

## Comparing Litigation and Arbitration of Employment Disputes: Do Plaintiffs Better Vindicate Their Rights in Litigation?

Michael Delikat and Morris M. Kleiner \*

Although there is limited empirical research on outcomes in employment arbitration, empirical research “has a role to play” in the policy debate over whether arbitration is an appropriate process to resolve statutory employment discrimination claims.<sup>1</sup> A 1995 study compared settled, litigated and arbitrated employment discrimination case outcomes.<sup>2</sup> That study concluded that the mean and median court jury verdicts in employment discrimination cases were at least three times higher than the comparable mean and median arbitration awards. The Equal Employment Opportunity Commission (“EEOC”), in its 1997 “Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment”, has taken the position that private arbitral systems are “structurally biased” against employees.

To assist in this policy debate and to create a resource for parties who are evaluating forum selection, this article discloses the results of certain studies of case outcomes performed by Orrick, Herrington & Sutcliffe, LLP. These studies include (i) a review of outcomes for all employment discrimination cases filed and resolved in the United States District Court for

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## MEDALOA: The Dispute Resolution Process of Choice

Tom Arnold\*

A useful tool in the litigator’s bag is the hybrid process of **MED**iation **And** **Last Offer Arbitration**.<sup>1</sup> This little-known, little-used process, mediation followed by last offer arbitration (with or without the intermediate facilitated negotiation of the design of the arbitration) is the process of choice in many commercial cases. MEDALOA is useful to break impasse where small values are at risk, or to craft a customized arbitration procedure where issues are complex, stakes are high or the parties are far apart.

### *Impasse Breaking*

In cases where relatively little is at risk or where the impasse has occurred in mediation with the parties not far apart by comparison with the burdens of a separate and independent arbitration, and where trust of the mediator is high, MEDALOA consists of

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discovery.

- It is noteworthy that the mediation here did not cost a penny. In mediation, the parties stood a good chance, say 50 to 70% , of settling the case, but when they did not settle, they got more than the cost of the mediation back in the money saved in the ongoing arbitration. Who does not want a piece of that action, a 50% chance of settlement cheap, but if I don't settle I get my money back?
- The real values at risk would likely have been totally consumed by almost unavoidable cost of 13-party court adversarial litigation; in contrast the total cost of MEDOLOA was probably between 10 and 20% of the real values at risk. When cost of dispute resolution is factored in, for all its rough spots and imperfections this nevertheless can be a much more just process than the courts can provide.

I don't have enough experience with MEDALOA in cases where one party or the other is clearly disengenuous in its approach, to be confident how it will work out in such cases. But where the parties and counsel are in good faith, I suggest that MEDALOA is the process of choice for many disputes.

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<sup>1</sup> MEDALOA is the name assigned to this process in 1993 by Bob Coulson, then president of the American Arbitration Association.

<sup>2</sup> Theoreticians, with good reason but nonetheless excessively, fear the mediator-turned-arbitrator. The reality is that in most of the low-value-at-risk situations and many other situations as well, it is better to assume those risks than the various certain burdens in time, cost and turmoil, of selecting a new arbitrator and re-convening the parties for the arbitration at a later time.

<sup>3</sup> Because mediation is conclusive only by agreement, the downside exposure in most cases is about equivalent to the cost of a couple of days of depositions of an expert—an expense lawyers often think to be so routine that they pay no attention to its cost when deciding to take that deposition.

<sup>4</sup> The Federal Circuit has now done that three times.

the Southern District of New York for the period April 1, 1997 to July 31, 2001, (ii) a survey of securities industry arbitration awards based on available National Association of Securities Dealers (“NASD”) and New York Stock Exchange (“NYSE”) arbitration awards made between January 1989 through February 2002 in employment cases. After presenting the results of these two studies, we compare those results and highlight the similarities and differences in case outcomes and other relevant issues associated with forum selection.

### ***Employment Discrimination Cases Filed In The Southern District Of New York***

To evaluate court case outcomes, we reviewed the docket sheets of all employment discrimination cases filed and resolved in the United States District Court for the Southern District of New York for the period April 1, 1997 to July 31, 2001. As the focus was on the trial of employment cases and not post-trial settlement, modifications of verdicts, or appeals, the statistics reflect results through trial conclusion, but not necessarily the final case result.

During this four and one-quarter year period, over 3,000 employment discrimination cases were filed and resolved in the Southern District of New York. Only one hundred and twenty-five (3.8%) of these cases resulted in a trial to conclusion. Of this group of 125 trials, 115 were jury trials and 10 were bench trials. This one statistic provides a significant counter-point to the opponents of pre-dispute arbitration, including the EEOC Commission, who confirmed that arbitration deprives discrimination claimants of a jury trial. The reality, born out by this statistic, is that only a very small percentage of plaintiffs in employment discrimination litigation ever have their claims resolved by a jury.

Of this group of 125 trials, plaintiffs prevailed in 33.6% and defendants prevailed in 66.4% of these cases. Where plaintiffs prevailed, median damages awarded were \$95,554 and average damages awarded were \$377,030. This disparity between median and average damages is a result of the fact that several relatively high

damage verdicts skewed the average upward. In those cases where plaintiff prevailed, the median attorneys' fees award was \$69,388 and the average attorney fee award was \$149,756. The median time from filing to verdict was twenty-five months, the average time to verdict was twenty-eight months.

**Employment Disputes In Securities Industry Arbitrations**

We also surveyed outcomes of the arbitration of employment disputes in the securities industry. Our data was compiled from reported NASD and NYSE arbitration awards made between January 1989 through February 2002 in five hundred seventy-two (572) employment cases. These cases displayed an array of employment related claims, as reflected in Table I.

**Table I  
Securities Arbitration Awards In Employment Cases  
(Reported from January 1989 through February 2002)**

Type	Median Arbitration Award	Average Arbitration Award	Total Decisions	Claimants Awarded: Number (Percent)
Wrongful Termination	\$77,703	\$528,351	350	130 (39.71%)
Sex Harassment	\$45,000	\$96,539	50	13 (26.00%)
Sex Discrimination	\$51,214	\$98,951	81	24 (29.63%)
Age Discrimination	\$160,313	\$258,352	102	33 (32.35%)
Race Discrimination	\$50,000	\$85,000	26	4 (15.38%)
Whistleblowing	\$98,500	\$105,125	13	4 (30.77%)

Of the 572 employment cases we examined, claimants received monetary relief in approximately 44% of the cases, and respondents prevailed in approximately 56% of the cases. The median award to prevailing claimants was \$75,000 and the average award was \$385,193. The average award is substantially skewed by one 1990 NASD panel award of \$38,000,000. Data concerning the duration of the cases and the hearings, are provided in Table II.

**Table II**

**Duration Of Proceedings In Securities Arbitration Of Employment Cases  
(Reported from January 1989 through February 2002)**

TIME FROM STATEMENT OF CLAIM TO DECISION & NUMBER OF HEARING SESSIONS				
FORUM	Median Time to Decision	Average Time to Decision	Median # of Hearing Sessions	Average # of Hearing Sessions
BOTH NYSE AND NASD	1 Year 4 Months	1 Year 7 Months	8	11.85
NYSE	1 Year 1 1/2	1 Year 4 1/2	10	13.91
NASD	1 Year 4 1/2 Months	1 Year 8 Months	8	11.27

In order to draw a more time-relevant comparison with our study of court outcomes in the Southern District of New York, we isolated arbitration made between April 1, 1997 through July 31, 2001, the same period as the court case study. In this time frame, there were a total of 186 arbitration awards with claimants prevailing in 46% of the cases and respondents prevailing in 54% of the cases. Median damages in this subset of the data for prevailing claimants were \$100,000 and average damages were \$236,292. Median attorneys' fees awarded to successful claimants were \$76,684 and average fees were \$36,282. Median time from filing to decision was 16½ months and average time to decision was 20½ months.

**Comparison Of Dispute Resolution Outcomes In Litigation And Arbitration**

We compare the data from the Federal Court Survey and the Securities Industry Arbitration Survey for the April 1, 1997 through July 31, 2001 time period in Table III. While no one should use information such as this to draw final conclusions about such a complex issue, the data do present a counter-point to some of the stereotypical criticisms expressed by opponents of private arbitration systems such as that in the securities industry.

First, the results from our Southern District of New York survey indicate that only a very small percentage (3.80%) of filed employment

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discrimination cases ever progress as far as a jury verdict. With so few cases ever reaching a jury for decision, its importance as a dispute resolution forum in the aggregate appears to be vastly overstated.

**Table III**

COMPARISON OF OUTCOMES		
	Securities Industry Arbitration	United States District Court Southern District of New York
Number of Concluded Cases Studied	186	125
Claimant/Plaintiff Prevailed	46.2%	33.6%
Median Monetary Award	\$100,000	\$95,554
Average Monetary Award	\$236,292	\$377,030
Average Attorneys' Fees to Prevailing Claimant/Plaintiff	\$36,282	\$149,756
Median Time from Filing to Judgment	16 1/2 months	25 months
Average Time from Filing to Judgment	20 1/2 months	28 1/2 months

The EEOC and others have also argued that private arbitration systems are “structurally biased” against employees seeking to vindicate civil rights. Yet the results of our surveys do not suggest such a bias. As noted in our chart on Comparisons of Outcomes, claimants had a higher success rate in arbitration (46%), compared to employment cases tried to conclusion in the federal court in New York over the same time period (34%). Median monetary recoveries for successful claimants in arbitration were slightly higher than median judicial recoveries in New York. Significantly higher average attorneys’ fees were awarded to prevailing claimants in litigation compared to arbitration, but median fee awards are approximately the same. Finally, the belief that arbitration is a faster way of resolving workplace disputes is borne out by the data from our studies which show that judicial resolutions of these kinds of complaints on average consume more time than arbitral resolutions.

**Statistical Validity Of These Results**

Table III discloses clear differences in

outcomes from the use of public and private tribunals in the adjudication of employment disputes. We must also ask whether these differences are statistically significant. An ideal statistical experiment would randomly assign cases alternately to private and public forums for the adjudication of these disputes. Clearly, this is impractical. In drawing upon actual cases, it would be preferable to have additional information such as the type of claims made in the Federal cases, and how their distribution corresponds to the array of claims made in the arbitrations. Information on characteristics of the individual or group bringing the case would also help us identify omitted variables that may have influenced the decision or the monetary outcome of each case. Variables such as case type or individual characteristics (“statistical covariates”) may influence the outcomes in both private arbitration and in the federal courts, and reduce the significance of the type of tribunal where the hearing was conducted. Unfortunately, we do not have information on these additional variables that may control for factors that may influence the outcomes of a trial or private sector adjudication. Recognizing the limitations of our data, we have used our information on the basic case outcomes for employment-related disputes to make basic statistical tests of significance between cases that were tried in the federal courts versus those adjudicated through arbitration.

Using the statistical test known as difference in means estimates, we compared the amount awarded to claimants, the time to a decision when there is a monetary award and when there is none, and the prevailing party.<sup>3</sup> Our estimates use one tailed t-tests, which show if there is any statistically significant difference in the mean values of adjudicated and arbitrated cases. Our results show that difference between the amounts awarded to plaintiffs in the federal courts and in arbitration are not statistically significant.<sup>4</sup> However, the time to a decision is statistically significantly greater in the federal courts relative to arbitration. This significant difference exists regardless of who prevails. Finally, there is a statistically significantly greater probability of a plaintiff winning a case before an arbitrator than in the federal courts. Adding

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additional control variables in a regression model is not likely to change the finding that for this sample the plaintiff has a greater chance of winning if a claim is brought to arbitration than to trial.

In order to further show the impact of these estimates, we simulated the expected dollar outcome of going to arbitration versus the federal courts by multiplying the likelihood of winning times the expected payoff. This produced a comparison of \$127,704 for the federal courts versus \$110,500 for arbitration. However, if the “payoff” includes both the compensatory award and legal fees, the plaintiffs receive more, on average, with arbitration. Clearly, these estimates show that for this kind of employment-related alternative dispute resolution procedure, plaintiffs are well served by arbitration relative to the federal courts both in terms of speedy justice and the likelihood of a positive outcome for plaintiffs.

### **Conclusion**

Although our studies present a limited view of relevant variables in case outcomes, we find no statistical support for the proposition advanced by the EEOC and other opponents of pre-dispute arbitration that arbitration is somehow biased against claimants. At least when compared to outcomes of reported securities industry

arbitration awards for a nearly three year period, the success rate for civil rights plaintiffs in federal court in New York, in the relatively small number of cases that go to a jury for decision, is in fact lower than the success rate for discrimination claimants in arbitration. Moreover, the process benefits of faster dispute resolution and lower transactional costs (i.e., attorneys’ fees expended) are also borne out by our surveys. While the statistical information presented herein is by no means intended to finally resolve the broader policy debate on the benefits or disadvantages of pre-dispute arbitration, it does provide a strong rebuttal to those opponents of arbitration who have argued with absolutely no empirical support that private arbitration systems are structurally biased.

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<sup>1</sup> L Bingham, *On Repeat Players, Adhesive Contracts and the Use of Statistics in Judicial Review of Employment Arbitration Awards*, 29 McGeorge L.Rev. 223 (Winter 1998).

<sup>2</sup> William M. Howard, *Arbitrating Claims of Employment Discrimination: What Really Does Happen? What Really Should Happen?*, 50 J. DISP. RESOL. 40 (1995).

<sup>3</sup> For an explanation of “difference in means estimates” statistical method, See Thomas Wonnacott and Ronald Wonnacott, *Introductory Statistics for Business and Economics*, John Wiley and Sons, New York, 1984, pp. 231-239.

<sup>4</sup> Table showing statistical comparisons of Federal Court decisions with private arbitration on file with editor.

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## **New Model Ethics Rule for Lawyer-Neutrals Published**

**Deborah A. Coleman**

In November 2002, the Commission on Ethics and Standards in ADR, sponsored by CPR Institute for Dispute Resolution and Georgetown University Law Center, published a new model rule of professional conduct for the lawyer as neutral. The new proposal is more detailed, and in some respects, more stringent than recent proposals by other bodies.

A distinguished group of practitioners, jurists and legal scholars participated in the years of deliberation, drafting and consultation that preceded the Commission’s model rule. According to the Commission, the CPR-Georgetown effort was intended to remedy some of the perceived

inadequacies of transdisciplinary ethical code drafting, for instance, in the Model Standards of Conduct for Mediators adopted by the American Arbitration Association, the Society of Professionals in Dispute Resolution and Councils of the ABA Sections of Litigation and Dispute Resolution in 1994,<sup>1</sup> and the “silences” of current legal ethics formulations such as that of the RESTATEMENT OF THE LAW GOVERNING LAWYERS. The Commission’s chair, Professor Carrie Menkel-Meadow, has criticized the RESTATEMENT for failing to speak to the lawyer as neutral at all.<sup>2</sup>

The ABA’s Ethics 2000 Commission gave some attention to the lawyer as neutral in its proposed amendments to the Model Rules of Professional Conduct, but its treatment was not comprehensive. The Ethics 2000 Commission