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Social context and employment lawsuit dispute resolution

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Abstract

Purpose – Using an institutional theory perspective (micro and macro), the authors examined employment lawsuits across case type and alternative dispute resolution methods (negotiated settlements versus trials and arbitrations).

Design/methodology/approach – The authors examined actual data from US federal court lawsuits ($N = 98{,}020$). The data included the type of lawsuit, the dispute resolution method used and the outcome of the lawsuit in terms of the dollar amounts awarded.

Findings – The results show that employers were more likely to win in high social context cases (civil rights) than in other cases (Employment Retirement Income Security Act of 1974, ERISA). In arbitrations, plaintiffs won more frequently and were awarded higher amounts in arbitration than in court trials. In arbitration, plaintiffs received more in high social context cases than in other cases.

Practical implications – The results show that employers lose more often and in larger dollar amounts in arbitration than in litigation. However, if arbitration rulings more closely matched the likely outcomes of trials, subsequent litigation would be less likely to be overturned, and transaction costs would be reduced. If this were the case, the arbitration of employment lawsuits would more closely match the arbitration of contractual grievances under the typical labor relations system, where the arbitrator's decision is usually final and binding. This could be a better outcome for all stakeholders in the dispute resolution process.

Originality/value – This is the first study of its kind to examine actual workplace conflicts that result in employment-related lawsuits from the perspective of social contextual factors.

Keywords Dispute resolution, Employment lawsuits

Paper type Research paper

Introduction

Many workplace conflicts result in lawsuits in which employees seek to prove that their employer violated their statutory rights. Typically, in these lawsuits, employees seek to vindicate their claims and recover monetary damages. Allegations that employment laws have been violated can result in lawsuits involving substantial defense costs and economic damages to organizations (Lind, 1997).

However, once a lawsuit is filed, the dispute can be resolved in several ways. The employer and the employees (the parties) may negotiate a voluntary settlement, the case

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can proceed to a trial in which the judgment of a judge or jury is rendered or the dispute may be submitted to an arbitrator.

In recent years, employers have been increasingly requiring employees to agree to arbitration of their legal rights as a condition of their employment (Colvin and Gough, 2015).

Traditionally, arbitration in the employment setting was most often used as the final step in a grievance proceeding under a collective bargaining agreement (Elkouri and Elkouri, 2012). However, in recent years, arbitration has been increasingly applied to the resolution of employment disputes in non-union settings outside of the context of a collective bargaining agreement. Research has shown that the use of arbitration to resolve employment lawsuits has grown substantially (Eisenberg and Hill, 2003; Lipsky *et al.*, 2003). This trend is supported by those who expect arbitration to reduce costs, avoid litigation risks and resolve disputes more expeditiously (Gould, 1987; Hill, 2003; Maltby, 1998; Stipanowich, 2004).

However, researchers have also studied whether arbitration may be designed in such a way that it would give an unfair advantage to employers (Colvin and Gough, 2015). Researches in this camp are concerned that arbitration may deprive employees of their rights to fair procedures or fair outcomes (Dunlop and Zack, 1997; Maltby, 1998; Zack, 1999). This has spurred debate about whether arbitrated case outcomes are substantially different than the outcomes resulting from trials and has provoked calls for empirical research comparing the processes and the outcomes of arbitrations to those of trials (Bingham and Chachere, 1999; Eisenberg and Hill, 2003; Zack, 1999).

Nevertheless, several recent court decisions have upheld agreements that require employment disputes to be resolved through arbitration. For example, following the rationale of the Supreme Court in which arbitration clauses in consumer contracts were enforced, the 5th Circuit Court of Appeals in Horton, Inc. v. *NLRB* (2013) ruled that an arbitration clause related to labor relations matters must be enforced. The Court reasoned that an important purpose of the Federal Arbitration Act is to enable parties to resolve disputes about statutory rights outside of a formal court proceeding. With the support of court rulings favoring arbitration, it is increasingly likely that employment disputes will be resolved by arbitration. Therefore, it is important to answer the question of whether this form of dispute resolution will be fair to employees and employers.

However, a fundamental question remains unanswered. This question involves the influence of the social context of the lawsuit on the distribution of outcomes. To study this question, we examined a large body of court cases that were resolved by negotiation, a trial or by arbitration. These cases invoked issues under three different types of legal claims, Title VII Employment Discrimination, NLRB Labor Relations and Employment Retirement Income Security Act of 1974 (ERISA) employee benefits. Each of these legal frameworks invoke unique social contexts that could influence the outcome of the cases in predictable ways. We study the interaction of case types that have different social contexts with different dispute resolution methods to better understand the influence of social contexts on lawsuit outcomes. We base this study on recent developments in the Institutional Theory as the framework for examining this important question

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Institutional theory

A fundamental premise of the institutional theory is that organizations seek to maintain their perceived legitimacy (Tost, 2011). Legitimacy is a perception that an institution is acting in ways that are proper according to a system of social norms and beliefs (Suchman, 1995). Legitimacy benefits organizations by enhancing their stability (DiMaggio and Powell, 1983).

The legitimacy theory is based on the idea of a social contract between an entity and its environment. Legitimacy represents how congruent an entity's value system and operations are with the values and norms of the environment (Mousa and Hassan, 2015; Brown and Deegan, 1998). Researchers have acknowledged that there are two legitimacy perspectives (Suchman, 1995; Tilling, 2004). The first is the institutional perspective, which focuses on how organizational structures as a whole are accepted by society. The second perspective is strategic. The strategic legitimacy perspective looks at the choices that organizations make to gain support from society (Suchman, 1995). Although most legitimacy researchers fall into one camp or the other, real-world entities face both institutional pressures and strategic challenges, and, therefore, it is important to look at both legitimacy perspectives (Suchman, 1995; Swidler, 1986).

At the institutional level, legitimacy can be used synonymously with institutionalization (Tilling, 2004). At this level, legitimacy empowers entities by making them "seem natural and meaningful" (Suchman, 1995, p. 576). For institutions to survive, they must gain legitimacy from their environment. The institutional legitimacy theory views legitimacy as a set of beliefs held by the institutional environment. These beliefs determine how the entity is built, how it operates and how it is evaluated (Suchman, 1995). The institutional environment includes existing institutions, government and society as a whole. One way institutions seek legitimacy is by responding similarly to environmental influences. These environmental influences include applicable laws and regulations (Meyer and Rowan, 1977; DiMaggio and Powell, 1983).

The strategic view of legitimacy views legitimacy as a resource that entities extract from their social environment and use to achieve their goals (Ashforth and Gibbs, 1990; Suchman, 1995). Within this perspective, the legitimacy theory examines how an entity gains approval, or avoids sanctions, from groups in society (Kaplan and Ruland, 1991). Thus, in one sense, achieving legitimacy can be pragmatic and based on advancing one's own self interests. (Suchman, 1995). On the other hand, achieving legitimacy can be viewed as a moral influence based on societal norms. We incorporate these two alternative perspectives in developing our hypotheses.

Moreover, recent advances in the institutional theory have provided an appropriate theoretical framework for the study of how individuals can cause institutions to change (Bitektine and Haack, 2015). This line of thinking focuses on how micro-level actors acting as evaluators of institutional legitimacy can influence macro-level factors related to overall perceptions of institutional legitimacy (Bitektine and Haack, 2015). It is posited that organizational legitimacy is based on judgments of individuals. When individuals perceive that the institution is acting in ways that do not meet their standards of what is proper, they will seek to change the institution to make it act in way that is more legitimate (Bitektine and Haack, 2015; Walker *et al.*, 1988).

A concrete manifestation of this phenomenon occurs when employees of an organization perceive that their employer is not acting in a legitimate fashion and they

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file lawsuits to effect change in the actions taken by the organization (Zdaniuk and Bobovel, 2011). In so doing, they are seeking to invoke the power of the judicial system in a "contest resolution" process that is designed to affect change Bitektine and Haack, 2015, p. 52). Within that judicial system, there are evaluators such as judges, juries or arbitrators who will act as evaluators of the legitimacy of the organization and then make their own individual judgments about whether there is needed change in what the organization has done. The standards of legitimacy that the evaluators in the justice system will use can be based on codified principles contained in the written text of statutes or case law (Bitektine and Haack, 2015). However, as these evaluators are judging the legitimacy of the organization's actions that are being challenged in the competitive environment of a lawsuit, the evaluators will be presented with multiple and conflicting arguments about what is proper and valid (Bitektine and Haack, 2015).

In this context, employers will resist negotiated settlements for large dollar amounts, because agreeing to such outcomes would signal that the organization's actions were not proper or legitimate. On the other hand, if employees agree to settlements for small dollar amounts, they will have succumbed to an agreement that maintains the social stability based on a tacit acknowledgement that the employer's actions were legitimate (DiMaggio and Powell, 1983). In some cases, where plaintiffs advance their claims that the organization's actions were not legitimate, they will resist agreeing to small settlements and pursue their arguments to judges, juries or arbitrators. Therefore, it can be expected that negotiated settlements to lawsuits will be much smaller than the amounts awarded by trials or arbitration proceedings.

Moreover, the evaluators (i.e. judges, juries or arbitrators) in the lawsuit process will look for clear standards established by text of statutes or prior cases upon which they can base their decisions. However, because the employer will be seeking to defend the legitimacy of its actions and the plaintiff is seeking to show that the employer's actions are not proper and, therefore, not legitimate, the standards that will be presented to the evaluators will be in conflict (Bitektine and Haack, 2015; Lopucki and Weyrouch, 2000). We propose that when this occurs, the evaluators will look to factors in the social context for cues upon which they can base their judgments. These social cues will be different for different types of cases.

Therefore, this study focuses on the impact that social context has on employment lawsuit outcomes, ultimately concluding that social factors may explain differences across case types and dispute resolution methods. A better understanding of the social factors that impact employment lawsuit outcomes is an important first step in improving outcomes for all stakeholders in the dispute resolution process.

Prior research

Prior research on alternative dispute resolution methods for employment lawsuits has focused on advantages to employers. Yet, some of the findings of this line of research are inconclusive and contradictory. For example, Bingham (1995) found that among 171 employment arbitration cases, employees won more cases than employers. However, the author focused only on arbitration and did not examine or compare findings to other types of dispute resolution methods. When arbitration cases were compared to those tried in the federal courts, Howard (1995) concluded that employees were equally likely to receive some award in both arbitration cases and trials. In contrast, Delikat and Kleiner (2004) found that plaintiffs were more likely to win an employment

discrimination charge before an arbitrator than before a federal judge when they compared 125 employment discrimination court cases to 186 arbitrations from the National Association of Securities Dealers and the New York Stock Exchange. Eisenberg and Hill (2003) found a similar pattern when they compared federal court cases, state court cases and arbitration cases from the American Arbitration Association. In general, the raw percentages in their study suggested that employees won more often in arbitrations than in trials, but the differences were not statistically significant. More recently, Colvin and Gough (2015) found that arbitration outcomes tended to favor employers when the employer was larger, used arbitration more often (i.e., was a "repeat player") and the arbitrator was male or less experienced (Colvin and Gough, 2015).

Some of the mixed results could be a result of the methodological limitations from which much of the research in this field suffers. For instance, many studies report simple percentage win rate comparisons without controlling for other potentially important variables (Howard, 1995). Some studies compared non-equivalent groups of cases that were submitted either to private arbitration agencies or to federal courts (Maltby, 1998). These studies generally do not permit strong causal inferences because of plausible alternative explanations arising from the differences between groups (Eisenberg and Hill, 2003). Other studies did not include a large enough sample of arbitrated cases to generate sufficient power to detect statistically significant differences across case type and dispute resolution methods (Eisenberg and Hill, 2003; Hill, 2003). Finally, some studies compared the results of arbitration awards to those of jury trials (Klass *et al.*, 2006; Wittman, 2003). Group decisions are substantially different from individual decision processes (Moscovici and Zavalloni, 1969). For example, juries and other groups tend to make more extreme decisions than do individuals (Greene and Bornstein, 2003). The Civil Rights Act of 1991 granted plaintiffs the right to a jury trial for disparate treatment cases.

For other cases, such as civil rights, disparate impact cases and cases under ERISA, there is generally no right to a jury trial (*Berry* v. *Ciba-Geigy*, 1985; *Thomas* v. *Oregon Fruit Products, Co.*, 2000). Furthermore, when the plaintiff has a right to a jury trial, the types and level of damages to which they are entitled are different. For example, under the Civil Rights Act of 1991, plaintiffs may seek compensatory or punitive damages in jury trial cases. Thus, a simple comparison between arbitrations and all trials (by judge or jury) confounds the type of dispute resolution procedure with the type of damages that could be awarded. The current study addresses these methodological issues by examining only cases that were filed in US federal courts and by comparing only trials before a judge to arbitrations.

However, beyond methodological concerns, another plausible rationale for the mixed findings of the prior research is that studies have not taken into account the social context of the different types of lawsuits. For that reason, another purpose of the current study is to build on existing research by studying the impact of social context on employee lawsuit outcomes across case type and dispute resolution method. Toward this aim, the current study seeks to answer the following questions from a social context point of view:

Q1. Does the type of social context of the employment lawsuit impact the likelihood of winning and/or the monetary award granted?

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Q2. Does the dispute resolution method used impact the likelihood of winning and/ or the monetary award granted?

Q3. Does the interaction between the type of case and the dispute resolution method significantly impact the ruling and dollar amount granted in employment lawsuits?

To answer these questions, we use a contemporary institutional theory perspective that incorporates both micro-level judgments about the propriety and macro-level judgments about validity that combine to influence the perceived legitimacy of institutions (Bitektine and Haack, 2015). This foundation identifies *propriety* as a micro-level judgment that individual evaluators make about an organization's practices and *validity* as a macro-level judgment about the organization within its social context (Bitektine and Haack, 2015).

This theoretical foundation enables an integration with prior studies that have focused on macrojustice and microjustice. Macrojustice focuses on the overall distribution of case outcomes and is, therefore, particularly appropriate for the investigation of systemic fairness (Bingham and Mesch, 2000). This contrasts with microjustice which examines processes and outcomes for individual parties and is, therefore, appropriate when the fairness of case outcomes is related to the underlying merits of individual cases (Adams, 1965; Brickman *et al.*, 1981). For instance, Thornton and Zirkel (1990) found that with the same case facts, arbitrators render different decisions between 30 and 40 per cent of the time. However, from the macro-level perspective, an important question is whether the distribution of outcomes is comparatively fair across different types of cases and dispute resolution procedures. For this question, a macrojustice perspective is appropriate (Bingham and Mesch, 2000; Todor and Owen, 1991).

Moreover, the macrojustice perspective complements the incentive-based approach to litigation (Flanagan, 1989; Shavell, 1997). Incentive approaches have been helpful in enhancing our understanding of how the private and social costs and benefits of litigation may lead to inefficiencies (Shavell, 1997). They also help us understand how economic motives are likely to influence litigation (Flanagan, 1989). However, incentive approaches often assume that plaintiffs are driven primarily by important and rational economic motives. This assumption does not take into account that people often behave in ways that run counter to self-interested, and ostensibly rational, utility-maximizing behaviors (Kahneman and Tversky, 1979). Prior research indicates that social influences can explain behaviors of the parties in employment lawsuit litigation (Goldman, 2003; Godman and Thatcher, 2002). Heeding calls for a closer look at social influence in organizational justice research, the current study examines two aspects of employee dispute designs – case type and dispute resolution method – to determine how the social context created by these factors affect case outcomes.

The types of cases examined in the current study are those in which the plaintiff alleges that employers have violated Civil Rights laws, ERISA or the National Labor Relations Act of 1935 (NLRA). The dispute resolution methods studied are arbitration and court trials. Drawing on the institutional theory, we formulate hypotheses about the expected differences in outcomes across case type, dispute resolution method and the interaction of case type and dispute resolution method.

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Theory and hypothesis development

Case type as a factor in decisions

Certain employment lawsuits take place within a context in which social factors are more likely to play an important role (Bazerman *et al.*, 2000; Wade-Benzoni *et al.*, 2002). Social factors may influence plaintiffs (employees) when determining whether to file a lawsuit and, in so doing, may impact the likelihood of success.

Civil rights cases. Civil rights cases are among the most socially charged lawsuits and stimulate strong social influences. Statutes that protect civil rights are designed to protect social values against employment discrimination based on age, race, sex or disability. Thus, when workers experience discrimination at work, they will likely interpret these events in relation to the social standards embodied in these statutes (Godman and Thatcher, 2002). Consequently, cases involving civil rights issues under federal anti-discrimination statutes are likely to invoke social influences in the dispute resolution process.

Furthermore, civil rights cases invoke ideological issues that are linked to social identities (Goldman, 2003; Wade-Benzoni *et al.*, 2002). Social identity is the recognition that one belongs to social groups (e.g., race and sex) and that membership in these groups is important in some significant way (Tajfel and Turner, 2004). From the micro-level perspective, individual plaintiffs in civil rights lawsuits often perceive a threat to their social identity by the actions taken by their employer (Tajfel and Turner, 2004). They will perceive that the actions taken by their employer are not proper or appropriate. Therefore, they will file a lawsuit to change what the employer has done. When their social identity is threatened, so is their self-image. To protect their self-image, civil rights plaintiffs are likely to be influenced by close associates who encourage them to assert their social identity by filing a lawsuit (Goldman, 2001; Groth *et al.*, 2002). However, this social support can encourage the filing of lawsuits to vindicate social identity even when the plaintiff's chances of winning a large monetary recovery are relatively low (Groth *et al.*, 2002). Hence, plaintiffs in civil rights cases may have relatively less regard for financial compensation than do plaintiffs in other types of cases (Goldman, 2001; Tjosvold, 1977). Therefore, it is expected that in civil rights cases, the plaintiffs are less likely to win, and when they do, they will receive less money.

The statutes that invoke civil rights issues include Title VII of the Civil Rights Act of 1964 (as amended in 1991), the Age Discrimination in Employment Act of 1967 and the Americans with Disabilities Act of 1990. Under these statutes, plaintiffs are permitted to recover, in addition to economic damages, non-economic damages for social-psychological factors such as emotional pain and suffering and mental anguish.

Moreover, from the macro-level perspective, organizations will seek to maintain the public image that their actions are valid and therefore legitimate. This is particularly true when it comes to issues related to race, sex and other forms of employment discrimination (Hymowitz, 2005). Organizations can and do go to great lengths to implement practices that are designed to reduce the risk that they will be embarrassed by public disclosures of unlawful discrimination (Lindsey *et al.*, 2013). These practices include sexual harassment training, workplace audits, etc. For this reason, it is less likely that plaintiffs will succeed in winning judgments or big dollar awards against their employers in employment discrimination cases. Thus, the combined effect of micro- and macro-level influences will result in lower likelihood of judgments against employers and small awards when they do prevail.

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Economic cases. In contrast to civil rights cases, those which deal primarily with economic issues have less of a social foundation. ERISA addresses benefit plans such as retirement, sick pay and health insurance. That statute protects the economic well-being of employees and the dependents covered by these plans. For example, in one ERISA case, an arbitrator awarded substantial damages to plaintiffs who alleged that they did not receive proper evaluation of their stock options under their employer's retirement plan (*Williams* v. *Imhoff*, 2000). In another ERISA case, a plaintiff was awarded substantial damages by an arbitrator under the employer's severance benefit plan (*Kropfelder* v. *Snap-On Tools*, 1994). Although plaintiffs in ERISA cases believe that they have been financially wronged, their social identity has not been violated. Therefore, in these cases, plaintiffs will be more likely to make an objective assessment of their economic self-interest. Moreover, ERISA generally does not permit recovery of non-economic damages (Neuworth, 2001), dealing only with the amount of money that employees should have received in fringe benefits or pensions. Therefore, the decision to pursue an ERISA lawsuit is the one based on objective and economic information rather than on affectively charged factors such as social identity and self-image.

Labor relations cases. NLRA was enacted to protect the rights of private sector employees to join unions and to collectively bargain with employers for improved working terms and conditions. Most charges filed against an employer for unfair labor practices under the NLRA are filed by unions. Under the NLRA, employers must not interfere with employees' right to collectively bargain and must not discriminate against employees because of their union status or activity, including the filing of unfair labor practice charges.

The NLRA also established the National Labor Relations Board (NLRB), which is tasked with enforcement of the Act. Any charges against employers are filed with a regional office of the NLRB. If, after investigating the charge, the Regional Director determines that a violation of the NLRA has taken place, and a complaint is then filed and the case is heard before an administrative law judge.

Social factors might play a role when an unfair labor practice charge is initially filed with the regional NLRB. Individuals often feel strong ties to the union and their membership to the union become part of their identity. However, because every charge is investigated prior to filing a complaint, the process itself reduces the influence that social factors play in pursuing a lawsuit. The initial review and investigation process also increase the merit of each case.

Although social factors will generally provoke plaintiffs to bring lawsuits with relatively lower chances of winning substantial monetary recoveries in civil rights cases, these factors are less likely to come into play in ERISA or NLRA cases. Further, although monetary awards are often the goal in ERISA cases and civil rights cases, the purpose of NLRA cases is often to remedy unfair labor practices by employers:

H1. Employers are more likely to prevail in civil rights cases than in ERISA and NLRA cases. When plaintiffs do prevail in civil rights cases, the dollar amounts will be lower than in ERISA cases.

Dispute resolution methods as a factor in decisions

Employment lawsuits can be resolved through several alternative methods. Plaintiffs (e.g., employees or job applicants) and the defendants (employers) can resolve their disputes through settlement negotiation, litigation or arbitration. In negotiation, the

parties share their interests with one another and, usually with the help of their attorneys, design a settlement that is satisfactory to both parties (Ury *et al.*, 1988). However, parties often discover that a third party is needed to reconcile their interests and decide how to proceed. In this situation, two notable options are litigation and arbitration.

In litigation, a court applies applicable legal standards to the facts of the case and issues a ruling. Arbitration also includes the application of appropriate standards to the case facts, followed by a ruling. However, in arbitration, an arbitrator, rather than a judge, issues the ruling. In arbitration, there are fewer restrictions on the type of evidence that may be admitted, and the parties may have relatively limited opportunities to demand information, documents, etc. through legal discovery proceedings (Sevilla, 2005). Yet, similar to the rulings from a court, an arbitrator's ruling is binding on both parties unless it is overturned on appeal (*Circuit City Stores, Inc.* v. *Adams*, 2001; *Gilmer* v. *Interstate/Johnson Lane Corporation*, 1991). In this section of the paper, the legitimacy theory is used to develop competing hypotheses regarding the impact that social factors have on arbitration outcomes.

Arbitration is a social institution that is impacted by social context. Similar to any social institution, arbitration seeks to gain legitimacy to assure its survival (Meyer and Rowan, 1977; Zucker, 1977). In the context of employment disputes, the use of arbitration will continue to rise only if it is viewed as a legitimate method of dispute resolution.

Organizational theorists have observed that institutions tend to imitate the actions of similar institutions, because they occupy a similar position in a social network that induces them to adopt similar goals, work with similar constraints, have similar stakeholders and produce similar outputs (Burt, 1987). Arbitration is a type of social institution that operates within a social context that also induces social pressure to conform. Arbitration rulings might be compared to trial court rulings in similar types of cases. This comparison might result in institutional pressure to adopt rulings that are similar to court decisions:

H2. Within case types (e.g. civil rights, ERISA and NLRA), there should be a similar proportion of rulings in favor of employers, and the amounts awarded to plaintiffs regardless of whether arbitration or trials are used to resolve the dispute.

The arbitration of employment lawsuits has received a great deal of attention in recent years. Much of that attention has focused on concerns by critics that plaintiffs are not receiving adequate protection (Dunlop and Zack, 1997). This creates a social context that is likely to make arbitrators sensitive to the threat to legitimacy of employment arbitration from the perspective of plaintiffs. For this reason, it is likely that arbitrators will respond to this social context by issuing rulings in which plaintiffs will win more often and receive higher dollar awards (Bingham, 1995). Therefore, for plaintiffs, the outcomes from arbitrations will probably be more favorable than the outcomes from court trials:

H3. Within case types (e.g. civil rights, ERISA and NLRA), the frequency of plaintiff winning and the dollar amounts awarded will be higher in arbitration than in court trials.

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Interaction of case type and dispute resolution methods

Arbitration is a type of institution that is likely to be increasingly adopted when it can provide legitimacy to the dispute resolution process (Colvin, 2003). However, the use of arbitration to resolve non-union employment disputes continues to be a controversial topic. On the one hand, supporters argue that arbitration reduces cost and increases procedural justice, because employees are more likely to get a hearing than they would by traditional litigation (Bingham, 1997). However, opponents argue that the arbitration of non-union employment disputes disadvantages employees. Studies find that when a union is not present, employers have the advantage in arbitration and enjoy superior outcomes (Bingham, 1997), whereas employees are dealt unfair losses and lower awards (Eisenberg and Hill, 2003).

In this section, we develop two competing hypotheses that examine how the interaction between case type and dispute resolution method might explain differences in outcomes across employment disputes. Each hypothesis is based on a different type of legitimacy. Both types of legitimacies are evaluative and based on judgments of the organization's activities, in our case, on arbitration outcomes. *H1* predicts that dispute outcomes are influenced by arbitrators' search for pragmatic legitimacy. *H2* argues the importance of moral legitimacy on arbitration outcomes.

Pragmatic legitimacy. Pragmatic legitimacy is based on the self-interest of an entity's closest audience members (Suchman, 1995). An evaluation of pragmatic legitimacy is based on materialistic calculations of exchanges with the entity. If exchanges are beneficial to the audience, the audience will support the entity. Arbitrators seeking pragmatic legitimacy will attempt to increase the value of exchange for their customers. This motivation can be described by the repeat player hypotheses, which predicts that arbitrators will tend to favor employers in arbitration cases where there is no union, because it is likely that they could receive additional cases from the same employer in the future (Bingham and Mesch, 2000; Dunlop and Zack, 1997). Repeat player effects have been observed in baseball salary arbitration and other private sector cases (Burger and Walters, 2005).

Repeat player effects could result in more favorable rulings for employers when cases are resolved through arbitration instead of court trials (Bingham, 1995). In arbitration, the parties have some influence over the selection of the arbitrator, but in federal court cases, trial judges are appointed for life and the parties have very little opportunity to determine who will hear their case.

Repeat player effects are more prone to occur in civil rights and ERISA cases where the employer is more likely than the employee to be a repeat player (Dunlop and Zack, 1997; Guthrie, 2002). In NLRA cases, both the employer and the union are likely to be repeat players.

Thus, there would be a lower likelihood of repeat player effects in NLRA cases. Further, in NLRA cases, both unions and employers have a say in arbitrator selection; thus, arbitrators with a record of favoring one side over the other will not be selected (Meltzer, 1967).

Therefore, plaintiffs should fare better in NLRA cases than in civil rights or ERISA cases. However, this effect should occur only in arbitration cases and not in trials. Thus, the repeat player effect should occur in civil rights and ERISA arbitration cases but not in NLRA arbitration cases. The differences between arbitration and trial outcomes within case type should reflect this pattern. Thus, if the behavior patterns of arbitrators

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are driven by a search for pragmatic legitimacy, we expect the repeat player hypothesis to be supported, resulting in an increase in win rates and dollar amounts for plaintiffs in NLRA cases more than in civil rights or ERISA cases:

H4. The benefits for employers of using arbitration as opposed to litigation (i.e., win rates and dollar outcomes) will be greater in civil rights and ERISA cases than in NLRA cases.

Moral legitimacy. In contrast to the repeat player hypothesis in which arbitration outcomes are influenced by arbitrators' search for pragmatic legitimacy, this section develops a competing hypothesis based on moral legitimacy. Where pragmatic legitimacy is based on materialistic evaluations, moral legitimacy reflects an evaluation of whether the activity of the entity is the "right thing to do" for society (Suchman, 1995).

The legal environment, within which courts operate, constitutes a strong coercive force, because court decisions can be overturned on appeal. Thus, trial courts depend, in part, on appellate courts for their legitimacy. If a lower court's decision is overturned on appeal, then that decision loses its legitimacy. Courts are bound by legal standards and rules. Institutional forces limit the possible outcomes and can even result in sub-optimal outcomes that focus on compliance with legal standards as opposed to appropriate remedies (Sitkin and Bies, 1994; Wade-Benzoni *et al.*, 2002).

In contrast, arbitrators are less constrained than judges in terms of *stare decisis* (i.e., binding precedent) and appellate review, giving them more freedom to rule and fashion remedies as they deem appropriate (Colvin, 2003). Although arbitrator rulings are cited by parties as precedent and the rulings of one arbitrator are sometimes compared to those of others, the pressure of comparisons on arbitrators is comparatively less. As arbitrators operate outside of the legal constraints of the court system, they are more likely to seek out evidence of discrimination and issue rulings and order remedies that address the purpose behind the law (Coulson, 1976; Tenbrunsel *et al.*, 2000). In doing so, arbitrators pursue moral legitimacy, deciding cases based on doing the right thing as defined by society's value system (Suchman, 1995). This helps to explain why prior research found that labor arbitrators deciding discrimination cases were more likely than courts to uphold discrimination grievances and to award back pay (Oppenheimer and LaVan, 1978; Wolkinson and Barton, 1980).

Further, the freedom granted to arbitrators permits them to render rulings that will enhance the differences between case types in terms of win rates and amounts awarded. Many federal district court cases invoking the NLRA are simply asking for a judgment that confirms or overturns the award of an arbitrator under a collective bargaining agreement (*Carpenters Pension Fund* v. *Enrico and Sons*, 1998). Moreover, it is common for courts to defer to arbitrator rulings in labor relations matters (Feuille *et al.*, 1990; *Yuasa, Inc.* v. *International Union*, 2000).

Thus, when comparing across case types, the differences between arbitrator rulings and judge rulings will be substantially less in NLRA cases than in civil rights or ERISA cases. Therefore, we expect differences in outcomes across case types (*H2*), but we also expect these differences to be enhanced when arbitration is used instead of litigation:

H5. When arbitration is used to resolve disputes, the differences across case types in terms of outcomes (proportion of rulings in favor of employers and dollar amounts) will be enhanced. The differences will be greater in civil rights and ERISA cases.

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Methods

Design and data

We used archival data from federal court cases collected by the Administrative Office of the US Courts (Federal Judicial Center, 2001). Data for each case were recorded by court clerks and became official records of the court system when the case was terminated. Data from all 94 federal district courts are included (Administrative Office of the USA Courts, 1985; Eisenberg and Farber, 1997). The unit of analysis is individual federal district court cases.

Cases were included if they were closed between 1996 through 2003, involved civil rights, ERISA or NLRA issues and there is a record of the dollar amount that the plaintiff received at the close of the case ($0 or higher). The seven-year time period was chosen because there were no major changes in the relevant federal statutes during this period (Oyer and Schaefer, 2002).

Case type. Categorical variables were created for each type of lawsuit: civil rights, ERISA and NLRA. Cases were coded as 1 if the case type applied and 2 otherwise. Civil rights cases pertaining to the Age Discrimination in Employment Act of 1967, Title VII of the Civil Rights Act of 1964 (as amended in 1991), the Americans with Disabilities Act of 1990 and similar statutes. ERISA cases pertain to the Employee Retirement Income Security Act of 1974 and deal with benefit plans such as retirement, sick pay, health and life insurance. This statute defines and imposes fiduciary duties on benefit and pension plan administrators. NLRA cases pertain to the National Labor Relations Act of 1935 and generally involve attempts to confirm or overturn the award of a grievance arbitrator or to determine the applicability of a collective bargaining agreement. Cases involving issues related to other USA or state constitutional issues, statutes or common law claims that are not included in the above three categories were coded as "other".

Dispute resolution method. Arbitrations refer to cases in which an arbitrator rendered a decision that resolved a case that was brought in a federal court (*Manuel* v. *Honda R and D Americas*, 2001). Trials refer to cases that ended by trials before a judge or resulted from a judicial ruling in response to a party's motion. Cases decided by juries are not included in this study. Cases resolved by settlement in which the parties voluntarily agree to settle the case were also collected.

Outcome. A dichotomous variable, called "trial outcome", was used to indicate whether the outcome of a trial favored the employer or the plaintiff. The official court record of the dollar amount that plaintiffs received when the case was closed was called "amounts received".

Control variables. "Case year" was included as a control variable, because the dollar amounts of judgments could be influenced by change in average wage rates and other time-related factors. A dummy variable called "federal government plaintiff" was also included as a control for cases in which the federal government was the plaintiff (1 = yes, 2 = no). The federal government has greater resources to bring to the litigation and brings credibility and prestige to the case, so it may be more likely that the plaintiff will win (Maltby, 1998). To control for differences in awards across courts, we included the variable "court mean". This variable represents the mean amount awarded by the court in employment law cases and was included because prior research suggests that individual courts differ in their tendency to rule in favor of the employers or employees (Gollub-Williamson *et al.*, 1997).

Results

H1 was supported, which predicted that employers were more likely to prevail in civil rights cases than in ERISA and NLRA cases. Table I reports simple descriptive statistics that compare case types and dispute resolution methods in terms of who won. Data indicate that employer win rates in civil rights case trials (77.8 per cent) and arbitrations (69.1 per cent) were significantly greater than in ERISA and NLRA cases. The results of a hierarchical linear regression analysis that includes control variables is reported in Table II. Model 1 shows a significant positive coefficient for civil rights cases favoring defendants. *H1* also predicted that the amounts awarded to plaintiffs in civil rights cases would be lower than in ERISA cases. Supporting this claim, in Table III, a regression analysis for the amounts awarded shows a significant negative coefficient for civil rights and NLRA cases and a significant positive coefficient for ERISA cases. Table IV shows the results of multiple means comparison tests based on the model presented in Table III that included the control variables. These tests analyze whether the estimated marginal means between rows and columns are significantly different. Within arbitrations, the amounts awarded in ERISA cases were significantly higher ($258,000) than those in civil rights cases. The same was true within trials, where ERISA case awards were significantly higher ($118,000) than civil rights case awards. No significant difference in awards was found across case types for settlements.

H2 was not supported, which predicted that the proportion of rulings in favor of employers, and the amounts awarded, would be similar within case types whether arbitrations or trials were used. Table I shows different percentage win rates within case types across arbitrations and trials. Table II shows significantly lower win rates for employers in arbitrations and significant interaction effects between case types and use of arbitration for civil rights and ERISA cases. These significant coefficients suggest that employers are significantly less likely to win in civil rights and ERISA cases when arbitration is used to resolve the dispute. Furthermore, Table III shows that the amounts received by plaintiffs are significantly less when trials are used instead of arbitration across all three case types. To understand the meaning of these differences, a general linear model analysis was conducted to produce estimated marginal means by case type and dispute resolution procedure. The results of that analysis are reported in Table IV. Comparing arbitrations to trials within case type shows that for civil rights and ERISA

		Who won?							
		Employer		Employee		Both		Total	
Case type	Dispute resolution	*N*	(%)	*N*	(%)	*N*	(%)	*N*	(%)
Civil rights	Trial	1,203	77.76	309	19.97	35	2.26	1,547	100
	Arbitration	47	69.12	17	25.00	4	5.88	68	100
NLRA	Trial	40	51.95	36	46.75	1	1.30	77	100
	Arbitration	36	29.75	81	66.94	4	3.31	121	100
ERISA	Trial	302	48.48	285	45.75	36	5.78	623	100
	Arbitration	21	20.59	79	77.45	2	1.96	102	100
Total	Trial	1,545	68.76	630	28.04	72	3.20	2,247	100
	Arbitration	104	35.74	177	60.84	10	3.44	291	100

Notes: $N = 2,538$; % = the row percentage

Table I. Employment law cases, by who won, case type and type of dispute resolution procedure (1996-2003)

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Table II. Hierarchical logistic regression predicting rulings in favor of defendants (employers)

Parameter	Model 1		Model 2		Model 3a		Model 3b		Model 3c	
	B	Odds ratio	*B*	Odds ratio	*B*	Odds ratio	*B*	Odds ratio	*B*	Odds ratio
Controls										
Case year	−0.105**	0.900	−0.100**	0.905	−0.100**	0.905	−0.100**	0.905	−0.100**	0.905
Federal plaintiff	−0.669**	0.262	−0.678**	0.258	−0.674**	0.260	−0.677**	0.258	−0.676**	0.259
court mean	−0.003**	0.997	−0.003**	0.997	−0.003**	0.997	−0.003**	0.997	−0.003**	0.997
Case types										
Civil rights	0.412**	2.28	0.351**	2.02	0.318**	1.89	0.353**	2.03	0.367**	2.08
NLRA	−0.511**	0.360	−0.358**	0.489	−0.323*	0.525	−0.324*	0.523	−0.397**	0.452
ERISA	−0.334**	0.513	−0.361**	0.486	−0.369**	0.478	−0.360**	0.487	−0.317**	0.531
Dispute resolution										
Arbitration	–	–	−0.402**	0.448	−0.499**	0.369	−0.386**	0.462	−0.293**	0.557
Interactions										
Civil rights × arbitration	–	–	–	–	0.315*	1.88	–	–	–	–
NLRA × arbitration	–	–	–	–	–	–	−0.069	0.871	–	–
ERISA × arbitration	–	–	–	–	–	–	–	–	−0.286*	0.564
Model										
Df	6		7		8		8		8	
−2 Log Likelihood	3,156.99		3,123.93		3,119.83		3,123.76		3,120.12	
L ratio X^2	385.56**		418.62**		422.71**		418.78**		422.48**	
ΔX^2	–		33.06**		4.10*		0.17		3.81*	
(%) Correct	67.3		69.1		70.0		69.3		70.0	
Pseudo R^2	0.18		0.19		0.20		0.19		0.20	

Notes: $N = 2{,}777$; $p < 0.05$; $^{**}p < 0.01$; the probability modeled is judgment in favor of employers; B = logistic regression parameter estimate; Gov. plaintiff = federal government was one of the plaintiffs; cases in the other labor litigation category are included to avoid model over-specification; $^{*}p < 0.05$; $^{**}p < 0.01$; ‘ ΔX^2 compares Model 1 to Model 2 and Model 2 to Models 3a, 3b, and 3c; percent correct at $p = 0.34$; pseudo R^2 (Nagelkerke)

Parameter	B	SE
Control variables		
Case year	−0.95*	0.46
Federal government plaintiff	57.49**	8.47
Court mean	0.52**	0.03
Dispute resolution types		
Settled	−81.41**	11.73
Trial	451.27**	46.22
Arbitration	450.40**	89.15
Case type		
Civil rights	−75.78**	10.15
NLRA	−47.71**	12.67
ERISA	85.94**	10.83
Dispute resolution × case type		
Settled × civil rights	76.01**	12.05
Settled × NLRA	43.53**	15.72
Settled × ERISA	−81.59**	12.79
Trial × civil rights	−267.20**	47.27
Trial × NLRA	−301.49**	63.78
Trial × ERISA	−311.40**	48.86
Arbitration × civil rights	−79.73	99.57
Arbitration × NLRA	−204.22*	95.87
Arbitration × ERISA	16.91	96.48

Notes: $*p < 0.05$; $**p < 0.01$; B = normal equation parameter estimates; SE = standard error

Table III. General linear model of amounts received by plaintiff by dispute resolution type and case type

cases, award amounts were significantly higher for arbitrations than for trials. Amounts awarded in NLRA arbitrations were not significantly different than those in NLRA trials.

H3 was supported, which predicted that across case types, the frequency of plaintiff winning, and the dollar amounts awarded, will be higher in arbitrations than in court trials. The differences in win rates for employers versus plaintiffs, illustrated in Table I, were confirmed in the hierarchical logistic regression reported in Table II. Moreover, the amounts awarded to plaintiffs in both civil rights and ERISA arbitrations were significantly greater than in trials (Table IV).

H4 predicted that the benefits for employers of using arbitration, in terms of win rates and dollar amounts, would be higher in civil rights and ERISA cases than in NLRA cases. *H4* was not supported, indicating that we find no evidence of repeat player effects. Table II shows a negative parameter estimate for arbitration, which indicates that arbitration lessens the chance that cases will be ruled in favor of the employer. In Model 3a, the signs of the main and interaction effect are opposite, indicating a buffering effect that shows that the use of arbitration weakens the likelihood that civil rights cases will receive rulings in favor of the employer (Cohen *et al.*, 2003). For Model 3b, the interaction of the use of arbitration and NLRA cases was not significant, indicating no effect. Model 3c shows a synergistic interaction effect between arbitration and ERISA case type. The negative parameter estimate for ERISA case types indicates that these

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Table IV. Multiple means comparisons (t-tests) using estimated marginal means from general linear model (GLM) for differences in amounts received by plaintiffs, by dispute resolution method and case type (rows compared to columns) comparison $ in (1,000s)

Resolution and type	*N*	M	1	2	3	4	5	6	7	8
1. Settled: civil rights	67,455	$30								
2. Settled: NLRA	3,348	$26	($4) *−0.63*	–						
3. Settled: ERISA	24,431	$34	$4 *1.39*	$9 *1.68*						
4. Trial: civil rights	1,692	$219	$189 *−0.03*	$194 *16.40***	$185 *18.59***					
5. Trial: NLRA	84	$213	$183 *19.41***	$188 *4.28***	$179 *4.13***	($6) *−0.14*				
6. Trial: ERISA	680	$337	$307 *4.23***	$311 *16.68***	$303 *19.66***	$118 *6.53***	$124 *2.70*			
7. Arbitration: Civil Rights	80	$406	$376 *20.10***	$380 *8.48***	$372 *8.38***	$187 *4.11***	$193 *3.12*	$69 *1.47*		
8. Arbitration: NLRA	133	$310	$280 *11.78***	$284 *8.11***	$276 *8.00***	$90 *2.52*	$96 *1.45*	($27) *−0.72*	($96) *−1.72***	
9. Arbitration: ERISA	117	$664	$634 *8.48***	$639 *17.14***	$630 *17.17***	$445 *11.74***	$451 *7.96***	$327 *8.26***	$258 *4.49***	$355 *7.06***

Notes: $^{**}p < 0.01$; N = number of cases; M = estimated marginal means from GLM model; t-tests shown in italics; tests for significant differences are based on the Tukey–Kramer adjustment for multiple comparisons appropriate for unbalanced designs (Hayter, 1984)

cases are less likely to be ruled in favor of the employer. Furthermore, the negative parameter estimate for the use of arbitration, combined with the negative parameter estimate for the interaction term between ERISA case type and the use of arbitration, indicates that rulings in favor of the employer are even less likely when arbitration is the method of dispute resolution.

H5 was supported, which predicts that when using arbitration, the differences between case types, in terms of proportion of rulings and amounts awarded, will be enhanced. These differences will be greater in civil rights and ERISA cases. Tables II and III show that when comparing arbitrations and trials, the win rates and amounts awarded are significantly different between trials and arbitrations in civil rights and ERISA cases. The enhancing effect of arbitration is illustrated in Figure 1, showing that the dollar amounts awarded to plaintiffs are higher in arbitrations.

Discussion

Findings and theoretical implications

This study reports significant support for the influence of social context in the resolution of employment disputes. Findings show that employers win more often and plaintiffs receive smaller dollar amounts in cases with high social context. For instance, the strong social factors present in civil rights cases influence individual plaintiffs, at the macro level, to advance to trial to bring about what they believe are needed changes to the organization. However, as organizations seek to maintain the validity of their perceived legitimacy at the micro level, they will resist these cases and also engage in efforts to ensure, at the macro level, that their organizational practices are less likely to expose them to public perceptions that their practices are not valid. It was expected that the combined forces of these micro- and macro-level social factors reduced the likelihood that plaintiffs win employment discrimination lawsuits. The data supported this conclusion.

The increased adoption of arbitration relies on it providing legitimacy to the dispute resolution process (Colvin, 2003). Using the institutional theory, we developed hypotheses predicting how social factors impact arbitration outcomes as compared to the outcomes from trials. From an institutional legitimacy perspective, it was

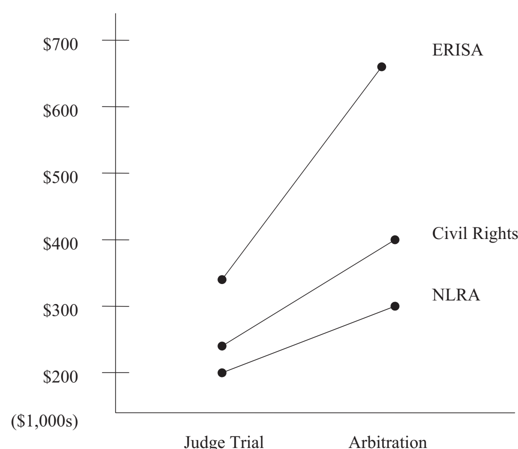

Figure 1. Amounts awarded to plaintiffs by case type and type of dispute resolution procedure

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hypothesized that arbitration outcomes would be similar to trial outcomes within case types. Findings did not support this.

From a strategic legitimacy perspective, it was hypothesized that gaining legitimacy requires arbitrators to be responsive to the critique that employment arbitration disadvantages employees. This results in arbitration rulings that are more favorable to plaintiffs than rulings made by judges. This hypothesis was supported. Win rates for employers are significantly lower in arbitration than in judge trials. The amounts awarded to plaintiffs are significantly higher in arbitrations than in judge trials.

One explanation for the lack of support for the institution legitimacy hypothesis could be the phase of legitimacy that arbitration is currently in. Four phases of legitimacy are discussed in the literature: establishing legitimacy, maintaining legitimacy, extending legitimacy and defending legitimacy (Tilling, 2004). The first phase, establishing legitimacy, requires entities to prove competence and meet standards set by existing institutions. At this phase of legitimacy, organizations are likely to feel institutional pressure to conform. However, arbitration is no longer establishing its legitimacy. The rapid shift from court trials to arbitration has been occurring since the 1990s (Eisenberg and Hill, 2003). This explanation can be investigated by comparing the similarity of early arbitration outcomes to those of trials.

Arbitration is most likely in the phase of maintaining legitimacy, as are most organizations (Tilling, 2004). This phase requires organizations to anticipate and prevent any challenges to its legitimacy (Ashforth and Gibbs, 1990). Social expectations are dynamic, and to maintain legitimacy, arbitration must remain responsive to changing social values. The support we find for strategic legitimacy (*H3*) gives further indication that arbitration is in a phase of maintaining legitimacy.

Continuing our study of the social context of employment disputes, we examined the interaction between case type and arbitration. Competing hypotheses were developed using two different types of legitimacy. The first interaction hypothesis predicted that arbitrators, in pursuit of pragmatic legitimacy, rule in favor of employers more often in civil rights and ERISA cases than do trial judges. This hypothesis was not supported. Next, we hypothesized that arbitrators seek moral legitimacy, and, as a result, the amounts awarded to plaintiffs are higher in civil rights and ERISA arbitrations. This hypothesis was supported. These findings highlight that social context may lead arbitrators to seek moral legitimacy by following larger cultural rules and values and not by basing outcomes on self-regarding calculations, as hypothesized by the repeat player hypothesis.

Researchers have expressed a concern that in employment cases, arbitrators are more likely to take a narrow view of their powers to offer remedies to plaintiffs than in labor relations cases in which they derive their powers from the collective bargaining agreement (Bingham and Chachere, 1999; Bingham and Mesch, 2000). However, our data suggest otherwise. Our findings show that plaintiffs are winning more often and receiving higher awards in arbitrations than in judge trials.

Strengths, weaknesses and future research

This study uses a large sample of actual employment disputes. This enabled us to investigate and report effects across case and dispute resolution type. Furthermore, the external validity and generalizability of these findings are enhanced because of the large sample size. However, this study uses archival data and not perceptual measures.

Therefore, only certain aspects of the influence of social context could be examined in this study. Future research is needed to explore the nature and effects of social context on the resolution of these and other types of disputes. In the future, researchers should focus not only on employment disputes in the USA and Western countries but also in other countries, such as China, with large and growing economies but very different dispute resolution mechanisms and legal systems (Chin and Liu, 2015; Oseni, 2015).

Practical implications

This study suggests that employers lose more often and in larger dollar amounts in arbitration than in litigation. Nevertheless, even a ruling against employers can result in subsequent litigation, should employers seek to overturn the arbitrator's ruling. This will significantly increase the transaction costs for both plaintiffs and defendants. However, if arbitration rulings more closely matched the likely outcomes of trials, then subsequent litigation would be less likely to be overturned, reducing transaction costs. If this was the case, the arbitration of employment lawsuits would more closely match the arbitration of contractual grievances under the typical labor relations system, where, in fact, the arbitrator's decision is usually final and binding. This could be a better outcome for all stakeholders in the dispute resolution process.

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