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Forced Arbitration In The Workplace: A Symposium

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Comparing Employment Discrimination Outcomes in Arbitration and Litigation: The High Costs of an Inexpensive Forum

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Forced Arbitration in the Workplace: A Symposium
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Does Mandatory Arbitration Affect Workers' Rights?

- U.S. Supreme Court:

“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.” (*Gilmer 1991*)



Rights Without a Remedy?

	Data	Win Rate	Mean Award
Clermont & Schwab (2004)	Federal Court (Universe)	33% (jury / bench combined)	\$889,182
Eisenberg & Hill (2003)	State Court (non-civil rights)	57%	\$462,307
Colvin (2011)	Arbitration (AAA)	21.4%	\$109,858



Are similar cases being adjudicated in arbitration and litigation?

- Are existing empirical studies making an **Apples** to **Oranges** comparison?
 - 1) Barriers to Entry
 - Expediency/Efficiency of arbitration may allow for lower value and less meritorious claims to be brought in arbitration
 - 2) Appellate Effect (“Filtering Effect”)
 - Arbitration may be adopted in conjunction with advanced human resource or alternative dispute resolution policies
 - Provides numerous opportunities to settle meritorious cases prior to filing
 - 3) Procedural Differences
 - Summary Judgment, common in civil litigation, is not prevalent in arbitration



Differences in outcomes are clear, but are cases similar?

Appellate Effects

- Employer Size

Procedural Differences

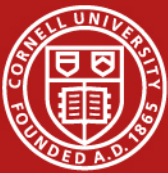
- Summary Judgment
- Forum

Barriers to Entry

- Salary Level

Case Characteristics

- Case Merit
- Alleged Discriminatory Act

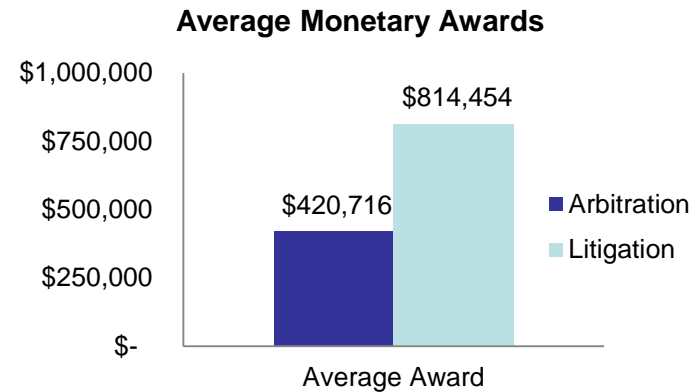
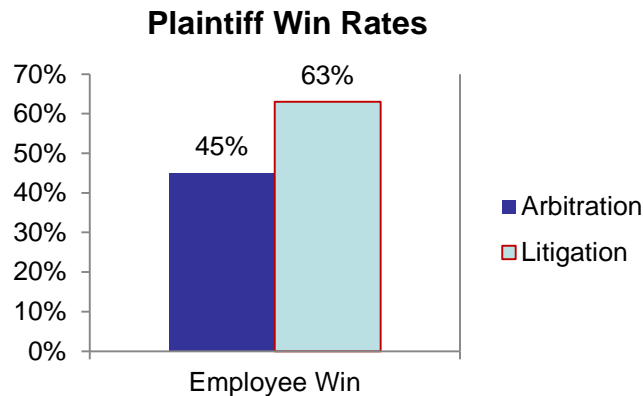


The Data

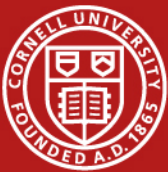
- 696 survey responses of National Employment Lawyers Association (NELA) Members
 - 37% response rate
- Respondents described 619 recent ***employment discrimination cases taken to verdict*** in:
 - Arbitration (28%)
 - Civil Litigation (72%)
- Analysis of California Employment Lawyers Association (CELA) is forthcoming



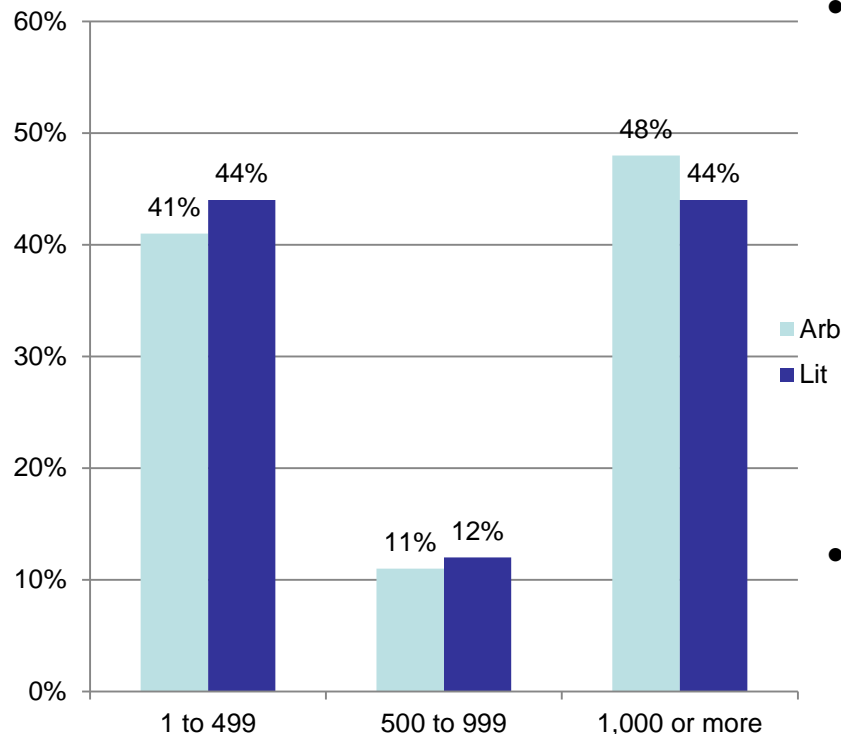
Overall Sample Statistics



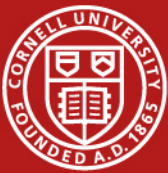
- On the surface, employee outcomes are starkly inferior in arbitration
 - 40% higher win rates in litigation
 - Average awards are twice as large in litigation



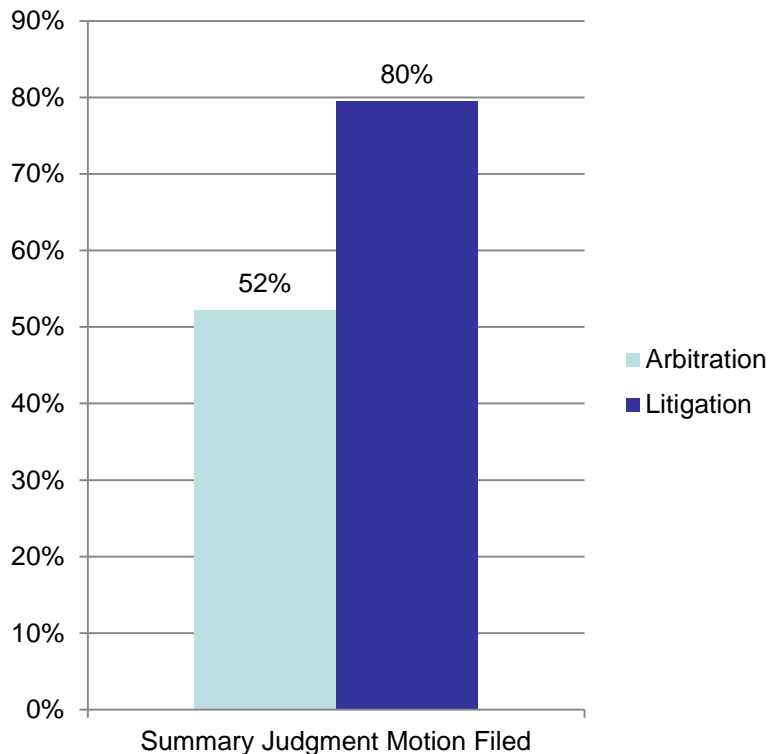
Employer Size



- Is there an appellate effect preceding arbitration?
 - Do established HR/ADR policies prevent or **filter meritorious discrimination claims**?
 - Strong, well-documented relationship between employer size and formality of personnel/HR policies (Pfeffer, 1977; Hirsch, 2008)
 - Also related to experience and greater resources (Gallanter, 1975)
- **No significant differences in size of defendant employer between arbitration and litigation**



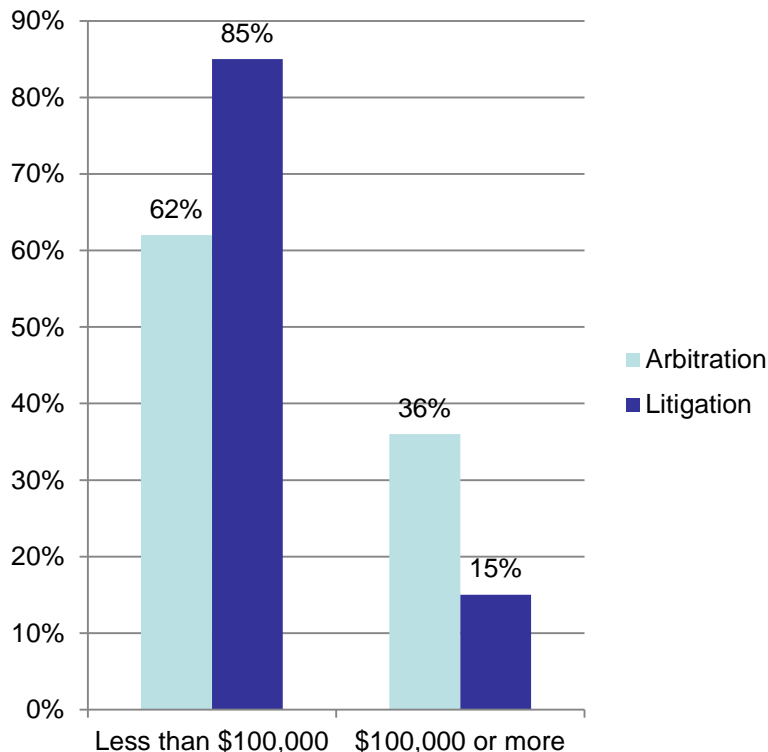
Summary Judgment



- Motions for summary judgment may explain differences in outcomes
 - Increased use of summary judgment in litigation may remove unmeritorious cases earlier in the process
- But, when restricting the comparison to ***only cases that survived a motion for summary judgment***, the differences in outcomes remain:
 - Win Rates: 43% arbitration v. 61% litigation
 - Awards (mean): \$322K arbitration v. \$815K litigation
- **No evidence that differences in summary judgment can explain differences in employee outcomes**



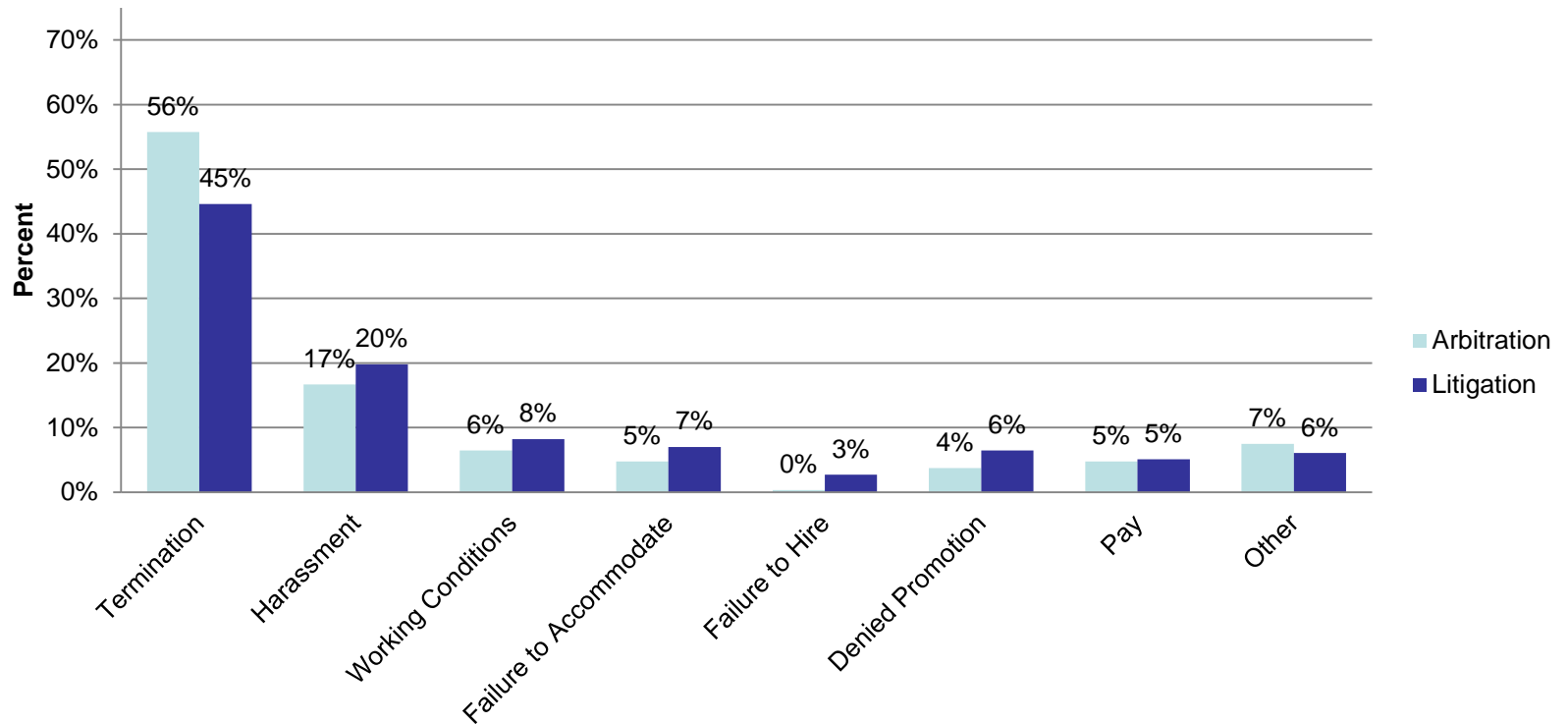
Employee Salary



- Arbitration is proclaimed to be a more accessible forum
 - Presence of low-value claims in arbitration may bias results
- Claims from low-salaried employees are **more likely in litigation verdicts** than arbitration verdicts
 - Arbitration may have an undeserved reputation for accessibility
- Given positive relationship between damages and salary, **we should expect outcomes to be superior in arbitration (...we don't, however)**

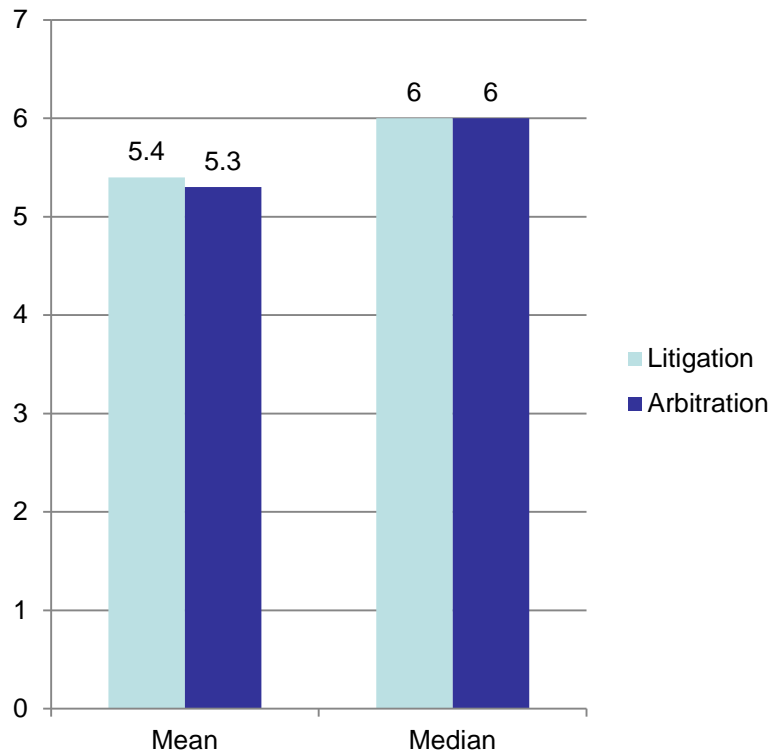


Alleged Discriminatory Actions





Case Merits



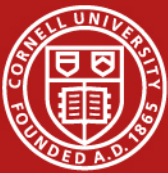
- Are cases heard in litigation more meritorious, on average, than those heard in arbitration?
- Attorneys responded to the following questions on a 7-point scale:
 - “This case was meritorious”
 - “There was a clear legal claim of harm, statutory violation, or breach of contract”
- **No significant differences in case merits**
- **Concerns over procedural differences, appellate effects, and lower barriers to entry are addressed when controlling for case merit.**



Regression Analysis

	Model 1: Employee Wins (Logit)		Model 2: Log Award Amount (OLS)		
	Odds Ratio	S.E.	Log Award Amount	$e^{\beta}-1$	Robust S.E.
Case Merit	2.375**	0.302	0.162	--	0.176
Arbitration Forum	0.41**	0.09	-0.43+	-0.35	0.24
Summary Judgment	0.76	0.16	0.05	0.05	0.27
Large Employer	0.918	0.168	0.430+	0.54	0.246
High Salary	1.103	0.259	.991**	1.69	0.231
<i>Action__</i>					
Termination	1.38	0.289	0.014	0.01	0.285
Harassment	1.48+	0.283	0.038	0.04	0.273
Working Conditions	0.89	0.276	0.428	0.53	0.292
Accommodations	0.78	0.230	2.166	7.72	1.387
Hiring	0.67	0.154	0.139	0.15	0.277
Promotion	0.75	0.483	-0.364	-0.31	0.319
Pay	1.93+	0.565	-0.186	-0.17	0.336
Other	1.01	2.651	0.938	1.56	0.553
Constant	0.019	0.014	10.897	54013.62	1.056
N	615		312		
R-squared	0.1187 (Psuedo)		0.077		

- Arbitration has a significant independent effect on employee outcomes
- Arbitration decreases the odds of an employee win by 59%
- Award amounts decrease by 35% in arbitration



Limitations

- Data include only cases brought to verdict by NELA members
 - Generalizability concerns
 - No information on settlements/dismissals
- Rely on self-reported data
 - Limited number of survey questions



Conclusions

- Outcomes in arbitration are **starkly inferior** to outcomes in litigation
- Differences in case characteristics **cannot explain** differences in outcomes
- Access to Justice and Segmentation concerns
 - Employees covered by arbitration clauses receive second-class justice
- Arbitration has an **undeserved reputation for accessibility**
 - Where are the low-value claims?