiated by the EEOC. As seen below, our proposal requires employers to notify employees that they have a right to file with the EEOC and let the Agency decide if the case is one of the fewer than 200 cases they will litigate. The rest of our policy can be implemented. Indeed, our proposal is greatly influenced by what we perceive to be the best practices of ADR. Thus, employers seeking to be employers of choice can implement our proposed policy and advertise it to applicants.

VI. We Propose the Following

The EEOC (and other federal and state agencies) should endorse an ADR policy and agree to "defer" cases to arbitration if the cases and the policy meet the following criteria:[89]

1. Employees must be informed that they have the right to file their charges with the EEOC.
    a. The EEOC will have thirty days to decide whether to defer or litigate the case. Because the deferrals will greatly reduce the number of cases to investigate, the EEOC will have increased resources to litigate cases.
    b. This will allow for development of the law and provide deterrence because the litigated cases will be public and the potential resources of the government to pursue these cases are vast. As one of our Cornell Center for Innovative Hospitality Labor and Employment Relations (CIHLER) board members once stated, "[I]f the EEOC is the plaintiff, God help you!"[90] Instead of fewer than 200 cases (under 1% of the A cases),[91] this should allow the EEOC to increase their litigation docket

88. Some may argue that once employers see the results of this study, they will be reluctant to implement arbitration polices. This could be the case! We contend, however, that employers seeking to use ADR for the "right reasons" see the polices as an employment relations tool where they can resolve the vast majority of disputes in a timely, non-adversarial manner. While lawyers may focus on win/loss, employers focus on morale, productivity, employee engagement, costs of disputes . . . and other factors that are not based on win/loss.

89. Sherwyn, Tracey & Eigen, *supra* note 81; *see also* Joyce E. Taber, Comment, *An Unanswered Question About Mandatory Arbitration: Should a Mandatory Arbitration Clause Preclude the EEOC from Seeking Monetary Relief on an Employee's Behalf in a Title VII Case?*, 50 Am. U. L. Rev. 281 (2000); Lewis Maltby, *Paradise Lost—How the* Gilmer *Court Lost the Opportunity for Alternative Dispute Resolution to Improve Civil Rights*, 12 N.Y.U. L. Sch. J. Hum. Rts. 1 (1994).

90. CIHLER is a Center housed in Cornell's Nolan School of Hospitality and ILR School. Statement by Joe Baumgarten, Partner and Chair of the Labor Department Proskauer, Roundtable Ithaca N.Y. (May 2010).

91. *See supra* note 31 and accompanying text.

so that becoming an "Agency case" becomes a realistic concern of employers. Since all cases are published, the EEOC can see where the law is not being interpreted correctly and take the next case in which such an issue arises.

c. Cases that do not fit into the EEOC enforcement priority protocol will be deferred if the employer's policy contains the elements listed in part 2 of our proposal below.

2. ADR in Exchange for Discharge and Discipline for Cause:

a. Anecdotally, we believe most employees do not understand the concept of "employment at will."[92] Moreover, the United States is one of the few, if not the only, industrial nations that still employs this doctrine.

b. With the number of different limits on at-will employment that already exist and the cost of turnover (e.g., morale, productivity, recruiting, training, etc.), it is not in employers' best interests to rely on the at-will doctrine as a defense in discrimination trials. Defense lawyers rarely take a case to trial without having a specific lawful reason for the employment decision. As CIHLER Board member Gregg Gilman stated: "*No* jury wants to hear I can fire anyone for no reason and they will infer an unlawful motivation. If I can't "prove" a good reason, I settle."[93] Of course, it is not in employees' best interests to be subjected to at-will employment. Thus, since at-will employment is not in society's best interests, it is time to let (and even encourage) employees and employers make the following trade: ADR in exchange for just cause instead of at-will employment.[94] We know of several employers who provide employees with a choice: (1) agree to a well-defined ADR system that includes an individual contract under which the employee can only be terminated for cause; or (2) remain an "at-will" employee, and if there is a dispute, the ADR system is not available and the employee would have to file with a state or federal agency. Consequently, two issues need to be addressed: (i) the distinction between voluntary versus mandatory arbitration; and (ii) the definition of just cause.

i. One of us, Katz, believes that employees should be able to voluntarily choose between ADR with cause or EEOC/litigation with at-will employment and not be forced to do

92. Research from Pauline Kim supports this anecdotal evidence. Pauline T. Kim, *Bargaining with Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 Cornell L. Rev. 105 (1997).

93. Mark Feffer, *"Employment at Will" Isn't a Blank Check to Terminate Employees You Don't Like*, SHRM (Nov. 7, 2017), https://www.shrm.org/resourcesandtools/hr-topics/employee-relations/pages/employment-at-will-isnt-a-blank-check-to-terminate-employees-you-dont-like.aspx [https://perma.cc/DEN3-5LT6]; *see also* Zev J. Eigen, Nicholas F. Menillo & David S. Sherwyn, *Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment and Implement a "Mandatory Arbitration Act*,*"* 87 Ind. Univ. L. J. 271 (2012).

94. Indiana Less, *Why At-Will Employment Is Bad For* Workers, Boss Mag. (2022), https://thebossmagazine.com/at-will-employment-bad-for-workers [https://perma.cc/VL6P-PG3T].

so as a condition of employment. He has a fundamental belief that employees should have choice and that fair systems will be chosen. Moreover, he believes that employees should have the ability to opt out of the ADR program after a certain amount of time (perhaps only two years after their initial choice to eliminate instability for organizations and the possibility of gaming). Sherwyn and Wagner, on the other hand, are fine with mandatory arbitration in exchange for a system where employees can only be terminated for "cause" (and we address what cause should be below) because they equate an ADR/for-cause system to the numerous employment rules that employees have no choice over (e.g., type of health insurance and cost, dress codes, vacation pay, reporting structures, remote work, union dues, etc.). That said, Sherwyn and Wagner do not think that the voluntary versus mandatory distinction is particularly relevant. They note that several employers who have offered employees the choice to choose just cause (and eliminated) at-will employment in exchange for ADR have found selection of the ADR-cause option at rates of over 95%.[95] Thus, Sherwyn and Wagner would support a voluntary arbitration system if necessary to get ADR legislatively available. Sherwyn and Wagner do not, however, support having an open-ended opt-out of the ADR system. Like Katz, they think this option would be unwieldly to manage and would be used strategically by lawyers, thereby undermining the process.

ii. What would just cause be in this system? Over the last seventy years, grievance arbitration included in collective bargaining agreements has resulted in a body of law that defines just cause. This standard for discharge and discipline is extremely high.[96] Since supervisors are not covered by the National Labor Relations Act (NLRA),[97] this jurisprudence has been applied exclusively to non-supervisors and almost all unionized hourly workers. Sherwyn worries that the common union version of just cause has also created a backlash against unionization, as it is seen as a guarantor of lifetime employment, save for egregious behavior. He believes there should be a viable middle ground between at-will and the existing unionized definition of just cause, especially since this system will apply to supervisors, managers, and high-level executives who are not covered by the NLRA and likely have more nuanced employment standards than the typical unionized hourly employee. He proposes that stakeholders on both sides of the aisle define this middle ground. Katz is not convinced

95. Four Seasons has had such a policy for over twenty-five years, and the acceptance rate has never been below 95%.

96. *See* KATZ, KOCHAN & COLVIN, *supra* note 15.

97. 29 U.S.C. § 152(3).

that the current union version of just cause is fundamentally flawed.

c. We do not see the development of a sensible and fair ADR policy as a choice between employment arbitration and litigation. We see it as a choice between ADR and EEOC/litigation. ADR is not litigation; to be effective, it should be part of a dispute resolution system. We propose that every approved ADR system have at least the following three steps:[98]

   i. Employees discuss the issue/concern with HR. If the organization does not have an HR professional, the discussion takes place between employees and their supervisors or the supervisors' supervisor. Numerous studies[99] show that this first informal and non-adversarial process resolves the most disputes. If not resolved, employees should move to step ii.

   ii. Employees can bring a complaint to a higher-level manager or to a peer review forum. Sometimes HR or the supervisor need either high-level people or peers to be involved in order to make the parties in the dispute see both sides and find a fair resolution. We have found that peer review is especially effective because peers understand the specifics of the work and the personalities of the players, and often can resolve problems effectively. Mediation can play an effective role in solving disputes at the workplace level, especially when included within a conflict management system.[100] This can advantage both employees and organizations by providing less expensive and quicker dispute resolution. Perhaps more importantly, mediated dispute resolution can address the organizational and systemic deficiencies that commonly underlie what at first might appear to be only an individual dispute. Our experience suggests that workplace disputes often escalate due to poor employee-supervisor communication, ineffective performance improvement efforts, or deficient organizational design.[101] Mediators can both help identify these systemic problems and stimulate the development of creative solutions.[102]

---

98. See Sherwyn, Estreicher & Heise, *supra* note 57, where the employer had a similar grievance system and fewer than 5% of the cases resulted in arbitration filing, proving that, at least in the non-union setting, step grievance systems result in resolutions and cases are not just pushed to arbitration.

99. *See* Katz, Kochan & Colvin, *supra* note 15.

100. *See generally* David B. Lipsky, Ronald L. Seeber & Richard Fincher, Emerging Systems for Managing Workplace Conflict: Lessons from American Corporations for Managers and Dispute Resolution Professionals (2003).

101. *See* William Ury, Jeanne Brett & Stephen Goldberg, Getting Disputes Resolved 201 (1988). During his nine years as dean of the IR School and ten months as interim provost of Cornell University, Katz observed the systemic problems that underpinned many employee complaints and the positive role that mediation could play in addressing those problems.

102. These suggestions are influenced by the polices that are drafted and implemented by Paul Wagner, Stokes Wagner.

Note that if the parties cannot settle, arbitration is the last step:

iii. Arbitration is the last step. There has been a lot written about various procedures that can help make arbitration a fair process.

1. The parties mutually select the arbitrator through an established agency (e.g., AAA, JAMS, etc.);
   a. Law schools should establish clinics to assist employees in arbitrator selection and case preparation if the employee does not have counsel;
   b. Arbitrators' biographies and records of case dispositions should be made available;[103]
   c. The employer should pay all the costs of the arbitration except for the employee's attorneys' fees and adjudication costs;[104]
2. There must be adequate discovery with a select number of depositions, document requests, and interrogatories to be determined by the arbitrator or the policy;
3. The statute of limitations for statutory claims should be no less than 180 days;[105]
4. The damages available, including fee shifting, must mirror that of federal, state, local, and common law;

---

103. This requirement should satisfy those who are concerned about the so-called "repeat player doctrine." The Repeat Player Doctrine contends that employers who have more than one arbitration achieve higher winning percentages than those that do not. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1 Emp. Rts. & Emp. Pol'y J. 189 (1997). Some readers inferred from these results that arbitrators made decisions in favor of employers because the arbitrators saw the potential for future cases. In previous articles, we contested these findings, but, regardless, it is easily fixed. Since employees will be able to see if the arbitrator has ever heard cases by this employer before, and presumably, would not choose such an arbitrator, the arbitrator would have little incentive to favor the employer to get future work because any concerned plaintiffs' lawyer or advocate would simply not choose that arbitrator.

104. Some may contend that arbitrators will be biased in favor of the employer because the employer pays. This argument is an attack on the professional integrity of arbitrators and there is no real evidence to support it. Of course, our policy could require the employee to pay half the cost, which would solve one problem and create another. Of the two, we find the latter much more problematic than the former. Forcing employees to pay $5,000–$10,000 per day will create barriers similar to those inherent in the litigation system. Conversely, we contend that requiring arbitrator selection to go through the AAA, having law school clinics help employees in their selections, having all arbitration awards issued by all arbitrators on the list available, and having the plaintiffs' bar available more than covers the potential problem of arbitrators being unethical and basing decisions on who is paying them.

105. Under Title VII, the statute of limitations is 180 days if there is no state law and agency (e.g., Georgia and North Carolina) and 300 days if both state and federal law apply. 42 U.S.C. § 2000e-5. We contend 180 days is enough time when there is an in-house ADR program.

5. If an employer makes a settlement offer and the judgment is for an equal or lesser amount, the plaintiff will pay the employer's costs and fees;
6. The arbitrator must issue a written opinion;
   a. The names of the parties will be redacted, and the opinion will be filed with an organization (e.g., government, university, private business such as West or Lexis) that will make the opinions available to the public.
   b. The opinion will also be filed with the EEOC so that it will allow the Agency to ensure that arbitrators are correctly applying the law. If not, the EEOC can pursue cases where litigation is necessary to "get the law right."
7. Appeals should be limited in accordance with generally accepted arbitration principles, as lack of appeals keep costs and time under control. Moreover, research shows that employment appeals weigh heavily in the employer's favor.[106]
8. Arbitration should be private. Privacy helps make it attractive to both employers and employees. If both parties agree, pre-arbitration, that they want the results to be public, they can make the publication happen; however, we would predict that, most often, both sides will favor privacy.[107]

As stated in the opening, we believe that strong arguments on several sides of many of these ADR issues exist and that they need to be debated and refined so as to be acceptable to reasonable employers and employees. For example, Katz can support a process without

106. *E.g.*, Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol'y Rev. 103, 110–12 (2009) [hereinafter Clermont & Schwab, *From Bad to Worse*] (noting that the approximately 41% to 9% spread in reversal rates on appeal between defendants and plaintiffs in employment discrimination cases is more extreme than the difference between plaintiff and defendant reversal rates in non-job cases); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud. 429, 442 (2004) [hereinafter Clermont & Schwab, *How Plaintiffs Fare*] (citing statistics illustrating that "employment discrimination plaintiffs have won only 19.29 percent of judge trials but 37.77 percent of jury trials"). The difference in reversal rates on appeal is stark. Reversal rates for defendants from plaintiff pretrial wins is 30% compared to a nearly 11% reversal rate for plaintiffs who appeal defendant pretrial wins. The reversal rate from trial wins is 41% for defendants when plaintiffs win at trial compared to nearly 9% for plaintiffs when the defendant wins at trial. Clermont & Schwab, *From Bad to Worse*, *supra* at 110.

107. There is currently a movement to ensure that all sexual discrimination cases and harassment cases be public. This will likely result in fewer cases being brought. At a Davis & Gilbert Roundtable in Manhattan in November 2019, Marty Scheinman, one of the top mediators in the nation stated that he has never met a plaintiff who did not want the case to be private. Thus, preventing private adjudication will, according to Scheinman, result in fewer cases being filed and more women simply accepting the conduct. We believe that privacy is a net positive, as redacted cases will help with the development of the law and employees can complain and adjudicate without having to worry that every Google search will yield that they sued their former employer.

the opt-out, while Sherwyn and Wagner could support a system where employees have a choice upon hire.

Conclusion

We do not pretend that our proposed system is either perfect or that it should be set in stone.[108] Policy experimentation, informed by academic research, would promote a useful evolution of policy. Numerous tweaks might be made to create a better system. We do know, however, that EEOC/litigation is an inefficient, heart wrenching, and costly practice. Moreover, the number of EEOC charges that are filed each year has made it impossible for the Agency to enforce and develop the law because it spends too many resources investigating and dismissing tens of thousands of cases each year. Despite common perception, no convincing evidence indicates that EEOC/litigation is more employee friendly than employment arbitration. That said, the current state of employment arbitration, as allowed by the Supreme Court, does not address the EEOC resource issue and thus does not help develop the law, does not create a process to productively address disputes, and lacks controls to ensure fairness and due process. Our proposal seeks to address the problems with the current systems by creating an ADR process, allowing the EEOC to maximize its effectiveness, and imposing controls that fix the problems that plague employment arbitration.

108. As stated in the introduction, this paper examines discrimination cases. We are not concerned with the lack of contract claims, as very few employees have employment contracts. Alternatively, wage and hour cases are extremely prevalent in employment litigation, are often litigated in class actions, and the damages are often so high that people refer to these lawsuits as "bet the company lawsuits." We believe that the class action system needs the type of examination we hoped to provide in this article and that others have discussed in numerous articles on ADR in general. We hope to address class action waivers, NDAs, and other aspects of non-discrimination employment disputes in our future work.