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# The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry

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# The Effect of Gender on Awards in Employment Arbitration Cases: The Experience in the Securities Industry

## **Abstract**

[Excerpt] In this paper we use quantitative techniques to assess whether gender makes a difference in employment arbitration. Specifically, we focus on the experience in the securities industry where employment arbitration was introduced in 1986. Over the period 1986-2008, approximately 3,200 arbitration awards were issued in employment disputes arising in the industry. In every case the employee (and his or her attorney) presented the arbitrator with a monetary figure representing the damages associated with the claim; the figure presented to the arbitrator usually included the claimant's demand for back pay and often included punitive damages as well. The employers in these cases always denied that the employees' claims had merit (and frequently filed counterclaims); the employer-respondent maintained in each of these cases that the arbitrator should not award the employee-claimant any money at all (Lipsky, Seeber, and Lamare, 2010).

## **Keywords**

employment, arbitration, gender, awards, securities industry

## **Comments**

### **Suggested Citation**

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**The Effect of Gender on Awards in  
Employment Arbitration Cases:  
The Experience in the Securities Industry**

by

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Paper prepared for the 63<sup>rd</sup> Annual Meeting of the Labor and Employment Relations Association, Denver, CO, January 8, 2011.

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We would like to acknowledge our gratitude to several individuals who assisted us in the preparation of this paper. We want to thank most sincerely Ron Seeber, who first had the idea of doing research on employment arbitration in the securities industry and played an active role in the early stages of our research. We also want to thank Heather Baker and, most especially, Missy Harrington for their assistance. At a workshop sponsored by the Department of Collective Bargaining, Labor Law, and Labor History at the ILR School, we presented our initial findings based on this research project. We would like to thank the participants in the workshop for their useful comments and suggestions, especially John Bishop, who provided advice on the quantitative methods we use in this paper.

In this paper we use quantitative techniques to assess whether gender makes a difference in employment arbitration. Specifically, we focus on the experience in the securities industry where employment arbitration was introduced in 1986. Over the period 1986-2008, approximately 3,200 arbitration awards were issued in employment disputes arising in the industry. In every case the employee (and his or her attorney) presented the arbitrator with a monetary figure representing the damages associated with the claim; the figure presented to the arbitrator usually included the claimant's demand for back pay and often included punitive damages as well. The employers in these cases always denied that the employees' claims had merit (and frequently filed counterclaims); the employer-respondent maintained in each of these cases that the arbitrator should not award the employee-claimant any money at all (Lipsky, Seeber, and Lamare, 2010).

Considerable variation exists in the size of these monetary awards, and in our research we developed hypotheses and regression models to explain this variation. We were able to translate the information contained in the awards into a very large database, and in this paper we use logistic regressions to estimate whether the monetary awards were influenced by the gender of the complainant, the complainant's attorney, the respondent's attorney, or the arbitrator (controlling for other variables).

We find that, depending on the definition of the dependent variable, the gender of the complainant and the complainant's attorney (but not the gender of the respondent's attorney or the arbitrator), had significant effects on the size of the award. In general, female complainants did less well than male complainants in employment arbitration in the securities industry. We should note that our results are quite robust and persisted even when alternative specifications of the regressions were estimated. Following the

presentation of our statistical findings, we explore alternative interpretations of their meaning, examining whether the gender variables in our analysis are proxies for other factors that might have influenced the outcomes in these arbitration cases. In most of these experiments, however, we could not find plausible factors that eliminated the gender effects.

It is commonly acknowledged that discrimination against women has been a widespread phenomenon on Wall Street (see, for example, Antilla, 2002; Chung, 2010, Roth, 2007; Selmi, 2005). Despite a rash of class action lawsuits over the last two decades in which women charged major Wall Street firms with sex discrimination, reports in the financial and business press and on the internet suggest that sex discrimination is a persistent problem in the securities industry (see, for example, Hewlett, 2010; Horn, 2010; Sherter, 2010; Tecco, 2010; Wallace, 2010).<sup>1</sup> Many securities firms have taken measures to correct overt forms of sexism, and there are numerous women who have forged successful careers on Wall Street (see, for example, Herera, 1997; Siebert; 2002). But the industry and the arbitration profession remain heavily dominated by men, and it is possible that vestiges of bias remain in these institutions and underlie our findings.

### **The Motivation for Our Research**

Two factors motivate the research we report in this paper. First, the rise of employment arbitration in the United States has been accompanied by concerns about whether the procedure provides a fair and equitable forum for the parties that use it. On the one hand, proponents of the practice maintain that arbitration provides a faster and cheaper means of resolving employment disputes than litigation. Support for the use of

arbitration to resolve employment disputes has been reinforced by several seminal Supreme Court decisions.<sup>2</sup> On the other hand, opponents of the practice argue that arbitration is not an adequate substitute for a judicial forum because it does not provide a level playing field for employment disputes (for a summary of arguments on both sides of this debate, see Seeber and Lipsky, 2006). Critics of the practice maintain that arbitration ordinarily does not provide due process protections that are equivalent to the protections both parties (but especially employees) would receive if their dispute was heard in a court of law. Arbitration has been criticized on several grounds: critics contend, for example, that it does not guarantee adequate discovery, appropriate representation, protections against conflicts of interest, and the competency and impartiality of the arbitrator.<sup>3</sup> Certainly most observers would agree that if the procedure results in the treatment of disputants that varies significantly by their gender, race, religion, nationality, or disability, it does not meet an elementary criterion of fairness. In this paper we focus on whether gender matters in employment arbitration.

Only within the last decade or so have researchers begun to do rigorous statistical analyses of critical issues in employment arbitration. As Colvin has noted, the research gap is due in part to “the dearth of publicly available data on which to conduct empirical research that would help evaluate the arguments on both sides of the employment arbitration debate” (Colvin, 2009). In contrast to most employment arbitration awards, all arbitration awards in the securities industry are publicly available and hence allow us to conduct the analysis presented in this paper.

The second factor motivating our research is the fact, as we have noted, that Wall Street, and more generally the securities industry, has not always been a hospitable place

for women. Indeed, there is considerable evidence that for most of its history a hostile atmosphere for women was commonplace in the industry. As Roth has written, “Not so long ago—as recently as the mid-1980s—Wall Street was one big men’s club of smoked-filled rooms and strippers on the trading floor. Women, to the degree that they were welcome at all, were relegated to roles as secretaries and sex objects. Firms blatantly discriminated against the few women who did fight to become traders, and court cases demonstrate a long history of groping, name calling, come-ons, blocked mobility, and sexual pranks” (Roth, 2007; for a thorough description of the discriminatory conditions women faced on Wall Street through the early part of this century, see Antilla, 2002). Over the last fifteen years, major class action lawsuits were brought against Smith Barney, Merrill Lynch, and Morgan Stanley, charging those firms with the improper treatment of women.<sup>4</sup> Each firm paid out more than \$100 million to resolve these lawsuits, although each firm denied that it had engaged in any systematic discrimination against women (Roth, 2007).

Some scholars believe that in recent years the treatment of women in the securities industry has improved appreciably, in part because of these class action lawsuits (Selmi, 2005). And it would be unfair to paint all firms in the securities industry with the same brush. For example, Prudential Financial, Inc., one of the largest companies in the financial services industry, was the target of two major class action lawsuits in the 1990s. But these lawsuits appear to have been a wakeup call for Prudential’s top management. The company promulgated a code of ethics, and top management took several significant steps to implement the code. It developed a sophisticated integrated conflict management system to handle employee complaints, and

in 1999 it appointed a dynamic leader to be both vice president in charge of managing this system and the company's chief ethics officer. Prudential, headquartered in Newark, New Jersey, also initiated programs that focus on the value of diversity in hiring and employment. For the past fifteen years the company has been listed by *Working Mother* as one of the "100 Best Companies for Working Mothers" in the U.S., and that publication now includes the company in its "Hall of Fame."<sup>5</sup>

Many observers contend, however, that sexism continues to plague the securities industry. In 2010 women alleging sex discrimination filed class action lawsuits against both Goldman Sachs and Bank of America Merrill Lynch; both firms have denied that these suits have any merit. Nevertheless, reports of "women fleeing Wall Street" have been abundant in the financial and business press. In the past decade 141,000 women, or 2.6 percent of the female workforce, left the industry, while the number of men working for Wall Street firms grew by 389,000, 9.6 percent of the male workforce (Wallace, 2010). "The economic downturn produced a talent pool overflowing with highly qualified candidates, both men and women, but evidence suggests that the bar for women to reenter Wall Street is disproportionately high" (Hewlett, 2010).

### **Arbitration in the Securities Industry**

In 1958 the New York Stock Exchange (NYSE) "established a rule that any controversy between a broker and the broker's firm would be settled by arbitration" (Antilla, p. 143). In 1968 the National Association of Securities Dealers (NASD) developed a Code of Arbitration Procedure, which was adopted as a voluntary program. But in 1972 the Code was made mandatory for members and registered persons.<sup>6</sup> In 2007 the enforcement, regulatory, and dispute resolution programs of the NASD and the NYSE



were merged under the Financial Industry Regulatory Authority (FINRA).<sup>7</sup> For the sake of simplifying matters, hereinafter we will refer to all arbitration cases arising under the NASD, the NYSE, and FINRA as FINRA cases.

FINRA is “the largest independent regulator for all securities firms doing business in the United States,” overseeing nearly 4,750 brokerage firms and 633,000 registered securities representatives. It administers “the largest dispute resolution forum for investors in registered firms,” and it provides arbitration and mediation services for claims involving customers and brokers (in 2008, about 75 percent of all filings), brokers and brokers (2 percent of filings), and employees and their firms (23 percent of filings).<sup>8</sup> The FINRA employment dispute resolution program covers only “associated persons” in the securities industry; associated persons are employees who are registered with the Securities and Exchange Commission and can accept and execute customers’ buy-and-sell orders. It is estimated that about one-third of the employees in the industry are registered representatives. (Hereinafter we will use the term “employee” to refer only to registered representatives.) There are approximately 6,100 arbitrators on the FINRA roster. Between 1994 and 2008 there were over 90,000 claims involving customers and brokers and over 2,600 claims involving employees and employers.<sup>9</sup>

The financial crisis that began in 2008 led directly to a dramatic increase in FINRA case filings, which more than doubled between 2007 and 2009 (from 3,238 in 2007 to 7,137 in 2009).<sup>10</sup> Although an analysis of the customer-broker cases would clearly be valuable, our interest in employment relations has led us to focus on the employment claims heard under FINRA auspices.<sup>11</sup>

## Women, Wall Street, and Arbitration

In the 1980s, as an increasing number of women were initiating lawsuits charging their Wall Street employers with sex discrimination (Antilla, 2002; Roth, 2007; Selmi, 2005; and Chung, 2010), the securities industry established its employment arbitration program to handle a wide array of employment complaints, including those alleging discrimination. Figure 1 shows the types of claims made by employees in the 3,200 awards we analyzed: in 28 percent employees claimed their employer had denied them compensation they had been owed; in 27.4 percent they claimed their employer had defamed them in some fashion (e.g., by alleging they had “churned” a customer’s account); in 13.5 percent employees claimed they had been wrongfully terminated; and in 8.4 percent they claimed their employer breached their contract. Cases involving a claim of statutory discrimination constituted 17.1 percent of the total, that is, over 540 cases. Not all of these cases, of course, involved a charge of sex discrimination; about 340 did, while the remaining involved charges of discrimination on the basis of race, age, religion, nationality, or disability.<sup>12</sup> In other words, slightly more than 10 percent of the FINRA awards involved a charge of sex discrimination.

[Figure 1 about here]

In fact, many of the women who brought charges against their firms wanted their day in court and believed they would not receive fair treatment in a mandatory arbitration system that had been promulgated by the industry. These women had the usual complaints about the deficiencies of employment arbitration, and they were especially concerned about the difficulty of appealing arbitrators’ decisions in the courts (see, for example, Antilla, 2002, pp. 137-160).<sup>13</sup> Antilla reports that plaintiffs’ attorneys, several

of whom were well known in the legal community for their opposition to employment arbitration, encouraged their female clients to bring class action suits against their Wall Street employers. Neither the New York Stock Exchange nor the National Association of Securities Dealers hears class action complaints in their arbitration systems, so the attorneys advised their clients that the best strategy for avoiding mandatory arbitration was the class action approach. The attorneys believed that the tactic of filing a class action suit, “by its very ingenuity, would at a minimum get the story out to the public, regardless of whether the case actually went to trial” (Antilla, p. 139).

Reports on the Smith Barney, Merrill Lynch, and Morgan Stanley class action lawsuits indicate that the vast majority of women in these suits settled their claims through negotiation or mediation. Ironically, however, some of the women needed to accept arbitration as the forum to resolve their complaints after negotiation and mediation failed to do so. The outcomes of these arbitration cases varied greatly. For example, an arbitration panel awarded a woman named Hydie Sumner, a former Merrill Lynch employee, an award of \$2.2 million (Chung, p. 233). But, an arbitration panel in a case involving a woman named Edna Broyles, who had been a broker in a Tampa, Florida, branch office of Shearson Lehman and was one of the plaintiffs in the Smith Barney lawsuit, awarded the complainant zero dollars (Antilla, pp. 271-289).

### **Descriptive Information**

In our sample of nearly 3,200 employment arbitration cases, not all cases had complete information. The N values, however, remained high regardless of the variables included in the models we tested, with variable-specific N values ranging from approximately 2,400 to the full sample of nearly 3,200 cases. Regarding the amount

awarded, we considered not only the part of the award that represented all or part of a complainant's principle claim (usually a claim for back pay or for unpaid compensation) but also any attorney fees claimed by either party and any claim for punitive damages. We deflated to 1986 dollars (using the CPI) both the total amount claimed by the complainant and the amount awarded, and we subtracted from the complainant's award the deflated value of any successful counterclaim by the respondent<sup>14</sup>. (This means that if the arbitrator found merit in the counterclaim but not in the claim, our calculation of the net deflated claim would be a negative number.) Table 1 provides the descriptive information for all the dependent and independent variables, including coding schemes, numeric frequencies, and percent information.

[Table 1 about here]

The mean award across all cases is about \$146,000, but this mean is the result of a highly skewed distribution of awards. The ten largest awards, for example, accounted for 22 percent (over \$101 million) of the total sum of money (\$467 million) awarded in all of the FINRA cases. The median amount claimed was \$375,000, while the median amount awarded was only \$1,000—a mere quarter of a percent of the amount claimed. (These amounts are not deflated.)<sup>15</sup> Across our entire sample, the mean deflated award for male complainants was \$96,854, while the mean deflated award for females was \$69,265. Of course, without controlling for other determinants of the awards, we cannot reach any meaningful conclusions about the interpretation of this difference.

The skewed distribution of awards means that it would be inappropriate to use the amount of the monetary award as a dependent variable in an Ordinary Least Squares (OLS) regression. Accordingly, following best practice, we use logistic regressions in

our analysis; in contrast to OLS, logistic regressions do not require that the dependent variable be normally distributed. To use logistic regressions, the dependent variable needs to be defined in dichotomous terms. Therefore, in our analysis we chose to use four definitions to denote what might be defined (for the sake of convenience) as a “win” or a “loss” for the claimant, and to test each as a dependent variable in our regression models. Each variable was dichotomized, with 0 representing a loss and 1 representing a win.

Our first approach counted any positive award at all as a win for the claimant (that is, any total award greater than zero), which is a common approach in empirical research on arbitration win rates (for a very useful summary of this research, see Gough, 2009). The problem with using this definition of a “win”, however, is that it ignores the relationship between the size of the award and the size of the claim; suppose a claimant files a claim for \$10 million but is awarded only \$1,000: should that award be considered a win for the claimant? It seems to us that using the *relative* size of awards is a better indicator of how well claimants do in arbitration than using the *absolute* size of awards. Accordingly, we decided to use successively more restrictive definitions of a claimant “win.” By using four relative definitions of a win, we provide one basis for testing the robustness of our findings.

Using the first definition of a win, we found that 58.3 percent of the FINRA cases yielded outcomes greater than zero (N = 1676). Our second definition of the dependent variable considered a win as any award greater than 25 percent of the amount claimed. Under this approach, complainants in 25.7 percent of the cases (N = 802) were victorious. Our third approach, which further narrowed the definition of a win, counted as winners

only cases with awards greater than 50 percent of the amount claimed. This definition yielded successful claims in 19.4 percent of the awards (N = 559). Our final definition counted a win as any award greater than 75 percent of the total amount claimed. Using this narrowest definition of victory, 14.6 percent of the awards (N = 421) resulted in victories for the claimant.

The key independent variables in our regressions are the gender of the various participants involved in the arbitration. These include the gender of the claimant, the gender of the claimant's attorney, the gender of the respondent's attorney, and the gender of the arbitrator.<sup>16</sup> (It is probably obvious that we could not include the respondent's gender because in virtually all the cases the respondents were firms or companies and not individuals.) Across all of our gender variables, we found a heavy male presence: about 84 percent of the arbitrators were men, 85 percent of the claimants were men, and 90 percent of their attorneys were men; approximately 75 percent of the respondents' attorneys were men. We used the individual's first name to determine the gender of the participant, so there may be some level of error-- although it turned out that identifying the gender of any of the participants was a problem in only a handful of cases. Where the first name was ambiguous (e.g., Casey), we excluded the case from the analysis.

We included a number of control variables in our analysis. For each of the models we estimated, we included the state in which the arbitration occurred (New York, California, and all others); the year issued (1988-2008, continuous); the number of hearing sessions (zero, 1 to 5, 6 to 10, 11 to 15, 16 to 20, and more than 20); and the amount claimed (less than \$25,000, \$25,000 to \$100,000, \$100,000 to \$1 million, and more than \$1 million). Reference categories were accorded to other state, more than 20

hearing sessions, more than \$1 million claimed, and all of the female gender variables, respectively.<sup>17</sup>

We performed a series of tests to ensure that none of our models suffered from multicollinearity or any other methodological concerns. For example, we employed statistical tools such as condition indexes and tolerance/VIF tests, in addition to a standard correlation matrix, to establish that none of the independent variables meaningfully influenced any of the other variables within the models we estimated. Also, we do not think it is likely that endogeneity arising from reverse causality exists in any of our regressions, although we readily acknowledge that (given the nature of our database) we may have an omitted variables problem (a matter we will turn to in a subsequent section).

In one of our simplest tests we generated a series of crosstabs to see whether –on the surface, at least—there was a relationship between our various definitions of “win” and the key gender variables. We found that the proportion of awards won by male claimants was consistently higher than the proportion won by female claimants, regardless of the definition of a “win”. We also found that claimant attorneys who were men won a higher proportion of their cases than claimant attorneys who were women—again, regardless of the definition of a win. In other words, this finding seems to suggest that both female and male claimants did somewhat better when they were represented by a male attorney. Curiously, we also found that respondents did somewhat better when they were represented by a female attorney. Finally, the arbitrator’s gender also appeared to make a difference: the awards issued by male arbitrators across all four definitions of a win were somewhat lower than the awards issued by female arbitrators. Although the

results seem to suggest that the gender of the principal participants was related to the outcomes in these cases, they do not tell us a great deal without controlling for other variables that may influence these outcomes.

### **Logistic Regressions**

Tables 2 through 5 present our regression results. Each table shows the regression estimates for one of our four dependent variables and also reports the N size, Nagelkerke  $R^2$ , unstandardized beta coefficients, standard errors, and odds ratios.

#### *Logistic Regression for Any Award Greater than Zero*

Table 2 shows the logistic regression results when we define claimant victory as any award greater than zero. The model fits the data well, easily passing the Hosmer and Lemeshow goodness-of-fit test, although the pseudo  $R^2$  was not particularly high. We found that any claimant win was influenced by the location of the arbitration hearing, the number of hearing sessions, the size of the claim, and the gender of the claimant. In terms of location, we found that cases heard in New York appeared to result in claimant victories more often than cases heard in other states ( $p < .05$ ). Regarding the number of sessions, we found that fewer sessions (zero and 1 to 5) were less likely to yield awards greater than zero ( $p < .05$  and  $p < .01$  respectively) than cases with more than twenty sessions. The regression in Table 3 also suggests that the amount of the claim significantly influenced the likelihood of a claimant victory, with smaller claims far less likely to result in awards above zero than claims of over \$1 million ( $p < .01$  for all claim sizes). Finally, we found a clear gender effect for claimants. Male claimants were substantially more likely to win anything at all, and Table 2 shows that men had a 34.4 percent greater likelihood than women of being awarded more than zero percent of the



amount claimed ( $p < .05$ ). The gender of the claimant's attorney, respondent's attorney, and the arbitrator did not significantly influence awards, using our first definition of victory.

[Table 2 about here]

#### *Logistic Regression for Awards Greater than 25 Percent of Amount Claimed*

Our second definition of the dependent variable assumes that a claimant victory is a positive award greater than 25 percent of the amount claimed. Table 3 provides the logistic regression for our model using this definition of the dependent variable. Again the model fit well, passing the Hosmer and Lemeshow test and offering a considerably stronger pseudo  $R^2$  of .260. In common with the results for our first dependent variable, we found that location, number of sessions, amount claimed, and gender significantly influence awards. Cases in New York again were more likely to yield victories for claimants ( $p < .01$ ). The number of hearing sessions is again significant, with fewer sessions (zero, 1 to 5, and 6 to 10) less likely to yield victories under our second definition ( $p < .01$  for all). The amount claimed has a highly significant effect on awards, with all levels of the amount claimed significantly less likely to result in claimant victories than the reference category, greater than \$1 million ( $p < .01$  for all). Finally, we find an even stronger gender effect for this second definition of our dependent variable. Both claimant gender ( $p < .10$ ) and the gender of the claimant's attorney ( $p < .01$ ) significantly influenced awards. Male claimants were again about 34 percent more likely to win than female claimants; especially noteworthy, however, is the finding that the gender of the claimant's attorney has an even larger influence on awards than the gender of the claimant. Claimants' attorneys who are men were 80.5 percent more likely to gain

victories than claimants' attorneys who are women. For our second definition of the dependent variable, the results for the gender of the respondent's attorney and the gender of the arbitrator are the same as they were for our first definition of the dependent variable: neither variable is statistically significant.

[Table 3 about here]

#### *Logistic Regression for Awards Greater than 50 Percent of Amount Claimed*

The third definition of our dependent variable assumes that any award greater than 50 percent of the amount claimed is a win for the claimant; the results for this definition of the dependent variable can be found in Table 4. Again, we find that the model fits well, passing the goodness-of-fit test and yielding a Nagelkerke  $R^2$  of .309. We also find that the year issued, number of sessions, amount claimed, and gender are all significant. In contrast to the previous regressions, however, location is not significant. On the other hand, the year the award was issued appears to matter, although only slightly ( $p < .01$ ). Table 4 shows that the number of sessions again has a significant effect on awards ( $p < .01$  for all). It also shows that the amount claimed was once again highly significant and negative for smaller claims ( $p < .01$ ). Finally, we again find that the gender of the claimant and the claimant's attorney have a significant effect on awards. The effects of these gender variables are similar to the effects that we found in our previous regression results. Male claimants were substantially more likely ( $p < .10$ ) than female claimants to achieve victories, with a positive award likelihood of 1.449, higher than it was in any of the previous regressions. The gender of the claimant's attorney was again significant ( $p < .05$ ), with male attorneys about 68 percent more likely than female attorneys to win an award more than 50 percent greater than the amount claimed. Lastly,

the gender of the respondent's attorney and the gender of the arbitrator again do not have a significant effect on awards.

[Table 4 about here]

#### *Logistic Regression for Awards Greater Than 75 Percent of Amount Claimed*

The fourth and final definition of our dependent variable assumes that a claimant victory is any award greater than 75 percent of the amount claimed. This represents the most restricted definition of victory, and the results can be seen in Table 5. Not surprisingly, given the previous results, we find that the model fits the data very well, with strong Hosmer and Lemeshow results and a Nagelkerke  $R^2$  of .363, the highest of all our regressions. Regarding the independent variables, we find statistical significance for the year the award was issued, the number of hearing sessions, amount claimed, and the gender of the claimant and the claimant's attorney. In common with the previous regression, location does not have a significant effect on awards. Table 5 shows that the year an award was issued has a significant effect on awards ( $p < .01$ ), similar to the effect the variable had in our previous regression. This finding suggests, of course, that in recent years claimants were much more likely to win relatively large awards (greater than 50 percent or 75 percent of the amount claimed) than they were in the earlier years of the FINRA program. Also, again fewer sessions (zero, 1 to 5, and 6 to 10) led to a lower likelihood of claimant victory ( $p < .01$  for all). The amount claimed was once again significant: all lower levels of the amount claimed had a significant negative effect on awards, compared to the highest category of amount claimed ( $p < .01$  for all). Finally, we once again find a gender effect, although it is quite different from the gender effect we found in our previous regressions. Table 5 shows that the gender of the claimant no

longer has a significant effect on awards. However, the gender of the claimant's attorney has an even greater effect on awards than it had in our previous regressions. It appears that claimants (both male and female) who are represented by male attorneys are over twice as likely to win relatively large awards (greater than 75 percent of the amount claimed) than claimants who are represented by female attorneys ( $p < .05$ ). However, before we rush to the conclusion that claimants in FINRA arbitration cases ought to retain male attorneys, we need to interpret our results more carefully and consider what "gender" actually means in our analysis.

[Table 5 about here]

### **Interpreting Our Results**

We think it is quite unlikely that our statistical results should be interpreted to mean that there is overt discrimination against women in FINRA arbitration cases. Consider our finding that the gender of the arbitrator does not affect the relative size of the award. We did not find, for example, that male claimants obtained larger awards when the arbitrator was a male, nor did we find that female claimants obtained larger awards when the arbitrator was a female. Rather, we found that male claimants did better than female claimants regardless of the gender of the arbitrator. In our view this finding provides at least limited support for our belief that FINRA arbitrators do not overtly discriminate against women. On the other hand, one might argue that both male and female arbitrators might be affected by a subtler form of bias: it is possible that arbitrators are unconsciously affected by deeply rooted cultural stereotypes about men and women, and without realizing it find more merit in the claims brought by men than

they do in the claims brought by women, even when the claims are essentially equally meritorious.

Another possibility is that there is a systematic difference between the merit of the claims brought by men and the merit of the claims brought by women. It is at least conceivable that, on the whole, male claimants have more meritorious claims than female claimants. We do not have sufficient evidence to draw any conclusions about this proposition; for example, we have no information about the number and nature of filings by male and female claimants. There is of course a lengthy process that precedes the issuance of an arbitration award. It typically involves both negotiation and mediation, and there are often motions by one party or the other that need to be heard by a court. Without knowing a lot more about what happens in those processes, it is difficult to draw solid conclusions on the basis of our findings. Suppose, for the sake of argument, that employers are more inclined to negotiate settlements with women than they are with men who have equally meritorious claims. One can imagine some Wall Street firms, with dubious reputations regarding the employment of women, deciding that it was a better strategy to settle complaints brought by women rather than proceed to arbitration and very likely court hearings that would put the firm in the public spotlight.

One can imagine other scenarios that would help explain our results. For example, it is quite likely, given what we know about the nature of employment in the securities industry, that female claimants who proceed to arbitration have less service or seniority in the industry than male claimants. It is possible that male claimants have been “bigger earners” than female claimants, and since a significant part of the arbitration awards is based on the claimants’ earnings, it would follow that male claimants would obtain larger

awards than female claimants. Regrettably, however, we do not have any data on the service, seniority, or earnings of the claimants. The absence of these kinds of data illustrates the omitted variables problem we acknowledged earlier in the paper.

A companion argument, it might be noted, is that male claimants might be employed by more successful or profitable firms (or branches of firms) than female claimants. If men are more likely to be employed by elite investment banks in New York City and women are more likely to be employed by brokerages in smaller cities, then one would expect (all other things being equal) that male claimants would obtain larger arbitration awards than female claimants. Again, regrettably, we lack the data to test this hypothesis.

Turning to our results for the claimants' attorneys, it is quite possible that "gender" in this case is a proxy for experience. We know that the legal profession, especially in New York City, continues to be dominated by men: the majority of the partners in most firms are men, although many of the younger associates are women.<sup>18</sup> A systematic difference between male attorney experience and female attorney experience in the FINRA arbitration cases might very well explain our regression results. Once again, however, we lack the data to test this hypothesis. (Conceivably, we could expand our database to include personal characteristics and human capital variables for all the attorneys who have appeared in FINRA arbitration cases, but quite obviously that would be a Herculean task.)

Fortunately, however, we do have enough data to examine some of the alternative explanations for our regression results. Our main ambition in conducting these additional tests was to find out whether gender lost its significance when we used different

specifications of our regression equations. In one experiment, for example, we changed the model parameters by converting the number of hearing sessions and the amount of the claim from categorical to continuous variables, and we converted the year the award was issued from a continuous variable to a categorical one. Although the overall structure of the model changed somewhat when we performed these tests, the gender of the claimant and of the claimant's attorney continued to have a significant effect on outcomes.

In addition, we could also test for the experience of the claimants, the claimants' attorneys, the respondents' attorneys, and the arbitrators within the FINRA arbitration system. We created an assortment of experience variables for these participants. For example, we could account for how many times a claimant's attorney or a respondent's attorney appeared in FINRA arbitration hearings. We ran tests to determine whether attorneys who appeared in more than one case obtained better awards than attorneys who appeared only once. We also distinguished attorneys who ranked in the "top ten" in terms of the number of FINRA cases they had handled from all other attorneys. We also constructed the experience variables for arbitrators and for claimants (187 individuals were claimants in more than one arbitration case). We found that these experience variables did significantly affect outcomes, but they did not eliminate the gender effects. In fact, the gender effects were virtually the same as those we report in this paper. It appears that the influence of gender on outcomes is independent of the influence of experience on outcomes. But we readily acknowledge experience in the FINRA system is a very limited measure of overall experience. For example, a better measure of the experience of the attorneys and the arbitrators would include their experience in arbitration cases conducted under the auspices of the American Arbitration Association,

JAMS, the Federal Mediation and Conciliation Service, and other providers.

Constructing that kind of experience variable would be a difficult if not impossible task.

In our database we discovered that some claimants were not represented by an attorney. In close to 10 percent of the cases the coders at FINRA indicated that a case was a *pro se* one, but in another 10 percent of the cases information on whether the case was a *pro se* one or not is simply missing, so it is conceivable that as many as 20 percent of the cases fall in the *pro se* category. There was no meaningful difference between the number of male claimants and the number of female claimants in this category, however it was defined, and we discovered that the variables we constructed for *pro se* cases had no significant effect on awards. In the regressions we present in this paper we eliminated these cases from the analysis.

We also ran a series of interaction terms in our regressions. For example, in one experiment we interacted the gender of the claimant with the gender of the claimant's attorney, but when that interaction term is included in a regression that also contains both of the gender variables entered separately there is too much multicollinearity to produce significance for any of the three variables. When only the interaction term is entered in the regressions, it proves to be significant in some of the regressions but not in others. By far we obtained the strongest and most robust results when we used the regression specifications presented in this paper.

We also hypothesized that there might be an interaction effect between the gender of the claimant and the amount claimed. The amount of the claim has a significant effect on awards in all the regressions we have tested. We theorize that there might be a relationship between male claimants and the amount claimed that help to explain why



mail claimants win larger awards. But when we included both the original and the interactive terms in the regressions, we found that the interaction term was not significant, but the original gender and amount claimed variables continued to have a significant influence on outcomes. Once again, the gender of the claimant appears to act independently of the amount claimed in determining arbitration outcomes.

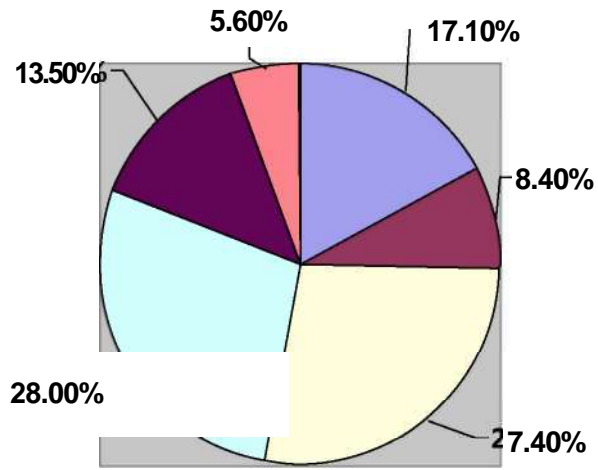
Finally, we examined the experience of the respondents in the FINRA arbitration system. In another paper we are preparing, we examine whether repeat players in FINRA arbitration cases have an advantage over one-time players, whether they are claimants or respondents. We discovered that the five firms that have most frequently been respondents in FINRA arbitration cases account for 608, or nearly 20 percent, of all the awards (Lipsky, Seeber, and Lamare, p. 58). We developed alternative definitions of the repeat-player effect and tested them in our regressions, and we found that in some cases (depending on the definition) repeat-player variables had significant effects on outcomes. But in all these experiments the gender effects followed the same pattern that we report in this paper, and in some cases the gender effects were enhanced. We conclude that the gender effects we report in this paper are independent of repeat-player effects.

### **Conclusion**

In this concluding section we would like to move beyond the limitations of our quantitative analyses and further into the realm of speculation. We have conducted numerous regression experiments, using various definitions of the dependent variable and various specifications of the estimating equations, and we have tested a variety of hypotheses that might possibly explain the gender effects. (We have reported only some of our results in this paper.) We discovered that the gender effects reported here are

remarkably stable and robust across the range of experiments we conducted. As we have noted, we believe that gender in our results might plausibly be a proxy for other factors that influence the experience of men and women in the FINRA arbitration process. But we have a suspicion that even if we had the data to explain what “gender” actually means in our analysis, there would still be a residual that represented the effects of gender *per se* on arbitration outcomes. We suspect that the numerous accounts—in court cases, in scholarly articles, and in the popular media—of the entrenched sexism that infects Wall Street is reflected in the experience women have in arbitration. We are confident that FINRA has done its best to construct a level playing field for men and women in arbitration—it has promulgated numerous rules designed to guarantee equity and fair treatment in its proceedings. But until the securities industry, and especially the major Wall Street firms, are truly committed to providing women with equal opportunity and fair treatment, the gender effects we have uncovered in FINRA arbitration awards are likely to persist.

**Figure 1: Types of Claims**



**Discrimination**

**Breach of  
Contract  
Defamation**

**Compensation**

**Wrongful  
Termination  
Other**

**Table 1: Frequency and Percentage Distribution of Variables**

<b>Variable</b>	<b>Coding Scheme</b>	<b>Frequency</b>	<b>Percent</b>
DEPENDENT			
No Win	Dichotomous	1199	41.7
Any Win > 0	Dichotomous	1676	58.3
Win > 25% Claimed	Dichotomous	802	25.7
Win > 50% Claimed	Dichotomous	559	19.4
Win > 75% Claimed	Dichotomous	421	14.6
INDEPENDENT			
New York	Categorical	1089	34.9
California	Categorical	374	12.0
Other State	Categorical (ref.)	1658	53.1
Year Issued	Continuous	---	---
Zero Sessions	Categorical	446	14.5
1 to 5 Sessions	Categorical	1256	41.0
6 to 10 Sessions	Categorical	778	25.3
11 to 15 Sessions	Categorical	250	8.1
16 to 20 Sessions	Categorical	134	4.4
20-plus Sessions	Categorical (ref.)	204	6.6
>25K Claimed	Categorical	589	20.9
25K to 100K Claimed	Categorical	464	16.5
100K to 1M Claimed	Categorical	1030	36.6
<1M Claimed	Categorical (ref.)	730	26.0
Claimant Gender (Male)	Dichotomous	2617	84.6
Clm. Atty. Gender (Male)	Dichotomous	2198	90.0
Rspdt. Atty. Gender (Male)	Dichotomous	2199	78.3
Arbitrator Gender (Male)	Dichotomous	2567	83.6

**Table 2: Logistic Regression for Any Award Greater Than Zero**

<i>N</i> = 2035		<i>Nagelkerke R<sup>2</sup></i> = .051	
<b>Variable</b>	<b>Unstd. B</b>	<b>S.E.</b>	<b>Odds</b>
New York	.215**	.103	1.240
California	-.246	.150	.782
Year Issued	.001	.011	1.001
Zero Sessions	-.609**	.244	.544
1 to 5 Sessions	-.666***	.196	.514
6 to 10 Sessions	-.265	.192	.768
11 to 15 Sessions	.354	.236	1.424
16 to 20 Sessions	.099	.276	1.104
>25K Claim	-.549***	.193	.578
25K to 100K Claim	-.872***	.174	.418
100K to 1M Claim	-.889***	.188	.411
Male Claimant	.296**	.128	1.344
Male Claimant Atty.	.191	.156	1.211
Male Respdt. Atty.	.043	.114	1.044
Male Arbitrator	.039	.126	1.040
Constant	-1.335	21.926	.263

\*\*\* = Significant at the .01 level; \*\* = Significant at the .05 level; \* = Significant at the .10 level

Hosmer and Lemeshow significance = .312

**Table 3: Logistic Regression for Awards Greater Than 25 Percent of the Amount Claimed**

<i>N</i> = 2035		<i>Nagelkerke R</i> <sup>2</sup> = .260	
<b>Variable</b>	<b>Unstd. B</b>	<b>S.E.</b>	<b>Odds</b>
New York	.360***	.122	1.434
California	-.080	.188	.923
Year Issued	.013	.013	1.013
Zero Sessions	-1.573***	.307	.207
1 to 5 Sessions	-1.176***	.247	.309
6 to 10 Sessions	-.930***	.244	.395
11 to 15 Sessions	-.017	.269	.983
16 to 20 Sessions	-.389	.329	.677
>25K Claim	-1.246***	.193	.288
25K to 100K Claim	-2.173***	.185	.114
100K to 1M Claim	-3.857***	.242	.021
Male Claimant	.293*	.160	1.340
Male Claimant Atty.	.590***	.202	1.805
Male Respdt. Atty.	.181	.140	1.199
Male Arbitrator	-.161	.150	.851
Constant	-25.000	26.456	.000

\*\*\* = Significant at the .01 level; \*\* = Significant at the .05 level; \* = Significant at the .10 level

Hosmer and Lemeshow significance = .349

**Table 4: Logistic Regression for Awards Greater Than 50 Percent of Amount Claimed**

<i>N</i> = 2035		<i>Nagelkerke R</i> <sup>2</sup> = .309	
<b>Variable</b>	<b>Unstd. B</b>	<b>S.E.</b>	<b>Odds</b>
New York	.237	.145	1.268
California	-.065	.223	.937
Year Issued	.045***	.016	1.046
Zero Sessions	-1.691***	.349	.184
1 to 5 Sessions	-1.566***	.294	.209
6 to 10 Sessions	-1.263***	.295	.283
11 to 15 Sessions	-.187	.317	.830
16 to 20 Sessions	-.304	.380	.738
>25K Claim	-1.404***	.196	.246
25K to 100K Claim	-2.711***	.200	.066
100K to 1M Claim	-4.459***	.292	.012
Male Claimant	.371*	.194	1.449
Male Claimant Atty.	.521**	.239	1.683
Male Respdt. Atty.	.218	.166	1.243
Male Arbitrator	-.040	.179	.960
Constant	-88.774***	31.471	.000

\*\*\* = Significant at the .01 level; \*\* = Significant at the .05 level; \* = Significant at the .10 level

Hosmer and Lemeshow significance = .301

**Table 5: Logistic Regression for Awards Greater Than 75 Percent of Amount Claimed**

<i>N</i> = 2035		<i>Nagelkerke R</i> <sup>2</sup> = .363	
<b>Variable</b>	<b>Unstd. B</b>	<b>S.E.</b>	<b>Odds</b>
New York	.240	.168	1.271
California	.094	.251	1.098
Year Issued	.072***	.018	1.075
Zero Sessions	-1.790***	.399	.167
1 to 5 Sessions	-1.88***	.350	.151
6 to 10 Sessions	-1.381***	.352	.251
11 to 15 Sessions	.429	.384	.651
16 to 20 Sessions	-.349	.450	.706
>25K Claim	-1.632***	.207	.196
25K to 100K Claim	-3.130***	.224	.044
100K to 1M Claim	-5.292***	.381	.005
Male Claimant	.370	.225	1.447
Male Claimant Atty.	.712**	.283	2.039
Male Respdt. Atty.	.196	.189	1.217
Male Arbitrator	-.052	.204	.950
Constant	-143.435***	36.646	.000

\*\*\* = Significant at the .01 level; \*\* = Significant at the .05 level; \* = Significant at the .10 level

Hosmer and Lemeshow significance = .341



<sup>1</sup> Some observers believe that discrimination against African Americans and other minorities is at least as serious as discrimination against women in the securities industry. As one reporter noted, “For far too long [Wall Street] has been a club stooped [sic?] in exclusivity. Needless to say, seeking out qualified African Americans for membership has never been a priority of chief executives of the major investment banks” (Clarke and McCoy, 1992).

<sup>2</sup> Most notably, *Gilmer v. Interstate/Johnson Lane, Corp.*, 500 U.S. 20 (1991) and *Circuit City Stores v. Saint Clair Adams*, 532 U.S. 105 (2001). Several of the Supreme Court’s most important decisions regarding employment and consumer arbitration, including *Gilmer*, originated in the securities industry. For example, *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987) held that investors who sign predispute arbitration agreements with their brokers could be compelled to arbitrate claims arising under the Securities and Exchange Act, and *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477 (1989) overturned *Wilko v. Swan*, 346 U.S. 427 (1953), which held that claims arising under the Securities Act could not be compelled to arbitration by means of a contract.

<sup>3</sup> Several of these criticisms of mandatory arbitration are stated in the findings section of a bill, called the Arbitration Fairness Act, which was considered in the last session of Congress. This bill, co-sponsored by Congressman Johnson and Senator Finegold, would amend the Federal Arbitration Act to ban the use of mandatory predispute arbitration agreements in employment, consumer, franchise, and civil rights disputes. For an assessment of the Arbitration Fairness Act, see Fincher, et al., 2009.

<sup>4</sup> *Martens v. Smith Barney, Inc.*, 194 F.R.D. 113, (S.D.N.Y. 2000); *Cremin v. Merrill Lynch, Inc.*, 957 F. Supp. 1460 (N.D.Ill. 1997); *EEOC v. Morgan Stanley & Co.*, 324 F. Supp. 2d (S.D.N.Y. 2004). The *Martens* case is the principal focus of Antilla’s book (Antilla, 2002).

<sup>5</sup> “2010 Working Mother 100 Best Companies,” *Working Mother*, found at <http://www.workingmother.com/BestCompanies/2010/08/2010-working-mother-100-best-companies>, accessed on December 29, 2010. According to *Working Mother*, about 50 percent of Prudential’s managers, senior managers, and corporate executives are women. Prudential has been ranked as the nineteenth best employer in the U.S. by *Computerworld*; see “Special Report: 100 Best Places to Work in IT, 2010,” *Computerworld*, found at <http://www.computerworld.com/spring/bp/detail/718>, accessed on December 29, 2010. Prudential, of course, is not a perfect employer: each year scores of its employees have filed complaints with its internal dispute resolution program, and some of these complaints allege discrimination. Since the company’s program was established in the late 1990s, not a single employee has elected to use the arbitration option available in the company’s system, although quite a few have used FINRA’s dispute resolution program. The development of Prudential’s integrated conflict management system is discussed in Lipsky, Seeber, and Fincher (2003).

<sup>6</sup> This section is drawn largely from Lipsky, Seeber, and Lamare, 2010.

<sup>7</sup> FINRA is classified as a self-regulatory organization (SRO). The SEC delegates to FINRA responsibility for enforcing certain industry standards and requirements related to brokerage and trading activities.

<sup>8</sup> For a description of FINRA’s dispute resolution programs, including the rules FINRA uses in arbitration cases, see <http://www.finra.org/index.htm>, accessed on January 30, 2010. We also draw here on Janice Kwon, “Securities Industry Arbitration: Overview of the Industry and the Debate Over Self-Regulatory Organizations,” unpublished paper prepared for the Association for Conflict Resolution Task Force charged with examining the Arbitration Fairness Act of 2009. Another useful source is Jill Gross and Alice Oshins, eds., *Investor’s Guide to Securities Industry Disputes: How to Prevent and Resolve Disputes with Your Broker* (New York, NY: Pace Law School and FINRA Investor Education Foundation, n.d.). Very little legal or empirical research has been conducted on arbitration in the securities industry. On the occasion of the twentieth anniversary of the Supreme Court’s decision in *Shearson/American Express v. McMahon*, 482 U.S. 220 (1987), the University of Cincinnati College of Law sponsored a symposium, “The Current State of Securities Arbitration,” which featured several papers by leading practitioners and scholars in the field; the symposium was published in 76 U. Cin. L. Rev. 459 (2007-08).

<sup>9</sup> Between 1986 and 1993 there were about 600 employment arbitration awards. The data cited in this paragraph are from records made available to the authors by FINRA.

<sup>10</sup> FINRA Dispute Resolution Statistics, found at <http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/>, accessed on February 9, 2010.

<sup>11</sup> Jill Gross is possibly the leading scholar on the arbitration of investor claims against securities firms. Of the many articles she has written on the topic, see, for example, Gross, 2001, 2006, and 2010.

<sup>12</sup> It should be noted that in many cases employees filed multiple charges. For example, in a handful of cases the employee filed a charge of both sex and age discrimination. The data we present here are based only on the primary allegation in each case.

<sup>13</sup> Antilla describes a number of fears that women claimants and their attorneys had about arbitration. For example, she notes that in both arbitration hearings and courtroom proceedings women are “vulnerable to the trauma of a psychiatric evaluation.” But, she says, “courtrooms provide more protections than do the informal auspices of an arbitration. In court, for example, [the claimant’s attorney] could get her client a protective order to keep invasive information private, and if the order were violated, it could lead to contempt proceedings” (Antilla, p. 151).

<sup>14</sup> Firms in the securities industry often require a newly hired broker to sign a promissory note, which calls for the broker to pay the firm, out of the broker’s commissions, a certain amount of money (sometimes in the six-figure range) within a certain time period (say, three or five years). Consider a case in which a broker is (for example) terminated, the broker files a charge against his employer, and the case goes to arbitration: if the broker has not paid off his promissory note, typically his (former) employer will file a counterclaim, demanding that the he/she do so.

<sup>15</sup> These results were first presented in Lipsky, Seeber, and Lamare, 2010. The single largest award in the FINRA cases was in *Sawtelle v. Waddell & Reed*; an arbitration panel awarded Sawtelle \$27.6 million (of which \$25 million was for punitive damages). See *Sawtelle v. Waddell & Reed, Inc.* (Docket No. 97-03642, award issued Aug. 7, 2001; 2001 NASD Arb. Lexis 820).

<sup>16</sup> If an arbitration panel heard the case, we only coded the gender of the chair of the panel on the grounds that the chair is the key decision maker in these arbitration cases.

<sup>17</sup> As noted earlier, the arbitration program in the securities industry was established in 1986, but only a handful of awards were issued in 1986 and 1987. About sixty awards were issued in 1988, and so we begin our analysis in that year. Also, a hearing session in our database is defined as half a day. The mean number of hearing sessions for all cases was 7.4 (i.e., 3.7 days).

<sup>18</sup> There are, of course, some major exceptions to this generalization. The New York law firm headed by Judith Vladeck has been a major player in both arbitration and court cases involving Wall Street firms. Other female attorneys play a prominent role in Antilla’s narrative of the class action lawsuits that have unfolded in recent years (Antilla, 2002).

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