

JURIES, RACE, AND GENDER: A STORY OF TODAY'S INEQUALITY

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INTRODUCTION

The Civil Rights Act of 1991¹ (“Act” or “1991 Act”) was thought to be a victory for employment discrimination plaintiffs—a “dramatic” expansion of their rights.² Twenty years later, however, we are told that the news for employment discrimination plaintiffs has gone “from bad to worse.”³ Employment discrimination plaintiffs should expect defendants to win their pretrial motions.⁴ Even if plaintiffs survive pretrial practice, they will likely lose at trial.⁵ Other than settlement, the chances of any plaintiff recovery

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1. Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2, 29, and 42 U.S.C.).

2. See Roger Clegg, *Introduction: A Brief Legislative History of the Civil Rights Act of 1991*, 54 LA. L. REV. 1459, 1471 (1994) (describing the Act from the plaintiff’s perspective as “a dramatic improvement on the law as it stood after the Supreme Court’s decisions in 1989”); Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 116 (2009) (“[T]he Civil Rights Act of 1991 made Title VII law more favorable to plaintiffs . . .”); Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 674 (describing the series of legislative enactments of which the Act was part as “a significant expansion of employee rights in the workplace”). Compare Editorial, *Thumbing His Nose at Congress; Mr. Bush Signs—and Undermines—the Rights Bill*, N.Y. TIMES, Nov. 22, 1991, at A30 (applauding the Act for ensuring “more justice in the workplace”), with Editorial, *A Lawyers Employment Act*, BOS. HERALD, Dec. 28, 1991, at 14 (predicting that the Act “would start an avalanche of senseless litigation, that business would surrender to unreasonable demands and establish hiring quotas to buy peace”). The Act, of course, was not a complete victory for the plaintiffs; both sides made compromises. See Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 924 (1993) (“The 1991 Act . . . reflects a series of compromises by liberal and conservative legislators . . .”).

3. See Clermont & Schwab, *supra* note 2, at 103.

4. See *infra* Part I.C.1.

5. See *infra* Part I.C.3.

are quite thin.⁶ Employment discrimination plaintiffs, or perhaps their lawyers, seem to have gotten the message. Employment discrimination suits are declining—even while Equal Employment Opportunity Commission (“EEOC”) filings are increasing.⁷ Federal litigation is becoming less and less relevant to redressing employment discrimination.

In this Article, as this Symposium reflects on the twenty-year history of the 1991 Act, I explore just how much “worse” things are today for plaintiffs. I do this by asking two questions. First, are plaintiffs now less likely to win than they were before the passage of the 1991 Act? In other words, does today’s bad news obscure the progress made since 1991? Second, does the 1991 Act’s expanded jury-trial right provide all plaintiffs an equal chance at recovery? The increased access to a jury trial was thought to be a major advancement for plaintiffs, and this Article analyzes whether particular types of plaintiffs fare better than others through an original Jury Outcome Study of 102 jury trials.

Through these inquiries, I discover some optimistic news. Most significantly, plaintiffs today are more likely to win at the trial level than before the 1991 Act.⁸ The expanded right to a jury trial granted by the 1991 Act⁹ likely has improved trial win rates, but an increase in win rates in bench trials is partly at play as well.¹⁰ The news, then, is not all bad.

But this is not a story of optimism. The increased win rate at the trial stage does not mean a greater percentage of plaintiffs are winning. Litigation filings themselves are declining.¹¹ Despite these reduced numbers, a lower percentage of plaintiffs proceed to trial today.¹² And even if plaintiffs present their cases to juries—the stage at which they enjoy their highest chance of success—losses are still likely.¹³

Nor are trials without risks for plaintiffs. In my Study of 102

6. *See infra* Part I.C.5. It is far from clear that even high-dollar class action settlements—think Texaco’s \$176 million settlement of its race case—have had any measurable impact on the workplace. These settlements had little, if any, impact on shareholder value or the company’s capitalization and produced “little to no substantive change within the corporations.” *See* Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1250, 1260–63, 1266–68 (2003) (examining the effects of employment discrimination class actions against Texaco, Home Depot, and Denny’s). The class actions studied included substantial settlements in the eight- to nine-figure range. *Id.* at 1249. The average plaintiff recovery was \$10,000 per class member. *Id.* at 1250.

7. *See infra* Part I.A.2.

8. *See infra* Part I.C.3.

9. 42 U.S.C. § 1981a(c)(1) (2006).

10. *See infra* Part I.C.3.

11. *See infra* Part I.A.2.

12. *See infra* Part I.C.2.

13. *See infra* Part I.C.3.

jury trials and 10 bench trials, plaintiffs were much more likely to be ordered to write defendants a check—for the defendants' costs—than the other way around.¹⁴

Most troubling, this is not a story of equality. Plaintiffs win most often before juries, but jury win rates differ with the category of plaintiff. For example, this Study reveals that African Americans and Latinos claiming race discrimination have the lowest jury win rates.¹⁵ Empirical studies of employment discrimination litigation usually do not distinguish among the types of discrimination alleged or the types of plaintiffs involved.¹⁶ The very few that do have also found that African Americans have lower win rates at various procedural stages.¹⁷ No study examining this issue has found differently. Thus, although my evidence is far from overwhelming—I analyze only 102 jury trials—it adds to the increasing evidence of inequality.

The question then becomes, what causes the disparity? Many who study jury behavior would predict jury bias by white jurors against African-American and Latino plaintiffs.¹⁸ While the evidence is increasing that juries are not neutral and it is likely that juror bias is partly at play, I conclude that the evidence of juror bias is not thus far conclusive in the context of employment discrimination litigation.¹⁹ Other factors may also be at work.

This Article proceeds in three parts. Part I presents the story of the change promised by the 1991 Act and compares outcomes before and after the 1991 Act. Here we discover one optimistic comparison: trial outcomes today are actually higher than they were before the 1991 Act, while pretrial outcomes and settlement rates are about the same.²⁰

Part II examines jury trials—the stage at which plaintiffs have the highest chance of success. We know surprisingly little about

14. See *infra* notes 147–50 and accompanying text.

15. See *infra* notes 165–66 and accompanying text; *infra* Table 2.

16. A few studies have examined the issue. See, e.g., LAURA BETH NIELSEN ET AL., AM. BAR FOUND., CONTESTING WORKPLACE DISCRIMINATION IN COURT: CHARACTERISTICS AND OUTCOMES OF FEDERAL EMPLOYMENT DISCRIMINATION LITIGATION 1987–2003 (2008), http://www.americanbarfoundation.org/uploads/cms/documents/nielsen_abf_edl_report_08_final.pdf; David Benjamin Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Jury Verdicts Reveals Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511 (2003); Laura Beth Nielsen et al., *Uncertain Justice: Litigating Claims of Employment Discrimination in the Contemporary United States* (Am. Bar Found., Research Paper No. 08-04, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1093313.

17. See *infra* Part III.A (discussing the other studies). This is the first Study to examine Latinos separately.

18. See *infra* Part III.B.2 (discussing jury bias).

19. See *infra* Part III.B.2.

20. See *infra* Parts I.C.1, I.C.3., I.C.5.

what types of plaintiffs are likely to win a jury trial. This Part analyzes 102 jury trials in seven judicial districts from 2005 to 2007. By examining outcomes in these jury trials, this Article demonstrates the uphill battle faced by African-American and Latino plaintiffs claiming race discrimination, particularly when compared to women claiming sex discrimination and others claiming race discrimination.

Part III is the heart of this Article and puts the results from Parts I and II in context. I demonstrate that my findings are consistent with the few other studies that disaggregate outcome data by the type of discrimination alleged and the type of plaintiff involved. Thus, my findings are less likely to be an exception and more likely to represent the reality of litigation for African Americans and Latinos.

In addition, many (but not all) who study jury behavior predict that jurors will bring their own biases into the jury room.²¹ Specifically, many studies demonstrate a bias of white jurors against black defendants.²² It would be easy to use this research to blame white juror bias for the disparate outcomes found in jury studies. And it is likely true that white juror bias is at least partly to blame. But without access to more information about the composition of the actual juries in this Study—some of which were probably all white, but some of which were probably diverse, and all of which reached unanimity for their verdicts—I am hesitant to end the analysis with that conclusion.²³ In fact, some recent research demonstrates a decrease in white juror bias when race issues are salient and when juries themselves are diverse.²⁴ Thus, the causes for the disparities—like the underlying problem of racism—are complex and not readily reducible to a single explanation. As is often true, more research is needed.

I. THE ATTEMPT AT CHANGE

This Part begins with a story of change: the increase in plaintiffs' rights under the Civil Rights Act of 1991 (and other legislation), the litigation growth that followed, and the subsequent changes in the law. This Part then uses the research of others to make new comparisons between outcomes in employment discrimination cases before and after the 1991 Act. This analysis demonstrates that the news has never been very encouraging for employment discrimination plaintiffs. One data point is, however, most encouraging: plaintiffs today are more likely to win if they get to trial. Yet, plaintiffs are now less likely to make it to trial in the first place.

21. *See infra* Part III.B.2.

22. *See infra* notes 193–94 and accompanying text.

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

24. *See infra* notes 208–12 and accompanying text.

A. *The 1991 Act*1. *The Legislation Itself*

Labeled a “quota” bill, the 1991 Act faced fierce opposition, including a presidential veto of a prior version of the bill in 1990.²⁵ Two events in 1991 altered the political calculus for those opposing the 1991 Act, especially for moderate Republicans. Former Klansman David Duke ran, unsuccessfully but surprisingly well, to become the Governor of Louisiana, and the Supreme Court confirmed Clarence Thomas to replace Thurgood Marshall on the Supreme Court, but only after a bruising battle that touched on sexual harassment in the workplace.²⁶ Both supporters and opponents of the 1991 Act heralded it as an extension of plaintiffs’ rights in employment discrimination cases.²⁷ The Act deemed wrong five Supreme Court opinions²⁸—thereby “restoring” pro-plaintiff standards—and also granted plaintiffs new rights to compensatory and punitive damages²⁹ and jury trials.³⁰

25. See Clegg, *supra* note 2, at 1464–65; Peter M. Leibold et al., *Civil Rights Act of 1991: Race to the Finish—Civil Rights, Quotas, and Disparate Impact in 1991*, 45 RUTGERS L. REV. 1043, 1059 (1993).

26. See Clegg, *supra* note 2, at 1469–70.

27. See *supra* note 2.

28. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), *superseded by statute*, Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074, *as recognized in* *CBOCS W., Inc. v. Humphries*, 553 U.S. 442, 442 (2008); *Lorance v. AT&T Techs., Inc.*, 490 U.S. 900 (1989), *superseded by statute*, 105 Stat. at 1074, *as recognized in* *Landgraf v. USI Film Prods.*, 511 U.S. 244, 251 (1994); *Martin v. Wilks*, 490 U.S. 755 (1989), *superseded by statute*, 105 Stat. at 1074, *as recognized in* *Landgraf*, 511 U.S. at 251; *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), *superseded by statute*, 105 Stat. at 1074, *as recognized in* *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), *superseded by statute*, 105 Stat. at 1074, *as recognized in* *Landgraf*, 511 U.S. at 251. Perhaps the most notable case was *Wards Cove*, which greatly limited the ability of plaintiffs to prove a disparate impact claim. See Leibold et al., *supra* note 25, at 1056–58. The Act’s attempt to restrict *Wards Cove* led to the Act’s “quota bill” label. *Id.* at 1058 n.72.

29. The Act provides for compensatory and punitive damages in disparate treatment cases, but not disparate impact claims. 42 U.S.C. § 1981a(a)(1) (2006). The amounts are capped according to the number of employees, ranging from \$50,000 for employers with one-hundred employees or fewer to \$300,000 for employers with more than five-hundred employees. *Id.* § 1981a(b)(3). The caps do not apply to race discrimination claims filed under § 1981. Punitive damages were available for the first time—so long as the suit is not against a government, government agency, or political subdivision—if the defendant acted with malice or reckless indifference. See *id.* § 1981a(b)(1). The Act also encourages the use of alternative dispute resolution. See Pat K. Chew, *Arbitral and Judicial Proceedings: Indistinguishable Justice or Justice Denied?*, 46 WAKE FOREST L. REV. 185 (2011).

30. 42 U.S.C. § 1981a(c)(1) (“If a complaining party seeks compensatory or punitive damages under this section . . . any party may demand a trial by jury . . .”).

2. *The Number of Suits Filed*

Commentators have long noted the litigation “explosion” that followed the 1991 Act.³¹ By 1997, employment discrimination filings³² had tripled³³ to become the largest category of civil litigation, at 10% of the docket.³⁴ Two other points, however, are often missed and put this increase in needed context.

First, complaints about the growth in employment discrimination filings preceded the 1991 Act. The American Law Institute, for example, in 1989 bemoaned the “explosion” in such litigation.³⁵ Between 1970 and 1989, the number of suits increased from 336 to 7613, a 2166% increase.³⁶ Yet, that increase mainly occurred in the 1970s; the number of suits filed in the 1980s held fairly steady.³⁷

Second, the number of employment discrimination suits began declining in 1998, after peaking at 23,796 in 1997.³⁸ Meanwhile, the overall civil docket has held fairly steady since 1985.³⁹ Between 1997 and 2006, employment discrimination filings decreased 40%.⁴⁰ As of 2009, employment discrimination litigation accounted for fewer than 6% of the civil federal court docket⁴¹ and lagged behind personal-injury product-liability cases and habeas corpus petitions.⁴²

31. See, e.g., Clermont & Schwab, *supra* note 2, at 115–16.

32. By employment discrimination cases, I mean cases coded as “442” by the Administrative Office of the United States Courts. See *id.* at 104 n.4. Employment discrimination claims can be filed under six statutes. See *id.* Yet it is Title VII that continues to dominate claims of discrimination in the workplace. *Id.* at 117 (“Title VII cases constitute the bulk of [these] cases, nearly seventy percent.”).

33. More precisely, the number of filings increased 184% from 1991 to 1997. Nielsen et al., *supra* note 16, at 12; cf. Clermont & Schwab, *supra* note 2, at 115–17 (finding that case terminations rose from 8303 in 1991 to 23,722 in 1998, an increase of 186%, and fell to 18,859 in 2005, a decrease of 20.5%).

34. Clermont & Schwab, *supra* note 2, at 103.

35. Peter Siegelman & John J. Donohue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW & SOC’Y REV. 1133, 1163 (1990); accord *id.* (quoting the Equal Employment Advisory Council as complaining in 1990 of the “tremendous increase” in employment discrimination suits).

36. John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 STAN. L. REV. 983, 989 tbl.2 (1991). Similarly, the number of cases terminated increased from 423 in 1971 to 5289 in 1979. Clermont & Schwab, *supra* note 2, at 115 n.36.

37. See Clermont & Schwab, *supra* note 2, at 115 & n.36, 116.

38. See Nielsen et al., *supra* note 16, at 12; cf. Clermont & Schwab, *supra* note 2, at 117–19 (reporting a drop in terminations starting in 1999).

39. Clermont & Schwab, *supra* note 2, at 115.

40. Specifically, the filings declined from a high of 23,796 in 1997 to 14,353 in 2006. Nielsen et al., *supra* note 16, at 12; cf. Clermont & Schwab, *supra* note 2, at 117 (reporting a decline of 37% for federal employment discrimination case terminations between 1999 and 2007).

41. Clermont & Schwab, *supra* note 2, at 104.

42. *Id.*

By contrast, the number of EEOC charges held fairly steady through 2007⁴³ and then substantially increased in 2008 and remained high in 2009.⁴⁴ This suggests that the decreased federal litigation rate is not likely due to a decrease in perceived discrimination, but a decrease in workers and their lawyers seeking federal court intervention.⁴⁵ While the number of filings still exceeds that of 1990, the recent decline in filings suggests that the enthusiasm for federal court involvement is abating, even while employees continue to complain to the EEOC about discrimination.⁴⁶

B. Subsequent Changes

1. Post-1991 Legal Changes

Like these numbers, the law of employment discrimination is far from static. The 1991 Act was not Congress's only attempt at expanding plaintiffs' rights in the workplace. The previous year, Congress recognized disability as a protected status in the workplace with the passage of the Americans with Disabilities Act ("ADA"),⁴⁷ which also certainly contributed to the increase in employment discrimination filings. In addition, the Family and Medical Leave Act of 1993 ("FMLA") forbade for the first time discrimination against employees using protected family and medical leave.⁴⁸

Two years after Congress effectively rebuked several of the Supreme Court's employment discrimination opinions, the Court again made it more difficult to prove a disparate treatment claim in *St. Mary's Honor Center v. Hicks*.⁴⁹ The Court has since placed significant restrictions on disability claims.⁵⁰ More recently, in *Ricci*

43. See *id.* at 118 n.45 (examining EEOC filings between 1997 and 2007).

44. See U.S. EEOC, *Charge Statistics FY 1997 Through FY 2010*, U.S. EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Mar. 28, 2011) (showing 80,680 charges filed in 1997; 80,840 in 2001; 95,402 in 2008; and 93,277 in 2009).

45. See Clermont & Schwab, *supra* note 2, at 118–19; Nielsen et al., *supra* note 16, at 31–32.

46. In 1990, plaintiffs filed 8272 employment discrimination suits, compared to 14,036 in 2009. See ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS OF THE UNITED STATES COURTS 145 (2009), <http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness.aspx?doc=/uscourts/Statistics/JudicialBusiness/2009/appendices/C02ASep09.pdf> (reporting the number of suits filed in 2009); MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 2000, at 1 (2002), <http://bjs.ojp.usdoj.gov/content/pub/pdf/crcus00.pdf> (reporting the number of suits filed in 1990).

47. 42 U.S.C. § 12101 (2006).

48. Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified as amended in scattered sections of 2, 5, and 29 U.S.C.).

49. 509 U.S. 502, 519–20 (1993) (holding that the plaintiff still bears the burden of persuasion on the element of intent, even if the defendant's stated reason for the adverse employment action is found by the fact finder to be false).

50. See RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE*

v. DeStefano, the Supreme Court called into question the continued viability of disparate impact claims.⁵¹ Congress again “corrected” Supreme Court rulings in the Lilly Ledbetter Fair Pay Act of 2009.⁵²

Other Supreme Court opinions on federalism and pleading have also limited the rights of employment discrimination plaintiffs. The Court has restricted state employees from receiving compensatory damages when suing their employers under the Age Discrimination in Employment Act (“ADEA”)⁵³ and the ADA.⁵⁴ The Court has also increased the pleading burdens required to survive a motion to dismiss for all types of cases.⁵⁵ Preliminary results indicate that employment discrimination cases are particularly susceptible to these heightened pleading hurdles and are more likely to be dismissed before the discovery phase.⁵⁶

All of these changes make it impossible to pinpoint the 1991 Act as the particular agent of change. Many factors obviously contribute to the ebb and flow of employment discrimination litigation outcomes.⁵⁷ Yet, given the significance of the 1991 Act, its twentieth

AMERICANS WITH DISABILITIES ACT 201–12 (2005) (asserting that the Supreme Court has “dissed” Congress with its decisions to restrict the ADA).

51. *Ricci v. DeStefano*, 129 S. Ct. 2658, 2681 (2009) (holding that an employer is not entitled to disregard promotional tests for hiring purposes “solely based on the racial disparity in the results”).

52. Pub. L. No. 111-2, 123 Stat. 5; *cf.* *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 641–42 (2007) (rejecting the argument that in a disparate pay claim under Title VII the statute of limitations restarts with each inadequate paycheck), *superseded by statute*, 123 Stat. at 5.

53. *See Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 91 (2000) (holding that “Congress did not validly abrogate the States’ sovereign immunity to suits by private individuals” in the ADEA).

54. *Bd. of Trs. of the Univ. of Ala. v. Garrett*, 531 U.S. 356, 374 (2001) (holding that “in order to authorize private individuals to recover money damages against the States, there must be a pattern of discrimination by the States which violates the Fourteenth Amendment, and the remedy imposed by Congress must be congruent and proportional to the targeted violation”).

55. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009) (clarifying that *Bell Atlantic Corp. v. Twombly* applies to all cases); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545–46, 560–63 (2007) (retiring the *Conley v. Gibson* “no set of facts” language and adopting a “plausibility” requirement).

56. *See* Patricia W. Hatamayar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. UNIV. L. REV. 553, 556 (2010) (finding a significant increase in grants of motions to dismiss in employment discrimination cases after *Iqbal*); Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 187 & nn.70–71 (2009) (finding a slight increase in dismissal rates in employment discrimination opinions referencing *Twombly*).

57. Other nonlegal factors arguably affect the filings of employment discrimination cases as well. *See, e.g.*, John J. Donohue III & Peter Siegelman, *The Evolution of Employment Discrimination Law in the 1990s: A Preliminary Empirical Investigation*, in HANDBOOK OF EMPLOYMENT DISCRIMINATION RESEARCH: RIGHTS AND REALITIES 261, 273–78 (Laura Beth Nielsen & Robert L. Nelson eds., 2005) (examining the relationship between plaintiff win rates and the economy after the 1991 Act). *But see* Clermont & Schwab, *supra* note 2, at 120 (finding little recent evidence of the effect of unemployment rates on federal

anniversary is a good time to judge whether outcomes for plaintiffs are improving or getting worse.

C. Outcomes

The focus in this Subpart is whether plaintiffs have higher success rates than they did before 1991. Clear indications of better outcomes would be lower rates of losing on a pretrial motion (which are almost always filed by defendants) and higher win rates and award amounts at trial. Settlement rates, which are more difficult to interpret, are also examined here.

1. Pretrial Disposition

Pretrial disposition rates are about the same before and after the 1991 Act.⁵⁸ About 30% of employment discrimination plaintiffs have their cases terminated under either a motion to dismiss or motion for summary judgment.⁵⁹ These pretrial adjudication rates are quite similar to the rates for other types of cases.⁶⁰

Yet, employment discrimination plaintiffs *themselves* are much less likely to win a pretrial adjudication than are plaintiffs in cases outside of the employment discrimination context.⁶¹ That is, employment discrimination plaintiffs are more likely to lose on their own motion for summary judgment when compared to other types of plaintiffs.

While pretrial disposition rates have held fairly steady, with time more plaintiffs may lose on a motion to dismiss. From 2001 to 2003 the overall rate of pretrial judgments stayed about the same, but the percentage of dismissals increased, while summary judgments decreased.⁶² The heightened pleading requirements in

filings).

58. See NIELSEN ET AL., *supra* note 16, at 46; see also Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 58 & n.53 (2005) (finding that 14.5% of all employment discrimination cases in two district courts in New York were dismissed via summary judgment); Clermont & Schwab, *supra* note 2, at 122–23 (finding that between 1979 and 2006 the nontrial disposition rate for employment discrimination cases—mostly as a result of pretrial motions—was around 20%, which was about the same rate found for other types of cases); Nielsen et al., *supra* note 16, at 9, 17 (finding a 19% summary judgment rate in 1672 cases filed between 1988 and 2003).

59. See NIELSEN ET AL., *supra* note 16, at 2, 29 (finding, in an analysis of 1788 cases filed from 1987 to 2003, an average of 18% of cases lost on a motion to dismiss and 16% on a motion for summary judgment).

60. See Clermont & Schwab, *supra* note 2, at 123 display 9.

61. *Id.* at 128 (“Over the period of 1979–2006 in federal court, employment discrimination plaintiffs have won 3.59% of pretrial adjudications, while other plaintiffs have won 21.05% of pretrial adjudications.”); see also *id.* at 128 display 14 (demonstrating the disparity in pretrial adjudications from 1979 to 2006).

62. Specifically, the dismissal rate increased to about 20% in 2003, and the summary judgment rate decreased to about 10% in 2003. See NIELSEN ET AL.,

Twombly and *Iqbal*, decided in 2007⁶³ and 2009,⁶⁴ respectively, may further increase the rate of dismissals in the years to come.⁶⁵

In sum, today pretrial adjudication rates are about the same as they were before the 1991 Act. Yet, the evidence indicates that plaintiffs may be more likely to lose a motion to dismiss in the future. Whether an increase in dismissals due to *Twombly* and *Iqbal* will correspondingly mean a decreased loss rate on motions for summary judgment—so that the overall pretrial adjudication rate stays about the same—is unknown at this time. Regardless, an increase in dismissals likely means fewer and lower settlements for plaintiffs. Professor Minna J. Kotkin has found that settlement rates and amounts increase after a defendant loses a pretrial motion.⁶⁶

2. Trial Rates

Before the 1991 Act, juries were available in age discrimination claims under the ADEA and for intentional race discrimination claims filed under § 1981.⁶⁷ The 1991 Act made juries available for all claims brought under Title VII,⁶⁸ which is the most common

supra note 16, at 46.

63. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

64. *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009).

65. Only in 2009 was it clear that the enhanced pleading obligations applied not just to complex cases, but to all civil cases, including employment discrimination litigation. *See id.* at 1953. Some commentators have already found an increase in dismissal rates since the implementation of the heightened pleading standards. *See supra* note 56. Others argue, however, that the standard in *Iqbal* is not significantly different from prior standards. *See* Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 878 (2009) (arguing that *Twombly* simply asks that plaintiffs “describe a state of affairs that differs significantly from a baseline of normality and supports a probability of wrongdoing greater than the background probability for situations of the same general type”); Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1316, 1319 (2010) (concluding that “the plausibility aspect of *Twombly* and *Iqbal* makes the pleading standard *more* forgiving, not less,” as only conclusory claims must be plausible, while nonconclusory claims “by definition [exceed] the threshold of *plausibly* suggesting an entitlement to relief”). The evidence in this respect is obviously preliminary given the recent nature of these cases.

66. Minna J. Kotkin, *Outing Outcomes: An Empirical Study of Confidential Employment Discrimination Settlements*, 64 WASH. & LEE L. REV. 111, 149 (2007) (“Median settlements are more than double those of cases resolved before a motion is made.”); *accord* Nielsen et al., *supra* note 16, at 15–17 (reporting that settlement amounts increase the longer the case stays alive); *see infra* Part I.C.5. (analyzing settlements and Professor Kotkin’s article in more detail).

67. *See Lorillard v. Pons*, 434 U.S. 575, 583–85 (1978) (recognizing the right to jury trial under the ADEA); George Rutherglen, *From Race to Age: The Expanding Scope of Employment Discrimination Law*, 24 J. LEGAL STUD. 491, 496 (1995) (noting that jury trials “have long been available for claims of racial discrimination under section 1981”).

68. 42 U.S.C. § 1981a(c)(1) (2006).

statute for employment discrimination claims, by making compensatory damages available under Title VII for disparate treatment claims.⁶⁹ This perhaps had the largest impact on sex discrimination plaintiffs, who before had no access to jury trials.⁷⁰

Trial rates are certainly down since the 1991 Act. Overall, the percentage of trials (both jury and bench) has declined from 18% in 1979 to 9% in 1990 and to 3% in 2006.⁷¹ This decline is not unique to employment discrimination cases; federal cases in general are less likely to be decided by trial.⁷² The number of employment discrimination *jury* trials has, however, increased substantially.⁷³ Correspondingly, the number of bench trials has declined.⁷⁴

Interestingly, employment discrimination cases are more likely to reach trial than the rest of the federal civil docket.⁷⁵ Until 2003, employment cases were more likely to result in a bench trial than nonemployment cases.⁷⁶ Now the rate is fairly similar, with nonemployment cases slightly more likely to be tried in front of a judge.⁷⁷ Juries, however, are much more likely to resolve employment cases than nonemployment cases.⁷⁸ That began in 1994 and continues today.⁷⁹ In sum, while most employment discrimination cases are not resolved via trial, their jury-trial rates are higher as compared to other cases.

69. *Id.* § 1981a(a)(1).

70. *See, e.g.,* Landgraf v. USI Film Prods., 511 U.S. 244, 249–50, 286 (1994) (refusing to extend the jury-trial right to sex discrimination cases filed before the 1991 Act).

71. TRACEY KYCKELHAHN & THOMAS H. COHEN, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990–2006, at 6 tbl.5 (2008), <http://bjs.ojp.usdoj.gov/content/pub/pdf/crcusdc06.pdf> (reporting a trial rate of 8.7% in 1990 and 3.2% in 2006); Clermont & Schwab, *supra* note 2, at 123 display 9 (showing a trial rate of 18.2% in 1979 and 2.8% in 2006); *cf.* Nielsen & Nelson, *supra* note 2, at 694 tbl.2.B (finding a trial rate of 8.7% in 1990 and 3.8% in 2001).

72. *See* Clermont & Schwab, *supra* note 2, at 123 display 9 (showing that the trial rate for all other civil cases dropped from 6.2% in 1979 to 1.0% in 2006). Similarly, employment cases have higher trial rates as compared to other types of civil rights claims, but not by much. *See* KYCKELHAHN & COHEN, *supra* note 71, at 6 tbl.5.

73. Specifically, the number of jury trials increased from 254 in 1990 to 633 in 2001. Nielsen & Nelson, *supra* note 2, at 698. *But see* Clermont & Schwab, *supra* note 2, at 125 display 12 (demonstrating a peak of 1020 jury trials in 1997, which dipped to 590 jury trials in 2005).

74. Specifically, the number of bench trials decreased from 410 in 1990 to 111 in 2001. Nielsen & Nelson, *supra* note 2, at 698; *cf.* Clermont & Schwab, *supra* note 2, at 125 display 11 (showing a peak of 1034 bench trials in 1984, which fell to 71 in 2005).

75. *See* Clermont & Schwab, *supra* note 2, at 123 display 9.

76. *See id.* at 125 display 11.

77. *See id.*

78. *See id.* at 126 display 13.

79. *See id.*

3. Trial Disposition Rates

Win rates for plaintiffs who reach trial are actually higher today than before 1991. From 1978 to 1985, plaintiffs' success rate at trial was 22%.⁸⁰ By 1990, the win rate reached almost 24%.⁸¹ The win rate was nearly 36% in 1998,⁸² and this increased to just over 38% in 2001.⁸³ Other types of plaintiffs fare significantly better at trial, but the gap has narrowed considerably since 1997.⁸⁴

The improved win rate is very likely due both to the growth in the number of jury trials and the increase in the win rate of bench trials. Plaintiffs' win rates have always been higher when a jury decided the case, and jury-trial win rates have held fairly steady. From 1978 to 1985, juries found in favor of plaintiffs at a rate of almost 43%.⁸⁵ The jury win rates in 1990 and 2001 were similarly high and remained consistent, at 41%.⁸⁶ The bench-trial win rate, however, started much lower, at 16% in 1990, but increased to 33% in 2001.⁸⁷ While the bench-trial win rate has declined a little since 2001, it is still higher than it was in 1990.⁸⁸

The reasons for the difference in jury and judge outcomes in employment discrimination cases have long been disputed. Some contend that a case-selection effect causes the disparities rather than anything particular to judges or juries.⁸⁹ Others argue that

80. Theodore Eisenberg, *Litigation Models and Trial Outcomes in Civil Rights and Prisoner Cases*, 77 GEO. L.J. 1567, 1578 (1989); cf. Clermont & Schwab, *supra* note 2, at 129 display 15 (noting win rates in 1985 of nearly 25% for employment discrimination plaintiffs and nearly 40% for other civil plaintiffs). Recently, the gap in win rates between employment cases and other cases has decreased significantly. See *id.* (showing in 2006 a win rate in employment discrimination cases of 34.6% compared to a win rate in other cases of 40.7%).

81. MARIKA F.X. LITRAS, U.S. DEP'T OF JUSTICE, CIVIL RIGHTS COMPLAINTS IN U.S. DISTRICT COURTS, 1990-98, at 9 tbl.9 (2000) (showing that in 1990 the win rate was 23.8%).

82. *Id.*

83. Nielsen & Nelson, *supra* note 2, at 697 tbl.3.A. The overall win rate for employment discrimination cases between 2000 and 2006 was 36.7%. KYCKELHAHN & COHEN, *supra* note 71, at 7 tbl.7.

84. Specifically, nonemployment plaintiffs won 40.7% of their cases in 2006, compared to 34.6% for employment plaintiffs. Clermont & Schwab, *supra* note 2, at 129 display 15. Other types of plaintiffs have similar win rates before both judges and juries. See *id.* at 130 display 16. Employment discrimination plaintiffs have lower win rates than do other plaintiffs when comparing judge and jury trials separately. See *id.*

85. See Eisenberg, *supra* note 80, at 1591 tbl.II; cf. *id.* (finding jury-trial win rates for plaintiffs to be higher in all regions of the United States).

86. In 1990 the jury win rate was 40.9% and was relatively the same in 2001, at 40.6%. Nielsen & Nelson, *supra* note 2, at 699 tbl.4.A.

87. See *id.*; see also Eisenberg, *supra* note 80, at 1591 tbl.II (finding a plaintiff bench-trial win rate of 19% between 1978 and 1985).

88. See Clermont & Schwab, *supra* note 2, at 130 display 16 (showing a slight decline in bench-trial win rates through 2005, starting in 2001).

89. See *id.* at 130-31 ("Certain groups of plaintiffs might do far worse

judge bias is at play.⁹⁰

4. Trial Awards

The 1991 Act made additional damages available for Title VII litigation,⁹¹ so one would expect award amounts to have increased, even apart from inflation rates. Yet, the one study making this comparison found a *decrease* in awards between 1990 and 2001.⁹² This study of outcomes of all employment discrimination cases disposed of by trial between 1990 and 2001 found a median monetary award of \$248,500 in 1990, but only \$130,500 in 2001.⁹³ The difference could be due to the miscoding of data,⁹⁴ but the significant decline is still troubling and hints at the need for research and analysis into why the awards are declining.⁹⁵

Juries continue to award more than judges, but the difference is decreasing. For example, the median jury award in 1990 was \$440,000, but in 2001 dropped to \$141,500.⁹⁶ The median bench award has stayed fairly constant. In 1990 the median bench award was \$114,000, and in 2001 it was \$112,500.⁹⁷ Other studies of civil

before judges or juries, but the reason most often lies in prevailing misperceptions about judges or juries that prompt lawyers to put before each fact finder different kinds of cases.”); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 443 (2004) (exploring why judges and juries decide different types of employment discrimination cases); Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 138–40 (2002) (defining and exploring selection effect as it relates to all types of cases and concluding that differences in jury and judge outcomes in most cases are due to case-selection effects).

90. See Oppenheimer, *supra* note 16, at 558–60 (discussing the way that judicial bias can affect employment discrimination case outcomes); Michael Selmi, *Why Are Employment Discrimination Cases So Hard To Win?*, 61 LA. L. REV. 555, 561 (2001) (“The primary reason discrimination cases are so hard to prove has to do with the bias courts bring to their analyses.”).

91. See *supra* note 29 and accompanying text.

92. See Nielsen & Nelson, *supra* note 2, at 697 tbl.3.B.

93. *Id.*; cf. LITRAS, *supra* note 81, at 9 tbl.9 (finding in employment discrimination cases a median award of \$450,000 in 1990 and \$137,000 in 1998). Another study for the years 1979 to 2000 found an increase over time. See Clermont & Schwab, *supra* note 89, at 458 app. (relying on data from the Administrative Office of the U.S. Courts for the years 1979 to 2000 to determine that the mean award before 1992 was \$626,358 and the mean award after 1991 was \$889,182).

94. See Donohue & Siegelman, *supra* note 57, at 278 n.11 (finding coding errors with award amounts); Theodore Eisenberg & Margo Schlanger, *The Reliability of the Administrative Office of the U.S. Courts Database: An Initial Empirical Analysis*, 78 NOTRE DAME L. REV. 1455, 1489–90 (2003) (noting the unreliability of the recording of damage awards).

95. See *infra* notes 143–46 and accompanying text (discussing the reasons for differences in jury award amounts, unrelated to the underlying merits claims).

96. See Nielsen & Nelson, *supra* note 2, at 700 tbl.4.B.

97. See *id.* A study of awards in all employment discrimination trials from

rights cases in general consistently conclude that juries award higher damages than do judges.⁹⁸

5. Settlement

A more difficult question is how to treat settlement, particularly given the lack of access to settlement amount data. Settlement is the most common disposition for employment discrimination cases.⁹⁹ I found little difference in settlement rates before and after the 1991 Act. In 1990, 35% of cases settled, and in 1998 that rate increased a little, to 39%.¹⁰⁰ By 2001 the rate had increased to nearly 43%,¹⁰¹ but has declined since then.¹⁰²

Employment discrimination cases do not settle more frequently than other cases,¹⁰³ but they are less likely to be settled early in the proceedings compared to other types of cases.¹⁰⁴ This means that employment plaintiffs must invest more time and money into their lawsuits before settling¹⁰⁵—thereby increasing the cost of litigation to plaintiffs—but possibly gaining a higher award through the effort.¹⁰⁶

Higher settlement amounts, even if settlement disposition rates remain the same, would very likely indicate better outcomes for plaintiffs, but settlement amounts are difficult to obtain. It is also hard to interpret overall settlement rates, detached from any information about merits or settlement amounts.¹⁰⁷ The little information available indicates that settlements are likely to be in the five-figure range, both before and after the 1991 Act.¹⁰⁸ The

2000 to 2006 found a median of \$158,460. See KYCKELHAHN & COHEN, *supra* note 71, at 7 tbl.7.

98. See KYCKELHAHN & COHEN, *supra* note 71, at 7 tbl.7 (finding that the median award from 2000 to 2006 for bench trials was \$71,500, compared to \$146,125 for jury trials); LITRAS, *supra* note 81, at 8 tbl.8 (showing higher jury awards than bench-trial awards from 1990 to 1998).

99. See Nielsen & Nelson, *supra* note 2, 693–95.

100. See LITRAS, *supra* note 81, at 6; Nielsen & Nelson, *supra* note 2, at 694 tbl.2.A.

101. See Nielsen & Nelson, *supra* note 2, at 694 tbl.2.A.

102. See NIELSEN ET AL., *supra* note 16, at 46 (“Settlements increased steadily between 1987 and 2000, before decreasing somewhat sharply between 2001–03.”).

103. See Clermont & Schwab, *supra* note 2, at 122.

104. See *id.* at 122–23.

105. See *id.*

106. See *supra* note 66 and accompanying text.

107. Professor Kotkin was able to compare settlement amounts with claimed lost wages to ascertain how successful plaintiffs were in their settlements. See Kotkin, *supra* note 66, at 139. By using this approach, she was able to demonstrate that the mean settlement for most types of claims was at least 50% of the plaintiffs’ lost wages. See *id.* at 154 fig.18.

108. Looking at 455 settlements in employment discrimination cases, Professor Kotkin found the mean settlement to be \$54,651 and the median to be about \$30,000. *Id.* at 144. According to an analysis of seventy-five cases filed

evidence comparing pre-1991 outcomes with post-1991 outcomes, however, is currently too thin a data set from which to draw any firm conclusions. The lack of increase in settlement amounts—despite the increased availability of damages in the 1991 Act¹⁰⁹ and the rate of inflation—suggests, however, that plaintiffs are not gaining an advantage in settlements after the 1991 Act.

6. Summary

In sum, employment discrimination cases are being filed at a greater rate since 1990, but filings have been declining since 1998.¹¹⁰ By comparison, the overall civil docket has held fairly steady, while EEOC filings are recently up.¹¹¹ Pretrial dispositions in favor of defendants have remained fairly constant, but an increase in dismissals under Rule 12(b)(6) has occurred recently and that rate of dismissal may continue to grow.¹¹² Defendants win pretrial motions at about the same rate in employment discrimination cases as they do in other civil cases, but plaintiffs in employment discrimination litigation are much more likely to lose their own pretrial motions as compared to other plaintiffs.¹¹³ As with the overall federal docket, fewer employment discrimination cases are decided by trial, but more are decided by a jury than before the 1991 Act, and the jury-trial rate today is higher for employment discrimination cases than for other cases.¹¹⁴ Jury win rates have remained fairly constant after the 1991 Act and are lower compared to other cases.¹¹⁵ Bench win rates are up since the 1991 Act, but are still lower than rates from other cases.¹¹⁶ Trial award amounts are down, but more research is needed to determine why that is the case.¹¹⁷ Lastly, settlement rates and amounts appear to be about the same as they were prior to the Act, but the research here is relatively sparse.¹¹⁸

II. JURY OUTCOME STUDY

This Part presents my Jury Outcome Study. Only a small

between 1987 and 2001, the median settlement was \$30,000, and the seventy-fifth percentile was \$92,458. Nielsen et al., *supra* note 16, at 17. Amounts rose for median awards of late settlements, which only occurred in fourteen cases. *See id.* (finding that in late settlements, meaning that the plaintiff survived a motion for summary judgment, “the median award rises to \$40,000 and the 75th percentile to \$110,000”).

109. *See supra* note 29 and accompanying text.

110. *See supra* Part I.A.2.

111. *See supra* notes 39, 44 and accompanying text.

112. *See supra* Part I.C.1.

113. *See supra* Part I.C.1.

114. *See supra* Part I.C.2.

115. *See supra* Part I.C.3.

116. *See supra* Part I.C.3.

117. *See supra* Part I.C.4.

118. *See supra* Part I.C.5.

percentage of employment cases reach juries—less than 3% (a higher rate than in other cases).¹¹⁹ Yet, once before a jury, plaintiffs have their highest chance of success.¹²⁰ We know surprisingly little, however, about how juries treat particular types of claims and plaintiffs.¹²¹ This Jury Outcome Study specifically identifies the plaintiff's claim, instead of the usual methodology, which analyzes employment discrimination claims as a whole.¹²² This Part starts with a description of the Jury Outcome Study and then analyzes the resulting data. Here, I reveal the low chances of success for some plaintiffs, particularly as compared to their peers.

A. Methodology

To find jury trials, my research assistant and I searched online databases maintained by the respective courts¹²³ to find the case summary sheet for all cases in seven districts (those districts for the cities of Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco)¹²⁴ filed between January 1, 2005, and December 31, 2007, with a case code of 442 (the code for employment discrimination filings)¹²⁵ with at least an eighteen-month disposition time.¹²⁶ When the case-summary sheet indicated that a jury or bench trial was held, the case was analyzed. The Study only included employment discrimination claims actually decided via trial. Claims disposed by pretrial motions, pretrial settlements, or post-trial motions were excluded. Using docket sheets and court documents, I assessed who won, and on what claims. Due to the Study's focus on trial outcomes, I did not analyze

119. See *supra* notes 71–72 and accompanying text.

120. See *supra* Part I.C.3.

121. A few studies have examined the issue. See, e.g., sources cited *supra* note 16.

122. See, e.g., Clermont & Schwab, *supra* note 2, at 117 n.40 (noting this limit on their data); Donohue & Siegelman, *supra* note 57 (analyzing employment discrimination litigation as a whole); Nielsen & Nelson, *supra* note 2, at 693–97 (examining various procedural outcomes for all employment discrimination cases).

123. That is, the district courts that participated in PACER (Public Access to Court Electronic Records), which has a Case Management/Electronic Case Filing system. See Wendy Parker, *Lessons in Losing: Race Discrimination in Employment*, 81 NOTRE DAME L. REV. 889, 904 nn.68–69 (2006) (describing PACER and its case-search method).

124. Others have used these seven districts in other empirical research on employment discrimination cases. These seven districts in the past have included approximately 20% of all filings, but that number may have declined with the changes in New Orleans after Hurricane Katrina. See Siegelman & Donohue, *supra* note 35, at 1143 tbl.1; Nielsen et al., *supra* note 16, at 9.

125. See Clermont & Schwab, *supra* note 2, at 104 n.4. Starting in 2005, the Administrative Office of the U.S. Court gave disability claims a different case code, see *id.*, but I found disability claims still coded as 442.

126. Disposition time for cases that go to trial typically exceeds eighteen months. See Clermont & Eisenberg, *supra* note 89, at 131.

subsequent appeals (although others have demonstrated that plaintiffs are likely to lose here as well)¹²⁷ or post-trial settlements.

Lastly, I excluded cases in which the plaintiff was pro se at the time of trial. This study evaluates win rates, and pro se plaintiffs are notorious for their low win rates.¹²⁸ With these exclusions, the Jury Study examined 102 jury trials. I also collected data on the bench trials meeting the same criteria, but only found ten such cases.

A major limitation on a study like this one is that the analysis of outcomes is detached from any analysis of a claim's merits.¹²⁹ By excluding pro se cases, I likely excluded the cases with too little merit for a lawyer to accept and cases litigated with too little skill to be successful. Thus, the Study only includes claims that a lawyer deemed had some merit and were then litigated with some degree of lawyerly skill.

Other than this exclusion, it is quite difficult to assess the merits of employment discrimination complaints. The defendant's subjective intent and plaintiff's work skills are usually key issues and often involve conflicting stories, which do not lend themselves to objective assessments.¹³⁰ After all, the judge has likely ruled that reasonable jurors could disagree about the facts, thus necessitating an actual trial. As a result, the data below cannot be used to assess the quality of the underlying claims.

Yet, the data is useful for another analysis. I use the data instead to determine whether some plaintiffs fare worse than others. I proceed with the presumption that lawyers have similar incentives and skills to file or defend *all* types of employment discrimination suits.¹³¹ The case selection effects should be about the same for all

127. For example, plaintiffs who win at trial are reversed on appeal about 42% of the time, while defendants who win trials are reversed on appeal only about 7% of the time. See Kevin M. Clermont et al., *How Employment-Discrimination Plaintiffs Fare in the Federal Courts of Appeals*, 7 EMP. RTS. & EMP. POL'Y J. 547, 552 (2003); see also Parker, *supra* note 123, at 932 n.200 (summarizing the studies demonstrating the strong likelihood that employment discrimination plaintiffs who win at the trial-court level lose on appeal).

128. See NIELSEN ET AL., *supra* note 16, at 36; Parker, *supra* note 123, at 915–16.

129. Professor Kotkin was able to overcome this limitation in her study of settlements because she had access to back-pay information for over half of her data set. See Kotkin, *supra* note 66, at 137, 151. Finding that settlements were closely linked to the amount of back pay, with some discounts in the settlement amount, she concluded that settlements afford most plaintiffs a “reasonable degree” of success. See *id.* at 117. Few settlements were so low as to demonstrate that the settlements were of nuisance value, and few settlements were so high as to reflect a windfall to the plaintiff. See *id.*

130. See Nielsen et al., *supra* note 16, at 10 & n.2.

131. See Parker, *supra* note 123, at 921–26 (examining the motivation to settle employment discrimination cases, without finding any differences for different types of employment discrimination suits); Selmi, *supra* note 90, at 569–71 (analyzing the incentives for lawyers to file employment discrimination

types of employment plaintiffs, with similar stakes and skills on both sides. Yet, we see in the Jury Outcome Study that some plaintiffs fare worse than other plaintiffs. These differences in outcomes suggest that something other than the usual reasons for low outcomes is at play.¹³²

B. The Outcomes

Of the 102 jury trials, most were race/national origin claims (63%), followed by gender claims (26%).¹³³ The Appendix to this Article details the claims asserted in the 102 jury trials.¹³⁴ The data not in the Appendix can be accessed online.¹³⁵ The following chart summarizes the win rates for the most common types of discrimination by the type of discrimination alleged.

cases, which apply equally to all types of employment discrimination claims).

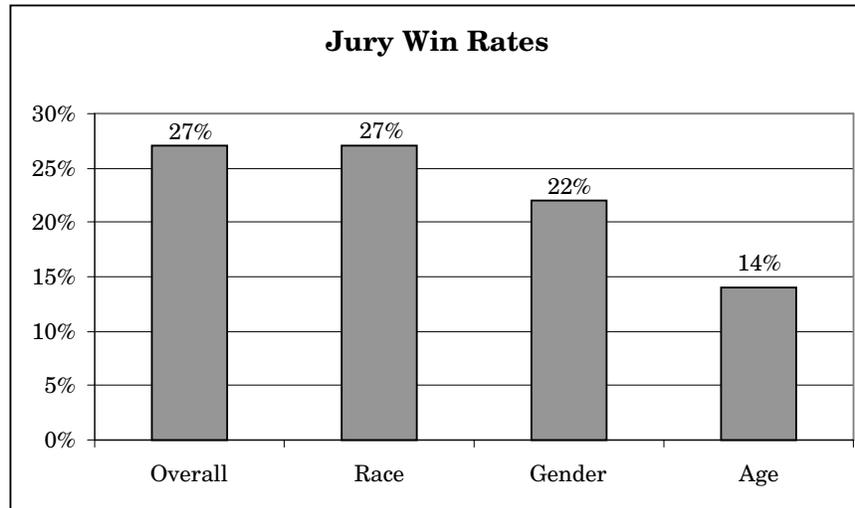
132. See Oppenheimer, *supra* note 16, at 553–56 (arguing that the low win rates for employment discrimination cases cannot be explained by defendants being repeat players, defendants having more at stake, or defendants having more resources because sexual harassment claims—claims in which the most is at stake—have higher win rates than do other types of employment discrimination claims); Selmi, *supra* note 90, at 569 (“[T]here is very little reason to believe that employment discrimination cases are any less meritorious as a class than other types of civil claims.”).

133. A first question is whether certain types of claims are more likely to make it to trial than other types of claims. I did not gather information on all the employment discrimination claims filed in the seven districts in the three years studied to determine the answer to that question. Making a rough comparison between what others have found for 2002 filings for the seven districts and the years studied here, 2005–2007, it appears that race cases are much more likely to reach the jury-trial stage than other types of claims. About 40% of cases filed in 2002 concerned race discrimination, see Nielsen et al., *supra* note 16, at 42 fig.2, but 63% of the jury trials in this study had race claims, see *infra* Appendix. This comparison suggests that race cases are more likely to survive pretrial motions and less likely to settle. But see Nielsen et al., *supra* note 16, at 20 (“Compared to whites and other people of color, African-American plaintiffs are significantly more likely to have their cases dismissed or lose on all claims at summary judgment and they are less likely to receive any kind of settlement and to prevail at trial, if the case goes that far.”). Yet, the difference may be due to the greater percentage of race claims filed in the seven districts in 2007 than in 2002.

134. Because many plaintiffs went to trial on more than one type of claim, the number of claims exceeds 102.

135. See Wendy Parker, *Technical Appendix: Juries, Race, and Gender: A Story of Today’s Inequality*, WAKE FOREST SCH. L., <http://users.wfu.edu/parkerwm/juries/> (last visited Mar. 28, 2011). This Technical Appendix includes all of the data for this Article in Excel format.

FIGURE 1



Overall, the plaintiff's jury-trial *win* rate, 27%, is lower than what others have found for employment discrimination litigation (about 40%, which includes pro se plaintiffs).¹³⁶ Perhaps jury win rates are declining. This is a study of more recent cases than the earlier studies. Or maybe juries in these large metropolitan areas have lower win rates than the nation as a whole, which was the subject of some of the earlier studies.

Looking at broad categories of status, religion claims had the lowest win rate at 0% and FMLA claims had the highest win rate at 50%.¹³⁷ Yet, only two religion claims and two FMLA claims went to a jury, so it is hard to draw much from these outcomes.¹³⁸ Gender claims had a 22% win rate, and race and national origin claims had a win rate of 27%.¹³⁹

The mean plaintiff award for all 102 jury trials was \$493,080.¹⁴⁰ Gender claims had a comparatively low mean award at \$229,884, while race and national origin claims had a mean award of \$244,347.¹⁴¹ Age and disability claims had seven-figure mean

136. See *supra* note 86 and accompanying text.

137. See *infra* Appendix.

138. Other studies that differentiated claims based on statutes also found a high win rate for FMLA claims. See Clermont & Schwab, *supra* note 2, at 117 display 6 (showing the highest win rate for FMLA cases); Clermont & Schwab, *supra* note 89, at 445 tbl.2 (finding a 50% jury-trial win rate for ten FMLA trials between 1998 and 2001).

139. See *infra* Appendix.

140. See *infra* Appendix. Some of the damage awards were reduced because of statutory caps. See *supra* note 29 (discussing the statutory caps).

141. See *infra* Appendix.

awards of \$1,917,872 and \$1,458,667, respectively.¹⁴²

The disparities in damages could be due to a number of factors—the earning capacity of the plaintiff,¹⁴³ the size of the employer given the statutory caps under Title VII,¹⁴⁴ the lack of economically based adverse employment action in some sexual harassment claims,¹⁴⁵ and the liquidated damages available under the ADEA.¹⁴⁶ Thus, it is difficult to draw any conclusions from these differences in damage awards. The variances might very likely be due to the different types of plaintiffs and claims before the jury and to underlying damage principles, rather than any bias or preference.

Interestingly, when looking at all trials, both bench and jury, it was slightly more likely that the plaintiff was ordered to pay the defendant its costs than it was for the plaintiff to recover any damages. In the 112 trials (this includes ten bench trials and 102 jury trials) with a represented plaintiff, plaintiffs won twenty-nine cases, with damages awarded in all twenty-nine cases.¹⁴⁷ Yet, in thirty-one cases, the plaintiffs lost at trial, and were ordered to pay the defendants' costs.¹⁴⁸ Granted, the amounts of the defendants' costs were much lower than the plaintiffs' awards.¹⁴⁹ The mean amount awarded to the defendant for costs was \$7678.¹⁵⁰ It is also entirely possible that the plaintiff never paid the defendant's costs—with either the parties settling that claim, perhaps in exchange for the plaintiff not pursuing an appeal, or with the defendant not pursuing payment. Regardless, this suggests a risk for plaintiffs in taking their claims to trial.

Certain types of plaintiffs outperformed other types within the same category.¹⁵¹ For example, women were much more likely to win their claims of gender discrimination than men.¹⁵² Women won 27% of their jury trials, while men won 0%.¹⁵³

In the category of discrimination based on race and national

142. *See infra* Appendix.

143. This would increase the amount of back pay and front pay—both significant categories of relief.

144. *See supra* note 29 (discussing the statutory caps).

145. *See* Kotkin, *supra* note 66, at 137.

146. *See* 29 U.S.C. § 626(b) (2006) (providing liquidated damages in the amount of back pay for willful age discrimination).

147. Parker, *supra* note 135.

148. *Id.*

149. *Id.*

150. *Id.*

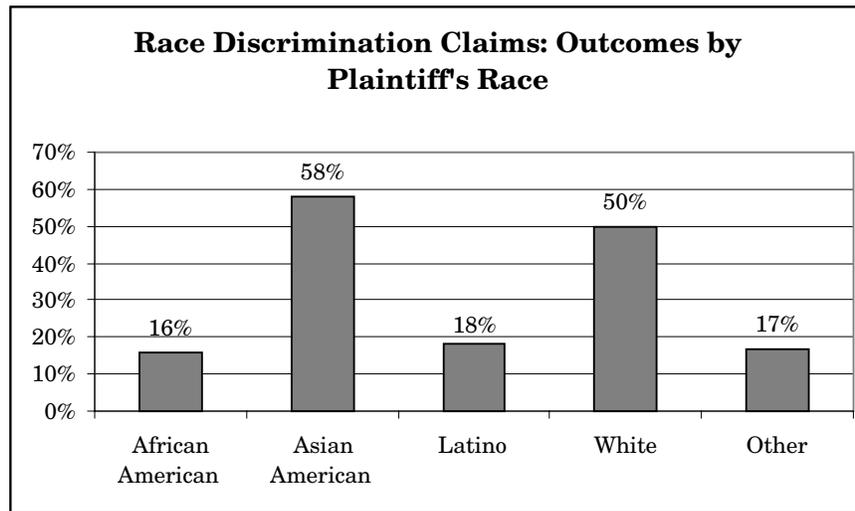
151. Unfortunately, the data set was too small to do any meaningful analysis of the intersectionality of plaintiffs' status.

152. Others have found that sexual harassment claims fare much better than sexual discrimination claims, *see, e.g.*, Berger et al., *supra* note 58, at 60; Oppenheimer, *supra* note 16, at 535, but in this Study most cases alleging sex discrimination included both types of claims. Thus, a comparison of sex discrimination and sexual harassment outcomes was not possible here.

153. *See infra* Appendix.

origin, the overall 27% win rate was inflated by the high win rate of whites (50%, n=4) and Asian Americans (58%, n=12).¹⁵⁴ Those claiming discrimination based on their status as African American or Latino, however, were much less likely to win, with respective win rates of 16% (n=31) and 18% (n=11).¹⁵⁵ Latinos also had by far the lowest mean plaintiff award, at \$55,887.¹⁵⁶ African Americans, on the other hand, had the highest mean award in the race discrimination category, at \$347,482.¹⁵⁷

FIGURE 2



The meaning of these disparate outcomes is the subject of the next Part.

III. INEQUALITY AND JURIES

This Part explores likely meanings of the disparate jury outcomes experienced by African-American and Latino plaintiffs claiming race discrimination. It begins by examining whether this outcome is consistent with other studies. Few studies disaggregate employment discrimination claims by type of discrimination or plaintiff.¹⁵⁸ Those that do demonstrate that African-American plaintiffs are more likely to lose than other plaintiffs¹⁵⁹—just as this

154. *See infra* Appendix.

155. *See infra* Appendix.

156. *See infra* Appendix.

157. *See infra* Appendix.

158. Administrative Office data, for example, only provides statutory breakdowns of the 442 category of cases. *See* Clermont & Schwab, *supra* note 2, at 104 n.4.

159. *See e.g.*, Nielsen et al., *supra* note 16, at 20.

Study found for African-American plaintiffs claiming race discrimination.¹⁶⁰ I then explore what scholars studying jury behavior would predict. Social psychologists often find evidence of racial and gender bias in juries, particularly in the criminal arena.¹⁶¹ These biases may partly explain the results in the Jury Outcome Study. Before assigning the sole responsibility for the disparity on juror bias, however, more information about the racial composition of the juries themselves is needed, particularly given the unanimity requirement for juries, the possibility of diverse juries, and the gaps in the social science research.

A. *Other Studies*

Most studies of employment discrimination suits examine such litigation as a whole.¹⁶² The few studies that disaggregate the data by type of claim and plaintiff, however, conclude that plaintiffs do not fare equally in their employment discrimination suits.¹⁶³

A study by the American Bar Foundation (“ABF”) examined a random sampling of 1672 employment discrimination suits filed between 1988 and 2003 in the seven districts studied herein.¹⁶⁴ That study concluded that African-American plaintiffs claiming any type of discrimination were more likely to lose at all stages of litigation than other employment discrimination plaintiffs.¹⁶⁵ Specifically, they were more likely to have their cases dismissed or lose on summary judgment, and less likely to settle or prevail at trial.¹⁶⁶

By comparison, female plaintiffs claiming any type of discrimination fared much better than other employment discrimination plaintiffs. Their claims were less likely to be dismissed or denied on summary judgment than male plaintiffs, and more likely to settle or prevail at trial.¹⁶⁷ Like the Jury Outcome Study, the ABF study found that “men filing Title VII sex claims fare worse than women, but that whites filing race claims do somewhat better than African Americans.”¹⁶⁸

160. *See supra* Table 2. I found no study discussing outcomes for Latinos claiming employment discrimination.

161. *See, e.g.*, Helen Boritch, *Gender and Criminal Court Outcomes: An Historical Analysis*, 30 *CRIMINOLOGY* 293 (1992) (analyzing gender differences in criminal court outcomes from 1871 to 1920); Justin D. Levinson & Danielle Young, *Different Shades of Bias: Skin Tone, Implicit Racial Bias, and Judgments of Ambiguous Evidence*, 112 *W. VA. L. REV.* 307 (2010) (examining how racism in jurors can be triggered).

162. *See sources cited supra* note 122.

163. *See sources cited supra* note 16.

164. *See Nielsen et al., supra* note 16, at 9.

165. *Id.* at 20.

166. *Id.* Some of the differences were due to lack of legal representation. *See id.* at 21–22, 26.

167. *See id.* at 20–21.

168. *See id.* at 28; *supra* notes 151–57 and accompanying text (finding that women fare better than men when claiming sex discrimination and that whites

Professor David Benjamin Oppenheimer examined California jury verdicts in 272 employment discrimination cases from 1998 to 1999 and was able to disaggregate the data and examine intersectionality of claims.¹⁶⁹ Overall, plaintiffs claiming race discrimination were more likely to lose their cases than were employment discrimination plaintiffs as a whole.¹⁷⁰ As the Jury Outcome Study revealed, white plaintiffs fared significantly better than nonwhite plaintiffs when claiming race discrimination.¹⁷¹ Professor Oppenheimer also found that sexual harassment claims had the highest win rate, especially for men claiming same-sex sexual harassment.¹⁷² In the Jury Outcome Study, women fared better than men in gender discrimination claims, but none of the four cases involving men in the Study involved same-sex harassment.¹⁷³

Professor Oppenheimer also discovered particularly low win rates when intersecting categories.¹⁷⁴ He summarized his thorough and interesting study of California juries with this: “[T]he case is strong that judges and juries in California are far more skeptical of race and sex-based employment discrimination claims brought by black women, and age-based employment discrimination claims brought by women over forty, than other employment law claims.”¹⁷⁵

Settlement rates also differ by claim. In one study, sexual

fare better than African Americans and Latinos when claiming race discrimination).

169. See Oppenheimer, *supra* note 16, at 515–16, 532–35 (using data from California’s major jury verdict reporters). Other studies have looked at the treatment of race discrimination cases but have not differentiated between the type of race claim. See, e.g., Vicki Schultz & Stephen Petterson, *Race, Gender, Work, and Choice: An Empirical Study of the Lack of Interest Defense in Title VII Cases Challenging Job Segregation*, 59 U. CHI. L. REV. 1073 (1992) (examining the lack-of-interest defense in race employment discrimination cases); Siegelman & Donohue, *supra* note 35, at 1152 tbl.4 (identifying differences in race employment discrimination cases at some data points in their comparison of published opinions with unpublished opinions).

170. See Oppenheimer, *supra* note 16, at 542 (finding a race case win rate of 36%, but an overall win rate of 53%).

171. See *id.* at 543 tbl.6 (reporting a win rate of 100% for whites suing for race discrimination, compared to a win rate of 36% for nonwhites suing for race discrimination); *supra* Table 2 (showing that white plaintiffs outperformed every other race except Asian Americans).

172. See Oppenheimer, *supra* note 16, at 535 (finding a 68% win rate for sexual harassment cases, compared to a win rate in other discrimination cases of 41%); *id.* at 539 (finding an even higher win rate for men claiming sexual harassment, 90%, although the amounts awarded were significantly less). For an analysis of why harassment claims have higher win rates, see *id.* at 536–38.

173. See *infra* Appendix. By contrast, in the Oppenheimer study, eight of ten sexual harassment claims by men involved same-sex harassment, and in each of those cases the same-sex plaintiff won. See Oppenheimer, *supra* note 16, at 539.

174. *Id.* at 549, 561.

175. *Id.* at 566.

harassment claims had the highest settlement rate, while race claims were the least likely to settle.¹⁷⁶ Similarly, Professor Kotkin's study on settlements revealed that race claims had the lowest median settlement rates and a disproportionate representation in the category of very low settlements.¹⁷⁷ This may have been partly explained by the high proportion of pro se plaintiffs claiming race discrimination, given that pro se plaintiffs typically have lower success rates.¹⁷⁸ Yet, the study still indicated that whites claiming race discrimination had higher settlements.¹⁷⁹

Nor did I find studies demonstrating that African Americans fared better than other plaintiffs. Thus, the Jury Outcome Study's findings are less likely to be an aberration, but instead likely to be representative of the reality of race discrimination litigation for African Americans and Latinos. The next Subpart turns to research on jury behavior to explore possible explanations for these negative outcomes for African-American and Latino plaintiffs.

B. Jury Behavior

1. Jury Demographics

My Study did not include an analysis of the racial makeup of the 102 juries.¹⁸⁰ The populations of the districts studied (Atlanta, Chicago, Dallas, New Orleans, New York City, Philadelphia, and San Francisco) are relatively diverse. Yet, the juries are still more likely to have greater white membership than African-American or

176. See NIELSEN et al., *supra* note 16, at 31 & fig.5.3, 32 & fig.5.4 (finding that 65% of sexual harassment cases settle, compared to an approximate 45% settlement rate for race cases); see also Parker, *supra* note 123, at 930 tbls.3 & 4 (finding age cases as likely to settle as race cases and less likely than gender cases in the Eastern District of Pennsylvania, while also finding that age cases were less likely to settle than both race and gender cases in the Northern District of Texas); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 762 (2007) (finding in an analysis of summary judgment motions that "the gender of the plaintiff had no statistically significant effect on the outcome of defendants' summary judgment-type motions").

177. Specifically, the mean settlement for all claims was \$54,651, and the median was \$30,000. Kotkin, *supra* note 66, at 144. Race cases, on the other hand, had a median recovery of about \$20,000. *Id.* at 157; see also *id.* at 148 fig.12 (comparing settlement amounts by type of claim). Moreover, race claims were overrepresented in the very low settlements below \$5000, perhaps because of the number of pro se race cases. See *id.* at 145–46 (noting "that in six of the twenty-three race cases, plaintiff was pro se or had appointed counsel"). Professor Kotkin has noted that the difference may be due to differences in back-pay amounts. See *id.* at 152.

178. *Id.* at 146, 148.

179. While the median settlement for all race cases was \$20,000, *id.* at 157, race cases with a white plaintiff had a median settlement amount of \$50,000. *Id.* at 148.

180. Nor is it clear whether such data is available.

Latino membership given the demographics of even diverse communities. For example, in the Southern District of New York (“SDNY”), whites comprise a majority of the members of the qualified jury wheels used to select jurors.¹⁸¹ The same is true for nonfederal civil trials in Cook County, Illinois, which includes the City of Chicago.¹⁸² In addition to this numerical minority status, qualified African Americans and Latinos are less likely to be placed on the qualified jury wheel in SDNY.¹⁸³

Because whites outnumber minorities even on Chicago and New York City juries, “minority defendants are [at] a significantly greater risk of facing a jury that is disproportionately white.”¹⁸⁴ Sometimes this translates into all-white juries. In the Chicago study, 28% of six-member juries had no African-American members, and 66% had no Latino members, making all-white juries far from unknown.¹⁸⁵ Thus, I presume that most of the juries in this study had some minority representation, but that whites still predominated. I also presume that if Chicago has a number of all-white juries, other districts will as well. Federal civil juries typically have only six members, and one study concluded that a six-person jury is less likely to be diverse than a twelve-member jury.¹⁸⁶ Yet, all jurors must reach the same conclusion; federal civil juries have a unanimity requirement.¹⁸⁷

2. *Juror Bias*

Newspapers regularly report the racial and gender composition

181. Specifically, whites were 57% of the qualified jury wheel in the Foley Square Division, compared to 14% African Americans and 20% Latino. See Jeffrey Fagan et al., *Measuring a Fair Cross-Section of Jury Composition: A Case Study of the Southern District of New York* 19 tbl.X (Mar. 14, 2008) (unpublished manuscript), available at <http://www.allacademic.com/one/mpsa/mpsa08/index.php> (go to “Search Papers” tab, enter “Measuring a Fair Cross-Section of Jury Composition” into the search field, select “Title” under the “Search By” field, and select “Search”).

182. A study of jury trials in the First Municipal District of the Circuit Court of Cook County, Illinois (the county in which Chicago is located) found that whites constituted 64% of juries, while African Americans and Latinos were 26% and 8%, respectively. Shari Seidman Diamond et al., *Achieving Diversity on the Jury: Jury Size and the Peremptory Challenge*, 6 J. EMPIRICAL LEGAL STUD. 425, 438 tbl.2 (2009).

183. For example, African Americans in the Foley Square division are underrepresented by 4% compared to their voting age population and Latinos are underrepresented by 7%. Fagan et al., *supra* note 181, at 19–20.

184. *Id.* at 28.

185. See Diamond et al., *supra* note 182, at 442 tbl.6, 444 tbl.7. The study did not specify how this translated into the number of all-white juries.

186. See *id.* at 428–29, 445.

187. FED. R. CIV. P. 48(b) (“Unless the parties stipulate otherwise, the verdict must be unanimous and must be returned by a jury of at least 6 members.”).

of juries, thereby implying that a jury's demographics matter.¹⁸⁸ The Supreme Court's prohibition against peremptory challenges based on race or gender also presumes at some level that a juror's race or gender affects how that juror will decide a case.¹⁸⁹ Similarly, a recent and innovative study of female judges found that women claiming sex discrimination were more likely to win when at least one of the appellate judges is female.¹⁹⁰ Psychological research also has demonstrated considerable racial bias in the population at large.¹⁹¹ In other words, in many arenas we believe that a person's race and gender impacts how that person might determine a case.

This Subpart examines whether social psychological research on jury behavior—what some call jury discrimination¹⁹²—is at least part of the reason for the less favorable outcomes suffered by African Americans and Latinos alleging race discrimination. That is, are white jurors too unlikely to believe African Americans' and Latinos' claims of race discrimination? Because minorities also serve on juries, this Subpart further analyzes whether, and how, minority representation will likely impact outcomes in race employment discrimination suits.

Many studies of white jurors in criminal cases would predict bias by white jurors against African Americans. Social psychologists have fairly consistently found in criminal cases that white jurors are more likely to convict African-American defendants, more likely to impose longer sentences on African-American defendants, and less

188. See Nancy J. King, *Postconviction Review of Jury Discrimination: Measuring the Effects of Juror Race on Jury Decisions*, 92 MICH. L. REV. 63, 63 n.3 (1993) (citing various magazines and newspapers reporting on jury composition); Samuel R. Sommers & Pheobe C. Ellsworth, *How Much Do We Really Know About Race and Juries? A Review of Social Science Theory and Research*, 78 CHI.-KENT L. REV. 997, 1022 (2003) (noting that media reports about trials usually include the racial composition of the jury).

189. See *J.E.B. v. Alabama*, 511 U.S. 127, 129 (1994) (holding that a peremptory challenge based on gender violates the Equal Protection Clause); *Batson v. Kentucky*, 476 U.S. 79, 86–87, 100 (1986) (holding that a peremptory challenge based on race violates the Equal Protection Clause); Sommers & Ellsworth, *supra* note 188, at 1022 (“Supreme Court rulings . . . suggest a tacit acceptance of the premise that racial composition can affect the verdict a jury reaches.”).

190. See Christina L. Boyd et al., *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389, 406 (2010) (finding that in sex discrimination claims “the likelihood of a male judge ruling in favor of the plaintiff increases by 12% to 14% when a female” is present on a panel of judges); cf. Jennifer L. Peresie, *Female Judges Matter: Gender and Collegial Decisionmaking in the Federal Appellate Courts*, 114 YALE L.J. 1759, 1761 (2005) (finding that claimants alleging sexual harassment or sex discrimination were twice as likely to prevail when a female judge sat on a three-judge federal appellate panel).

191. See King, *supra* note 188, at 77–80 (summarizing why jurors might bring individual biases to the jury room); Sommers & Ellsworth, *supra* note 188, at 1010–14 (reviewing social psychological research on racism and explaining how this research relates to jurors).

192. See King, *supra* note 188, at 64.

likely to convict in cases with African-American victims.¹⁹³ The studies with white jurors and Latino defendants are fewer in number, but overall consistent with what has been found for white jurors and African-American defendants.¹⁹⁴

One might infer from these criminal studies that whites would have a similar bias in civil cases, but few have done similar studies in the civil context. One study by Professors Ted Eisenberg and Martin Wells found that an increase of African Americans in the jury pool correlated with an increase in successful employment discrimination cases, but this finding only held in federal court, and not in state court.¹⁹⁵

Studies also document the impact of women serving on juries. Specifically, women are more likely than men to convict defendants accused of rape, and more likely to convict and award longer sentences to defendants accused of crimes against children.¹⁹⁶

193. See Theodore Eisenberg, *Death Sentence Rates and County Demographics: An Empirical Study*, 90 CORNELL L. REV. 347, 370 (2005) (“[M]inority community skepticism about the justness of the death penalty is a contributing factor to low death sentence rates in black defendant-black victim cases.”); King, *supra* note 188, at 80–99 (summarizing research demonstrating bias of white jurors against African-American defendants and the bias of African-American jurors for African-American defendants); Kitty Klein & Blanche Creech, *Race, Rape, and Bias: Distortion of Prior Odds and Meaning Changes*, 3 BASIC & APPLIED SOC. PSYCHOL. 21, 30 (1982) (concluding for criminal trials that jurors were more likely to find the black defendant guilty in a rape case than the white defendant); Sommers & Ellsworth, *supra* note 188, at 1006–08 (summarizing the studies demonstrating white juror bias); *id.* at 1019–21 (reviewing studies on African-American jurors); Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597, 599–600 (2006) (finding that in mock criminal jury trials whites were more likely to convict the black defendant than the white defendant, unless the evidence made race salient, in which case the conviction rates were about the same); Laura T. Sweeney & Craig Haney, *The Influence of Race on Sentencing: A Meta-Analytic Review of Experimental Studies*, 10 BEHAV. SCI. & L. 179, 190 (1992) (finding that jurors are more likely to recommend longer sentences for black defendants). *But see* Ronald Mazzella & Alan Feingold, *The Effects of Physical Attractiveness, Race, Socioeconomic Status, and Gender of Defendants and Victims on Judgments of Mock Jurors: A Meta-Analysis*, 24 J. APPLIED SOC. PSYCHOL. 1315, 1333 (1994) (finding that a defendant’s race does not consistently influence a juror’s behavior toward the criminal defendant). Another scholar has taken this research even further, demonstrating that “implicit racial biases affect the way judges and jurors encode, store, and recall relevant case facts.” Justin D. Levinson, *Forgotten Racial Equality: Implicit Bias, Decisionmaking, and Misremembering*, 57 DUKE L.J. 345, 345 (2007).

194. See King, *supra* note 188, at 84–85 (discussing the results of some of these studies).

195. Theodore Eisenberg & Martin T. Wells, *Trial Outcomes and Demographics: Is There a Bronx Effect?*, 80 TEX. L. REV. 1839, 1869 (2002) (“Increasing black population percentages do correlate with higher plaintiff win rates in federal urban trials [for employment discrimination claims] but not in state urban trials or federal non-urban trials.”).

196. See, e.g., Sandra Benlevy, *Venus and Mars in the Jury Deliberation*

Women jurors also rule more often in favor of women alleging sexual harassment.¹⁹⁷

I find it fairly easy to relate the Jury Outcome Study's higher win rate for women claiming sex discrimination to the prevalence of women on juries.¹⁹⁸ Even without access to information about demographics of the 102 juries, it is hard to imagine any of the juries being all male, or not having a significant representation of women. The prevalence of women on juries likely has a strong effect on jury outcomes in sex discrimination cases, similar to the presence of female judges at the appellate level.¹⁹⁹

Explaining the low win rate of African Americans and Latinos by pointing to white juror discrimination is tempting as well. Plenty of evidence in the criminal law context would support this conclusion.²⁰⁰ To the extent, however, that people of color are on the juries, the biases of those juries would depend on finding biases on behalf of those jurors, or a willingness to go along with biases of the white jurors. Here the evidence is quite thin; most evidence indicates a bias of African-American jurors for African-American parties, and little research examines how African Americans and whites interact on juries.²⁰¹ Also unexplained by the juror-bias studies is why Asian Americans have higher win rates, unless one supposes that whites do not have the negative stereotypes about Asian Americans that they have against African Americans and Latinos—which may, in fact, be true.²⁰²

Yet, I ultimately conclude that while white juror bias may be at issue—especially on all-white juries—more research into the demographics of the actual juries is needed to determine to what degree that bias causes disparate outcomes. The presence of all-white juries would be particularly instructive, but to what extent all-white juries decided race discrimination claims is simply unknown.

In addition, the issue of disparate jury outcomes is likely too complicated for simple conclusions. For example, the studies of white juror bias are not without critics. While many find instances of jury discrimination by whites, Professors Samuel Sommers and Phoebe Ellsworth argue fairly persuasively that most of the criminal

Room: Exploring the Differences That Exist Among Male and Female Jurors During the Deliberation Process, 9 S. CAL. REV. L. & WOMEN'S STUD. 445, 448–51 (2000); Lucy Fowler, *Gender and Jury Deliberations: The Contributions of Social Science*, 12 WM. & MARY J. WOMEN & L. 1, 20–22 (2005).

197. See Fowler, *supra* note 196, at 25.

198. See *supra* notes 152–53 and accompanying text; *infra* Appendix.

199. See *supra* note 190 and accompanying text.

200. See *supra* notes 193–94 and accompanying text.

201. See, e.g., Sommers & Ellsworth, *supra* note 188. Studies do indicate, however, that minority jurors are less likely to be vocal during deliberations. *Id.* at 1025.

202. See *supra* Table 2; *infra* Appendix.

studies are too limited in scope and technique to be ultimately conclusive in labeling white jurors as generally discriminatory.²⁰³ They particularly fault many studies for examining only white jurors, without comparing those jurors' outcomes with those of African-American jurors (who may have a bias similar to that of the whites in the study), and for determining only how individuals react, when actual jurors decide cases collectively, as members of a jury.²⁰⁴

Professors Sommers and Ellsworth agree that white juror bias exists, but their research suggests it would be less prevalent in employment discrimination litigation.²⁰⁵ They draw on psychological research demonstrating that white bias is "more likely when salient norms regarding racism are absent."²⁰⁶ That is, in the "run-of-the-mill" situation, whites will demonstrate bias, but when race becomes an issue, whites demonstrate less bias.²⁰⁷

Relying on this research, they conducted two mock jury studies. They found that an increase of racial salience in a criminal trial actually decreases the disparate impact of white juror discrimination on African-American defendants.²⁰⁸ Thus, "[w]hen racial issues were made salient in the case, individual White mock jurors were equally likely to vote to convict the White and Black defendant. When race was not salient, Whites gave higher guilt ratings and longer sentence recommendations to the Black defendant than to the White defendant."²⁰⁹

Employment discrimination cases filed on the basis of race by their nature make race issues salient. The research of Professors Sommers and Ellsworth suggests, therefore, that the biases of white jurors may be less at play in employment discrimination than many of the criminal jury studies suggest.

This may be particularly true for juries that are diverse. Professors Sommers and Ellsworth further argue that jury diversity improves the quality of outcomes and decreases racially disparate outcomes.²¹⁰ Specifically, one study indicated that "racial diversity has a significant effect on the judgments of White jurors and on their contributions to deliberations."²¹¹ Even before the juries began

203. See Sommers & Ellsworth, *supra* note 188, at 1004.

204. *Id.* at 1004–05.

205. See *id.* at 1029.

206. *Id.* at 1014.

207. See *id.* The authors explain, "In such situations, White perceivers often let their guard down, allowing their behavior to be influenced by anti-Black attitudes and prejudice." *Id.*

208. See *id.* at 1014–16. But see King, *supra* note 188, at 100 n.138 (finding that when racial issues are more prominent during a trial, bias is more likely to exist).

209. Sommers & Ellsworth, *supra* note 188, at 1015.

210. See *id.* at 1028.

211. *Id.* at 1030; see also *id.* at 1028 ("Compared to all-White juries, racially mixed juries tended to deliberate longer, discuss more case facts, and bring up more questions about what was missing from the trial Racially mixed

to deliberate, whites on diverse juries were less likely to convict African-American defendants than whites on all-white juries.²¹² Thus, to the extent the juries in this Study were not all white, this research further suggests something in addition to white juror bias is at play.

The idea of juror bias is consistent with many studies and with the enduring nature of racism. To the extent that the juries studied herein were all white, juror bias could very well cause disparate outcomes for African-American and Latino plaintiffs alleging race discrimination. The picture becomes more complicated, however, to the extent that the juries were not all white. Research on the value of diverse juries and on the reaction of whites when race issues are salient would suggest that something more than white juror bias is at issue. Perhaps the legal standards do not adequately capture today's expressions of discrimination against African Americans or Latinos. Further, pretrial rulings by judges could be affecting the claims and evidence presented to juries. In short, while white juror bias may be at play, other factors likely are as well.

CONCLUSION

The news is not all bad for employment discrimination plaintiffs. Since the passage of the Civil Rights Act of 1991, plaintiff outcomes in trials are up. Juries resolve more employment discrimination claims than before, and plaintiffs continue to do best when a jury decides the facts. Even bench trials are more welcoming to plaintiffs than before the Act's passage.

Yet, a disconnect between perceived discrimination and judicially found discrimination exists. EEOC filings are up, but federal court filings are down. Further, the most common type of EEOC complaint—a race discrimination claim filed by an African American—faces decreased odds of winning a jury trial when compared to other employment discrimination plaintiffs. Why African Americans and Latinos have depressed win rates—a finding not unique to this jury study—could possibly be explained by biases jurors typically bring to the jury room, and an increase in jury diversity could possibly help to ameliorate some of this bias.

juries were also more likely to discuss racial issues”).

212. *See id.*

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APPENDIX

TABLE 1: PLAINTIFF TRIAL SUCCESS OVERALL

	Number	Winning Plaintiffs	Plaintiff Win Rate	Mean Plaintiff Award
All Trials	117	29	25%	525,070
Jury Trials	104	28	27%	493,080
Bench Trials	13	1	8%	1,420,797

TABLE 2: TRIALS WITH PLAINTIFF REPRESENTED BY COUNSEL

	Number	Winning Plaintiffs	Plaintiff Win Rate	Mean Plaintiff Award
All Trials	112	29	26%	525,070
Jury Trials	102	28	27%	493,080
Bench Trials	10	1	10%	1,420,797

TABLE 3: JURY TRIALS WITH PLAINTIFF REPRESENTED BY COUNSEL

	Number	Winning Plaintiffs	Plaintiff Win Rate	Mean Plaintiff Award
Race / National Origin	64	17	27%	244,347
African American	31	5	16%	347,482
Asian American	12	7	58%	233,946
Latino	11	2	18%	55,887
White	4	2	50%	300,000
Other National Origin	6	1	17%	67,088
Gender	27	6	22%	229,884
Female	22	6	27%	229,884
Male	5	0	0%	0

TABLE 4: NATURE OF CLAIM

	Number	Winning Plaintiffs	Plaintiff Win Rate	Mean Plaintiff Award
Age	14	3	21%	1,917,872
Disability	7	2	29%	1,458,667
FMLA	2	1	50%	11,145
Religion	2	0	0%	0

TABLE 5: DISTRICT COURT

	Number	Winning Plaintiffs	Plaintiff Win Rate	Mean Plaintiff Award
Atlanta (N.D. Ga.)	14	3	21%	144,647
Chicago (N.D. Ill.)	17	2	12%	53,241
Dallas (N.D. Tx.)	11	1	9%	11,145
New Orleans (E.D. La.)	5	0	0%	0
New York (S.D.N.Y.)	31	13	42%	208,413
Philadelphia (E.D. Pa.)	15	5	33%	1,308,397
San Francisco (N.D. Cal.)	9	4	44%	1,000,829