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Lessons in Losing: Race Discrimination in Employment

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LESSONS IN LOSING: RACE DISCRIMINATION IN EMPLOYMENT

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INTRODUCTION

Imagine a plaintiff's employment discrimination lawyer—let's call her Zoe—meeting a new client. Austin, the new client, tells Zoe a familiar story. He believes he wasn't promoted at work because he is African American. Of course, his boss didn't say, "Austin, I can't promote you. You are African American." Yet, Austin believes he was more than qualified, and a white person got the job instead.

Zoe sympathizes, but isn't that hopeful. Austin's story fits the basic framework of an employment discrimination case, but Zoe thinks that the framework (namely the *McDonnell Douglas*[1] test) fails to identify the subtle, as opposed to overt, discrimination Austin and most plaintiffs allege. That is, the law works well at identifying and prohibiting the individual manager who fires an employee after negative comments about the employee's ancestry, but not so well with unconscious or hidden discrimination. In addition, Zoe has found federal courts

1 McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing the prima facie case as plaintiff showing "(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications").

quick to accept defendants' nondiscriminatory reason for what happened. Unless she can settle the claim, Zoe warns Austin, he shouldn't expect any sort of legal redress.

Zoe's advice mirrors the current state of legal scholarship on employment discrimination litigation. Empirical studies amply demonstrate a plaintiff's slim chances of winning an employment discrimination suit.[2] For example, employment discrimination plaintiffs prevail at rates roughly half that of insurance plaintiffs.[3] Only prisoners fare worse as plaintiffs.[4] Scholars have also documented well the judiciary's failure to redress more subtle discrimination[5] and the judiciary's readiness to defer to the defendant's stated reason for the challenged employment action.[6]

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2 *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Appeal from Jury or Judge Trial: Defendants' Advantage*, 3 AM. L. & ECON. REV. 125, 154 (2001) [hereinafter Clermont & Eisenberg, *Jury or Judge*]; Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 153 (2002) [hereinafter Clermont & Eisenberg, *Realities*]; Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004); Kevin M. Clermont, Theodore Eisenberg & Stewart J. Schwab, *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 547 (2003); John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 985, 990, 1001 (1991); John Golmant, *Analysis and Perspective: Statistical Trends in the Disposition of Employment Discrimination Cases*, 20 Empl. Discrimination Rep. (BNA) 602, 604 (Apr. 30, 2003); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 555 (2001); *see infra* notes 199–200 (detailing these studies).

3 Mike Selmi has shown that plaintiffs are more likely to lose an employment discrimination suit than a personal injury or insurance case at the trial court level. Selmi, *supra* note 2, at 559.

4 *See* Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989); Selmi, *supra* note 2, at 561.

5 *See, e.g.*, Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995); Deborah Malamud, *The Last Minuet: Disparate Treatment After* Hicks, 93 MICH. L. REV. 2229 (1995); Rachel F. Moran, *The Elusive Nature of Discrimination*, 55 STAN. L. REV. 2365 (2003); Amy L. Wax, *Discrimination as Accident*, 74 IND. L.J. 1129 (1999). For descriptions of this debate, see Chad Derum & Karen Engle, *The Rise of the Personal Animosity Presumption in Title VII and the Return to "No Cause" Employment*, 81 TEX. L. REV. 1177, 1188–90, 1195–209 (2003); Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 468–74 (2001). This is explored further *infra* Part II.B.1.

6 *See, e.g.*, Theodore Y. Blumoff & Harold S. Lewis, Jr., *The Reagan Court and Title VII: A Common-Law Outlook on a Statutory Task*, 69 N.C. L. REV. 1 (1990); William R. Corbett, *The "Fall" of* Summers, *The Rise of "Pretext Plus," and the Escalating Subordination of Federal Employment Discrimination Law to Employment at Will: Lessons from* McKennon *and* Hicks, 30 GA. L. REV. 305 (1996); Ann C. McGinley, *Rethinking Civil Rights and Employment at Will: Toward a Coherent National Discharge Policy*, 57 OHIO ST. L.J.

Yet, Zoe's advice is ultimately incomplete, as is the current scholarship. We actually know little empirically about how employment discrimination claims filed on the basis of *race and national origin* fare.[7] Ruth Colker has studied disability cases separately,[8] as have Ann Juliano and Stewart Schwab for sexual harassment claims.[9] Yet, no one has undertaken that work for race. These cases haven't had their story told in any comprehensive way.[10] This Article undertakes this

1443 (1996). For a discussion of this argument, see Derum & Engle, *supra* note 5, at 1190–92, 1209–24. This is explored further *infra* Part II.B.2.

7 For the sake of simplicity, I'll refer to race and national origin employment discrimination cases as "race employment discrimination cases" or the like. While the concept of race is intensely debated, using the word "race" is simply more concise than "race and national origin" in an already wordy field of law review articles.

8 *See* Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 109 & n.45 (1999) [hereinafter Colker, *ADA Windfall*] (analyzing 475 appellate decisions on Westlaw and 615 trial court outcomes in an ABA database); Ruth Colker, *Winning and Losing Under the Americans with Disabilities Act*, 62 OHIO ST. L.J. 239, 245 (2001) [hereinafter Colker, *Winning and Losing*] (analyzing 720 appellate opinions on Westlaw); *see also* Ruth Colker, *The Death of Section 504*, 35 U. MICH. J.L. REFORM 219 (2002) (analyzing the impact of the ADA on Section 504 outcomes).

9 *See* Ann Juliano & Stewart J. Schwab, *The Sweep of Sexual Harassment Cases*, 86 CORNELL L. REV. 548 (2001) (examining 666 sexual harassment opinions from 1986 to 1996 found on Lexis and Westlaw). For citation to more limited studies of sex discrimination cases, see *id.* at 549 n.2. Of particular importance is a study of the lack of interest defense in both sex and race employment discrimination cases. *See* Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992) (examining lack of interest defense in race and sex employment discrimination cases from 1965 to 1989, which included 117 published opinions, plus a small data set from the ABA).

10 I found only one recent study that specifically examined employment discrimination cases filed on the basis of race or national origin. David Benjamin Oppenheimer examined California jury verdicts in 272 employment discrimination cases from 1998 and 1999 and was able to disaggregate the data by sex and race claims. *See* David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 515–16 (2003) (using data from California's major jury verdict reporters). Oppenheimer summarized his thorough and interesting study of California juries with this conclusion: "the case is strong that judges and juries in California are far more skeptical of race and sex-based employment discrimination claims brought by black women, and age-based employment discrimination claims brought by women over forty, than other employment law claims." *Id.* at 566.

Older studies of race and national origin employment discrimination were likewise limited in their scope. *See, e.g.*, Schultz & Petterson, *supra* note 9 (examining the lack of interest defense in race employment discrimination cases); Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and*

task, to provide the first national, comprehensive examination of race employment discrimination.

Through empirical studies of 659 race cases,[11] 172 gender cases,[12] and 109 age cases,[13] I seek to answer two sets of questions. First, are plaintiffs statistically more likely to win some types of race employment discrimination cases? Will a particular mix of plaintiffs, defendants, claims, and defenses lead to a more winnable lawsuit for plaintiffs? More particularly, while some have criticized the application of traditional employment discrimination principles to nontraditional employment discrimination plaintiffs (read: white males), are these plaintiffs successfully availing themselves of employment discrimination law? Are they even commonplace? These questions find their answers in Part I.[14] Second, how do race employment discrimination plaintiffs fare when compared with those alleging gender or age discrimination? Are courts treating different types of discrimination differently? This is the subject of Part II.

From the answers to these two broad sets of inquiries, I argue that the current perception of judges as ignoring subtle discrimination and deferring to defendants is perhaps a little too optimistic. The current status of race employment discrimination is actually worse than previously told. Courts are doing more than deferring to defendants; they are actually agreeing with the defendants due to what I term an "anti-race plaintiff ideology."[15]

This Article proceeds in three parts. Part I chronicles my first empirical step: a search for the statistically more winnable suit alleging race discrimination in employment. Particular factors certainly indicate a stronger chance for plaintiffs' success. A plaintiff represented by counsel and responding to a motion to dismiss is statistically more likely to win than the overall sample, but neither factor is surprising.[16]

Unpublished Employment Discrimination Cases, 24 LAW & SOC'Y REV. 1133, 1152 (1990) (identifying differences in race employment discrimination cases at some data points in their comparison of published opinions with unpublished opinions).

11 *See infra* Tables A1, A2, A3 & A4.

12 *See infra* Table A5.

13 *See infra* Table A6.

14 *See infra* notes 83–85 and accompanying text.

15 This is different from what Kevin Clermont, Ted Eisenberg, and Stewart Schwab have labeled an "anti-plaintiff bias." *See infra* Part III.A. I am not suggesting that all plaintiffs are treated unfairly. Instead, I am contending that race plaintiffs are treated worse for reasons that are perhaps unknowable or indefinable, but for reasons that don't appear to be race neutral.

16 *See infra* Part I.D.1–2. Filing in a particular district court may also improve a plaintiff's chance of a judicial win, but the data here is far from complete. *See infra* Part I.D.3.

By contrast, the other factors studied have little, if any, impact on judicial success.[17] Overall, district court judges treat race and national origin employment discrimination cases fairly alike, no matter who the plaintiffs and defendants are, no matter what their respective arguments are, and no matter what the race and gender of the judge are. The bottom line for all the cases studied is simple: plaintiffs almost always lose when courts resolve their claims. For example, for the 192 race cases filed in the year 2002 in the Eastern District of Pennsylvania and the Northern District of Texas, only *one* plaintiff won when the judiciary[18] in some fashion decided the case—a jury trial in the Eastern District of Pennsylvania.[19] For the 125 cases in which plaintiff won in an opinion published in the year 2002, the number of plaintiffs' judicial victories was four, all of which were again jury trials.[20]

Part II explores possible race neutral explanations for these dismal outcomes. One possible reason might be that all the good cases settle, leaving only the weakest for judicial resolution.[21] The low judicial win rate would then be explained by the merit of the cases decided by the judiciary. The data does not support this explanation. If defendants settle at such a high rate to explain the low plaintiff win rates, one would expect high settlement rates for cases in which the plaintiff won a summary judgment motion, which signals some legal merit to plaintiff's claim. But the empirical studies in this Article indicate that cases in which plaintiff won a summary judgment motion had a *lower* settlement rate than the cases as a whole.

A second set of race neutral explanations would emphasize, as the current literature argues, the judiciary's inability to remedy subtle discrimination and the judiciary's deference to defendant's rendering of why plaintiff wasn't chosen.[22] While both points are very likely true to some degree, the studies indicate that the explanations are in a key respect incomplete. The two rationales have equal applicability to all forms of employment discrimination—whether it be age, disability,

17 *See infra* Part I.D.4–5.

18 A main topic of this Article is the role of the judiciary in employment discrimination litigation, so a definition of "judiciary" seems in order. By judiciary, I refer to the federal district courts in all eighty-four districts and any action that occurs via federal district court jurisdiction. That is, I include jury trials, which are very much affected by a variety of judicial orders, such as proper jury instructions and rulings on motions for judgment as a matter of law. Jury trials are quite infrequent in the studies included in this Article, but provided the very few instances of a judicial win.

19 *See infra* note 112; *see also infra* Tables A3 & A4.

20 *See infra* notes 157–60 and accompanying text; *see also infra* Table 2.

21 *See infra* Part II.A.

22 *See supra* notes 5–6 and accompanying text.

gender, national origin, race, or religion. In all contexts, a court *could* equally ignore evidence of subtle discrimination or too often defer to the defendant's story. Treating types of discrimination similarly, in fact, has some empirical support. Research by Kevin Clermont and Stewart Schwab, for example, has suggested that "pretrial and trial win rates are similar across types of discrimination cases."[23] One might also think that disposition rates would be relatively the same across the many types of discrimination given the substantial similarity in the lawyers handling such cases, the great overlap in the law governing such cases, and the similar incentives to sue and settle a claim.[24]

Yet, I found, as Mike Selmi has contended, that courts treat certain types of employment discrimination cases differently.[25] The research in this Article was able to break down employment discrimination cases not by *statute* (the approach of Clermont and Schwab, which does not perfectly capture the type of discrimination),[26] but by the *type* of discrimination alleged. From this, I found that judges are dismissing more race cases on pretrial motions than they are for gender discrimination cases.[27] This is so even though gender cases were more likely to settle than race cases. Most surprisingly, however, was the outcome in age discrimination cases, a finding at odds with a common belief that age cases are *easier* to win.[28] The

23 Clermont & Schwab, *supra* note 2, at 445 (breaking down employment discrimination claims by the following statutes: Title VII, ADA, § 1981, § 1983, ADEA, and FMLA).

24 Perhaps, however, there is more stigma in being called a race discriminator than a gender discriminator that would cause a defendant to be less likely to settle a race claim. Then one would think that race cases decided by the judiciary would have more merit than gender cases as defendants settle fewer cases and seek judicial approval of their challenged actions. The data is inconclusive as to whether this is true. *See infra* Part II.C.2 (finding that race cases had lower rates of settlement and higher pretrial judgment rates than gender cases).

25 *See* Selmi, *supra* note 2, at 562 ("The bias the courts bring to the cases varies by the type of case.").

26 For example, the comparison for Clermont and Schwab included statutes such as Title VII and § 1983 that include more than one type of discrimination. *See* Clermont & Schwab, *supra* note 2, at 445.

27 *See infra* Part II.C.2.

28 *See, e.g.*, Selmi, *supra* note 2, at 564, 566 (arguing that age discrimination cases "tend to fare the best in court, particularly before juries that can sympathize with the plaintiffs given that all jurors are likely to become old," but also recognizing that "[c]ourts have thus been inclined to craft rules that facilitate granting summary judgment against age discrimination plaintiffs"). *But see* Clermont & Schwab, *supra* note 2, at 445 (including Age Discrimination in Employment claims as a separate category to examine and finding no differences in how claims are treated).

data from this study indicates that the outcomes in age discrimination cases are very similar to the dismal outcomes in race discrimination.[29]

Part III argues that the current state of judicial decisionmaking in race and national origin cases evidences what I call an "anti-race plaintiff ideology." Judicial resolution of these cases is overwhelmingly via a pretrial judgment where the judge must say as a matter of law reasonable jurors could not find for the plaintiff.[30] This demonstrates not federal courts *deferring* to defendants, but judicial *agreement* with defendants in race cases.[31] This type of judicial decisionmaking is quite different from public law litigation, where deference is a common decisionmaking tool.[32] For example, in school desegregation cases courts explicitly state that they will defer to defendants, and then judicially approve the defendants' positions after an evidentiary hearing.[33] The deference in school desegregation seems altogether different from how courts approach their employment discrimination cases, with their frequent pretrial resolution of questions and rare mention of deference or the related value of employment at will.[34] Employment discrimination cases demonstrate not mere deference, but an anti-race plaintiff ideology that largely validates defendants' version of the challenged events.[35]

I. THE ABSENCE OF THE WINNABLE LAWSUIT

Here I tell the story of the typical race and national origin employment discrimination lawsuit. Rather than focus on a handful of opinions on a particular topic or on high profile litigation, I examine the "sweep" of such cases to examine a broader array of claims.[36] My original goal was to define plaintiffs' winnable cases. That goal

29 *See infra* Part II.C.3.

30 *See infra* Part III.B.1; notes 47, 49 and accompanying text.

31 *See infra* Part III.B.1.

32 By public law litigation, I mean "cases challenging the operation of public institutions, i.e., school desegregation, the rights of institutionalized persons, public housing discrimination, and voting rights." Wendy Parker, *The Supreme Court and Public Law Remedies: A Tale of Two Kansas Cities*, 50 HASTINGS L.J. 475, 479 n.13 (1999).

33 *See* Wendy Parker, *Connecting the Dots:* Grutter, *School Desegregation, and Federalism*, 45 WM. & MARY L. REV. 1691, 1705–45 (2004) [hereinafter Parker, *Connecting*]; Wendy Parker, *The Decline of Judicial Decisionmaking: School Desegregation and District Court Judges*, 81 N.C. L. REV. 1623, 1644–52 (2003) [hereinafter Parker, *Decline*]; Parker, *supra* note 32, at 534–42.

34 *See infra* notes 211–14 and accompanying text.

35 *See infra* Part III.A.

36 *See* Juliano & Schwab, *supra* note 9, at 592 ("[E]xamination of the sweep of cases will provide useful antidotes to the tendency to generalize too far from a handful of cases.").

proved elusive, and, as we'll see later, the chances of success for race plaintiffs are even smaller than the current literature suggests, which already demonstrates that employment discrimination plaintiffs lose much more often than other plaintiffs.[37]

Determining the current state of these cases in the federal district courts necessarily leads to empirical work. This Part starts with the "how" of the two empirical studies analyzed in this Article.[38] It describes the methodology of the two studies and argues that the breadth and depth of the studies provide a fairly complete picture of most employment discrimination lawsuits filed on the basis of race. It then describes the "who"—the plaintiffs and the defendants—of these cases.[39] Next, the "what" of these cases is described; here we learn plaintiffs' very low chances of success when a court decides their claim.[40] Lastly, this Part turns to the "why" of those low chances of success and demonstrates that plaintiffs almost always lose—regardless of their status or their claims, the status or arguments of the defendants, or the gender or race of the judges.[41]

A. The How

This Part describes the methodology of the two studies presented in this Article. Both concern race employment discrimination claims,[42] but utilize different databases. One is a national study of 467 reported opinions (which I'll call the "national study"), and the other examines 192 court filings from the Northern District of Texas or the Eastern District of Pennsylvania (the "case filing study" for short). This Part also argues that the reliance on both reported opinions and case filings presents a very detailed, and important, picture of race employment discrimination litigation.

1. The National Study

The national study evaluates 467 decisions of the federal district courts issued in 2003 and available on Westlaw.[43] All 467 opinions

37 *See infra* Parts II.B, III.A; *supra* notes 2–4 and accompanying text.

38 *See infra* Part I.A.

39 *See infra* Part I.B.

40 *See infra* Part I.C.

41 *See infra* Part I.D.

42 Again, I am frequently using the word "race" to include both race and national origin claims. *See supra* note 7.

43 The opinions included in the national study were generated from the district court database on Westlaw with the following search: "Title VII" "employment discrimination" /p race ethnicity "national origin" & date (after 1/1/2003 & before 1/1/2004). This search produced 886 search results. The number of opinions gener-

concern allegations of race and/or national origin discrimination[44] filed under Title VII,[45] with Title VII substantive law governing the resolution of the claim.[46] Further, the national study focuses on the most common procedural posture and claim decided by federal courts: pretrial motions[47] on disparate treatment

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ated from the search slowly increased over time, as Westlaw supplemented its database. The last search was conducted on June 30, 2004, and produced 886 cases. That list is available upon request.

44 I studied both race and national origin because of the conceptual overlap in prohibiting race and ethnic discrimination—both seek to end discrimination based on skin color and ancestry. This is not to suggest that the two are the same; the two, in fact, are coded separately in this Article.

45 Title VII is the most commonly used basis to challenge employment discrimination due to race or national origin. *See* 42 U.S.C. § 2000e (2000).

46 Excluded from the study are the following issues: proper defendants, plaintiffs' employee status, enforceability of arbitration clauses or settlement agreements, discovery disputes, and preclusion issues. I personally made the decision as to whether to include or exclude all opinions, and it is entirely possible that I excluded cases that should have been included. This completely random occurrence, however, should not affect the outcomes of the national study. *See* Schultz & Petterson, *supra* note 9, at 1089 n.45 ("Although our search was designed to locate all published decisions in which a federal court addressed the lack of interest argument, we may not have located every such case. Such a failure would raise no methodological problem, however, so long as the search strategy did not yield a biased selection of cases. There is no reason to suspect any such bias.").

Because the study concerned the treatment by district court judges of Title VII race plaintiffs, I also excluded magistrate judges' opinions that had not been adopted or approved by a district court judge in the magistrate judge opinion found on Westlaw.

Certain procedural postures were also excluded as having more to do with the procedural standards than with Title VII substantive law. Excluded procedural postures included motions to dismiss because of improper service, motions to remand to state court, motions to amend, and post-judgment motions for attorneys' fees and/or costs. I also excluded two procedural postures because such motions so rarely succeed. I omitted opinions solely concerning plaintiffs' motion for summary judgment. I also excluded motions to reconsider and Rule 60 motions because such rulings are rarely granted and reflect more about stiff procedural burdens than Title VII substantive issues.

Also, to the extent these types of excluded issues or procedural postures arose in an opinion with an otherwise includable discussion (for example, a resolution of a summary judgment motion on a failure to hire on Title VII substantive grounds), the opinion was included in the national study, but the discussion of the excludable issues and/or procedural postures was not coded.

47 *See* FED. R. CIV. P. 12(b)(6) (dismissal for failure to state a claim upon which relief can be granted); FED. R. CIV. P. 56 (judgment because no genuine issue of material fact is in dispute and the moving party is entitled to judgment as a matter of law). In both instances, the court is saying as a matter of law that reasonable jurors could not find for the plaintiff. For a motion to dismiss, a legal defect in plaintiffs'

claims.[48] Employment discrimination cases rarely make it to trial,[49] and disparate impact claims are infrequent, although far from extinct.[50] I chose to study district courts simply because many more disputes are resolved at the trial court level than at the appellate level and because these cases represent more typical claims than appellate decisions.[51]

Two research assistants coded the opinions for sixty-one factors, which focused on the claims and defenses asserted, along with outcome data.[52] Most opinions contained a final disposition of the

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pleading exists. In the summary judgment context, plaintiffs cannot prove their cases such that reasonable jurors could find in their favor. At neither posture is there an evidentiary hearing. This study did not cover motions to dismiss on procedural grounds such as improper service. *See supra* note 46 (discussing inclusion of opinions in study).

48 In a disparate treatment claim, plaintiffs allege they were intentionally treated differently because of their race or ethnicity, or any other covered characteristic. This is frequently proven through the *McDonnell Douglas* test. *See supra* note 1 (setting forth that test).

49 The Administrative Office has reported that 3.39% of employment discrimination cases were resolved by a trial. *See* Clermont & Schwab, *supra* note 2, at 438–39. This figure includes both jury and bench trials. *See id.* When analyzing the Westlaw search results, I found only eight opinions that were not motions to dismiss and/or motions for summary judgment, and that otherwise met the national study's criteria. By contrast, 20% of employment discrimination cases are resolved by pretrial motion. *See id.* at 444; *see also* Golmant, *supra* note 2, at 604 (reporting that from 1992 to 2000, 25% to 35% of cases were resolved by judgment at the pretrial stage, with a defendant victory rate ranging from 85% to 95%).

50 I found only two opinions filed exclusively on disparate impact grounds that otherwise met the national study's criteria, and the two opinions were excluded from the study. Twenty opinions alleged both disparate treatment and disparate impact, and these opinions were included in the study.

51 *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 100 (1999) ("Because the district courts are often the last arbiter of a plaintiff's case, these cases are of particular importance."); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CAL. L. REV. 1457, 1481 n.162 (2003) ("Trial judges tend to confront more 'easy cases,' with less ideological contestation, than appellate judges do, and trial judges' decisions have less precedential impact. As a result, their opinions are somewhat less ideological than those of appellate courts.").

52 A copy of the coding sheet is available upon request. The coding of the data has strong internal consistency. After the research assistants coded the opinions, I checked all the coding sheets for errors and corrected any errors detected. To ascertain the consistency in the coding, the method was repeated for five percent of the opinions. *See* Juliano & Schwab, *supra* note 9, at 556–59 (reporting a similar method of checking the internal consistency of the data). The results of the double coding are available upon request. Forty-eight out of sixty-one factors had perfect agreement and only two factors had less than 92% agreement. Plaintiffs' occupation had a consistency rate of 88%; the disposition of the defense of failure to comply with EEOC

case.[53] For those that did not include the ultimate resolution, I obtained a docket sheet from online databases maintained by the district courts.[54]

a. The Benefits and Limits of Reported Opinions

The national study contains only reported opinions—those either published officially by the court or unofficially by Westlaw.[55] Reported opinions play a critical role in the development of the law, and empirical studies often examine them.[56] Yet, suspicion often greets such studies.[57] The concern is simply that reported opinions may be

procedural requirements, 82%. After the double coding, I rechecked the coding of plaintiffs' occupation, and I changed a handful of the codes to improve the consistency in coding.

53 In 128 opinions the plaintiff won in whole or in part; and in ten opinions the defendant entirely won on the motion, but that motion did not address all of plaintiff's race and/or national origin claims. *See infra* notes 156–58 and accompanying text; *see also* Wendy Parker, Technical Appendix—Reported Decisions National Data [hereinafter Reported Decisions National Data], http://www.wfu.edu/~parkerwm/Reported%20Decisions%20National%20Data%20Excel.htm (last visited Apr. 1, 2006); Wendy Parker, Technical Appendix—Reported Decisions Plaintiff Wins Data [hereinafter Reported Decisions Plaintiff Wins Data], http://www.wfu.edu/~parkerwm/Reported%20Decisions%20Pl%20Wins%20Data%20Excel.htm (last visited Apr. 1, 2006). In 329 opinions, the defendant won on all of plaintiff's race and national origin claims. *See* Reported Decisions National Data, *supra.*

54 See *infra* notes 68–69 for a description of this database.

55 *See* Siegelman & Donohue, *supra* note 10, at 1138 (defining published opinions as those available on Lexis, even if not officially reported).

56 *See, e.g.*, Colker, *ADA Windfall, supra* note 8; Colker, *Winning and Losing, supra* note 8; Juliano & Schwab, *supra* note 9; Schultz & Petterson, *supra* note 9; David Sherwyn, Michael Heise & Zev J. Eigen, *Don't Train Your Employees and Cancel Your "1-800" Harassment Hotline: An Empirical Examination and Correction of the Flaws in the Affirmative Defense to Sexual Harassment Charges*, 69 FORDHAM L. REV. 1265, 1275 (2001) (examining seventy-two summary judgment opinions on affirmative defense in sexual harassment cases found on Lexis and Westlaw); Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731 (2003) (analyzing 169 opinions on remittitur available on Westlaw).

57 The concern over studies of reported opinions is primarily one of overstating the results of such studies because of a failure to recognize the limits of studying reported opinions. *See, e.g.*, Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 CORNELL L. REV. 581, 588 (1998) ("[I]t is the case-selection effect—whereby the parties' selection of the cases to litigate produces a biased sample from the mass of underlying disputes—that causes the near-fatal ambiguity."); Clermont & Eisenberg, *Realities, supra* note 2, at 125–26 ("[Published opinion studies are] a very risky undertaking. . . . [I]t is tough to infer truths about the underlying mass of disputes or what lies below disputes. On the other hand, published decisions are a skewed sample of that tip of judicial decisions."); Siegelman & Donohue, *supra* note 10, at 1135

an unrepresentative sample of lawsuits. The debate over studying reported opinions is long-standing. My aim here is not to provide the definitive answer to that debate (such a goal would be impossible), but instead to agree with others who have contended that studies based on reported opinions provide valuable insight into our legal system and are worthwhile.

The Benefits. Studying reported opinions has two primary benefits. First, while reported opinions fail to reveal *everything* about our judicial system, they reveal quite a bit.[58] Reported opinions usually tell us about the status of the plaintiffs and the nature of their claims, the status of the defendants and the nature of their defenses, the ruling in the case, along with the procedural posture and the reasoning for the ruling. Further, the proliferation of electronic databases such as Westlaw has expanded greatly the universe of reported opinions.[59] Eleven judicial districts, for example, make all of their opinions available to Westlaw.[60]

Apart from the depth and availability of data in reported decisions, a second benefit exists. Not only do reported opinions contain a wealth of information, but that information matters. Lawyers, judges, public policy experts, and lawmakers rely on reported opinions.[61] Officially published opinions, and sometimes unofficially pub-

("[C]ases with published opinions are systematically different from those without, such sources and techniques need to be used with more caution than they have been.").

58 *See* Juliano & Schwab, *supra* note 9, at 553 (noting that although differences certainly exist, published opinions represent the "bulk of the issues and fact patterns with which federal judges wrestle").

59 Westlaw includes in its database opinions officially reported, but also opinions brought to its attention by judges and others. *See* Beiner, *supra* note 51, at 98 n.165 ("Some cases are brought to [Westlaw's] attention by the courts themselves, and others are brought to its attention by attorneys or researchers that find the case of particular interest."); Ahmed E. Taha, *Publish or Paris? Evidence of How Judges Allocate Their Time*, 6 AM. L. & ECON. REV. 1, 4 (2004) ("On its own initiative West Group sometimes acquires and publishes an opinion that is mentioned in legal periodicals, suggested to West by attorneys or other judges, or cited by a judge in another opinion.").

60 According to Westlaw's description of its district court database, the following districts make all of their opinions available to Westlaw: Northern District of California, District of Columbia, Northern District of Illinois, District of Kansas, Eastern District of Louisiana, District of Massachusetts, Northern District of Mississippi, Eastern District of New York, Southern District of New York, Eastern District of Pennsylvania, and Northern District of Texas.

61 *See* Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1164 n.83 (1991) ("[W]hen Congress debated recent civil rights legislation, studies of appellate opinions dominated the empirical picture being drawn."); Michael Heise, *The Importance of Being*

lished opinions,[62] serve as precedent for both lawyers and judges and inform their ideas about the status of the law. Further, studies based on all reported opinions—not just those reaching the popular press such as multi-million dollar settlements for Home Depot and Texaco[63]—will give a broader cross-section of race cases and thus better inform public policy debates and proposed legal changes.

The Limits. Studies of reported opinions benefit from the potential of a broad scope: long periods of times, a multitude of factors, and a wide geography are all feasible when studying reported opinions. But the depth is not complete. Some types of disputes rarely make it to the case filing stage and thus are necessarily excluded from a study of reported opinions. Similarly, some types of claims make it to the case filing stage, but not to the status of reported opinions. That is, certain selection mechanisms come into play in getting a dispute to the case filing stage and then from the case filing stage to the reported opinion stage. For example, employment discrimination disputes involving high wage earners are more likely to result in suits filed *and* judicial opinions reported than disputes including low wage earners.[64] Thus, one should not conclude from reported opinions

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Empirical, 26 PEPP. L. REV. 807, 826 (1999) ("An important function of written published judicial opinions is to shape future litigants' expectations and predictions about what might happen if their case should proceed to trial. Moreover, these expectations and predictions in turn influence the nuanced decisional analyses about whether to even initiate, let alone litigate, potential legal claims."); Juliano & Schwab, *supra* note 9, at 592 (justifying the reliance on published opinions because it reveals "the body of sexual harassment claims with which judges wrestle, from which they form their world views, and upon which they develop the doctrine of sexual harassment law"); Taha, *supra* note 59, at 2, 7 (reasoning that "the small percentage of judges' decisions that are published are responsible for changes in law and for most observers' perceptions of the federal court system" and that "published decisions are more likely to be read and cited by the legal community").

62 On the differing precedential value of opinions unofficially reported, see Penelope Pether, *Inequitable Injunctions: The Scandal of Private Judging in the U.S. Courts*, 56 STAN. L. REV. 1435, 1536–79 (2004).

63 For two interesting looks at high profile class action litigation, see Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1269–97 (examining the effects of employment discrimination class actions against Texaco, Home Depot, and Denny's); Sturm, *supra* note 5, at 509–19 (describing class action gender discrimination suit against Home Depot).

64 *See* Siegelman & Donohue, *supra* note 10, at 1154 ("As one would expect, management, professional, and technical workers—which are the high-wage job classifications—are more common in the published sample, while low-wage operatives are over represented in the unpublished sample."); *see also* Clermont & Eisenberg, *Realities*, *supra* note 2, at 140 ("The challenge is to tease out the residual meaning in win-rate data by removing the inherent case-selection ambiguities—thereby isolating, say, the

that employment discrimination claims are more likely to concern high wage earners. Instead, these wage earners are simply over-represented in the sample.

b. The Use of Reported Opinions

Given that reported opinions are not a perfect reflection of similar claims or case filings, but that the opinions provide a wealth of accessible information, the question becomes how to utilize the data. One can clearly make *descriptive* claims from reported opinions. The more difficult question is how to *interpret* these results. Before interpreting the results, one must make sure that the results are not skewed by factors that influence whether an opinion is reported or not. Otherwise, one's interpretation of the data may be overstated or wrong.[65] In other words, the data from reported decisions need not be perfect to be informative, but to be informative the data needs careful treatment.

2. Case Filing Study

Even though reported opinions can give us "good"[66] data, to provide as complete a picture as possible, I supplemented the national

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remaining implications of the case-strength factor. That is, careful research and theorizing can often succeed in overcoming the effect of settlement.").

65 Selection issues can be particularly acute at the district court level. Most employment discrimination cases settle without producing any reported opinion. Pretrial decisions are frequent and often brief, thereby reducing the opportunity for writing an opinion deemed worthy of publication. *See* Juliano & Schwab, *supra* note 9, at 556 n.39 ("Because district court opinions address claims at every stage of the proceeding and many of their ruling [sic] have little precedential value, district court judges often choose not to officially report decisions."). By contrast, appellate courts are more likely to write an opinion explaining the reasons for their decisions and to publish their opinions than district courts. Publication policies and rates vary greatly, however, among the circuit courts. *See* Deborah Jones Merritt & James J. Brudney, *Stalking Secret Law: What Predicts Publication in the United States Courts of Appeals*, 54 VAND. L. REV. 69, 86 (2001) (discovering the publication rates of circuit courts in appeals from the decisions of the National Labor Relations Board); Pether, *supra* note 62, at 1567–79 (detailing the different publication practices of the circuit courts). No one has undertaken a similar analysis of publication policies and rates among district courts, where it is harder to define what could be published among the many decisions made by district courts. Appellate courts, on the other hand, typically issue one opinion per appeal, thereby making an easier definition of publication rates at the appellate level.

66 *See* Clermont & Eisenberg, *Realities*, *supra* note 2, at 154 (concluding article with a short statement of "[d]ata are good").

study with the case filing study.[67] This second study examined case filings from the Eastern District of Pennsylvania and Northern District of Texas.[68] This Part describes the methodology of this study of case filings.

To select the cases, a research assistant searched an online database maintained by the respective courts for all cases filed in the year 2002 and identified with a case code of employment discrimination[69] and a cause of action of a Title VII race or national origin claim.[70] From those criteria, the research assistant found eighty-two

67 *See* Schultz & Petterson, *supra* note 9, at 1092 ("In light of the possibility that the decisions in our data set may be unrepresentative, we compare them to a second data set comprised of a sample of closely-matched group of filed cases.").

68 Siegelman and Donohue studied these two districts, along with five others, in their 1990 comparison of reported and unreported district court employment discrimination opinions. *See* Siegelman & Donohue, *supra* note 10, at 1143. In that study, the Eastern District of Pennsylvania had the second highest percentage of unique employment discrimination cases with published opinions (24.4%), while the Northern District of Texas was the district with the second lowest percentage of unique employment discrimination cases with published opinions (5.7%). *See id.* Both districts also participate in Case Management & Electronic Case Filing system (CM/ECF), an electronic database maintained by district courts that includes docket sheets and selected case filings. Further, both districts included on the case summary on CM/ECF for each case the type of discrimination alleged in the suit. *See infra* note 70. Lastly, both districts make all their opinions available to Westlaw, which thus provides good comparison possibilities with the national study. *See supra* note 60 and accompanying text.

69 CM/ECF allows searches by case category and date complaint filed. Docket sheets and some court filings can also be retrieved from the database. The particular query run was the following: case filed from January 1, 2002, to December 31, 2002, with Administrative Office case category of "Civil Rights: Jobs," the category for employment discrimination cases. This search produced 557 cases for the Eastern District of Pennsylvania and 401 cases for the Northern District of Texas. The coding of cases by case category has been found to have high reliability. *See* Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1463 (2003) ("[T]he most basic code for researchers' use of AO data—the case category, which identifies cases as pertaining to a specified subject matter—appears from the limited research already done, to be highly accurate.").

70 This can be found on the case summary page provided for every case satisfying the query. Included in the case filing study were cases identified with the cause of action of "42:2000 Job Discrimination (Race)," which loosely corresponds to Title VII (42 U.S.C. § 2000e (2000)) claims that concern either race or national origin. No case was described with a cause of action of "42:2000 Job Discrimination (National Origin)"; it appears that national origin cases were coded as race claims. The complaints and docket sheets collected also revealed national origin claims being coded as race claims. It is entirely possible that the clerk would code a case as race discrimination and that the case be about another type of discrimination. I found no evidence of this, however, in the docket sheets, which can sometimes be fairly descriptive

cases for the Eastern District of Pennsylvania and 110 cases for the Northern District of Texas. For comparison purposes, I also collected from the two districts data on 172 gender employment discrimination cases and 109 age employment discrimination cases.[71] Relying on docket sheets, the cases were coded for nineteen factors, primarily focusing on the outcomes of various procedural stages.

The national and case filing studies were designed to be similar in topic and time period.[72] Yet, the case filing study utilized a broader definition of court action than in the national study. The national study relied only on opinions, while the case filing study examined any judicial action reflected on a docket sheet.[73] Thus, the case filing study captures a broader picture of the all procedural postures involved in resolving a case, while the national study only examines the procedural posture of a particular opinion but in great detail. Together, the studies represent both the depth and breadth of race and national origin employment discrimination cases. The remainder of this Article discusses the resulting data from the two studies. Most of

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of plaintiff's claims. Further, clerks have been found to have a high degree of accuracy in coding the overall case code and the same is very possible for coding the type of discrimination. *See* Eisenberg & Schlanger, *supra* note 69, at 1463. Finally, I would expect that the random occurrence of mislabeling the type of discrimination alleged would not affect the overall conclusions of this Article.

71 *See infra* Tables A5 & A6. The cause of action on the case summary page, *see supra* note 70, was for the gender cases "42:2000 Job Discrimination (Sex)" or "42:2000 Job Discrimination (Sexual Harassment)." *See infra* Part II.C.2. Many thanks to Joan Williams for encouraging this collection of data. The cause of action for the age cases included "29:621 Job Discrimination (Age)"; "29:633 Job Discrimination (Age)"; and "42:2000 Job Discrimination (Age)." *See infra* Part II.C.3.

72 The national study based on the Westlaw database and the court filings study based on the CM/ECF database utilize different search engines, but the two are relatively compatible. The main relevant difference in the two search engines is that Westlaw allows searches by the date of the opinion, while CM/ECF allows searches by date complaint filed or by last entry date on the docket sheet.

Although the data in the Westlaw study and the CM/ECF study need not match up completely for the comparison of data to be informative, I attempted to have the data be of the closest time frame available. To that end, the CM/ECF study included cases in which the complaint was filed within the year 2002, while the Westlaw included all district court opinions published in 2003 in an effort to capture the most recent year for which data would be available. Although a definitive study was not conducted, the quick overview of the Westlaw database found many opinions where the complaint was filed in 2002. Picking 2002 as the year of filing also allowed sufficient time for the case to be terminated.

73 *See* Heise, *supra* note 61, at 825 n.105 ("I use the term 'judicial opinion' loosely in this context. Courts generate an array of official workproduct (*e.g.*, judicial orders, memorandum, judgments, opinions).").

the analyzed data can be found in the Appendix to this Article. The data not in the Appendix can be accessed online.[74]

B. The Who: Plaintiffs and Defendants

This Part discusses the parties and their claims found in published opinions.[75]

1. The Plaintiffs and Their Claims

The national study of reported opinions revealed men (59%) suing more often than women (39%), and at a rate higher than their representation in the workforce.[76] The plaintiff's race or national origin was most often identified as African American or black (60%). The next most common race or national origin was white, not of Hispanic origin (10%), followed by Hispanic plaintiffs in 8% of the opinions.[77] Plaintiffs' union membership was mentioned in 16% of the cases, slightly more than the rate of unionized employers in the workforce.[78] Plaintiffs typically worked in either blue collar (30%) or "other white collar" fields (29%) (meaning not professional, clerical, or technical, but other white color work such as teaching or management).[79] The reported opinions included overwhelmingly suits with

74 *See* Wendy Parker, Technical Appendix [hereinafter Technical Appendix], http://www.wfu.edu/~parkerwm (last visited Apr. 1, 2006). This Technical Appendix includes all of the data for this Article in Excel format along with the coding sheets as PDF files. The output files are in SPSS format.

75 Because of a possible case selection effect, *see supra* notes 57, 64–65 and accompanying text, the parties in published opinions likely do not mirror the parties in all similar cases or disputes. Because existing scholarship tells us little about the average party to a race or national origin claim, the data for published opinions adds some knowledge, albeit limited knowledge.

76 BUREAU OF LABOR STATISTICS, U.S. DEP'T. OF LABOR, TABLE 1: EMPLOYMENT STATUS OF THE CIVILIAN NONINSTITUTIONAL POPULATION BY AGE AND SEX, 2002 ANNUAL AVERAGES, *available at* http://www.bls.gov/cps/wlf-tables1.pdf. (identifying women as making up 47% of the workforce, and men at 53%). In the remaining opinions, the plaintiffs' gender was nonascertainable (one opinion, or 0.2%), or there were multiple plaintiffs, with at least one female and one male (six opinions, or 1.3%). *See infra* Table A1.

77 The plaintiff's race was Middle-Eastern descent in 3% of the opinions; Asian/Pacific Islander, 3%; multi-racial individual or group, 2%; Native American, 1%; or nonascertainable, 13%. *See infra* Table A1.

78 BUREAU OF LABOR STATISTICS, U.S. DEPT. OF LABOR, TABLE 34: UNION AFFILIATION OF EMPLOYED WAGE AND SALARY WORKERS BY SEX, ANNUAL AVERAGES, 1983–2002, *available at* http://www.bls.gov/cps/wlf-tables34.pdf (reporting that 13% of those employed are represented by unions).

79 The representation of other occupations in the national study are as follows: 10% administrative, 8% clerical, 8% law enforcement/firefighter, and 3% technical.

one plaintiff (94%), suing with attorney representation (80%),[80] and without any assistance from government agencies (99%),[81] public interest organizations (100%), or amicus filings (100%).[82] In sum, the most common plaintiff in a published opinion was an African American male, working in either blue collar or other white collar fields and represented and assisted solely by a private attorney.

Surprising, given the attention they have recently received in the literature, was the relatively small percentage of whites suing.[83] Although some have expressed concerns with white men using employment discrimination law, only 6% of the opinions had a white man as a plaintiff.[84] (Their win rate was less than the overall sample.[85]) Also particularly noteworthy is the complete absence of class actions, which are given a fair amount of attention in the literature.[86]

See infra Table A1. The occupation was nonascertainable in 13% of the opinions. *See infra* Table A1. Compare these figures with those in Juliano & Schwab, *supra* note 9, at 561 (reporting the following occupational breakdown in study of published decisions on sexual harassment from 1986 to 1995: 12% professional, 29% clerical, 38% blue collar, 21% management and white collar, and 10% nonascertainable).

80 Attorney representation was defined as whether the plaintiff was represented by counsel at the time the opinion was written.

81 The small percentage of cases filed by the federal government (1%, or 3 cases out of 467) is contrasted with the percentage of cases filed *against* the federal government (15%, 68 out of 467). *See infra* Table A1. This is consistent with other studies. *See* Schultz & Petterson, *supra* note 9, at 1146 ("While the level of government plaintiff participation decreased, the level of government defendant involvement increased over time.").

82 Similar results were reported in a sexual harassment study. *See* Juliano & Schwab, *supra* note 9, at 561–63 (finding less than 2% with any public interest involvement, and less than 1% class actions).

83 *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 493, 517 (2003) (considering whether limiting disparate impact analysis to minorities would violate the Equal Protection Clause); Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1034 (2004) (arguing that *McDonnell Douglas* should no longer apply to either claims by minorities or whites); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 Nw. U. L. REV. 1505, 1512 (characterizing "the question of the sweep of disparate impact [as having] important practical and theoretical implications").

84 Thirty cases had white men as plaintiffs (or 6%), while sixteen cases had white women (or 3%). *See* Wendy Parker, Technical Appendix—Reported Decisions Frequencies App A [hereinafter Reported Decisions Frequency App A], http://www.wfu.edu/~parkerwm/Reported%20Decisions%20Frequencies%20App%20A.spo (last visisted Apr. 1, 2006); *see also* Reported Decisions National Data, *supra* note 53.

85 The win rate of white males was 17.9%, compared to an overall win rate of 27.4%. *See* Reported Decisions Frequencies App A, *supra* note 84; *see also* Reported Decisions National Data, *supra* note 53.

86 *See supra* note 63 and accompanying text.

The most common type of claim was retaliation (51%).[87] Other common complaints included discharge (39%), harassment/hostile work environment (37%),[88] terms and conditions that are not pay-related (32%), promotion (28%), and terms and conditions that are pay-related (19%).[89] Constructive discharge claims, which have also been the subject of recent scholarship in the sexual harassment arena, were uncommon.[90]

2. The Defendants and Their Defenses

In the national study, plaintiffs sued private employers 51% of the time, state or local governments 34% of the time, and the federal government 15% of the time.[91] Defendants raised as a defense most

87 For a thorough analysis of the meaning and importance of retaliation claims, see Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18 (2005).

88 The national database only included disparate treatment claims, *see supra* note 48 and accompanying text, which necessarily raises the question of how to define harassment claims. Some define harassment claims as something different from disparate treatment and disparate impact. *See, e.g.*, Martha Chamallas, *Title VII's Midlife Crisis: The Case of Constructive Discharge*, 77 S. CAL. L. REV. 307, 309, 342–43 (2004). Because harassment claims arose frequently enough in reported opinions to be fairly studied (37% of opinions included harassment claims), I included them in the national study, even though some might not classify harassment claims as disparate treatment claims.

89 The remaining types of claims coded were all asserted in less than 10% of the opinions: constructive discharge (8%), demotion (4%), failure to hire (4%), and failure to reinstate (1%). *See infra* Table A1.

90 *See* Chamallas, *supra* note 88, at 313 (arguing that in sexual harassment cases "at the crux of the constructive discharge litigation is a question of attribution and responsibility, rather than one of the proper characterization of the nature of the action"); *see also supra* note 89 (reporting that 8% of the opinions claimed discrimination through constructive discharge).

91 In two cases (0.4%), plaintiffs sued both private employers and governments. *See infra* Table A1. Compare this percentage with those in Juliano & Schwab, *supra* note 9, at 563–64 (noting that in a sexual harassment study of published opinions, the federal government was a defendant in 4% of opinions, and state or local governments were defendants in 23% of opinions). Siegelman and Donohue found in their 1990 study that governments were overrepresented as defendants in reported opinions. *See* Siegelman & Donohue, *supra* note 10, at 1154 ("Similarly, if one looked only at published cases, one would suspect that cases against utilities and government employers were more common and cases brought in the service sector were less frequent than they in fact are. The differences might be explained by a wage effect, in that service jobs pay less and utility and (federal) government jobs pay more."). The case filing study also indicated that government defendants may be overrepresented in reported opinions. *Compare infra* Table A1 (government defendants in 48% of published opinions), *with infra* Table A3 (government defendants in 17% of cases filed), *and infra* Table A4 (government defendants in 21% of cases filed). This difference, however, could be due to how court clerks code cases with government defend-

often the failure to demonstrate a prima facie case (80%), but also asserted frequently two other defenses: legitimate, nondiscriminatory reason for the adverse employment action (54%) and plaintiffs' failure to comply with EEOC requirements (43%).[92]

C. *The What*

At this point, I describe the overall win rates in the cases studied.

1. What Counts as a Win

Plaintiffs' victories are a rare event in employment discrimination litigation, so I've defined plaintiffs' wins broadly to capture as many cases as possible. For tried cases, whether by jury or bench, plaintiffs' victories are the awarding of any relief, whether it be injunctive or monetary. The quantity or quality of the relief was not evaluated to deem the award a win. For pretrial motions, a win for plaintiffs included any ruling in their favor, no matter how minor; a win for defendants meant only a complete win on the motion.[93] Thus, if a plaintiff lost on three arguments to dismiss for failure to comply with EEOC rules, but won one such argument, then the plaintiff was coded as winning on the defense of failure to comply with EEOC procedural requirements.[94]

The more difficult conceptual issue is how to define settlements. Settlements do not fit neatly into the categories of win or loss.[95] They almost always reflect some sort of compromise in claim. Plaintiffs may be only getting a nominal amount or may be compromising their claims significantly. On the other hand, it is difficult to define settlements as a loss. Plaintiffs, after all, most likely received something in exchange for foregoing the claim. Further complicating the picture is

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ants, rather than a difference between published opinions and cases filed. *See supra* notes 69–70.

92 *See infra* Table A1.

93 *See* Juliano & Schwab, *supra* note 9, at 569 ("We count the case as a 'win' for the plaintiff if the court upheld the plaintiff's sexual harassment claim in whole or in part.").

94 Such a ruling on a pretrial motion allows plaintiffs to proceed on at least part of the case. *See id.* ("Many opinions arise from pretrial motions to dismiss the plaintiff's claim, after which a 'winning' plaintiff could face other motions to dismiss as well as a trial on the merits, post-trial motions, and an appeal. Winning at an early stage does not necessarily indicate an ultimate victory for the plaintiff, but losing an early motion typically indicates an ultimate defeat.").

95 *See* Colker, *Winning and Losing*, *supra* note 8, at 256 ("It is hard to categorize settlements as pro-plaintiff or pro-defendant since plaintiffs typically settle for less than they seek in litigation.").

the limited data on settlement terms. And even if that information were readily accessible, it would be difficult to evaluate objectively whether the settlement represented a victory or a loss for the plaintiff. For these reasons, a settlement can't be defined as either a win or a loss.[96]

To the extent this Article is concerned with how courts treat cases, defining settlements is of importance to the extent settlements affect the types of cases a court decides, an issue independent of whether the settlement is defined as a win or loss. So here I don't put settlements into a win or loss category, but into the category of a compromise of a claim. Plaintiffs and defendants are usually glad to have the matter resolved, with plaintiffs typically pleased with some relief. Yet, it is almost inconceivable that both parties' respective claims have not been compromised in some sense.

2. Pretrial Win Rates

In the national study of reported opinions on pretrial motions, plaintiffs won about one in four opinions.[97] The win rate was higher in the opinions addressing a motion to dismiss than when resolving a motion for summary judgment.[98]

Other studies have found that reported opinions *overstate* plaintiffs' win rates.[99] This would suggest that plaintiffs would have a *lower* win rate in unreported decisions than in published ones. Although this may be true for tried cases, a comparison of data in the case filing and reported decision studies demonstrates that reported opinions on

96 Either way, plaintiffs have had at least some opportunity to state their claims, and the courts have had some involvement in the telling of the story. The availability of a federal court forum certainly has value independent of the compromise settlement plaintiffs receive for their claim. *See generally* Susan Sturm, *Equality and the Forms of Justice*, 58 U. MIAMI L. REV. 51, 54 (2003) (describing the importance of courts in "facilitating the elaboration and implementation of public law norms").

97 Plaintiffs' win rate in the national study was 27%. *See infra* Table A1. The final trial outcome of these lawsuits can be found *infra* Table 2. When also asserting a disparate impact claim, which only occurred in 4% of the opinions, plaintiffs won in whole or part 15% of the time on the case. *See infra* Table A1.

98 Plaintiffs' win rate was 42% in the 74 motions to dismiss, and was 25% in the 393 motions for summary judgment. *See infra* Table A1.

99 *See* Colker, *ADA Windfall*, *supra* note 8, at 105 (concluding that "it appears that reliance on publicly available opinions overstates plaintiffs' success rates both at trial and on appeal"); Colker, *Winning and Losing*, *supra* note 8, at 275 (finding that "published decisions tend to be more pro-plaintiff than unpublished decisions"); Siegelman & Donohue, *supra* note 10, at 1155 n.43 (reporting that published opinions overstate plaintiffs' win rates for all nonsettled cases, when compared to unpublished opinions).

pretrial motions tend to *understate* plaintiffs' win rates on pretrial motions. In other words, defendants are more likely to win a pretrial motion in a reported opinion than in an unreported opinion. The following Table compares the win rates on motions to dismiss and motions for summary judgment in the opinions in the national study for the Eastern District of Pennsylvania and the Northern District of Texas and the cases in the case filing study, with the larger figures in bold face.[100]

TABLE 1. COMPARISON OF WIN RATES ON PRETRIAL MOTIONS: CASE FILING STUDY AND NATIONAL STUDY

	Eastern District of Pennsylvana		Northern District of Texas	
	Case Study % (*N*)	National Study % (*N*)	Case Study % (*N*)	National Study % (*N*)
Motions to Dismiss—Plaintiff Wins	**76%** (13)	50% (3)	**47%** (9)	17% (1)
Motions for Summary Judgment—Plaintiff Wins	**67%** (10)	46% (6)	23% (8)	**43%** (12)

The overall numbers are obviously small, and a larger data set may indicate a different result. Yet, the numbers are striking for the large differences in win rates in reported decisions as compared with those that are not reported. With the exception of the win rate on motions for summary judgment in the Northern District of Texas, the win rate for plaintiffs was much higher in the rulings in the case filing study than in the opinions examined in the reported opinion study. Although this is contrary to earlier studies, this should not be surprising for one key reason. When defendants win pretrial motions, the case is usually being disposed of, which makes it more likely that there

100 To determine how representative the national study is of plaintiffs' win rates on pretrial motions, one can compare those pretrial outcomes with the results in the case filing study of all filed cases. But the comparison should not be one between the overall national figures with the overall case filing results. As will be discussed later, the case filing study and national study both demonstrated differences in how jurisdictions treat their race and national origin employment cases. *See infra* Part II.C. Thus, when comparing the national study with the case filing study to determine how representative the national study is, it is important to dis-aggregate the national study data by district court. For the case filing study, I only included motions decided by the court. In other words, I omitted motions that were pending at the time this Article went to press (only one such motion) and motions in which the case settled before the court ruled.

will be a reported opinion.[101] A ruling for plaintiffs on defendants' pretrial motion, on the other hand, disposes of no claim, or only part of the claim, which decreases the possibility of an opinion with enough detail and analysis to warrant publication.

3. Disposition Rates

The case filing study demonstrates that other than fairly routine (and minor) discovery disputes and scheduling orders, the cases typically involved little judicial effort.[102] Settlement was the most frequent disposition. Of the 192 cases in the case filing study, 128 cases settled (a settlement rate of 67%).[103] The settlement rate is less than the settlement rate for all employment discrimination suits in the two districts.[104] As we'll see, this settlement rate is also lower than the settlement rate in gender cases.[105]

Particularly disturbing are plaintiffs' chances of success outside of settlement. Unsettled cases in the case filing study are far outside the long-standing principle that predicts cases resolved by the judiciary should generally be about evenly split between plaintiffs' and defend-

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101 *See* Theodore Eisenberg & Stewart J. Schwab, *What Shapes Perceptions of the Federal Court System?*, 56 U. CHI. L. REV. 501, 508 (1989); Marc A. Franklin, *Suing Media for Libel: A Litigation Study*, 1981 AM. B. FOUND. RES. J. 795, 799 n.11; Marc A. Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 AM. B. FOUND. RES. J. 455, 464; Wendy Parker, *The Future of School Desegregation*, 94 NW. U. L. REV. 1157, 1196 (2000); Siegelman & Donohue, *supra* note 10, at 1146; Michael E. Solimine, *The Quiet Revolution of Personal Jurisdiction*, 73 TUL. L. REV. 1, 41 (1998).

102 For example, in the Northern District of Texas, over half of the cases (53%, or fifty-eight cases) were disposed of with no motion to dismiss or motion for summary judgment filed; 41% (or forty-five cases) had only one such motion. Only 7% (or eight cases) had two of these motions. No case had three. *See infra* Table A4.

103 *See infra* Tables A3 & A4.

104 The settlement rate for race cases in the Eastern District of Pennsylvania was 78%, *see infra* Table A3, compared to an 81% settlement rate for all employment discrimination cases filed in that district. In the Northern District of Texas, the settlement rate for race cases was 58%, *see infra* Table A4, compared to a 67% settlement rate for all employment discrimination suits filed in the district. The settlement rates for all employment discrimination claims comes from the Administrative Office. *See infra* note 159 and accompanying text (discussing accessibility of Administrative Office data). The most recent year for which Administrative Office data is available is 2000. These figures are derived from cases filed under federal question jurisdiction. *See* Selmi, *supra* note 2, at 559 n.16 (using federal question jurisdiction when researching employment discrimination cases in the Administrative Office database). The figures were not that different when all bases of jurisdiction were included.

105 *See infra* Part II.C.2.

ants' wins.[106] Under this theory, plaintiffs should settle cases when they have weak claims, and defendants should settle cases when they have weak defenses. This idea, commonly called the Priest-Klein theory after its original authors,[107] contends that cases that are *not* close in merit are the ones that settle,[108] and that these cases in the "gray zone" are the ones the judiciary resolves.[109] Wins here, according to the theory, should "be evenly split between plaintiff victories and defendant victories, or converge on a 50/50 outcome as the law becomes clear and known."[110]

In the case filing study the outcomes were far from evenly split. Forty cases not only did not settle but were also resolved by the judiciary on the merits (i.e., a judgment for the defendant was not based on a problem with service or prosecution of the suit).[111] Of these forty cases, defendant won on the merits in thirty-nine cases and a plaintiff won in only one case (a jury trial in the Eastern District of Pennsylvania).[112] In percentage terms, plaintiffs' win rate was 2.5%, compared to defendants' win rate of 97.5%.[113] Further, as we'll see later, plaintiffs' win rate is still profoundly low, even if they have prevailed

106 *See* Clermont & Eisenberg, *supra* note 57, at 588 (explaining that "even if the legal criterion highly favors plaintiffs, as does strict liability, one should not observe a plaintiff win rate well above 50%. Instead, case selection will leave for adjudication a residue of unsettled cases exhibiting some nonextreme equilibrium win rate.").

107 *See generally* George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984) (addressing the relationship between litigated disputes and those resolved through settlement).

108 *See id.* at 9–17 (describing the effect of parties' expectations on settlement negotiations and noting that settlements are more likely where one party has a powerful case); *see also* Daniel Kessler et al., *Explaining Deviations from the Fifty Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation*, 25 J. LEGAL STUD. 233, 234 (1996) (noting Priest and Klein's observation that "the clear-cut cases will be more likely to settle before trial"); Leandra Lederman, *Which Cases Go to Trial?: An Empirical Study of Predictors of Failure To Settle*, 49 CASE W. RES. L. REV. 315, 322–23 (1999) (explaining that Priest and Klein's model "predicts that the close cases will be tried").

109 *See* Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1571 (1989).

110 *See* Parker, *supra* note 101, at 1196.

111 *See infra* Tables A3 & A4.

112 *See infra* Tables A3 & A4. In the Eastern District of Pennsylvania, six cases were resolved by a pretrial judgment in defendant's favor, three cases were resolved with a jury trial in defendant's favor, and one case was resolved with a jury trial in plaintiff's favor. *See infra* Table A3. In the Northern District of Texas, twenty-eight cases were resolved by a pretrial judgment in defendant's favor, and two jury trials held in defendant's favor. *See infra* Table A4.

113 The remaining twenty-four cases were either granted a stay because of a bankruptcy petition, dismissed for failure to prosecute, dismissed for procedural reasons, or were pending at the time this Article went to press. *See infra* Tables A3 & A4.

on a motion to dismiss or a motion for summary judgment.[114] The meaning of this deviation from the Priest-Klein theory of even outcomes is discussed in the remainder of this Article.

D. The Why

Within these overall low win rates lurks the possibility that plaintiffs win more often a particular set of cases. For that reason, this Part goes beyond the overall win/loss rates and asks, through two statistical tests,[115] whether some cases are more likely to be won or lost in a way that is statistically significant.[116] The national study, with its depth of information on each lawsuit, necessarily provides most of the data in

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114 *See infra* notes 156–62 and accompanying text.

115 The two tests used are a Pearson chi-square and binary logistic regression. A Pearson chi-square test determines whether two observed values differ from their expected values and whether the difference is likely due to chance. *See infra* note 116 (explaining statistical significance). The Pearson chi-square tests herein all test whether plaintiffs won or lost on the disparate treatment claim as compared to some other single factor. In each of the Pearson chi-square tests, the total number of observations was greater than forty, and all the expected cell values were greater than or equal to five. *See* Dale A. Nance, *Comment on the Age Discrimination Example*, 42 JURIMETRICS J. 341, 342 (2002) (identifying this as "one rule of thumb" for Pearson chi-square tests). Also, the Pearson chi-square tests were two-tailed tests, which measure whether the mean of one distribution differs significantly from the mean of the other distribution, regardless of the direction (positive or negative) of the difference. *See generally* Robert Timothy Reagan, *Reply to Comments on the Age Discrimination Example*, 42 JURIMETRICS J. 363, 367–68 (2002) (explaining the difference between one-tailed and two-tailed tests).

A binary logistic regression test estimates the probability that an event will occur given certain parameters. Unlike a Pearson chi-square test, a binary logistic regression test can test the effect of more than one variable on a dependent variable, which is binary. Here the dependent variable was whether the plaintiffs or defendants won. A defendant's win was coded as 0, and a plaintiff's win was coded as 1. The multiple independent variables were then tested against the dependent variable. An odds ratio greater than 1 indicates an increase in plaintiffs' chances for success when other factors are held constant. The odds ratio of the coefficient reflects the change in odds that the event will occur given a unit increase in the independent value. *See* Clermont & Eisenberg, *supra* note 57, at 589. When a binary logistic regression includes independent variables that are mutually exclusive, then one of the variables must be excluded for the regression (called the reference variable). *See* Colker, *Winning and Losing*, *supra* note 8, at 267 n.69.

116 The statistical significance indicates the likelihood that a particular outcome occurred by chance, and is expressed herein as a *p* value. Social scientists usually define a *p* value of less than .05 as statistically significant. A *p* value of less than .10 is typically defined as approaching significance. *See generally* Lee Epstein et al., *The Norm of Prior Judicial Experience and Its Consequences for Career Diversity on the U.S. Supreme Court*, 91 CAL. L. REV. 903, 912 n.41 (2003) ("The p-value indicates the exact level of statistical significance. If the p-value is less that a threshold of Type I tolerable error

this Part, although the case filing study is also relevant at certain points. The data indicates that three factors strongly predict plaintiffs' chances for success in surviving defendants' pretrial motions: attorney representation, the procedural posture of the defendants' motion, and the location of the district court.[117] Yet, the factors ultimately fail to explain fully plaintiffs' low win rates.[118] In fact, I found no evidence of a winning combination, from the standpoint of the plaintiffs, of parties, legal positions, and judges.[119]

1. Pro Se Plaintiffs

Pro se plaintiffs lost more frequently than those represented by counsel, and the higher loss rate was statistically significant.[120] Finding that attorney representation increases plaintiffs' chances of success should not be controversial.[121] The decision of an attorney to accept the case, along with the attorney's efforts to win the case,

(typically 5%), then one can conclude that the relationship in the observed data is not due to chance alone and is thus statistically significant.").

117 *See infra* Part I.D.1–3.

118 *See infra* Part I.D.1–3.

119 *See infra* Part I.D.1–5: *see also infra* Table A2.

120 In the national study, the win rate when plaintiffs were proceeding pro se was 16%; when not proceeding pro se, 30%. *See infra* Table A1. A Pearson chi-square test found a *p* value of .009, which indicates statistical significance. The importance of proceeding pro se was also evident in the binary logistic regression results. The odds ratio was also high, at .452, indicating that pro se status decreased plaintiffs' chances for success by 54.8%. This was statistically significant at the 1% level. *See infra* Table A2.

The case filing study also indicated that plaintiffs were more likely to win and more likely to settle if represented by counsel. For example, in the thirty-two pro se cases in the Northern District of Texas, nine cases settled (a 28% settlement rate, as compared to an overall settlement rate of 58%); twelve cases were involuntarily dismissed for failure to prosecute, and eleven cases were pretrial judgments in defendants' favor (a 34% pretrial judgment rate, as compared to an overall pretrial judgment rate of 26%). *See* Wendy Parker, Technical Appendix—ND Tex Race Frequencies App D [hereinafter ND Tex Race Frequencies App D], http://www.wfu.edu/~parkerwm/ND%20Tex%20Race%20Frequencies%20App%20D.spo (last visited Apr. 1, 2006); *infra* Table A4. In the five pro se cases in the Eastern District of Pennsylvania, one case settled (a 20% settlement rate, as compared to an overall settlement rate of 78%), two cases were involuntarily dismissed for failure to prosecute, and two cases were pretrial judgments in defendants' favor (a 40% pretrial judgment rate, as compared to an overall pretrial judgment rate of 7%). *See* Wendy Parker, Technical Appendix—ED Pa Race Frequencies App C [hereinafter ED Pa Race Frequencies App C], http://www.wfu.edu/~parkerwm/ED%20Pa%20Race%20Frequencies%20App%20C.spo (last visisted Apr. 1, 2006); *infra* Table A3.

121 *See* Colker, *Winning and Losing*, *supra* note 8, at 266 ("It is common knowledge that pro se plaintiffs are rarely successful in the appellate courts.").

should indicate not only some merit to the claim but also increased chances that the case will be competently litigated.[122] However, the small number of pro se cases (20% in the national study,[123] 6% in the Eastern District of Pennsylvania,[124] and 29% in the Northern District of Texas[125]) means that pro se status is not the only explanation for plaintiffs' overall low win rates. In other words, one should not conclude that most employment discrimination cases are lost due to the absence of attorney representation. In fact, the win rate in the national cases where plaintiffs have attorney representation is only 30%, as compared to the overall win rate of 27%.[126]

2. Procedural Posture

Second, plaintiffs were more likely to win a motion to dismiss than one for summary judgment, and the difference in win rates is statistically significant.[127] As is true for the significance of pro se status, plaintiffs' higher win rates in responding to a motion to dismiss than to a summary judgment motion should not be surprising. The standard for a motion to dismiss is very forgiving to plaintiffs.[128] The national study had the highest number of instances of motions to dismiss, but they occurred in only 16% of (or seventy-four) opinions. For summary judgment opinions alone, plaintiffs' win rate of 25% was not that much worse than the overall win rate of 27%.

3. Geographic Differences

A third important factor predicting success was the district court issuing the opinion. For example, the Northern District of Texas

122 *See* Selmi, *supra* note 2, at 569–70 (arguing that the small number of pro se employment discrimination cases means that most employment discrimination cases have merit).

123 *See infra* Table A1.

124 *See infra* Table A3.

125 *See infra* Table A4.

126 *See infra* Table A1.

127 In the national study, plaintiffs' win rate for motions to dismiss was 42%; motions for summary judgment, 25%. *See infra* Table A1. A Pearson chi-square found a *p* factor of .002. Likewise, the case filing study also revealed that plaintiffs are more likely to win a motion to dismiss than a motion for summary judgment. In the Eastern District of Pennsylvania, plaintiffs' win rate for motions to dismiss was 76%; motions for summary judgment, 67%. In the Northern District of Texas, plaintiffs' win rate for motions to dismiss was 47%; motions for summary judgment, 23%. *See infra* Tables A3 & A4; *see also supra* Table 1; *supra* note 100. As discussed earlier, reported opinions tend to understate plaintiffs' win rates on pretrial motions. *See supra* notes 99–101 and accompanying text.

128 *See supra* note 47.

awarded defendants their costs in 16% of the cases filed in the year 2002, while the Eastern District of Pennsylvania never awarded defendants their costs.[129] The national study also demonstrated geographical differences.[130] Plaintiffs have much higher chances of success in reported decisions in the district courts in the Second, Third, Fifth, Eighth, and Tenth Circuits.[131]

Yet, it would be wrong to identify at this stage particular courts as more receptive to plaintiffs' claims. First, factors outside the court room—the availability of lawyers, for example, given the impact of attorney representation on win rates[132]—may be influencing the outcome, and not the district court itself. For example, in the case filing study the Northern District of Texas had a much higher rate of pro se plaintiffs than the Eastern District of Pennsylvania, and this may better explain the different disposition rates than the differences in the court hearing the case.[133] Second, the national study likely suffers from a geographical bias. Publication policies and rates differ markedly by court.[134] Some courts may be more likely to publish opinions in plaintiffs' favor, while others less likely. As a result, not all courts are equally represented in the national study, thus making it difficult to draw conclusions about particular courts. Thus, while the case filing and national studies both raise the question of whether different courts treat race cases differently, neither adequately answers the question.

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129 *See infra* Tables A3 & A4. Similarly, the Northern District of Texas was more likely to award a pretrial judgment to defendant (26% of all cases in the district) than the Eastern District of Pennsylvania (7%). *See infra* Tables A3 & A4. Part of this difference is likely due to the higher percentage of pro se plaintiffs in the Northern District of Texas. *See infra* note 133 and accompanying text.

130 For example, not one plaintiff won in the thirteen opinions reported from the Northern District of California, while the win rate for plaintiffs was 60% in the fifteen opinions from the District of Connecticut. *See infra* Table A1.

131 For example, binary logistic regression results suggest that a plaintiff in a district court in the Third Circuit is more than three times more likely to win (the odds ratio is 3.143) than a plaintiff in the Fourth Circuit (the reference variable), and that the increased win rate is statistically significant, with a p value of .044. *See infra* Table A2.

132 *See supra* Part I.D.1.

133 The Pennsylvania district had a 6% pro se rate, *see infra* Table A3, compared to the Texas district's 29% pro se rate, *see infra* Table A4.

134 *See supra* note 65 and accompanying text; *see also infra* Table A1 (detailing the inclusion rates in the national study by district court).

4. Claims and Defenses

Defenses and claims asserted also had statistical significance at times, but always with a very small impact on whether plaintiffs were more likely to win.[135] For example, plaintiffs alleging discrimination in retaliation were less likely to win.[136] Yet, this had a minor effect on plaintiffs' chances for a judicial win, having an overall impact of less than 1%.[137] In other words, plaintiffs bringing retaliation claims were less than 1% more likely to lose. Other claims and defenses had statistical significance, but again with an overall impact of less than 1%.[138] With such small impacts on win rates, it is difficult to treat the factors as determinative. By contrast, having an attorney increased plaintiffs' chances of winning by 54%.[139]

5. Race and Gender of Judges

Apart from the claims and defenses asserted in a case is the race and gender of the judge hearing the claims. Because reported decisions fairly represent all opinions by the judge's race or gender,[140] the national study provides a good opportunity to test the relationship be-

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135 *See infra* Table A2.

136 According to a binary logistic regression, the *p* value was .058, which is approaching statistical significance. *See infra* Table A2; *see also supra* note 116.

137 According to the results of a binary logistic regression, the odds ratio was .996, indicating that alleging a retaliation claim decreases plaintiffs' chances of success by only .04%. *See infra* Table A2.

138 *See infra* Table A2.

139 *See supra* note 120 and accompanying text.

140 For example, my colleague Ahmed Taha examined 188 district court opinions on the constitutionality of the Federal Sentencing Guidelines. *See* Taha, *supra* note 59, at 8. This restriction allowed him to control for the many different aspects of opinions that can affect publication rates and to focus on the characteristics of judges and their effect on publication rates. He studied which judges choose to publish opinions—either by submitting the case for official publication by West, by submitting the opinion to Westlaw, or by not protesting Westlaw's publication of their opinion. *See id.* at 4. A judge's gender and race had no measurable effect on the official publication by West or on unofficial publication by Westlaw. *See id.* at 11 n.12 ("When I include sex and race variables they are insignificant individually and jointly."); *see also* Siegelman & Donohue, *supra* note 10, at 1149 n.34 ("Although such variables as age, experience, and self-esteem may influence the probability that a given judge produces a published opinion in a given case, since cases are assigned randomly to judges, such effects presumably wash out in larger samples and thus can be ignored."). Attributes of judges that impact publication rates are unrelated to attributes studied here. *See* Taha, *supra* note 59, at 25 ("These analyses found that, all else equal, judges who held prior political positions, who received higher ABA ratings, who had lighter caseloads, who had longer tenures, who struck down the guidelines, or who had a greater chance of promotion were more likely to publish their decisions.").

tween judges' race and gender and the outcome in race employment discrimination cases. The national study indicated no statistical difference in how judges treated cases, based on the judges' race and gender.[141] This was true also when considering how judges treated plaintiffs of their same race.[142] In sum, the race and gender of the judge did not affect plaintiffs' chances for success, an outcome similar to studies of other subject matters.[143]

6. Summary

Perhaps others, particularly with larger databases, will be able to identify for plaintiffs their winnable race and national origin lawsuit.[144] In the national study, the presence of many individual factors indicated a win rate more than the overall win rate of 27% on the

141 The win rate in the fifteen opinions with an African American female judge was 27%, which was not statistically significantly different from the win rate of other judges (the *p* value under a Pearson chi-square was .412). The win rate in the eighty-seven opinions with a white female judge was 31%, which was not statistically significantly different from the win rate of other judges (the *p* value under a Pearson chi-square was .401). The win rate in the 293 opinions with a white male judge was 27%, which was not statistically significantly different from the win rate of other judges (the *p* value under a Pearson chi-square was .779). *See infra* Table A1.

142 For example, reported opinions with white plaintiffs and white judges had an overall win rate of 22%, as compared to a win rate of 21.7% in all the opinions with white plaintiffs and other judges (the *p* value under a Pearson chi-square was .920). Opinions with African American plaintiffs and African American judges had an overall win rate of 22%, as compared to a win rate of 26.7% in all the opinions with African American plaintiffs and other judges (the *p* value under a Pearson chi-square was .458). *See* Reported Decisions Frequency App A, *supra* note 84.

143 In criminal cases, reviews of the race of judges and their rulings found no correlations, except for one study. *See* Gregory C. Sisk et al., *Charting the Influences of the Judicial Mind: An Empirical Study of Judicial Reasoning*, 73 N.Y.U. L. REV. 1377, 1459 (1998) (examining district court opinions on constitutionality of Federal Sentencing Guidelines and concluding that "outcome votes of minority judges were not significantly different, while the reasoning of those judges varied substantially"); *id.* at 1456 (finding that "[s]tudies of trial judges in the very context of criminal cases and criminal sentencing have uncovered very little variation in the behavior of judges based upon race"). *But see* Eisenberg & Johnson, *supra* note 61, at 1190 (finding in intentional discrimination cases that having a black or female judge increased substantially a plaintiff's chances of success, but that the increase was not statistically significant); Selmi, *supra* note 2, at 571 ("Having judges who have experienced discrimination and understand its subtle operation is likely to influence the decisionmaking process.").

144 *See, e.g.*, Colker, *Winning and Losing*, *supra* note 8, at 272 ("With a larger database, it is possible that one might find that harassment claims correlated significantly with lack of success on the part of a plaintiff.").

pretrial motions, but occurred so infrequently that statistical significance proved elusive.[145]

But for now, after analyzing 467 reported opinions for sixty-one factors and 192 case filings for nineteen matters, little evidence of what helps plaintiffs win, other than the obvious, appears. Nor can pro se status or procedural posture of motion to dismiss fully explain the profoundly low win rates. Overall, neither factor is frequent. In the national study, 80% of the opinions had plaintiff attorney representation and 84% of the opinions responded to a defendant's motion for summary judgment.

In sum, most plaintiffs will very likely come up empty handed when the judiciary decides their claim.[146] At best, they may survive a motion to dismiss or a motion for summary judgment. But both studies indicate, as the next Part demonstrates, that passing this hurdle neither increases the rate of settlement *nor* ultimate success when appearing before a judge.[147]

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145 Plaintiffs had higher win rates than their overall 27% win rate in opinions when more than one plaintiff sued (37% plaintiffs' win rate); when plaintiffs were Asian or Pacific Islander (39%) or of Middle Eastern descent (38%); when plaintiffs' occupation was technical (36%); when plaintiffs claimed discrimination in demotion (42%); and when the court mentioned plaintiffs' requests for punitive damages (42%). *See infra* Table A1. On the other hand, plaintiffs had lower win rates than their overall 27% win rate in cases when plaintiffs were white and not of Hispanic origin (22%); when plaintiffs' occupation was clerical (19%); when plaintiffs alleged disparate impact and disparate treatment (15%); and when plaintiffs alleged failure to hire (17%). *See infra* Table A1.

Yet, none of these deviations—whether more or less than the overall win rate—was statistically significant. The number of observations, even in a study of 467 opinions, was too infrequent to demonstrate that the outcome was not due to chance, rather than to the characteristic itself. For all the factors noted above, the number of observations in which the factor was present in an opinion was never more than forty-six. Plaintiffs were white, not of Hispanic origin in forty-six cases; more than one plaintiff, twenty-seven; Asian or Pacific Islander, thirteen; Middle Eastern descent, sixteen; clerical occupation, thirty-seven; technical occupation, fourteen; plaintiff alleged both disparate impact and disparate treatment, twenty; plaintiff alleged failure to hire, eighteen; plaintiff alleged demotion discrimination, nineteen; and opinion mentioned punitive damages request, thirty-three. *See infra* Table A1. Yet, these qualities should be noted as potential influences on the outcome of a pretrial motion.

146 *See* Colker, *ADA Windfall*, *supra* note 8, at 110 (questioning whether plaintiffs' low win rates in ADA cases are explained by "plaintiff lawyers [who] are generally aware of the trends in this area, but [who do not] believe they apply to the individual case they are litigating").

147 *See infra* notes 156–62 and accompanying text.

II. POSSIBLE RACE NEUTRAL EXPLANATIONS

This Part examines two competing theories, both race neutral, to explain plaintiffs' low win rates. One argues that cases with the slightest merit settle, leaving only the weakest claims for judicial resolution.[148] I'll call this the "defendants' settlement incentives" theory. Under this theory, the low win rate simply reflects defendants' strong incentives to settle and the resulting weakness of the claims coming before the courts. The other contends that the low win rate is due to a failure in the judiciary's evaluative function—specifically, that the judiciary cannot redress subtle discrimination and/or defers too readily to defendants' explanations of the challenged employment practice.[149] While both approaches, which are not mutually exclusive, have validity, I argue that they fail to explain fully judicial decisionmaking.

A. Do All the Good Cases Settle?

According to the defendants' settlement incentives theory, plaintiffs alleging race discrimination in employment fare poorly when before federal district courts because their claims are weak.[150] Under this argument, the defendants act on strong incentives to settle meritorious and even somewhat meritorious lawsuits. Defendants fear a trial, with its unpredictable outcome, and a public airing of their affairs. As a result, this theory contends, only particularly weak claims remain for federal court resolution, and this best explains plaintiffs' low win rate.

Although defendants rarely welcome the label of discriminator—and this may be particularly true for race discrimination—I believe the defendants' incentive theory is too simplistic to explain adequately

148 *See infra* Part II.A.

149 *See infra* Part II.B.

150 *See* Ruth Colker, *Empirical Studies: How Do Discrimination Cases Fare in Court? Proceedings of the 2003 Annual Meeting of the Association of American Law Schools, Section on Employment Discrimination*, 7 EMP. RTS. & EMP. POL'Y J. 533, 536 (2003) (noting that many interpret low win rates under the ADA as a result of the "good cases" being resolved by the EEOC); Schultz & Petterson, *supra* note 9, at 1106–07 (noting that "a number of commentators have suggested that employers have greater stakes than plaintiffs in employment discrimination cases in general"); Peter Siegelman & John J. Donohue III, *The Selection of Employment Discrimination Disputes for Litigation: Using Business Cycle Effects To Test the Priest-Klein Hypothesis*, 24 J. LEGAL STUD. 427, 428 (1995) (contending that "the party with more at stake will have the higher win rate"); *see also* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 98–103 (1974) (arguing that repeat players will have a higher win rate).

such profoundly low win rates.[151] Of the 192 race and national origin employment discrimination cases filed in the Eastern District of Pennsylvania and the Northern District of Texas in 2002, only *one* plaintiff won when a court was the decisionmaker (and this was a jury trial).[152] In the national opinion study, 381 of the 464 unique cases did not settle and were decided by the judiciary on the merits.[153] Plaintiff won only five of the 381, all of which were jury trials.[154] I'm doubtful that defendants have strong enough settlement incentives to explain such lopsided outcomes. Instead the outcome rates might indicate the opposite. Shouldn't plaintiffs have higher incentives to settle than defendants given their meager chances of success outside of settlement? Perhaps it is plaintiffs instead of defendants who have an overwhelming desire to settle, and are willing to compromise their claims significantly to do so. Moreover, one could easily question whether defendants have such a strong desire to settle given their overwhelmingly high win rates in unsettled cases.[155]

Further, if defendants had such a strong incentive to settle, leaving only cases with the barest possibility of success, then one would expect that the rate of settlement in cases in which plaintiffs prevailed on pretrial substantive motions to be higher than in all cases. When

151 *See* Clermont, Eisenberg & Schwab, *supra* note 2, at 566 ("Moreover, even assuming that plaintiff-defendant differences explain the anti-plaintiff pattern seen on appeal in other case categories, employment-discrimination cases stand out so sharply in this regard that one simply has to resort in part to an attitudinal explanation. . . . In sum, rather than yielding to the intuitive appeal of the view that employment-discrimination plaintiffs are overly litigious, we tentatively conclude that appellate judges are acting as if it is they who accept that view.").

152 This was a jury trial in the Eastern District of Pennsylvania. By contrast, defendants won thirty-nine times (97% of the time) when the court decided the case on its merits. *See supra* note 112 and accompanying text; *see also infra* Tables A3 & A4.

153 In 329 opinions for 329 unique cases, the defendant won entirely on the pretrial motion and judgment was entered in defendants' favor. In 138 opinions for 135 unique cases, all or part of plaintiffs' race case remained. Of those 135 cases, seventy-one cases settled, two were dismissed for failure to prosecute, *see infra* Table 2 (discussing the ultimate outcome in 125 cases in which the plaintiff prevailed in a published opinion), and ten were pending or were unknown in outcome when this Article went to press, *see infra* note 158 (detailing the outcome in ten cases in which the defendant prevailed entirely in a published opinion, but part of the plaintiff's race case remained). The remaining fifty-two cases were judicially resolved on their merits. *See infra* notes 154–58 and accompanying text; *see also* Reported Decisions National Data, *supra* note 53; Reported Decisions Plaintiff Wins Data, *supra* note 53.

154 *See infra* Table 2; *infra* note 158 and accompanying text.

155 *See* Oppenheimer, *supra* note 10, at 565 ("And the suggestion that employers fear ruinous race discrimination verdicts is belied by the fact that so few of the employment discrimination cases filed and tried are race cases, and the fact that African Americans so rarely win such cases.").

plaintiffs have won pretrial motions, particularly ones for summary judgment, the court has granted at least some merit to plaintiffs' version of events, and the defendants' settlement incentives theory would strongly predict an eventual settlement.

Yet, both the national and case filing studies found that the rate of settlement was *lower* in cases in which plaintiffs prevailed on pretrial substantive motions. In the national study, plaintiffs won in whole or part in 128 opinions, all of which left unknown the ultimate disposition of the claims.[156] Taking into account three cases with two reported opinions in plaintiffs' favor, this left 125 unique cases.[157] The following Table describes the final outcome of the claim at the trial court level, considering all 125 cases together and also dividing these cases into times when plaintiffs won a motion to dismiss or a motion for summary judgment in a published opinion.

TABLE 2. PLAINTIFFS WON IN NATIONAL STUDY OPINION: FINAL TRIAL COURT DISPOSITION

Disposition	All Pretrial Plaintiff Wins % (*N*)	Motion to Dismiss Plaintiff Wins % (*N*)	Motion for Summary Judgment Plaintiff Wins % (*N*)
Settlement	54% (68)	41% (14)	59% (54)
Dismissal—Failure to Prosecute	1% (1)	0% (0)	1% (1)
Judgment for Plaintiff—Trial	3% (4)*	0% (0)	4% (4)
Judgment for Defendant—Pretrial	18% (23)	44% (15)	9% (8)
Judgment for Defendant—Trial	15% (19)†	3% (1)	20% (18)
Pending/Unknown‡	8% (10)	12% (4)	7% (6)
Total	100% (125)	100% (34)	100% (91)

* All four were jury trials.

† This included thirteen jury trials and six bench trials.

‡ For three cases, I was unable to locate the docket sheet. Seven cases were pending at the time of publication.

156 *See infra* Table A1.

157 I used docket sheets, which are increasingly available online through CM/ECF and other online databases, to ascertain the disposition at the trial court level of the opinions in which plaintiffs won. *See supra* notes 68–69 (discussing CM/ECF).

The figures are surprising in two ways: the settlement rates and the final disposition rates.[158] If defendants have very strong incentives to settle, even relatively weak claims, then the cases where plaintiffs have prevailed in a substantive pretrial motion should have higher settlement rates than in all cases. Then a court has deemed at least part of plaintiffs' claim with some merit, and this would suggest that defendants would then have a strong incentive to settle. Yet, the settlement rates—54% for all opinions with plaintiffs' win; 41% for opinions with plaintiffs' wins on a motion for dismissal; and 59% for opinions with plaintiffs' wins on a motion for summary judgment—are all less than the national settlement rate of all employment discrimination cases (67%)[159] and less than the settlement rate of race and national origin claims in the case filing study (also 67%).[160] Defendants are choosing not to settle as many cases in which the plaintiffs have prevailed on at least one pretrial motion. The defendants' incentives theory would have predicted otherwise.

Similarly, in the case filing study, settlement rates were lower in cases in which plaintiffs prevailed in a pretrial motion than the settlement rates for all the race and national origin cases in the districts. In the Eastern District of Pennsylvania, the settlement rate in cases in which plaintiffs won on a pretrial motion was 68%, compared to a

158 In ten opinions, the defendant won entirely on the pending motion, but part of plaintiffs' race case remained. In those ten cases, defendants were awarded pretrial judgments in five cases; three cases settled; one plaintiff won a jury trial; and one case was dismissed for failure to prosecute. *See* Reported Decisions National Data, *supra* note 53; Reported Decisions Plaintiff Wins Data, *supra* note 53.

159 This figure is from Administrative Office data for the fiscal year 2000, the most recent available year. The Administrative Office database can be accessed at http://teddy.law.cornell.edu:8090/questata.htm, a web site maintained by Cornell Law School. The settlement rate for employment discrimination cases is lower when compared to all nonemployment discrimination cases. *See* Clermont & Schwab, *supra* note 2, at 442 (finding lower plaintiffs' win rates in employment discrimination cases than in all other types of cases). Race cases in the case filing study also had a lower settlement rate than all employment discrimination cases in the studied districts. *See supra* note 104 and accompanying text.

Granted, the comparison of settlement rates in opinions in which plaintiffs won on a race and national origin claim to settlement rates of all employment discrimination cases is not perfect. Yet, the comparison still calls into question why cases with a published plaintiff win have a lower settlement rate than all employment discrimination cases. The comparison also indicates that not all the "good" race and national origin cases settle. After all, even when plaintiffs defeat defendants' summary judgment motion, only a little over half of such cases settle. Further, this decreased settlement rate is also reflected in the case filing study. *See infra* notes 161–62 and accompanying text.

160 *See supra* notes 103–04 and accompanying text; *see also infra* Tables A3 & A4.

settlement rate of 78% in all the district's race cases examined.[161] In the Northern District of Texas, the settlement rates were about the same. The settlement rate in cases in which plaintiffs won on a pretrial motion was 59%, about the same rate of settlement found in all the district's race and national origin cases (58%).[162] By any measure, plaintiffs who prevail in reported decisions or in unreported decisions should not expect a greater chance of settling their case. Instead, defendants appear to be litigating claims, not settling them, when they think they have a good chance of winning.

In a 1990 study comparing cases with reported opinions to those without reported opinions, Peter Siegelman and John Donohue argued that cases with reported opinions are less likely to settle because the cases are more complex and novel than cases without reported opinions.[163] This would suggest that the low settlement rate for the national study of reported opinions in which plaintiffs won a pretrial motion indicates not defendants' unwillingness to settle strong claims, but instead merely reflects the cases' difficulty.

Yet, that explanation fails in this instance. Complex and novel cases are also more likely to produce fairly even win rates for plaintiffs and defendants.[164] These cases are by their nature ambiguous and in the "gray zone" for which even outcomes are expected. But the disposition of the national study of reported opinions with plaintiffs' wins are far from a predicted 50/50 win rate. When a plaintiff won in a published opinion and did not settle, the judicial win rates[165] for the ultimate disposition of the case were only 9% for plaintiffs but 91% for defendants.[166] This win/loss rate is similar to that in the case filing study of all filed cases for a particular year. In the case filing study, the win rates for cases without a settlement (and counting only dispositions based on the merits) was 3% for plaintiffs and 97% for defend-

161 *See* ED Pa Race Frequencies App C, *supra* note 120; *infra* Table A3.

162 *See* ND Tex Race Frequencies App D, *supra* note 120; *infra* Table A4.

163 *See* Siegelman & Donohue, *supra* note 10, at 1154–55; *see also id.* at 1141 n.23 ("Because judges are less likely to write opinions that only address clear or settled legal issues, complexity and changes in law should generate more written decisions.").

164 *See supra* notes 106–10 and accompanying text; *see also* Siegelman & Donohue, *supra* note 10, at 1148 (finding that "published decisions will be more prevalent among the cases in which the stakes between the parties are equal").

165 Here I include the cases the district court decided on the merits, thereby omitting the one case dismissed for failure to prosecute and the ten cases that were pending or whose outcome was unknown at the time this Article went to press. *See supra* Table 2.

166 Forty-six cases did not settle and were decided on the merits by the time this Article went to press. Plaintiffs won four of the cases; defendants, forty-two. *See supra* Table 2.

ants.[167] Thus, I am doubtful that the relatively low settlement rate is a reflection of the complexity of the case, and these extremely lopsided win rates ultimately undercut the defendants' settlement incentives theory.[168] After reading all 467 opinions, I also question whether any opinion included what could be deemed a "novel" issue in Title VII law. They all appear to be run-of-the-mill employment discrimination disputes.

B. Is the Judiciary's Evaluative Function Failing?

Other possible race neutral explanations of plaintiffs' low win rates would be failures in the judiciary's evaluative function. This Part considers specifically two possible errors as explaining plaintiffs' low win rates—the judiciary's failure to redress subtle discrimination and the judiciary's excessive deference to employers.[169] Both errors have equal applicability, in theory, to all types of employment discrimination, and in fact both have generally been applied in the literature without regard to the type of discrimination alleged.

1. Subtle Discrimination

As others have documented well, judicial decisionmaking seems currently unable to redress the subtle, systemwide discrimination that is more prevalent today than overt discrimination by a single decisionmaker.[170] Susan Sturm labels this later type of discrimination as "second generation" discrimination.[171] Her description of such discrimination is a good one: the "complexity [of second generation discrimination] lies in the multiple conceptions and causes of the harm, the interactive and contextual character of the injury, the blurriness of the boundaries between legitimate and wrongful conduct, and the structural and interactive requirements of an effective remedy."[172] She gives as an example a glass ceiling at a large law firm that can "be discernible only if examined in context and in relation to broader patterns of conduct and access."[173] Today's litigation often

167 That is, forty cases did not settle and were decided on the merits by the time this Article went to press. Plaintiff won one (a jury trial in the Eastern District of Pennsylvania) and defendants won thirty-nine. *See supra* notes 111–13 and accompanying text; *infra* Tables A3 & A4.

168 *See supra* note 150 and accompanying text.

169 See *supra* notes 5–6 for citations to the scholarship.

170 See *supra* note 5 for citations to the key scholarship.

171 *See* Sturm, *supra* note 5, at 460, 468–74.

172 *Id.* at 469.

173 *Id.* at 471.

involves issues surrounding less obvious discrimination, but this is likely not a new phenomenon. As Chad Derum and Karen Engle have demonstrated, lawmakers and judges have long recognized the existence of subtle discrimination, although our understanding has certainly matured.[174]

2. Deference to Defendants and Commitment to Employment at Will

Many scholars have also identified judges as too deferential to employment discrimination defendants.[175] For example, Sturm notes that "[s]ome courts have deferred to an employer's procedures, regardless of their actual effectiveness in eliminating identified problems of harassment or discrimination. Deference may stem from a judicial reluctance to impose a specific code that dictates the features of an internal process to employers."[176] Derum and Engle recognize deference as well, and make an important contribution in explaining that judicial commitment to the "employment at will" doctrine contributes to the deference.[177] The two argue that "[t]he employment at will doctrine—the background rule against which Title VII was enacted that permits employers to make hiring and firing decisions for good reasons, bad reasons, or no reason at all—is making a comeback within the doctrine of employment discrimination law."[178] According to Derum and Engle, a commitment to employment at will manifests itself, in part, when "many judges quite consciously and deliberately believe that, even under Title VII, they should not interrogate the practices of the private workplace without direct evidence of mendacity."[179]

In theory, both of these critiques of the judiciary's evaluative function have equal applicability to all forms of discrimination. Whether the plaintiff alleges discrimination in age, gender, or race, courts can fail to identify subtle discrimination and can defer to defendants. In other words, the explanations are race neutral by their terms. Yet, as the next Part demonstrates, I found a difference in disposition rates by type of discrimination alleged.[180] The difference

174 *See* Derum & Engle, *supra* note 5, at 1196–1209. It thus may not be accurate to describe "unconscious bias [as] 'second generation,' or a phenomenon that was not known or understood in the 1960s." *Id.* at 1192.

175 See *supra* note 6 for citations to the key scholarship.

176 *See* Sturm, *supra* note 5, at 537–38 (footnote omitted).

177 *See* Derum & Engle, *supra* note 5, at 1236–41.

178 *See id.* at 1182.

179 *See id.* at 1193.

180 *See infra* Part II.C.

suggests that something other than theoretically race neutral explanations might be at play.

C. Comparisons to Race

Here I analyze whether employment discrimination cases are treated similarly. Empirical research by Clermont and Schwab has indicated that "pretrial and trial win rates are similar across types of discrimination cases."[181] In reaching this conclusion, they divided cases according to the statutory basis for the claim, which will necessarily lead to some overlap in the specific type of discrimination alleged.[182] Selmi has suggested otherwise, that courts treat different cases differently. He has proposed that "[t]he bias the courts bring to the cases varies by the type of case."[183] In doing so, he extends the literature on unconscious bias beyond the job site to the courthouse.[184] Here I discuss empirical evidence supporting Selmi's argument that race cases are treated differently than other types of discrimination. I specifically found that race cases are treated worse than gender cases.[185] This suggests the incompleteness of race neutral explanations of what is underlying plaintiffs' low win rate. I also found evidence that age discrimination cases suffer about the same fate as race cases, which indicates that the current perception of age cases as one of the more easy types of cases to win may not be accurate.[186]

1. Juliano and Schwab's 2001 Study of Sexual Harassment

Juliano and Schwab's study of sexual harassment opinions shares much in common with the national study—both rely on district court opinions published by Westlaw and both are coded for similar factors.[187] Yet, the win rates were remarkably different. In the sexual harassment study of district court opinions on pretrial motions, plain-

181 *See* Clermont & Schwab, *supra* note 2, at 445 (breaking down employment discrimination claims by the following statutes: Age Discrimination in Employment Act of 1967, 29 U.S.C.A. §§ 621–634 (West 1999 & Supp. 2005); Family and Medical Leave Act of 1993, 29 U.S.C.A. §§ 2601–2654; Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §§ 2000e to e-17; 42 U.S.C. § 1983 (2000); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–12213).

182 For example, one of the categories studied was Title VII of the Civil Rights Act of 1964, a statute covering different types of discrimination. Title VII covers race, sex, color, religion, and national origin. 42 U.S.C.A. §§ 2000e to e-17.

183 Selmi, *supra* note 2, at 562.

184 *See id.* at 561–62.

185 *See infra* Part II.C.1–2.

186 *See infra* Part II.C.3.

187 *See* Juliano & Schwab, *supra* note 9, at 560–72.

tiffs won 53% of the time.[188] By comparison, the national study's look at 467 opinions demonstrated an overall win rate for plaintiffs of 27%.[189] Even more surprising is that the majority of the cases in the sexual harassment study were not covered by the Civil Rights Act of 1991,[190] which Juliano and Schwab found to have a profound and significant positive impact on plaintiffs' chances for success.[191] All the opinions in the national study, on the other hand, were covered by the Civil Rights Act of 1991. The difference in outcomes may be a factor of time. Juliano and Schwab's study covered the years 1986–1996[192] and the national study was of the year 2003;[193] perhaps things have gotten worse with time. Yet, the case filing study also indicated that gender discrimination cases are easier for plaintiffs to win than race discrimination cases, as the next section demonstrates.

2. Gender Filings in Pennsylvania and Texas

Case filings in the Eastern District of Pennsylvania and the Northern District of Texas also indicate differences in outcomes between gender and race cases.[194] The following Table compares settlement and pretrial judgment rates in gender and race cases (trial data was too infrequent to study),[195] with the larger numbers bolded:

188 *Id.* at 570. Vivian Burger examined summary judgment dispositions in the district courts of the Second Circuit available on Westlaw. That work also demonstrated that plaintiffs were more likely to survive a summary judgment motion when claiming sex discrimination rather than race or age discrimination. *See* Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45 (forthcoming 2006). She attributes the difference to the inclusion of sexual harassment cases in her database.

189 *See supra* note 97 and accompanying text; *see also infra* Table A1.

190 Pub. L. No. 102-166, 105 Stat. 1071.

191 *See* Juliano & Schwab, *supra* note 9, at 597 (finding a plaintiffs' win rate of 84.8% in the thirty-three opinions in which the Civil Rights Act of 1991 applied).

192 *See id.* at 550.

193 *See supra* note 43.

194 The collection of these cases is discussed *supra* notes 69–71 and accompanying text.

195 For example, in the case filing study, only five trials were held for the 192 cases filed in the year 2002. *See infra* Tables A3 & A4; *see also supra* note 49 (detailing national trial rates for employment discrimination cases).

TABLE 3. COMPARISON OF DISPOSITION RATES: CASE FILING STUDY OF GENDER AND RACE DISCRIMINATION

	Eastern District of Pennsylvana		Northern District of Texas	
	Gender % (*N*)	Race % (*N*)	Gender % (*N*)	Race % (*N*)
Settlement Rates	**87%** (87)	78% (64)	**72%** (52)	58% (64)
Defendant Pretrial Judgment	6% (6)	**7%** (6)	14% (10)	**26%** (28)

Although it is more pronounced in Texas than in Pennsylvania, both districts present the same pattern: that gender cases are more likely to settle and defendants in gender cases are less likely to win a pretrial judgment than in race cases. This difference indicates that plaintiffs alleging race discrimination face higher odds when pursuing their claims in federal court than plaintiffs claiming gender discrimination.

3. Age Filings in Pennsylvania and Texas

Also notable are the settlement rates and pretrial judgment rates in age cases. The following Table compares settlement and pretrial judgment rates in age and race cases (again, trial data was too infrequent to study), with the larger numbers bolded:

TABLE 4. COMPARISON OF DISPOSITION RATES: CASE FILING STUDY OF AGE AND RACE DISCRIMINATION

	Eastern District of Pennsylvana		Northern District of Texas	
	Age % (*N*)	Race % (*N*)	Age % (*N*)	Race % (*N*)
Settlement Rates	78% (60)	78% (64)	53% (17)	**58%** (64)
Defendant Pretrial Judgment	**17%** (13)	7% (6)	22% (7)	**26%** (28)

Age discrimination cases appear to be much harder to win (and settle) than previously proposed.[196] Their settlement and defendant pretrial judgment rates are very similar to the race cases. This indicates that the current perception of age cases as easier to win than

196 *See* George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 509 (1995) ("By every measure, plaintiffs in ADEA cases are better off than plaintiffs in other employment discrimination cases."); *see also supra* note 28.

other discrimination claims may undervalue the biases that judges bring to these cases.

4. Summary

The critiques of the judiciary's evaluative function apply, in theory, equally across the many types of employment discrimination claims. Yet, Colker has demonstrated incredibly low win rates for disability plaintiffs,[197] and this Article indicates that race and national origin plaintiffs also fare worse than gender plaintiffs and employment discrimination plaintiffs in general.[198] This difference in treatment suggests that errors in the judiciary's evaluative function cannot fully explain these cases—something else is at play in deeming race and national origin plaintiffs as bringing less worthy cases. In other words, the difference in disposition rates suggests the possibility that the race neutral explanations of employment discrimination litigation are incomplete. This is the subject of the next Part.

III. The Difference in Race

This Part first argues that the difference between race and gender cases and all employment discrimination cases indicates that race neutral errors in the judiciary's evaluate function are incomplete in their description of judicial decisionmaking and that an anti-race plaintiff ideology exists. Secondly, I examine the limits in the future of judicial decisionmaking given the anti-race plaintiff ideology infecting race employment discrimination cases.

A. Anti-race Plaintiff Ideology

In their analysis of employment discrimination cases as a whole, Clermont, Eisenberg, and Schwab have described an "anti-plaintiff bias."[199] One example given of that bias is that employment discrimi-

197 Colker examined the trial outcomes in 615 private disability cases in a database compiled by the ABA. *See* Colker, *ADA Windfall*, *supra* note 8, at 109. The win rate for defendants was 92.7%. *See id.* Similarly, in the national study, claims of disability discrimination that were filed also in the Title VII race case had a win rate on the disability claim of only 13%, the lowest win rate on a non-Title VII race claim. *See infra* Table A1.

198 *See supra* Part II.C; note 104 and accompanying text.

199 Even if employment discrimination plaintiffs beat the odds and win at the trial court level, they face an "anti-plaintiff effect in federal appellate courts," meaning they are much more likely to lose an appeal than defendants. *See* Clermont & Eisenberg, *Realities*, *supra* note 2, at 153; Clermont & Schwab, *supra* note 2, at 451; Clermont, Eisenberg & Schwab, *supra* note 2, at 554; *see also* Clermont & Eisenberg, *Jury or Judge*, *supra* note 2 at 155 ("The appellate court is more favorable to the defendant

nation plaintiffs are much more likely to be reversed on appeal than other defendants.[200] Lurking within employment discrimination litigation, I think, are categories of cases that fare particularly poorly. Plaintiffs alleging race and national origin discrimination are one example of this. Very little about particular case characteristics, or combination of characteristics, indicates why race and national origin cases are so hard for plaintiffs to win.[201] Instead, almost all types of cases are lost. Race plaintiffs are also less likely to settle and more likely to lose a pretrial judgment than gender plaintiffs[202] and less likely to settle than all employment discrimination cases.[203]

I'm doubtful the disposition differences are because race cases have less merit. Plaintiffs' attorneys face the same economic decision in deciding whether to file a race, gender, or any employment discrimination case, and the plaintiffs' and defendants' bars are similar for all types of employment discrimination claims.[204] The governing

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than is the trial judge and the jury. . . . [T]he big difference between appellate court and trial jury is more surely owing to the appellate judges' sizable misperceptions regarding the jury.").

Others have also found a judicial bias. *See* Oppenheimer, *supra* note 10, at 566 ("The most likely explanation is judicial and juror bias against women and minorities, with particularly strong bias against 'older' women and black women."); Schultz & Petterson, *supra* note 9, at 1165 ("[T]he decline in plaintiffs' success rates reflects in part a shift toward less pro-plaintiff standards for evaluating the validity of the lack of interest defense in race discrimination cases."); Selmi, *supra* note 2, at 562 ("[C]ourts often analyze race cases from an anti-affirmative action mindset, one that views both the persistence of discrimination and the merits of the underlying claims with deep skepticism.").

200 Plaintiffs who won at trial are reversed on appeal about 42% of the time, while defendants who win trials are reversed on appeal only about 7% of the time. Clermont, Eisenberg & Schwab, *supra* note 2, at 552. Similarly, plaintiffs who win at the pretrial stage lose 42% of the time, compared to defendants' 11% reversal of defendants' pretrial wins. *Id.*; *see also* Clermont & Schwab, *supra* note 2, at 450 (reporting reversal rates when defendants appeal plaintiffs' pretrial victories at 45% and reversal rates when plaintiffs appeal defendants' pretrial victories at 11%). Other studies for particular types of employment discrimination lawsuits reported similar findings. *See* Colker, *supra* note 150, at 540 (reporting an 83% success rate for ADA defendants on appeal); Schultz & Petterson, *supra* note 9, at 1162 (in cases with the lack of interest defense finding that "plaintiffs' success rate on appeal fell from 90 percent in the earlier period to only 33.3 percent in the later period").

201 *See supra* Part I.D.

202 *See supra* Part II.C.1–2.

203 *See supra* note 104 and accompanying text.

204 Plaintiffs and defendants themselves "face much the same economic incentives. For plaintiffs and their attorneys, those incentives should discourage weak claims." Clermont, Eisenberg & Schwab, *supra* note 2, at 565; *see* Selmi, *supra* note 2, at 569–70 (discussing the economic incentives of employment discrimination lawyers).

law for each type of discrimination shares much of the same standards for demonstrating liability.

Nor do I think that the difference can be explained because race cases are more susceptible to winnable summary judgment motions than gender cases or employment discrimination cases as a whole. In all employment cases, including nonharassment claims, issues that are not easily translated into a successful summary judgment motion predominate. Regardless of the type of discrimination alleged, a key issue is often whether the employee's performance was satisfactory and whether the employee was entitled to the challenged action. All of this depends on credibility and inferences from behavior which are not easy matters to prove via summary judgment, where "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor"[205] and where material facts must be found as a matter of law to favor only one party.

Although many use the term "bias" in describing their results,[206] I adopt a different phrase here—"anti-race plaintiff *ideology*"—for what I witness in race and national origin cases. Bias and ideology both capture the idea that courts are not receptive to plaintiffs' claims. Yet, I think ideology is a better description of what occurs in race and national origin cases. Courts almost certainly believe that racial discrimination in the workplace is wrong, unlike the immediate reaction of some judges to *Brown v. Board of Education*,[207] which was clearly a bias.[208] The courts today are not seeking to undermine employment discrimination jurisprudence. Instead, the judiciary believes quite often that the particular situation before it demonstrates no discrimination—that the plaintiffs' claims lack legal merit and the defendants are right as a matter of law. The attitude reflects a world view at odds with the premise underlying the particular plaintiff's lawsuit.[209] This ideology is defined further in the next Part by examining what it tells us about future judicial reform.

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205 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). This is not to suggest that summary judgment should never be awarded in employment discrimination cases, just that it should be of equal difficulty across the many types of discrimination. For an excellent analysis of summary judgment in employment discrimination cases, see Beiner, *supra* note 51, at 86–97.

206 *See supra* note 199.

207 347 U.S. 483 (1954).

208 *See generally* J. HARVIE WILKINSON III, FROM *BROWN* TO *BAKKE*: THE SUPREME COURT AND SCHOOL INTEGRATION: 1954–1978, at 80–87 (1979) (describing the resistance of some Southern judges to *Brown*).

209 *See* Selmi, *supra* note 2, at 574 ("[D]octrine is rarely sufficiently restraining to limit the bias of courts, and where the Supreme Court leaves room for discretion it invariably leaves room for bias.").

B. Future Judicial Decisionmaking

This Part turns to the question of what the anti-race plaintiff ideology tells us about the future of judicial decisionmaking. I specifically argue that in race cases the problem is more fundamental than the current literature suggests—that courts generally know about subtle discrimination and courts are more than hesitant to make employers explain their actions. Instead, the judiciary appears to *agree* with defendants in race and national origin cases that plaintiffs' cases are without legal merit. The judiciary validates and approves the defendants' position not because of deference, but from a perception that discredits the likelihood of plaintiffs' claims and validates the defendants' story. This ideology may be present in all employment discrimination cases, but is particularly pronounced in race cases.

1. The Ideology Represents Agreement with Defendants, Not Deference to Defendants

For two reasons, I think the courts are doing more than deferring to defendants—instead they are agreeing with the defendants on the merits. Both reasons bear on the inadequacy of proof that employment at will and deference are important to the judiciary. First, courts almost never mention the employment at will doctrine or deference in their decisions.[210] It is almost impossible to prove that deference or

210 I found only two of the 467 opinions in the national study that use the words "defer" or "deference" in ways other than noting a delay in timing (i.e., deferring the decision on a pending motion) or the notion of deference to administrative agencies. One opinion was discussing deference in a First Amendment claim, a matter outside the scope of the study. *See* Caruso v. City of Cocoa, 260 F. Supp. 2d 1191, 1209 (M.D. Fla. 2003). One opinion lends very small support to the idea of judicial deference to employers. *See* Buggs v. Powell, 293 F. Supp. 2d 135, 144 (D.D.C. 2003) ("'In a close case, a reasonable juror would usually assume that the employer is more capable of assessing the significance of small differences in the qualifications of the candidates, or that the employer simply made a judgment call. But this does not mean that a reasonable juror would in every case defer to the employer's assessment.'" (quoting Aka v. Wash. Hosp. Ctr., 156 F.3d 1284, 1294 (D.C. Cir. 1998) (en banc))).

Courts referenced the phrase "employment at will" rarely. The text of only nine of the 467 opinions used the term, but none of the uses implied in any way a judicial commitment to the concept. Four cases discussed the term in the context of state causes of action such as negligent discharge and breach of contract. *See* Smith v. Diamond Offshore Mgmt. Co., No. CIV. A. 03-2024, 2003 WL 23095586 (E.D. La. Dec. 23, 2003); Keeley v. Cisco Sys., No. CIV. A. 301CV1504D, 2003 WL 21919771 (N.D. Tex. Aug. 8, 2003); Alexander v. Excel Meats, No. CIV. A. 5:02–CV-041-C, 2003 WL 21353924 (N.D. Tex. June 9, 2003); Ijames v. Murdock, No. 1:01CV00093, 2003 WL 1533448 (M.D.N.C. Mar. 21, 2003). Three cases examined whether employment at will employment agreements were covered by § 1981. *See* Wells v. Hosp. Group of Ill.,

the employment at will doctrine is driving a court's acceptance of defendants' explanations when the court says nothing to that effect. The thought processes of a judge, apart from the written opinion, are clearly difficult to ascertain. The court's acceptance of defendant's explanation for the challenged action could reflect any number of values other than a commitment to employment at will or deference to employers.

Second, not only do courts rarely mention deference, it is inconsistent with how the courts in fact are treating the cases. Perhaps the easiest way to demonstrate this is by contrast to school desegregation where deference is a common explanation of decisionmaking, as it is in other types of public law litigation.[211]

Deference as an explanation for judicial decisionmaking typically indicates that there is some ambiguity in the law or the facts, and the courts decide to defer to one party's arguments to resolve that ambiguity. For example, in school desegregation cases courts are to eliminate the present-day effects of past discrimination, but everyone admits we can't know what the world would look like absent the school district's discrimination, nor do we know how to achieve that world.[212] While employment discrimination law clearly has its ambiguity, it at least asks more answerable question (did plaintiff prove by a preponderance of the evidence that the defendant in this instance

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No. 92 C 6111, 2003 WL 21704416 (N.D. Ill. July 23, 2003); Herron v. Daimler Chrysler Corp., 267 F. Supp. 2d 941 (S.D. Ind. 2003); Spielman v. Fisher Printing, Inc., No. 02 C 7454, 2003 WL 1090360 (N.D. Ill. Mar. 10, 2003). One other case quoted the term from an employee handbook, in a discussion about the employer's attendance policies. *See* Williams v. Aviall Servs., Inc., No. CIV. A. 3:01-CV-2151, 2003 WL 21018567, at *3 (N.D. Tex. Feb. 12, 2003). Finally, one court used the term in deciding whether an employee suffered an adverse employment action when neither job offer had job security. *See* Musgrove v. Mobil Oil Corp., No. 3:99-CV-1562-P, 2003 WL 21653125, at *9 (N.D. Tex. Apr. 1, 2003).

Derum and Engle also argue that the commitment to employment at will and the corresponding deference can arise when a court presumes that personal animosity is *not* reflective of any discrimination. *See* Derum & Engle, *supra* note 5, at 1179. Yet, in the 467 opinions, I found only seventeen opinions that referenced the terms "personality" or "personal animosity," and four of those times the concepts helped plaintiffs prevail. *See* Buggs v. Powell, 293 F. Supp. 2d 135; Sullivan v. Newburgh Enlarged Sch. Dist., 281 F. Supp. 2d 689 (S.D.N.Y. 2003); Canady v. John Morrell & Co., 247 F. Supp. 2d 1107 (N.D. Iowa 2003); Forts v. City of N.Y. Dep't of Corr., No. 00 Civ. 1716 LTS FM, 2003 WL 21297299 (S.D.N.Y. June 5, 2003).

211 Sturm has earlier explored this deference in public law cases. *See generally* Susan P. Sturm, *A Normative Theory of Public Law Remedies*, 79 GEO. L.J. 1355, 1412 (1991) ("The deferrer model of remedial process . . . undermines the court's legitimacy in . . . important respects.").

212 *See* Parker, *Decline*, *supra* note 33, at 1645–52.

discriminated). One can argue about the nature of the proof, but no one would contend that the question is completely and always unanswerable. School desegregation, on the other hand, asks an unanswerable question. That is, deference to one party is practically compelled in school desegregation and other public law cases.

Further, in school desegregation, the Supreme Court has held that the courts should defer to the defendants in what the remedy should and should not include, and courts explicitly do so.[213] The deference in school desegregation also draws on the federalism implications of federal judges deciding how to structure and run local schools.[214] These cases are rarely decided without an evidentiary hearing; summary judgment practice is almost unheard of. These procedural postures suggest the presence of arguable facts, not factual certainty.

In employment discrimination cases, on the other hand, deference lacks such legitimacy as a decisionmaking tool. The Supreme Court has never articulated a role for deference in employment discrimination, and federalism is a nonissue in suits against private employers and the federal government. The courts behave as if there is no ambiguity in the outcome. Trials are very infrequent; instead defendants are most often winning on pretrial motions that require judges stating that they believe they have reached the "right" result "as a matter of law." In granting defendants a summary judgment, the court must reach the conclusion that reasonable jurors could only find for defendants.

Further, summary judgment forces defendants to go beyond the pleadings to prove the inadequacy of plaintiffs' case. This very often involves proof of plaintiffs' lack of qualifications or proof of defendants' legitimate, nondiscriminatory reasons. In both summary judgment situations, defendants are usually setting forth their own affirmative proof, rather than simply pointing to plaintiffs' lack of proof. The court thus engages in determining the issues surrounding the challenged action in granting defendants' summary judgment motion. The cases, decided most often by pretrial motion, therefore seem to include more than deference to employers, but an agreement with defendants. While employment discrimination legal standards certainly offer some ambiguity and choice, courts are behaving as if the particular cases they are deciding themselves offer no ambiguity

213 *See* Parker, *Connecting*, *supra* note 33, at 1731–39 Liability is rarely litigated in school desegregation cases, and the meaning of the right at stake is largely defined by the remedy. *See* Parker, *supra* note 32, at 514–19.

214 *See* Parker, *Connecting*, *supra* note 33, at 1746–60.

or choice in defendant's win. And I see no reason not to take the judges' word on this as at least a partial explanation of what is driving the courts—that is, that judges believe defendants are right as a matter of law, with no ambiguity or deference involved in reaching that conclusion.

By drawing this distinction between an anti-race plaintiff ideology and the employment at will doctrine and deference, I don't mean to suggest that courts never defer to defendants or that courts are never hesitant to undercut the employment at will doctrine. I'm instead suggesting that in addition to deference and a commitment to employment at will, courts also have an ideology that discounts the possibility of discrimination in race and national origin cases.

2. The Ideology Suggests that Changing the Courts Is More Difficult than Previously Believed

Recognizing the different treatment of the various types of employment discrimination claims is necessary in any attempt at reform, for it begs the question of whether courts *can* be reformed internally, an issue altogether different from the concern of whether courts *should* be reformed. That is, if the judiciary in fact has an anti-race plaintiff ideology, why would we expect the judiciary to one day be more receptive to the possibility of race discrimination in employment and change the way it treats these cases? The difference in outcomes also raises the question of whether the answer to both questions—can and should judicial decisionmaking be changed—will differ depending on the type of discrimination.

For example, an anti-plaintiff ideology in race and national origin cases calls into question how seriously courts would take their proposed role in Sturm's "structural approach" to redressing second generation employment discrimination, even if the Supreme Court made clear that the law required such an approach. Sturm, drawing upon her important work on public law remedial process,[215] has proposed a structural process for employment discrimination that includes almost every conceivable player—employees, employers, lawyers, insurance companies and brokers, administrative agencies, and organizations are all there—and also a redefined role for the judiciary.[216] Through a "dynamic" process, these players would come together to redress discrimination. She specifically redefines the court's role as follows:

215 *See* Sturm, *supra* note 211.

216 Sturm, *supra* note 5, at 524–37.

> Courts would thus not unilaterally construct or articulate standards for effective internal conflict resolution mechanisms to be adopted or followed by employers as a basis for avoiding liability. Instead, they would participate in creating a structure for employers, with the assistance of mediating actors, to develop and evaluate the effectiveness of the employers' internal systems.[217]

Sturm conceptualizes the court as being a "catalyst"[218] that will create "judicially elaborated . . . legal norms"[219] that give employers "incentives"[220] with "enforcement" in limited situations.[221] While Sturm's approach limits some of the judiciary's current power,[222] she still depends on some possibility that the court will disagree with defendants and will articulate the norms of employment discrimination laws.

As is hopefully clear by now, I am left unconvinced that most courts will engage in the role Sturm assigns them in race and national origin cases alleging disparate treatment. She is right, I believe, to develop a strong role for employers in identifying and redressing the causes and manifestations of subtle discrimination.[223] This has been a prominent part of her articulation of the public law remedial process that has rightly recognized the limits of courts acting alone to redress matters such as prison reform and school segregation.[224] But I'm not sure courts would provide much of a check on this process.

In a way, she and I are talking about a different set of cases. By definition she is focusing on sexual harassment claims and subjective employment actions that have a disparate impact.[225] My focus on the run-of-the-mill race and national origin disparate treatment claim is entirely different. Yet, the courts are not so divided; what we learn

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217 *See id.* at 560.

218 *Id.* at 521, 557.

219 *Id.* at 522.

220 *Id.* at 557.

221 *Id.* at 558.

222 *See id.* at 555.

223 *See id.* at 559 ("Courts would look to employers to develop and justify criteria of effectiveness in problem solving for their own internal systems."); *see also id.* at 543–46 (developing the role of employers in more detail).

224 *See* Sturm, *supra* note 211. She recognizes the connection with her prior work, but also an important distinction: "In many respects, the role I advocate is simply an extension of my earlier work articulating a normative theory for the role of courts in public remedial decisionmaking. However, in the structural workplace regime, the court's role is not limited to shaping this process upon a finding of a violation. . . . Instead, it establishes the general norm, and it then creates the incentives for employers to create processes that comply with the norm and help solve more general problems connected to fair and efficient decisonmaking under conditions of complexity and diversity." Sturm, *supra* note 5, at 562.

225 *See* Sturm, *supra* note 5, at 468–69.

about courts in one area often reveals how courts will behave in another area. My point is that we should be extremely cautious about the judiciary articulating norms or enforcing norms that recognize that employers themselves can't take care of any problem with existing workplace racial and ethnic discrimination. Judges, in other words, seem to be opting out of race and national origin disparate treatment cases—because employers are right—and I'm uncertain whether they would not also do the same in race and national origin impact cases. Sexual discrimination cases are another matter altogether; here courts appear more receptive to disagreeing with defendants.[226] But for race and national origin cases, I'm far from hopeful that courts will use any power given to them to "encourage" employers to do something they already don't want to do.

This is not to suggest, however, that we turn away from the courts altogether in efforts to redress racial and ethnic employment discrimination. I cannot ignore that courts offer plaintiffs the value of a public forum in which to tell their stories and hopefully to resolve their claims.[227] More fundamentally, it is unclear whether plaintiffs have a better venue option. Arbitration is a possibility,[228] but only limited empirical work examines the treatment of civil rights employment cases decided by arbitration.[229] Rather than calling for an exit from

226 Yet, gender discrimination is supposedly better addressed by employers. *See id.* at 555.

227 *See supra* note 96 and accompanying text.

228 The Supreme Court has affirmed the enforceability of arbitration agreements for employment discrimination suits. *See* Circuit City Stores v. Adams, 532 U.S. 105 (2001); Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991). Arbitration agreements do not preclude the EEOC from filing its own suit. *See* EEOC v. Waffle House, Inc., 534 U.S. 279 (2002). The Supreme Court has not reached the issue of whether an enforceable arbitration agreement also precludes the filing of a class action. *See generally* Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) (plurality opinion) (split over whether to reach the merits of such a question).

229 Theodore Eisenberg & Elizabeth Hill, *Arbitration and Litigation of Employment Claims: An Empirical Comparison*, DISP. RESOL. J., Nov. 2003–Jan. 2004, at 44 nn. 2 & 7; Elizabeth Hill, *Due Process at Low Cost: An Empirical Study of Employment Arbitration Under the Auspices of the American Arbitration Association*, 18 OHIO ST. J. ON DISP. RESOL. 777 (2003); William M. Howard, *Arbitrating Claims of Employment Discrimination: What* Really *Does Happen? What* Really *Should Happen?*, DISP. RESOL. J., Oct.–Dec. 1995, at 40; Lewis L. Maltby, *Private Justice: Employment Arbitration and Civil Rights*, 30 COLUM. HUM. RTS. L. REV. 29 (1998); David Sherwyn, Samuel Estreicher & Michael Heise, *Assessing the Case for Employment Arbitration: A New Path for Empirical Research*, 57 STAN. L. REV. 1557 (2005).

In noncivil rights employment claims, Ted Eisenberg and Elizabeth Hill found no difference in win rates or in awards for higher-paid employees in arbitrations by the American Arbitration Association. Eisenberg & Hill, *supra*, at 47. The data was too limited to draw a similar conclusion for lower-paid employees. *See id.* For civil

the judiciary, this Article seeks to change the terms of the debate to recognize that courts treat types of employment discrimination cases differently. In other words, this Article seeks to begin a discussion on which judicial reforms would be appropriate for what types of discrimination. This necessarily entails recognizing that discrimination claims face a hierarchy of preferences in the judiciary and that judges are placing particular hardships on race and national origin plaintiffs. In sum, the unconscious discrimination infecting American society infects its judiciary as well.[230]

CONCLUSION

This Article provides a comprehensive, national examination of routine race and national origin employment discrimination lawsuits. Although all types of employment discrimination cases are "hard to win,"[231] that difficulty is especially pronounced for race and national origin claims. These types of cases are proving almost impossible to win in federal court. Plaintiffs' only true chance for a recovery is settlement, and here the options are more limited than they are for other cases. Race cases settle at lower rates than employment discrimination cases as a whole.[232] They are also treated worse than gender employment discrimination cases—they are harder to settle, and defendants are more likely to win a pretrial judgment in their favor.[233]

Some readers may argue that I have overstated plaintiffs' slim chances for success. After all, race and national origin plaintiffs can and still do settle more than half of their lawsuits, and this bargaining takes place in the "shadow of the law." If you define these settlements as plaintiffs' judicial victories, then the odds are far from bad. Yet, I can't ignore one particularly disheartening outcome that, to me, demonstrates an anti-race plaintiff ideology that seriously erodes plaintiffs' bargaining power. While individual cases may have an acceptable resolution, considering race and national origin cases collectively presents a different picture.

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rights employment claims, they found that "the award results were consistent with arbitrators acting similarly to in-court adjudicators." *Id.* at 50–51. Yet, their data for civil rights claims was so limited that it is hard to draw firm conclusions from the results. *See id.* at 50. For example, they only had eight observations of arbitration resolutions. *See id.* at 49.

230 *See* Selmi, *supra* note 2, at 561–62.

231 *Id.* at 555.

232 *See supra* note 104 and accompanying text.

233 *See* Part II.C.2.

In the race cases in the two studies that didn't settle and that the court resolved on the merits—421 out of 656 unique cases[234]—plaintiffs won only six cases.[235] (This outcome certainly does not translate to a national win rate, but only reflects the win rates of the cases studied herein.) The shockingly low win rate, coupled with the overall lower settlement rate as compared to plaintiffs in all employment discrimination cases[236] *and* the low percentage of settlements even when plaintiff prevailed on a pretrial motion[237] *and* the more favorable plaintiff outcomes in gender cases,[238] to me demonstrates that race and national origin plaintiffs face particularly difficult hurdles. Although plaintiffs bargaining for settlements do so in the shadow of the law and with the threat of a jury trial, that shadow actually just hangs over the plaintiffs, who must settle or almost certainly get nothing. Defendants, on the other hand, are bargaining, basking almost, in bright sunshine from the courts. If we are to bring sunshine to both sides of the typical race and national origin suit, and clarity to our current understanding of judicial decisionmaking in these cases, then we must recognize that courts are doing more than deferring to defendants. Instead, they seem particularly hesitant of certain types of claims, including race and national origin ones. Only by recognizing the unique challenges of race and national origin cases can we one day overcome them.

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234 That is, 467 opinions in the national study, covering 464 unique cases, and 192 cases in the case filing study. For the 656 unique cases, 199 cases settled, twenty-four cases were resolved without reaching the merits, and twelve were pending when this Article went to press. *See supra* notes 53, 103–14, 156–62 and accompanying text; *see also infra* Tables A1, A3 & A4.

235 For the six plaintiffs wins, plaintiffs won a jury trial in the Eastern District of Pennsylvania in the case filing study; a jury trial in a case in the national study in which the defendant won on the motion reported in the opinion, but part of the plaintiffs' race and national origin claims remained; and four jury trials in cases in the national study in which the plaintiffs won in the reported opinion. *See supra* Table 2; *supra* notes 112, 158 and accompanying text; *see also infra* Table A3. For the 421 defendant wins, in the national study defendants won 329 pretrial judgments in the reported opinions studied; five wins in cases in which the defendant won on the motion reported in the opinion, but part of the plaintiffs' race and national origin claims remained; and forty-two wins in cases in which the plaintiff won in the reported opinion. *See supra* Table 2; *supra* notes 153, 158 and accompanying text. In the case filing study, defendants had thirty-three wins in Texas, and twelve wins in Pennsylvania. *See supra* note 112 and accompanying text; *see also infra* Tables A3 & A4.

236 *See* note 104 and accompanying text.

237 *See supra* notes 156–62 and accompanying text.

238 *See supra* Part II.C.1–2.

APPENDIX[1]

TABLE A1. NATIONAL STUDY OF REPORTED DISTRICT COURT OPINIONS: DATA SUMMARY

Variable	Number	%	Plaintiff Win Rate
All Cases	467	100.0	27.4
Plaintiff Pro Se			
No	374	80.1	30.2
Yes	93	19.9	16.1
Number of Plaintiffs			
One	440	94.2	26.8
More than one	27	5.8	37.0
Plaintiff's Gender			
Female	183	39.2	27.3
Male	277	59.3	27.1
Both	6	1.3	50.0
Nonascertainable	1	.2	.0
Plaintiff's Race			
African American or Black	281	60.2	26.7
Asian or Pacific Islander	13	2.8	38.5
Hispanic	37	7.9	29.7
Middle Eastern decent	16	3.4	37.5
Multi-racial individual	5	1.1	20.0
Multi-racial group	4	.9	25.0
Native American	4	.9	.0
White, non-Hispanic	46	9.9	21.7
Nonascertainable	61	13.1	31.1
Plaintiff's Occupation			
Administrative	47	10.1	29.8
Blue Collar (including supervisory blue)	139	29.8	31.7
Clerical	37	7.9	18.9
Law enforcement/firefighter	35	7.5	31.4
Other white collar	134	28.7	23.9
Technical	14	3.0	35.7
Nonascertainable	61	13.1	24.6

1 This Appendix contains most of the data analyzed in this Article. The data not in this Appendix can be accessed online. *See* Technical Appendix, *supra* note 74. The Technical Appendix includes all the data and output files and coding sheets used herein.

Variable	Number	%	Plaintiff Win Rate
Plaintiff's Union Membership Mentioned in Opinion			
No/not mentioned in opinion	391	83.7	27.4
Yes	76	16.3	27.6
Plaintiff's Theory			
Disparate treatment only	447	95.7	28.0
Both disparate impact and treatment	20	4.3	15.0
Plaintiff's Allegations of Discrimination			
Race—Yes	419	89.7	26.5
Race—No	48	10.3	35.4
National origin—Yes	112	24.0	26.8
National origin—No	355	76.0	27.6
Color—Yes	29	6.2	27.6
Color—No	438	93.8	27.4
Sex/gender—Yes	115	24.6	27.0
Sex/gender—No	352	75.4	27.6
Disability—Yes	56	12.0	19.6
Disability—No	411	88.0	28.5
Age—Yes	76	16.3	23.7
Age—No	391	83.7	28.1
Religion—Yes	24	5.1	25.0
Religion—No	443	94.9	27.5
Publication			
Published in official reporters	145	31.0	29.7
Not published in official reporters	322	69.0	26.4
Race and Gender of District Court Judges			
African American female	15	3.2	26.7
African American male	41	8.8	22.0
Asian American male	4	.9	50.0
Hispanic male	27	5.8	25.9
White female	87	18.6	31.0
White male	293	62.7	27.0
EEOC/DOJ a Plaintiff in Case			
No	464	99.4	27.6
Yes	3	.6	.0
Public Interest Group or Amicus Involved in Case			
No	467	100.0	27.4
Type of Defendants			
Private employer	240	51.4	26.3
Federal government	68	14.6	23.5
State or local government	157	33.6	31.2
Both government and private employer	2	.4	.0

Variable	Number	%	Plaintiff Win Rate
Procedural Posture of Court's Decision			
Rule 12 motion for dismissal	74	15.8	41.9
Rule 56 motion for summary judgment	393	84.2	24.7
Plaintiff's Claim—Win Rate on Case When Allegations Made			
Failure to hire	18	3.9	16.7
Demotion	19	4.1	42.1
Failure to promote	130	27.8	27.7
Failure to reinstate	6	1.3	33.3
Harassment/hostile work environment (pre-opposition)	171	36.6	33.9
Retaliation (post-opposition)	236	50.5	32.2
Discharge	184	39.4	23.4
Constructive discharge	35	7.5	25.7
Terms and conditions—pay-related	87	18.6	36.8
Terms and conditions—not pay-related	151	32.3	25.8
Plaintiff's Claim—Win Rate on Individual Claim			
Failure to hire	18	3.9	11.1
Demotion	19	4.1	21.1
Failure to promote	130	27.8	16.2
Failure to reinstate	6	1.3	33.3
Harassment/hostile work environment (pre-opposition)	171	36.6	18.7
Retaliation (post-opposition)	236	50.5	19.9
Discharge	184	39.4	17.9
Constructive discharge	35	7.5	17.1
Terms and conditions—pay-related	87	18.6	24.1
Terms and conditions—not pay-related	151	32.3	16.6
Plaintiffs' Win Rate on Non-Title VII Race Claims—Win Rate on Individual Claim			
§ 1983 and race/national origin/color	62	13.3	21.0
State civil rights claim(s)	104	22.3	25.0
State tort claim(s)	56	12.0	14.3
Federal gender/sex discrimination claim(s)	85	18.2	27.1
Federal disability discrimination claim(s)	54	11.6	13.0
Federal age discrimination claim(s)	73	15.6	20.5

Variable	Number	%	Plaintiff Win Rate
Defenses—Win Rate on Case When Allegation Made			
Legitimate, nondiscriminatory reason	251	53.7	25.1
Failure to demonstrate prima facie case	374	80.1	29.7
EEOC procedural requirements	202	43.3	38.6
Defenses—Win Rate on Individual Defense			
Legitimate, nondiscriminatory reason	251	53.7	21.5
Failure to demonstrate prima facie case	374	80.1	35.8
EEOC procedural requirements	202	43.3	31.3
Request for Punitive Damages Mentioned in Opinion			
No/missing	434	92.9	26.3
Yes	33	7.1	42.4
Costs Awarded to Defendant	4	.9	.0
Federal District Courts Organized by Circuit			
First Circuit	7	1.5	14.3
Second Circuit	110	23.6	31.8
Third Circuit	28	6.0	39.3
Fourth Circuit	41	8.8	17.1
Fifth Circuit	60	12.8	38.3
Sixth Circuit	18	3.9	16.7
Seventh Circuit	106	22.7	20.8
Eighth Circuit	23	4.9	43.5
Ninth Circuit	16	3.4	6.3
Tenth Circuit	19	4.1	47.4
Eleventh Circuit	24	5.1	8.3
D.C. Circuit	15	3.2	26.7
Federal District Courts			
Alabama Middle District	5	1.1	.0
Alabama Northern District	1	.2	.0
Arizona District	2	.4	50.0
Arkansas Eastern District	2	.4	100.0
California Northern District	13	2.8	.0
Connecticut District	15	3.2	60.0
Delaware District	5	1.1	0.0
District of Columbia	15	3.2	26.7
Florida Middle District	2	.4	50.0
Florida Northern District	1	.2	.0
Florida Southern District	10	2.1	10.0

Variable	Number	%	Plaintiff Win Rate
Georgia Northern District	5	1.1	.0
Illinois Central District	1	.2	100.0
Illinois Northern District	95	20.3	20.0
Illinois Southern District	1	.2	.0
Indiana Southern District	9	1.9	22.2
Iowa Northern District	3	.6	66.7
Iowa Southern District	2	.4	.0
Kansas District	19	4.1	47.4
Kentucky Western District	2	.4	.0
Louisiana Eastern District	11	2.4	45.5
Louisiana Middle District	2	.4	.0
Louisiana Western District	1	.2	.0
Maryland District	17	3.6	11.8
Massachusetts District	3	.6	33.3
Michigan Eastern District	4	.9	.0
Minnesota District	9	1.9	44.4
Mississippi Northern District	1	.2	100.0
Missouri Eastern District	1	.2	.0
Missouri Western District	3	.6	33.3
Nebraska District	3	.6	33.3
New Hampshire District	1	.2	.0
New Jersey District	1	.2	100.0
New York Eastern District	15	3.2	46.7
New York Northern District	1	.2	.0
New York Southern District	73	15.6	23.3
New York Western District	6	1.3	33.3
North Carolina Middle District	15	3.2	20.0
Ohio Northern District	5	1.1	.0
Ohio Southern District	4	.9	50.0
Oregon District	1	.2	.0
Pennsylvania Eastern District	19	4.1	47.4
Pennsylvania Western District	1	.2	0.0
Puerto Rico District	3	.6	.0
South Carolina District	1	.2	.0
Tennessee Eastern District	2	.4	.0
Tennessee Western District	1	.2	100.0
Texas Eastern District	3	.6	66.7
Texas Northern District	34	7.3	38.2
Texas Southern District	1	.2	.0
Texas Western District	7	1.5	28.6
Virgin Islands District	2	.4	50.0
Virginia Eastern District	2	.4	.0
Virginia Western District	1	.2	.0
Wisconsin Eastern District	1	.2	100.0
Wisconsin Western District	4	.9	25.0

TABLE A2. LOGISTIC REGRESSION SHOWING FACTORS INFLUENCING PLAINTIFFS' WINS IN NATIONAL STUDY OF 2003 TITLE VII RACE OPINIONS

Independent Variables	Estimate Coefficient	*P* Value	Odds Ratio
Plaintiff's Race			
Omitted reference variable = nonascertainable			
Asian or Pacific Islander	.323	.610	1.382
Black	-.217	.480	.805
Hispanic	-.067	.883	.935
Middle Eastern descent	.282	.630	1.326
Multi-racial individual	-.593	.607	.553
Multi-racial group	-.305	.797	.737
Native American	-20.410	.999	.000
White, non-Hispanic	-.488	.280	.614
Plaintiff's Gender			
Omitted reference variable = female			
Plaintiff male	-.005	.981	.995
Plaintiff both	.986	.237	2.680
Plaintiff's Occupation			
Omitted reference variable = other white collar			
Administrative	.302	.424	1.352
Blue collar (including supervisory blue)	.390	.153	1.476
Clerical	-.296	.525	.744
Law enforcement/firefighter	.379	.363	1.461
Technical	.571	.336	1.771
Nonascertainable	.039	.914	1.039
Other Characteristics of Plaintiffs			
Plaintiff pro se	-.794	.009‡	.452
Plaintiff's union membership	.039	.890	1.040
More than one plaintiff	.389	.350	1.476
Type of Defendants			
Omitted reference variable = private employer			
Federal government	-.146	.650	.864
State or local government	.243	.283	1.275
Both government and private employer	-20.170	.999	.000

Independent Variables	Estimate Coefficient	*P* Value	Odds Ratio
Type of Discrimination Alleged			
Race discrimination claim	-.737	.087*	.478
National origin discrimination claim	-.343	.294	.709
Color discrimination claim	.176	.691	1.193
Gender discrimination claim	-.017	.947	.984
Disability discrimination claim	-.420	.242	.657
Age discrimination claim	-.182	.545	.834
Religion discrimination claim	-.246	.631	.782
Type of Race Claim Alleged			
Failure to hire claim	.007	.315	1.007
Demotion claim	-.006	.255	.994
Failure to promote claim	.002	.529	1.002
Reinstatement	-.003	.707	.997
Harassment claim	-.004	.111	.996
Retaliation claim	-.004	.058*	.996
Discharge claim	.004	.116	1.004
Constructive discharge claim	.003	.492	1.003
Terms and conditions—pay-related claim	-.005	.084*	.995
Terms and conditions—not pay-related claim	.004	.093	1.004
Types of Defenses Alleged			
Legitimate, nondiscriminatory reason defense	.003	.143	1.003
Failure to demonstrate prima facie case defense	-.010	.002†	.990
EEOC procedural rules defense	-.005	.027†	.995
District Courts Organized by Circuit			
Omitted reference variable = Fourth Circuit			
First Circuit	-.211	.855	.810
Second Circuit	.818	.077*	2.267
Third Circuit	1.145	.044†	3.143
Fifth Circuit	1.105	.025†	3.019
Sixth Circuit	-.029	.969	.971
Seventh Circuit	.241	.615	1.272
Eighth Circuit	1.318	.026†	3.736
Ninth Circuit	-1.128	.311	.324
Tenth Circuit	1.475	.017†	4.371
Eleventh Circuit	-.817	.335	.422
D.C. Circuit	.569	.427	1.766

* Difference approaching statistical significance at .10 level.
† Difference approaching statistical significance at .05 level.
‡ Difference approaching statistical significance at .01 level.

TABLE A3. CASE FILING STUDY OF EASTERN DISTRICT OF PENNSYLVANIA: DATA SUMMARY OF RACE CASES

Variable	Number	%*
All Cases	82	100
Final Disposition		
Dismissed—settled	64	78
Involuntary dismissal	3	4
Judgment for plaintiff—pretrial motion	0	0
Judgment for plaintiff—jury trial	1	1
Judgment for plaintiff—bench trial	0	0
Judgment for defendant—pretrial motion	6	7
Judgment for defendant—jury trial	3	4
Judgment for defendant—bench trial	0	0
Other nonmerits based dismissals in defendant's favor	3	4
Pending	2	2
Defendant's First Pretrial Motion—Type		
Motion to dismiss	14	17
Motion for summary judgment	13	16
Not applicable	55	67
Defendant's First Pretrial Motion—Outcome		
Upheld plaintiff's claim, in whole or in part	19	23
Ruled in favor of defendant and case dismissed	6	7
Ruled in favor of defendant and part of case alive	0	0
Case settled before court ruled	2	2
Not applicable	55	67
Defendant's Second Pretrial Motion—Type†		
Motion to dismiss	3	4
Motion for summary judgment	5	6
Not applicable	74	90
Defendant's Second Pretrial Motion—Outcome		
Upheld plaintiff's claim, in whole or in part	4	5
Ruled in favor of defendant and case dismissed	0	0
Ruled in favor of defendant and part of case remains	2	2
Case settled before court ruled	1	1
Not applicable	74	90
Motion pending	1	1
Referral to Nonbinding Mediation or Settlement		
No	53	65
Yes	29	35

Variable	Number	%*
Type of Defendant		
Private employer	64	78
Federal government	7	9
State or local government	11	13
Plaintiff Pro Se		
No	77	94
Yes	5	6
Costs Awarded to Defendant		
No	82	100
Yes	0	0

* Percentiles do not add up to 100 because of rounding.

† One case had a third motion, and the case settled before the court ruled on the motion. Another case also had a third pretrial motion, and the motion was granted after a jury verdict in defendant's favor.

TABLE A4. CASE FILING STUDY OF NORTHERN DISTRICT OF TEXAS: DATA SUMMARY OF RACE CASES

Variable	Number	%*
All Cases	110	100
Final Disposition		
Dismissed—settled	64	58
Involuntary dismissal	13	12
Judgment for plaintiff—pretrial motion	0	0
Judgment for plaintiff—jury trial	0	0
Judgment for plaintiff—bench trial	0	0
Judgment for defendant—pretrial motion	28	26
Judgment for defendant—jury trial	2	2
Judgment for defendant—bench trial	0	0
Other nonmerits based dismissals in defendant's favor	3	3
Defendant's First Pretrial Motion—Type		
Motion to dismiss	20	18
Motion for summary judgment	32	29
Not applicable	58	53
Defendant's First Pretrial Motion—Outcome		
Upheld plaintiff's claim, in whole or in part	14	13
Ruled in favor of defendant and case dismissed	26	24
Ruled in favor of defendant and part of case alive	6	6
Case settled before court ruled	6	6
Not applicable	58	53
Defendant's Second Pretrial Motion—Type		
Motion to dismiss	1	1
Motion for summary judgment	7	6
Not applicable	102	93
Defendant's Second Pretrial Motion—Outcome		
Upheld plaintiff's claim, in whole or in part	3	3
Ruled in favor of defendant and case dismissed	5	5
Ruled in favor of defendant and part of case remains	0	0
Case settled before court ruled	0	0
Not applicable	102	93
Referral to Nonbinding Mediation or Settlement		
No	65	59
Yes	45	41

Variable	Number	%*
Plaintiff Pro Se		
No	78	71
Yes	32	29
Type of Defendant		
Private employer	91	83
Federal government	4	4
State of local government	15	14
Costs Awarded to Defendant		
No	92	84
Yes	18	16
Amounts Stated in Five Dockets:		
$13,916.30		
$ 2,861.23		
$ 1,935.05		
$ 1,323.70		
$ 1,101.22		

* Percentiles do not add up to 100 because of rounding.

TABLE A5. CASE FILING STUDY: DATA SUMMARY OF GENDER CASES

Variable	Number	%*
All Cases—Eastern District of Pennsylvania	100	100
Final Disposition		
Dismissed—settled	87	87
Involuntary dismissal	3	3
Judgment for plaintiff—pretrial motion	0	0
Judgment for plaintiff—jury trial	0	0
Judgment for plaintiff—bench trial	0	0
Judgment for defendant—pretrial motion	6	6
Judgment for defendant—jury trial	2	2
Judgment for defendant—bench trial	0	0
Other nonmerits based dismissals in defendant's favor	1	1
Pending	1	1
All Cases—Northern District of Texas	72	100
Final Disposition		
Dismissed—settled	52	72
Involuntary dismissal	8	11
Judgment for plaintiff—pretrial motion	0	0
Judgment for plaintiff—jury trial	0	0
Judgment for plaintiff—bench trial	0	0
Judgment for defendant—pretrial motion	10	14
Judgment for defendant—jury trial	0	0
Judgment for defendant—bench trial	1	1
Other nonmerits based dismissals in defendant's favor	1	1
Pending	0	0

* Percentiles do not add up to 100 because of rounding.

TABLE A6. CASE FILING STUDY: DATA SUMMARY OF AGE CASES

Variable	Number	%*
All Cases—Eastern District of Pennsylvania	77	100
Final Disposition		
Dismissed—settled	60	78
Involuntary dismissal	1	1
Judgment for plaintiff—pretrial motion	0	0
Judgment for plaintiff—jury trial	2	3
Judgment for plaintiff—bench trial	0	0
Judgment for defendant—pretrial motion	13	17
Judgment for defendant—jury trial	0	0
Judgment for defendant—bench trial	0	0
Other nonmerits based dismissals in defendant's favor	1	1
All Cases—Northern District of Texas	32	100
Final Disposition		
Dismissed—settled	17	53
Involuntary dismissal	5	16
Judgment for plaintiff—pretrial motion	0	0
Judgment for plaintiff—jury trial	0	0
Judgment for plaintiff—bench trial	0	0
Judgment for defendant—pretrial motion	7	22
Judgment for defendant—jury trial	0	0
Judgment for defendant—bench trial	1	3
Other nonmerits based dismissals in defendant's favor	2	6

* Percentiles do not add up to 100 because of rounding.