EMPIRICAL ANALYSIS OF EMPLOYMENT ARBITRATION DECISIONS

A Thesis in
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by
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ABSTRACT

Supreme Court rulings in *Gilmer v. Interstate/Johnson Lane Corp.* (1991) and subsequent cases declared binding arbitration agreements enforceable even when violations of federal statutes were at issue. The Supreme Court’s 1991 ruling in *Gilmer* was accompanied by an increased use of employment arbitration amongst American employers. Concurrent with the rise of employment arbitration, vigorous debates arose over the relative advantages or inequities inherent in the arbitral forum. Proponents advanced arguments for the accessibility, speed, and fairness of arbitrating statutory claims. Diametrically opposed, critics have contended that the arbitral forum is characterized by employee-unfriendly outcomes, high cost barriers, and arbitrator biases. This present study weighs in on various facets of this debate by empirically analyzing employee outcomes in arbitration cases heard under the aegis of the Judicial and Mediation Services, Inc. (JAMS) and American Arbitration Association (AAA) between January 2003 and January 2006. Though careful to note that there are numerous explanations for the differences found, this study presents findings that employee win rates are lower in arbitration than in federal and state courts, but arbitration is much more expedient; there are significant repeat employer and repeat employer-arbitrator pair effects; and support for an arbitrator gender effect is equivocal.
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Introduction

The Supreme Court’s 1991 ruling in *Gilmer v. Interstate/Johnson Lane Corporation* stated that statutory claims, specifically age discrimination claims, were subject to mandatory arbitration. As a corollary to the Supreme Court’s *Gilmer* decision, mandatory arbitration clauses, also known as “pre-dispute arbitration clauses,” are becoming an increasingly common element in employment agreements, employment applications, and employee handbooks (Colvin, 2007; Estreicher, 2001). When a pre-dispute contract is signed, a prospective employee waives their right to bring any employment-related dispute to court and agrees instead to settle their grievance in an arbitral forum. Furthermore, most arbitration agreements provide for binding arbitration, meaning an arbitrator’s award is final and subject to only limited judicial review (Hill, 2003).

Increased scrutiny of the arbitration forum has been concurrent with the increased use of pre-dispute arbitration clauses by employers (Moore, 2000). Critics of mandatory arbitration view it as an assault on individuals’ legal rights and an employee-unfriendly forum, citing due process concerns, confidentiality, cost barriers, and arbitrator bias (O’Keefe, 2005). Proponents respond that arbitration provides a fair, inexpensive, and speedy alternative to a litigation system characterized by high costs and interminable delays (Hill, 2003). While representatives from both sides of the issue make their opinions readily available, one cannot help but notice the dearth of empirical support to defend their stances (Colvin, 2007).

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1 In this seminal ruling, the plaintiff, Gilmer, claimed that he was illegally discriminated against because of his age. He attempted to file a Title VII violation with the Equal Employment Opportunity Commission (EEOC), but had signed a mandatory arbitration agreement upon being hired. Due to the arbitration clause, the employer insisted that the dispute be taken to arbitration as opposed to state or federal court; Gilmer disagreed and took the case all the way to the Supreme Court.
To try and address the paucity of empirical evidence, my thesis will empirically examine what the literature supports as critical issues within the employment arbitration landscape. The data being analyzed are from employment arbitration cases conducted under Judicial Arbitration and Mediation Services, Incorporated (JAMS) and the American Arbitration Association (AAA). First, I will present a brief history of the evolution of the American arbitration forum, from its inception in 1925 through the present. Second, I will address arbitration characteristics, specifically, employee win rates and time to disposition and compare outcomes to employee outcomes in state and federal court. Third, I will concentrate on whether a repeat-player bias exists in the data. Fourth, I will investigate whether the arbitrator’s gender affects employee win rates, percent of claim awarded, and award amounts; this section is of special concern as this area of arbitration has been left largely unexamined for more than a decade. Finally, I run regressions using gender, repeat employer status, and repeat employer-arbitrator pair status as independent variables and verdict and award amount as dependent variables.
Arbitration History

Legal History

Dismantling a longstanding prejudice against the use of arbitration agreements, the Federal Arbitration Act of 1925 (FAA) provided that arbitration agreements involving future or existing claims “shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law…for the revocation of any contract.” Section 3 of the FAA established arbitration as a viable method of alternative dispute resolution, meaning that two or more parties can agree to take their disputes to an impartial third party, called an arbitrator; Section 4 of the FAA delegates the power to federal courts to enforce any award rendered in arbitration.

Initially, the Court was apprehensive to enforce arbitration agreements when statutory claims were in dispute. Two key cases defined the limits of arbitration agreements before 1975 and elucidated the Court’s reluctance to extend the power to arbitrate statutory claims to the arbitral forum. In Wilko v. Swan (1953), the defendant misrepresented and willfully omitted information regarding 1,600 shares of common stock of Air Associates, Inc. purchased by the plaintiff. The plaintiff filed an action under the Securities Act of 1933, but the defendant asserted that the dispute should be resolved through arbitration, citing that the sales contract contained an arbitration clause. The Supreme Court ruled that arbitration was not a suitable forum to resolve a dispute otherwise covered by an existing federal statute (i.e. the Securities Act), reasoning that public policy would be violated as the arbitration environment could not guarantee that the law would be correctly applied. The Wilko decision was a clear indication of the
Court’s skepticism of the arbitral forum’s ability to uphold public policy and the integrity of federal statutes. (Moore, 2000)

A second influential case in arbitration history is *Alexander v. Gardner-Denver Co.* (1974), where the Supreme Court ruled again that federal statutes were outside the ambit of arbitration, this time with respect to Title VII. The plaintiff, Alexander, claimed that he was wrongfully discharged because of his race. A collective bargaining agreement covered the plaintiff and contained a mandatory arbitration clause. The case was initially heard in arbitration, but the Court refused to uphold the arbitrator’s decision. The arbitrator initially ruled that the plaintiff had been discharged for just cause, but the plaintiff appealed in federal court where the Supreme Court eventually stated: “Arbitral procedures, while well suited to the resolution of contractual disputes, make arbitration a comparatively inappropriate forum for the final resolution of rights created by Title VII” (*Alexander v. Gardner-Denver Co.*, 1974). In subsequent cases, the Supreme Court applied the *Alexander* rationale to claims brought under other federal statutes such as the Fair Labor Standards Act (see *Barrentine v. Arkansas-Best Freight System, Inc.*, 1981).

The *Alexander* and *Wilko* decisions are representative of the Court’s initial distaste for arbitration; arbitration was relegated to contractual disputes and did not have a place in the federal statute arena (Moore, 2000). Beginning in the mid-1980s and continuing into the 1990s, a noticeable paradigm shift occurred and the Supreme Court began issuing decisions demanding a more liberal interpretation of the FAA.

Diametrically opposed to the rationale expressed in earlier decisions, the Supreme Court stated in *Mitsubishi Motors v. Soler Chrysler-Plymouth, Inc.* (1985) that: “By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights
afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.”

Less than a decade later, the Supreme Court issued a decision on *Gilmer v. Interstate/Johnson Lane Corp.* (1991), which characterizes the arbitration environment today. The plaintiff in *Gilmer* was a manager of financial services at Interstate/Johnson Lane, Corp. and had signed a mandatory pre-dispute arbitration agreement as a condition of his employment. After being fired at the age of 62, the plaintiff filed a complaint with the EEOC alleging a violation of the Age Discrimination in Employment Act (ADEA) and the suit was taken to federal court. Citing *Mitsubishi*, the defendant argued that the FAA extended to all disputes arising from mandatory arbitration, even those otherwise covered by federal statutes. Upon review, the Supreme Court ruled that arbitration was an acceptable forum to decide disputes arising from federal statutes, stating: “a party trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration”2 (*Gilmer*, 1991).

*Expansion of Arbitration*

*Gilmer* has been extended to many other federal statutes in recent years and there is no ambiguity that the courts will interpret the FAA liberally. The aforementioned environment has led American employers to use of employment arbitration more prolifically. At the time of the *Gilmer* ruling, Feuille and Chachere (1995) found only four out of 111 firms, or 3.6 percent, used outside arbitration in 1991; by 1995, four years

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2 The dispute was taken to arbitration after the Supreme Court’s ruling, and Gilmer received a favorable ruling.
after *Gilmer*, the General Accounting Office (GAO) found that ten percent\(^3\) of employers with 100 or more employees had adopted employment arbitration for non-union employees, and indicated that half of these employers imposed mandatory arbitration as a condition of employment (GAO, 1995). In a survey specific to the telecommunications industry, Colvin (2004b) reports that 41 out of 291, or 14.1 percent, of respondents indicated they had adopted employer arbitration procedures. Adjusting for employer size, these 14.1 percent of employers cover 22.7 percent of the workforce (Colvin, 2004b). These studies have shown that use of employment arbitration has been steadily and rapidly increasing in the wake of *Gilmer*.

**Arguments for and against employment arbitration**

*Gilmer* and subsequent decisions expanding arbitration’s scope have inspired an extraordinary amount of criticism. First, mirroring the views of the early Court, critics condemn the use of arbitration because of the limited nature of appeal (Sternlight, 2001). Furthermore, opponents often cite lack of written awards, confidentiality, limited discovery, and the ability of employers to unilaterally structure arbitration agreements to their favor (Sternlight, 2001).

The FAA provides grounds, albeit limited, for overturning an arbitrator’s award:

“(1) the award was procured by corruption, fraud, or undue means; (2) there was evident partiality or corruption in the arbitrators; (3) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or (4) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and

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\(^3\) This number was later reported to be 7.8 percent after the GAO contacted employers seeking clarification and additional information pertaining to their policies, only to find some employers did not use arbitration for employment disputes (Colvin, 2004b).
definite award upon the subject matter submitted was not made” (FAA, 1925).

In addition to these statutory criteria, common law has established the following conditions which, if present, constitute grounds for overturning an arbitral award: the award “(1) is in ‘manifest disregard of the law;’ (2) conflicts with ‘public policy;’ (3) is ‘arbitrary and capricious;’ (4) is ‘completely irrational;’ or (5) ‘fails to draw its essence’ from the parties’ underlying contract” (Moore, 2000, p. 1585).

Though these may seem to provide sufficient protection against “unfair” decisions, the Courts have adopted extraordinarily narrow interpretations of the above criteria which allow for blatant, sometimes egregious, mistakes and errors of law (Moore, 2000). In fact, many critics assert that the lack of broad judicial review vitiates any advantages in speed and efficiency that arbitration provides (Kinnecome, 1999; Maltby, 1994).

To counter the claims of critics, proponents of arbitration advance the following arguments:

- Arbitration is less expensive than traditional litigation; the cost of defending an employment case in court often amounts to over $200,000, while the average cost of an employment arbitration case is approximately $20,000 (Estreicher, 2001).
- Arbitration is much more expedient than litigation (Zack, 1999). Employment litigation is notoriously protracted and can take years to reach a final decision, arbitration on the other hand offers limited appeal and informal processes which result in quicker resolutions (Zack, 1999).
Arbitration involves knowledgeable experts in a respective field; an individual arbitrator’s knowledge and expertise is greater than that of an individual judge or jury. This characteristic makes arbitration awards more predictable and less emotion driven (Kinnecom, 1999).

In short, years of congressional and judicial support coupled with minimal oversight create an environment susceptible to bias, nonfeasance, and inequities. Mere susceptibility to inequity, without reference to empirical evidence, however, has been the primary concern of opponents who inveigh against the arbitral forum; lacking in many of the arguments of critics and advocates alike is reference to solid, empirical evidence (Hill, 2003).

The present and preceding sections explained what arbitration is, how it has evolved, and the current debate surrounding it. In the next sections, arbitration decisions will be empirically analyzed to test the claims of critics and proponents alike.
Description of Methods

Pursuant to Section 1281.96 of the California Code of Civil Procedure, any private arbitration company must collect and publish select characteristics of all employer-promulgated consumer arbitration cases it administers or is involved in as of January 31, 2003 (California State Senate, 2008). The instant study analyzes two original datasets, consisting exclusively of employment dispute cases conducted by Judicial Arbitration and Mediation Services, Inc. (JAMS) between January 2003 and March 2007 and by the American Arbitration Association (AAA) between January 2003 and August 2006. The JAMS dataset consists of 385 cases, 65 of which resulted in a decision during the time period expressed above, the remaining 320 cases were canceled, settled, dismissed, or were pending final decision. The AAA dataset is comprised of 2,757 employment arbitration disputes, 830 of which resulted in an arbitrator ruling, and 1,927 of which were canceled, settled, or dismissed prior to arbitration or were pending final decision.

As a result of Section 1281.98 of the California Code of Civil Procedure, the data filed by JAMS and AAA are representative of *Gilmer*-type arbitration agreements (i.e. employer-promulgated agreements), and are therefore particularly apposite for commenting on the contemporary debate surrounding mandatory arbitration (Colvin, 2007).

The JAMS and AAA dataset include the following variables:

- Award amount

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4 As mentioned by Colvin (2007), the AAA filings include all employer-promulgated consumer arbitration cases filed nationally, not just in California.
Using the above variables, it is possible to look at: (1) employee win rates; (2) award amounts; (3) time to disposition; (4) repeat player effects; and (5) arbitrator gender effects. An employee win rate is defined as an outcome where the employee receives a verdict in their favor or receives any monetary compensation. Pegging the definition of an employee win to such a low standard will help reveal the magnitude of disparities that are present between the arbitration and litigation forums. Repeat players are defined as employers that have used either JAMS or AAA on more than one occasion.

Furthermore, to compare employee win rates in arbitration with those in state and federal courts, data already collected and published in a journal article authored by

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5 This variable is reported in JAMS dataset only.
6 This variable is reported in JAMS dataset only
7 This variable is reported in JAMS dataset only
Eisenberg and Hill (2003) is employed. Eisenberg and Hill’s state court data is derived from the Civil Trial Court Network (CTCN), a project of the National Center for State Courts and the Bureau of Justice Statistics (BJS) to record employee outcomes in state courts. This data contains information on 145 trials ending in 1996 from a random sample of 45 of the 75 most populous counties in the United States. Eisenberg and Hill use federal court data from the Administrative Office of the United States Courts dataset. This federal dataset covers 1430 employment discrimination cases that were resolved anywhere from 1999 through 2000.

In order to test my hypotheses that there is a difference between two populations, a chi-squared test is employed with analyses involving two categorical variables. If the usable cases within the JAMS dataset are not of sufficient size to run a reliable chi-squared test, Fisher’s exact tests were used\(^8\). For analyses involving one categorical variable and one continuous variable, a t-test is employed to test if there is a difference between the mean values of the continuous variable with respect to the categorical variables\(^9\).

\(^8\) A Fisher’s exact tests calculates the difference between the observed and expected observation for small sample sizes (cell size < 5) and reports the probability that differences between the two populations are the result of chance.

\(^9\) If applicable, a t-test controlling for unequal variances was performed, otherwise, a traditional t-test was performed.
Literature Review

The current literature on employment arbitration can be described primarily as “descriptive, anecdotal, proscriptive, and normative” (Bingham & Chechere, 1999, p. 86). There is relatively little literature analyzing or examining the employment arbitration process empirically. The reason for this scarcity of empirical work is an ongoing lack of access to data and a “tradition of confidentiality” (Bingham and Mesch, 2000; Bingham, 1999). Most employment arbitration occurs in the context of a binding agreement in which both parties agree to maintain complete confidentiality (Eisenburg & Hill, 2003; Bingham & Chechere, 1999; Maltby). Furthermore, employment arbitration awards are generally unpublished and confidential themselves, further restricting access to data. Despite these shortcomings, what follows is an overview of the theoretical and empirical contributions relevant to my research.
Arbitration vs. Litigation: Employee Win Rates, Expedition, and Costs

Table 1: Employee Win Rates

<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Sample Size</th>
<th>Data</th>
<th>Employee Win Rates (%) (Employer-Promulgated/Individually-Negotiated)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bingham (1995)</td>
<td>n= --</td>
<td>1992 AAA</td>
<td>74</td>
</tr>
<tr>
<td>Bingham (1997)</td>
<td>n= 270</td>
<td>1993-94 AAA</td>
<td>70</td>
</tr>
<tr>
<td>Bingham (1998)</td>
<td>n= 203</td>
<td>1993-95 AAA</td>
<td>52 (21/67)</td>
</tr>
<tr>
<td>Maltby (1998)</td>
<td>n= --</td>
<td>1993-95 AAA</td>
<td>66</td>
</tr>
<tr>
<td>Eisenberg and Hill (2003)</td>
<td>n=145</td>
<td>1996 State Court</td>
<td>57</td>
</tr>
<tr>
<td>* Civil rights cases</td>
<td>n=1430</td>
<td>1999-2000 Federal Court</td>
<td>36</td>
</tr>
<tr>
<td>Colvin (2007)</td>
<td>n=836</td>
<td>2003-06 AAA</td>
<td>20 (20/--)</td>
</tr>
</tbody>
</table>

^ Pre Adoption of Due Process Protocol

There are numerous studies marshalling data on American Arbitration Association (AAA) arbitration cases to address three questions: (1) Is arbitration fair to employees?; (2) Is arbitration faster than litigation?; and (3) Are arbitrator fees a barrier to employee access to the system (Sherwyn et al, 2005; Colvin, 2007)?

Employee Win Rates in Arbitration

Early AAA case analyses from the 1990s provide surprisingly consistent results. In her 1998b analysis of employment disputes among AAA employment arbitration awards in 1992, Lisa Bingham found that arbitrator awards favored employees in 74 percent of cases. In a later paper, Lisa Bingham analyzes the employee win rates in employment dispute cases heard by the AAA from 1993 to 1994 in which she found that employees won 70 percent of the time (Bingham, 1997). Corroborating Bingham’s
figures, Maltby (1998) found that employees won 66 percent of employment disputes heard by the AAA in the time period of 1993 through 1995 (Maltby, 2003).

Though these studies produced similar results, it would be wise to question their relevance to the arbitration environment today, nearly a decade and a half later. First, these initial studies predate the adoption of the Due Process Protocol for Mediation and Arbitration of Statutory Disputes Arising Out of the Employment Relationship (Due Process Protocol) (Colvin, 2007). The Due Process Protocol was established in 1995, “in order to assure some measure of fairness and due process to employer-promulgated schemes for private resolution of statutory disputes” (American Bar Association, 1995). The Due Process Protocol recommends specific features and processes that should be present in mandatory arbitration agreements and hearings including (1) freedom of representative choice; (2) adequate prehearing discovery; and (3) joint selection and compensation of the arbitrator, among others. It was supported and endorsed by multiple organizations including the National Academy of Arbitrations, American Arbitration Association, Society of Professionals in Dispute Resolution, National Employment Lawyers Association, Federal Mediation and Conciliation Service, and the American Civil Liberties Union, and is now the standard. Theoretically, the adoption of the Due Process Protocol should make the arbitration process more friendly and fair to employees, and employee win rates, ceteris paribus, should be higher today than in the 1990s (Colvin, 2007).

The Due Process Protocol, however, is just part of a larger question: are the cases of the early 1990s representative of the current employment arbitration forum that exists today? Colvin (2007) explains that a majority of the cases decided in the early 1990s
involved claims by highly educated employees with the power to negotiate individual contracts, typically managers and executives; however, claims brought today are established under arbitration provisions from employment manuals or handbooks which are “forced” upon employees and usually required as a condition of employment.

Bingham (1998b), in an analysis of 203 AAA awards between the years of 1993 and 1995, found that employee claimants won 68.8 percent of the time if the cases involved employees who had negotiated their contracts individually. If, however, employee claimants brought a case resulting from personnel manuals or handbooks, they only won 21.3 percent of the time. This represents a 47.5 percentage point difference between these two types of contracts.

The drastic disparity between the win rates on this single characteristic is cause for concern. Individual win rates should be much lower in today’s arbitration environment because the majority of claims being brought today originate from employer-promulgated mandatory arbitration agreements as opposed to individually-negotiated arbitration agreements that were characteristic of the early 1990s (Colvin, 2007).

To address the changing arbitration environment, with emphasis on the Due Process Protocol and the changing nature of arbitral cases themselves, researchers have continued analyzing what little empirical data exist for more recent arbitrator decisions. Elizabeth Hill, in a 2003 study, found that employees won in employment arbitration 43 percent of the time. Hill found that the overall win rate of 43 percent could be broken down to a 34 percent win rate for employees under a personnel handbook-type contract, whereas individually-negotiated (employer-promulgates) contract win rates were 68
percent, or 34 percentage points greater. Lisa Bingham, along with co-author Shimon Sarraf, examined the outcomes of 58 AAA decisions in 1996 and 1997 in a 2000 study. The pair found an overall employee win rate of 39.7 percent; however, if the employee claimant went to arbitration as a result of an individually-negotiated contract, the win rate was 61.3 percent. If, however, a personnel handbook established the arbitration forum, the employee win rate was 27.6 percent, 33.7 percentage points lower.

Lastly, Colvin (2007) found that the employee win rate in the AAA Consumer arbitration filings data was only 19.7 percent, well below the findings from the early 1990s, and significantly lower than comparable contemporary studies. The AAA Consumer arbitration filing data used by Colvin were comprised of personnel handbook and other employer-promulgated arbitration agreements only, so no comparison between individually-negotiated contracts could be made.

In contrast to the research on employment arbitration, Eisenberg and Hill (2003) were able to collect larger-scale datasets for state and federal litigation outcomes by using data gathered by government agencies. Their analysis of 1430 employment discrimination cases heard in federal courts yielded an employee win rate of 36.4 percent. They report a slightly higher employee win rate in state courts, with an employee win rate of 43.8, derived from 160 state court employment discrimination cases. Cases involving non-civil rights disputes tried in state court produce an employee win rate of 56.6 percent, based on 145 such cases.

The employee win rates produced in the Eisenberg and Hill study are higher than employee win rates based on employer-promulgated agreements reported in the studies
conducted by Colvin (2007), Bingham and Sarraf (2000), Hill (2003), and Bingham (1998b), agreements which are characteristic of a developed post-Gilmer environment.

An inherent limit on comparison of results is the unknown comparability of the cases in the arbitrated and litigated samples. Specifically, lack of comparability of disputes in terms of employee win rates can emanate from two sources: (1) merits of types of cases initially brought to arbitration and litigation; and (2) the settlement processes that precede the final adjudicatory stage which systematically affect the merits of cases routed to the final stages of arbitration and litigation (Eisenberg and Hill, 2003).

Addressing the first issue: with characteristically lower costs, employees may be more likely to bring meritless cases to arbitration. If meritless cases that would never have been brought to court are presented in the arbitration forum, it should be expected that employee win rates are lower in arbitration, as the average arbitration case would have less merit than the average federal or state court case.

Addressing the second issue: different settlement processes and norms can have an effect on the types and merits of cases reaching the final stages of litigation or arbitration. Both Colvin (2004a) and Hill (2003) advance an appellate effect argument, theorizing that internal dispute resolution procedures are likely to obviate arbitration when disputes are meritorious. Essentially, internal processes filter out meritorious claims before they reach the final arbitration stage. As employers with arbitration agreements are likely to have more developed human resource policies, the early settlement of disputes would cause employee win rates in arbitration to be lower (Colvin, 2007).

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10 Eisenberg and Hill (2003) originally present three sources resulting in lack of comparability. In addition to the two listed, the third source of confusion is that arbitration hearings can conflate legal dismissals and resolution of factual differences to terminate disputes.
In recent years, policy-capturing studies have appeared in the literature to address the redoubtable task of controlling for merits of cases presented to decision-makers in the arbitration and litigation forums. Policy-capturing studies present hypothetical scenarios to decision-makers to examine the effect of individual factors on the decision-maker role (Klaas et al, 2006; Colvin, 2007).

In 2006, Klaas et al published a policy-capturing study looking at decisions of 140 AAA employment arbitrators, 82 labor arbitrators from the National Academy of Arbitrators (NAA), and 83 jurors who had served in employment discrimination cases over the last five years. The study analyzed participant responses on 32 hypothetical termination cases to see if there were systematic differences in the decision-making processes between the three groups. The authors conclude in this study that employee rights are likely to be affected by increased use of employment arbitration, finding that labor arbitrators are most likely to rule in favor of the employee, followed by jurors, and then employment arbitrators. This finding is consistent with those from studies of post-*Gilmer* arbitration cases.

*Hypothesis 1: Employee win rates will be lower in arbitration than in state and federal employment litigation*
**Time until Disposition**

An argument in favor of arbitration is its expediency. Whereas the informality, limited appeal, and limited discovery of arbitration are commonly used to dissuade policy-makers from extending the use of arbitration, these characteristics are at the root of the efficacy of arbitration (Ware, 2001).

Eisenberg and Hill (2003) report that it takes an average of 818 days, nearly two and a half years, for state courts to decide a civil rights employment dispute. In federal court, the mean time from filing to disposition of employment discrimination claims is 709, slightly below two years. Comparatively, Eisenberg and Hill report that civil rights employment disputes take only 262 days for employer-promulgated disputes, and 383 days where employees negotiated their contracts individually. Furthermore, Colvin (2007) found that the mean time to a decision among 849 AAA cases was 332 days. The time to a decision of 262 days found in employer-promulgated contract disputes that Eisenberg and Hill report, coupled with Colvin’s (2007) finding of 332, are substantially shorter than times to decisions found in state and federal courts. Furthermore, these types of cases are characteristic of those present in the JAMS and AAA cases the present study analyzes.

Past authors are quick to point out comparability issues when trying to explain disparate employee win rates between arbitration and litigation, yet they neglect to apply this same standard when commending the arbitral forum for its speed. Similar to employee win rates, if arbitration and litigation receive cases with differing merits, then it is not correct to claim that one forum is faster than the other; however, average time to
disposition in litigation is an order of magnitude greater than that found in arbitration, so differing merit is not likely to account for this difference.

Hypothesis 2: Time until disposition will be shorter in arbitration than in state and federal employment litigation

Arbitrator Fees

A subtle difference between arbitration and litigation is the payment of decision-makers. In litigation, though there are filing and other miscellaneous fees, the parties involved do not incur the costs of the judge’s and/or the jury’s time. In employment arbitration, however, the parties involved must pay arbitrator fees with one side paying the full costs or splitting it amongst themselves\(^{11}\). Critics of arbitration raise due process concerns over employee payment of arbitrator fees and its potential to act as a barrier to employee access to the system, while proponents contend employee payment of arbitrator fees deters frivolous suits (Colvin, 2007; Ware, 2001).

In a 1994 D.C. Circuit Court ruling, Judge Roberts, articulated five minimal criteria that an arbitration agreement must contain if it is to be valid (Cole, 105 F.3d at 1470,1994). One such criterion was that an employee was not to pay for arbitrator fees, in part or in whole. The Cole court asseverated that arbitration could not be considered an acceptable surrogate for litigation if mandatory arbitration contracts required employee payment for the right to have the arbitrator hear and decide a case as access to

\(^{11}\) Parties must also pay filing fees, but Hill (2003) states that “the AAA announces amendments of its rules of procedure, effective Nov. 1 2002, to include reduction of employees’ forum fees under mandatory arbitration agreements to a total fee of $124.16. Going forward, there should be no more issue of affordability of forum fees for arbitration under the auspices of the AAA” (Hill, 2003, p. 3).
federal courts is free save for small filing fees and basic court costs (Cole, 105 F.3d at 1470. 1994).

After looking at AAA cases filed in 2003 through 2006, Colvin (2007) found that employers paid 100 percent of arbitrator fees in 96.6 percent of the cases. Furthermore, he reported a mean and median arbitrator fee of 6,105 dollars and 2,472 dollars, respectively. Hill (2003) looked at this issue and found that in 70 percent of cases, employers paid 100 percent of arbitrator fees in 200 AAA cases decided in 1999 and 2000. Hill states that the average forum fee\(^{12}\) for lower-income employees was 2,292 dollars, and states that even low-income employees could afford to pay this amount.

Colvin (2007) aptly summarizes the debate when he concludes: “Although imposition of arbitrator fees on employees is an important issue in principle…it is in practice relatively rare,” (Colvin, 2007, p.424-425). To continue researching this issue, the proceeding section investigates the size of arbitrator fees and what fraction employees must pay.

\(^{12}\) Hill defines “forum fees” as filing fees, hearing fees, and arbitration fees, while attorney fees “are the cost of counsel” (Hill, 2003, p. 12).
Results

The results of select characteristics of JAMS and AAA cases are presented in Table 2 below:

Table 2: Arbitration and Litigation Characteristics

<table>
<thead>
<tr>
<th></th>
<th>JAMS [mean (median)]</th>
<th>AAA [mean (median)]</th>
<th>Litigation Eisenberg &amp; Hill (2003)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sample size</td>
<td>385</td>
<td>2,757</td>
<td>145- 1430</td>
</tr>
<tr>
<td>Decided cases</td>
<td>65</td>
<td>830</td>
<td>75%</td>
</tr>
<tr>
<td>Employee Win Rate</td>
<td>19 (27.2%)</td>
<td>159 (19.2%)</td>
<td>36 – 57%</td>
</tr>
<tr>
<td>Time to Disposition (days)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All cases</td>
<td>285 (248)</td>
<td>295 (257)</td>
<td>723-818</td>
</tr>
<tr>
<td>Awarded cases</td>
<td>380 (308)</td>
<td>343 (309)</td>
<td></td>
</tr>
<tr>
<td>Arbitrator Fee ($)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All cases</td>
<td>9,509 (1,200)</td>
<td>2,463 (563)</td>
<td></td>
</tr>
<tr>
<td>Awarded cases</td>
<td>25,634 (18,600)</td>
<td>9,318 (6,000)</td>
<td></td>
</tr>
</tbody>
</table>

The analyses of employee win rates yield significantly different results between the JAMS and AAA data sets. As previously stated, in both datasets an employee “win” is defined as a ruling in the employee’s favor, partially or in full; cases that were withdrawn or settled are not considered. As described in Table 2, the employee win rate in the AAA dataset, based on 830 employment arbitration awards, is 19.2 percent. The employee win rate in the JAMS dataset, based on 65 employment arbitration awards, is 27.2 percent.

The respective mean and median time to disposition found in the JAMS and AAA dataset are within 10 percent of each other. The mean and median times to disposition
for all JAMS cases are 285 and 248 days, respectively, while the mean and median times to disposition for awarded JAMS cases are 380 and 308 days, respectively. The times to disposition in AAA cases are slightly higher than those found in JAMS, with a mean and median time of 295 and 257 days, respectively, for all cases in the dataset and a mean and median time of 343 and 309 days, respectively, for cases receiving an award.

The last characteristic of employment arbitration decisions heard under the aegis of JAMS and AAA presented in Table 2 is the total cost of arbitration, expressed in terms of total arbitrator’s fee. For all cases involving the intervention of JAMS, even those that were settled or withdrawn, the mean and median arbitrator fee is 9,509 and 1,200 dollars, respectively. For cases deserving an award by JAMS, the mean and median arbitrator fee is 25,634 and 18,600 dollars, respectively. The mean and median arbitrator fee for all cases heard under the AAA is 2,463 and 563 dollars, respectively. The mean and median arbitrator fee for cases involving an employee award is 9,318 and 6,000 dollars, respectively. The total arbitrator fees are skewed by very large arbitrator fees at the top 5 percent; the top 5 percent of fees exceed 85,000 dollars in the JAMS dataset and 30,000 dollars in the AAA dataset.

In the AAA dataset, in 96.6 percent of cases employers paid 100 percent of the arbitrator fees. In the JAMS dataset, in 94.6 percent of cases employers paid 100 percent of the arbitrator fees.

Eisenberg and Hill (2003) showed that employee win rates were much higher for higher paid employees when compared to lower paid employees. Therefore, insight into the 8 percentage point difference in employee win rates and the nearly 300 percent difference in arbitrator fees between the JAMS and AAA datasets can be gained by
looking at the average salary levels reported in the two datasets. Within the JAMS cases, 42.9 percent record yearly incomes equal to or greater than $100,000 while 57.1 percent record yearly incomes of less than $100,000. It should be noted that there are only fourteen instances of salary levels being reported in the JAMS dataset, representing 3.6 percent of JAMS cases. A sample size of fourteen severely limits the probative value of salary level in the JAMS dataset. Among the AAA cases, 16.7 percent record yearly incomes greater than $100,000 while 83.3 percent record yearly incomes of less than $100,000. These statistics are based off of the 1,007 cases where salary levels are reported, representing 36.6 percent of AAA cases. The available data suggests that JAMS cases involve higher paid employees when compared to AAA cases which could partially explain the difference in win rates and arbitrator fees.

Discussion

Hypothesis 1 was supported by the JAMS and AAA data. Irrespective of the differences between the win rates from the two arbitration datasets, both the JAMS and AAA employee win rates are well below the employee win rates in state court as reported by Eisenberg and Hill. The same study reported an employee win rate of 36.4 percent among civil rights employment disputes decided in federal court, 43.8 percent among civil rights employment disputes decided in state court, and 56.6 percent for non-civil rights employment disputes decided in state court. Though the difference between arbitration employee win rates and win rates of civil rights disputes in federal court is not as drastic as that seen between arbitration and state court outcomes, win rates are still at least 9.2 (JAMS) and 17.2 (AAA) percentage points lower in arbitration.
As expected, the employee win rates derived in the present study closely resemble employer-promulgated win rates found in other studies. The 19.2 and 27.2 percent employee win rates found in AAA and JAMS cases, respectively, are similar to the win rates of 28 percent found by Bingham and Sarraf when analyzing 1996 and 1997 AAA decisions as well as Colvin’s 2007 study analyzing recent AAA awards which presents an employee win rate of 20 percent.

The eight percentage point differences in win rates between JAMS and AAA could be partially explained by differences among the two arbitration providers. Though both JAMS and AAA have adopted the Due Process Protocol and generally have the same rules governing an arbitration hearing, the education and past experience of arbitrators within the two forums are different. JAMS arbitrators are homogenous; all JAMS arbitrators are retired judges who have attended law school and most have worked in the private sector as a lawyer for over a decade. AAA arbitrators are relatively heterogeneous; AAA arbitrators consist of lawyers, judges, academics, and industry experts, with varying levels of education and experiences. The fact that JAMS arbitrators are all ex-judges helps explain why the employee win rate found in JAMS is closer to those found in state and federal litigation when compared to AAA.

Though there are stark differences in employee win rates between litigation and arbitration, there are only limited explanations or conclusions that can be drawn from this difference. Without controlling for the types of cases heard in each forum, observing employee win rates at face value will likely lead to specious conclusions; however, such disparity does establish a *prima facie* case that employee rights are better protected in litigation.
Support for Hypothesis 2 was also found in the data. Average time to disposition in litigation is nearly twice the amount that is found in arbitration. With such large differences, supported by large sample sizes, it is doubtful that exogenous factors fully explain the variation in time to disposition between the two forums; however, if the merits of cases heard in arbitration and litigation were systematically different, then differences in merit could explain some of the differences in expediency.

Considering employees are likely to be unemployed during the proceedings, faster proceedings will be advantageous to employees more so than employers. Employees, if they win, will receive compensation in less time using the arbitration forum, and so will experience less economic hardship (Colvin, 2007); however, regardless of its relative expediency, time to disposition still hovers around one year.

Additional information that would be necessary to begin to effectively draw conclusion pertaining to the reasons behind differences between arbitration and litigation outcomes would be the merits of individual cases at each stop along the dispute resolution process. Increased attention to policy-capturing studies would help satisfy this demand and future research should reflect this.

The use of both policy-capturing studies and empirical studies will provide an opportunity for triangulation which will increase the validity of the results. Triangulation mitigates the internal biases and flaws that come from using a single methodology. If both the policy-capturing studies and empirical research continue to agree, even though there may be omitted variables, we can have more confidence that the results are valid.

Though arbitrator fees found in AAA are not high enough to trammel employees from protecting their rights through arbitration, arbitrator fees in JAMS can likely surpass
25,000 dollars. Such high fees in JAMS could be considered a hardship for employees to meet, especially considering they would likely be unemployed during the proceedings. Analysis of the allocation of arbitrator fee, however, produces relieving and consistent results. With approximately 95 percent of employers paying 100 percent of arbitrator fees, due process concerns based on employee payment of arbitrator fees are unfounded as only 5 percent of employees had to pay half, one third, or a quarter of arbitrator fees (the full cost of arbitration was never solely borne by an employee in either dataset).

The AAA announced in 2002 that all arbitrator fees in mandatory predispute employment arbitration would be allocated to the employer. The rule does, however, allow for joint payment of arbitrator fees if stipulated in individually-negotiated contracts, which are characteristic of higher paid employees, so reasonably outside the scope of due process concerns. If all arbitration providers adopted the AAA standard for allocation of arbitrator fees, this would guarantee that arbitration fees will never impose an undue burden on lower income employees, but would still provide for a fair distribution of fees in cases of individually-negotiated contracts.

Having analyzed the differences between arbitration and litigation, it is now important to review the literature about repeat player biases and to test to see if such biases are present in the AAA or JAMS dataset.
Repeat Player Bias

Table 3: Repeat Player Effects:

<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Sample Size</th>
<th>Data</th>
<th>Employee Win Rates (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bingham (1997)</td>
<td>n=270</td>
<td>1993-95 AAA</td>
<td>70</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>16</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>--</td>
</tr>
<tr>
<td>Bingham (1998a)</td>
<td>n=230</td>
<td>1993-95 AAA</td>
<td>67</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>23</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>25</td>
</tr>
<tr>
<td>Colvin (2007)</td>
<td>n=836</td>
<td>2003-06 AAA</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>14</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>11</td>
</tr>
</tbody>
</table>

Critics have expressed concern over the possibility or the presence of a repeat player bias in arbitration. Employers, who arbitrate often, are the “repeat players,” whereas employees, who generally do not use the process more than once in their lifetime, can be considered “one-shot players” (Colvin, 2007).

The repeat player bias draws its essence from game theory: given that employer repeat players have the prerogative to choose, or at least influence, who arbitrates a given case, arbitrators will have an incentive to betray their neutrality and issue favorable decisions to repeat players with hopes that employers will select them to arbitrate future disputes (Bingham, 1999; Colvin, 2007). An employer’s ability to pick an arbitrator, or at least an arbitrator provider, is furthered by their ability to unilaterally structure the arbitration agreement in employer-promulgated agreements; this obviously gives employers a distinct advantage over employees.
The AAA reported profits of more than 85 million dollars in 2002, and currently has over 7,000 neutrals listed on their roster (American Arbitration Association, 2008). Though the AAA is a non-profit agency and charges a simple agency or list fee, individual arbitrators are free to charge their own prices and keep whatever profits are earned during an arbitration hearing. Simply put, the more cases an arbitrator is selected to preside over, the more money that arbitrator earns; this is equally true for JAMS neutrals.

The D.C. Circuit Court of Appeal, citing Judge Roberts, has discussed the repeat player bias, observing that there are unique protections against this bias in the collective bargaining environment:

“For example, because both unions and employers are repeat customers of arbitration and have a hand in selecting the arbitrator to hear their disputes, arbitrators who regularly favor one side or the other will not be hired again. As a result, arbitrators have a strong personal interest in crafting awards that will be respected as fair by both parties regardless of who wins or loses the particular dispute.” (Cole, 105 F.3d at 1470. 1994, citing 9 U.S. §§1-2, 1994)

However, what is true with regards to labor arbitration and the collective bargaining environment is not necessarily characteristic of consumer arbitration. The D.C. Circuit Court of Appeal states:

“Unlike the labor case, in which both the union and employer are regular participants in the arbitration process, only the employer is a repeat player in cases involving individual statutory claims. As a result, the employer gains some advantage in having superior knowledge with respect to selection of an arbitrator.” (Cole, 105 F.3d at 1470. 1994, citing 9 U.S. §§1-2, 1994)

Though there is a clear economic incentive for arbitrators to give biased rulings, doing so would be an obvious breach of ethical and professional codes. The current body
of literature, however, presents evidence that a repeat player effect does exist in the arbitration environment but is careful to note there are many explanations to account for it.

Bingham found in a study examining 270 consumer arbitration rulings decided under the auspices of the AAA between 1993 and 1994 that repeat players received favorable outcomes when compared to non-repeat players (Bingham, 1997). Whereas arbitrators awarded damages to an employee grievant in 71 percent of the cases involving non-repeat employer players, when a repeat employer was involved, arbitrators awarded damages to an employee grievant in a mere 16 percent of cases, a 55 percentage point difference.

In another study of 203 AAA awards from January 1, 1993 to December 31, 1995, Bingham asserts: “there is undeniably a repeat player effect in employment arbitration” (Bingham, 1998a, p. 97). She found that employees were issued no relief in a staggering 77 percent of cases where repeat employers were involved, yet arbitrators awarded no relief in only 33 percent of cases where non-repeat employers were involved.

In a recent review of 836 employment arbitration cases yielding awards administered by the AAA from Jan. 1, 2003- Sept. 30, 2006, Colvin (2007) further supports the existence of a repeat player bias. The employee win rate for repeat employers was only 14 percent, while the employee win rate for “one-shot” employers was 32 percent, an 18 percentage point difference.

Though Bingham and others are quick to point out the salience of a repeat player effect, the literature also acknowledges that “the problem is to account for it” (Bingham, 1998a, p. 97). Professor Marc Galanter enumerates a list of employer advantages and
employee disadvantages that help account for preferential outcomes towards repeat players. He identifies the following collection of advantages that repeat players enjoy over one-shotters:

“(1) experience leading to changes in how the repeat player structures the next similar transaction; (2) expertise, economies of scale, and access to specialist advocates; (3) informal continuing relationships with institutional incumbents; (4) bargaining reputation and credibility; (5) long-term strategies facilitating risk-taking in appropriate cases; (6) influencing rules through lobbying and other use of resources; (7) playing for precedent and favorable future rules; (8) distinguishing between symbolic and actual defeats; (9) investing resources in getting rules favorable to them implemented.

One-shotters, on the other hand: (1) have more at stake in a given case; (2) are more risk averse; (3) are more interested in immediate over long-term gain; (4) are less interested in precedent and favorable rules; (5) are not able to form continuing relationships with courts or institutional representatives; (6) cannot use the experience to structure future similar transactions; and (7) have limited access to specialist advocates” (Bingham, 1999, p. 5-6, citing Galanter, 1975)

Eisenberg and Hill (2003) and Colvin (2007) give credence to the theory that the increased win rates for repeat players is not necessarily caused by arbitrator bias. Instead, the authors lend their support to the idea that internal processes and dispute resolution procedures (DRP) may account for some of the difference in win rates. Colvin (2007) states that he has found examples of internal dispute resolution systems acting as a filter, culling out meritless claims and facilitating settlement prior to the arbitration stage. Evidence of this “appellate effect” can be seen in Hill’s 2003 study which included 34 arbitration decisions involving repeat employers. Hill found that 25 of the 34 cases involved employers with an internal dispute resolution procedure and 9 out of the 34 involved employers without DRPs. In the Hill (2003) study, employees won only 24
percent of those cases involving a repeat employer with a DRP as opposed to 44 percent of cases involving repeat employers without a DRP. Hill’s finding is clear evidence of the appellate effect of DRPs. It is important to note, however, that these considerations may only have some explanatory power when addressing the repeat player effect, and arbitral bias can still explain some of the difference.

To test more directly for a repeat-player bias, Colvin (2007) looked at a subset of cases that involved only repeat employers. Analyzing this subset of the data helps to isolate the effect of an arbitrator bias from the legitimate advantages repeat employers enjoy. Colvin (2007) found 124 instances of employers using a particular arbitrator on more than one occasion. These employers in repeat employer-arbitrator pairs received favorable rulings in all but 11 percent of cases as opposed to 21 percent of cases not involving repeat employer-arbitrator pairs.

Furthermore, Bingham (1998a) also that employees lose more frequently when a decision is made where the employer has used the same arbitrator at least once before. In such cases, arbitrators gave no relief 75 percent of the time, which is significantly higher than the 45 percent of no relief rulings in cases where employers had not previously used the arbitrator (Bingham, 1998a). In an earlier study, Bingham (1997) notes an unsettling, but statistically insignificant, characteristic of the data set: in every case where an employer used an arbitrator on more than one occasion, the arbitrator ruled in the employer’s favor. Diffusing alarm is the fact that only two such cases existed in the data set.

A substantial critique of measuring a repeat employer-arbitrator bias can be gleaned from the text of Sherwyn, Estreicher, and Heise (2005). Sherwyn et al. impugn
the methodology of previous repeat player studies, arguing that arbitrators are not omniscient and do not know whether an employer will be a repeat player on their first encounter. They suggest that the first instance of a repeat employer-arbitrator pair should not be coded as a repeat employer-arbitrator incidence as it is not known at the time whether this employer-arbitrator pair will be repeated. Colvin responds by arguing all appearances by an employer should be coded as such stating: “we would expect that the decisions in the first cases involving employer-arbitrator pairings that subsequently become repeat pairings to have a higher rate of employer wins than cases involving employers and arbitrators who do not subsequently become involved in a repeat pairing” (Colvin, 2007). Colvin, however, does not explain his logic used to reach this conclusion; he does not explain why this bias would be reserved for select first-time employers when arbitrators do not know if these employers will appear in future cases.

This methodological debate elucidates an elision in the current literature. There is a general consensus on the origins of a repeat employer bias, but the literature has failed to present a theory of how this bias operates or is put into practice. Do arbitrators harbor a bias and express it in every decision, or are they selectively biased, giving biased rulings only to those employers that are likely to provide future business, or some other alternative? Though not directly stated in their paper, the arguments presented by Sherwyn et al would favor a theory of selectivity, where arbitrators are biased towards those employers who have shown a willingness to select them more than once.

In conclusion, the literature consistently reports there to be an established repeat player effect and a noteworthy repeat employer-arbitrator effect. Furthermore, Galanter, Colvin, and Hill contend that there are advantages apart from arbitrator bias that give
repeat players an overall advantage relative to one-shotters so conclusions should be limited.

*Hypothesis 3:* Repeat player employers will fare better than one-shotters with respect to employee win rates and award amounts.

*Hypothesis 4:* Repeat employer-arbitrator pairs will have lower employee win rates and lower awards than non-repeat employer-arbitrator pairs.
Results

Employees lose more frequently and receive smaller awards when the defendant is a repeat player as opposed to a non-repeat player (see Table 4a/b). 

Table 4a: Repeat Player Effects in JAMS

<table>
<thead>
<tr>
<th></th>
<th>Non-repeat Employer</th>
<th>Repeat Employer</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Employee Win Rates (%)</strong></td>
<td>42.9 (N=6 out of 14)</td>
<td>25.5 (N=13 out of 51)</td>
<td>P=0.206</td>
</tr>
<tr>
<td><strong>Average Award Amount ($)</strong></td>
<td>973,870 N=5</td>
<td>329,878 N=11</td>
<td>P=0.143</td>
</tr>
<tr>
<td><strong>Average Number of Previous Cases Heard with JAMS</strong></td>
<td>0 N=98</td>
<td>68 N=283</td>
<td>P=0.000***</td>
</tr>
</tbody>
</table>

***= at least 99% confident the difference is not due to chance

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13 An employer is coded as a repeat player if it appears more than once in the dataset, as Colvin (20007) suggests. An employer is defined as a repeat player in Table 2a/b during its first appearance and subsequent appearances in the dataset.

14 This number is derived from a variable unique to the JAMS dataset; JAMS directly provided a variable reporting the number of previous cases each employer has heard with JAMS. This variable presumably reports all types of arbitration an individual employer has been involved in during an undisclosed time period.
**Table 4b: Repeat Player Effects in AAA**

<table>
<thead>
<tr>
<th>AAA</th>
<th>Non-repeat Employer</th>
<th>Repeat Employer</th>
<th>Significance</th>
</tr>
</thead>
<tbody>
<tr>
<td>Employee Win Rates (%)</td>
<td>33.2 N=86</td>
<td>12.8 N=73</td>
<td>P=0.000***</td>
</tr>
<tr>
<td>Average Award Amount ($)</td>
<td>38,587 N=259</td>
<td>13,542 N=571</td>
<td>P=0.004***</td>
</tr>
<tr>
<td>Percent of Claim Awarded</td>
<td>35.4 N=159</td>
<td>22.2 N=209</td>
<td>P=0.075*</td>
</tr>
<tr>
<td>Average Number of Previous Cases Heard with AAA</td>
<td>0 N=996</td>
<td>25 N=1761</td>
<td>P=0.000***</td>
</tr>
</tbody>
</table>

* = at least 90% confident the difference is not due to chance
*** = at least 99% confident the difference is not due to chance

Within the JAMS dataset, when the defendant is a non-repeat employer, the employee win rate is 42.9 percent, derived from six employee verdicts and eight employer verdicts. When the defendant is a repeat player, JAMS cases produce an employee win rate of 25.5 percent. Though there is a 17.4 percentage point difference between employee win rates when faced with a non-repeat employer as opposed to a repeat employer, this difference is statistically insignificant (Chi-Squared(1)= 1.60, P<0.206), this is partially due to the relative small sample sizes. Differences in award amounts granted to employees faced with one-shot employers compared to those faced with repeat player employers is not significant with a P-value of .143; however, with average employee awards of 973,870 dollars and 329,878 dollars for one-shotters and repeat employer players, respectively, the data is still suggestive of the presence of a repeat player effect. Once again a small sample size is partially responsible for the lack

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15 Previous cases heard with AAA were obtained by counting the number of times each employer appears in the dataset. This variable only captures those cases heard between 2003 and 2006 and is restricted to employment arbitrations only.
of significance as well as skewed awards, where the top quintile of awards is almost 2,000,000 dollars.

In comparing 259 one-shot employer outcomes to 571 repeat player employer outcomes found in the AAA dataset, the employee win rates are 33.3 percent and 12.8 percent, respectively. A chi-squared analysis produced a Chi-Squared(1) = 48.5835 and a P-value of 0.000, meaning there is less than 0.001 percent chance that the difference in employee win rates is due to chance. The same pattern can be seen in the average percentage of claim awarded. Employees faced with one-shot employers received 35.4 percent of their claims, on average; however, only 22.2 percent of their claim, on average, was received when a repeat employer was involved. Though not significant at the 95 percent level, a chi-squared test yields a p-value of .075, meaning it is significant at the 90 percent level. Lastly, the average AAA award amount for cases involving a repeat employer is 13,519 dollars but is 38,737 when cases involve a one-shot employer, which is significant below the 95 percent level.

Out of the sample of 571 AAA awards involving repeat employers, employees won only five out of 116 cases, or 4.3 percent, involving repeat employer-arbitrator pairs\textsuperscript{16}, compared to 68 out of 455, or 15.0 percent, cases that did not involve repeat employer-arbitrator pairs. This difference is statistically significant at the 95 percent level (Chi-Squared(1)= 9.52,\ P = 0.002). An important finding is that of the five cases awarded in employees’ favor in the repeat employer-arbitrator pairs, four, or 80 percent, were awarded during the first encounter of an employer-arbitrator pair, while only one

\textsuperscript{16} Repeat employer-arbitrator pairs were coded as such in their first appearance and subsequent appearances as Colvin (2007) presents.
employee award, or 20 percent, was recorded on the second occurrence of a repeat employer-arbitrator pair.

Additionally out of the same 571 AAA awards involving repeat players, the mean award in the 455 cases involving non-repeat employer-arbitrator pairs is 16,544 dollars compared to an average award of 1,766 dollars in cases involving repeat employer-arbitrator pairs (P=0.0023).

It is noteworthy to point out that though employees fare worse in the AAA dataset in the presence of a repeat employer-arbitrator pair in terms of win rates and award amounts, the average number of cases employers in repeat employer-arbitrator pairs have heard with AAA is significantly higher than the number of cases previously heard by employers in non-repeat employer-arbitrator pairs. Employers involved in repeat employer-arbitrator pairs were engaged in an average of 42 previous cases with AAA while repeat employers not in employer-arbitrator pairs were engaged in 22 previous arbitration hearings with AAA, on average. This is significant at less than 0.001 percent and shows that non-repeat employer-arbitrator pairs have less experience in arbitration than repeat employer-arbitrator pairs.

Consistent with the AAA repeat employer-arbitrator statistics, out of the sample of 51 JAMS awards involving repeat players, employees won zero out of the three cases involving employers in repeat employer-arbitrator pairs, compared to 13 out of 48, or 27.1 percent, of cases that did not involve employers in repeat employer-arbitrator pairs. A Fisher’s exact test reports a P-value=0.41, meaning that it is not significant and that this difference is 41 percent likely due to chance; however, the lack of significance is likely due to small sample sizes. Within the sample of 51 decisions, the average award of
a JAMS case involving a non-repeat employer-arbitrator pair is $329,878$ dollars, while no awards were given to employees facing repeat employer-arbitrator pairs.

In accord with what was found in the AAA dataset, employers in repeat employer-arbitrator pairs in the JAMS dataset have, on average, more experience in arbitration with JAMS than their counterparts. While employers in repeat employer-arbitrator pairs have been involved with JAMS arbitration an average of 4.2 previous times, employers in non-repeat arbitrator-employer pairs have heard an average of 1.8 previous cases with JAMS\(^\text{17}\). This difference was found to be significant at the .0001 level.

**Discussion**

The data from both the JAMS and AAA datasets support Hypothesis 3, which states that repeat employers will fare better in terms of award amounts and employee win rates than one-shot employers. Though not all the differences were significant, the data showed a clear tendency toward lower awards and employee win rates when a case involved a repeat employer. The one exception to this pattern is average award amounts in JAMS. As discussed above, however, it would be brash to attribute this difference to a repeat player bias alone; there are a myriad of explanations to account for the improved employer outcomes for repeat employers like those discussed by Hill (2003) and Galanter (1975).

\(^{17}\) These statistics were derived from the number of times an employer appears in the dataset. Like the AAA dataset, this restricts experience to the years of 2003 to 2006. Furthermore, JAMS directly provided a variable reporting the number of previous cases each employer has heard with JAMS. This variable presumably reports all types of arbitration an individual employer has been involved in during an undisclosed time period. For the sake of comparability between the two dataset, the given variable was not used in the above calculations.
Support for Hypothesis 4 is also found in both datasets. The presence of a repeat employer-arbitrator pair in the AAA dataset strongly and certainly translates to worse employee outcomes, on average, both in terms of award amounts and employee win rates. Small sample sizes prevent statistical significance of the same trends in JAMS data, but employee win rates are lower for repeat employer-arbitrator pairs than non-repeat pairs.

The advantages, outside of arbitrator bias, attributed to repeat players are theoretically present in both non-repeat and repeat employer-arbitrator pairs. By analyzing only a subset of the datasets, redacted to include only repeat employers, and still finding that employees fare significantly worse when confronted with a repeat employer-arbitrator pair is evidence that an arbitrator bias exists. The small sample sizes (N=51) found in the JAMS dataset partially dispels alarm; however, the presence of statistically significant repeat employer-arbitrator pair effects were found in the AAA data, which is substantially larger (N=571).

It is an important finding that employers in employer-arbitrator pairs in the AAA dataset experience better outcomes, in terms of win rates, in succeeding cases after the pairing has been established. This finding has noteworthy implications for future studies and the continued advancement of repeat employer theory; however, because there are only five total occurrences of employee wins, reliable conclusions are limited. Nonetheless, this phenomenon is suggestive that repeat employer-arbitrator bias is expressed more blatantly in cases after the initial pairings.

If the five instances of employee wins in repeat employer-arbitrator pairs are representative of the arbitration forum, it would appear that arbitrators are selectively
biased (or simply more biased) to those employers who have shown a willingness to select them more than once.

To fill a gap in the current literature and put forth a unique theory of repeat employer-arbitrator bias, I rely on one basic assumption: biased arbitrators act in their own self interest. If arbitrators are susceptible to bias, then they will act on that bias if the expected payoffs (p) of acting biased (i.e., repeat business) exceed the expected costs (c) (i.e., being labeled a biased arbitrator and the loosing of business). Given the above tradeoff, it would be irrational for arbitrators to be blindly biased towards employers in general; not all employers are likely to give repeat business, so there is no benefit to act in a biased manner, yet the cost of being labeled a biased arbitrator still remains (p < c). Instead, they separate those employers that are likely to give repeat business from those that are not likely. Stated differently, arbitrators would have to assess with which employers expected payoffs are likely to exceed expected costs. In order to choose which category an employer will be put in, an arbitrator would need some kind of identifier or signal. Given the evidence, I theorize that employer’s repeat use of their services is the “signal” for an arbitrator to act in a biased manner; once the repeat relationship has been established, arbitrators view the potential pay offs of their bias as exceeding the risks associated with it (p > c). Future research should look into this issue in more detail to strive for a working theory of how arbitrator bias would operate.

As with comparisons of win rates between arbitration and litigation, there are comparability issues and differences between firms and cases likely to be involved in repeat employer-arbitrator pairs. For example, the bigger the employer is, the more cases they are likely to be involved in, the more likely they are to encounter the same
arbitrator on more than one occasion. Furthermore, firm size affects an employer’s ability to benefit from economies of scale. Regardless of an arbitrator bias, controlling for firm size would make measurements of an arbitrator bias more feasible.

Along with employer size, past experience in the arbitral forum theoretically confers certain advantages that can be applied to subsequent hearings. The JAMS and AAA data are unanimous on this point: employers involved in repeat employer-arbitrator pairs had nearly twice as much experience (42 previous cases compared to 22 previous cases in AAA, and 4.2 previous cases compared to 1.8 previous cases in JAMS) as non-paired repeat employers implying that at least some of the difference between the two samples can be attributed to experience, and not bias alone.

Other factors that would help with analyzing a repeat player bias is total number of arbitration cases an employer has been involved using any arbitration service as well as the internal DRPs of each employer.

If future research continues to support the presence of a repeat player bias, firm policy actions should be implemented. To protect against repeat employer biases maintained by arbitrators, new rules could be incorporated into the Due Process Protocol. Specifically, the Due Process Protocol could outright forbid repeat use of an arbitrator by a particular employer, though this would be extreme. Alternatively, new rules could be implemented that peg arbitration awards to an employer’s history. If an employer has shown a willingness to break the law in the past, then present and future costs of breaking the law should increase as well. Not only will this penalize repeat law breakers, it but would reduce the problems of repeat player biases as employers will have a greater incentive not to be defendants in arbitration.
This section has shown that strong repeat player and repeat employer-arbitrator pair effects exist. The next issue to be looked at in detail is gender effects in arbitration.
Gender Effects

Table 5: Arbitrator Gender Effects

<table>
<thead>
<tr>
<th>Author(s)</th>
<th>Sample Size</th>
<th>Data</th>
<th>Gender Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Zirkel (1983)</td>
<td>n= 369</td>
<td>Arbitration</td>
<td>None</td>
</tr>
<tr>
<td>Bigoness and DuBose (1985)</td>
<td>n=80</td>
<td>Hypothetical</td>
<td>M</td>
</tr>
<tr>
<td>Scott and Shadoan (1989)</td>
<td>n=169</td>
<td>Arbitration</td>
<td>None</td>
</tr>
<tr>
<td>Bemmels (1990)</td>
<td>n=459</td>
<td>Arbitration</td>
<td>M</td>
</tr>
<tr>
<td>Thornton and Zirkel (1990)</td>
<td>n=177</td>
<td>Hypothetical</td>
<td>None</td>
</tr>
<tr>
<td>Caudill and Oswald (1993)</td>
<td>n=146</td>
<td>Hypothetical</td>
<td>F</td>
</tr>
<tr>
<td>Steffensmeier and Herbert (2003)</td>
<td>n=--</td>
<td>PA Courts</td>
<td>F</td>
</tr>
</tbody>
</table>

M= Males harsher than females
F= Females harsher than males

The core concern of this section is whether female and male arbitrators approach sentencing in gender-specific ways. An analysis of whether there is a difference between male and female arbitrator awards as a function of arbitrator gender must cover a deluge of materials from the fields of sociology, criminology, psychology, philosophy, and arbitration.

Minimalist versus maximalist theory has emerged as a leading debate from the varied school of feminist thought (Steffensmeier & Hebert, 1999). The maximalist perspective holds that there are basic differences between the sexes which create cognitive, emotional, and behavioral differences between the genders (Epstein, 1988). Some supporters of this view claim these differences are biologically determined, while others suggest that differences emerge as a result of social conditioning; nonetheless,
proponents of the maximalist view claim that immutable differences exist and result in different approaches to everyday decisions, creating a distinctive culture of women (Gilligan, 1982). As stated by Lehman (1993, p. 179): “These uniquenesses purportedly lead men and women to take difference approaches to a wide variety of issues and problems.” In terms of decision-making, those that ascribe to the maximalist view of gendered behavior contend woman base decisions on moral concerns with priorities given to social relationships, while male decision-making is dominated by “rights, [and] formal reasoning that uses a universalizable, abstract, and impersonal style” (Gilligan, 1982). This theory obviously suggests that there will be differences in the sentencing styles of male and female arbitrators; however, this theory does not predict whether female arbitrator awards will be more or less employee friendly than male arbitrator awards.

The minimalist model insists that gender differences are merely superficial and not nearly as entrenched as the maximalist claim. Minimalists concede gendered differences exist in society, but they attribute these differences to “a social control system that prescribes and proscribes specific behaviors for women and men” (Epstein, p. 25, 1988). Essentially, it is not inherently different personality traits that contribute to gender differences, it is societal constraints that influence past experiences and opportunities. Therefore, any psychological or experienced-based differences between the sexes can be extirpated should women and men be held to identical societal constraints, say through common education, training, or professions (Steffensmeier & Hebert, 1999). In brief, minimalists claim that members of either gender will define themselves and align with expectations that their training and professions dictate, as opposed to what society at-
large dictates. As the backgrounds and experiences of arbitrators in the samples are relatively homogenous, especially JAMS arbitrators\(^\text{18}\), the minimalist model predicts that similar experiences and training will lead to similar sentencing styles of men and women.

Staines et al. (1974) describe a behaviorist phenomenon called the Queen Bee syndrome which can be applied to arbitration. The Queen Bee syndrome states that women in power tend to treat other women in subordinate roles less favorably. First, the theory contends that women in power have worked exceptionally hard in order to achieve their rank and expect other women to work equally as hard. Due to the aforementioned mentality, women in power are expected to “align themselves against the advancement of other women” (Caudill & Oswald, 1993, p. 262). As female arbitrators are in a position of superiority, the Queen Bee syndrome predicts that female claimants will receive harsher outcomes than men when faced with women arbitrators. It should be noted that this theory says nothing on women’s reaction to male subordinates; however, as women grievants can safely be assumed to be part of the dataset, harsher treatment towards women by female arbitrators would affect the overall employee win rate. Therefore, by ruling more harshly against a subset of the population, this theory implies that women arbitrators will render more employee unfriendly decisions than their male counterparts.

Gender effects have also been studied in the criminology field. Though the processes are different in the arbitral and criminal justice systems, arbitrators and judges have similar duties and responsibilities (Bemmels, 1988). The similarities in responsibilities make studies of defendant characteristics on treatment in the criminal justice system relevant (Bemmels, 1988). There are two competing theories in the

\(^{18}\) JAMS arbitrators have particularly homogenous backgrounds; they are approximately the same age, have graduated law school, the majority have practiced law for over a decade as a lawyer, and all are ex-judges.
The chivalry/paternalistic thesis suggests that men maintain a protective attitude towards women (Moulds, 1980). The theory states that women are seen as helpless, like children, and therefore should not be held fully accountable for their actions (Moulds, 1980). This theory implies that male arbitrators will treat transgressions by women with a greater tolerance than they extend to males, leading to better arbitral outcomes for women. Once again, though this theory does not postulate male arbiter actions toward men, if male arbitrators are more lenient towards women, then overall employee outcomes will be more favorable where male arbitrators are presiding.

Support for the Queen Bee syndrome and the chivalry/paternalistic thesis can be found in the labor arbitration literature. Bemmels (1988) found that female grievants were treated more favorably by male arbitrators than female arbitrators after analyzing 1,812 discharge arbitration cases in the United States. In his earlier research, Bemmels reached the same conclusions with data from Alberta and British Columbia (Bemmels, 1988a; Bemmels, 1988c). Bingham and Mesch (2000) found evidence of preferential treatment towards women by male arbitrators; however, the results were not statistically significant. Though not unanimous (see Mesch, 1995), applying these studies and

19 The evil woman thesis contends that women who break societal norms are punished for two transgressions. First, women are chastised for the wrongdoing in question. If found guilty that wrongdoing, women are then seen to have committed the second crime of breaking the stereotype of women as gentle, nurturing, and kind. The punishment meted out compounds both transgressions and is therefore more severe.
theories to employment arbitration, past research suggests that female arbitrators will be more severe in their decisions relative to male arbitrators.

More directly applicable to the question at hand is the literature analyzing differences between the sentencing styles of male and female judges. Steffensmeier and Hebert (1999), using data from 1991-1993 judicial sentences in Pennsylvania and additional archival data, examined whether a judge's gender affected criminal defendants’ outcomes in court. The authors conclude that significant differences exist between the decisions delivered by male judges and those delivered by female judges. Specifically, they found that women judges were 10 percent more likely to incarcerate and their sentences were 5 months longer on average than those of male judges. The authors impress, however, that in the majority of the sentencing-related variables analyzed, gender effects were non-existent or negligible. Summarizing the criminology literature, the authors state: “the effects of judge's gender on sentencing outcomes are small or negligible but… where differences do exist, female judges are harsher” (Steffensmeier & Hebert, 1999, p. 1166). Unfortunately, Steffensmeier and Hebert do not fit their results into a theoretical framework, but suggest others look into it for future research. The authors do, however, offer that differences in gender socialization lead women to be more moralistic and to feel more threatened than males by breaches of social norms, leading female judges to be more severe in their sentencing decisions. Furthermore, research on juror decision-making has generally found that the gender of jurors has no or a negligible effect on outcomes of rape or sexual assault cases (Faulkner 1979 & Weisbrod 1986, as cited by Steffensmeier & Herbert, 1999). Taken together, these studies suggest that
arbitrator gender effects will be negligible or, if present, woman arbitrators will be slightly harsher towards employees than male arbitrators.

Numerous studies have dealt directly with the differences between the decision-making outcomes of male and female arbitrators. Zirkel (1983), Bigoness and DuBose (1985), Scott and Shadoan (1989), Thorton and Zirkel (1991) and Caudill and Oswald (1993) all report results that bear on this issue. Zirkel (1983), looking at 369 arbitrator decisions, found that there was no difference between male and female arbitrator outcomes. Bigoness and Dubose (1985) found similar results using 80 students as mock arbitrators. Though they found that men and women arbitrators did not vary significantly in their decisions, they did find that women arbitrators regarded grievant offenses as less serious than male arbitrators did. Clyde Scott and Elizabeth Shadoan (1989) tested to see if female arbitrators issue less severe judgments than male arbitrators, but their empirical findings failed to identify any significant differences between the genders. In analyzing 177 arbitrators rulings on six hypothetical cases, Thorton and Zerkil (1990) found that arbitrator gender cannot account for any differences in the awards granted to grievants. Bemmels (1990) found that women arbitrators issued judgments slightly more favorable to grievants than male arbitrators when analyzing 459 arbitrator awards. Finally, Caudill and Oswald (1993) asked 146 arbitrators to rule on a hypothetical drug-testing case and found that women arbitrators are harsher than their male counterparts. Caudill and Oswald (1993) found that women arbitrators were less likely to issue full reinstatements, but also found that gender did not have any explanatory power in length of suspensions.

A review of the literature on arbitrator gender effects yields mixed results. While Bigoness and Dubose (1993) and Bemmels (1990) found that women arbitrators are
likely to be less harsh than male arbitrators, Caudill and Oswald (1993) found that women are likely to be harsher than males. The plurality of findings, however, has found no differences in outcomes that can be explained by arbitrator gender. The field of criminology contends that female judges are more severe to both male and female convicts. Corroborating the findings of the criminology literature, the Queen Bee thesis and the chivalry/paternalistic thesis suggest that female arbitrators will issue more employee-unfriendly results relative to male arbitrators and are backed by empirical evidence. There is theoretical support that outcomes will vary based on gender, and the majority of studies analyzing arbitrator gender effects directly have reported that males are harsher than females; therefore, it is predicted that employee outcomes will be worse when male arbitrators are presiding over the case.

*Hypothesis 5: Employee win rates, award amounts, and percentage of claim awarded will be lower when a male arbitrator presides relative to when a female arbitrator presides*
Results

Employee outcomes in the JAMS and AAA datasets were categorized by arbitrator’s gender to test for gender differences. Results equivocally show that employees fare better in arbitration when their case is presided over by a male arbitrator as opposed to a female arbitrator (see Table 6).

Table 6: Gender Differences

<table>
<thead>
<tr>
<th></th>
<th>JAMS</th>
<th>AAA</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Male N=47</td>
<td>Female N=18</td>
</tr>
<tr>
<td>Arbitrator Gender</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employee Win Rate (%)</td>
<td>21.3</td>
<td>50.0</td>
</tr>
<tr>
<td>Award Amount ($)</td>
<td>803,792</td>
<td>265,078</td>
</tr>
<tr>
<td>Percent of Claim (%)</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

* = at least 90% confident the difference is not due to chance
** = at least 95% confident the difference is not due to chance

Employee win rates in JAMS cases are 21.3 percent for cases presided over by a male arbitrator and 50.0 percent when a female arbitrator hears the case; this difference is significant at the .023 level (Chi2(1)= 5.19), meaning there is only a 2.3 percent chance the different win rates in terms of gender are a result of chance. The AAA cases present a different pattern, though the difference is not statistically significant. Employee win rates are 20.6 percent when a male arbitrator presides over a case and 19.3 percent when a case is heard in front of a female arbitrator (Chi2(1)= 1.62).

In terms of award amount, the two datasets present consistent results. There is a statistically significant trend showing that male arbitrator awards are greater than female

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20 Some cases had a two, three, or four party arbitration panel, these cases were left out of gender analysis.
21 Claim amounts were not adequately reported in the JAMS dataset, making evaluations of percent of claim awarded infeasible.
arbitrator awards that can be seen in the AAA data, with male arbitrators awarding 26,039 dollars per employee win, on average, and female arbitrators awarding 13,344 dollars per award, on average; this difference is significant at the .033 level. Even when evaluated as a percent of claim awarded, the AAA data shows a statistically significant difference between awards of male and female arbitrators, with female arbitrators awarding a lower percentage of employee claims; male arbitrators awarded 31.7 percent of an employee’s claims, on average, while female arbitrators awarded 20.6 percent of an employee’s claim, on average.

The JAMS data shows male arbitrators award 803,792 dollars, on average, while female arbitrators award 265,078 dollars, on average. The standard deviation of female-awarded awards is 417,588 dollars and the standard deviation is 909,144 dollars for male-awarded awards. Furthermore, there were only 11 total cases of arbitrators granting monetary awards in an employee verdict\(^\text{22}\). With such large standard deviations and small sample sizes, it is no surprise that even a drastic difference of close to 600,000 dollars, on average, is not statistically significant at the .05 or .1 level.

The salary levels of employees differ between male and female arbitrators which could explain for some or all of the gendered differences seen in Table 6. Analysis of salary levels can only be performed in the AAA dataset because, out of all employee verdicts in JAMS, there is only one instance where salary is reported. The AAA reports three distinct salary levels of (1) under $1000,000, (2) $100,000-$250,000, and (3) above $250,000. Where salary level was reported, 72.7 percent of employees fell into the first category, 18.2 percent fell into the second, and 9.1 percent fell into the third when a male arbitrator was presiding. If the case was heard by a female arbitrator, 87.5 percent fell

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\(^{22}\) Out of the 11 awards, five were granted by males while six were granted by females.
into the first category, 12.5 percent fell into the second, and there were no employees in the third, and highest, salary tear. As male arbitrators are more likely to hear disputes from employees with higher salaries (27.3 percent earning above $100,000, compared to 12.5 percent for females), salary levels could help explain the gender disparity in employee outcomes. However, the fact that female arbitrators award a lower percentage of an employee claim, on average, does not seem to be reconciled by differing salary levels, unless those with higher salary levels deflate their claim and those with lower salary levels inflate their claims.

Discussion

The data, with one exception, shows that employee outcomes are better under male arbitrators than female arbitrators; this is true for employee win rates in AAA cases, average award amounts, and average percentage of claim awarded. The exception is employee win rates in the JAMS dataset, which show female arbitrators awarding employee verdicts more often than male arbitrators. This result supports the Queen Bee hypothesis, the Chivalry/Paternalistic thesis, and a broader maximalist view of gender differences.

This finding provides broad support for the maximalist view of gender differences, as gender differences were most severe in the JAMS dataset; this is true even though the backgrounds of JAMS arbitrators, and therefore their social constraints, are most homogenous. Though male and female JAMS arbitrators are almost identical in terms of education and professional experience, stark and significant gender differences exist in terms of employee win rates and average award amounts. On the surface, this is evidence for the maximalist view of gender differences, which states that gender
differences are immutable, perhaps even biological, and evidence against the minimalist view, which claims that gender differences are a result of social norms and can be overcome with similar experiences.

There are many confounding variables that should make one reticent to draw hard conclusions from the above results. First, it has been shown that males receive cases involving employees with higher incomes, on average. Differing salary levels can affect the quality of counsel one can afford, is related to education, and previous studies have used income as an indicator of the type of contract (employer-promulgated or individually-negotiated) disputes arise from. Furthermore, it is a real possibility that claim amounts could be systematically inflated based on salary levels, which has led some researchers to be hesitant of using claim amounts for analysis (Colvin, 2008). Additionally, it is reasonable to believe that an arbitrator’s gender might influence the types of decisions and cases they get through direct or indirect discrimination, so controlling for the merits of the case would help control for that, too.

There may be underlying differences, such as education, age, or previous arbitration experience that could help account for the differences based on arbitrator’s gender. If older, more experienced arbitrators are more likely to rule in favor of employers, and if these characteristics are associated with men, then there may be a spurious correlation between gender and arbitration outcomes.

Though bivariate analysis shows that arbitrator gender effect exist, the proceeding section looks at arbitrator gender as just one of many independent variables regressed on employee win rates and award amounts.
Regression Analysis

An advanced analysis of the effects of arbitrator gender, repeat employer status, and repeat employer-arbitrator pair status, and employee self representation on employee outcomes in arbitration can be determined through use of OLS regression for award amounts and a logit model for employee win rates. Regression analysis was reserved for the AAA data only due to the large sample size; the JAMS dataset was too small and did not provide enough variation between the independent and dependent variables.23

Previous sections of this thesis have commented on the potential and expected influences of arbitrator gender and repeat player status, however, these regression models introduce employee self representation as having an effect on employee outcomes. Hill (2003) found a statistically insignificant difference between employee win rates based on employee self representation status, with self represented employees experiencing lower win rates. Colvin (2007), however, did find a significant relationship between employee self representation and win rates and award amounts. Colvin found self-represented employees won only 13.7 percent of cases compared to employees represented by counsel that won 22.6 percent of cases. There was a similar disparity between average award amounts, with self represented employees receiving less than 50 percent of the awards won by employees with counsel, on average.

23 For example, JAMS data showed no variation in arbitrator verdict and repeat employer-arbitrator status, and self representation occurred in only two cases deserving a verdict.
Table 7: Logit Model: Factors Influencing AAA Employee Win Rates

<table>
<thead>
<tr>
<th>Variable</th>
<th>Odds Ratio</th>
<th>z-value</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arbitrator Gender (Female=1)</td>
<td>.795</td>
<td>-1.16</td>
<td>0.246</td>
</tr>
<tr>
<td>Repeat Employer (Yes=1)</td>
<td>.362</td>
<td>-5.40</td>
<td>0.000 ***</td>
</tr>
<tr>
<td>Employer-Arbitrator Pair (Yes=1)</td>
<td>.262</td>
<td>-2.81</td>
<td>0.005***</td>
</tr>
<tr>
<td>Self Represented (Yes=1)</td>
<td>.663</td>
<td>-1.94</td>
<td>0.052*</td>
</tr>
<tr>
<td>Constant</td>
<td>-.514</td>
<td>-3.32</td>
<td>0.001***</td>
</tr>
<tr>
<td>Pseudo R-Squared</td>
<td>0.078</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Chi-Squared</td>
<td>62.3</td>
<td></td>
<td>0.000***</td>
</tr>
</tbody>
</table>

* = at least 90% confident difference is not due to chance  
***= at least 99% confident difference is not due to chance

Table 7 describes the outcome of a logit regression with employee win rate as the dependant variable and repeat employer, repeat employer-arbitrator pair status, arbitrator gender, and self representation as independent variables. All independent and dependent variables are binary. The odds ratio for the Employer-Arbitrator Pair variable is the furthest from one of all the independent variables, at .2618. This means that when an employer involved in a repeat employer-arbitrator pair is party to an arbitration, an employee’s odds of winning are only .2618 as large as the odds of winning against a non-repeat employer-arbitrator pair. The odds ratio of the Repeat Employer variable is

24 Repeat Employer and Repeat Employer-Arbitrator pairs were calculated using the methodology proposed by Colvin (2007).
similar at .3618, meaning that the odds of an employee winning against a repeat employer is only .3618 that of winning against a non-repeat employer. The odds ratios associated with both these variables are significant at the 99 percent confidence interval. If an employee chooses self representation, their odds of winning are .663 as large as if they choose professional representation. If “yes”, all of these structural variables - repeat employer status, repeat employer-arbitrator status, and self representation status - are associated with decreased likelihoods of an employee win. Table 7 also reveals that an arbitrator being female is associated with a .795 chance of winning compared to cases with a male arbitrator; this relationship, however, is not statistically significant.

Overall the model only explains 7.75 percent of the variation found in employee win rates; a low R-Squared was expected in this model, as there are conspicuous relevant variables that were omitted due to lack of data. The chi-squared statistic is 62.3, meaning the overall model is still significant at the 0.001 level regardless of the low R-Squared.
Table 8: OLS Regression: Factors Influencing AAA log of Award Amounts

<table>
<thead>
<tr>
<th>Variable</th>
<th>Coefficient</th>
<th>% change</th>
<th>t-value</th>
<th>p-value</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arbitrator Gender (Female=1)</td>
<td>-0.45</td>
<td>-36.2</td>
<td>-1.54</td>
<td>0.125</td>
</tr>
<tr>
<td>Repeat Employer (Yes=1)</td>
<td>-1.93</td>
<td>-88.5</td>
<td>-6.16</td>
<td>0.000 ***</td>
</tr>
<tr>
<td>Employer-Arbitrator Pair (Yes=1)</td>
<td>-1.01</td>
<td>-63.7</td>
<td>-2.43</td>
<td>0.015**</td>
</tr>
<tr>
<td>Self Represented (Yes=1)</td>
<td>-0.69</td>
<td>-49.9</td>
<td>-2.30</td>
<td>0.022**</td>
</tr>
<tr>
<td>Constant</td>
<td>3.82</td>
<td></td>
<td>13.72</td>
<td>0.000***</td>
</tr>
<tr>
<td>Adjusted R-Squared</td>
<td>0.078</td>
<td></td>
<td></td>
<td>0.000***</td>
</tr>
</tbody>
</table>

* = at least 90% confident difference is not due to chance  
** = at least 95% confident difference is not due to chance  
*** = at least 99% confident difference is not due to chance

Table 8 displays the results of a log-linear regression with the natural log of award amount\(^{25}\) as the dependent variable and the same independent variables found in the previous model (see Table 7). After a brief calculation, the coefficients shown in Table 8 express the percent change in award amount from an increase of 1 unit in the independent variables\(^{26}\). The percent change in award amounts is -88.5 percent for the variable repeat employer, meaning the presence of a repeat employer reduces the award by 88.5 percent of the award given when the defendant is not a repeat employer, on average. All three structural variables are significant at the .05 level. The coefficient on arbitrator gender is not significant but it still shows that female arbitrator awards are 36.2 percent less than male arbitrator awards. Similar to the logit model, the independent variables in Table 8

\(^{25}\) Natural log of awards was used instead of “award amount” to make the error terms more closely resemble a normal distribution  
\(^{26}\) percent change in Award Amount = 100 x (\(e^{B} - 1\))
explain only 7.8 percent of the variance in the dependent variable as a result of omitted variables.

The correlation matrix describing the bivariate Pearson correlations between each pair of variables is presented in Table 9 below.

Table 9: Correlation Matrix

<table>
<thead>
<tr>
<th></th>
<th>Arbitrator Gender</th>
<th>Repeat Employer</th>
<th>Repeat Employer-Arbitrator</th>
<th>Self Representation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arbitrator Gender</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Repeat Employer</td>
<td>-.0013</td>
<td>1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Repeat Employer-Arbitrator</td>
<td>.0378</td>
<td>.2986</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Self Representation</td>
<td>.0405</td>
<td>.0931</td>
<td>.0488</td>
<td>1</td>
</tr>
</tbody>
</table>

The strongest correlation is between the variables Repeat Employer-Arbitrator and Repeat Employer, which is unsurprising; an employer must first be a repeat employer first in order to ever engage in a repeat employer-arbitrator pair. The correlations between all other sets of variables are all under .1.

Discussion

Both models show that repeat employer status, repeat employer-arbitrator status, and self representation have statistically significant effects on employee outcomes. Though bivariate analysis shows that there are differences in employee outcomes as a function of gender, when other independent variables are added, gender no longer shows a statistically significant effect on employee outcomes. This implies that arbitrator
characteristics are not as important as previous sections show. Not being able to prove statistical significance does not mean that arbitrator gender has no influence; it simply means we cannot reject the null that arbitrator gender has no effect on employee outcomes. A possible explanation for why arbitrator gender was significant in the bivariate analysis and not the regression models is that repeat employers could be more likely to choose female arbitrators, and in the process win rates and award amounts would be lower for female arbitrators because of increased use by repeat employers. Future research should continue to focus on arbitrator and structural characteristics to test if the current correlations are legitimate or whether their significance is a result of omitted variable bias.

Regression analysis concludes the quantitative portion of this study; what follows is a section presenting the limitations of this study and a conclusion, including policy recommendations emanating from the results presented in this, as well as the previous three, section.
Limitations

This present study is not immune to numerous limitations. First and foremost, omitted variable bias hindered the explanatory power of the findings. In particular, there was no way to measure the merits of cases presented between arbitration and litigation, to male and female arbitrators, or to arbitrators of any gender as a function of repeat player status. If the merits of cases were known, stronger conclusions could have been made.

Another limitation to this study is the incomplete data in both datasets, particularly salary level of employees. Though merits were left completely unreported, having such incomplete data in terms of salary level effectively negated its usefulness in advanced analysis. Other variables that would have contributed to this study would be: internal DRPs, employer size, total employer arbitration experience, quality of counsel, and type of employment dispute. Especially in the regressions, the addition of new variables could lower the explanatory power of the four independent variables used.

Furthermore, this study partially suffered from limitations in coding. As arbitrator gender was never given, it had to be created from an arbitrator name. Further internet research was done when arbitrators had names that could not easily be associated to one gender or the other to determine their sex. Error could arise out of my own subjective determination of what constitutes a “gender specific” name. To guard against this in future research, two or more codings, by two or more people, could be independently coded and then compared.
Conclusion

The body of empirical evidence presented to date shows changing patterns over time. The first studies presented relative similarities between employment arbitration outcomes and employment litigation outcomes, likely due to the type of contracts disputes would arise under. More recent studies have shown a substantial decline in employee win rates, suggesting that the post-*Gilmer* environment is characterized by substantially lower employee win rates and arbitration awards than the previous studies imply. The findings expressed here go along with this trend; employee win rates found in JAMS and AAA cases were noticeably lower than those found in studies of older decisions and lower than employee win rates in court. As predicted, time to disposition was found to be shorter in arbitration than in litigation, fortifying the results already established in the literature. Furthermore, due process concerns over allocation of arbitration fees are largely not founded in reality, as employee payment of even a portion of arbitration fees is relatively rare.

This study also presents equivocal evidence of gendered differences in arbitrator decision-making. Men, who make up roughly 66 percent of the samples looked at, were found to be more generous than females in terms of award amounts; however, women were found to rule in an employee’s favor more often than men in the JAMS dataset. In both regression models, being female had a negative effect of the dependent variable, but the coefficient was not statistically significant.

Of most concern are findings indicating repeat player biases. Compared to non-repeat employers, repeat employers fare significantly better in arbitration in terms of win rates and award amounts. Additionally, repeat employer-arbitrator pairs experience
significantly better outcomes than non-repeat employer-arbitrator pairs, further
supporting the existence of a repeat player bias. Repeat employers and repeat employer-
arbitrator pairs, however, do have more arbitration experience than their respective
counterparts.

A perennial lack of data severely restricts the conclusions that can be drawn from
these findings. Quality of research would benefit immensely if more variables were
included in those required to be disclosed pursuant to Section 1281.96 of the Code of
Civil Procedure. In particular, variables indicating the merits of individual cases would
be ideal. Reporting strength of evidence against the claimant and defendant, respectively,
or reporting repeat offenses would solve many comparability problems that persist in the
current data. Realistically these variables may be too difficult or expensive to collect, so
more practical request would be for the law to simply require more in-depth variables on
defendant/claimant characteristics including the gender of the claimant, the size of the
employer, and previous dispute resolution processes utilized before arbitration.
Furthermore, knowing the specific type of employment dispute being arbitrated (i.e.,
discrimination, sexual harassment, wrongful termination, etc) would be helpful for
researchers as well. Whether it is exploring the repeat player bias, gender differences, or
differences between litigation and arbitration, having additional information on the nature
of cases would significantly improve the probative value of future findings.

This and future analysis of AAA and JAMS arbitration decisions would also
benefit from complete data from arbitration providers. Pursuant to the California statute,
arbitration providers must post information on select variables; however, frequency of
provider use and employee salary was consistently left unreported. Though JAMS
contained information on past use of JAMS arbitration by specific employers, AAA did not even report this variable that the law requires. Furthermore, only 4 percent of cases in JAMS and only 14 percent of cases in AAA reported salary levels of employees.

Arbitration providers ignore that the statute requires arbitrations involving employment disputes to be accompanied by the annual wage range of the employee involved. The arrant disregard for Section 1281.96 of the Code of Civil Procedure should drive policy makers to increase enforcement and penalties for non-compliance. The limited data that the act requires arbitration providers to disclose is valuable to researchers, but conclusions are limited when this information is incomplete.
Bibliography


