CHAPTER 4

FINAL AND BINDING, BUT APPEALABLE TO COURTS: EMPIRICAL EVIDENCE OF JUDICIAL REVIEW OF LABOR AND EMPLOYMENT ARBITRATION AWARDS

MICHAEL H. LEROY*
PETER FEUILLE**

The Paradox of Judicial Review of Labor and Employment Arbitration Awards

Private forms of workplace arbitration are more prevalent than ever. In unionized work settings, labor arbitration provides employers and unions with an indispensable method for adjusting their relationship. Until recently, most nonunion firms provided no arbitration for employment disputes.[1] In the past few years, however, many employers have adopted employment arbitration.[2]

This development has generated much more controversy than the labor-management model.[3] Critics charge that the newer

*Professor, Institute of Labor and Industrial Relations and College of Law, University of Illinois at Urbana-Champaign, Champaign, Illinois.

**Director and Professor, Institute of Labor and Industrial Relations, University of Illinois at Urbana-Champaign; Member, National Academy of Arbitrators, Champaign, Illinois.

[1]An estimate of the use of arbitration by nonunion employers as of 1990 appears in Lewin, *Grievance Procedures in Nonunion Workplaces: An Empirical Analysis of Usage, Dynamics, and Outcomes*, 66 Chi.-Kent L. Rev. 823, 824–25 (1990). *See also* Health, Education & Human Servs. Div., U.S. General Accounting Office, Pub. No. 95-150, Employment Discrimination—Most Private-Sector Employers Use Alternative Dispute Resolution (1995), *reproduced at* 1995 WL 488006 [hereinafter 1995 GAO Report] (survey of 2,000 businesses found that almost all firms with 100 or more employees used an alternative dispute resolution (ADR) method).

[2]*See Alternative Dispute Resolution: Most Large Employers Prefer ADR as Alternative to Litigation, Survey Says*, 1997 Daily Lab. Rep. (BNA) (May 14), No. 93: A-4 (surveying 530 Fortune 1,000 companies, this study found that 79% of employers use arbitration). *See also* Bickner et al., *Developments in Employment Arbitration*, 52 Disp. Resol. J. 8, 78 (1997) (reporting a massive increase in the use of arbitration in nonunion workplaces following the Supreme Court's 1991 decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 55 FEP Cases 1116 (1991)).

[3]*See Halligan v. Piper Jaffray, Inc.*, 148 F.3d 197, 202, 77 FEP Cases 182 (2d Cir. 1998) ("In the aftermath of *Gilmer* . . . mandatory binding arbitration of employment discrimination

model—which forces employees to forgo access to courts—is strongly biased in favor of employers.[4] On the other hand, employees face serious obstacles when they seek to adjudicate legal claims arising out of their employment. They may have difficulty obtaining counsel.[5] If they succeed in persuading an attorney to represent them in federal court, they face crowded dockets with concomitant delays and long odds of ever receiving a verdict on the merits of their claims.[6] In response, Congress has amended key employment discrimination laws and fostered private dispute resolution systems to encourage use of alternative dispute resolution (ADR) methods, including arbitration.[7]

Here we examine a paradox that inheres in workplace arbitration systems.[8] This method is supposed to provide disputants with a low cost alternative to courts, permit them to select the arbitrator,

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disputes as a condition of employment has caused increased controversy."), *cert. denied*, 526 U.S. 1034, 79 FEP Cases 512 (1999). Arbitration of individual employment rights has led to concerns that it (1) is usually imposed on employees; (2) precludes individuals from suing in court to protect their employment rights; (3) imposes unfair forum fees; (4) denies recovery for attorneys' fees; (5) offers arbitrators who are typically older white males who may be predisposed to rule in favor of employers, especially in race and sex discrimination cases; (6) fails to screen arbitrators adequately to determine their qualifications; and (7) is biased by the repeat player effect.

[4]*E.g.*, Gorman, *The Gilmer Decision and the Private Arbitration of Public-Law Disputes*, 1995 U. Ill. L. Rev. 635 (1995); Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow Dog Contracts of the 1990s*, 73 Denv. U. L. Rev. 1017 (1996).

[5]One survey of attorneys who represent plaintiffs in employment discrimination disputes found that respondents accepted 5% of the cases in which their legal services were requested. Howard, *Arbitrating Claims of Employment Discrimination*, 50 Disp. Resol. J. 40, 44 (1995).

[6]Statistical measures of this complex problem are reported by Gauvey, *ADR's Integration in the Federal Court System*, 34 Md. B. J. 36, 41 (2001), reporting that the rate of civil cases that go to trial in federal courts has steadily declined (8.4% in 1975, 6.5% in 1980, 4.7% in 1985, 4.2% in 1990, 3.5% in 1995, and 2.3% as of June 30, 2000). A study of employment discrimination lawsuits in the federal courts found that the proportion disposed of by trial declined from 9% in 1990 to 5% in 1998. Litras, *Bureau of Justice Statistics Report on Civil Rights, Complaints Filed in U.S. District Courts*, 2000 Daily Lab. Rep. (BNA) (Jan.10), No. 13: E-5. This study also found that the median amount of time for processing an employment discrimination case from filing to trial verdict was 18 months in 1998. *Id.*

[7]*See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, as amended, 42 U.S.C. §§12101, 12212; Civil Rights Act of 1991, Pub. L. No. 102-166, amending Title VII of the Civil Rights Act of 1964, 42 U.S.C. §1981. Both laws state: "Where appropriate . . . the use of alternative means of dispute resolution, including . . . arbitration, is encouraged to resolve disputes arising under this chapter." Two examples of recent ADR initiatives are the Civil Justice Reform Act, 28 U.S.C. §471 (authorizing more ADR programs to be administered by federal courts to alleviate problems with cost and delay); the Alternative Dispute Resolution Act of 1998, 28 U.S.C. §§651–658; and the Administrative Dispute Resolution Act, enacted in 1990, 5 U.S.C. §571(a) (all federal agencies to implement ADR policies for internal disputes).

[8]*E.g.*, Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 Hastings L.J. 1199 (2000). Although it is an earlier publication, Fiss, *Against Settlement*, 93 Yale L.J. 1073 (1984), remains the most influential and thoughtful article on this subject.

and adjudicate their cases quickly and efficiently.[9] To preserve these advantages, arbitrator awards should be final and binding. If a sore loser at arbitration succeeds in having a court vacate an award, this breaches the promise made by the disputants to abide by the arbitrator's ruling. This logic implies that courts should play no role in reviewing arbitration awards.

Imagine, however, that courts never reviewed an arbitrator's ruling, or that they carried out such perfunctory reviews that every appealed award was confirmed. The U.S. Supreme Court considered this possibility 41 years ago when it decided the *Steelworkers Trilogy*.[10] These decisions carved out narrow but vital grounds for courts to review the arbitration process in the labor-management domain. If arbitration lacks this external constraint, what prevents an arbitrator from exceeding his or her authority or imposing his or her own brand of industrial justice? What if the award fails to draw its essence from the agreement? If courts cannot vacate problematic awards, arbitrator misjudgments cannot be corrected. This, too, breaches the parties' agreement. Even if these contractual problems do not arise, an award can violate an important law or rule. Arbitration is above the law if courts cannot vacate awards that conflict with public policy.

These paradoxical concerns carry over into the arena of individual employment rights, with additional dilemmas for the reviewing courts. Arbitration of individual employment rights is in a much earlier stage of development than labor arbitration. Thus, the standards for reviewing these arbitration awards have yet to be

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[9] *See* Letter from Federal Mediation and Conciliation Service to Arbitrators and Customers (Re: Office of Arbitration Services Update), Feb. 2001 (copy on file with authors, reporting on measures of cost and efficiency from Oct. 1, 1999–Sept. 30, 2000). On average, Federal Mediation and Conciliation Service (FMCS) arbitrators charged a daily rate of $672, fees of $2,863.49, and expenses of $321.67. The average total charge to a union and employer was $3,185.16, which the parties typically split on an equal basis. The FMCS requires arbitrators to contact the parties within 14 days to set a hearing date. Regulations also require that arbitrators make awards no later than 60 days from the date of the closing of the record as determined by the arbitrator. For a comparison to individual employment arbitration, see *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1481 n.8, 72 FEP Cases 1775 (D.C. Cir. 1997) (estimating arbitrators' fees of $250–350 per hour and 15–40 hours of arbitrator time in an employment case, for total arbitrators' fees of $3,750 to $14,000). *See also Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 552, 84 FEP Cases 1358 (4th Cir. 2001) ("[T]he arbitration of disputes enables parties to avoid the costs associated with pursuing a judicial resolution of their grievances. By one estimate, litigating a typical employment dispute costs at least $50,000 and takes two and one-half years to resolve.").

[10] *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 46 LRRM 2414 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 46 LRRM 2416 (1960); *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 46 LRRM 2423 (1960).

promulgated in Supreme Court decisions like the *Steelworkers Trilogy*. Without such guidance, federal courts have applied statutory standards under the Federal Arbitration Act (FAA).[11] They have also developed nonstatutory standards to review awards, such as manifest disregard of the law.[12]

The dilemmas posed by these appealed employment arbitration awards are more complicated because they often result from a very different bargain. In the labor-management realm, unions seek grievance arbitration, and employers are free to take it, leave it, or negotiate over it.[13] In the nonunion setting, employers often impose arbitration on their employees to avoid expensive liability for discrimination.[14] Thus, agreements to arbitrate individual employment rights are sometimes adhesive.[15] They may also institutionalize bias or other serious problems in the selection of arbitrators.[16] Unlike the federal judiciary, where presidential appointments are consciously made to reflect diversity in American society, the pool of arbitrators available to hear employment discrimination cases is strikingly homogeneous.[17] Thus, if courts rubber-stamp every award challenged under this system, the worst tendencies of this dispute resolution process never can be curbed.

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[11]Ch. 213, 43 Stat. 883 (1925) (codified as amended under 9 U.S.C. §1).

[12]*See Montes v. Shearson Lehman Bros., Inc.*, 128 F.3d 1456, 4 WH Cases 2d 385 (11th Cir. 1997). The most common nonstatutory standard is manifest disregard of the law. For a more complete discussion, *see* Note, *Vacatur of Commercial Arbitration Awards in Federal Court: Contemplating the Use and Utility of the "Manifest Disregard" of the Law Standard*, 27 Ind. L. Rev. 241 (1993).

[13]*E.g.*, *Lehigh Portland Cement Co. v. Cement, Lime, Gypsum, & Allied Workers Div.*, 849 F.2d 820, 826, 128 LRRM 2766 (3d Cir. 1988).

[14]*See* 1995 GAO Report, *supra* note 1. This report states that private firms use ADR systems because "almost any system is quicker, cheaper, and less harrowing than going to court."

[15]*Armendariz v. Foundation Health Psychcare Servs., Inc.*, 99 Cal. Rptr. 2d 745, 768, 83 FEP Cases 1172 (Cal. 2000) (holding that a mandatory employment arbitration agreement was adhesive and unconscionable: "It was imposed on employees as a condition of employment and there was no opportunity to negotiate . . . . [T]he economic pressure exerted by employers on all but the most sought-after employees may be particularly acute, for the arbitration agreement stands between the employee and necessary employment, and few employees are in a position to refuse a job because of an arbitration requirement.").

[16]*E.g.*, U.S. Government Accounting Office, Procedures for Updating Arbitrator Disclosure Information, 2000 WL 1869538 (Nov. 9, 2000).

[17]Empirical research by Tobias, *Judicial Selection at the Clinton Administration's End*, 19 Law & Ineq. 159, 167 (2001), showed that in 1994, President Clinton named 29 women (29%) and 37 minorities (37%) out of 101 judges. The push to increase diversity on the federal bench is so powerful that even President George W. Bush gave this significant consideration in announcing his first group of federal judges. Among these 11 appointees, he nominated two African-Americans, one Hispanic, and one woman. Harwood & Greenberger, *Bush's Judicial Picks Signal the Beginning of Battle for Courts*, Wall St. J., May 10, 2001, at A-1. *Compare* Health, Education & Human Servs. Div., U.S. General Accounting Office, Pub. No. 94-17, Employment Discrimination—How Registered Representatives Fare in Discrimination Disputes (1994), *reproduced at* 1994 WL 836270 [hereinafter 1994 GAO Report] (in 1992, the typical New York Stock Exchange arbitrator was a white male and 60 years of age; only 11% were women, and less than 1% were African-American).

Origins of Judicial Review of Workplace Arbitration

By now, the Supreme Court's development of standards for court review of labor arbitration awards is well known.[18] Because we present new empirical research findings based on nearly 400 federal court decisions, we do not address this historical background. Instead, in this section we highlight developments that occurred during the 2000–2001 term of the U.S. Supreme Court.[19] The proportion of these cases to the Court's annual case load suggests that the justices take an unusual interest in workplace arbitration.[20]

Today the standards for judicial review of labor arbitration awards are almost entirely settled—certainly there are no new *Trilogy* issues for the Court to decide. The remaining contention focuses primarily on the public policy exception to award confirmation.

Late in 2000 the Court returned for the third time to the public policy exception in *Eastern Associated Coal Corp. v. United Mine Workers*.[21] Twice, a coal company fired an employee after finding that he used marijuana while driving heavy machinery on a public highway. Two separate arbitration awards reinstated him, but with restrictions. The company refused to comply with the second award, contending that it violated the Omnibus Transportation Employee Testing Act of 1991,[22] which provides that "the greatest efforts must be expended to eliminate the . . . use of illegal drugs . . . by those individuals who are involved in [safety-sensitive positions, including] operation of . . . trucks."[23] The Supreme Court rejected this argument because the Act also favors rehabilitation of drug users, and no rule expressly prohibits a drug offender from being employed as a truck driver.

In the same vein, the Court renewed its admonition to all federal courts to refrain from second-guessing fact findings made by

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[18]For an excellent review, see St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at* Enterprise Wheel *and Its Progeny*, 75 Mich. L. Rev. 1137 (1977).

[19]*Eastern Associated Coal Corp. v. Mine Workers (UMW) Dist. 17*, 531 U.S. 57, 165 LRRM 2865 (2000); *Adams v. Circuit City Stores, Inc.*, 121 S.Ct. 1302, 85 FEP Cases 266 (2001); *Major League Baseball Players Ass'n v. Garvey*, 121 S.Ct. 1724, 167 LRRM 2134 (2001).

[20]For a comparison, see Greenberger & Calmes, *Next President Likely to Tip Balance of Supreme Court*, Wall St. J., Oct. 2, 2000, at A-36, 2000 WL-WSJ 26611552, reporting that the Supreme Court decided only 73 cases in its 1999–2000 term.

[21]531 U.S. 57, 165 LRRM 2865 (2000). Previous cases were *W.R. Grace & Co. v. Rubber Workers Local 759*, 461 U.S. 757, 113 LRRM 2641, 31 FEP Cases 1409 (1983), and *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 126 LRRM 3113 (1987).

[22]Pub. L. No. 102-143, 105 Stat. 953 (1991).

[23]*Eastern*, 531 U.S. at 63 (citing Pub. L. No. 102-43, §2(3)).

arbitrators. In *Garvey v. Roberts*,[24] the Ninth Circuit rejected an arbitrator's factual findings and then resolved the merits of the parties' dispute instead of remanding the case for further arbitration proceedings.[25] An annoyed Supreme Court upbraided the appeals court, stating: "We recently reiterated that if an arbitrator is even arguably construing or applying the contract and acting within the scope of his authority, the fact that a court is convinced he committed serious error does not suffice to overturn his decision."[26] In a revealing passage, where the justices deemed the appellate court's ruling "nothing short of baffling,"[27] the Court pointedly repeated itself, declaring: "But again, established law ordinarily precludes a court from resolving the merits of the parties' dispute on the basis of its own factual determinations, no matter how erroneous the arbitrator's decision."[28]

Turning to the nonunion form of workplace arbitration, the Supreme Court has regulated only the strength of the employer-imposed requirement to arbitrate. This is called mandatory or compulsory arbitration, because employees are required as a condition of employment to agree to arbitrate an employment dispute and waive their right to sue in court. In *Gilmer v. Interstate/Johnson Lane Corp.*,[29] the Court ruled that the FAA applied to the agreement of a securities broker. This meant that Robert Gilmer, who sued his former employer in federal district court on an age

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[24]203 F.3d 580, 163 LRRM 2449 (9th Cir. 2000).

[25]The underlying dispute involved a grievance by the former star first baseman, Steve Garvey, alleging that Ballard Smith, CEO of the San Diego Padres, colluded with other baseball executives to deny him a new contract or a contract extension. Garvey presented a June 1996 letter from Smith stating that, before the end of the 1985 season, Smith offered to extend Garvey's contract through the 1989 season, but that the Padres refused to negotiate with Garvey thereafter because of collusion. The arbitrator did not find this letter credible, however, because of its "stark contradictions" with Smith's testimony at an earlier hearing. This factual determination led the arbitrator to deny Garvey's grievance for $3 million. *Id.*

[26]*Major League Baseball Players Ass'n v. Garvey*, 121 S.Ct. 1724, 1728, 167 LRRM 2134 (2001) (internal quotes omitted).

[27]*Id.* at 1728. In a further rebuke, the Court observed that "the Court of Appeals here recited these principles, but . . . it overturned the arbitrator's decision because it disagreed with the arbitrator's factual findings, particularly those with respect to credibility." The Ninth Circuit said it would have credited Smith's 1996 letter, and it concluded that the arbitrator's contrary conclusion was "irrational" and "bizarre." *Id.*

[28]*Id.* at 1729. Repeating its guidance in *Misco*, the Court stated again: "When an arbitrator resolves disputes regarding the application of a contract, and no dishonesty is alleged, the arbitrator's 'improvident, even silly, factfinding' does not provide a basis for a reviewing court to refuse to enforce the award." *Id.*

[29]500 U.S. 20, 55 FEP Cases 1116 (1991).

discrimination claim under the Age Discrimination in Employment Act (ADEA),[30] was compelled to arbitrate his claim.[31]

Notably, the Supreme Court limited its holding in *Gilmer*. Several amici curiae in support of Gilmer wanted a broader ruling from the Court, that most arbitration clauses in employment agreements are not covered by the FAA. They contended that the FAA's exclusion section, enacted in 1925 and consisting of "seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce,"[32] was meant to exclude all employment contracts. According to them, this was Congress's way of saying in 1925 that the FAA is a commercial and not an employment law. The majority refused to rule directly on this point.[33] Because the Court avoided this issue, lower courts have become immersed in it.[34]

But the majority decided enough of this issue to give many employers the impression that arbitration clauses in their employment contracts are enforceable. This was accomplished when the majority wrote that "we choose to follow the plain language of the FAA and . . . therefore hold that § 1's exclusionary clause does not apply to Gilmer's arbitration agreement."[35] Added to this, the Court emphatically rejected Gilmer's argument that an arbitration agreement could not result in a waiver of an individual's access to a judicial forum.[36] Because Gilmer did not prove that Congress intended to prevent arbitration of age discrimination claims, the majority reasoned that an employer and employee could agree to private adjudication of these claims.[37]

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[30]29 U.S.C. §§621–634.

[31]500 U.S. at 23.

[32]*Id.* at 25 n.2.

[33]*Id.* at 25 (stating that "*Gilmer*, however, did not raise the issue in the courts below, it was not addressed there, and it was not among the questions presented in the petition for certiorari. In any event, it would be inappropriate to address the scope of the § 1 exclusion because the arbitration clause being enforced here is not contained in a contract of employment.").

[34]The majority forced this question on lower courts when it said that "we leave for another day the issue raised by amici curiae." *Id.*

[35]*Id.*

[36]The majority based this conclusion on the fact that the Court had ruled in earlier cases involving arbitration agreements that legal claims arising under a variety of federal statutes were to be arbitrated rather than litigated in court. *Id.* at 26.

[37]The majority said, "we note that the burden is on Gilmer to show that Congress intended to preclude a waiver of a judicial forum for ADEA claims." *Id.* at 26. The Court ultimately concluded that Gilmer failed to prove that Congress intended to prohibit the arbitration of these claims. *Id.* at 35.

Although *Gilmer* only dealt with the arbitrability of an ADEA claim, the majority opinion gave some hint about the standard that courts should apply in reviewing this kind of arbitration award. Gilmer contended that "judicial review of arbitration decisions is too limited."[38] The majority rejected his argument by noting that, "although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute at issue."[39]

Following *Gilmer*, many employers adopted employment arbitration programs.[40] In addition, most federal circuits extended *Gilmer* to arbitration agreements involving other occupations and to other federal antidiscrimination statutes.[41] The Ninth Circuit took a solitary and defiant stance against this trend in *Craft v. Campbell Soup Co.*[42] To resolve this schism, the Court granted certiorari in *Circuit City Stores, Inc. v. Adams.*[43]

In *Circuit City*, a sales clerk who had signed an employment arbitration agreement on his employment application sued the company in a California state court and alleged a variety of discrimination violations. Circuit City petitioned to remove the matter to federal court, under jurisdiction provided by the FAA, to enforce the arbitration agreement. The federal district court granted the company's motion, and Adams appealed. While his appeal was pending, the Ninth Circuit issued *Craft*. The expansive holding of *Craft*[44] divested federal courts in the Ninth Circuit of jurisdiction to enforce employment arbitration contracts.

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[38] *Id.* at 32 n.4.

[39] *Id.*

[40] 1994 GAO Report, *supra* note 17.

[41] *See McWilliams v. Logicon, Inc.*, 143 F.3d 573, 576, 8 AD Cases 225 (10th Cir. 1998); *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 274, 3 WH Cases 2d 1697 (4th Cir.1997); *Pryner v. Tractor Supply Co.*, 109 F.3d 354, 356–58, 154 LRRM 2806, 73 FEP Cases 615 (7th Cir.), *cert. denied*, 522 U.S. 912, 157 LRRM 2960, 74 FEP Cases 1792 (1997); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1470–72, 72 FEP Cases 1775 (D.C. Cir. 1997); *Rojas v. TK Communications, Inc.*, 87 F.3d 745, 747–48, 71 FEP Cases 664 (5th Cir. 1996); *Asplundh Tree Expert Co. v. Bates*, 71 F.3d 592, 596–601 (6th Cir. 1995).

[42] 177 F.3d 1083, 161 LRRM 2403 (9th Cir. 1999).

[43] 121 S.Ct. 1302, 85 FEP Cases 266 (2001).

[44] *Craft*, 177 F.3d at 1094 (stating that "we hold that the FAA does not apply to labor or employment contracts. . . . [W]e have no jurisdiction over Campbell Soup's interlocutory appeal and this appeal is hereby dismissed."). *Craft* differed from decisions of other circuits by examining the legislative history of the FAA. *Id.* at 1089–91. This history has two main features. When Congress enacted the FAA in 1925, it intended that the law apply only to commercial transactions. *Id.* at 1090. In addition, at the time Congress exempted seamen and rail employees, this was the full extent of its extension of commerce powers. Interpreting this exclusion in light of the near vacuum of federal regulation of private-sector employment in 1925, *Craft* reasoned that, as federal regulation grew exponentially in the 1930s and later, the exclusion of employment contracts from the FAA grew commensurately. *Id.* at 1086–87.

In deciding to review *Circuit City*, the Supreme Court addressed the question reserved by the *Gilmer* majority: Does the FAA's exclusion of employment contracts in section 1 of "seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce" mean that all other employee contracts are covered by the FAA?

The *Circuit City* majority took a simple approach in ruling that the FAA's exclusionary language is limited to the occupations expressly enumerated in section 1. Five justices reasoned that if this exclusion was so broad as to cover all employment contracts, there would be no point in its specific reference to seamen and railroad employees.[45] The majority also applied the canon of ejusdem generis to interpret the breadth of section 1's reference to "any other class of workers engaged in . . . interstate commerce."[46] The first part of this analysis construed the term "any other class of workers" to mean that "this . . . residual clause should be read to give effect to the terms 'seamen' and 'railroad employees,' and should itself be controlled and defined by reference to the enumerated categories of workers which are recited just before it . . . . "[47] In treating the remaining ambiguity in section 1—"engaged in . . . interstate commerce"—the majority responded indirectly to the Ninth Circuit's theory of variable federal jurisdiction over private-sector employment contracts.[48] In dissent, Justice Stevens reasoned that the majority improperly ignored congressional consideration

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[45] *See Circuit City*, 121 S.Ct. at 1307, stating: "This line of reasoning proves too much, for it would make the § 1 exclusion provision superfluous." The Court continued: "If all contracts of employment are beyond the scope of the Act under the § 2 coverage provision, the separate exemption for 'contracts of employment of seamen, railroad employees, or any other class of workers engaged in . . . interstate commerce' would be pointless." *Id.*

[46] *Id.*, stating: "The wording of § 1 calls for the application of the maxim ejusdem generis, the statutory canon that '[w]here general words follow specific words in a statutory enumeration, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."

[47] *Id.* at 1309.

[48] The majority declined to offer their own legislative history of the FAA. Instead, they tediously analyzed the difference between statutes that say "affecting commerce," "involving commerce," and "engaged in commerce." *Id.* Thus, they drew a negative inference from the FAA's use of the words "engaged in commerce":

> Unlike those phrases, however, the general words "in commerce" and the specific phrase "engaged in commerce" are understood to have a more limited reach. In *Allied-Bruce* [*Terminix Cos. v. Dobson*, 513 U.S. 265, 277 (1995)] itself the Court said the words "in commerce" are "often-found words of art" that we have not read as expressing congressional intent to regulate to the outer limits of authority under the Commerce Clause.

Id.

of the unequal bargaining power between employers and employees when the FAA was enacted.[49]

Summarizing key developments in the Supreme Court's treatment of workplace arbitration since the *Trilogy*, the labor arbitration judicial review model is at a mature stage where little future development should be expected. This model allows courts to vacate arbitrator rulings, but only in very limited circumstances. In contrast, the employment arbitration review model is 40 years behind this jurisprudence. *Circuit City* merely decided the threshold issue of judicial enforcement of agreements to arbitrate employment disputes. Moreover, the Court intends to add its regulatory imprint in this area by deciding whether an arbitration agreement precludes enforcement of employment discrimination law by administrative agencies.[50]

Research Literature and Methods

The autonomy of the labor arbitration system has been investigated since the *Steelworkers Trilogy*.[51] After more than a decade of experience with *Trilogy* progeny, the National Academy of Arbitrators (NAA) concluded that courts achieved a proper balance in ordering enforcement of labor arbitration agreements[52] and confirming arbitration awards.[53] As time passed, however, more courts

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[49]He reasoned that if the majority had been more honest about confronting this history, they could not have avoided observing that "the potential disparity in bargaining power between individual employees and large employers was the source of organized labor's opposition to the Act, which it feared would require courts to enforce unfair employment contracts." *Id.* at 1318.

[50]*EEOC v. Waffle House, Inc.*, 193 F.3d 805, 9 AD Cases 1313 (4th Cir. 1999), *cert. granted*, 121 S.Ct. 1401 (2001).

[51]*See* Jalet, *Judicial Review of Arbitration: The Judicial Attitude*, 45 Cornell L.Q. 519 (1960); Smith & Jones, *The Impact of the Emerging Federal Law of Grievance Arbitration on Judges, Arbitrators, and Parties*, 52 Va. L. Rev. 831 (1966).

[52]In the 1970s and early 1980s, the Academy concluded that courts practiced deference in accordance with the *Steelworkers Trilogy*. *See* Kurtz, *Arbitration and Federal Rights Under Collective Bargaining Agreements*, in Arbitration—1977, Proceedings of the 30th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1978), 260, 288, stating that "in general, if the arbitration award is not [in] manifest disregard of the contract and draws its essence from the contract, it will be enforced by the courts in routine fashion." The courts were applauded for being "very sensitive about not usurping the role of the arbitrator in reaching a final and binding decision of a contract dispute." *Id.* at 309.

[53]More recently, see, e.g., Jones, *A Meditation on Labor Arbitration and "His Own Brand of Industrial Justice,"* in Arbitration 1982: Conduct of the Hearing, Proceedings of the 35th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1983), 1, 6, concluding that the "courts of appeal have . . . interpret[ed] the 'essence' rationale in such a manner as to implement the determined effort of the Supreme Court to surround labor arbitration and the parties' collective bargaining agreement with the strongest possible measure of insulation from the displacing intrusions of courts."

vacated labor arbitrator rulings. This prompted increasing concern during the 1980s that courts interfered too much.[54] Today, this research literature offers a discouraging assessment of federal court adherence to the *Trilogy*. Professors Theodore St. Antoine[55] and David Feller[56] represent this view.

This criticism is based on textual analysis of selected appellate court decisions that are perceived as influencing lower courts. There is sound logic in this kind of analysis, but it also raises questions. First, how much are district courts influenced by these appellate decisions? This is fair to ask because vacatur cases are fact-specific. Thus, the precedential value of appellate decisions may be

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[54]One of the earliest expressions of concern about the decline of judicial restraint in administering the arbitration process is Feller, *The Coming End of Arbitration's Golden Age*, in Arbitration—1976, Proceedings of the 29th Annual Meeting, National Academy of Arbitrators, eds. Dennis & Somers (BNA Books 1976), 97. This theme was amplified in Robins, *The Presidential Address: Threats to Arbitration*, in Arbitration Issues for the 1980s, Proceedings of the 34th Annual Meeting, National Academy of Arbitrators, eds. Stern & Dennis (BNA Books 1982), 1. More recently, see Gottesman, *How the Courts and the NLRB View Arbitrators' Awards*, in Arbitration 1985: Law and Practice, Proceedings of the 38th Annual Meeting, National Academy of Arbitrators, ed. Gershenfeld (BNA Books 1986), 169; Reinhardt, *Arbitration and the Courts: Is the Honeymoon Over?* in Arbitration 1987: The Academy at Forty, Proceedings of the 40th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1988), 25; Vetter, *Enforceability of Awards: Public Policy Post–Misco*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1989), 75; Gottesman, *Enforceability of Awards: A Union Viewpoint*, in Arbitration 1988: Emerging Issues for the 1990s, Proceedings of the 41st Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books 1989), 88. *See also* Gould IV, *Judicial Review of Labor Arbitration Awards—Thirty Years of the* Steelworkers Trilogy: *The Aftermath of* AT & T *and* Misco, 64 Notre Dame L. Rev. 464 (1989).

[55]St. Antoine, *The Changing Role of Labor Arbitration*, 76 Ind. L.J. 83, 102 (2001):

> In the halcyon days following the Second World War, labor arbitrators operated in a largely self-contained domain where the collective bargaining agreement reigned almost supreme. External civil law in the form of statutes and common-law court decisions seldom intruded. Then, as a spate of civil rights statutes and other laws aimed at protecting individual employee rights in the workplace poured forth in the 1960s and 1970s, arbitrators construing labor contracts were drawn ineluctably into the interpretation and application of this overlapping legislation. That in turn led to heightened judicial scrutiny of arbitral awards in both union and nonunion contexts.
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> . . .
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> Not surprisingly, increased judicial review of awards dealing with statutes whetted many courts' appetites for going further and taking a closer look at the area previously left mostly to itself—awards concerning collective agreements. At least that was true of those awards which in the courts' eyes might be seen to contravene some sort of "public policy."

[56]Feller, *Putting Gilmer Where it Belongs: The FAA's Labor Exemption*, 18 Hofstra Lab. & Emp. L.J. 253, 282 (2000):

> Labor arbitration was . . . put on a higher plane than arbitration of commercial disputes under the FAA. Yet, as a result of the elevation of FAA arbitration in later years and the misapplication of *Enterprise Wheel*, when it comes to enforcement of awards, the reverse is now true. Labor arbitration is given less respect than commercial arbitration.

limited. Second, federal court critics rarely use a quantitative approach, but their conclusions are phrased in statistical terms, such as trends and tendencies. What are the aggregate behaviors of courts that review labor and employment arbitration awards?

We use a different approach. We examine the outcome of all reported court decisions involving an appealed workplace arbitration award. Using keyword searches on Westlaw's Internet service, we generated an initial list of decisions that were likely to meet predetermined criteria for inclusion in a research database.[57] Three criteria were used: the decision (1) was made either by a federal district or circuit court[58] pursuant to some form of federal jurisdiction,[59] (2) involved award confirmation or vacatur, and (3) had a private-sector employer and union or individual employee.[60] A decision was not included if it failed to meet any of these criteria. The most common case that was excluded involved only prearbitration disputes. By ruling on whether a workplace dispute is arbitrable, these decisions involved another facet of judicial review of workplace dispute resolution. They did not present, however, the issue of court review of the arbitrator's ruling.

The date of decision also determined inclusion in the database. In a previously published study, we analyzed judicial review of labor arbitration awards from June 1960 through late June 1991.[61] For labor-management cases, we began our current research with the

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[57]For the labor-management database, we used the keyword search "TRILOGY & ARBITRATOR & AWARD & VACAT! OR CONFIRM! & UNION." For the individual employment rights database, we used "GILMER & ARBITRATOR & AWARD & VACAT! OR CONFIRM!"

[58]Therefore, our primary search was conducted in the ALLFEDS database. However, when we extended our search by keyciting *Enterprise Wheel*, some state cases reviewing arbitration awards appeared in our list. Because these decisions were made by state courts, they were excluded from the sample. *E.g., City of Chicago v. Water Pipe Extension, Bureau of Engineering Laborers' Local No. 1092*, 707 N.E.2d 257, 160 LRRM 1092 (Ill. App. Ct. 1999).

[59]The labor-management cases are reviewed under §301 of the Taft-Hartley Act, 29 U.S.C. §185, whereas individual employment rights cases are typically reviewed under the FAA, 9 U.S.C. §§1–16. In the latter group, some cases arise under other jurisdictional grounds. *E.g., McNulty v. Prudential-Bach Secs., Inc.*, 871 F. Supp. 567 (S.D.N.Y. 1994), arising under the Jurors' Act, 28 U.S.C. §1875.

[60]*E.g., City of Chicago v. Water Pipe Extension, Bureau of Engineering Laborers' Local No. 1092*, 707 N.E.2d 257, 160 LRRM 1092 (Ill. App. Ct. 1999).

[61]LeRoy & Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How Federal Courts Respond*, 13 Indus. Rel. L.J. 78 (1991). This research analyzed 1,148 federal district court decisions and 480 federal circuit court decisions that resulted in a court order that compelled or denied arbitration or enforced or vacated an arbitrator's award in whole or in part. These decisions were published after June 23, 1960, and before July 1, 1991. While this article was being edited, four circuit and four district court decisions involving public policy challenges to labor arbitration awards were published and were therefore added to our database.

endpoint in our earlier database. This allowed us to compare federal court behavior during the 1990s and the early part of the following decade with an earlier period. Thus, our search included cases decided from July 1991 through late March 2001.

For the new database on individual employment rights, we used May 14, 1991 as a cutoff. This was done to restrict our search to cases decided after *Gilmer*. During our search, we found one pre-*Gilmer* decision that reviewed an award, and we included it because it was indistinguishable from post-*Gilmer* decisions.[62]

We expanded our search for cases that met the inclusion criteria. We added cases that were cited in these decisions if they met the parameters for inclusion and did not duplicate our initial search. Next, we keycited each decision in our list to add appropriate but overlooked cases.

Finally, we keycited *Steelworkers v. Enterprise Wheel & Car Corp*.[63]—the *Trilogy* case that set forth standards for judicial review of labor arbitration awards—as well as *Gilmer* decisions to ensure that our other search methods did not overlook other appropriate cases. All three procedures added unduplicated cases. Although the samples may not contain the universe of reported arbitration award cases, they were produced by a thorough research methodology.

For each qualifying case, we used a lengthy survey to classify information about the arbitration facts, reasons for the losing party's appeal to the courts, the court's ruling, and the basis for the order.[64] This information was coded into variables (e.g., vacatur or confirmation of the award, federal circuit in which a court made a decision, etc.). Finally, we analyzed these data using a statistical program for the social sciences (SPSS).

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[62]*Booth v. Hume Publ'g, Inc.*, 902 F.2d 925 (11th Cir. 1990). *Booth* was decided on June 5, 1990; *Gilmer* was decided on May 13, 1991. Although we used *Gilmer* as cutoff for nonunion cases in the same way we used the date of the *Steelworkers Trilogy* in our 1991 study, we also realized that *Gilmer* did not set standards for reviewing arbitration awards. Because the Supreme Court has not yet decided a *Trilogy* analog for judicial review of arbitration awards that result from this process, there was no good reason to exclude this pre-*Gilmer* decision.

[63]363 U.S. 593, 46 LRRM 2423 (1960).

[64]Our information was limited to the published facts and reasoning in each decision. Thus, we had no access to the parties' contract, the arbitration award (except as summarized by the court decision), any evidence adduced at arbitration, or the record produced in district or circuit court. This prevents us from offering our own normative judgments of any arbitration decisions or court rulings (in other words, we are unable to conclude how justified or ill-advised these specific decisions and rulings were). This background is important because it explains our inability to judge whether a particular court decision is consistent or inconsistent with the *Trilogy* standards.

Research Findings

The first part of our analysis examines the labor-management model. Table 1 summarizes 1,244 district court decisions and 543 appellate court decisions from 1960–2001:

1. Courts have confirmed awards at a consistent rate throughout this 41-year history. District courts confirmed 71.8 percent of the 1,008 cases decided from 1960–1991, and 70.3 percent of the 232 decisions in the past decade.[65] Appellate courts behaved about the same, confirming 70.5 percent of awards from 1960–1991, and 66.4 percent in the recent period.
2. Comparing recent to earlier decisions, the award confirmation rate dropped substantially in district courts in the Fourth and Eighth Circuits but rose in the Ninth Circuit. Although federal courts in the aggregate are consistent in their tendency to confirm awards, their behavior varies by region. This is most evident among district courts in circuits with large subsamples. In the past decade the confirmation rate for these courts increased in the Ninth Circuit by 13 percent. Although the Tenth Circuit had only seven award confirmation cases from 1991–2001, it confirmed all of them. Even adjusting for this very small sample size, the 45.8-percent increase in the confirmation rate by courts in this circuit is noteworthy.

   Conversely, the confirmation rate dropped by 15.5 and 19.2 percent in the Fourth and Eighth Circuits, respectively. Meanwhile, district courts in two circuits where a high number of cases occur had fairly constant rates over these periods. Confirmation rates for courts in the Second and Third Circuits increased by 4.7 and 4.2 percent, respectively.
3. Awards that were challenged in federal courts almost always ruled in favor of a union. Unions prevailed in 84.9 percent of the arbitration awards (see Table 2).[66]
4. During the more recent period surveyed, confirmation rates varied only moderately by the type of issue on which awards were challenged (see Table 2). The most effective argument for contesting an award was that it failed to draw its essence from

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[65] *See* last two rows in Table 1.

[66] Awards in 197 of the 232 underlying arbitrations ruled in favor of unions. Unions prevailed in 80% of the awards in our earlier study. *See* Feuille & LeRoy, *Grievance Arbitration Appeals in the Federal Courts: Facts and Figures*, 45 Arb. J. 35, 42 (1990).

Table 1. Federal Court Confirmation of Labor Arbitration Awards

Court Confirms Award (by Circuit)	*Union Wins Award*	*District Decisions*	*Appellate Decisions*
First (Maine, N.H., Mass., R.I.)			
July 1991–March 2001	6/7(83.3%)	6/7 (85.7%)	4/5 (80.0%)
June 1960–June 1991		69/94(73.4%)	20/29 (69.0%)
Second (N.Y., Conn., Vt.)			
July 1991–March 2001	33/41(80.5%)	35/41(85.7%)	8/8 (100%)
June 1960–June 1991		128/158 (81%)	20/32 (62.5%)
Third (Pa., N.J., Del.)			
July 1991–March 2001	22/25 (88%)	21/25 (84%)	3/7 (42.9%)
June 1960–June 1991		118/148(79.8%)	32/39 (82.1%)
Fourth (Md., W. Va., Va., N.C., S.C.)			
July 1991–March 2001	17/20 (88.2%)	9/20 (45%)	9/13 (69.2%)
June 1960–June 1991		23/38 (60.5%)	8/13 (61.5%)
Fifth (Miss., La., Tex.)			
July 1991–March 2001	8/10 (80.0%)	7/10 (70.0%)	2/5 (40.0%)
June 1960–June 1991		57/96 (59.4%)	41/55 (74.5%)
Sixth (Mich., Ohio, Ky., Tenn.)			
July 1991–March 2001	41/47 (87.2%)	28/47 (59.5%)	21/31 (67.7%)
June 1960–June 1991		80/111 (72.1%)	39/62 (62.9%)
Seventh (Ill., Ind., Wis.)			
July 1991–March 2001	13/15 (86.7%)	12/15 (80%)	4/5 (80%)
June 1960–June 1991		74/101 (73.3%)	30/43 (69.8%)
Eighth (Ark., Mo., Iowa, Minn., N.D., S.D., Neb.)			
July 1991–March 2001	21/24 (87%)	14/24 (58.4%)	9/19 (47.4%)
June 1960–June 1991		59/76 (77.6%)	35/46 (76.1%)
Ninth (Cal., Alaska, Haw., Or., Wash., Idaho, Mont., Nev., Ariz.)			
July 1991–March 2001	15/20 (75.0%)	15/20 (75.0%)	12/15 (80.0%)
June 1960–June 1991		67/108 (62.0%)	47/66 (71.2%)
Tenth (Colo., Wyo., Utah, Kan., Okla., N.M.)			
July 1991–March 2001	6/7 (85.7%)	7/7 (100%)	2/2 (100%)
June 1960–June 1991		13/24 (54.2%)	11/17 (64.7%)
Eleventh (Ga., Fla., Ala.)			
July 1991–March 2001	11/11 (100%)	5/11 (45.5%)	2/5 (40.0%)
June 1960–June 1991		9/19 (47.4%)	6/11 (54.5%)
District of Columbia			
1991–2000	4/5 (80.0%)	4/5 (80.0%)	1/1 (100%)
June 1960–June 1991		27/35 (77.1%)	11/14 (78.6%)
Totals			
July 1991–March 2001		163/232 (70.3%)	77/116 (66.4%)
June 1960–June 1991		724/1008 (71.8%)	301/427 (70.5%)

Table 2. Judicial Review of Labor Arbitration Awards, July 1991–March 2001: Confirmation of Awards by *Trilogy* Issues

Court Confirms Award	*Union Wins Award*	*District Court*	*Appellate Court*
Total Appealed Awards	197/232 (84.9%)	163/232 (70.3%)	77/116 (66.4%)
*Basis for Challenging Award**			
Arbitrator exceeded authority	82/97 (84.5%)	74/97 (76.2%)	29/43 (67.4%)
Award did not draw its essence from CBA	136/152 (89.5%)	107/152 (70.4%)	53/80 (66.3%)
Arbitrator made fact-finding error	22/28 (78.6%)	23/28 (82.1%)	7/13 (53.9%)
Award violated a public policy	71/84 (84.5%)	60/84 (71.4%)	30/41 (73.2%)
Award procured by bias or fraud	4/8 (50.0%)	6/8 (75.0%)	0

*Because some cases raised two or more issues, figures do not add up to sample size.

the agreement. District courts confirmed 70.4 percent of these awards. The least effective argument for vacating an award was that the arbitrator made a fact-finding error. In cases raising this argument, the award enforcement rate was 82.1 percent. The confirmation rate for awards challenged on public policy grounds fell in this range. District courts confirmed 71.4 percent of these awards. The range between these extremes was not large.

Next we examine court review of employment arbitration awards (see Table 3):

1. Challenges to employment arbitration awards are a recent development. Our search produced only 50 award confirmation cases. Among the 34 district court decisions for which data were available,[67] approximately one-third (34.8 percent) oc-

[67]We located 23 district court cases. Another 11 cases resulted from circuit court decisions that contained a summary of arguments and rulings made in an unpublished district court ruling. The decision year for these unpublished cases was usually not reported in the appellate opinion.

Table 3. Judicial Enforcement of Individual Employment Arbitration Awards, 1990–2001

Industry[1]	
Securities	21/34 (61.8%)
Nonsecurities	12/34 (35.3%)
Manufacturing	1/34 (2.9%)
Employee Characteristics[2]	
Female	10/26 (38.5%)
African-American	6/34 (17.6%)
Underlying Legal Claims[3]	
Title VII (federal)	13/23 (56.5%)
ADEA (federal)	6/23 (26.1%)
ADA (federal)	2/23 (8.7%)
Other (federal)	2/23 (8.7%)
Unjust dismissal (state)	3/19 (15.8%)
Emotional distress (state)	3/19 (15.8%)
Defamation (state)	2/19 (10.5%)
Fraud (state)	2/19 (10.5%)
Antidiscrimination (state)	5/19 (26.3%)
Breach of contract (state)	4/19 (21.1%)
Employer Action[4]	
Discharge/termination	25/32 (81.3%)
Demotion	2/32 (6.3%)
Pay/bonus	4/32 (12.5%)
Who Wins Award?	
Employer	21/34 (61.8%)
Split award	6/34 (17.6%)
Employee	7/34 (20.6%)
Amount of Award (N = 9 awards)	
Range: $57,605–$3,617,935	
Median: $90,355	
Who Challenges Award in Federal District Court[5]	
Employee	25/33 (75.8%)
Employer	8/33 (24.2%)
Who Wins Award Challenge in Federal District Court	
Employee	11/34 (32.4%)
Employer	23/34 (67.6%)
Federal District Court Ruling on Award	
Confirm full award	29/34 (85.3%)
Confirm part award	1/34 (2.9%)
Vacate award	4/34 (11.8%)
Who Wins Award Challenge in Federal Appeals Court	
Employee	6/16 (37.5%)
Employer	10/16 (62.5%)
Federal Appeals Court Ruling on Award	
Confirm full award	13/16 (81.3%)
Confirm part award	0
Vacate award	3/16 (18.7%)
Federal Appeals Court Ruling on District Court Decision	
Affirm decision	9/16 (56.3%)
Affirm decision in part	2/16 (12.5%)
Reverse decision	5/16 (31.3%)
Sample Characteristics	
Federal district court decisions	34
Federal appellate court decisions	16
Challenged Awards	
Awards appealed to federal courts	34

[1]Examples include telecommunications, consumer products, and law firms.
[2]Court decisions inconsistently reported this information, but these incomplete data are included to show the minimum extent that women and African-Americans were compelled to arbitrate their employment disputes.
[3]Plaintiffs sometimes cited multiple causes of action; we coded the primary cause of action.
[4]Two cases did not report the adverse action taken or alleged to be taken by the employer.
[5]In 1 of the 34 cases, both parties challenged the award.

curred in 2000 (no cases had been reported yet for 2001). Another 13 percent were handed down in 1999. Thus, about half of the decisions in this sample were decided since 1999; the remaining decisions were scattered from 1991–1998, with one peak occurring in 1997 (17.4 percent). About two-fifths (43.8 percent) of the appellate decisions occurred in 2000 or 2001.

2. Approximately two-thirds of these cases (61.8 percent) involved the securities industry. This result was not unexpected, because the securities industry has been at the forefront of using individual employment arbitration.[68] Thus, our sample contained some atypical employment disputes. For example, two cases involved high-level executives who received multimillion-dollar awards for their pay claims.[69]
3. The sample contained a substantial amount of employment discrimination claims. About 56 percent of the cases involved Title VII claims (all but one complained of race discrimination, sex discrimination, or both), and 26 percent of the cases involved ADEA claims. Almost 40 percent of the employees in these disputes were female, and 18 percent were African-American.
4. Termination was the employer action that triggered most of the arbitrations (81.3 percent). Pay and bonus issues trailed far behind (12.5 percent), as did demotions (6.3 percent).
5. Employers prevailed in 62 percent of the awards. In the 26 percent of awards in which employees received money, the median amount was $90,355.
6. Employees were much more likely than employers to sue to vacate an award (76 versus 24 percent).
7. Employers won about 67 percent of these award challenge cases before district courts, and 63 percent before courts of appeals.
8. Courts confirmed a high percentage of employment awards. District and appellate courts confirmed 85 and 81 percent, respectively, of challenged awards.

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[68] *See* 1994 GAO Report, *supra* note 17. The GAO study reported that only 18 employment arbitrations occurred between August 1990 and December 1992. During 1991 and 1992, 1,110 arbitrations occurred, most of which dealt with customer complaints.

[69] *Brown v. Coleman Co.*, 220 F.3d 1180 (10th Cir. 2000), *cert. denied*, 121 S.Ct. 1191 (2001); *Prudential Bache Secs., Inc. v. Tanner*, 72 F.3d 234 (1st Cir. 1995).

Behind the Numbers: Textual Analysis of Federal Court Decisions

Our methodology questions the conventional approach for assessing judicial review of arbitration awards. The conventional method relies heavily on textual analysis of selected appellate cases. We believe this approach can be improved by statistical analysis of a large number of court decisions. We also recognize, however, that a study based solely on statistics is likely to disembody vital information about judicial behavior. In this part of our analysis, we examine why some courts vacated awards. We agree with the widely held view that some judges exceed the boundaries of judicial review set forth in the *Steelworkers Trilogy*, but we also believe that two other reasons contribute to the vacatur results presented earlier.

In Figure 1 we outline these reasons. In both arbitration systems—labor-management and individual employment—these include (1) the judge, (2) the arbitrator, or (3) a particular feature of the arbitration system. In the following discussion, we provide textual analysis of cases that fit into each of these categories—for example, a court decision in which a judge was too meddlesome or an arbitrator's decision or conduct that was so odd that the arbitrator must be held responsible for vacatur of the award. We also discuss how systemic factors contributed to court decisions that departed from the *Trilogy* norm.

Cell 1 (Labor-Management Arbitration): The Judge

Our database includes cases that validate widely held concerns about judicial review of awards. The district court decision in

Figure 1. Sources of Deviation in Award Confirmation Rates.

		Actor or Institution	
Labor-Management Arbitration	Cell 1: Federal Judge	Cell 2: Arbitrator	Cell 3: Arbitration System
Individual Employment Arbitration	Cell 4: Federal Judge	Cell 5: Arbitrator	Cell 6: Arbitration System

Tennessee Valley Authority v. Tennessee Valley Trades & Labor Council[70] is a case in point.

Robert Ingle, a nuclear power plant operator with 17 years of employment, was fired after he tested positive for marijuana. Per company policy he was referred to the employee assistance program (EAP). Ingle applied for admission, but during processing he received conflicting information about his enrollment. One doctor approved him, but another believed he had no drug problem and therefore declined his admission. By the time this confusion was cleared up, the company deactivated Ingle's clearance and fired him.

The arbitrator, a former labor relations manager for the Tennessee Valley Authority (TVA), reinstated Ingle with back pay. He based his ruling on the positive assessments of Ingle made by supervisors at the arbitration hearing. He also noted that the EAP was designed for this kind of occasion, and the company put Ingle in an intolerable Catch-22 situation.

In suing to vacate the award, TVA contended that the arbitrator's decision failed to draw its essence from the collective bargaining agreement. Ruling in favor of TVA and vacating the award, the district court reasoned that the collective bargaining agreement must be "'read in the light of the relevant provisions of the Framework Agreement,' which is 'key to understanding the nature of labor-management relations governed by the collective bargaining agreement.' "[71]

The Sixth Circuit reversed and granted enforcement of the award, adding this rebuke: "The district court's conclusion otherwise led it to substitute its own notions of industrial fairness for that of the arbitrator. This result is problematic because proper resolution of employee grievances is a subject matter in which courts have little expertise."[72]

Cell 2 (Labor-Management Arbitration): The Arbitrator

The research literature rarely singles out arbitrators as part of the problem of heightened judicial review. However, our database contains several highly unusual arbitration awards.

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[70]184 F.3d 510, 161 LRRM 2844 (6th Cir. 1999).
[71]*Id.* at 516–17.
[72]*Id.* at 516.

Consider the embarrassing case of *Flexsys America v. Local Union 12610*.[73] A worker was suspended for 30 days after he argued with his supervisor. At the end of a contentious hearing, the arbitrator asked some questions, and the attorneys agreed to leave the arbitration open for the submission of a final brief. Later, the arbitrator called the company attorney and held an ex parte conversation. Although briefs had not been submitted, he announced to the attorney that he had already come to a decision on the merits. He said that he was not going to explain his reasons, but asked the attorney to reopen the arbitration to investigate the supervisor's background. He then stated that if the company declined to reopen the hearing to investigate the supervisor, he would grant the grievance without explanation.

The arbitrator wanted to know if the supervisor was gay. While talking to the company's attorney, the arbitrator said he handled hundreds of homosexual cases in the military. He believed that the supervisor was "flighty" during the hearing, and then said that if the grievant thought that his supervisor was "a queer," he would rescind the discipline.[74] After this extremely inappropriate conversation ended, the employer's attorney contacted her union counterpart to have the arbitrator removed from the case, but her request was declined.

The arbitrator then issued a ruling in which he upheld the grievance and granted back pay. The company believed that the award failed to draw its essence from the collective bargaining agreement, reflected the arbitrator's own brand of industrial justice, and was biased. The district court agreed and vacated the award.[75] Considering the arbitrator's highly inappropriate post-hearing behavior, we cannot fault the reasoning and decision of the district court.

Carpenters Local 1027 v. Lee Lumber & Building Material Corp.[76] provides another example of arbitrator misjudgment. After the

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[73]88 F. Supp. 2d 600, 164 LRRM 2985 (S.D. W. Va. 2000).

[74]*Id.* at 602.

[75]*Id.* at 604, stating:

> There was never any evidence presented by either party that the supervisor was gay. The only individual who raised homosexuality as an issue was the Arbitrator, and that was after the arbitration hearing during an inappropriate, arbitrator-solicited, *ex parte* conversation. Accordingly, the Court finds that a reasonable person would conclude that the Arbitrator was biased, and that arbitrator bias is also an appropriate ground for vacation of the arbitration award.

[76]2 F.3d 796, 144 LRRM 2199 (7th Cir. 1993).

company fired the grievant, the union filed a grievance and negotiated his reinstatement. The only condition that the company put on reinstating the grievant was that he return to work within 7 days. Unfortunately, the grievant was out of town during this time, and union officials did not track him down. However, the union contacted him 9 days after entering into this settlement and told him to report to work. By then the company had withdrawn its offer. The union then refiled the grievance and prevailed at arbitration. The arbitrator issued a strange remedy, however. Although the collective bargaining agreement expressly defined a grievance as a complaint or claim against the employer, he ordered the union to reimburse the grievant for the entire amount of back pay.

The union sued in district court to vacate this remedy. The district court ruled for the union and reasoned that the arbitrator exceeded his contractual authority. On appeal, the Seventh Circuit affirmed this vacatur.[77] We cannot fault the reasoning and conclusion of either court in this case.

At the same time, we also found cases of remarkable judicial restraint when arbitrators used what the courts believed was extremely poor judgment. We highlight two cases because they demonstrate potentially serious consequences when courts adhere to the *Trilogy*'s highly deferential review standards.

In *Jacksonville Area Association for Retarded Citizens v. General Service Employees Union Local 73*,[78] a private-sector, nonprofit corporation provided care for physically and mentally impaired residents. One morning four employees left their regular place of work to visit another building to see if a patient was a hermaphrodite. Finding this resident in a classroom, they removed him to the restroom to be toileted. Once there, one worker positioned himself at the door while another lowered the client's pants in the presence of the other two employees. After satisfying their curiosity, the employees returned the client to the classroom. Once co-workers reported

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[77] *Id.* at 799, stating:

> Not only does the collective bargaining agreement strongly imply that the arbitrator could not impose the reimbursement remedy he imposed in this case, we think it is clearly implausible to suppose the parties ever contemplated that remedy. Given the arbitration clause the parties did agree to, it is almost unimaginable that the union would have agreed to the type of remedy imposed here if the question had arisen during bargaining.

The court also reasoned "that Lee and the union did not agree to arbitrate any claims other than those by the union or an employee against Lee." *Id.*

[78] 888 F.Supp. 901, 149 LRRM 3109 (C.D. Ill. 1995).

this incident, the employer conducted a formal investigation and then fired these offenders.

The arbitrator found that the employees' conduct was improper, but because he believed termination was too severe, he reduced their punishment to an unpaid suspension. The employer contended—and the reviewing court agreed—that the workers abused this client.[79] A variety of Illinois[80] and federal[81] laws prohibit mistreatment of institutionalized patients. The district court believed that "one cannot persuasively argue against the existence of a strong public policy prohibiting the abuse of mentally impaired individuals."[82] Nevertheless, it denied the employer's motion to vacate the award, but with obvious reluctance.[83]

A bus company discharged a driver after he was involved in his 24th accident during a 12-year career in *United Transportation Union Local 1589 v. Suburban Transit Corp.*[84] The final accident occurred on the New Jersey Turnpike as the driver rear-ended a tractor-trailer because he was tailgating. In the past, nine of the driver's accidents were deemed to be preventable. This was his third preventable rear-end collision.

The arbitrator found that the driver was responsible for the accident. He also determined that the driver was a veteran employee who had given loyal service to the company for nearly 12 years. In addition, the arbitrator concluded that the company did not adequately train the driver. He reversed the discharge and ordered the company to provide the driver with more training.

The bus company sued to vacate the award, and the district court granted its motion. On appeal, the Third Circuit reversed the

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[79] *Id.* at 906, stating: "In the instant matter, there does not appear to be a dispute concerning the existence of a public policy supporting the prohibition and prevention of the abuse of mentally impaired individuals. Indeed, there are several statutes that support this conclusion."

[80] *Id.* at 906–07 (citing, inter alia, §§2-112 of the Illinois Mental Health and Developmental Disabilities Code: "Every recipient of services in a mental health or developmental disability facility shall be free from abuse and neglect"; and 3- 210, defining abuse as "any physical injury, sexual abuse, or mental injury inflicted on a recipient of services other than by accidental means.").

[81] The court cited the Protection and Advocacy for Mentally Ill Individuals Act of 1986, 42 U.S.C. §10801 et seq.

[82] 888 F. Supp. at 909.

[83] *Id.*, stating that "the Court . . . is deeply disturbed and utterly revolted by the employees' conduct underlying this action. We can confidently state that if we were arbitrating the instant dispute, the employees would not have been reinstated to their former positions." The court continued: "However, that is not the issue here. The parties contractually agreed to have an arbitrator interpret the disciplinary provisions of their employment agreement and now the [employer] must live with that decision." *Id.*

[84] 51 F.3d 376, 148 LRRM 2796 (3d Cir. 1995).

district court. Analyzing whether the arbitrator had exceeded his powers, the court said that the "parties bargained for contractual ambiguity instead of defining 'proper cause' in the [collective bargaining agreement]. Having decided not to define the phrase, [the company] cannot escape the results of that bargain simply because the arbitrator has chosen to interpret that phrase differently than [the company] may have wanted . . . ."[85]

Nevertheless, the appeals court conceded that the arbitrator's judgment was faulty when the court acknowledged that the company's "interpretation of the [collective bargaining agreement] is more reasonable than the result announced by the arbitrator."[86] In addition, although the court recognized that the award posed a potential threat to public safety, it found that it did not violate an express public policy.[87] In sum, the Third Circuit's application of the *Steelworkers Trilogy* was legally correct but hindered the bus company's efforts to provide safe travel for its customers.

Cell 3 (Labor-Management Arbitration): The Arbitration System

This cell addresses our finding for 1991–2001 that appellate courts confirmed 73.2 percent of awards that were challenged on public policy grounds. As we noted, this confirmation rate is similar to cases where an appeal was based on some other issue, for example, the award failed to draw its essence from the agreement. Thus, this issue does not warrant the concern that it has received since *United Paperworkers v. Misco, Inc.*[88] was decided.

Our database suggests that there is more to this story, however. When appellate courts vacate awards on public policy grounds, the underlying dispute usually involves the termination of an employee who was discharged for drugs or alcohol. The new dimension that appears in our database is that courts still exercise restraint in these cases but make an exception when the work setting poses a strong safety concern to the public.

As evidence of this tendency, we highlight three vacatur decisions—all involving separate events and locations—that consisted

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[85] *Id.* at 380.

[86] *Id.*

[87] *See id.* at 382: "We acknowledge that public transportation safety is a valid public concern, but Suburban has failed to demonstrate that public policy requires vacation of the arbitrator's award here."

[88] 484 U.S. 29, 126 LRRM 3113 (1987).

of Exxon Corporation challenges to awards that reinstated employees who were discharged for drug or alcohol violations. In *Exxon Corp. v. Esso Workers Union*,[89] the company fired a truck driver who hauled 12,000 gallons of gasoline on a public highway while under the influence of cocaine. The arbitrator upheld the validity of the drug test but determined that the punishment was too severe, and therefore reduced the penalty to a 2-month suspension. The First Circuit ruled that the arbitrator's award violated "a broad national consensus that persons should not be allowed to endanger others while laboring under the influence of drugs."[90]

A 1989 accident involving a 635-foot oil tanker led to the discharge of the ship's helmsman in *Exxon Shipping Co. v. Exxon Seamen's Union*.[91] Morris Foster was tested for drugs after he ran his ship aground in the Mississippi River. Exxon administered its own drug test and one for the U.S. Coast Guard. Foster tested negative under the Coast Guard's more lenient standard, but positive for marijuana under the company's tougher standard. After conducting a confirmatory test and again finding traces of marijuana, Exxon fired Foster. The arbitrator found that Exxon's more stringent standard was not unreasonable and that the totality of the evidence conclusively established Foster's use of marijuana. The arbitrator also concluded that Foster had been on vacation for 9 days before the accident occurred, and his test showed residual traces. This meant that the company failed to prove under the collective bargaining agreement that Foster used marijuana while he was on duty. The arbitrator therefore decided that the penalty was too severe and ordered the company to reinstate Foster.

In court, the union contended that Coast Guard drug regulations prohibit drug use by seamen only while on duty. Exxon countered that the policy also prohibits off-duty drug use. The appellate court disagreed with both parties, because their arguments "obscure[d] the goal of the public policy embodied in the regulations—safe operation of vessels."[92] It vacated the award, noting that "[i]n furtherance of this goal, the regulations require

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[89]118 F.3d 841, 148 LRRM 2796 (1st Cir. 1997).

[90]*Id.* at 848. The court continued: "This consensus is made manifest by positive law and translates into a well defined and dominant public policy—indeed, a national crusade—counselling against the performance of safety-sensitive tasks by individuals who are so impaired." *Id.*

[91]993 F.2d 357, 143 LRRM 2312 (3d Cir. 1993).

[92]*Id.* at 361.

drug testing and authorize the imposition of stiff penalties on employees like Foster who fail drug tests."[93]

In *Exxon Corp. v. Baton Rouge Oil & Chemical Workers Union*,[94] Donald Chube temporarily substituted for a supervisor in a safety-sensitive position in a chemical processing plant and therefore had to take a drug test. During this time, the company revised its drug testing policy, over the union's objections. The revision was more restrictive because it included random testing and denied rehabilitation for employees who tested positive. After the union and company negotiated to impasse, Exxon unilaterally implemented the revised policy and said it would become effective on September 1, 1989.

On August 24, Chube tested positive for cocaine use. Exxon fired him on September 13, citing him for violating the newly implemented drug policy. The arbitrator determined that the issue was whether Chube violated the policy, not if Exxon had a right to terminate an employee who tested positive for cocaine. He then concluded that Exxon violated the collective bargaining agreement by discharging Chube because the employee had not violated a posted rule. His award required Exxon to reinstate Chube with full back pay. The arbitrator also provided an alternative award of 1 year's back pay. He did this because Chube was incarcerated after his discharge for selling drugs and therefore was unavailable for reinstatement.

Exxon sued to vacate the award, but the district court denied this motion. On appeal before the Fifth Circuit, the company's motion to vacate was granted. Exxon contended that the award violated public policy because it ordered reinstatement of a cocaine user and convicted drug dealer to a safety-sensitive job. The union argued that the alternative award, ordering only back pay and not reinstatement, violated no public policy. Finding this a close case, the court vacated the award, reasoning that

> the public policy exception . . . must be read not only to prohibit the prospective placement of an employee into a position where he is a danger to his company and to fellow employees . . . but also to prohibit

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[93]*Id.* The court continued: "The Coast Guard regulations are part of a broader public policy against operation of common carriers under the influence of drugs or alcohol." In support of this conclusion, the court cited an array of specific laws and regulations. *Id.* at 361–62.

[94]77 F.3d 850, 151 LRRM 2737 (5th Cir. 1996).

a retrospective approval of the conduct that created the unsafe situation in the first place.[95]

In sum, we believe that the arbitration system is responsible for producing some awards that conflict strongly with core judicial values. These conflicts are so deeply rooted that they go beyond mere disagreement between individual arbitrators and judges. To illustrate, in labor arbitration there is a powerful norm to rehabilitate an errant employee.[96] Sometimes, however, courts conclude that societal costs for enforcing this arbitral value are too high. In effect, courts are forced to choose between the judicial values embedded in the *Steelworkers Trilogy* and other judicial values, such as protecting the environment from an imminent catastrophe. The Exxon cases reveal this conflict. Our point is that this problem transcends individual judges and arbitrators and is systemic in nature.

Turning to the individual employment arena, we note how these arbitration cases differ from the labor arbitration model. Award confirmation cases in this arena are extremely rare but are also rapidly increasing. This limited database provides the following examples of cases that tended to deflect the confirmation rate below or above the normal range.

Cell 4 (Individual Employment Arbitration): The Judge

In all other cells in our matrix, we present decisions that vacated awards and led to lower award confirmation rates. In the very limited time that federal courts have been reviewing individual employment arbitration awards, no judge has overturned an arbitrator's findings of fact or substituted judicial interpretation of contract language for an arbitrator's judgment.

We note, however, that under the *Steelworkers Trilogy* and the FAA, some degree of judicial review of arbitration awards is not only permitted but is warranted. When a judge is too deferential, this amounts to failure of judicial responsibility. We pose the

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[95] *Id.* at 857. The court continued: "In addition to addressing future conduct, the public policy against drug use in safety-sensitive positions also must look back to the conduct that is the subject of the grievance. The policy looks to the future to ensure safety, but looks back to deny condonation of misconduct." *Id.*

[96] *See* Elkouri & Elkouri, How Arbitration Works, 5th ed. (BNA Books 1997), at 925:

> Some consideration generally is given to the past record of any disciplined or discharged employee. An offense may be mitigated by a good past record and it may be aggravated by a poor one. Indeed, the employee's past record often is a major factor in the determination of the proper penalty for the offense.

following decision as an example of what we believe is excessive judicial deference to an award that resulted from an aberrant arbitration process.

In *LaPrade v. Kidder, Peabody & Co., Inc.*,[97] Linda LaPrade sued Kidder Peabody for sex discrimination. Her lawsuit was stayed on June 24, 1992, pending the outcome of arbitration. The first hearing occurred 14 months later, in September 1993. The arbitration process extended over 74 hearing and conference dates and took 6 years to complete. On October 8, 1999, the National Association of Securities Dealers (NASD) arbitration panel issued its ruling denying all of LaPrade's discrimination and defamation claims. The panel also ordered the company and LaPrade to pay $61,424 and $8,376, respectively, for NASD forum fees. Kidder Peabody returned to court to lift the stay and confirm the award. LaPrade filed a counterclaim to vacate parts of the award, including her share of forum fees. The court granted Kidder Peabody's motion in its entirety.

LaPrade challenged the assessment of fees, basing her contentions on *Cole v. Burns International Security Services*.[98] That case differed from LaPrade's because the plaintiff challenged the arbitration process before an award was issued.[99] As the *LaPrade* court noted, *Cole* ruled that certain forum fees—those that equate to filing fees and other administrative expenses in a federal lawsuit—could be assessed in compulsory arbitration. But the court ruled that no arbitration fees could be charged unless a court charged a similar fee.

In ruling that forum fees were not so excessive here as to constitute a manifest disregard of the law, the *LaPrade* court was impressed by the fact that the $8,376 in forum fees assessed against the complainant amounted to $113.19 for each of her 74 hearing sessions and conferences. This ruling was factually correct but missed the point made in *Cole* concerning the accessibility of arbitration to employees who are compelled to substitute this

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[97]94 F. Supp. 2d 2, 82 FEP Cases 1434 (D.D.C. 2000), *aff'd*, 246 F.3d 702, 85 FEP Cases 779 (D.C. Cir. 2001).

[98]105 F.3d 1465, 72 FEP Cases 1775 (D.C. Cir. 1997). LaPrade contended that "under the spirit and the letter of *Cole*, she cannot be required to pay any part of the arbitration fees, much less $8,376." 94 F. Supp. 2d at 7. In making this argument, she quoted *Cole*: "[I]t would undermine Congress' intent to prevent employees who are seeking to vindicate statutory rights from gaining access to a judicial forum and then require them to pay for the services of an arbitrator when they would never be required to pay for a judge in court." 105 F.3d at 1484.

[99]105 F.3d at 1469–70.

forum for a court of law. LaPrade incurred other costs in arbitrating her claims. Contrary to the reputation that arbitration has for being a comparatively quick process, her 6-year hearing ordeal was no more advantageous—indeed, it was probably much slower—than many civil trials.[100]

In addition, the *LaPrade* court's emphasis on cost per hearing ignored the cost of LaPrade's attorneys' fees for this protracted process. Although *Cole* analyzed types of expenses that were chargeable to a complainant, the plaintiff in that case was not charged over $8,000 for forum fees. The main point of *Cole* is that public courts do not cost plaintiffs much in the way of direct charges, and therefore neither should an arbitration.[101] By deferring to an award that was so expensive in direct and indirect costs to a complainant, the *LaPrade* court legitimized the use of high process costs as a method of reducing employee access to arbitration.[102]

Cell 5 (Individual Employment Arbitration): The Arbitrator

The district court in *DeGaetano v. Smith Barney, Inc.*[103] vacated part of an award that denied a complainant's motion for attorneys' fees in a sex discrimination case. In March 1995, DeGaetano sued Smith Barney, alleging that her complaints of sexual harassment by her boss were ignored. In February 1996, a federal court denied DeGaetano access to a judicial forum and compelled arbitration of her claims for sex discrimination and emotional distress.

During an early phase of the arbitration, DeGaetano formally applied for recovery of her attorneys' fees. On March 18, 1997, the

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[100]94 F. Supp. 2d at 3 (reporting that LaPrade's employment discrimination lawsuit was stayed by court order on June 24, 1992, hearings commenced in September 1993, and the arbitration panel ruled on her complaint on October 8, 1999). Compare *LaPrade* with a typical civil trial as discussed in *Bradford v. Rockwell Semiconductor Sys., Inc.*, 238 F.3d 549, 84 FEP Cases 1358 (4th Cir. 2001).

[101]After framing the issue as "Can an employer require an employee to arbitrate all disputes and also require the employee to pay all or part of the arbitrators' fees?" the *Cole* court reached this conclusion:

> There is no doubt that parties appearing in federal court may be required to assume the cost of filing fees and other administrative expenses, so any reasonable costs of this sort that accompany arbitration are not problematic. However, if an employee like Cole is required to pay arbitrators' fees ranging from $500 to $1,000 per day or more . . . in addition to administrative and attorney's fees, is it likely that he will be able to pursue his statutory claims? We think not.

105 F.3d at 1484.

[102]LaPrade's appeal was denied in 246 F.3d 702, 85 FEP Cases 779 (D.C. Cir. 2001) (en banc).

[103]983 F. Supp. 459, 75 FEP Cases 579 (S.D.N.Y. 1997).

arbitration panel awarded DeGaetano $90,355 in damages and interest, equal to 1 year of pay, but denied her petition for attorneys' fees. Although this amount was not reported, it was probably substantial because the hearing phase of her arbitration took 10 days.

DeGaetano sued to vacate the fee portion of her award. She based her challenge on Title VII of the 1964 Civil Rights Act, as amended, providing that "the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee."[104] The district court adopted a common law standard of review that permits vacatur or modification in the rare instance "when the arbitrator[ ] acted in manifest disregard of the law."[105]

In ruling for DeGaetano, the court observed that "[a]lthough not couched in mandatory terms, this statute establishes a presumptive entitlement to an award of attorney's fees for prevailing parties."[106] Concluding that DeGaetano's award must have been based on a finding of employment discrimination, the court reasoned that she was a prevailing plaintiff under Title VII and therefore entitled to recover attorneys' fees. Finally, the court found that this legal oversight was not inadvertent. It said that "the Arbitration Panel appreciate[d] the existence of a clearly governing legal principle but decide[d] to ignore or pay no attention to it."[107]

In *Montes v. Shearson Lehman Bros., Inc.*,[108] the Eleventh Circuit found that an arbitration award manifestly disregarded a federal

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[104]*Id.* (citing 42 U.S.C. §2000e-5(k)).

[105]*Id.* at 462. The court explained that it "should not vacate an arbitration award for manifest disregard simply because of 'error or misunderstanding with respect to the law.'" *Id.* (quoting *International Telepassport Corp. v. USFI, Inc.*, 89 F.3d 82, 85 (2d Cir. 1996)). Instead, "the term manifest disregard clearly means more: The error must have been obvious and capable of being readily and instantly perceived by the average person qualified to serve as an arbitrator." *Id.* In addition, "the term disregard implies that the arbitrator appreciates the existence of a clearly governing legal principle but decides to ignore or pay no attention to it." *Id.*

[106]*Id.* (citing, inter alia, *Hensley v. Eckerhart*, 461 U.S. 424, 429, 31 FEP Cases 1169 (1983) (in order to "ensure effective access to the judicial process for persons with civil rights grievances[,] . . . a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust")).

[107]*Id.* at 464. The employer also contended that an award of attorneys' fees was barred here in any event by the Smith Barney arbitration policy. In fact, DeGaetano's employment agreement provided that "[e]ach side shall pay its own legal fees and expenses." *Id.* at 460. DeGaetano maintained, however, that this contract provision was void as a matter of public policy. The court rejected Smith Barney's argument by holding that its arbitration policy was void as a matter of public policy to the extent that it prevented prevailing plaintiffs from obtaining an award of attorneys' fees in employment discrimination cases. *Id.* at 464–65.

[108]128 F.3d 1456, 4 WH Cases 2d 385 (11th Cir. 1997).

wage and hour law. The Fair Labor Standards Act (FLSA)[109] requires employers to keep track of an employee's time at work and to pay overtime after 40 hours per week, unless that employee falls under an appropriate managerial or related exemption. Delfina Montes was an office worker in Shearson's Hallandale branch office and sued her employer for failure to pay overtime. Because she signed an industry arbitration agreement, her suit was dismissed, and her only recourse was to arbitrate her FLSA claim.

At the hearing, counsel for Shearson told the arbitration panel to ignore the FLSA. The award sustained Shearson's position and failed to analyze Montes's FLSA claim. She sued to vacate the award, and the district court dismissed her challenge. On appeal, she challenged the arbitration panel's decision as arbitrary, capricious, and contrary to public policy. Her appeal relied heavily on the transcript showing that Shearson's lawyer repeatedly told the panel to disregard the FLSA.

The Eleventh Circuit reviewed the award under the FAA and common law standards. Noting that it had jurisdiction under the FAA, the court used these nonstatutory standards to review Montes's appeal: Was the arbitration decision (1) arbitrary or capricious; (2) in manifest disregard of the law; and (3) violative of public policy? Recognizing that "each of these three grounds could conceivably be encompassed in the other, courts, including this one, have treated these reasons as discrete and separate."[110] It then narrowed its review to manifest disregard of the law.

This analysis began by defining the extremely limited role that federal courts play in conducting this review. An award cannot be reversed for error or misinterpretation. But as other circuits have found,[111] clear disregard for the law is another matter:

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[109]29 U.S.C. §201 et seq.

[110]128 F.3d at 1459 n.5.

[111]*Id.* at 1460 (noting that every other circuit has expressly recognized that manifest disregard of the law is an appropriate reason to review and vacate an award, citing *Prudential-Bache Secs., Inc. v. Tanner*, 72 F.3d 234, 11 IER Cases 453 (1st Cir. 1995); *Willemijn Houdstermaatschappij, BV v. Standard Microsystems Corp.*, 103 F.3d 9 (2d Cir. 1997); *United Transp. Union Local 1589 v. Suburban Transit Corp.*, 51 F.3d 376, 148 LRRM 2796 (3d Cir.1995); *Upshur Coals Corp. v. Mine Workers (UMW) Dist. 31*, 933 F.2d 225, 137 LRRM 2397 (4th Cir. 1991); *M & C Corp. v. Erwin Behr GmbH & Co.*, 87 F.3d 844 (6th Cir.1996); *National Wrecking Co. v. Teamsters Local 731*, 990 F.2d 957, 143 LRRM 2046 (7th Cir. 1993); *Lee v. Chica*, 983 F.2d 883 (8th Cir.), *cert. denied*, 510 U.S. 906 (1993); *Barnes v. Logan*, 122 F.3d 820 (9th Cir. 1997), *cert. denied*, 523 U.S. 1059 (1998); *Jenkins v. Prudential-Bache Secs., Inc.*, 847 F.2d 631 (10th Cir. 1988)). In *McIlroy v. PaineWebber, Inc.*, 989 F.2d 817, 820 n.2 (5th Cir. 1993), the Fifth Circuit rejected nonstatutory grounds for vacating arbitration awards.

> When a claim arises under specific laws, however, the arbitrators are bound to follow those laws in the absence of a valid and legal agreement not to do so. As the Supreme Court has stated, "[b]y agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum."[112]

The Eleventh Circuit then differentiated between an award that involves an erroneous interpretation of the law and one that involves manifest disregard: "'Manifest' means '[e]vident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, undubitable, indisputable, evident, and self-evident.'"[113] "Disregard," according to the court, means "to treat as unworthy of regard or notice; to take no notice of; to leave out of consideration; to ignore; to overlook; to fail to observe."[114] After considering these definitions, the court concluded "that a manifest disregard for the law, in contrast to a misinterpretation, misstatement or misapplication of the law, can constitute grounds to vacate an arbitration decision."[115]

Applying this standard, the court vacated the award, noting that "we are able to clearly discern from the record that this is one of those cases where manifest disregard of the law is applicable, as the arbitrators recognized that they were told to disregard the law (which the record reflects they knew) in a case in which the evidence to support the award was marginal."[116] The court remanded the matter to the district court with instructions to refer the dispute to a new arbitration panel.[117]

Neary v. Prudential Insurance Co. of America was another manifest disregard case.[118] In vacating the award, the district court appeared to rearbitrate the underlying employment dispute. We call attention to this case because, unlike *Montes*, the arbitrator was not told to disregard the law. Instead, the court drew that conclusion on its

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[112]128 F.3d at 1459–60 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)). The court went on to say that "'we have indicated that there is no reason to assume at the outset that arbitrators will not follow the law; although judicial scrutiny of arbitration awards necessarily is limited, such review is sufficient to ensure that arbitrators comply with the requirements of the statute.'" *Id.* at 1460 (citing *Shearson/American Exp., Inc. v. McMahon*, 482 U.S. 220, 232 (1987)).

[113]*Id.* at 1461 (quoting Black's Law Dictionary, 6th ed. (West 1990), 962).

[114]*Id.*

[115]*Id.* at 1461–62 ("We emphasize again that this ground is a narrow one.").

[116]*Id.* at 1462.

[117]*Id.* at 1464.

[118]63 F. Supp. 2d 208 (D. Conn. 1999).

own. This decision shows that a reviewing court can exercise considerable discretion under the manifest disregard standard.

Thomas Neary alleged wrongful termination in his suit against Prudential Insurance, but the court denied Neary a trial and granted the employer's motion to compel arbitration. More than 1½ years later, a panel of NASD arbitrators granted summary judgment in favor of Prudential. On a motion to vacate, the district court ruled in favor of Neary. The judge concluded that the factual record showed that the arbitration panel's decision to grant summary judgment in favor of Prudential was in manifest disregard of the law. The panel failed to account for state law exceptions to employment at will, which limit an employer's right to fire an employee when that person exercises a First Amendment right or the employee's conduct is protected by a public policy.

Neary brought these legal standards to the attention of the arbitration panel. The court then concluded: "It is unquestionable that the arbitration panel manifestly disregarded the standard for summary judgment. The record in this case provides overwhelming evidence to support an inference that Neary was wrongfully terminated."[119] The court based its decision on an inference rather than direct evidence. In a passage that suggests future grounds for expanding judicial review of awards, the court said: "The record in this case strongly indicates that the arbitration panel did not base its ruling in favor of Prudential on motion to dismiss grounds. The failure of the panel to explain its decision complicates this determination."[120]

Cell 6 (Individual Employment Arbitration): The Arbitration System

This section presents another case that used the nonstatutory standard of manifest disregard of the law. We classify *Halligan v. Piper Jaffray, Inc.*[121] in Cell 6 because the action that constituted

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[119]*Id.* at 210. The court noted that Prudential documents referred to Neary as a "union instigator" and that Prudential knew that Neary was associated with a terminated Prudential agent named Plante who was involved in whistleblowing activities. *Id.* Prudential deposed Neary as part of its defense against a suit by Plante and then terminated Neary about 1 month later allegedly based on information Neary provided during that deposition. *Id.* The court concluded: "These facts undeniably raise a genuine issue of material fact in regard to Prudential's motivation for terminating Neary. On a motion for summary judgment, that is all the law requires." *Id.*

[120]*Id.* at 211 n.3.

[121]148 F.3d 197, 77 FEP Cases 182 (2d Cir. 1998), *cert. denied*, 526 U.S. 1034, 79 FEP Cases 512 (1999).

manifest disregard for the law—an award that failed to explain the reason for denying a complaint—is not an idiosyncratic problem but a systemic practice in the arbitration domain.

The plaintiff sued to vacate an NASD award as executrix for her husband's estate. Theodore Halligan, her husband, unsuccessfully arbitrated his claim of age discrimination under the ADEA.[122] The district court dismissed a challenge to this award. On appeal, the Second Circuit reversed this judgment and vacated the award.

When he was hired in 1973 as a salesman, Halligan signed an industry arbitration agreement. In 1992, Halligan claimed that he was forced out of his job by a new CEO who discriminated against him because of age. Halligan's claim was first presented at an arbitration hearing in October 1993, and hearings continued into 1995. By then, Halligan's cancer prevented him from testifying. After Halligan died, his widow continued the arbitration, and during these hearings arbitrators were presented with "very strong evidence of age-based discrimination."[123] For example, just before his separation, Halligan ranked fifth among 25 salespersons. His employer's main defense was that Halligan voluntarily retired. In March 1996, after extensive hearings, the arbitrators denied all claims made by the Halligans. The award recited the claims and defenses of each party but contained no explanation or rationale.

In reviewing the award for manifest disregard of the law, the court observed that "the reach of the doctrine is severely limited."[124] Halligan contended that "the NASD has undue influence here."[125] The court declined to rule on this complaint, but narrowed its attention to the common arbitration practice of failing to provide an explanation in the award.

Applying this standard, the court remarked that "Halligan presented overwhelming evidence that Piper's conduct . . . was

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[122]29 U.S.C. §§621–634.

[123]148 F.3d at 198. The Second Circuit recited this evidence at length (e.g., although Halligan ranked first in the firm in sales from 1987 through 1991 and had always been among Piper's top salesmen, he was subjected to repeated discriminatory statements by upper-level management, such as "you're too old . . . [and] our clients are young and they want young salesmen" and "we want you out of here quickly"). *Id.* at 198–99.

[124]*Id.* at 202 (internal quote omitted). In the Second Circuit, manifest disregard "clearly means more than error or misunderstanding with respect to the law [citation omitted]." *Id.* The court stated that, in order to modify or vacate an award for manifest disregard, it "must find both that (1) the arbitrators knew of a governing legal principle yet refused to apply it or ignored it altogether, and (2) the law ignored by the arbitrators was well defined, explicit, and clearly applicable to the case." *Id.*

[125]*Id.* Halligan criticized the industry's exclusive control over the NASD Code of Arbitration Procedure. The court also set forth a detailed explanation of these procedures. *Id.* at 202–03.

motivated by age discrimination."[126] The Second Circuit reasoned: "In view of the strong evidence that Halligan was fired because of his age and the agreement of the parties that the arbitrators were correctly advised of the applicable legal principles, we are inclined to hold that they ignored the law or the evidence or both."[127] The court added: "Moreover, the arbitrators did not explain their award."[128]

In reaching this result, the court declined to state a broad rule that requires arbitrators to explain their awards.[129] Instead, it explained:

> We want to make clear that we are not holding that arbitrators should write opinions in every case or even in most cases. We merely observe that where a reviewing court is inclined to find that arbitrators manifestly disregarded the law or the evidence and that an explanation, if given, would have strained credulity, the absence of explanation may reinforce the reviewing court's confidence that the arbitrators engaged in manifest disregard.[130]

The Second Circuit also based its reasoning on assumptions made by the Supreme Court in *Gilmer v. Interstate/Johnson Lane Corp.*[131] After stating that "[t]his case puts those assumptions to the test,"[132] the court concluded that "[h]ad the arbitrators offered [an] explanation of the award, on this record it would have been extremely hard to accept—but they did not do even that."[133]

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[126] *Id.*
[127] *Id.* at 204.
[128] *Id.*
[129] *Id.* (explaining that "[i]t is true that we have stated repeatedly that arbitrators have no obligation to do so"). In this vein, it is interesting to consider Justice Douglas's thoughts on this a generation ago in the *Steelworkers Trilogy*: "To require opinions free of ambiguity may lead arbitrators to play it safe by writing no supporting opinions. This would be undesirable for a well-reasoned opinion tends to engender confidence in the integrity of the process and aids in clarifying the underlying agreement." *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597–98, 46 LRRM 2423 (1960).
[130] *Halligan*, 148 F.3d at 204.
[131] 500 U.S. 20, 55 FEP Cases 1116 (1991). The *Halligan* court recalled that "the Supreme Court ruled that an employee could be forced to assert an ADEA claim in an arbitral forum, [but] the Court did so on the assumptions that the claimant would not forgo the substantive rights afforded by the statute, that the arbitration agreement simply changed the forum for enforcement of those rights and that a claimant could effectively vindicate his or her statutory rights in the arbitration." *Halligan*, 148 F.3d at 204.
[132] 148 F.3d at 204. Observing that *Gilmer* stated that procedural inadequacies in arbitration are best left for resolution in specific cases, the Second Circuit noted: "At least in the circumstances here, we believe that when a reviewing court is inclined to hold that an arbitration panel manifestly disregarded the law, the failure of the arbitrators to explain the award can be taken into account." *Id.* The court stated: "[W]e are left with the firm belief that the arbitrators here manifestly disregarded the law or the evidence or both." *Id.*
[133] *Id.*

Conclusions

The Supreme Court's current term shows a continuing emphasis on promoting workplace arbitration. In two pertinent decisions, the Court added to the autonomy of these private ADR systems. *Eastern Associated Coal* provided the federal courts a reinforcing signal to avoid vacating labor arbitration awards that seemingly or arguably conflict with a public policy. Unless an award directly conflicts with a positive law—for example, by reinstating an employee when a statute or other positive law expressly forbids employment of a person who breaks a rule or law—courts are to confirm an arbitrator's decision. *Circuit City* instructed federal courts to enforce employment arbitration agreements in the private and mostly nonunion segment of the work force.

Our empirical research captures two images of these evolving ADR systems. The labor-management picture is more like a lengthy video that shows constancy and fluctuation in considerable detail, whereas the second is like a snapshot taken just after the birth of the individual employment model. These images lead us to the following conclusions.

The Labor-Management Model

Our overriding conclusion is that most critics of the judicial review of labor arbitration awards fail to give federal courts due credit for their adherence to the *Steelworkers Trilogy*.

1. Considering all types of challenges to labor arbitration awards, the results here show that courts are amazingly consistent. The confirmation rates from 1960–1991 by district and appellate courts were 71.8 and 70.5 percent, respectively.[134] The overall confirmation rates observed here are virtually identical.[135] These figures tell the most important story about judicial review of labor arbitration awards: federal district courts have been very consistent in their award enforcement behavior since 1960, when the *Trilogy* was decided.
2. For public policy challenges to awards, there is too much emphasis on a few precedents that arguably depart from the

[134] *See* Table 1.
[135] *Id.*

Trilogy. The 72 percent award confirmation rate by district courts from 1991–2001 in public policy cases is a significant improvement compared to previously published results for earlier periods (54.7 percent in 1960–1981, and 55.3 percent in 1982–1987).[136] The confirmation rate found for the brief period following *Misco* (69.5 percent for 1988–1991) remained nearly constant in this study.[137] The fact that appellate courts from 1991–2001 confirmed awards at nearly the same rate as district courts (73.2 percent)[138] adds to the evidence of impressive consistency by the courts. Nevertheless, our analysis of three Exxon Corporation decisions[139] suggests why the Supreme Court issued another cautionary decision in *Eastern Associated Coal*. After the Exxon *Valdez* disaster, caused by a drunken helmsman, courts have been torn between unusually difficult choices: adhere very closely to the guidance and spirit of *Misco*, or give practical effect to a variety of laws that aim to protect co-workers, communities, and the environment from extraordinary safety risks.

3. This study empirically validates the claim that some courts fail to adhere to the deferential standards of the *Trilogy*, but pinpoints the problem in particular circuits. Southern courts have deviant confirmation rates and appear to act on unarticulated regional norms. Consider the Eleventh Circuit, where 11 out of 11 appealed awards favored unions, but only 28 percent ultimately survived review by both the district and appellate courts.[140]

The Individual Employment Model

Although the individual employment arbitration system substantially differs from the labor-management model, our main conclusion has a similar theme. In this instance, most of the research literature is critical of federal courts, with the key criticism being that courts are too laissez-faire. The main conclusion that emerges from our statistical findings is that courts are evolving toward more stringent review of awards in these arbitrations. In time, we believe they will behave more like courts that review labor-management awards.

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[136]LeRoy & Feuille, *The Steelworkers Trilogy and Grievance Arbitration Appeals: How Federal Courts Respond*, 13 Indus. Rel. L.J. 78, 106 (1991).
[137]*Id.*
[138]*See* Table 2.
[139]*See supra* notes 89–95.
[140]*See* Table 1.

The confirmation rates for the individual employment cases are certainly higher than labor-management cases (compare 70.3 and 66.4 percent, respectively, for the district and circuit courts that reviewed labor arbitration awards[141] and 85.3 and 81.3 percent, respectively, for the district and circuit courts that reviewed individual employment awards).[142] We suggest that the similarities in confirmation rates across these two systems are noteworthy.

1. Our research shows that the confirmation rate has begun to drop for the individual employment cases. These data are preliminary and subject to the usual caveats about small sample size and missing information, but consider that from 1991–1996 district courts decided only six award challenge cases and confirmed the award each time. However, during 1997–2000 (there are no reported district decisions yet for 2001), these courts confirmed awards in 14 out of 17 cases (82.4 percent). Unfortunately, we were not able to determine the year of the district court ruling in the remaining 11 cases decided at this level—these cases were reported only as circuit court decisions, and the appellate court's opinion did not provide enough information to determine the date of the district court decision.
2. Courts operating in the labor-management domain have had the benefit of rather explicit judicial review guidelines from the *Trilogy*, which was decided in 1960, augmented by the public policy review standard promulgated in *W.R. Grace & Co. v. Rubber Workers Local 259*[143] in 1983. There are no *Trilogy* counterparts for review of individual employment cases. Certainly, the 1925 FAA provides statutory standards for review, and courts have also applied a variety of nonstatutory standards in reviewing individual employment cases. Until the Supreme Court provides definitive guidance for these standards in the context of workplace arbitration—as distinguished from commercial and other forms of arbitration—courts will proceed more cautiously.
3. Our database also provides some information about the speed and efficiency of this dispute resolution process. Whereas some cases fit the prototype of a short, inexpensive, and therefore

[141] *See* Table 2.
[142] *See* Table 3.
[143] 461 U.S. 757, 113 LRRM 2641 (1983).

accessible process,[144] others functioned worse than court adjudications.[145]

Conclusion and Prediction

We conclude by taking a long-term view of the relationship between federal courts and workplace disputes. In the unionized sector our research strongly suggests that the existing judicial review equilibrium—only a tiny slice of awards are appealed, and the courts vacate less than a third of these challenged awards—will continue. Our research provides almost no support for claims that the federal courts are increasingly undermining the finality of the labor arbitration process.

The current move by many nonunion employers to embrace employment arbitration is driven primarily by their desire to avoid litigation over workplace disputes. The Supreme Court has given the green light to this phenomenon in *Gilmer* and again in *Circuit City*. In turn, employers can take refuge in the majority rulings in both cases that allow for judicial enforcement of arbitration agreements. At the same time, our research suggests that we should expect an increasing number of the awards produced via these agreements to be challenged in court. Our research also suggests that federal judges are increasingly likely to have considerable say about the future of the employment arbitration process and the decisions it produces as they wield the power to approve or vacate these awards.

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[144] *Ahing v. Lehman Bros.*, 2000 WL 460443 (S.D.N.Y. Apr. 18, 2000).

[145] *Chisholm v. Kidder, Peabody Asset Mgmt.*, 966 F. Supp. 218, 73 FEP Cases 1623 (S.D.N.Y. 1997), *aff'd*, 164 F.3d 617, 79 FEP Cases 787 (2d Cir.1998) (43 hearing days from 1992–1996); *Sobol v. Kidder, Peabody & Co.*, 49 F. Supp. 2d 208, 83 FEP Cases 35 (S.D.N.Y.1999) (62 hearing days from 1994–1998); *Mayes v. Lanier Worldwide, Inc.*, 115 F. Supp. 2d 1330 (M.D. Ala. 2000) (9 hearing days); *LaPrade v. Kidder, Peabody & Co.*, 94 F. Supp. 2d 2, 82 FEP Cases 1434 (D.D.C. 2000), *aff'd*, 246 F.3d 702, 85 FEP Cases 779 (D.C. Cir. 2001) (74 hearing dates and conferences from 1991–1996, with nine postponements by the employer).