



# Employment Civil Rights Law Falls Short in Practice, Reinforcing the Very Harms It Aims to Redress

FINDINGS FROM ABF AFFILIATED SCHOLAR ELLEN BERREY AND ABF RESEARCH PROFESSORS ROBERT NELSON AND LAURA BETH NIELSEN ON THE CHANGING DYNAMICS OF EMPLOYMENT CIVIL RIGHTS

In a random sample of 1,788 cases filed between 1988 and 2003 across the U.S. and 100 interviews with legal parties, researchers made startling discoveries on the unintended consequences of employment discrimination litigation.



## REAL WORLD IMPACT

During the course of their research, Berrey, Nelson, and Nielsen conducted over 100 interviews with plaintiffs, defendants, and attorneys. All names have been changed to protect the privacy of individuals. Audio recordings can be found at [rightsontrial.com](http://rightsontrial.com).

### A Closer Look at Employment Civil Rights Litigation

- Despite significant legislative and judicial progress in employment civil rights over the past fifty years, workplace discrimination based on race, gender, age, and disability persists. However, plaintiffs often face substantial challenges in navigating litigation.
- Targets are often mistreated by colleagues and vilified by management when they report discrimination. If they do decide to file a suit, they struggle to obtain legal representation.
- The system of discrimination litigation puts plaintiffs at a disadvantage, often reinforcing the power of management and further entrenching discrimination in and out of the workplace.
- Plaintiffs and employer defendants alike tend to perceive unfairness within the system. Yet, the adversarial character of litigation imposes significant personal and financial burdens on plaintiffs; they frequently feel as if they've lost, regardless of the outcome of the case. Employers feel inconvenienced by what they regard as meritless suits.

### Key Findings

- Contrary to popular perceptions of employees as highly litigious, fewer than 1% of employees who perceive they were discriminated against file a charge with the EEOC. Only 15% of EEOC charges lead to the filing of a lawsuit; of those filings, only 6% make it to trial. In just 2% of cases filed in federal court, plaintiffs win something at trial.
- About 50% of cases end in settlement. The median settlement is \$30,000.
- Plaintiffs are more likely to experience favorable outcomes if they are represented by an attorney they hire, by the EEOC, or by a public interest law firm.
- Lawyers are highly selective in taking cases and clients. Their acceptance rate is less than 10%.

**Gerry Handley suffered racist taunts and teasing at work for years. He finally decided to sue after his co-workers told him “a lot of the blacks had sex with their daughters’... And [my manager] asked me, he said, did I ever have sex with my daughter?” Handley settled for a modest sum and kept his job, but he regretted ever pursuing legal charges. “If I had to do it over again, I wouldn’t do it because I lost everything,” he said. “I would have just took it and kept my mouth shut... because if you fight back, it ain’t worth it. The legal system and the justice, it ain’t there.”**

- 23% of cases are filed *pro se* (without a lawyer). *Pro se* cases are dismissed at a rate of 40%, compared to 11% for cases with attorneys. In contrast, the defendant always has representation.
- There are stark racial disparities in legal representation in employment discrimination cases. African Americans are 2.5 times more likely to file claims *pro se* compared to their white peers; Asian American and Latino/a plaintiffs are 1.9 times more likely to file *pro se*.
- People of color who seek out an attorney often face numerous obstacles. They may be disadvantaged by structural inequalities, including a lack of information about the legal system and limited time and resources to secure legal representation, which is rarely paid on contingency and usually requires expensive consultation fees. These individuals' cases also may be hindered by lawyers' biases, such as lawyers' assessments of potential clients' "demeanor" and "credibility," which frequently hinge on stereotypical and unfounded assumptions.
- 93% of federal employment discrimination claims are made by individual plaintiffs.
- Class action cases comprise less than 1% of cases. However, plaintiffs are more successful when they file a case as part of a class action or simply with more than one plaintiff; filing collectively gives them an even chance of winning at trial compared to a 3/10 chance for plaintiffs overall.
- Employers rely on small settlements to end cases, which shields them from making systematic changes to address discrimination. They seldom have to acknowledge discrimination occurs.
- Plaintiffs who are represented by a lawyer routinely are advised to settle in order to mitigate risk.
- Only three of the 41 plaintiffs interviewed reported that they were "very satisfied" with the outcome of their case. 56% were "not at all satisfied." 37% had ambivalent feelings.
- Plaintiffs typically get little or nothing of material value from their litigation. They often experience grave costs, including debt and depression. They rarely get their jobs back, which is a common goal. For those who win settlements, the funds rarely cover the expenses incurred.
- Some plaintiffs are proud of trying and satisfied because they got to tell their story.

## Citations

Berrey, Ellen, Nelson, Robert, & Nielsen, Laura Beth. *Rights on Trial: How Workplace Discrimination Law Perpetuates Inequality*. Chicago: University of Chicago Press, 2017.

## Sources

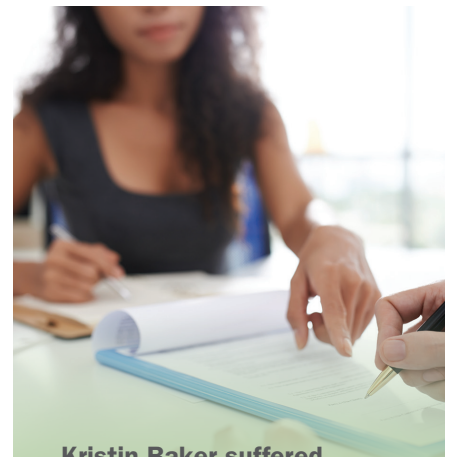
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**Kristin Baker suffered egregious sexual harassment for years and made repeated complaints to HR. After she filed a discrimination case, her employer offered her \$10,000 to leave the company. Baker recounted her reasons for not leaving. "I didn't do anything wrong. If I leave at this point, then I am the guilty party because then it looks like I just wanted it for the money," she said. "And it had absolutely not one thing to do with the money. It had to do with my integrity and who I am." Baker eventually settled for one dollar, a public apology from the company, and the option to keep her job. Despite cases like this, the majority of defense attorneys interviewed were skeptical about sexual harassment cases. One said, "I've been doing this for 20 years and, in sex harassment cases, out of all of the cases I've seen throughout the years, I have yet to see a legitimate sex harassment case."**

American Bar Foundation, 750 Lake Shore Drive, 4th Floor, Chicago, IL 60611

312-988-6500 | [info@abfn.org](mailto:info@abfn.org) | [americanbarfoundation.org](http://americanbarfoundation.org)

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