

**Rights on Trial:
Race and Representation in Employment Civil Rights
Litigation**

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I. Introduction

Gerry Handley, an African-American computer operator, had worked for a large manufacturing company for nine years when, after being assigned to a new unit, he began to receive racial harassment from his supervisor and co-workers.

We worked in this big computer, like a lab. They had these big computers and every day, you know, we would run and maintain these computers like 24 hours, 7 days a week, and they had like a main console. And these guys that were like our supervisors, you know, you'd come in and they might, almost like on the board. They'd have a picture of a black man eating like ribs, and he'd have like all types of sauce on his face, you know. And they would just all the time say stuff like the KKK, and just to me it was like a poisoned environment. (14P:2)

He suffered this treatment for three years before he complained to the EEOC. Given that his workplace was in a constant state of racialized talk and tension, we asked, "What was the straw that broke the camel's back?" What led him to file a formal complaint? He said:

They would like always bring up these racial conversations and make these racial jokes. What I would do is I'd just ignore them. I wouldn't laugh or I wouldn't listen in, I would just sit there and they would try to pull me into the conversation asking me questions. They started talking about incest and they started talking about blacks from slavery time, you know, they bred them and sold them, and they inbred them down in the south, and I'm from down south, and so they asked me, they told me a lot of the blacks had sex with their daughters and stuff like that, way back from the Caribbean's, and I would just sit there listening like, oh my God, I know they're not saying this, and the guy asked me, he said, did I ever have sex with my daughter. And so . . .

I1: He asked you if you had sex with your daughter?

R: Yeah.

I1: And this is your boss or your manager?

R: He was like my lead. (14P:2-3)

Gerry Handley's case is unusual along several dimensions among employment discrimination lawsuits. First, he was joined by two other plaintiffs, whereas 90% of federal discrimination claims are made by a single plaintiff. Second, he experienced the kind of overtly racist harassment that was well documented by fellow workers and his own records that provided an unusually strong legal claim. Third, he was a "winner" at law. He settled with the manufacturer for \$50,000, which is substantially higher than the median settlement amount of \$30,000 in employment civil rights cases. Unlike most plaintiffs, he maintained his job with his employer and even won back the same position from which he was transferred when he complained.

Yet in other respects, Handley suffered many of the harms that other plaintiffs incur over the course of litigation. Tensions surrounding the lawsuit led to a divorce with his white wife, forcing Handley to live out of his car during the course of the lawsuit. He did not trust his lawyer and thought he was shortchanged in the settlement, but felt he had no choice but to accept it. He had to pay 20% of his settlement to his attorney, and his divorced wife claimed one-half the settlement. While he regained his old job, he suffered a loss in job seniority, which may have contributed to him being laid off a year later during a major "downsizing" by his employer.

We asked him if he felt like anyone in the company supported him, which led to an exchange about whether he would do it all over again.

It was like a really poison environment. It was like a lot of people really lost their jobs and got demoted. I mean, it was like these 10 people that were supporting me in the department, they like ruined their lives. They like had to move and lost their jobs

and had to relocate, and I could tell you, it was just horrible. It poisoned the whole environment. If I had to do it over again, I wouldn't do it because I lost everything.

I1: So what would you do if you had to do it over again?

R: I would have took it. When he said that, you know, about my daughter, I would have just took it and kept my mouth shut and not tell anybody. Keep your mouth shut and just take it, you know, because if you fight back, it ain't worth it. The legal system and the justice, it ain't there. (14P:13-14)

Gerry Handley exemplifies the burdens that many plaintiffs bear in employment civil rights litigation. Despite several advantages that Handley enjoyed—legal representation, being joined by other plaintiffs, seemingly compelling evidence of harassment—his case illustrates the personal risks to plaintiffs of the contemporary American approach to workplace discrimination. The adversarial character of the anti-discrimination regime imposes considerable costs on individual plaintiffs. These costs appear to be especially high for certain groups of plaintiffs—African-Americans and other people of color who bring claims of racial discrimination. Ironically, the groups for whom civil rights legislation was first and most urgently sought, may now be experiencing a unique form of inequality within the system of employment civil rights litigation.

In this paper we explore the dynamics of race and representation in the contemporary system of employment civil rights litigation. We begin by briefly reviewing theoretical debates about the mobilization of law to combat employment discrimination. We then describe the research design through which we gathered quantitative and qualitative data on employment civil rights litigation.

After presenting a quantitative overview of outcomes in some 1,672 closed cases, we engage in an in-depth examination of two cases that reveal contested constructions of race and racial discrimination in the workplace and in the litigation system. We turn again to the quantitative data to analyze patterns of legal representation within discrimination litigation. These data

reveal the importance of having a lawyer to obtaining a favorable outcome and the disproportionate tendency of African-Americans and *Title VII* race plaintiffs to be unrepresented. We then turn to a comprehensive treatment of in-depth interviews with plaintiffs and plaintiffs' lawyers in an effort to explain the representational disparity we find among white and non-white plaintiffs. In sharp contrast to the explicit discourse about race that marked the two case studies, plaintiffs' lawyers are largely silent about race as a criterion for choosing clients. They refer to other aspects of cases and clients that affect their decisions to represent. Finally we briefly summarize findings from a paper written by our colleagues on this project that suggest the importance of the race of judge to the outcomes of cases for plaintiffs of color. We conclude with theoretical observations.

II. Rights On Trial: Theories of Legal Mobilization and Employment Civil Rights Litigation

Employment civil rights cases take on special significance beyond the interests of the parties involved precisely because American anti-discrimination law is what Burke calls a "litigious policy." The primary vehicle for enforcing employment civil rights laws – for accomplishing our shared social goal of equal opportunity in the workplace -- is lawsuits brought by private individuals. Against this policy backdrop, these contests are morally and emotionally consequential for the parties involved: plaintiffs are seeking a remedy for what they perceive as a violation of their rights; employers are defending against the charge that they engaged in discrimination.

Theorists of rights mobilization and legal consciousness have written extensively on competing constructions of employment rights, although often outside the context of litigation. Albiston's work on the Family and Medical Leave Act examines how a rights discourse around leave policies must compete with other workplace discourses concerning the good worker, the family wage, and managerial prerogatives. Engel and Munger suggest that disability rights primarily have an effect by shaping the consciousness of employers and workers with disabilities, rather than through litigation. McCann's book Rights at Work found that a rights discourse and at least the threat of litigation served as a catalyst in several pay equity campaigns in the 1980s. Charles Epp's recent book, Making Rights Real (2009),

asserts that the threat of liability is one of the critical ingredients in establishing systems of “legalized accountability” in organizations, including employment systems that deal with problems such as sexual harassment.

While these scholars see rights discourses and litigation as empowering efforts at redressing inequalities in the workplace, other scholars are more skeptical. In The Civil Rights Society Kristin Bumiller writes of the limitations of the anti-discrimination law model. She suggests that it is unrealistic to expect individuals to use the law to resist discrimination; targets of discrimination are reluctant to take on the label of “victim” and fear that recourse to law will create more problems than it will solve. Sam Lucas’s recent book also voices skepticism about the current “discrimination frame.” He argues that focusing on individual cases of allegedly intentional discriminatory behavior diverts attention from more fundamental inequalities of race and gender and the more fundamental social interventions required to address those inequalities.

In addition to theoretical debates about rights mobilization, the character of discrimination claims are central to policy debates about how to enforce employment civil rights, as well as to broader cultural debates about the use of law to redress inequality. Employers assert that many discrimination lawsuits are frivolous and that access to courts for such cases should be limited. Conservative commentators suggest that discrimination lawsuits are another example of how litigation has run amok in American society, creating an “excuse factory” for unqualified workers and burdening business with unnecessary costs.

This cultural debate may be particularly salient around assertions of racial discrimination in the workplace. African-American workers are far more likely than their white counterparts to report experiencing discrimination in the workplace (Rutgers 2004). As Quillian (2006) reports, “[m]ost white Americans hold complicated and arguably contradictory views about race... [They] support the principle of equal treatment regardless of race and repudiate the practice of discrimination. At the same time, white respondents endorse many stereotypical beliefs, doubt the existence of significant racial discrimination, and show low levels of support for efforts to achieve racial equality through government intervention.

White respondents find it hard to reconcile racial inequality with their belief in the unimportance of discrimination; the explanation offered by a plurality is that African-Americans and Hispanics do not work hard enough. In contrast to the beliefs expressed by most survey respondents, audit studies of discrimination reveal high levels of discrimination in housing and labor markets” (2006, p. 322).

Rights on Trial is the working title of the book being authored by Laura Beth Nielsen, Robert Nelson, and Ellen Berrey for the larger project from which the material in this paper is taken. It is in a double sense that rights are on trial in employment civil rights litigation. Plaintiffs bear the burden of asserting their rights in an adversarial context. In the polarized setting of litigation, they often are confronted by the employer-defendant’s assertion that they were not a deserving employee. Defendants also are subjected to the vagaries of litigation and express dissatisfaction with the system, but face fundamentally different kinds of costs than plaintiffs.

The tensions we observe in ordinary employment civil rights cases raise questions about the system at the broader societal level. If the parties experience the system of employment civil rights litigation as unfair and inefficient, how effectively can this system adjudicate claims of discrimination and encourage equal opportunity in the workplace? What then is the role of employment civil rights litigation with respect to hierarchies of race, gender, age, and disability in American society?

III. Research Design and Data

Our project draws on three datasets. The first is an expanded replication of Donohue and Siegelman’s earlier research on employment discrimination case filings. We collected a random sample of employment civil rights cases filed in federal courts between 1988 and 2003 in seven regionally diverse federal districts: Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco (see, Donohue and Siegelman 1991; Donohue and Siegelman 1993; Donohue and Siegelman 1995). These districts contain about 20% of all filings, capture variation in legal and social context, and, for cost considerations, are located close to federal records depositories. Three hundred cases were drawn from the list of all civil employment discrimination cases (classified as nature of suit code “442”) in

these districts from 1988 to 2003 compiled by the Administrative Office of the U.S. Courts (AOUSC) in each city, yielding a sample of 2,100 total cases. We derived sampling weights by district based on the total number of employment discrimination case filings in each district. This article examines only closed cases (n=1,805) with all required key variables for this analysis, producing a final sample for analysis of 1,672 cases.

We developed an extensive coding form and trained teams of coders for each site. The same data collection manager supervised and trained coders in each location. 10% of the cases were coded independently by different coders to allow tests of intercoder reliability. In 94% of cases there was agreement between coders on case outcome, the dependent variable in this analysis. Manually coding a random sample of case filings provides far more valid and representative data, but the approach faces some limitations because publicly available files can be incomplete due to misfiling or poor record keeping.

A second dataset consists of 100 in-depth interviews with plaintiffs, defendants, and their lawyers. We randomly drew a subsample of cases from our filings sample in two districts.¹ Where possible we interviewed opposing parties and lawyers in the same case. The interviews were taped, transcribed, and coded. We came close to our ideal, getting 41 plaintiffs, 19 plaintiffs lawyers, 20 defense lawyers, and 20 defendant organizations (including either inside counsel, human resources professionals, or other high level managers). We achieved roughly a 50% response rate to our requests for interviews. For 28 of cases we obtained interviews with multiple parties; in 19 cases we were able to interview parties on both sides of the case.

A third set of data we obtained was the confidential charge data file obtained from the EEOC for the years 1991-2002, which contains the universe of complaints submitted to the EEOC or state fair employment agencies (Lancaster, Nielsen and Nelson 2006). In some 85% of cases in the court filings dataset we were able to obtain a match to the EEOC charge file. For cases from 1995 on we are able to use the EEOC priority handling code, contained in the EEOC charge file, as a predictor of the outcome of lawsuits.

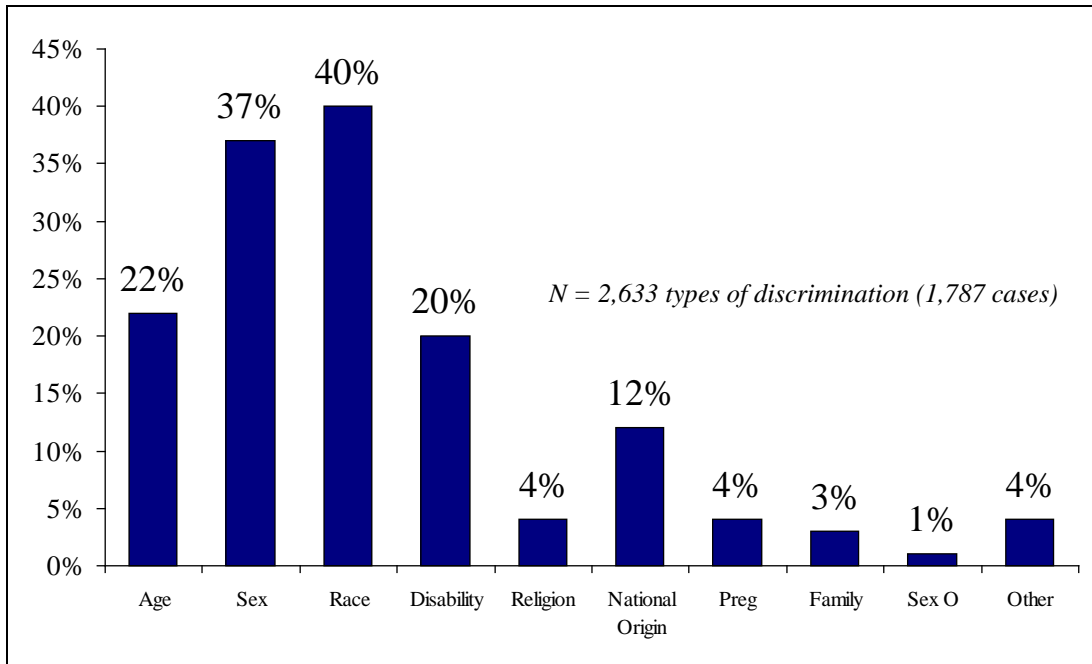
¹ We constructed a 4x4 table with basis of discrimination (race, sex, age, and disability) cross-tabulated with outcomes (Dismissed, Early Settlement, Late Settlement, and Trial) and then randomly drew within each of the 16 cells for willing participants.

Our research design provides some distinctive analytic advantages. Foremost, in contrast to most research on litigation, it begins with case filings rather than published opinions. This approach provides a far more comprehensive measurement of the entire system of discrimination litigation. Second, we were able to code the outcomes of cases as sequences of possible endings, rather than reduce outcomes to a binary measure of “win” or “loss.” Finally, we were able to systematically select cases for in-depth interviewing from a large random sample with known characteristics. Thus we can locate our qualitative results within a comprehensively constructed sampling frame.

IV. Quantitative Overview: Employment Civil Rights Litigation as a System of Individualized Justice

Before turning to the qualitative data on particular cases, it is valuable to provide a quantitative overview of results from the filings dataset. (These results are presented in greater detail in a project report [Nielsen, Nelson, Lancaster, and Pedriana 2009] and a previously published article [Nielsen, Nelson, and Lancaster 2010].) First, as shown in Figure 1, 25 to 40 years after the Civil Rights Act of 1964, race discrimination cases continue to be the largest category of claims filed. Race, sex, disability, and age are the most common types of allegations. In just one year in the period, sex claims narrowly edged out race as the most frequent claim.

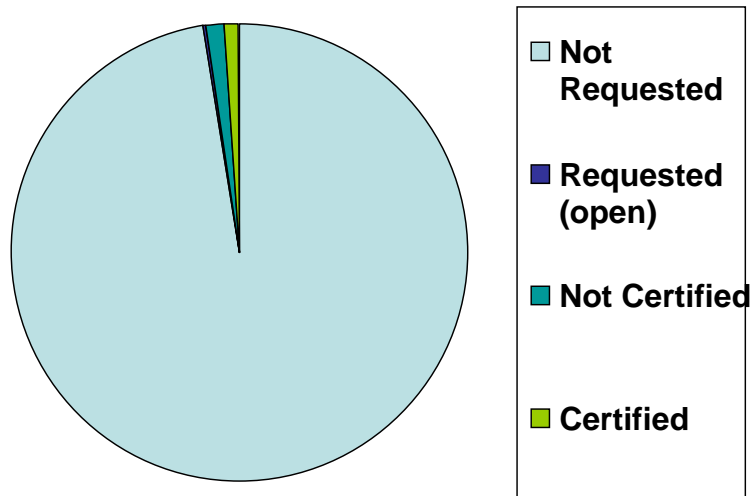
Figure 1: Discrimination Types Alleged in Filings
Race, Sex, Age, Disability, Religion, National Origin,
Pregnancy, Family Status, Sexual Orientation, Other



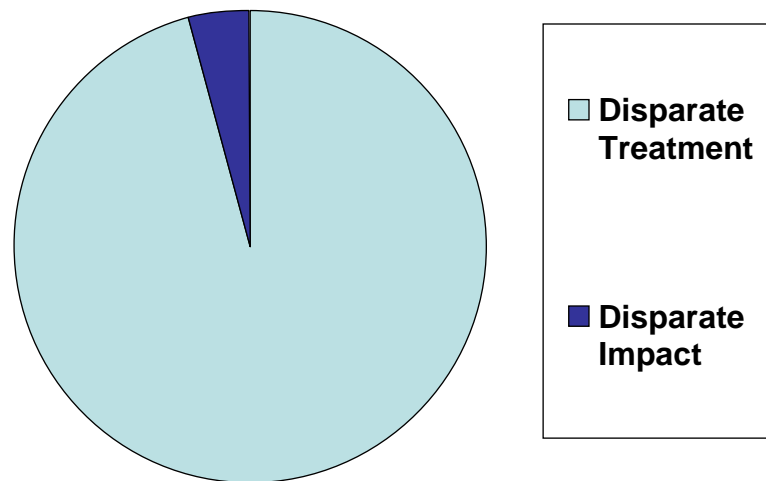
A second striking phenomenon is the predominance of individual, disparate treatment cases: we can see that this is overwhelmingly a field characterized by individual plaintiffs making disparate treatment claims. (See Figure 2.) Class actions – which are important for a variety of reasons – are extremely rare, making up less than one percent of the caseload.

Figure 2: Individualized Justice or Social Change?
(n = 1787)

Class Action Status



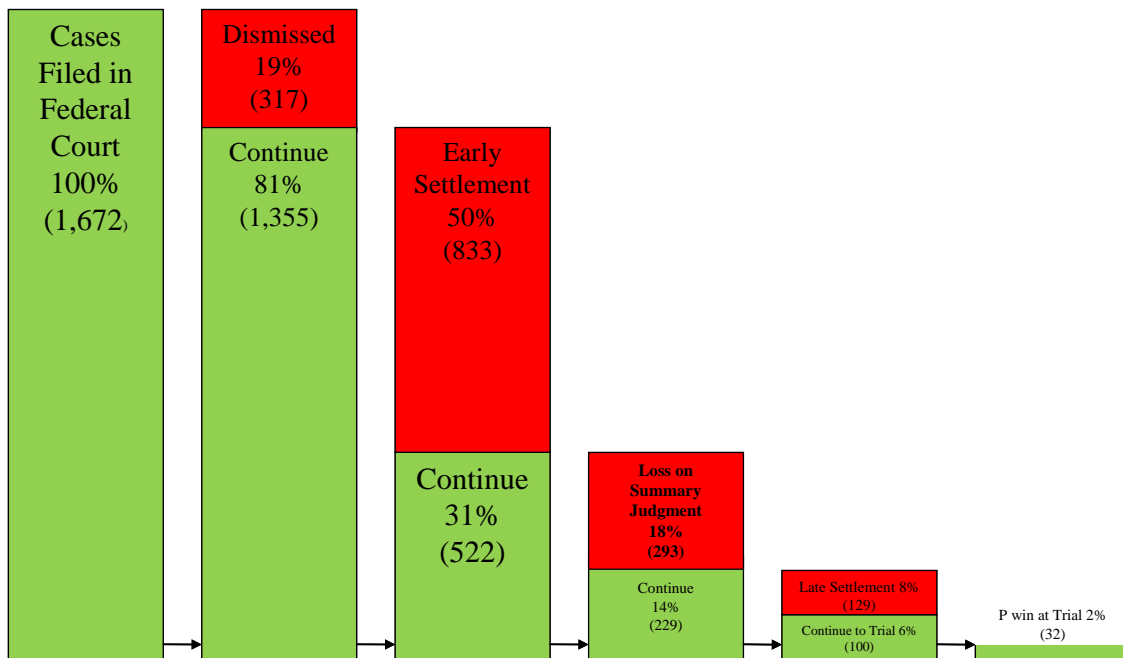
Theory of the Case



Third, our detailed outcome coding clearly shows the sequence whereby cases come to an end. (See Figure 3.) 19% of cases are dismissed. 50% settle “early”, by which we mean before a motion for summary judgment. We learned from various sources, as well as from limited data in our own dataset, that the median settlement is \$30k. If a case does not settle early, it has a greater than 50% chance of ending with a loss for the plaintiff on

summary judgment. This event occurs in 18% of cases overall. After summary judgment, a little more than one-half of remaining cases (or 8% overall) settle “late.” 6% of cases go to trial, where plaintiffs win about one-third of the time (or in 2% of cases overall). These patterns demonstrate that plaintiffs often lose outright or settle for small amounts.

**Figure 3: The Paths of Federal Employment Discrimination Cases:
A Sequential Model of Outcomes, 1988-2003**



As we reported in our previously published paper (Nielsen et al. 2010), the most powerful predictors of outcome are whether a plaintiff has a lawyer (14% are *pro se*) and whether the litigation exhibits any kind of collective action (including being a class action, having multiple plaintiffs, being represented by the EEOC or by a public interest law firm). Among the more provocative findings, EEOC Priority codes have virtually no power to predict outcomes, nor did any of our other efforts to measure the strength of a case, such as an index of legal effort/investment that we created.

Race in itself does not play a major role in predicting case outcomes. African-American plaintiffs are somewhat more likely than whites to lose on summary judgment, but Title VII race cases are somewhat less like to lose on summary judgment.

However, Title VII race cases are more likely to be dismissed. These quantitative results help frame the analysis that follows. While race claims remain the most frequent type of allegation, case outcomes do not appear strongly associated with the race of plaintiff. Yet when we examine contests around claims of racial discrimination, and the determinants of obtaining legal representation, race appears as a highly salient feature of this system of litigation.

V. Contested Constructions of Race Discrimination

Legal scholars will recognize that all litigation entails contests over how to construe the law and the facts of a case. Which constructions prevail determines not only the outcome of the particular dispute, but may set the rules for similar cases that follow. The constructions advanced by the parties in employment civil rights context are important for the relationship between law and workplace hierarchies. We observed in the quantitative data that the paradigmatic case involves an individual plaintiff asserting that they were the victim of disparate treatment. Defendants respond that the challenged actions either were not based on illicit grounds or were based on bona fide business reasons.

The contests therefore reflect hierarchies in the workplace, in law, and in society (Berrey, Hoffman, Nielsen forthcoming). For plaintiffs, a case reflects their personal experience with discrimination; defendants typically reject that interpretation and argue that the plaintiff misunderstands. In the process the defendant often will derogate the plaintiff. The power relations between the parties are further displayed in the litigation process. Plaintiffs, as “one-shotters,” are at a disadvantage in understanding how litigation works; and this lack of understanding is worse for *pro se* plaintiffs. Defendants, who are all represented and often repeat players, understand litigation but feel burdened by having to respond to what they view as frivolous claims. They see plaintiffs as illegitimate claimants and their lawyers as irresponsible or self-serving.

We chose two race cases that contained very rich data on the differing perspectives of parties and their lawyers. In some ways these cases are paradigmatic: they are brought by individuals with disparate treatment claims. They are *unusual*

primarily because they both go all the way to trial. Both were filed and concluded in the 1990s. While there are several fascinating aspects of these interviews, one is that the plaintiffs could recall details about the case as though it were yesterday, even though they were interviewed more than 10 years after the fact. For the lawyers, they often struggled with remembering the details, although for all of the respondents these were memorable cases in some respects. It is apparent that these cases were events of a lifetime for the plaintiffs. For the lawyers and defendants, these were but one case among many.

The first litigation account concerns Annie Daley, an African-American woman working as supervisor (of supervisors) in a large telecommunications firm. Shortly after a new Director, a white woman, took over as Annie's boss, Annie began to experience what she regarded as racial animus:

I must have had about 6 or 7 Supervisors [under my supervision]. And I think I probably I had about 4 Supervisors who just happened to be qualified African-American Supervisors. And it wasn't that I was specifically going out looking for African American Supervisors. I hired the people that were best qualified. And so then I was accused by my Director of hiring too many African Americans in my department and like I said once I got my team organized and that's when we began to really start pulling things together and we all started meeting our goals. (18P:3)

Annie Daley later went to the same Director to ask for support when white Supervisors were not performing and engaging in overtly racially hostile talk.

AD: And so and I'm telling my Director you know, "hey, this person is not doing this, this person's not doing that, this person." And so. But she does not support me in correcting them.

Int: Right

AD: So there's one particular Supervisor who who made it very clear that she was not going to report to a Black woman.

Int: Mmm Hmm

AD: She even called me a Black “B” and uh . .

Int: To your . .

AD: You know I’m telling her all this stuff. . . But well, she’s not supporting, my Director is not supporting me at all. (18P:5)

When Ms. Daley’s director did not assist her in disciplining the white supervisors who reported to Ms. Daley, Ms. Daley went to the Human Resources department to report these concerns. Human Resources talked to her manager and Ms. Daley was terminated without warning two weeks later.

After her termination, Ms. Daley approached a young attorney who had represented other plaintiffs against the telecommunications company. In the next quote, he explains why he took the case despite the fact that there was no smoking gun evidence:

I have a strong recollection of her and she’s somebody who I got a very quickly got a sense of being a quality person who I’m sure, I was sure at that time and still am, you know was good at her job and was somebody who seemed to me like a quality employee who gave me an explanation of how things happened to her that I’m sure based on my recollection now involved the subtle kind of racial discrimination that you see a lot in the workplace. There were no epithets...(18PL:2)

This attorney took the case largely based on his impression that Ms. Daley was a “quality person” whose account would be credible, given circumstantial evidence.

With his help, Ms. Daley filed with EEOC and later in federal court, naming both the telecommunications company and two individuals as defendants. The telecommunications company retained outside counsel, who had a very negative view of the case and of Ms. Daley’s lawyer. The defense counsel characterized Daley’s lawyer as a “bottom feeder,” said that he

was reaching to get a large award, and reported that he tried several clearly unprofessional tactics at trial. Interestingly, the defense attorney's description of Ms. Daley exactly paralleled Daley's own account of how she was perceived and portrayed:

*Defense counsel: I am pretty sure that the [Annie Daley's] supervisors and all the people in that line, because there were some individual defendants in that case too, um felt pretty strongly that everything they had done was absolutely kosher. And [Annie] did not have a case. She had **not** been discriminated against. Uh and, my recollection is that the in-house lawyers supported that as well, both [lawyer's name] and his boss.*

Int: Mmm Hmm

Defense counsel: And then I took [Annie's] deposition and I didn't think [Annie] was a very persuasive person in deposition. She came across as not terribly sharp and really kind of cold. Uh. . . Not someone you would warm up to and feel sympathy for. She came across as rigid and sort of bitchy. (18DL:8)

This is a rare juxtaposition in fieldwork on litigation. Ms. Daley reported that her white subordinates called her a "Black B." White defense counsel characterized Ms. Daley as "sort of bitchy."

Efforts at settlement were half-hearted from both sides, as the telecommunications company's posture in this period was to litigate rather than settle. Their position may have been hardened because Daley's attorney had represented other plaintiffs against the company. The company was interested in sending a message to their employees, and this attorney, that they would not "simply settle" such claims.

The defendant-organization filed a motion for summary judgment, which was denied. On the eve of jury selection, the defendant-organization offered a settlement of \$100,000. Both the trial judge and Ms. Daley's attorney recommended she accept the offer, although her attorney made clear to her that it was her decision. Ms. Daley declined and the case proceeded to

trial. The jury was largely white and included several older white males.

The interviewees each recalled different, notable aspects of the trial. Ms. Daley's lawyer recalled learning that the general counsel for the defendant was attempting to intimidate a witness in the hall outside the courtroom. He informed the judge and cross-examined the general counsel about the allegation. The defense lawyer recalled a particularly hostile African-American woman who had been Ms. Daley's supervisor before she was terminated from the defendant, who exuded anger to the courtroom at being required to appear and give testimony, but who had to admit that she had given negative evaluations to Ms. Daley. And the plaintiff, Ms. Daley, recalled that the night before closing arguments, a brick was thrown through her window. This caused her to go to the apartment of a friend and miss the last day of the trial.

When the case went to the jury, it did not take them long to return a verdict for the defendant-organization. In retrospect, Annie Daley wished she had accepted the settlement offer. She also worried that she may have hurt her case by missing court on the day of closing statements. Yet both Ms. Daley and her attorney said the most important matter in the case was not money, but the pursuit of justice. As Annie Daley explained:

Int: What did you feel like when you originally went to the EEOC and hired the lawyer what did you want, what were you hoping to get?

AD: I was hoping to get some sort of justice; I was hoping to let them know that this was something that they could not just continue to do to people. To let them know that they were being put on notice. To get justice and then, of course, after that, to get some sort of compensation.

Int: Right and so as that, so as that process happened where you go from this idea of wanting them to sort of change their practice and behave better and you realize that well what the thing I can really get is money here did that feel, how did you feel about that?

AD: Well you know because you really cannot change people, you know. You can't change really behavior but you can try to prevent people from you know from mistreating people. You know you can't make them not be racist, but you can make them feel it if they choose to be. (18P:15)

Ms. Daley notes not only the difficulty of “getting justice” but also of changing how people think about race in the workplace. Ms. Daley’s case is atypical in that it went to trial, but remarkably typical in what happened in the workplace. When Ms. Daley took her concerns to human resources she suddenly found herself in an antagonistic relationship with management. The company response was defensive. In defending the case, the employer attacked her competence and questioned the motives of her attorney. And her ultimate outcome in pursuing the case to trial was that she lost.

The second case we examine in depth is that of Franklin Williams. Mr. Williams was a laborer for a railroad for 15 years. According to Mr. Williams, his white supervisors became jealous of him for developing new safety techniques that led him to be featured in a company film. He had also scored the highest on a promotion test, but was not promoted. This led him to file a charge with the EEOC, which he did not pursue. Sometime later, Mr. Williams was seriously injured on the job when a large crane hook struck him in the head. He was given a period of leave and a cash payment of \$25k.

When Mr. Williams returned to work he was punished for two infractions and was terminated for the third. 1) Management suspended him for 5 days for missing work while appearing in court, even though Williams claimed he gave advance notice, and other employees who had taken similar leaves for court appearances had not been punished. 2) Management suspended him for 10 days for allegedly sleeping on the job. And 3) when he said he had his supervisor “in his sights” (which the supervisor took to mean his gun sites), he was led out of work by security in handcuffs behind his back. Mr. Williams denied the validity of all these disciplinary charges and in particular, the claim that he threatened his supervisor.

Mr. Williams filed with the EEOC and in federal court. He attempted to obtain a lawyer but ended up representing himself

with the very substantial assistance of his wife, a paralegal. We interviewed Williams and his wife, in their home, in the evening. They were convinced that Williams had been strongly affected by the racism of his fellow workers and supervisors, and that the legal system was biased against them. One indication of this bias was the fact that the judge kept allowing defense counsel to miss required dates for trial preparation. When Williams asked for sanctions, the court rejected his request:

Williams: The Judges wouldn't touch him with a 10-foot pole. We asked that he be sanctioned. We asked for judgments by default. Had I been late one time, they'd have kicked it out. You lose.

With him? Nooo. Gave him all the time he needed. And what really, where he really played a game with the time thing was when they allowed us to proceed for intentional infliction of emotional distress, because that was a tort and it had never been filed against the railroad, you know. In other words, my thing is this: I'm black, true enough, but don't fault me because I can read. In other words, the thing of it is, now I see why you want the slaves killed. If I can read, that mean I can understand what you are trying to say and do to me. And me being, you know, point blank right in to it, you show me, point blank, this is why I don't want your ass to read. You can understand my system, you know what's going on, so. Therefore, to make a long story short, I took it as though they were telling me straight up, and let me be candid, "Nigger, I'm not going to destroy his career for you. Okay, he doesn't follow civil rules of civil procedure, I'm not going to do it for you. I'm not going to sanction him, I'm not going to do one damn thing." And they didn't. I said okay. And believe me, by law, we were right every time and on the money. (11P:19)

The case proceeded to a three day bench trial, without the defense seeking a motion for summary judgment. On the last day of the trial, the judge interrupted the proceedings to announce from the bench that OJ Simpson had been found innocent of murder. Later that same day, immediately at the conclusion of the trial, the judge issued his ruling from the

bench, denying all of Mr. Williams' claims. Mr. Williams and his wife were convinced that it was the OJ verdict that motivated the judge to rule against them "out of anger." Mr. Williams and his wife felt that if the judge today were to reread the transcript of the trial, he would change his mind. Williams described how he felt about the outcome of the case:

Williams: You know, if it wasn't for my wife and my children, I'd have did like this [mimes shooting himself in the head]. Because I lost everything, you know, and given the fact that like I said, I've never been arrested for anything. I'm thinking the law exists for everybody. You know how they say it's, "justice?" It's "Just Us." Not justice for all, and Bush is proving that right now, "Just Us." (11P:25)

The inside counsel who tried the case for the defendant-employer thought it was a clear case for the defendant which did not even merit a substantial settlement offer.

Defense counsel: It was, you know, pretty clear that, you know, cracks about you know to supervisors about you know what was it? From such and such a location I you know I can see you in my gun sites [you know it's related workers or something]. It's like, okay, "goodbye," you know. (11D:4)

Mr. and Mrs. Williams saw race in the events in the workplace. Williams suspected that a white employee, who Mr. Williams thought to be a skinhead, might have unleashed the crane that struck him. He thought the white supervisors did not want an uppity African-American to advance from below them. The Williams' also saw race in the legal system, most especially in the ruling of the trial judge.

The trial judge saw the case very differently from the Williams'. In the transcript of the judge's ruling from the bench, he noted that it is difficult to prove racial discrimination by:

"so-called direct evidence" [because] "people usually don't announce their ...discriminatory attitudes when they make employment decisions..." [He noted that] "the issue is not whether the employer was right or wrong...[The law] doesn't even guarantee a

fair decision. What it does guarantee is that there will be no decision made on the basis of race.... I conclude that there is no evidence that Mr. [Williams] was treated less favorably than any white employee with a similar pattern of conduct....[P]ossible circumstantial evidence that would support a discrimination charge is simply nonexistent in this case. (Trial Transcript)

The Williams case is a compelling illustration of a racial divide in this society. To the judge, Williams had not proved his case. To the defense, it was a frivolous claim. To the Williams', the outcome was the result of an irrational reaction by the judge to the OJ Simpson verdict and the refusal of white institutions to provide justice to African-Americans.

We may be tempted to dismiss the Williams case as highly eccentric. Yet it is interesting to consider the discussion of the defendant-railroad's attorney when we were discussing another case with him. In that case, the railroad settled in a racial harassment case where the defense counsel admitted that the unit involved had done some things to the plaintiff "they were not proud of." The company refused an initial settlement request from the plaintiffs' lawyer of six figures, characterizing it as a "ransom demand." They would not pay without first investigating whether there was a problem. The EEOC ruled against the defendant, but no conciliation was reached. After the company lost part and won part of a summary judgment motion, the case was headed to trial. As trial approached, the defendant agreed to a significant settlement, not because the company felt they were in the wrong, but because they thought the facts "might inflame a jury."

This is how the inside counsel characterized the plaintiff and his injury in this case:

Defense counsel: This particular individual I didn't think had much of a complaint because nothing had happened to him. He was an individual with marginal skills who was working in a job that he would normally not be able to command that type of a salary or wage, but because of the inflated salaries of the railroad industry, he was in effect doing a lot better than he could in the market. He was

complaining about relatively minor things with job assignments, you know, who got the shiniest shovel among the crews. (11D:9)

The defense counsel goes on to say the plaintiff was “after money.”

In the two cases we examined, we found consistent with Bumiller, that litigation places a heavy burden on plaintiffs. Just as these two individuals were at a disadvantage in the workplace, they were at a disadvantage in court. The burden on plaintiffs is especially intense in individual cases. We found in our quantitative analysis of outcomes that cases with just two plaintiffs enjoyed greater success than does a solo plaintiff. A solo plaintiff can be dismissed as misperceiving the situation, and probably does not have the same ability to do the homework necessary to support a case. When there are even two plaintiffs, it is more difficult to characterize the plaintiffs as out of touch with reality.

Yet, perhaps we should not lose sight of the fact that at least these plaintiffs had their day in court. The employer could not just ignore their claims, as is the most common outcome of a termination in which an individual feels they have been the target of discrimination.

Despite the outcomes of these cases, the parties did not change their interpretation of the validity of their construction of the case. The plaintiffs not only saw their workplace injury as the product of racism, they saw the litigation process as racially biased—in the person of a judge they thought was influenced by the OJ Simpson verdict or in the persons of white jurors who “just do not understand discrimination.” The defendants rejected the assertion that race played a part in the terminations of the plaintiffs and blamed the plaintiffs for reading race into the situation.

Both survey data we collected at the conclusion of our in-depth interviews and the reported perceptions of defense counsel in a case with apparently stronger facts than these cases, indicate that this is a general pattern among defendants. In the case where the defendant recognized that there were things done to the plaintiff that “they were not proud of”, where they lost before the EEOC and on a motion for summary judgment, where they

paid a substantial settlement to avoid taking it to a jury, they disparaged the plaintiff as not having a real injury and just being after money. This tendency by defendants and their counsel suggests that what matters most to defendants in the handling of cases, and probably in the design of their personnel practices, is legal risk, not the moral force of a plaintiff's claim.

Our more in-depth analysis of these two cases complements what we found in our quantitative analysis of case outcomes: there is no easy empirical resolution of the debate over the prevalence of "frivolous" cases. Individual cases are very much subject to conflicting interpretations. The defendants in these two cases regarded them as weak, although at one point they offered \$100,000 to settle one of the cases. The plaintiffs in these two cases did not carry the burden of proof in the eyes of the trier of fact, but that does not mean the cases were frivolous either in what they meant to the plaintiffs or in terms of the amount of evidence plaintiffs presented.

Our findings in these two cases very much mirror the interpretation of Roscigno and Light in their analysis of Ohio Civil Rights Commission cases where there were findings of probable cause or a settlement of the charge (Roscigno 2007). Roscigno and Light write of "the alternative realities of workers and bosses" in race cases. The individual race claimant reports overt racism in how they have been treated; the employer most often responds with a complete denial of racism and an insistence that they made employment decisions based on meritocratic grounds (Roscigno 2007, pp. 39-55).

VI. Quantitative Models of Race and Representation in Employment Civil Rights Litigation

Given the significance of legal representation to outcomes, we analyze the factors that correlate with legal representation. Table 1 presents cross-tabulations of legal representation by characteristics of plaintiffs and their jobs. Overall 14% of plaintiffs act *pro se* throughout their cases; some 8% begin *pro se* but gain counsel at some time during their case; and some 78% of plaintiffs are represented by counsel throughout their case. Characteristics of plaintiffs and their jobs are strongly related to whether they are represented by lawyers. African-Americans and other plaintiffs of color are much more likely to represent themselves *pro se* or to gain counsel after the initial filing. Men

also are somewhat more likely to appear *pro se* than are women. Workers in typically lower paying jobs are less likely to have legal representation throughout their cases. Thus whereas 90% of managers have lawyers throughout, only 67% of office support workers and 75% of blue collar workers have lawyers from start to finish.

<<Table 1 Here>>

We conducted multi-variate analyses of these patterns to test whether they held up when we introduced other controls. Table 2 presents logistic regression models of two forms of legal representation: whether a plaintiff filed their case *pro se* and whether a plaintiff who filed *pro se* gained counsel later in the litigation process. In the first model, in column 1, we include all cases with complete data (n=1667). In the second model, in column 2, we only are analyzing the 403 cases in which a plaintiff filed *pro se*. At the outset, we should state that we are not making causal claims in interpreting these results. We cannot definitively determine the direction of some of the effects. For example, is it the case that cases filed under 42 U.S.C. 1981 rather than Title VII of the Civil Rights Act are more likely to attract counsel? Or, does a filing under 42 U.S.C. 1981 require a level of sophistication possessed only by lawyers? Indeed, both factors may be at work in producing an association between a 1981 filing and the presence of legal representation from the filing of a lawsuit.

The results in Column 1 of Table 2 again demonstrate the strong influence of race in the employment discrimination litigation system. Net of other factors, white plaintiffs are significantly less likely to file *pro se*; African-American plaintiffs are significantly more likely to file *pro se*. Moreover, in addition to the race of the plaintiff, race claims filed under Title VII are more likely to be filed without the benefit of counsel. The advantages in representation for some groups we identified in the bivariate tables hold, but some do not achieve statistical significance. For example, women are somewhat more likely than men to begin litigation with counsel, but the difference is not statistically significant. Plaintiffs in managerial jobs are statistically significantly more likely to initiate litigation with the benefit of counsel, as are plaintiffs with more tenure at their employer.

The statute under which a claim is filed is significantly related to the presence of a lawyer at filing. As noted already, Title VII race claims are more likely to be filed *pro se*, as are Title VII “other” claims. Title VII race claims are the most frequent type of filing in this system. The individuals filing race claims under Title VII may be more willing to file a claim on their own or may have difficulty obtaining legal representation before filing in court. The significant effect for “Title VII other” may itself represent a lack of sophistication associated with lack of counsel, if a plaintiff filing *pro se* checks off Title VII as the basis for a claim but does not clearly specify the basis for discrimination. Plaintiffs filing under the Americans with Disability Act also are significantly more likely to file *pro se*. While the ADA has a broad scope, which may invite filings without the benefit of counsel, it also involves complex issues of the definition of a disability and the reasonableness of accommodation by an employer. Cases filed under 42 U.S.C. 1981, which involves race claims of a specific character, as well as other cases filed under specific statutes like the FMLA and the PDA, are significantly more likely than other filings to be made with the assistance of counsel. To file a case under specific, more rarely used statutes, requires the sophistication of counsel. While a particular fact pattern may trigger the acceptance of these cases by a lawyer, they almost certainly could not be filed by a layperson.

We see a very strong association between filing *pro se* and a finding of not supported by the EEOC. Again this is an instance in which the direction of the effect is ambiguous. It may be that when the EEOC finds against a charging party, that it discourages lawyers from taking their case. It may also be that complainants represented by counsel are more likely to shape the EEOC outcome to avoid such a negative finding.

We again see some locality effects in patterns of representation. Plaintiffs in New Orleans and Philadelphia are significantly less likely than plaintiffs elsewhere to file *pro se*.

One might expect that the legal system would attempt to compensate for some of the factors associated with filing *pro se* by adding legal representation after initial filing. With a few exceptions, we do not see this pattern in the model for the probability of gaining counsel after filing *pro se*, which is modeled in the second column of Table 2. Employees in sales positions are more likely to gain counsel, as are employees with

longer tenure. But the coefficient for gaining counsel after filing *pro se* is negative for African-Americans, even though not significant. The same pattern holds for Title VII race claims. The lack of representation for African-Americans and persons making race claims is not redressed after a *pro se* filing. Those who filed *pro se* under “Title VII other” also are significantly less likely to gain counsel compared to other plaintiffs. Cases filed under 42 U.S.C. 1981 continue to stand out, as they are more likely to gain counsel after filing *pro se*. *Pro se* filers in Chicago are more likely than those in other districts to obtain counsel, possibly as a result of an active assigned lawyer program.

Both the social characteristics of plaintiffs and the nature of their legal claims are associated with the presence or absence of counsel from the time of filing through the course of litigation. Most striking is the continuing significance of race—as a plaintiff characteristic and as a characteristic of the legal claim—to patterns of legal representation. African-Americans and race claims are disadvantaged in legal representational resources.

<<Table 2 Here>>

VII. Qualitative Analysis of Racial Disparities in Legal Representation

These findings present a question that cannot be resolved with closed-ended data from court filings: why do some plaintiffs secure lawyers while others do not? Specifically, why are African-American and Title VII race plaintiffs less frequently represented than other plaintiffs, given the clear connection between having a lawyer and obtaining a more successful outcome?

In this section of the paper we probe qualitative data from interviews with plaintiffs and lawyers to determine why some people file cases *pro se* while others retain a lawyer. We examine individually each of the eight *pro se* plaintiffs in our interview sample and their reasons for forgoing representation, then review accounts from all the lawyers in our qualitative sample explaining how they go about screening clients and ultimately decide who to accept and reject. Finally, we examine plaintiffs who successfully retained lawyers. We conclude that racial disparities in representation rates stem from disparate social, cultural, and financial resources. These disparities affect the behavior of both plaintiffs and lawyers, with each group

playing a role in determining representation outcomes. Importantly, we will present evidence that the disparity does *not* emerge primarily because African-American plaintiffs and race plaintiffs have legally “weaker” cases that lawyers refuse based on their poor merits.

A. The Framing Hypotheses and Literature

There are several possible explanations for why plaintiffs do not have an attorney at the time of filing. Within those general considerations, we can consider whether African-American plaintiffs and Title VII race plaintiffs are less likely to have legal representation. These are:

- Hypothesis 1: Unrepresented plaintiffs cannot access lawyers because of social, financial, or cultural barriers.
- Hypothesis 2: Unrepresented plaintiffs do not retain a lawyer because they prefer to self-represent or otherwise choose not to use one.
- Hypothesis 3: Unrepresented plaintiffs have attempted to secure a lawyer, but lawyers reject their cases because they appear to lack merit.
- Hypothesis 4: Unrepresented plaintiffs have attempted to secure a lawyer, but lawyers reject their cases for reasons unrelated to merit, for example, inability to pay, practice constraints, or personal bias.

The four hypotheses incorporate issues that drive much of the current socio-legal scholarship dealing with access to redress through the courts. Work on *who* controls access to the courts emphasizes that both lay people and legal professionals play a role in determining when disputes become court cases. A key point from this literature has been that, contrary to academic predictions that low case volumes show *legal* hurdles are blocking plaintiffs who would otherwise pursue litigation, many people voluntarily select extra-legal resolutions for problems that they could alternatively take to court (Nielsen and Nelson 2005). Thus, the classic litigation “pyramid”² (Miller and Sarat 1981) is shaped by a mixture of legal hurdles to access and plaintiffs’ voluntary decision-making, as informed by complex social and cultural factors (Albiston 2005; Bumiller 1988; Nielsen 2000; Nielsen and Nelson 2005). This insight, extended beyond the decision to file a case to the related question of whether to retain a lawyer, warns against assuming that

² The pyramid illustrates that few disputes (the bottom of the pyramid) become formal litigation (the tip of the pyramid).

unrepresented plaintiffs are the victims of inaccessible lawyers without looking at their self-described motivations.

The critical issue from a policy perspective is whether plaintiffs with meritorious cases have the ability to pursue them in a way that is consistent with their own goals and preferences. The hypotheses guide policymakers and analysts about where and how to intervene in this system to expand access.

As we stated above, an underlying limitation in our data, and perhaps any inquiry in this field, is that we have no systematic way to assess the legal merits of the cases in our sample. While our data reveals the procedural history and outcome of each case, and whether the federal Equal Opportunity Commission saw merits in the claim prior to filing, it is ultimately not possible to conclude from this data whether a given case unfolded in a manner that reflects its legal significance. And yet, a question of primary interest for researchers and practitioners alike is “Were these just ‘bad’ cases?” Even without knowing the answer to this question, evidence that something *other than* legal merits influences the outcome of cases raises policy concerns. Hypothesis 1 and Hypothesis 4 imply that social, cultural, and financial inequalities limit access to lawyers irrespective of legal merits.

It is important to note that the four hypotheses are not mutually exclusive. For example, it is possible that plaintiffs who have difficulty accessing experienced lawyers (Hypothesis 1) are then rejected by the lawyers that they are able to contact using their limited resources (Hypotheses 3 and 4). It is also possible that plaintiffs who are rejected by one or more lawyers for any reason (Hypotheses 3 and 4) then decide that they *prefer* to self-represent rather than continue their search for a receptive attorney (Hypothesis 2.) Thus, the various parts of the lawyer-seeking process might reflect different conditions.

Literature on the Role of Lawyers

Scholarship on the role lawyers play in shaping disputes generally focuses on lawyers’ actions during litigation, in particular their self-interested motives for pursuing settlement (Kritzer 1987; Kritzer 1998) or accepting plea bargains (Blumberg 1967; Lizotte 1978; Wilkins 1992) even when their clients oppose such agreements. A large body of work explores

how different payment schemes affect lawyers' litigation strategies, with most drawing a distinction between hourly fee and contingency plans (Kritzer 1984b; Kritzer 2002; Kritzer 2004; Miceli 1994; Shavell 1982). Relatively few studies have focused on the process through which lawyers accept or reject clients at the *outset* of civil litigation, and no major studies seem to have looked in detail at the flip side of how people go about selecting lawyers. The literature in this area is thus sparse, in particular from the qualitative perspective.

Daniels and Martin are an exception, offering a series of papers on how lawyers practicing personal injury and medical malpractice law in Texas evaluate potential clients in different legal contexts (Daniels and Martin 2005-6; Daniels and Martin 2002; Daniels and Martin 2006-2007). They found that lawyers responded to tort reform by accepting far fewer cases on contingency, and in doing so changed their selection criteria to exclude plaintiffs with more difficult cases, including those with a prior history of filing lawsuits, those who moved frequently, and those with criminal records (Daniels and Martin 2002). Tort reform also changed lawyers' consideration of damages in the client screening process, prompting many to reject those with limited recovery prospects, including low wage earners, clients with limited physical injuries, and other "meritorious but less profitable cases" that would require substantial or prolonged work for a low recovery (Daniels and Martin 2005-6). Importantly, Daniels and Martin found that not all lawyers responded the same way to a legal environment that almost all perceived as increasingly hostile to tort claims: low-volume, non-specialist lawyers decreased their case loads more than successful specialists, and also reported increasing selectivity on specific client criteria and an aversion to investing substantial work in small recovery cases. Elite lawyers, in contrast, were less likely to curtail their practices or alter their selection criteria because their clients were generally pre-screened through referrals from other lawyers, weeding out claims with small damages or barriers to recovery.

Herbert Kritzer has also addressed the issue of client selection in his work on contingency practice (Kritzer 1984a; Kritzer 1997; Kritzer 2004). Analyzing survey data, Kritzer found wide variation in client acceptance rates among lawyers, with those receiving a higher volume of calls from potential clients accepting a lower percentage of cases (Kritzer 1997). Kritzer

also touches on the screening process itself: the lawyers he surveyed denied the highest fraction of cases over the phone without a meeting, and the next fraction after a single in-person consultation. High-volume lawyers rejected a higher percent of their cases through preliminary phone screening than did low-volume lawyers. The top reasons lawyers give for rejecting cases are lack of liability and low damages (Kritzer 1997). Mary Nell Trautner conducted similar analyses on a group of lawyers she pre-classified as elite tort specialists based on their case loads, finding substantial variation in case acceptance rates even within this group (Trautner 2006/7). Because variation was not based on call volume, Trautner suggests that screening dynamics may work differently among elite specialists. Van Hoy has compared small-town generalists with urban specialist tort lawyers, finding that the former screen more carefully because they lack the capital to finance complex or risky cases out of pocket, instead referring plaintiffs to specialists - often based in regional hubs - who appear better able to handle them. (Van Hoy 1999) But Daniels and Martin have found that even referral depends on profitability, with lawyers referring only cases that appear lucrative enough to generate worthwhile fees (Daniels and Martin 2005-6).

These studies suggest that the perceived legal merits of a case (liability) do not alone determine whether a lawyer will accept it, but rather that damages and a cost-benefit analysis of work load relative to recovery also shape acceptance decisions. Beyond finances, what extra-legal factors do lawyers consider when screening cases? Michelson, studying Chinese lawyers, offers the only major paper on social and cultural attributes that factor into lawyers' assessments (Michelson 2006). He finds that Chinese lawyers consider financial prospects – namely, whether a claim will produce convertible property or merely a non-material resolution – but also reject clients that they deem “untrustworthy,” “difficult,” or overly assertive. Because they base their perceptions on a client's geographic ties (rural clients are disfavored) and education level, Chinese lawyers end up rejecting non-urban clients with low education levels, many of whom seek to resolve disputes with employers over working conditions that promise limited financial awards.

Literature on Pro se Litigants

If lawyers are screening clients (as assumed by Hypotheses 3 and 4 above), clients may also be making decisions about how or whether to seek lawyers (Hypothesis 1 and 2 above). A few researchers have gathered basic data on *pro se* litigants and their reasons for filing without a lawyer, focusing on whether finances serve as major deterrent or, alternatively, whether *pro se* plaintiffs have freely rejected lawyers. Kritzer answers the former question in the negative, using a logit model to show that the type of case – meaning whether it involves personal injury, estate issues, child custody, etc. – is a better predictor of whether a claimant will retain a lawyer than the claimant's income (Kritzer 2008). He finds that low-income plaintiffs are generally less likely to use lawyers than middle-income plaintiffs, with the exception of personal and economic injury cases, for which the pattern is reversed. Kritzer attributes this anomaly to the unique prevalence of contingency arrangements in these practice areas. He notes, however, that a relatively high fraction of low-income claimants use lawyers in family law and estate cases, concluding that low-income status is not the main barrier to getting a lawyer, but rather that litigants make voluntary choices based on the type of case at hand (Kritzer 2008).

Sales' study of people who participate in divorce proceedings without a lawyer found that they tended to be lower income, younger, and less educated, but also those with less complex cases (no children, no property to divide). At least some *pro se* litigants freely chose to self-represent based on a cost-benefit analysis of lawyers' services. Barclay's study of respondents appealing state trial court decisions found that some clients chose to self-represent because their trial lawyers refused to address aspects of their cases that were important to clients but legally irrelevant (Barclay 1996).

In sum, prior research documents a "gatekeeping" (Kritzer 1997) phenomena in which lawyers accepted some clients while rejecting others for a variety of reasons, including how they perceive the merits of the case (liability), but also how profitable a case is likely to be, how much work it would require, and personal judgments about clients' character and demeanor. At the same time, some clients voluntarily eschew representation

based on their own cost-benefit analyses, often tipped by their perception that simple cases do not require counsel. Notably, prior literature has not considered how the factors shown to influence lawyers' and plaintiffs' representation decisions relate to race. This is unsurprising given that race plays only a tangential role in tort law involving personal injury and medical malpractice, as well as in divorce proceedings. In contrast, race is by definition central to the subset of employment discrimination claims that allege racial discrimination. Thus, to the extent that lawyers make screening decisions based on extra-legal considerations of financial recovery and clients' demeanor, if these criteria correlate with race they might affect minority plaintiffs' access to lawyers. Conversely, if minority plaintiffs have different perceptions of their claims' complexity, or make different cost-benefit assessments of the value of counsel, in addition to having different amounts of disposable income, the factors that prior research has identified as salient would translate into racial disparities in the likelihood of retaining a lawyer.

B. The *Pro se* Plaintiffs

Our sample of forty-one plaintiff interviews includes eight subjects who filed their federal cases *pro se* and never gained a lawyer. Six of these subjects were African-American (five men and one woman). Two were white (one man and one woman). Our qualitative data thus largely mirrors the closed-ended dataset we use in the model above: about 14% of respondents were *pro se*, and of these 75% were African-American and 25% were white.

The remaining 33 plaintiffs had lawyers for some or all of their cases. Of this group, 22 were white (12 men, 10 women); 11 were African-American (5 men, 6 women). Thus, represented plaintiffs were 66% white and 33% African-American. Remarkably, out of the 10 African-American men in the sample, 50% were *pro se* for the entirety of their cases. Conversely, out of the 13 white men in the sample, 92% were represented, while just one person (8%) was *pro se*. For the 7 African-American women, 86% were represented, while 14% (just one person) was *pro se*. White women were 92% represented and 8% *pro se*.

African-American pro se plaintiffs

An analysis of each African-American *pro se* plaintiff revealed that often more than one hypothesis was consistent with the plaintiffs' account of the lawyer search process. Overall, however, Hypothesis 1 (social capital access constraints) and Hypothesis 2 (personal choice) appear the least frequently. Hypothesis 1 is evident only in one case, where the plaintiff was unable to access a lawyer beyond the phone book. As a result he limited himself to one unsuccessful inquiry. The other plaintiffs appear to have had ways to contact lawyers through personal or professional connections. Hypothesis 2 features only for two African-American plaintiffs, both of whom chose not to actively seek lawyers based on their attitudes toward litigation. Other plaintiffs seem to have wanted lawyers. Hypothesis 3 and 4, in contrast, seem to have influenced outcomes in five of the six cases; in each of these five cases, decisions by lawyers were relevant. Hypothesis 3 – rejection based on the merits – likely played a role in three of the six cases, although plaintiffs' vague recollections make precise assessment difficult. Hypothesis 4 – rejection for extra-legal reasons, namely inability to pay – was a plausible factor in four of the six cases, although never as the sole determinant.

To the extent that *pro se* plaintiffs lack funds to hire a lawyer, a problem that three interviewees mentioned,³ African Americans would likely be differentially affected; the gap between African-American and white income and wealth, and its underlying causes, has been exhaustively documented. But this observation requires qualification. The sample of *pro se* plaintiffs also included two white plaintiffs. These white plaintiffs had diverse reasons for not securing a lawyer and do not obviously differ from the African-American *pro se* plaintiffs above.

The analysis suggests that lawyers – not plaintiffs – are largely controlling representation patterns. Hypothesis 3 and 4 together are affirmed 7 times, while Hypothesis 1 and 2 collectively surface only 3 times. This pattern recommends turning to lawyers' perspectives for insight on why some plaintiffs fail to secure representation while others succeed.

³ Chris Black, Frank Williamson, Philip Jacobsen

C. The Lawyers: A High Bar

The following analysis is based on interviews with 19 plaintiffs' attorneys representing a range of practice specialties, sizes, and prestige levels, from solo practice generalists to lawyers engaged in pro bono work through large firms to an elite national class action specialist. Diversity aside, every plaintiff's attorney interviewed stressed that he or she accepted a very small fraction of the cases that potential discrimination clients presented, with several estimating a 10% or smaller acceptance rate.

Did lawyers report rejecting cases on legal grounds or for extra-legal reasons? Notably, while many dwelt on the scarcity of "good" cases involving bona fide illegal discrimination, most lawyers also said that they sometimes rejected cases they believed had merit, either because their practice was overloaded, or because they felt projected damages did not justify the required work. Thus, lawyers themselves affirmed both Hypothesis 3 (rejection on the merits) and Hypothesis 4 (rejection for extra-legal reasons).

Lawyers reported using screening processes to make rejection faster and easier. Most described screening that took place before they would agree to meet a client or discuss their case details. PL-12, for example, an experienced plaintiffs' attorney, said his office conducted "in-depth" phone screenings by an on-call intake attorney that weeded out most clients; if a client was referred directly to him or his partner, however, one of them would personally do the initial assessment. PL-22, a specialist who got clients through referrals from lawyers, former clients, and professionals such as accountants, as well as through mass advertising and the yellow pages, said all potential clients were screened over the phone; one out of ten calls resulted in an invitation to a meeting, at which clients were required to fill out an extensive questionnaire and pay a consultation fee starting at \$75.00 that was meant to deter casual inquiries. PL-40 utilized phone screenings in which she looked for specific details that suggested discrimination, rejecting clients if they did not mention key points, and also charged a consultation fee for a meeting if the client survived the phone call. Even PL-13, a single practitioner running a small office who stated a willingness to "listen" to most clients, said he required advance appointments to deter walk-ins.

Lawyers claimed an ability to assess the legal merits of a case (Hypothesis 3) almost instantaneously. But, the quick screening processes they described also open the door to Hypothesis 4 – rejection for extra-legal reasons. Clearly, client’s ability to present a compelling case quickly over the phone was important to securing a lawyer. This is consistent with other studies showing that tort lawyers reject most cases over the phone, in particular busier lawyers who advertise for clients (Kritzer 1997). At least one lawyer in our sample (PL-12), however, mentioned giving special consideration to personal referrals, suggesting that social or professional connections might help getting a foot in the door. These patterns would likely work against African-American plaintiffs, who might be less experienced at making compelling phone presentations to strangers, and also less likely to have personal connections in the legal world.

1. Plaintiffs’ Demeanor

After the initial phone call, most plaintiffs’ attorneys said a large part of their decision to accept or deny a client was based on how he or she presented at the initial meeting. Attorneys discussed two main aspects of presentation that were important: demeanor and preparation. Attorneys had a variety of ways of referring to demeanor. Some assessed clients specifically for how they were likely to interact with their attorney. PL-15, a prominent African-American civil rights attorney, said he had a “sixth sense” for “difficult” clients, meaning that they would become “accusatory” or “whin[y]” in the course of the lawyer-client relationship; in his view, “a personal relationship with a client means a lot.” PL-34, another experienced specialist, agreed “[F]irst of all a piece of whatever you do if you have any sense as a lawyer is you know is there chemistry, is this somebody that you feel like you can work with. Are you able to communicate effectively with that person?” For these attorneys, a client’s demeanor at the initial meeting served as a clue to how they would interact with their lawyers, and clients with whom they lacked “chemistry” were likely to be rejected.

Attorneys also assessed clients’ demeanor in relation to the credibility of their case. In other words, they felt clients’ mannerisms spoke to whether the facts they related were true. PL-18, Annie Daley’s lawyer, stated that “whatever the case is,

if I don't have a sense of the, if I personally don't get a sense of the honesty of the person or if I don't feel like what I'm hearing is what's really there, I generally don't get involved." PL-30-1 said that he used the first interview to decide whether he really "believe[d]" what a potential client was telling him. PL-51 referred more directly to the "smell test" that, prior to discovery, she necessarily depended on to determine whether a client was "trying to work the system," instead of having a "morally right" conviction that he or she had been discriminated against; this attorney rejected clients whom she felt had the former motive.

Finally, some attorneys assessed demeanor in terms of whether a client would interact favorably with a judge or jury. A few explicitly distinguished this type of demeanor from the demeanor required to persuade the attorney to accept the case. PL-12 explained that "we assess both the plaintiff in terms of our hit on her (sic) and kind of perception of how she might be perceived [by the court]," while PL-30-1 said that after deciding whether he himself "believed" a client, he focused on their "confidence in their ability to communicate their story and to be believed to be likable, be sympathetic figures, and so forth, because so many times even people with good stories to tell, if they can't tell it well, just are not going to survive the process." Such criteria are perhaps surprising given that all the interviewed attorneys agreed that trials – bench or jury – were rare, and most cases were expected to settle based on an agreement between the parties.

These observations might help explain the underlying pattern of underrepresented African-American and Title VII race plaintiffs if lawyers tend to unfavorably assess the demeanor of minority plaintiffs, viewing them either as "difficult" to work with, not credible, or unlikely to present well to a judge or jury. None of the attorneys made such a connection explicit. Still, all except one of the attorneys in our sample were white, and a large literature exists on unconscious biases in interracial assessments (cite.g., Fiske 1998). Given that many of the plaintiffs attorneys believed that race cases were among the most ambiguous and dependent on "he said she said" accounts, this may work to the disadvantage of African-American clients.

2. Plaintiffs' Preparation

Apart from demeanor, several attorneys said they were more likely to accept clients who came to their initial meetings with documents or background work, or who seemed likely to assist with their case preparation going forward. PL-12 said a good client “was someone who’s responsible and follows instructions, whether it’s depo prep or getting the documents and responding to the document requests,” and that he typically instructed potential clients to obtain documents prior to the first meeting. A few lawyers recalled cases that they would have rejected had it not been for background work a client had already done to develop his claim. PL-22, who represented a 26-year-old white police officer in a disability case, said he accepted the case because it had “interesting facts” that a prior IL Department of Human Rights investigation had documented at the client’s initiative; without this background he would have passed it over. PL-52, a specialist who described himself as strictly plaintiff-side, recalled a client for whom “the facts of the case were, as he told them,...pretty outrageous but he had some documents [obtained from his work] which made it all make sense so I agreed to take his case.” An attorney at a public interest firm said she accepted a case largely because the client had already organized other employees at her workplace to request medical files, thereby showing that discrimination was widespread and laying the groundwork for a class claim.

These lawyers responded positively to clients’ foresight in requesting and assembling documentary evidence. Although some lawyers were sensitive to employees’ difficulties in obtaining documents, especially when they had been fired, they also said that a paper trail could differentiate a clear claim from an ambiguous one, especially given the lack of accessible evidence at the consultation stage prior to filing a case. In the words of PL-52, “documents are important [at the first meeting].”

A distinguishable form of case preparation that some lawyers valued was clients’ ability to articulate facts in a legally coherent manner. This type of “framing” qualifies as a form of preparation in that it requires plaintiffs to have partially formulated a claim, either by relying on background knowledge or by doing preliminary research. One lawyer said he specifically waited for a client to frame his case in legal terms,

saying “I usually don’t suggest discrimination. I want to know if they’ll come up with that on their own and many times they do...I want to find out if there’s something other than what the employer says is the reason” (PL-24). Other lawyers said they rejected clients who did not immediately reference facts that could fit into legal frameworks: race, sex, age, or something other than “office politics” (PL-40). Presumably, a knowledgeable plaintiff would be better able to provide facts that she knew might sustain a claim, whereas a naïve plaintiff might simply stress the circumstances that she felt were most unfair, unaware that most lawyers screened out merely “unfair” stories prior to even meeting clients.

Although many lawyers said they preferred clients who came to their meetings prepared with documents and having done background work, or those who framed their cases to include salient facts, some also cautioned that they often turned down clients who appeared to have visited several attorneys already and “ma[de] the case more interesting [through embellishment]” after being rejected. One said explicitly that he preferred clients who were *not* savvy about the legal process, noting that “ what I feel more of an affinity for are people who really don’t know what their rights are and they’re generally lower in the food chain, lower in the corporate food chain” (PL-18). Thus, attorneys seem to have perceived a line between clients who used knowledge to build a valid case and those who used knowledge to manipulate the system and its evaluative criteria. Lawyers referenced demeanor as a way to negotiate this line: clients who could articulate their rights and/or had assembled documentary evidence were preferred, but only if lawyers “believed” them based on their demeanor, and furthermore saw them as “reasonable” collaborators in the attorney-client relationship.

The preference some lawyers showed for prepared clients might be expected to work to the disadvantage of African-American plaintiffs who, statistically, would be likely to have less education, work in jobs with less access to documents or opportunities to request them, and perhaps to have less general legal knowledge about the litigation process. At the aggregate level, these factors might make it difficult for African-American clients to create succinct, supported presentations that put facts above emotions.

3. Payment

The client screening process necessarily involves questions of payment. There was wide variation in the sample as to how lawyers negotiated payment. Some operated on contingency, expecting the bulk of payment only when and if a client prevailed. Contingency lawyers might or might not charge a retainer fee or require a reduced hourly rate in addition to a portion of recovery. Other lawyers billed entirely by hourly rate, shunning contingency arrangements. Some took pro bono cases. Many reported using a variety of plans, or having shifted between payment modes over the course of a career. Notably, the payment scheme an attorney followed influenced how he or she evaluated potential clients ((See Daniels and Martin 2005-6; Kritzer 1994).

Contingency

Attorneys who worked on contingency based acceptance decisions on projected recovery. For these lawyers, liability was separate from, and *less* relevant than, potential damages. Factors that lawyers considered in assessing recovery included the plaintiff's salary (which would serve to calculate back pay, so higher salaries were favored), and whether the plaintiff found a new job immediately after being fired (which could mitigate lost wages, and thus limit damages). One lawyer said that he was generally unwilling to "invoke the heavy machinery of the law," even for "somebody who kind of seems to have the facts to support a case," if the client found a new job "two weeks" after being fired (PL-34). Another lawyer said he used a formula to determine whether one-third of anticipated recovery would equal his goal hourly billing rate, and would only take cases in this ballpark because they made "economic sense." Given that recovery depended largely on a clients' salary, this lawyer said that, regardless of merits, "if they were like low wage earners, like \$3,000 a month, I would not be interested in filing a lawsuit or anything like that" (PL-8). This cutoff (equivalent to \$36,000 yearly) would exclude many African-American workers, given that the average income for a African-American full-time worker in 2008 was \$ 37,325. White, non-Hispanic full-time workers, in contrast, averaged \$ 53,210 annual salary in 2008.⁴

⁴ http://www.census.gov/hhes/www/cpstables/032009/perinc/new10_001.htm. Note that the African-American figure is for respondents who checked the African-American box alone or in combination with

Other researchers have found that contingency tort lawyers screen cases primarily on the basis of potential damages, rejecting cases when liability seems clear but recovery is limited, among them infant deaths due to medical malpractice and personal injury cases with elderly or unemployed victims who did not lose wages (See Daniels and Martin 2005-6; Findley 2004 (Summer)). Our data suggests this pattern holds for employment discrimination lawyers, with likely implications for racial disparities in representation. Because African-American workers are likely to have lower salaries and fewer benefits (see generally Altonji and Blank 1999), lawyers may screen them out based on profit incentives. In addition, contingency lawyers in our sample reported doing a cost-benefit analysis to assess the amount of work and immediate financial investment required to obtain a given award. Several also said that race cases were “difficult” and lengthy to litigate because of savvy employers and the frequent absence of “smoking gun” evidence (PL-15, PL-18, PL-26, PL-34). Race cases, to the extent that they promised low damages, substantial work, and delayed recovery, would thus be disfavored by contingency lawyers.

Hourly

Lawyers who followed hourly billing schemes were less directly concerned with how much a claim might recover. Because they were guaranteed payment regardless of outcome, damages were less significant in their decision-making. These lawyers saw hourly-fee arrangements as a way to represent clients who wanted to pursue cases that might not prevail or that promised to be extremely labor intensive in relation to recovery. Still, most said they discouraged clients from proceeding when their cases appeared legally weak or their potential recovery was limited. PL-24, for example, said he used an up-front retainer fee to force clients “to decide whether it’s worth it or not [to proceed with a case]” and to give them an “awakening” to the risk of losing. This lawyer then continued at an hourly rate, avoiding contingency in almost all cases because he found recovery to be unpredictable. PL-40 said she accepted cases both on contingency and on an hourly-fee basis, but that she always charged an initial meeting fee and told people not to seek a meeting unless their facts were promising; other lawyers agreed

other race and/or ethnicity boxes on the census survey. The white figure is for respondents who checked the white box alone.

that they avoided taking cases for an hourly fee unless they had some merit and the client both understood the risks and could afford the expense.

Clearly, hourly fee payment plans with up-front retainers would be out of reach for plaintiffs lacking substantial financial assets. Again, because African-American plaintiffs as a group are likely to have lower income and wealth than other groups, their ability to secure an hourly-fee lawyer is probably diminished. Most lawyers described hourly-fee arrangements as an option for plaintiffs who could not convince contingency lawyers to accept their cases – in other words, it expanded the representation prospects for only those plaintiffs who could afford it. Financial constraints probably limit African-American plaintiffs' access to these “auxiliary” lawyers, forcing many of them to find a contingency lawyer or go without.

Pro Bono or Informal

While most lawyers said payment prospects were important to client evaluation, this was not the case for all lawyers in the sample. Lawyers who claimed to have personal or ideological commitments to the plaintiffs' side sometimes described indifference to financial gain. PL-37, who worked for a public interest organization and then transitioned to a firm, said she preferred clients who had “kind of public interest goals” and were not “money driven.” This lawyer reduced her fees considerably in order to help sympathetic plaintiffs and repeated that she “wasn't willing to do a case to make money,” rejecting clients who appeared motivated only by financial gain. One experienced lawyer said that he felt it was typical to count on “mak[ing] up...for the weak cases by the strong cases” (PL-34), while another said his firm took about one-third of their cases pro bono based on interest and commitment to helping plaintiffs, writing off these costs and “hopefully at the end of the year have some money left over after we pay everybody” (PL-52). Lawyers who reported taking cases without regard for payment generally said they selected them based on legal interest or sympathy for a client.

To summarize, lawyers' approach to payment likely contributes to the racial disparity in representation rates in a way that supports Hypothesis 4 – rejection of clients for extra-legal reasons.

4. Downplaying and Discouraging

Lawyers consistently and strategically downplayed client's cases during initial conversations, explaining that it was important to reduce plaintiffs' expectations to avoid anger or disappointment at the outcome. As one lawyer said, "one of the cardinal rules is that you never oversell a case to a client, you under sell. You want the client's expectations to be very low so that when you get the result, the client thinks that, you know, there should be parades in your honor" (PL-08). Another screened out ambivalent plaintiffs using a disclaimer over the phone: "I will say to people from what you tell me, I don't think I can help you. If you really want a consultation, I'll give it to you, and so sometimes people say well, you mean I don't have a case? Then I say, I'm not telling you that because you're not my client...." (PL-40). Other lawyers reported delivering similar warnings, or charging a consultation fee specifically to deter unsure plaintiffs. Almost all said they spent a portion of first meetings urging clients to reduce their expectations from the outset.

How would such rituals affect potential clients? Presumably, the effect would differ according to how confident a plaintiff felt in her case, as well as how willing she was to question an "expert" opinion. For hourly-fee lawyers, the disclaimers would also have differential effects depending on how well a plaintiff could afford the expense. A plaintiff like Frank Williams, who was considering a second mortgage to pay a lawyer, would likely be more deterred than a wealthy client with a different cost-benefit calculus. Lower income plaintiffs – disproportionately African-American – might decide to file *pro se* instead of hiring expensive lawyers who downplayed their claims even while quoting daunting costs. Plaintiffs who lacked confidence or funds would also be less likely to seek a second opinion, something that lawyers said they recommended to all rejected clients, in fact expecting them to "make the rounds of the good firms" in the course of finally securing representation (PL-12). African-American plaintiffs, perhaps more sensitive to expert "downplaying," might decline to contact additional lawyers if they thought it would only result in additional denigration of their cases. Lawyers' conduct might thus contribute indirectly to Hypothesis 2, in which plaintiffs decide they would be better off without representation.

D. The Represented Plaintiffs

We turn in conclusion to plaintiffs who successfully retained lawyers, comparing their methods to those described in the two sections above. Interviews with the 33 plaintiffs in our sample who had a lawyer at some point reveal a pattern that supports lawyers' accounts of rejecting most clients, while advising them to seek second opinions; many plaintiffs who successfully secured attorneys reported consulting with several before finding one they felt comfortable with, was willing to work out an acceptable payment arrangement, or in some cases, was willing to take their case at all. Plaintiffs used multiple methods to conduct these searches:

Personal Referral

Some plaintiffs received referrals, often from a union representative, a co-worker, a friend, or a family member. These networks represent various forms of social capital, supporting Hypothesis 1 (unrepresented plaintiffs lack access to lawyers because of social, financial, or cultural barriers). Thirteen of the represented plaintiffs received a personal referral at some point in their search process. For some, these referrals led to representation, with the important caveat that they were then able to negotiate an acceptable payment scheme. Kristin Baker, for example, a 33-year-old white sex discrimination plaintiff, had a friend in the insurance business who convinced a lawyer at a large law firm to take her case at a discount although he did not normally represent individuals. In this case, personal social capital was clearly instrumental. Annie Daly, who we featured above, talked to a co-worker who had similar issues in the past at the same employer, later contacting the woman's lawyer who expressed familiarity with the issues and agreed to take the case. John Palmer, a 45-year-old African-American manager filing a race claim, chose a law firm that his father had worked with professionally, while Jack Stern, a 26-year-old white police officer filing for disability discrimination, chose the law firm with which a fellow officer cum law student was interning. Many of the plaintiffs told similar stories of seeking and following personal referrals, sometimes with special help from the referring party.

However, two of the eight plaintiffs who did not secure lawyers likewise received personal referrals – Chris Black from a doctor,

and Mitchell Collins from a friend. While both these plaintiffs followed up on the referrals, neither led to representation for reasons of cost, lack of expertise, and loss of motivation on the part of the plaintiff. Other *pro se* plaintiffs – Margaret Turner, and Philip Jacobson for example – did not mention personal referrals, but did discuss their involvement with workplace unions and legal advocates who had helped them with other matters. In addition, some represented plaintiffs who received personal referrals did not end up using them, either because they lacked expertise or were too expensive. Still, referrals often led to other referrals, a pattern that prior research has documented as central to the division of labor among lawyers (Daniels and Martin 2005-6; Van Hoy 1999). Social and professional contacts thus undoubtedly helped in securing a lawyer, even though they were neither necessary nor sufficient. This observation helps explain the racial disparity in representation rates; African-American plaintiffs, more likely to hold non-professional jobs and have fewer years of education, as a group probably have fewer social and professional contacts that might generate referrals.

Services and Directories

In addition to or as an alternative to personal referrals, some represented plaintiffs used referral services ranging from a bar association service to the phone book, or simply picked someone local without relying on an interpersonal connection. Thirteen of the 33 represented plaintiffs used a referral service, directory, or unassisted local selection at some point in their search. Terry Lazio, a 67-year-old white technician filing a disability claim, first went to the workman's compensation attorney who served his factory, who told him that he did not handle discrimination cases. Mr. Lazio then went to a local attorney whom he did not know, but who took the case on contingency. Floyd Kelley, a 57-year-old African-American professional filing a race claim, took advantage of a group plan through his American Express account that offered him access to a list of participating at reduced rates, selecting one that charged an up-front fee. Robert Lester, a 49-year old white professional claiming age discrimination, obtained a list from the bar association and "just went down the list and, you know, for no other reasons, just selected four of them, and basically then I went out and I interviewed them and discussed my case to see if there was something there." Several plaintiffs used the phone book or

general search methods to contact a lawyers that they that they ended up hiring. In sum, “cold calling” or other impersonal referral methods worked for some plaintiffs who had no personal connections, provided that they were able to come to a payment agreement.

Did the eight *pro se* plaintiffs in our sample make use of these general, impersonal search methods without success? Two of them - Philip Jacobson and Chris Black – described using the yellow pages or directories, Mr. Jacobson to contact one lawyer who quoted an unaffordable \$500 retainer fee and Mr. Black to “call[] all over the state” without success. The other six either did not use a directory or did not describe their process. In sum, our data suggests that while services or directories do not work for all plaintiffs, they are an option for some people who lack personal connections to lawyers.

Persistence

Notably, many plaintiffs who successfully secured attorneys reported consulting with several on the road to signing a retainer. Peter Nichelsen, a 56-year-old white police officer filing a race case, received a referral from his police union. But instead of following it he contacted the Pacific Legal Foundation, a conservative advocacy group that he thought might sympathize with his reverse discrimination claim. When they rejected his case he talked to a friend who had used a lawyer for his own employment case; this was the attorney he ultimately selected. Rob Narrot, a 64-year old white warehouse manager filing an age and disability case, similarly started by going to Equip For Equality, an advocacy group. He did not pursue becoming a client there, but instead obtained three referrals from a bar association, meeting with each referred attorney and choosing the one with the most desirable fee plan. Several plaintiffs echoed stories of multiple consultations, negotiations, and rejections before securing a lawyer.

Clearly, for this type of extensive search money helped; Mr. Narrot, for example, believed that his ability to persist depended on his comparably large resources. However, some plaintiffs without equivalent resources succeeded through persistence, including the three represented plaintiffs who received court-appointed lawyers: Evan Oliver, a 44-year-old white chemist bringing a disability claim, endured four income-less years after

being fired while he “went and contacted different law firms until somebody finally agreed to take my case [on contingency with a \$500 retainer].” Mr. Oliver, unhappy with that lawyer, later requested and received a court appointed replacement. Matthew Brown, a 47-year-old African-American manager filing for race, consulted with many attorneys, but realized early in the process that none would take his case without immediate payment. Mr. Brown persisted because “every time I met with one of these lawyers, I’d try to squeeze a question in,” thereby learning more about his case and ultimately that if he filed *pro se* he could request a court-appointed lawyer, which he did successfully. Kristin Hamilton, a 42-year old African-American supervisor, filed a race claim *pro se*, then kept showing up at hearings and asking questions until the judge appointed an attorney who happened to be in the courtroom. And even plaintiffs who were able to afford lawyers described cost-minimizing strategies such as getting multiple quotes or applying to legal clinics before signing on with an attorney at cost.

Plaintiffs’ stories of persistence corroborate lawyers’ accounts of high selectivity, varying payment plans, and role that personality plays in client evaluation. Lawyers themselves said they expected plaintiffs to “make the rounds” in their effort to secure representation. They furthermore saw their “downplaying” of claims as a routine practice that would not deter clients from persisting. The difficulties built into the lawyer seeking process may explain part of the racial disparity in its outcome. Clients willing and able to persist through multiple hurdles likely have resources to invest in the process. In addition, successful seekers likely possess a willingness to question negative assessments from “experts” in the field, as demonstrated by clients who themselves “interviewed” multiple lawyers. Persistent plaintiffs were thus unfazed by repeated denigration of their cases. These attributes imply a level of material, social, and cultural capital that white plaintiffs may be more likely to possess.

We have reviewed the lawyer-seeking process from three perspectives: *pro se* plaintiffs, lawyers, and represented plaintiffs. What does the holistic view say about the four hypotheses with which we began? Hypothesis 1 – that *pro se* plaintiffs lack access to lawyers because of limited social and cultural capital – has support; although the *pro se* plaintiffs in

our sample did not strongly validate it, successful plaintiffs' stories did. Hypothesis 2 – that *pro se* plaintiffs choose to forgo lawyers – also has some support, with the important caveat that lawyers' accounts of high fees and “downplaying” of prospects show that “choice” is constrained by external influence and is only nominally “free.” Hypothesis 3 – that lawyers reject cases based on legal merits – appears to apply for some of our *pro se* plaintiffs, and is unsurprisingly affirmed by lawyers. Hypothesis 4 – that lawyers reject cases for reasons unrelated to legal merit – gains strong support from this analysis. *Pro se* plaintiffs recalled lawyers quoting unaffordable fees; lawyers admitted to selecting cases based on damages, not liability, as well as screening out “difficult” and unprepared clients; and represented plaintiffs recalled being rejected by some lawyers even while others agreed to represent them, with subsequent litigation showing that the claims were not, in fact, invalid.

These findings help explain why African-American plaintiffs and those filing Title VII race claims are less likely to have lawyers. As a group, African-Americans are likely to have fewer social, personal, and professional contacts with lawyers (Hypothesis 1), less willingness to voluntarily pursue and hire experts who downplay their claims while quoting high costs (Hypothesis 2), and lower incomes and less developed preparation and “pitching” skills, both of which would sour lawyers on their claims (Hypothesis 4). All of these patterns would contribute to a disparate racial pattern. This is true even though our data cannot speak objectively to the merits of interviewees' claims (Hypothesis 3). Given the support for Hypotheses 1, 2, and 4, it is unlikely that African-American and race plaintiffs fail to gain lawyers at higher rates than whites primarily because their cases lack legal merit. Instead, the disparate social, cultural, and economic resources that manifest in these patterns explain the gap.

VIII. Race of Judges and Race of Plaintiff in Employment Civil Rights Cases

Two of the co-authors of this paper conducted an analysis of the effects of the race of judge and plaintiff on outcomes in our sample of cases (see Weinberg and Nielsen forthcoming). They focused on the subset of cases in which there was a decision on a motion for summary judgment. These cases have the analytic advantage that they already have withstood dismissal and have

not “settled early,” and so have advanced to a stage where the defense is challenging whether the case has sufficient merits on the law that it is worthy of adjudication on the facts. And because these decisions are made by a judge, they uniquely isolate judicial decision making.

Weinberg and Nielsen find strong effects for the interaction of race of judge and race of plaintiff. In logistic regressions controlling for other variables, they find that white judges grant defendant’s motion for summary judgment in an estimated 40% of cases involving white plaintiffs compared to 79% of cases involving minority plaintiffs. Minority judges, by contrast, grant defendant’s motion for summary judgment in less than 1% of cases involving white plaintiffs and less than 2% in cases with minority plaintiffs. When plaintiffs appear *pro se*, the probability that a white judge will grant the motion rises to almost 80% for white plaintiffs and 95% for minority plaintiffs. Minority judges are less much affected by a plaintiffs *pro se* status. Less than 2% of white *pro se* plaintiffs lose on summary judgment, and just under 10% of minority *pro se* cases lose on summary judgment.

These findings are provocative in their own right, for it suggests that the racial composition of the federal bench has a significant effect on a critical phase of employment civil rights litigation, and that this effect varies by race of plaintiff. But the findings may also offer a window on the racial correlates of perceptions of the legal validity of claims of racial discrimination. If white judges reflect the perceptual dispositions of white lawyers, plaintiff or defendant, in a professional subfield dominated by white attorneys, African-American plaintiffs will be at a disadvantage compared to white plaintiffs.

IX. Conclusion

In ways visible and invisible, articulated and implied, race is a critical dimension of employment civil rights litigation. Not only does race continue to be the leading category of claims of discrimination, but claims of racial discrimination may be the most conflictual, as they connect to deep cultural and economic divides in American society. Part of the work ahead for our project is to compare the contested claims of plaintiffs and defendants across the major charging categories of race, gender, age, and disability—because each taps into different kinds of

workplace hierarchies and have their own distinct histories in law and in work organizations. It may well be that we have observed for race will hold for other types of discrimination litigation, but we need to perform systematic empirical work to make those comparisons.

Our research makes visible racial aspects of employment civil rights litigation that only have been suggested in prior work. The stories of Gerry Handley, Annie Daley, and Franklin Williams are barely recorded in the files of federal records centers. Their's are not the cases that appear in media accounts of discrimination litigation. Some stories like theirs are captured in the relatively small number of cases that produce an opinion on a motion for summary judgment or a trial court opinion. And in those documents, their stories appear in legally stylized form, as a reduction or refraction of the nature of their dispute with their employer. Our strategy has been to make those stories visible, but also to locate them within a systematic quantitative analysis of how they are similar or dissimilar to discrimination cases overall.

Our in-depth analysis of these cases, which benefitted from interviews from all sides in these disputes, brings to life the contentious nature of discrimination litigation and the sharp divergence between plaintiffs and defendants over what happened in the workplace and its significance in law. The adversarial process at the very least reflects and probably magnifies the racially polarized interpretations of the parties. Gerry Handley, Annie Daley, and Franklin Williams went to the law seeking a fair adjudication of their claims. In the course of litigation they suffered further injury, which they attributed to racial bias in the law. The defendants in the Daley and Williams cases rejected the racial interpretations of the plaintiffs and suggested, in effect, that they were playing what one human resources respondent called "the race card."

We know from the literature in social psychology that claims of discrimination, even when founded in facts, lead to the derogation of the source by co-workers and supervisors (Major and Kaiser 2005). Apparently lawyers and judges are not immune to such perceptual tendencies. Plaintiff and defendant employment lawyers have fundamentally opposed views of each other and their clients. In a majority of filed cases they must come together to agree on a settlement of a discrimination claim. But they strike those bargains not through a genuine coming to

terms with the nature of the claim, but with an eye on the cost of proceeding and the odds of gaining a favorable outcome.

Despite the assertions of defense attorneys, plaintiffs attorneys are very much gatekeepers in discrimination litigation, turning away 90% of potential cases. Plaintiffs attorneys have come to understand the challenges of winning a race case and apparently less likely to take cases presented by African-American plaintiffs (although we do not have direct data on this point). It is indisputable that African-American plaintiffs who file are less likely to have legal representation, and this seriously damages their chances of a successful outcome in litigation. Plaintiffs attorneys never explicitly acknowledged race of potential client as a factor in taking their case. But the methods of case selection they described to us in detail may well have a disparate impact on African-American plaintiffs.

In a legal system and a socio-economic system that exhibits stark disparities by race in rates of incarceration, employment, health, and wealth, perhaps it is not surprising that we find racial division and racial disparities in the system of employment civil rights litigation. This may be all the more expected in an arena that invites those who feel they have been victims of racial discrimination to pursue those claims with the force of law, while defendants and many whites are suspicious of the merit of their claims. Still it is sobering to see that racial polarization and racial inequality continue to be reproduced in patterns of legal representation and advocacy in the field of employment civil rights.

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Table 1
Plaintiff and Case Characteristics by Legal Representation

	<i>Pro se</i> Throughout	Gained Counsel	Lawyer Throughout	Total
Race***				
Black	21.48%	11.7%	66.81%	100% (675)
White	8.13%	3.17%	88.69%	100% (504)
Other POC	14.29%	7.14%	78.57%	100% (350)
Unknown	14.83%	5.32%	79.85%	100% (263)
Total	15.35%	7.48%	77.18%	100%
	275	134	1,383	N = 1,792
Sex***				
Male	18.9%	7.9%	73.2%	100% (873)
Female	11.99%	7.15%	80.86%	100% (909)
Unknown	10%	0	90%	100% (10)
Total	15.35%	7.48%	77.18%	100%
	275	134	1,383	N = 1,792
Occupation***				
Management/Business	6.22%	3.73%	90.04%	100% (241)
Professional & Related	12.04%	6.69%	81.27%	100% (299)
Service	17.82%	7.59%	74.59%	100% (303)
Sales	7.89%	7.89%	84.21%	100% (190)
Office & Administrative				
Support	21.41%	11.18%	67.41%	100%(313)
Blue Collar	16.4%	8.04%	75.56%	100% (311)
Other	15.38%	15.38%	69.23%	100% (13)
Total	14.37%	7.72%	77.9%	100%
	240	129	1,301	N = 1,670

Table 2
Logistic Regression Predicting *Pro se* Filing

	Filed Case <i>Pro se</i>	<i>Pro se</i> , but Gained Counsel
Plaintiff Demographics		
White	-0.481* [2.18]	-0.678 [1.35]
Black	0.563* [2.31]	-0.518 [1.39]
Male	0.262 [1.53]	-0.326 [1.15]
Manager/Professional	-0.733** [3.23]	0.656 [1.61]
Service, Sales, Office Occupation	0.064 [0.32]	0.720* [2.13]
Age	0.012 [1.22]	-0.006 [0.36]
Tenure at Job	-0.033* [2.57]	0.046* [2.40]
Member of Union	0.427 [1.69]	-0.109 [0.27]
Basis of Claim		
Title VII – Race Discrimination	0.666** [2.91]	-0.147 [0.42]
Title VII – Sex Discrimination	0.167 [0.80]	0.211 [0.60]
Title VII – Retaliation	-0.123 [0.65]	-0.236 [0.66]
Title VII – Other Type of Discrimination	0.531** [2.59]	-0.770* [2.21]
ADEA – Age Discrimination	0.198 [0.73]	-0.138 [0.32]
ADEA – Retaliation	0.246 [0.67]	0.215 [0.29]
ADA – Disability Discrimination	0.810** [3.43]	-0.495 [1.25]
ADA – Retaliation	-0.405 [0.97]	-0.344 [0.45]
42 usc 1981	-0.794** [3.68]	1.184** [2.84]
42 usc 1983	-0.382 [0.99]	0.313 [0.38]
Constitutional Case	-0.09 [0.19]	0.218 [0.18]
Other Statutory Basis	-1.459** [5.91]	-0.297 [0.71]
Nature of Discrimination		
Hiring	0.097 [0.32]	-1.036 [1.69]
Firing	-0.169 [0.98]	0.071 [0.25]
Sexual Harassment	-0.459 [1.46]	-1.055 [1.75]
Conditions of Employment	-0.084 [0.46]	1.010** [3.28]
Pay	-0.209 [0.84]	0.274 [0.69]
Specific Individual(s) Committed Discrim.	0.207 [1.16]	-0.492 [1.67]
Strength of Case		
EEOC – Support on the Merits	-0.585 [1.25]	-0.656 [0.89]
EEOC – Not Support on the Merits	1.896** [10.23]	0.074 [0.25]
Case of Disparate Impact	-0.341	0.348

Constant	[0.87]	[0.47]
	-1.843**	-0.232
	[3.25]	[0.25]
N	1667	403
Pseudo - R ²	.3036	.2069
χ^2	339.07**	81.60**
* p<.05, ** p<.01		